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March 7, 2005

VIA HAND DELIVERY

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

Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*
Docket No. 04-00381

Dear Chairman Miller:

Enclosed are the original and fourteen copies of BellSouth's *Response in Opposition to the Joint Petitioners' Motion for Emergency Relief.* Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*

Docket No. 04-00381

BELLSOUTH TELECOMMUNICATIONS INC.'S RESPONSE IN OPPOSITION TO THE JOINT PETITIONERS' MOTION FOR EMERGENCY RELIEF

BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Tennessee Regulatory Authority ("TRA" or "Authority") deny the Joint Petitioners' *Motion for Emergency Relief* ("*Motion*") filed by NuVox, Xspedius, KMC III, and KMC V ("Joint Petitioners") on March 1, 2005. The Petition misconstrues binding federal law as well as the parties' agreement regarding procedural matters in the pending 252 arbitration. The Authority should reject the *Motion*.

BACKGROUND

On February 4, 2005, the Federal Communications Commission ("FCC") released its permanent unbundling rules in the Triennial Review Remand Order ("TRRO"). The *TRRO* identified a number of former Unbundled Network Elements ("UNEs"), such as switching, for which there is no section 251 unbundling obligation.[1] In addition to switching, former UNEs include high capacity loops in

[1] *TRRO*, ¶ 199 ("Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide." (footnote omitted).

specified central offices,[2] dedicated transport between a number of central offices having certain characteristics,[3] entrance facilities,[4] and dark fiber.[5] The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers, adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] In each instance, the FCC unequivocally stated that the transition period for each of these former UNEs -- loops, transport, and switching -- would commence on March 11, 2005.[7]

While the FCC explicitly addressed how to transition the embedded base of these former UNEs through change of law provisions in existing interconnection agreements, the FCC took a different direction with regard to the issue of "new adds." For new adds, the FCC's belief "that the impairment framework we adopt is self-effectuating" controls.[8] Instead of requiring that the ILECs continue to allow CLECs to order more of the former UNEs during the transition period, the FCC provided that no "new adds" would be allowed. For example, with regard to switching the FCC explained "[t]his transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[9] The FCC made

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[2] *TRRO*, ¶¶ 174 (DS3 loops), 178 (DS1 loops).
[3] *TRRO*, ¶¶ 126 (DS1 transport), 129 (DS3 transport).
[4] *TRRO*, ¶ 137 (entrance facilities).
[5] *TRRO*, ¶¶ 133 (dark fiber transport), 182 (dark fiber loops).
[6] *TRRO*, ¶¶ 142 (transport), 195 (loops), 226 (switching).
[7] *TRRO*, ¶¶ 143 (transport), 196 (loops) 227 (switching).
[8] *TRRO*, ¶3.
[9] *TRRO*, ¶ 199; *see also* 47 C.F.R § 51.319(d)(2)(iii) ("[r]equesting carrier may not obtain new local switching as an unbundled network element."). The new local switching rule makes clear that the prohibition against new UNE-Ps applies to new lines. Switching is defined to include line-side facilities, trunk side facilities, and all the features, functionalities and capabilities of the local switch. *TRRO*, ¶ 200. When a requesting carrier purchases the unbundled local switching

similar findings concerning certain transport routes and certain high capacity loops.[10] The FCC specifically found: "[t]his transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order."[11] The FCC made almost identical findings with respect to high-capacity loops and transport, holding that its transition rules "do not permit competitive LECs to add new [high capacity loops and transport on an unbundled basis] ... where the Commission has determined that no section 251(c)(3) unbundling requirement exists."[12]

The FCC clearly intended these provisions regarding "new adds" to be self-effectuating. First, the FCC specifically stated that "[g]iven the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005 ...."[13] Second, the FCC expressly stated its order would not "... supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial

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element, it obtains all switching features in a single element on a per-line basis. *TRO,* at 433; the TRRO retained this definition (TRRO, n. 529). Thus, the switching UNE means the port and functionalities on a per-line basis and the prohibition against new adds applies to the *element* itself – thus, the federal rule applies to lines

[10] *TRRO,* ¶ 142, 195; *see also* 47 C.F.R. § 51.319 (e)(2)(i), (ii), (iii), and (iv) (ILEC is not require to provide unbundled access to entrance facilities; requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements); *and* 47 C.F.R. § 51.319 (a)(4)(iii), (a)(5)(iii), and (a)(6) (requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements). Attached as Exhibit A is BellSouth's letter to the FCC in which it specifies the nonimpairment wire centers. BellSouth stated plainly that "[t]o the extent any party is concerned about the methodology BellSouth has employed or the wire centers identified on the enclosed list in which the nonimpairment thresholds have been met, it should bring that concern to the [FCC's] attention." Thus, BellSouth is not seeking "unilaterally" to determine where no obligation to unbundle high-capacity loops, transport, and dark fiber exists

[11] *TRRO,* ¶ 227 (footnote omitted).

[12] *TRRO,* ¶ 142, 195; *see also* 47 C.F R. § 51 319 (e)(2)(i), (ii), (iii), and (iv) (ILEC is not require to provide unbundled access to entrance facilities; requesting carrier may not obtain new DS1; DS3, and dark fiber transport as unbundled network elements); *and* 47 C.F.R. § 51.319 (a)(4)(iii), (a)(5)(iii), and (a)(6) (requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements).

[13] *TRRO,* ¶ 235.

basis ...,"[14] conspicuously omitting any similar intent not to supersede conflicting provisions of existing interconnection agreements. Consequently, in order to have any meaning, the *TRRO*'s provisions precluding the ordering of "new adds" have to have effect as of March 11, 2005.

Joint Petitioners seek to circumvent the FCC's intention by relying on paragraphs 227 and 233 of the *TRRO.* Joint Petitioners' arguments are fatally flawed. Paragraph 227 provides that "[t]he transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order." Paragraph 233 of the *TRRO* addresses changes to interconnection agreements.

Footnote 527 of Paragraph 227 modifies the "except as otherwise specified" clause. Footnote 527 makes clear that, when the FCC stated "except as otherwise specified in the Order," it was referring to continued access to shared transport, signaling and call-related databases and was not making an implicit reference to the change of law process. In addition, the clear meaning of the "except as otherwise specified" language in paragraph 227 is obvious from the very next paragraph of the *TRRO.* In paragraph 228, the FCC held that the "transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period." The availability of voluntarily negotiated interconnection agreements for interested carriers is also "otherwise specified in

[14] *TRRO*, ¶ 199 *Also* ¶¶ 148, 198.

the Order" but has no impact on the prohibition against new adds. Consequently, if a CLEC and an ILEC had voluntarily negotiated an agreement under Section 252 pursuant to which the ILEC voluntarily agreed to provide UNE-P or switching at a rate other than TELRIC, the FCC did not intend to interfere with that voluntarily adopted obligation. For instance, BellSouth has agreed to provide switching to customers with four lines or more in certain Metropolitan Statistical Areas (e.g., enterprise customers) at a market rate of $14. By including the "except as otherwise specified" in paragraph 227 and acknowledging carriers' ability to freely negotiate alternative arrangements in paragraph 228, the FCC made clear that it did not intend to override those provisions.

Likewise, Joint Petitioners' focus on the interconnection agreement portion of the sentence in paragraph 233, ignores the "consistent with our conclusions in this Order" clause. To be consistent with the conclusions in the Order, the transition plan for the embedded base of UNE-Ps will be implemented via the change of law process, but the prohibition against new UNE-Ps (and other UNEs) is self-effectuating. The first two sentences of paragraph 233 simply confirm that changes to the interconnection agreement should be consistent with the framework established in the *TRRO,* whether self-effectuating or via change of law.

Thus, Joint Petitioners have ignored the FCC's clear statement of intent and their complaint concerning BellSouth's announced intent to reject orders for these former UNEs on March 11, 2005 is meritless.

Joint Petitioners raise two arguments. First, Joint Petitioners argue that BellSouth has obligations under existing interconnection agreements to continue to accept orders for these former UNEs until those interconnection agreements are changed. Second, Joint Petitioners contend a procedural agreement in the pending arbitration between the parties requires BellSouth to continue to provide these UNEs. Neither argument is correct.

ARGUMENT

A. The FCC's Bar On "New Adds" Is Self-Effectuating And Relieves BellSouth Of Any Obligation Under Its Interconnection Agreements To Provide These Former UNEs To Joint Petitioners.

BellSouth does not dispute that its interconnection agreements contain change of law provisions; however, that is not the issue here. If the FCC had held that Joint Petitioners could continue to add more former UNEs until the interconnection agreements were changed pursuant to the change of law provisions found in interconnection agreements, or even if it had been silent on the question of "new adds," then presumably no dispute would exist between Joint Petitioners and BellSouth. Neither situation is the case here, however, and Joint Petitioners' motion disregards what the FCC actually said in the *TRRO*.

The new rules unequivocally state the carriers may not obtain new UNEs, and the FCC said unequivocally that there would be a transition period for embedded UNEs that would begin on March 11, 2005 that would last 12 months: "we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months

of the effective date of this order."[15] The FCC made almost identical findings with respect to high-capacity loops and transport, holding that its transition rules "do not permit competitive LECs to add new [high capacity loops and transport on an unbundled basis] ... where the Commission has determined that no section 251(c)(3) unbundling requirement exists."[16] The FCC also said unequivocally that this "transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[17] How much clearer could the FCC be?

