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January 6, 2005

Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Complaint of XO Tennessee, Inc. Against BellSouth and Request for Expedited Ruling and for Interim Relief*
Docket number: 04-00306

Dear Chairman Miller:

The above-captioned complaint filed by XO Tennessee, Inc. ("XO") against BellSouth Telecommunications, Inc. ("BellSouth") is again on the Authority's agenda for January 10, 2005. The issue presented is XO's request for interim relief, ie., pending a final decision in this matter, XO has asked that BellSouth be directed to convert XO's special access circuits to UNE loops at the interim rate proposed by XO, subject to a retroactive true-up.

The issue of interim relief was also on the agency's December 13, 2004 agenda but was postponed, in part, at the request of BellSouth to await an announcement by the FCC concerning new unbundling rules. See BellSouth's "Request to Defer," filed December 9, 2004.

On December 15, 2004, the FCC voted to approve the long-awaited "permanent" unbundling requirements. The new rules have no effect on the interim relief requested by XO for DS1 circuits, and little, if any, impact on the interim relief requested by XO for DS3 circuits.

First, the rules continue to require BellSouth to convert existing, special access circuits to UNE loops if requested by a CLEC.[1] Second, the rules continue to require BellSouth to unbundle DS-1 loops, (the equivalent of 24 voice-grace lines and the most frequently ordered high capacity line) in all BellSouth wire centers in Tennessee.[2] Third, the rules continue to

[1] See FCC Press Release (attached) at 1; transcript of FCC proceedings at 13-14 (attached), and "ILEC's Motion to Govern Future Proceedings," filed January 4, 2005 with the U S Court of Appeals for the District of Columbia Circuit," at 16 (attached) In the Motion (at 16), the ILECs, including BellSouth, finally acknowledge that the conversion of a special access line to a UNE loop is simply a change in the billing rate, the same point XO has been making since it filed this complaint

[2] See "ILEC's Motion" at 14 (attached) The "ILEC's Motion," in which BellSouth joined, states that BellSouth has only three wire centers in the entire region which are large enough to fit the FCC's criteria for "non-UNE" DS-1 loops None of BellSouth's three largest wire centers is in Tennessee Therefore, the FCC rules on DS-1 loops do not affect Tennessee.

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require BellSouth to unbundle all DS-3 loops (a DS-3 loop is the same as 28 DS-1 loops), except those DS-3 loops which are located in a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators.[3] Upon information and belief, XO asserts that, at most, two wire centers in Tennessee fall within that exception.

In light of the FCC's announcement, there is no longer any reason to delay giving XO interim relief, at least in regard to those special access circuits which involve DS-1 circuits and DS3 circuits in all but the two wire centers in question BellSouth should be directed, effective immediately, to comply with XO's requests to perform the requested conversions for all XO's special access DS1 circuits to DS-1 UNE loops and begin charging, subject to a retroactive true-up, the UNE rate for the same billing conversion process for EELs, or the "switch as is" rate in the parties' interconnection agreement..

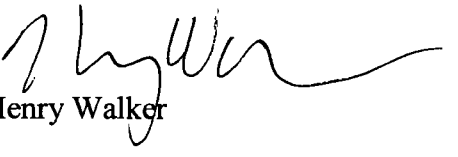
In regard to XO's special access circuits which involve DS-3 lines, BellSouth should be directed to report to the TRA and to XO within two weeks whether any Tennessee wire centers fall within the exemption carved out by the FCC. Following that report, BellSouth should be ordered to perform the requested DS3 conversions in all other Tennessee wire centers, circuits and the issue of whether the alleged exempt wire centers meet the full test for nonimpairment should be addressed in the hearing phase of the docket.

As XO has previously noted, granting XO's request for interim relief will not prejudice BellSouth because of the provision for a retroactive true-up. On the other hand, failure to grant the request harms XO in artificially elevating the cost of the circuits in question, and may impact XO's ability ultimately to fully and accurately recover the amounts overcharged by BellSouth for those circuits.