Joint Petitioners contend that notwithstanding the clear language of the *TRRO* -- there will be a transition period, it will begin on March 11, 2005, and there will be no "new adds" during that transition period -- the FCC really didn't mean what it said. Evidently, Joint Petitioners believe that BellSouth is obligated to continue to provide new UNEs until its contract with BellSouth is amended pursuant to change of law provisions therein. Joint Petitioners' belief is wholly inconsistent with the language of the *TRRO* and is flatly contradicted by the federal rules.[18]

First, the FCC understood that existing interconnection agreements often contained "change of law" provisions. For instance, the FCC specifically contemplated that the contract provisions for the transition of the embedded base

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[15] *TRRO*, ¶199

[16] *TRRO*, ¶ 142, 195; *see also* 47 C F.R. § 51.319 (e)(2)(i), (ii), (iii), and (iv) (ILEC is not require to provide unbundled access to entrance facilities; requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements); *and* 47 C.F.R. § 51.319 (a)(4)(iii), (a)(5)(iii), and (a)(6) (requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements).

[17] *Id.*

[18] Notably, Joint Petitioners' Motion is devoid of a single reference to the *rules*

of former UNEs would be effectuated through the change of law process. Further, the FCC provided that throughout the 12-month transition period (during which the FCC clearly said there would be no "new adds") CLECs would continue to have access to the embedded UNE-Ps during the transition period, but at an increased rate, until the migration of the embedded base was complete.[19] Finally, the FCC made the increase in the rates of the former UNEs retroactive to the effective date of the order to preclude gaming by the CLECs during the negotiation process.[20]

The FCC's obvious reason for making the increased rates retroactive is to keep CLECs from unnecessarily delaying the amendment process and gaming the system by postponing the date for the higher rates applicable to the embedded base of UNEs. It is equally clear that the FCC did not directly address amending existing interconnection agreements to eliminate any requirement that incumbent local exchange carriers ("ILECs") provide new UNEs. If the FCC had intended to allow CLECs to continue to add new UNEs until the interconnection agreements were amended, it could have easily said so. It did not. Instead, it specifically provided that the transition period did not authorize new adds.[21] The only reasonable, logical and legally sound conclusion is that the provisions prohibiting new adds was intended by the FCC to be self-effectuating.

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[19] *Id.*

[20] *TRRO*, n. 630 Thus, if Joint Petitioners ultimately executed a interconnection agreement amendment on May 11, 2005, the transition period rates would apply as of March 11, 2005 and Joint Petitioners would need to make a true-up payment to BellSouth.

[21] BellSouth will permit feature changes on Joint Petitioners embedded base of customers; however, the FCC was clear that CLECs could not continue to *increase* its embedded base. *See* 51 319(d)(2)(iii); 51 319 (e)(2)(i), (ii), (iii), and (iv); and 51.319 (a)(4)(iii), (a)(5)(iii), and (a)(6).

There is no question that the FCC has the legal authority to create a self-effectuating change to existing interconnection agreements as it has done here. Indeed, in the TRO, the FCC decided not to make its decisions self-executing. *See TRO*, ¶ 700 ("many of our decisions in this order will not be self-executing"). The FCC's authority to make self-effectuating changes exists under the *Mobile-Sierra* doctrine, which allows the FCC to negate any contract terms of regulated carriers so long as the FCC makes adequate public interest findings. Thus, "[f]or all contracts filed with the FCC, it is well-established that 'the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest.'" *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999) (*quoting Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).[22]

The FCC was very clear in the *TRRO* that access to UNEs without impairment was ***contrary to the public interest*** and must stop. Notably, the FCC held that "it is now clear ... that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment."[23] Also, the FCC held "we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine facilities-based competition."[24] Likewise, the FCC held that "the

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[22] *Citing, in turn, FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956) *and United Gas Co v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956) (the FCC has the power to set aside any contract which it determines to be "unjust, unreasonable, unduly discriminatory, or preferential.").

[23] *TRRO*, ¶ 218.

[24] *TRRO*, ¶ 218.

continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives."[25]

The FCC has applied *Mobile-Sierra* to require a fresh look at contracts between ILECs and CMRS providers executed before the 1996 Telecommunications Act in light of the reciprocal compensation provisions of §251(b)(5) of the Act. In relevant part, citing *Western Union Tel. Co. v. FCC*, the FCC explained that "[c]ourts have held the Commission has the power ... to modify .. provisions of private contracts when necessary to serve the public interest." *First Report and Order,* 11 FCC Rcd 15499, ¶ 1095 (1996) (additional citations omitted).[26]

That these interconnection agreements are filed with and approved by the state commissions, rather than the FCC, has no impact on the FCC's ability to change these contracts when it is in the public interest to do so. While *Cable & Wireless P.L.C. v. FCC* applied to "all contracts filed with the FCC,"[27] the reference to "filing" means that decision applies to all contracts and other agreements *that are subject to the FCC's authority not just contracts actually filed with the FCC. See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 380, 381 (1999). Thus, as the Supreme Court made clear in *Iowa Utilities Bd.,* state commissions perform their functions subject to FCC rules designed to implement the statute and establish the public interest. The FCC has enacted new rules designed to further the public interest by finding "the continued availability of unbundled mass market switching

[25] *TRRO,* ¶ 199.

[26] In the *Local Competition Order,* the FCC modified pre-existing agreements as of the effective dates of its new rules – just as it did in the *TRRO.*

[27] *Cable & Wireless,* 166 F.3d at 1231.

would impose significant costs in the form of decreased investment incentives"[28]. As a matter of national public policy, unbundled switching adversely impacts the public by creating disincentives for the creation of facilities-based competition – which competition has been found to be the fundamental objective of the Act. The FCC has spoken – and Joint Petitioners cannot ignore its message by hiding behind interconnection agreements that have been modified by the self-effectuating new rules to address the national public policy and the objectives of the Act.

The FCC has full authority to issue a self-effectuating order that eliminated CLECs' ability to add new UNE customers after March 11, 2005. That existing interconnection agreements have not been formally modified to implement that finding is irrelevant. Through the *TRRO* the FCC has exercised its authority in a manner that trumps Joint Petitioners' individual contracts and BellSouth has no obligation to provide new UNEs to Joint Petitioners on or after March 11, 2005.

B. The Joint Petitioners' Claims Regarding the Scope of the Abeyance Agreement Are Meritless and Should Be Rejected.

The Joint Petitioners' second argument in support of the Emergency Petition is premised on the parties' procedural agreement in June 2004 to suspend the current arbitration proceedings for 90 days ("Abeyance Agreement"). As explained below, that argument is now moot given the Authority's rejection of the very purpose of the Abeyance Agreement, which was to add *USTA II* issues to the arbitration. The Joint Petitioners' argument is also based on an erroneous

[28] *See* n. 16, *IBD Mobile Communications, Inc. v. COMSAT Corp*, Memorandum Opinion and Order, 16 FCC Rcd 11474, ¶ 16 n. 50 (2001). (The FCC explained that "Sierra-Mobile analysis does not apply to interconnection agreements simply cannot apply, particularly where the FCC's current order, by its own terms, appears to dictate a different requirement").

interpretation of the Abeyance Agreement. Specifically, the Joint Petitioners are attempting to manipulate the Abeyance Agreement by improperly expanding its scope to apply to the *TRRO*. This manipulation is designed to avoid operating pursuant to the FCC's most recent pronouncement of BellSouth's obligations under the Act. Indeed, the Joint Petitioners' entire argument is premised on a fictitious (and nonsensical) agreement between the parties to not invoke the change in law obligations in the current Interconnection Agreement ("Current Agreement") for the *TRRO* or for any other FCC Order that follows or is tangentially related to *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Circuit 2004) ("*USTA II*). There was never such an agreement. And, as established below, the Joint Petitioners' arguments are nothing more than a desperate ploy to gain a competitive advantage over other CLECs that is devoid of any evidence in support and is ultimately irrelevant to implementing the FCC's "no new adds" requirements on March 11, 2005.

1. The Joint Petitioners' Argument is Now Moot.

The purpose of the Abeyance Agreement was to add *USTA II* issues to the parties' pending arbitration. Based on the Abeyance Agreement, supplemental arbitration issues resulting from *USTA II* were proposed to the Authority. The Authority's hearing officer rejected the supplemental issues, thereby negating the very purpose of the Abeyance Agreement.[29] The Joint Petitioners' argument turns on the parties' agreement to add new issues. In light of the Authority's *Order*, the

[29] *See* January 04, 2005 TRA *Order*, attached as Exhibit C.

Abeyance Agreement has, in essence, been negated and the Joint Petitioners' argument is therefore moot.

2. The Abeyance Agreement Only Applies to Change of Law Obligations and Thus Is Inapplicable.

First, assuming *arguendo* that there was no dispute as to the scope of the Abeyance Agreement (which is denied by BellSouth), that agreement does not in any way restrict BellSouth's rights under the *TRRO*. In the Emergency Petition, the Joint Petitioners effectively concede that the Abeyance Agreement is limited in application to "changes of law" requiring negotiation and amendment under the Current Agreement. As stated above, the FCC's bar on "new adds" beginning March 11, 2005 does not trigger the parties' "change of law" obligations under the Current Agreement because it is self-effectuating. Simply put, the FCC trumped the parties' change of law obligations as well as any ancillary agreement, if one existed, regarding those obligations.[30] Consequently, the parties are relieved of those obligations in order to implement the FCC's "no new adds" requirement from the *TRRO*. Thus, even accepting the Joint Petitioners' description and interpretation of the Abeyance Agreement (which BellSouth does not), that agreement does not impact BellSouth's rights under the *TRRO* for "new adds." [31]

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[30] For the reasons discussed above, even assuming that BellSouth agreed with the Joint Petitioners' description of the scope of the Abeyance Agreement (which it does not), the *Mobil-Sierra* doctrine mandates that the parties be relieved of complying with those obligations to serve the public interest *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C Cir. 1999) (*quoting Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) ("For all contracts filed with the FCC, it is well-established that 'the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest.'").

[31] If the Authority rejects this argument, there is no need to address the Abeyance Agreement argument at this time because there is no emergency. Moreover, as the following argument makes clear, there are factual disputes about the scope of the Abeyance Agreement that

3. The Parties Never Agreed to Expand the Abeyance Agreement to Include the *TRRO*.

While BellSouth submits that the FCC's no "new adds" requirement is not a change of law that requires amendment of the Current Agreement under the terms thereof, the Joint Petitioners' arguments still fail if the Authority finds differently. Contrary to the Joint Petitioners' claims, the implementation of the *TRRO* is not covered by the Abeyance Agreement. Rather, the parties limited their agreement to not invoke change of law process to changes set forth in *USTA II* only.

On June 15, 2004, the D.C. Circuit's stay of the *USTA II* decision expired. This expiration triggered the parties' change of law obligations in their existing agreements. Rather than exercise those obligations, in light of the on-going negotiations for a new agreement and the parties' pending arbitration, the parties decided to a 90 day abeyance of the pending arbitration proceeding to "consider how the post-*USTA II* regulatory framework should be incorporated into the new agreements currently being arbitrated and to identify what arbitration issues may be impacted and what additional issues, if any, need to be identified for arbitration." *See* Joint Motion at 2. The parties further agreed "that no new issues may be raised in this arbitration proceeding other than those that result from the Parties' negotiations regarding the post-*USTA II* regulatory framework." *Id.* Additionally, because the parties agreed to raise issues relating to *USTA II* into the

the Authority will need to resolve. In the event the Authority is not inclined to rule in BellSouth's favor on the interpretation of the Abeyance Agreement, the only means by which the Authority can adequately resolve those factual disputes is through an evidentiary, including pre-filed testimony and briefing.

pending arbitrations, the parties also agreed to not engage in separate change of law negotiations/arbitrations for *USTA II*:

> With this framework, the Joint Petitioners and BellSouth have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreements to address *USTA II* and its progeny. Accordingly, the Parties have agreed that they will continue operating under their current Interconnection Agreements until they are able to move into the new arbitrated/negotiated agreements that ensue from this proceeding.

See Joint Motion at 2. In other words, the parties agreed to hold the arbitration in abeyance for 90 days to do the following: (1) negotiate *USTA II* changes into the new interconnection agreements; and (2) for those *USTA II* changes that could not be negotiated, to agree on *USTA II* issues to add to the arbitration.

The language of the Joint Motion itself and the timing of the parties' agreement to hold the change of law process in abeyance both demonstrate that the scope of the agreement was limited only to changes resulting from *USTA II.* Contrary to this clear interpretation of the Abeyance Agreement, the Joint Petitioners' argue that, eight months before the release of the *TRRO,* BellSouth voluntarily waived its right to amend its existing interconnection agreements with the Joint Petitioners for the *TRRO* or any other FCC Order that is tangentially related to *USTA II*. Nothing can be farther from the truth and the Authority should reject this erroneous manipulation of the Abeyance Agreement for the following reasons.

First, the Joint Petitioners argument directly conflicts with the purpose of the Abeyance Agreement. As stated above, BellSouth agreed to avoid the

separate/second process for negotiating/arbitrating change of law for "*USTA II* and its progeny" because those issues would be raised in the pending arbitrations. *See* Joint Motion; June 29, 2004 e-mail from counsel for Joint Petitioners to counsel for BellSouth, attached hereto as Exhibit B (stating that "purpose of abatement would be to consider how the post USTA II regulatory framework should be incorporated into the new agreements currently being arbitrated by Joint Petitioners and to identify what arbitration issues may be impacted and what additional issues, if any, need to be identified for arbitration – ***and that by doing so***, we'd be avoiding a separate/second process of negotiating/arbitrating change-of-law amendments to the current agreement ....") (emphasis added).

The parties entered the Abeyance Agreement to address a timing issue arising out of *USTA II.* The Agreement went no further. As the Authority is aware, the deadline to add new issues to the parties' arbitration was October 2004. Thus, while the parties could add issues arising out of *USTA II,* they certainly could not add issues arising out of the *TRRO* because it had not yet been issued! It makes no sense to assume that BellSouth would have agreed to waive its change of law rights with respect to the *TRRO,* particularly in light of the fact that there was no opportunity and still no opportunity to include *TRRO* issues in the arbitration.

Notably, the parties' revised matrix, submitted in October 2004, contained several Supplemental Issues relating to *USTA II* and the *Interim Rules Order*[32] but

[32] Although the parties agreed to limit new issues being raised to those resulting from the "post-*USTA II* regulatory framework", the parties subsequently agreed to also include issues

none of these Supplemental Issues substantively addressed the *TRRO* because the FCC did not even issue that decision until February 4, 2005. Consequently, the parties could not have included the *TRRO* in the Abeyance Agreement because the parties could not, and currently cannot, raise *TRRO* issues in the arbitration proceeding. Indeed, adopting the Joint Petitioners' interpretation is impermissible because it would result in the complete frustration of the Abeyance Agreement as the parties would have no venue (either through the pending arbitration or through a change of law arbitration) to address disputes relating to the *TRRO*. *See Wilkerson v. Williams*, 667 S.W.2d 72 (Tenn. App. 1983) (when in doubt regarding contract's meaning, courts should prefer construction rendering contract "fair, customary and such as prudent men would naturally execute" instead of construction that is "inequitable, unusual, or such as reasonable men would not be likely to enter into"); *Pettyjohn v. Brown Boveri Corp.*, 476 S.W.2d 268 (Tenn.App. 1971) (court chose construction of contract rendering it "more reasonable and rational"); *Moore v. Moore*, 603 S.W.2d 736 (Tenn. App. 1980) (court will construe contract, according to plain meaning, to determine reasonable meaning).

The Authority, in reviewing the identical Joint Motion, specifically found that the parties' agreement to avoid a second/separate change of law process was limited to *USTA II* ("the Order"): "Within this framework, the Parties agree to avoid a separate process of negotiating change-of-law amendments to the current

relating to the *Interim Rules Order* in the arbitrations because the FCC issued that decision during the 90 day abeyance

interconnection agreements ***to address USTA II....***"[33] The Joint Petitioners have never challenged the Authority's Order and instead are articulating a completely contrary position with the Emergency Petition.

Third, the crux of the Joint Petitioners' argument is that the parties cannot "continue operating under their current Interconnection Agreements until they are able to move into the new arbitrated/negotiated agreements that ensue from this proceeding" if the parties amend those agreements to incorporate the *TRRO*. Simply stated, the Joint Petitioners improperly read into the Joint Motion and the Abeyance Agreement a requirement that the rates, terms, and conditions of the Current Agreement were frozen as of June 30, 2004, until such time as the parties move onto the new arbitrated agreements. This interpretation is not only factually incorrect but also expressly rejected by the custom of the parties.

Indeed, there is nothing in the Joint Motion, the Order, or in the Abeyance Agreement that supports this interpretation. Further, it should be undisputed that the parties can and are continuing to operate under the Current Agreement until such time as the new arbitrated agreements become effective, even if certain provisions of the Current Agreement are modified to reflect changes of law. Further, as evidenced by recent amendment filings in Tennessee by NewSouth, NuVox, and BellSouth on February 22, 2005, (both of which are attached hereto as Exhibit D), the custom of the parties is to amend the Current Agreement and to continue operating under the Current Agreement, as amended.[34] Accordingly, the

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[33] *See* July 16, 2004 TRA Order, attached hereto as Exhibit C (emphasis added).

[34] As explained above, the FCC has determined that the "no new adds" requirement is self-effectuating and therefore trumps the change of law provision.

practice and custom of the parties is directly contrary to the arguments asserted by the Joint Petitioners and thus the Authority should reject them. *See Pinson & Assoc., Inc. v. Kreal*, 800 S.W.2d 486, 487 (Tenn. App. 1990) (course of conduct of parties is important factor in construing contract because it "is the strongest evidence of their original intent"); *Park National Bank v. Goolsby*, 164 S.W.2d 545, 546 (Tenn. 1942) (noting importance of custom or usage in explaining what is indistinct in contract).

Fourth, the express language of the Abeyance Agreement does not support the Joint Petitioners' interpretation. The Abeyance Agreement provides that the parties would avoid a second/separate change of law negotiation/arbitration for "*USTA II* and its progeny." "Progeny" has a specific legal definition, and the Authority should give effect to this specific definition. Indeed, *Black's Law Dictionary* (2000 ed.) defines "progeny" as a "line of opinions that succeed a leading case <*Erie* and its progeny>." Accordingly, as used in the Joint Motion, "*USTA II* and its progeny" means opinions of a court or state commission reaffirming or restating the D.C. Circuit's vacatur of certain unbundling obligations in *USTA II*. The *TRRO* does neither. Rather, it is an administrative decision setting forth new rules and thus does not meet this legal definition of "progeny."

Unlike the Joint Petitioners' argument, this interpretation of the Abeyance Agreement is entirely consistent with the intent of the parties to limit their agreement to *USTA II*. The reason for this is clear: Because the parties agreed to incorporate *USTA II* issues into pending arbitrations, the agreement also encompassed any subsequent court or state commission decision making the same

conclusions as did the D.C. Circuit in *USTA II*. To hold otherwise would frustrate the entire purpose of the Abeyance Agreement as the parties would still be subject to change of law negotiations/arbitrations for these subsequent decisions, which only reaffirmed or restated the findings of *USTA II*.