XO, therefore, again reiterates it request for interim relief.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 
Henry Walker

HW/djc
Enclosures
cc: Guy Hicks

[3] See FCC Press Release (attached) at 2.

NEWS

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See MCI v FCC 515 F 2d 385 (D C Circ 1974)

FOR IMMEDIATE RELEASE:
December 15, 2004

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FCC ADOPTS NEW RULES FOR NETWORK UNBUNDLING OBLIGATIONS OF INCUMBENT LOCAL PHONE CARRIERS

New Network Unbundling Rules Preserve Access to Incumbents' Networks by Facilities-Based Competitors Seeking to Enter the Local Telecommunications Market

Washington, D.C. – The Federal Communications Commission today adopted rules concerning incumbent local exchange carriers' (incumbent LECs') obligations to make elements of their network available to other carriers seeking to enter the local telecommunications market. The new framework builds on actions by the Commission to limit unbundling to provide incentives for both incumbent carriers and new entrants to invest in the telecommunications market in a way that best allows for innovation and sustainable competition.

The rules directly respond to the March 2004 decision by the U.S. Court of Appeals for the D.C. Circuit which overturned portions of the Commission's Unbundled Network Element (UNE) rules in its Triennial Review Order. We provide a brief summary of the key issues resolved in today's decision below.

- **Unbundling Framework.** We clarify the impairment standard adopted in the *Triennial Review Order* in one respect and modify its application in three respects. *First*, we clarify that we evaluate impairment with regard to the capabilities of a *reasonably efficient* competitor. *Second*, we set aside the *Triennial Review Order*'s "qualifying service" interpretation of section 251(d)(2), but prohibit the use of UNEs for the provision of telecommunications services in the mobile wireless and long-distance markets, which we previously have found to be competitive. *Third*, in applying our impairment test, we draw reasonable inferences regarding the prospects for competition in one geographic market based on the state of competition in other, similar markets. *Fourth*, we consider the appropriate role of tariffed incumbent LEC services in our unbundling framework, and determine that in the context of the local exchange markets, a general rule prohibiting access to UNEs whenever a requesting carrier is able to compete using an incumbent LEC's tariffed offering would be inappropriate.

- **Dedicated Interoffice Transport.** Competing carriers are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines Competing carriers are impaired without access to DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines Finally, competing carriers are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competitive LEC's

network in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity dedicated transport where they are not impaired, and an 18-month plan to govern transitions away from dark fiber transport. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled dedicated transport at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

- **High-Capacity Loops.** Competitive LECs are impaired without access to DS3-capacity loops except in any building within the service area of a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are impaired without access to DS1-capacity loops except in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are not impaired without access to dark fiber loops in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity loops where they are not impaired, and an 18-month plan to govern transitions away from dark fiber loops. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled facilities at a rate equal to the higher of (1) 115% of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115% of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

- **Mass Market Local Circuit Switching.** Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching. We adopt a 12-month plan for competing carriers to transition away from use of unbundled mass market local circuit switching. This transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs. During the transition period, competitive carriers will retain access to the UNE platform (*i.e.*, the combination of an unbundled loop, unbundled local circuit switching, and shared transport) at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004, plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for this combination of elements, plus one dollar.

Action by the Commission, December 15, 2004 by Order on Remand (FCC 04-290). Chairman Powell, Commissioners Abernathy and Martin, with Commissioners Copps and Adelstein dissenting. Chairman Powell, Commissioners Abernathy, Copps and Adelstein issuing separate statements.

Wireline Competition Bureau Staff Contact: Jeremy Miller, 418-1507; Email. jeremy.miller@fcc.gov

-FCC-

Federal Communications Commission

Open Meeting

Wednesday, December 15, 2004

Item No. 6

Bureau: Wireline Competition

Title: Unbundled Access to Network Elements (WC Docket No. 04-313) and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers (CC Docket No. 01-338).