The use of the phrase "USTA II and its progeny" was no accident as the parties specifically negotiated and reached a compromise with this agreed-upon language while drafting the Joint Motion. In fact, the original draft of the Motion presented by the Joint Petitioners contained the phrase "post-USTA II regulatory framework" instead of "*USTA II* and its progeny." *See* July 9, 2004 e-mail and attachment from counsel for BellSouth to counsel to Joint Petitioners, attached hereto as Exhibit E. In response, BellSouth struck the phrase "post-*USTA II* regulatory framework" and inserted "*USTA II*" because it was concerned that the Joint Petitioners' language was too broad as it could encompass the FCC's Final Rules (ultimately set forth in the *TRRO*), which was never the intent of the parties. *Id.* Accordingly, BellSouth proposed that the subject sentence should read: "With this framework, the Joint Petitioners and BellSouth have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreement based on *USTA II*." *Id.*

In the next draft, the Joint Petitioners reasserted the phrase "post-*USTA* II regulatory framework," which was still unacceptable to BellSouth.[35] Consequently,

[35] Interestingly, under the Joint Petitioners' own interpretation, even the broader phrase "post-*USTA II* regulatory framework" does not result in the inclusion of the *TRRO* and the Final Rules that resulted. KMC, one of the Joint Petitioners, used this exact same phrase to mean solely the *USTA II* decision. Specifically, in filing a similar motion in North Carolina to postpone its pending arbitration proceeding with Sprint, KMC stated that the "Parties respectfully request that

the parties discussed the impasse, wherein BellSouth specifically informed the Joint Petitioners of its concern with their language and the parties agreed to *"USTA II* and its progeny." This negotiation history definitively establishes that (1) BellSouth never agreed to the interpretation now set forth by the Joint Petitioners; (2) BellSouth expressly advised the Joint Petitioners that it objected to the interpretation that the Joint Petitioners are now espousing; and (3) the parties agreed to language to address BellSouth's concerns. The Joint Petitioners conveniently fail to disclose these facts, in obvious recognition of their fatal effect.

Fifth, adopting the Joint Petitioners' argument would lead to an absurd or unreasonable result as it would require the Authority to find that BellSouth indefinitely agreed to waive contractual rights related to the incorporation of the *TRRO* in the Current Agreement eight months prior to those changes even being issued. In effect, the Joint Petitioners argue that BellSouth essentially gave up the right to implement those new rules for the Current Agreement even before any party knew what those rules would contain and without any venue to address disputes related to those new rules. Not only is this factually incorrect but it also leads to absurd and unreasonable results that only benefit the Joint Petitioners.

Tennessee law mandates that, in construing a contract, absurd or unreasonable results should be avoided.

---

the Authority hold this proceeding in abeyance to provide additional time for the Parties to address the ***effect of the post-USTA II regulatory framework, the Interim Order, and the forthcoming unbundling rules on the terms, conditions and rates that should be included in the Agreement ....*** *See* December 2, 2004 Motion at 2, attached hereto as Exhibit F (emphasis added). This express inclusion of the *Interim Rules Order* and the *TRRO* proves that, at least KMC (and presumably all of the Joint Petitioners because their position on all the issues are allegedly the same) construes the phrase "post-*USTA II* regulatory framework to be limited to *USTA II* and does not encompass the FCC's *Interim Rules Order* or the *TRRO*.

> "The words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one, and the court will likewise endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other. So that interpretation which evolves the more reasonable and probably contract should be adopted, and a construction leading to an absurd result should be avoided."

See Securities Inv. Co. v. White, 91 S.W.2d 581, 583-584 (Tenn. App. 1935). For this additional reason, the Commission should reject the Joint Petitioners' arguments.

C. If BellSouth Is Ordered To Provide New UNE-P Circuits After March 11, 2005, It Is Entitled To A Retroactive True-Up To An Appropriate Rate.

For all the reasons set forth in this pleading, BellSouth is not obligated to provide new UNEs circuits after March 11, 2005. If, however, the Authority is inclined to grant Joint Petitioners any emergency relief (which it should not do), the Authority should explicitly direct that if Joint Petitioners order new UNEs on or after March 11, 2005, Joint Petitioners must compensate BellSouth for those UNE orders at an appropriate rate retroactive to March 11, 2005.

The retroactive payment is important not only as a legal matter but as a policy matter. The FCC was unequivocal in its holding that no CLEC is entitled to new UNE circuits after March 11, 2005. Short of an order denying Joint Petitioners' request, the *only* way for the Authority to comply with the FCC's order is to require Joint Petitioners to pay BellSouth the difference between the UNE-P rate and an appropriate rate back to March 11, 2005. Other states have adopted true-ups. For instance, the Texas Commission adopted an interim agreement that

does not require SBC to add new UNE orders and includes a true-up provision.[36] The Michigan Commission has decided to complete expedited proceedings in 45 days, during which new orders can apparently be issued subject to a true-up.[37] A true-up is the only way to equalize the risk between the parties – if ordered to provision new UNEs after March 11, BellSouth unquestionably is bearing the risk associated with the continuation of an unlawful unbundling regime. Joint Petitioners should bear the risk of a true-up if its position is determined to be wrong.

A true-up is also necessary in the interests of fairness. The FCC has also been clear that commercial negotiations can produce pro-competitive and pro-consumer outcomes.[38] BellSouth has successfully negotiated, to date, 48 commercial agreements with CLECs for the purchase of a wholesale local voice platform service, which agreements cover in excess of 310,000 access lines. If the Authority disregards the self-effectuating portion of the *TRRO,* the progress BellSouth has achieved in reaching commercial agreements could come to a halt, at least in the near term. If CLECs know that they can continue adding new unbundled network elements at TELRIC rates until the amendment and arbitration

[36] *See* Exhibit G for orders from the Texas PUC. The orders from the Texas Commission appear to diverge from action taken by the Georgia Commission, which, in addressing a motion similar to the one filed by Joint Petitioners, ruled against BellSouth. The Georgia Commission has not yet released a written order.

[37] *See* Exhibit H for an order from the Michigan Commission.

[38] Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein On Triennial Review Next Steps, March 31, 2004, *see also* FCC Chairman Michael K. Powell's Comments on SBC's Commercial Agreement With Sage Telecom Concerning The Access To Unbundled Network Elements, April 5, 2004 (expressing hope "for further negotiations and contracts - so that America's telephone consumers have the certainty they deserve"); FCC Chairman Michael K. Powell Announces Plans For Local Telephone Competition Rules, June 14, 2004 (strongly encouraging "carriers to find common ground through negotiation" because "[c]ommercial agreements remain the best way for all parties to control their destiny").

process is completed, which can take up to twelve months under the *TRRO*, they will have no reason to pay more than TELRIC by entering into a commercial agreement at this juncture. Significantly, allowing CLECs to continue adding unbundled network elements until the amendment and arbitration process has been completed, even though they are not impaired, unfairly prejudices those carriers that have entered into commercial agreements. Carriers that entered into commercial agreements will be forced to compete for new customers against CLECs that can undercut their prices solely by virtue of these CLECs getting to pay TELRIC rates, unless the Authority requires a true-up.

The Authority recently allowed XO to effectuate a change to its interconnection agreement with BellSouth ***without*** going through the change of law process. XO, while acknowledging that its agreement with BellSouth did not allow for the conversion of special access circuits to UNES, argued that the TRO provisions regarding such conversion were self-effectuating. The Authority granted interim relief to XO subject to a retroactive true-up.[39] If the Authority is inclined to grant Joint Petitioners any relief (which BellSouth opposes), the Authority should condition any such relief on a retroactive true-up, consistent with its decision in the XO proceeding.

CONCLUSION

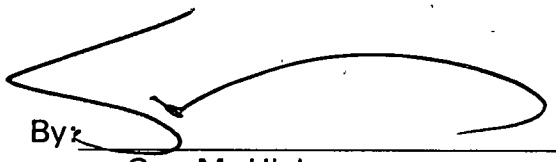
The Authority, in accordance with the FCC's Final Rules, should not order BellSouth to provide new UNEs, for which there has been a national finding of no

[39] The Authority deliberated on February 28, 2005 in Docket No 04-00306 BellSouth respectfully disagrees with the Authority's decision to set an interim rate A copy of XO's e-mail asserting that the sections of the TRO benefiting XO are self-effectuating is attached as Exhibit I

impairment, after March 11, 2005. If, however, the Authority requires new UNEs after March 11, 2005, the Authority should order a retroactive rate true-up back to March 11, 2005.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



By: _____

Guy M. Hicks
Joelle J. Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

R. Douglas Lackey
James Meza
675 W. Peachtree St., NE, Suite 4300
Atlanta, GA 30375

Meza, James

From: Heitmann, John [JHeitmann@KelleyDrye com]
Sent: Tuesday, June 29, 2004 7:37 PM
To: Meza, James; jimmeza@imcingular.com
Cc: Culpepper, Robert, Joyce, Stephanie, Hendrickson, Heather T., Heitmann, John, Campen, Jr , Henry C.
Subject: Proposed 90 Day Abatement
Importance: High

Jim,

Per our discussions on Monday and Tuesday June 28 and 29, 2004 at Parker Poe in Raleigh, the Joint Petitioners (KMC, Xspedius and NuVox/NewSouth), have, per your request, reconsidered their position with respect to the 90 day abatement of the ongoing arbitrations proposed by BellSouth

Based on our understanding that it is the mutual understanding of the JPs and BST that
(1) the purpose of the abatement would be to consider how the post USTA II regulatory framework should be incorporated into the new agreements currently being arbitrated by Joint Petitioners and to identify what arbitration issues may be impacted and what additional issues, if any, need to be identified for arbitration -- and that by doing so, we'd be avoiding a separate/second process of negotiating/arbitrating change-of-law amendments to the current agreement (which the parties would continue operating under until they were able to move into the new arbitrated/negotiated agreements),
(2) the parties would continue their efforts to reduce the number of issues already identified, including going forward with the July 8 summit in DC,
(3) the parties will cooperate on regional scheduling (as has been the case under Mr Meza's tenure on this case),
(4) the parties should be able to agree to a regional discovery agreement much along the lines the JPs proposed (based on an agreement in concept -- but not in detail -- reached by the parties earlier),

the Joint Petitioners are willing to join BST in a motion to abate for 90 days provided that we agree
(1) on a joint motion (we can work on it tomorrow -- should be simple);
(2) to work jointly to secure uniform grant of the motion in all states, including SC (and that we agree to a "plan B" in case SC requires withdrawal and refiling – which would require a commitment by BST not to bounce JPs from their existing agreements, provided we re-file within the new window),
(3) to a regional discovery agreement (we're ready to hammer it out tomorrow morning and to continue tomorrow morning the cooperative process with good faith negotiations to resolve outstanding discovery issues in NC), and
(4) to frame the 90 day abatement as being from the currently proposed or set hearing dates (the point would be that we would jointly try to push-out what already has been scheduled informally between us and formally by the Commissions – realizing that SC may have to be handled differently if they insist that the arb petition be withdrawn and refiled)

I think this should be doable Please call me right away on my cell, if you think differently Can we meet at Parker Poe at 8 30 or 9 in the morning to get this done? (We would be postponing the remaining depos and this week's remaining testimony deadlines, so that we could spend the day (or as much of it as it takes) to get this done – I hope to be in DC on Thursday prepping for a 10-3 issue reduction call with Rhona and Jim on Friday)

Best, John

John J. Heitmann
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Fax (202) 955-9792
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jheitmann@kelleydrye.com

-----Original Message-----
From: Culpepper, Robert [mailto:Robert.Culpepper@BellSouth.com]
Sent: Thursday, June 24, 2004 5:51 PM
To: Heitmann, John
Subject: RE: Proposed 90 Day Abatement

Perhaps we can discuss tmo or next week in Raleigh OK?

> -----Original Message-----
> **From:** Heitmann, John [mailto:JHeitmann@KelleyDrye.com]
> **Sent:** Thursday, June 24, 2004 5:27 PM
> **To:** Culpepper, Robert
> **Cc:** Reynolds, Rhona; Meza, James; Tamplin, James; Hendrickson, Heather T.; Elmi, Jennette E.; Joyce, Stephanie; Falvey, Jim; Jennings, Jake; Russell, Bo; Cadieux, Ed; mabrow@kmctelecom.com; rpifer@kmctelecom.com
> **Subject:** FW: Proposed 90 Day Abatement
> **Importance:** High
>
> Robert,
>
> KMC, NewSouth/NuVox and Xspedius are opposed to a 90 day abatement at this time. We are not, however, opposed to folding in the post USTA II regulatory framework into the ongoing arb As was the case with the TRO, we agree with you that it would be a waste of time to negotiate and arbitrate a separate "change-of-law" amendment when we have the new agreement arbitration as a vehicle for getting that done What we would propose is to identify the specific rules that have been vacated and any arbitration issues currently teed-up based on our dispute about those rules We would then discuss what impact if any the post USTA II regulatory framework has on those provisions If the FCC issues an interim rules order, we could also assess how that impacts those provisions We would hold those issues over to a second phase of the proceeding, wherein the parties could raise additional issues regarding other provisions of Attachment 2 that may be directly impacted by the vacated rules Given the number of issues that remain and the prosepect of adding new ones, a two phase approach may come as a bit of relief for all involved Do you think that this approach would be workable?
>
> Best regards, John
>
> **John J. Heitmann**
> Kelley Drye & Warren LLP
> 1200 19th Street, N.W., Suite 500
> Washington, D.C. 20036
> Office (202) 955-9888
> Fax (202) 955-9792
> Mobile (703) 887-9920
> jheitmann@kelleydrye.com
>
> -----Original Message-----
> **From:** Culpepper, Robert [mailto:Robert.Culpepper@BellSouth.com]
> **Sent:** Monday, June 21, 2004 7:21 PM
> **To:** Heitmann, John

Cc: Reynolds, Rhona; Meza, James
Subject: Proposed 90 Day

John, please review and discuss the same with your clients. Since I wasn't on this afternoon's call, the following is my understanding of the proposal which was discussed. Thanks, Robert

THE FOLLOWING IS A DRAFT FOR DISCUSSION PURPOSES ONLY:

The parties, by and thru their respective counsel, agree that it is beneficial to have additional time to review and discuss the impact that the DC Circuit's vacatur of certain FCC unbundling rules has on (i) the unresolved issues in the pending arbitration proceedings; (ii) the parties' existing interconnection agreements; and (iii) potentially other new issues that may arise in connection therewith. Accordingly, the parties agree to the following:

1. To immediately cease all arbitration related activity, including but not limited to: filing testimony, engaging in discovery, and filing motions other than those that may be associated with item #2 below

2. To jointly approach all State Commissions regarding discontinuing the arbitration proceedings for a 90 day period in a manner that complies with applicable law.

3 During such 90 day period, BellSouth agrees to not invoke the change of law provisions in the existing interconnection agreements in attempt to incorporate the impact of the DC Circuit's vacatur into existing interconnection agreements.

4. Following the conclusion of the 90 day period, the arbitrations may be reconvened with updated/revised issues, positions, and supplemental testimony on any revised/updated issue/position

5. This agreement is made with a full reservations of rights by all parties and shall not be considered a waiver of any previously asserted position and/or contractual rights

Agreed and Accepted.

NewSouth/NuVox/KMC/Xspedius

BellSouth

*****

113

Meza, James

From: Meza, James
Sent: Friday, July 09, 2004 2 21 PM
To: 'Heitmann, John'
Cc: Rankin, Edward; Joyce, Stephanie; Hendrickson, Heather T ; Campen, Jr., Henry C.
Subject: Motion to Hold in Abeyance_v12.DOC

John Attached are my suggested revisions to the draft motion. BellSouth agrees to the Jan 11-14 hearing dates in NC and to pushing each state's hearing date back by the same amount of time. Please let me know if you have any questions

Regards,

Jim

Motion to Hold in Abeyance_v12...

Exhibit B

BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

Docket No. P-772, Sub 8
Docket No. P-913, Sub 5
Docket No. P-989, Sub 3
Docket No. P-824, Sub 6
Docket No. P-1202, Sub 4

In the Matter of) **Joint Petition of NewSouth**) **Communications Corp. *et al.* for**) **Arbitration with BellSouth**) **Telecommunications, Inc.**)	**JOINT MOTION TO HOLD PROCEEDING IN ABEYANCE**

JOINT MOTION TO HOLD PROCEEDING IN ABEYANCE

NewSouth Communications Corp. ("NewSouth"), NuVox Communications, Inc. ("NuVox"), KMC Telecom V, Inc. and KMC Telecom III, LLC (collectively "KMC"), and Xspedius Communications, LLC on behalf of its operating subsidiary Xspedius Management Company Switched Services, LLC ("Xspedius") (collectively the "Joint Petitioners") and BellSouth Telecommunications, Inc. ("BellSouth") (together, the "Parties"), through their respective counsel, submit this Joint Motion to Hold Proceeding in Abeyance and hereby respectfully request that the [redacted] (the "Commission") hold the above-captioned proceeding in abeyance for a period of ninety (90) days. In doing so, the Parties request that the Commission suspend all pending deadlines and consideration of all pending motions until after October 1, 2004. ~~Thereafter, arbitration-related activity would resume with submission of a revised issues matrix, supplemental pre-filed direct testimony by the Joint Petitioners and supplemental pre-filed reply testimony by BellSouth and a resumption of additional procedures, including Joint Petitioners' rebuttal testimony, established up to and including the~~

~~hearing.~~ By this Joint Motion, and contingent upon a grant by the Commission of the relief requested herein, the Parties waive through [redacted] the deadline, under section 252(b)(4)(C) of the Act, 47 U.S.C. § 252(b)(4)(C), for final resolution by the Commission of the issues in this arbitration. In support of this Joint Motion, the Parties submit the following.

~~Each of the Joint Petitioners and BellSouth currently are parties to an interconnection agreement, arising under sections 251 and 252 of the Act, 47 C.F.R. §§ 251 and 252, for the State of [redacted]. Although the terms of the Parties' current interconnection agreements have expired, the Joint Petitioners and BellSouth have agreed to continue to operate under the rates, terms and conditions set forth in those agreements until such time as a replacement interconnection agreement ensues from this arbitration proceeding and is approved by the Commission.~~

Joint Petitioners and BellSouth have engaged in the above-captioned arbitration proceeding since February 11, 2004. On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit, in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.2004) ("*USTA II*"), affirmed in part, and vacated and remanded in part, the rules of the Federal Communications Commission ("FCC"), pursuant to which ~~applicable to the~~ incumbent LECs are obligated ~~'s obligation~~ to provide to any requesting telecommunications carrier access to network elements on an unbundled basis. The D.C. Circuit initially stayed its *USTA II* mandate for a period of sixty (60) days. The stay of the *USTA II* mandate later was extended by the D.C. Circuit for a period of forty-five (45) days, until June 15, 2004 on which date the D.C. Circuit's *USTA II* mandate issued. At this time, certain of the FCC's rules applicable to BellSouth's obligation to provide to Joint Petitioners network elements on an unbundled basis are vacated and the FCC is

expected to issue new rules. ~~subject to review and revision by the FCC, as ordered by the D.C. Circuit.~~

In light of these events, the Parties have agreed to the proposed 90-day abatement so that they can consider how the post *USTA II* regulatory framework should be incorporated into the new agreements currently being arbitrated and to identify what arbitration issues may be impacted and what additional issues, if any, need to be identified for arbitration. The Parties have agreed that no new issues may be raised in this arbitration proceeding other than those that result from the Parties' negotiations regarding the post-*USTA II* regulatory framework.