Summary: The Commission will consider an Order on Remand concerning incumbent local exchange carriers' obligations to make elements of their networks available on an unbundled basis.

MARLENE DORTCH: Commissioners, the sixth and final item on today's agenda will be presented by the Wireline Competition Bureau. It is entitled *Unbundled Access to Network Elements and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers.*

MALE VOICE: Chief, if you're awake enough, you can proceed with your argument

JEFFREY CARLISLE, CHIEF, WIRELINE COMPETITION BUREAU: Oh, I think I'll be able to make it through. Our second item today is

action is a funny way of showing its continued support. As a result of this decision, there will be less competition, less choice, and higher rates. The people who pay America's phone bills deserve better, so I dissent.

Some would have us believe that this is the road we have to travel in the wake of court decisions, yet those protestations come from the very people who refuse to seek review of the court decisions that the majority claims constrain us. Though I will not join the decision today, I do want to thank the Commission staff for their hard work, their commitment, the time spent on this item. This proceeding and its predecessor have not been easy ones. We all know that. But throughout, the Bureau has been helpful; the Bureau has been candid; the Bureau has been generous with its time. I'm grateful for that. I'm grateful to their devotion to the task at hand and hope that there is some well-deserved time for rest and relaxation in the weeks ahead. And again, I am grateful to the dialogue we had amongst us all, particularly over the past few days, and I thank you for that.

CHAIRMAN MICHAEL K. POWELL: Thank you very much, Commissioner. Commissioner Martin?

KEVIN J. MARTIN, COMMISSIONER: Well, I will be voting to approve the item today, but I do have, um, some reservations. I certainly that I agree with many of the concerns that Commissioner Copps has expressed about the ultimate impact and, indeed, appreciate in the past many of his efforts and have that supported them. But I also have real concerns actually with the

legality of the current item that's in front of us. I think that there's a concern about the potential of our insufficient recognition of special access. You know, today, almost 80 percent of DS1's and more than 95 percent DS3's are provided as special access noise UNEs. And even excluding the three largest purchasers of high capacity facilities, there are more than 120 CLECs who use special access 100 percent of the time. But despite these evidence of competition, today's order ultimately only provides relief from DS3 unbundling in one percent of the wire centers across the country, and DS1 unbundling in less than one-half of one percent of the wire centers across the country.

I'm also concerned about some of the tests that we end up using for loop unbundling. First, we, we require for loop unbundling that there be both a density and an actual fiber colocator requirement. In other words, we require both actual and potential deployment. Uh, I think that this seems somewhat inconsistent, even of our rejection of a similar test for transport, and I think that that might be somewhat inconsistent.

I'm also concerned that we fail to include any other building-by-building approach outside of the largest wire centers to address this actual and potential deployment. We don't look at the evidence of either of those in a building-by-building approach outside the largest wire centers. And finally, I would say that I am somewhat concerned about the potential that we have

for the full conversion of existing and future special access orders to UNE pricing.

I think that those all raise some potential problems that I would be concerned about. And I am concerned that we are fully implementing that D.C. Circuit decision. As everyone knows, I didn't agree with all the aspects of that decision, but at this point, I agree with Commissioner Abernathy that our primary responsibility is to fully implement that decision, so I've got some concerns about where we seem to be going. But unless the Office of General Counsel has any specific concerns with any of the approaches that we're doing here, then I will vote to approve the item. Thank you.

CHAIRMAN MICHAEL K. POWELL: Okay, Commissioner. Commissioner Adelstein?

JONATHAN A. ADELSTEIN, COMMISSIONER: Thank you. With this order, the Commission officially pulls the plug on the local competition provisions of the Telecommunications Act of 1996, and it pulls the plug on the companies' investors who sought to deliver on the promise of the Act, and it pulls the plug on American consumers, to whom that promise was made. By undermining facilities-based competition, the Commission relegates consumers to an inevitable future of higher rates and fewer choices. Regrettably, and I think unnecessarily, the Commission's action will ratchet up rates for both residential consumers and small businesses, which are so central to our nation's economic growth. By not defending the Commission's

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 00-1012 *et al.*

UNITED STATES TELECOM ASSOCIATION, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,
Respondents.