With this framework~~In so doing~~, the Joint Petitioners and BellSouth have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreements based on *USTA II*. Additionally, ~~which~~ the Parties have agreed that they will continue operating under their current Interconnection Agreements until they are able to move into the new arbitrated/negotiated agreements that ensue from this proceeding. ~~The Parties have agreed that this process of assessing the impact of the post-*USTA II* regulatory framework will commence with a BellSouth produced redline (including BellSouth's suggested revisions) of the latest arbitration version of Attachment 2 (May 23, 2004) of the new interconnection agreements currently before the Commission in this arbitration proceeding. Additional redlines, negotiations, and issue identification will take place during the 90-day period. The Parties have agreed that no new issues may be raised other than those that result from the Parties' negotiations regarding the post-*USTA II* regulatory framework.~~

During this ninety (90) day period, ~~T~~the Parties also have agreed to continue their efforts to reduce the number of issues already identified. In this regard, the Parties have agreed to conduct multiple ~~a~~ face-to-face ~~issue resolution meeting to take place on July 8, 2004~~negotiations.

Consistent with the foregoing, the Joint Petitioners and BellSouth hereby respectfully request that the Commission hold the above-captioned proceeding in abeyance for a period of ninety (90) days. In so doing, the Parties request that the Commission suspend all pending deadlines and consideration of all pending motions until after October 1, 2004. The Parties also jointly propose and request approval of the following revised procedural schedule.

[redacted]	Revised Issues Matrix
	Supplemental Direct Testimony (Joint Petitioners)
	Supplemental Reply Testimony (BellSouth)
	Rebuttal Testimony (Joint Petitioners)
Dec. 14-17, 2004	Hearing

John: Would we move the NC hearing back to Jan 11th per your request?

Respectfully submitted,

[redacted]

BELLSOUTH TELECOMMUNICATIONS, INC.

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(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)

Dated: February 25, 2005~~July 9, 2004~~

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

January 4, 2005

IN RE:	)	
	)	
JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP, NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO., SWITCHED SERVICES, LLC AND XSPEDIUS MANAGEMENT CO. OF CHATTANOOGA, LLC OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC.	)	**DOCKET NO. 04-00046**

ORDER DIRECTING FILING OF JOINT ISSUES MATRIX AND AMENDING PROCEDURAL SCHEDULE

On February 11, 2004, New South Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Chattanooga, LLC ("the Joint Petitioners") filed their *Joint Petition for Arbitration.* BellSouth Telecommunications, Inc. ("BellSouth") filed its answer to the *Joint Petition for Arbitration* on March 8, 2004. On April 13, 2004, the parties filed a Joint Issues Matrix, identifying some 31 items for arbitration. On May 19, 2004, the parties filed a revised joint issues matrix, identifying 107 items for arbitration, and agreed to waive the nine-month deadline referenced in 47 U.S.C. § 252(b)(4)(C). On June 8, 2004, the Pre-Arbitration Officer previously assigned to this docket issued an *Order Accepting Petitions for Arbitration*, in which she adopted the issues identified in the May 19, 2004 Joint Issues Matrix for the purpose of the arbitration. She further directed that any modification of an issues statement in the Joint

Issues Matrix to be filed on June 25, 2004 would be subject to the approval of the Authority. Subsequently, a revised Joint Issues Matrix identifying 107 items was filed by the parties on June 25, 2004.

On July 15, 2004, the parties filed a Joint *Motion to Hold Proceedings in Abeyance*, in which they requested an abeyance of the proceedings until October 1, 2004 in light of the decision in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"). Specifically, the parties requested the abeyance so that they could consider "how the post USTA II regulatory framework should be incorporated into the new agreements being arbitrated and to identify what arbitration issues may be impacted and what additional issues, if any, need to be identified for arbitration."[1] The Pre-Arbitration Officer granted the request to hold the docket in abeyance on July 16, 2004.[2] On October 13, 2004, the parties filed a Joint Issues/Open Items Matrix, identifying 114 items for arbitration, including additional issues related to *USTA II*.

At a status conference held on November 19, 2004, the Pre-Arbitration Officer pointed out that the October 13, 2004 Joint Issues/Open Items Matrix, which included additional *USTA II* issues, was contrary to the *Order Accepting Petitions for Arbitration*, which accepted those issues identified in the June 25, 2004 Joint Issues Matrix for arbitration. Upon inquiry from the Pre-Arbitration Officer concerning the additional *USTA II* issues for which arbitration was being sought, BellSouth indicated its position was that the supplemental issues should be addressed in the generic docket filed by BellSouth[3] rather than in the arbitration.[4] The Joint Petitioners indicated that, although their position was that a generic docket was premature, there were a

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[1] *See Joint Motion to Hold Proceedings in Abeyance*, p 2 (July 15, 2004)

[2] *See Order Granting Joint Motion to Hold Proceedings in Abeyance and Establishing Revised Procedural Schedule* (July 16, 2004)

[3] *See In re BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No 04-000381, *Petition to Establish Generic Docket* (October 29, 2004)

[4] Transcript of Proceedings, pp 11-12 (November 19, 2004)

number of options including a generic docket to address the supplemental issues.[5]

The Pre-Arbitration Officer finds that, pursuant to 47 U.S.C. § 252(b)(4)(A),[6] issues for arbitration must be raised in the petition or response. The supplemental issues related to *USTA II* are found neither in the *Joint Petition for Arbitration* filed by the Joint Petitioners nor in the response filed by BellSouth. In addition, the June 8, 2004 *Order Accepting Petitions for Arbitration* adopted the issues identified in the May 19, 2004 Joint Issues Matrix for the purpose of the arbitration, which did not include the *USTA II* issues. Finally, the parties have conceded that there are other options available to address the *USTA II* issues and have not shown that any prejudice will occur by disallowing the supplemental issues in this arbitration. As a result, the Pre-Arbitration Officer finds that the supplemental issues related to *USTA II* added to the October 13, 2004 Joint Issues/Open Items Matrix should be stricken from consideration by the arbitration panel. The parties are directed to file a revised matrix based upon the issues identified in the June 25, 2004 matrix, indicating any issues that have since been settled and any issue statements that have been agreed upon by the parties.

In addition, as discussed at the Status Conference, the remainder of the Procedural Schedule is amended as set forth below:

December 3, 2004	**The Parties shall file with the TRA a revised Joint Issues Matrix representing the consensus of the Parties on all issues**
December 3, 2004	**All Discovery Requests Served (one copy filed with Authority)**

[5] Transcript of Proceedings, pp 12-13 (November 19, 2004)

[6] 47 U S C § 252(b)(4)(A) reads

(4) ACTION BY STATE COMMISSION –

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3)

December 30, 2004	**Responses and Objections to Discovery Due (one copy filed with Authority)**
December 30, 2004	**Preliminary Dispositive Motions (if any)**
January 5, 2005	**Motions to Compel**
January 6, 2005	**Responses to any Preliminary Dispositive Motions (if any)**
January 7, 2005	**Status Conference on Discovery (if needed)**
January 14, 2005	**Supplemental Responses to Discovery (if ordered)**
January 19, 2005	**Pre-hearing Conference**
January 25-28, 2005	**Hearing before Arbitration Panel**

All filings are due **no later than 2:00 p.m.** on the dates indicated.

IT IS THEREFORE ORDERED THAT:

1. The Parties are directed to file an updated joint issues matrix reflecting the issues identified in the June 25, 2004 matrix and indicating any issues that have since been settled and any issue statements that have been agreed upon by the parties; and

2. The Procedural Schedule is amended as stated herein.

Jean A. Stone, Counsel
as Pre-Arbitration Officer

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

July 16, 2004

IN RE:	)	
	)	
JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS CORP, NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS COMMUNICATIONS, LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO., SWITCHED SERVICES, LLC AND XSPEDIUS MANAGEMENT CO. OF CHATTANOOGA, LLC OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC.	)	**DOCKET NO. 04-00046**

ORDER GRANTING *JOINT MOTION TO HOLD PROCEEDING IN ABEYANCE* AND ESTABLISHING REVISED PROCEDURAL SCHEDULE

This matter is before the Pre-Arbitration Officer pursuant to the *Joint Motion to Hold Proceeding in Abeyance* ("*Joint Motion*") filed by NewSouth Communications, Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, and Xspedius Communications, LLC on behalf of its operating subsidiaries Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Chattanooga, LLC ("Joint Petitioners") and BellSouth Telecommunications, Inc. ("BellSouth") on July 15, 2004.

The Pre-Arbitration Officer established a Procedural Schedule in this matter on May 25, 2004.[1] In the *Joint Motion*, the Parties request that the proceeding in this Docket be held in abeyance for ninety (90) days, including the suspension of pending deadlines and consideration

[1] The previous Pre-Arbitration Officer assigned to this Docket issued the Order establishing the Procedural Schedule. *See Order Denying Motion in Part and Establishing Procedural Schedule* (May 25, 2004)

of all pending motions until after October 1, 2004.[2] Contingent upon the grant of the *Joint Motion*, the Parties agree to waive the 9 month deadline required by 47 U.S.C. § 252(b)(4)(C) for final resolution of the arbitration by the Authority.[3] The Parties also propose and request approval of a revised procedural schedule.

As support for the *Joint Motion*, the Parties state that they have engaged in this arbitration proceeding since February 11, 2004. On March 2, 2004, the United States Court of Appeals for the District of Columbia in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") affirmed in part, and vacated and remanded in part, certain rules of the Federal Communications Commission ("FCC"). As a result, the Parties aver that, at this time, certain of the FCC's rules applicable to BellSouth's obligation to provide to Joint Petitioners network elements on an unbundled basis are vacated and the FCC is expected to issue new rules. Therefore, the Parties request the proposed abatement so they may consider how the post *USTA II* regulatory framework should be incorporated into the new agreements currently being arbitrated and to identify what arbitration issues may be impacted or need to be identified for arbitration. The Parties agree that no new issues may be raised in the arbitration proceeding other than those that result from their negotiations regarding the post *USTA II* regulatory framework. Within this framework, the Parties agree to avoid a separate process of negotiating change-of-law amendments to the current interconnection agreements to address *USTA II* and to continue operating under the current agreements until they are able to move into the new agreements that ensue from this proceeding. Finally, the Parties agree to continue efforts to reduce the number of issues already identified during the abatement period.

---

[2] In light of the proposed procedural schedule submitted jointly by the Parties, the Pre-Arbitration Officer deems the request for a 90 day abatement to be a request for abatement until October 1, 2004, a date less than 90 days from the date of the filing of the *Joint Motion*

[3] The Parties already have confirmed their agreement to waive the nine (9) month deadline *See Letter from Guy M Hicks to Hon Kim Beals, Prearbitration Officer* (May 19, 2004)

The Pre-Arbitration Officer finds that, for the reasons stated by the Parties in the *Joint Motion*, the joint request of the Parties to hold this proceeding and filing deadlines in abeyance is well taken and the proceeding and deadlines should be suspended until October 1, 2004.

The Parties have also jointly requested a revised procedural schedule. As a result of the granting of the suspension of this proceeding until October 1, 2004, the request is well-taken and a revised procedural schedule is established as follows:

October 1, 2004	The Parties shall file with the TRA a revised Joint Issues Matrix representing the consensus of the Parties on all issues
October 22, 2004	Pre-filed Supplemental Direct Testimony shall be filed with the TRA and served on all Parties
November 12, 2004	Pre-filed Rebuttal Testimony shall by filed with the TRA and served on all Parties
November 19, 2004	A Status Conference will be held at **10:00 a.m.** to set a schedule for any necessary Discovery and to set a schedule for the Hearing

All filings are due **no later than 2:00 p.m.** on the dates indicated.

IT IS THEREFORE ORDERED THAT:

1 The *Joint Motion* of the Parties requesting that the proceeding and filing deadlines in this matter be held in abeyance is granted and the proceeding and filing deadlines are suspended until October 1, 2004.

2. A revised Procedural Schedule is established as stated herein.

Jean A. Stone, Counsel
as Pre-Arbitration Officer

BELLSOUTH

BellSouth Telecommunications, Inc
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

guy hicks@bellsouth com

Guy M Hicks
General Counsel

615 214 6301
Fax 615 214 7406

February 22, 2005

VIA HAND DELIVERY

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

Re *Approval of the Amendments to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc and NewSouth Communications Corp Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*
Docket No 05-00061

Dear Chairman Miller

Pursuant to Section 252(e) of the Telecommunications Act of 1996, NewSouth Communications Corp and BellSouth Telecommunications, Inc. are hereby submitting to the Tennessee Regulatory Authority the original and fourteen copies of the attached Petition for Approval of the Amendments to the Interconnection Agreement dated May 18, 2001. The first Amendment revises the Notice provision in the Agreement and the second Amendment adds Quickserve to the Agreement

Thank you for your attention to this matter.

Sincerely yours,

Guy M. Hicks

cc: Bo Russell, NewSouth Communications, Corp.
John Heitmann, NewSouth Communications, Corp
Mary Campbell, NewSouth Communications, Corp.
John Fury, NewSouth Communications, Corp

#420636

Exhibit E

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In re: *Approval of the Amendments to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and NewSouth Communications Corp Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*

Docket No. _____

PETITION FOR APPROVAL OF THE AMENDMENTS TO THE INTERCONNECTION AGREEMENT NEGOTIATED BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND NEWSOUTH COMMUNICATIONS CORP. PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996

COME NOW, NewSouth Communications Corp. ("NewSouth") and BellSouth Telecommunications, Inc., ("BellSouth"), and file this request for approval of the Amendments to the Interconnection Agreement dated May 18, 2001 (the "Amendment") negotiated between the two companies pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, (the "Act"). In support of their request, NewSouth and BellSouth state the following:

1. NewSouth and BellSouth have successfully negotiated an agreement for interconnection of their networks, the unbundling of specific network elements offered by BellSouth and the resale of BellSouth's telecommunications services to NewSouth. The Interconnection Agreement was filed with the Tennessee Regulatory Authority ("TRA") on August 1, 2001 for approval.

2. The parties have recently negotiated two Amendments to the Agreement. The first Amendment revises the Notice provision in the Agreement and the second Amendment adds QuickServe to the Agreement. Copies of the Amendments are attached hereto and incorporated herein by reference.

3. Pursuant to Section 252(e) of the Telecommunications Act of 1996, NewSouth and BellSouth are submitting their Amendments to the TRA for its consideration and approval.

The Amendments provide that either or both of the parties are authorized to submit the Amendments to the TRA for approval.

4. In accordance with Section 252(e) of the Act, the TRA is charged with approving or rejecting the negotiated Amendments between BellSouth and NewSouth within 90 days of their submission. The Act provides that the TRA may only reject such an agreement if it finds that the agreement or any portion of the agreement discriminates against a telecommunications carrier not a party to the agreement or the implementation of the agreement or any portion of the agreement is not consistent with the public interest, convenience and necessity.

5. NewSouth and BellSouth aver that the Amendments are consistent with the standards for approval.

6. Pursuant to 47 USC Section 252(i) and 47 C.F.R. Section 51.809, BellSouth shall make available the entire Interconnection Agreement filed and approved pursuant to 47 USC Section 252.

NewSouth and BellSouth respectfully request that the TRA approve the Amendments negotiated between the parties.

This 23rd day of Feb., 2005.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301
Attorney for BellSouth

CERTIFICATE OF SERVICE

I, Guy M. Hicks, hereby certify that I have served a copy of the foregoing Petition for Approval of the Amendments to the Interconnection Agreement on the following via United States Mail on the 23rd day of Feb., 2005:

Mr. Bo Russell
NewSouth Communications, Corp.
2 N. Main St.
Greenville, SC 29601

Mr. John Hitmann
NewSouth Communications, Corp.
1200 19th Street, NEW
Suite 500
Washington, DC 20036

Ms. Mary Campbell
NewSouth Communications, Corp.
2 N. Main St.
Greenville, SC 29601

Mr John Fury
NewSouth Communications Corp.
2 N. Main St.
Greenville, SC 29601

Guy M. Hicks

Amendment to the Agreement
Between
NewSouth Communications, Corp.
and
BellSouth Telecommunications, Inc.
Dated May 18, 2001

Pursuant to this Amendment, (the "Amendment"), NewSouth Communications, Corp ("NewSouth"), and BellSouth Telecommunications, Inc ("BellSouth"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated May 18, 2001 ("Agreement") to be effective thirty (30) calendar days after the date of the last signature executing the Amendment ("Effective Date")

WHEREAS, BellSouth and NewSouth entered into the Agreement on May 18, 2001, and,

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows

1 To replace the Notices contacts for NuVox Communications, Inc with the following

Mr Bo Russell
2 N Main St
Greenville, SC 29601
brussell@nuvox com

Mr John Heitmann
1200 19th Street, NW
Suite 500
Washington, DC 20036
JHeitmann@KelleyDrye com

Copy to
Ms Mary Campbell
2 N Main St
Greenville, SC 29601
MCampbell@nuvox com

Mr John Fury
2 N Main St
Greenville, SC 29601
JFury @ nuvox com

2 All of the other provisions of the Agreement, dated May 18, 2001, shall remain in full force and effect

3 Either or both of the Parties are authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996

IN WITNESS WHEREOF, the Parties have executed this Amendment the day and year written below

BellSouth Telecommunications, Inc.	**NewSouth Communications, Corp.**
By Kristen Rowe	By Jake E. Jennings
Name Kristen Rowe	Name Jake E. Jennings
Title. Director	Title VP, Regulatory Affairs
Date 1/21/05	Date 01-18-05

[CCCS Amendment 2 of 2]

Amendment to the Agreement
Between
NewSouth Communications, Corp.
and
BellSouth Telecommunications, Inc.
Dated May 18, 2001

Pursuant to this Amendment, (the "Amendment"), NewSouth Communications, Corp ("NewSouth"), and BellSouth Telecommunications, Inc ("BellSouth"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated May 18, 2001 ("Agreement") to be effective February 10, 2005.

WHEREAS, BellSouth and NewSouth entered into the Agreement on May 18, 2001, and,

WHEREAS, both Parties agree that an initial New Installation of a 2-Wire Port/Loop Combination- Residence line provisioned at a Location where QuickServe is available on the line shall incur a QuickServe Non-Recurring Charge (NRC) at the NRC Currently Combined Conversion Rate set forth in the Agreement and that any initial New Installation of a 2-Wire Port/Loop Combination - Residence line provisioned at a location where QuickServe is not available, shall incur the Not Currently Combined NRC, First and Additional rates set forth in the Agreement,

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

1 The Parties agree to incorporate into Attachment 2 of the Agreement the rates and USOCs as set forth in Exhibit 1 of this Amendment attached hereto and incorporated herein by this reference

2 All of the other provisions of the Agreement, dated May 18, 2001, shall remain in full force and effect

3 Either or both of the Parties are authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996

IN WITNESS WHEREOF, the Parties have executed this Amendment the day and year written below

BellSouth Telecommunications, Inc.	NewSouth Communications, Corp.
By [signature]	By [signature]
Name Kristen Rowe	Name Jake E. Jennings
Title Director	Title VP, Regulatory Affairs
Date 1/13/05	Date: 1/14/05

[CCCS Amendment 2 of 20]

BellSouth Telecommunications, Inc
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

guy hicks@bellsouth com

Guy M Hicks
General Counsel

615 214 6301
Fax 615 214 7406

February 22, 2005

VIA HAND DELIVERY

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

Re. *Approval of the Amendments to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc and NuVox Communications, Inc f/k/a Trivergent Communications, Inc Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*
Docket No 05-00060