ILECS' MOTION TO GOVERN FUTURE PROCEEDINGS

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January 4, 2005

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with all its attendant social costs. On the contrary, in metropolitan areas across the country, CLECs are *already* competing without UNEs, demonstrating that in such areas there is "no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have [been] the object of Congress's concern." *USTA I*, 290 F.3d at 422.

By its own account, however, the FCC granted no substantial relief from unbundling of high-capacity facilities. Indeed, as noted above, Chairman Powell has trumpeted the fact that the agency preserved "wide unbundling" of these facilities in the "overwhelming majority" of markets, and has merely tried to "satisfy the court," Powell Statement at 1-2, by giving what can be fairly described as token relief to ILECs.

In entire major cities, such as Houston, San Antonio, San Diego, Tampa, and St. Louis, where there are as many as 17 CLECs competing using their own fiber networks[29] — and for which the ILECs provided detailed maps demonstrating widespread competition without UNE deployment, *see* Attachment C — the FCC provided *no* relief whatsoever for DS-1 loops. Indeed, the FCC required unbundling of those loops in *all* wire centers with fewer than 60,000 business lines (which is more than 99% of wire centers) even though the record demonstrated that competitors can and do deploy high-capacity facilities on a widespread basis in much smaller wire centers. For example, BellSouth — which has only 3 wire centers with at least 60,000 business lines — provided data showing that, in its 78 wire centers with between 20,000 and 60,000 business lines, there were an average of *7 fiber-based fiber collocators*.[30] The FCC's test thus assumes that collocation is a significant measure of CLECs' ability to provide service to

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[29] The record demonstrated that there were 17 CLECs with competitive networks in Houston, 15 in Tampa, 14 in San Antonio, 13 in San Diego, and 10 in St. Louis. *See* UNE Fact Report 2004, App. D.

[30] *See* Ex Parte Letter from Bennett L. Ross, BellSouth, to Marlene H. Dortch, FCC, WC Docket 04-313 & CC Docket No. 01-338, Attachment at 1-2 (Dec. 7, 2004).

cannot "treat special access availability as irrelevant to the impairment analysis") And, although the Court left open the possibility that the FCC might "in certain cases" find impairment even though ILEC alternatives exist, it concluded that the agency "*cannot* justify a finding of impairment" where the evidence shows that carriers are successfully serving customers using those alternatives and thus that tariffed services "have obviously not made competitive entry uneconomic " *Id* at 577 (emphasis added) The Court could not have made clearer that there is no lawful justification for imposing the social costs of unbundling where competitors are already competing using special access services "Where competitors have access to necessary inputs at rates that allow competition not only to survive but to flourish, it is hard to see any need for the Commission to impose the costs of mandatory unbundling " *Id* at 576

The FCC's decision that it would somehow be "inappropriate" to rely upon evidence of CLEC use of special access to deny unbundling, no matter how strong the evidence that CLECs are already competing successfully using those tariffed services, cannot be squared with the FCC's duty to implement this Court's mandate

3. Finally, and even more egregiously, even in those situations where a CLEC is already successfully serving a location using special access, the FCC has decided to allow CLECs to convert the special access circuits to UNEs In such circumstances, CLECs will receive exactly the same service that they always have, but will move from the tariffed special access rate to the subsidized TELRIC rate. Allowing such conversions to UNEs does not allow competition to exist where it otherwise would not; it simply gives a price break to competitors that are already competing successfully to serve a particular customer

This Court concluded in *USTA II* that the FCC may not lawfully allow such abuses of unbundling *See* 359 F.3d at 593 The Court explained that the existence of "robust