Dear Chairman Miller

NuVox Communications, Inc. f/k/a Trivergent Communications, Inc and BellSouth Telecommunications, Inc. are hereby submitting to the Tennessee Regulatory Authority the original and fourteen copies of the executed Amendments to the Interconnection Agreement dated June 30, 2000 The Interconnection Agreement expired on June 29, 2003 and the parties are currently in arbitration proceedings in BellSouth's nine state region The Interconnection Agreement will continue month to month until the arbitrations have been completed

The first Amendment adds Quickserve to the Agreement and the second Amendment replaces the rates for Attachment 3 Local Interconnection in the Agreement

Thank you for your attention to this matter

Sincerely yours,

Guy M. Hicks

GMH/dt

Enclosure

cc: Hamilton E. Russell, III, Trivergent Communications, Inc
John J. Heitmann, Esquire, Attorney for Trivergent Communications, Inc
Don Baltimore, Esquire, Attorney for Trivergent Communications, Inc

#538118

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In re: *Approval of the Amendments to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and NuVox Communications, Inc. f/k/a Trivergent Communications, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*

Docket No. _____

PETITION FOR APPROVAL OF THE AMENDMENTS TO THE INTERCONNECTION AGREEMENT NEGOTIATED BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND NUVOX COMMUNICATIONS, INC. F/K/A TRIVERGENT COMMUNICATIONS, INC. PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996

COME NOW, NuVox Communications, Inc. f/k/a Trivergent Communications, Inc. ("NuVox") and BellSouth Telecommunications, Inc., ("BellSouth"), and file this request for approval of the Amendments to the Interconnection Agreement dated June 30, 2000 (the "Amendment") negotiated between the two companies pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, (the "Act"). In support of their request, NuVox and BellSouth state the following:

1. NuVox and BellSouth have successfully negotiated an agreement for interconnection of their networks, the unbundling of specific network elements offered by BellSouth and the resale of BellSouth's telecommunications services to NuVox. The Interconnection Agreement was approved by the Tennessee Regulatory Authority ("TRA") on October 24, 2000.

2. The Interconnection Agreement expired on June 29, 2003 and the parties are currently in arbitration proceedings in BellSouth's nine state region. The Interconnection Agreement will continue month to month until the arbitrations have been completed.

3. The parties have recently negotiated two Amendments to the Agreement. The first Amendment adds Quickserve to the Agreement and the second Amendment replaces the rates for Attachment 3 Local Interconnection in the Agreement.

4. Pursuant to Section 252(e) of the Telecommunications Act of 1996, NuVox and BellSouth are submitting their Amendments to the TRA for its consideration and approval. The Amendments provide that either or both of the parties are authorized to submit the Amendments to the TRA for approval.

5. In accordance with Section 252(e) of the Act, the TRA is charged with approving or rejecting the negotiated Amendments between BellSouth and NuVox within 90 days of their submission. The Act provides that the TRA may only reject such an agreement if it finds that the agreement or any portion of the agreement discriminates against a telecommunications carrier not a party to the agreement or the implementation of the agreement or any portion of the agreement is not consistent with the public interest, convenience and necessity.

6. NuVox and BellSouth aver that the Amendments are consistent with the standards for approval.

7. Pursuant to 47 USC Section 252(i) and 47 C.F.R. Section 51.809, BellSouth shall make available the entire Interconnection Agreement filed and approved pursuant to 47 USC Section 252.

NuVox and BellSouth respectfully request that the TRA approve the Amendment negotiated between the parties.

This 23rd day of Feb., 2005.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC

By: _____
Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301
Attorney for BellSouth

CERTIFICATE OF SERVICE

I, Guy M. Hicks, hereby certify that I have served a copy of the foregoing Petition for Approval of the Amendments to the Interconnection Agreement on the following via United States Mail, on the 23rd day of Feb., 2005:

Hamilton E. Russell, III
Regional Vice President – Legal and Regulatory Affairs
NuVox Communications, Inc. (formerly TriVergent)
301 North Main Street, Suite 500
Greenville, SC 29601

John J. Heitmann Esquire
Counsel to NuVox Communications, Inc.
Kelley Drye & Warren LLP
1200 19th Street, NW
Washington, DC 20036

Don Baltimore, Esquire
Farrar & Bates
211 Seventh Avenue North, Suite 420
Nashville, TN 37219-1823

_____
Guy M. Hicks

Amendment to the Agreement
Between
NuVox Communications, Inc. (fka Trivergent Communications, Inc.)
and
BellSouth Telecommunications, Inc.
Dated June 30, 2000

Pursuant to this Amendment, (the "Amendment"), NuVox Communications, Inc (fka Trivergent Communications, Inc) (NuVox), and BellSouth Telecommunications, Inc ("BellSouth"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated June 30, 2000 ("Agreement") to be effective thirty (30) calendar days after the date of the last signature executing the Amendment

WHEREAS, BellSouth and NuVox entered into the Agreement on June 30, 2000, and,

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows

1 The Parties agree to replace the rates in Exhibit A of Attachment 3, with the rates set forth in Exhibit 1 of this Amendment, attached hereto and incorporated herein by this reference.

2 All of the other provisions of the Agreement, dated June 30, 2000, shall remain in full force and effect

3 Either or both of the Parties are authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year written below.

BellSouth Telecommunications, Inc.	**NuVox Communications, Inc. (fka Trivergent Communications, Inc.)**
By: Kristen E. Agee	By:
Name. KRISTEN E. AGEE	Name: Hamilton E. Russell
Title. DIRECTOR	Title. VP, Legal Affairs
Date: 1/12/05	Date: 01-07-05

[CCCS Amendment 2 of 11]

STATE OF NORTH CAROLINA
UTILITIES COMMISSION

DOCKET NO. P-294, SUB 28

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:	)	
	)	
Petition of KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC for Arbitration of an Interconnection Agreement with Sprint Communications Company, LP Pursuant to Section 252(b) of the Communications Act of 1934, as Amended.	)	**JOINT MOTION OF KMC TELECOM III LLC, KMC TELECOM V, INC., KMC DATA LLC AND SPRINT COMMUNICATIONS COMPANY, LP TO HOLD PROCEEDING IN ABEYANCE**

Sprint Communications Company, LP ("Sprint") and KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC (collectively "KMC") (jointly referred to herein as "Parties") submit this Joint Motion and respectfully request that the Commission hold this arbitration proceeding in abeyance until January 21, 2005. In so doing, the Parties request that the Commission suspend all pending deadlines and consideration of any pending motions until after January 21, 2005. By this Joint Motion, and upon the contingency that the Commission grants the relief requested herein, the Parties agree to waive the time frames specified in 47 U.S.C. 252(b)(4)(C) and agree not to appeal an arbitration decision on the grounds that the Commission failed to act within those time frames. In support of this Joint Motion, the Parties state as follows:

1. This arbitration was filed by KMC on December 23, 2003. Prior to the filing of the Petition for Arbitration, the Parties were negotiating the appropriate terms and conditions for the Master Interconnection and Resale Agreement ("Agreement") based on the law effective during the negotiations. In a decision dated March 2, 2004 the United States Court of Appeals for the District of Columbia Circuit, in *United States Telecom Ass'n v. FCC,* 359 F.3d 554) ("*USTA II*"), affirmed in part, vacated in part, and remanded in part certain rules of the Federal

Communications Commission ("FCC") that govern the rights and obligations of ILECs and CLECs regarding services and unbundled network elements. While the effectiveness of the *USTA II* decision was initially stayed by the court, the court's mandate was ultimately issued on June 15, 2004. On August 20, 2004, the FCC released its Order in *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 ("*Interim Order*"). The FCC has indicated its intent to issue unbundling rules prior to the end of 2004.

2. In consideration of the circumstances noted above, the Parties respectfully request that the Commission hold this proceeding in abeyance to provide additional time for the Parties to address the effect of the post-*USTA II* regulatory framework, the Interim Order, and the forthcoming unbundling rules on the terms, conditions and rates that should be included in the Agreement, as well as to identify any related issues for resolution in this arbitration. KMC and Sprint agree that no new issues may be raised in this arbitration proceeding other than those that result from the Parties' negotiations regarding the above referenced rules and orders that have occurred after the date this arbitration was filed.

3. The Parties have therefore agreed to an abeyance until January 21, 2005 to provide KMC and Sprint with the time necessary to incorporate into the Agreement language reflective of the above referenced rules and orders that have occurred after the date this arbitration was filed. The Parties may respectfully request a further abeyance depending on, for example, the status of the FCC's rules, during the abeyance period. The abeyance would promote administrative efficiency, in that it would permit the Parties to avoid negotiating and arbitrating the unbundling provisions of the interconnection agreement multiple times based on changing rules and to efficiently identify any and all issues in need resolution by the

Commission, and thereby avoid a separate and/or duplicative negotiation and arbitration of interconnection agreement terms to reflect the above referenced rules and orders that have occurred after the date this arbitration was filed. In short, the Parties believe that it is reasonable to account for the new realities created by the-post-*USTA II* regulatory framework, *the Interim Order*, and the forthcoming unbundling rules. The Parties have agreed that they will continue to operate under their current interconnection Agreement until they execute the new agreement that results from this proceeding. During the abeyance period, the Parties would also continue their efforts to close the few remaining issues already included in the arbitration.

In light of the foregoing, Sprint and KMC respectfully request that the Commission hold this arbitration proceeding in abeyance until January 21, 2005. Upon the conclusion of the abeyance time-period, the Parties propose that KMC would file a supplement to its Petition for Arbitration and a revised issues matrix to identify all remaining issues in need resolution by the Commission, and that Sprint would then file a supplemental response and revised issues matrix.

This the 2nd day of December, 2004

By: Jack H. Derrick / by HCC

Jack H. Derrick, Senior Attorney
Edward Phillips, Attorney
SPRINT COMMUNICATIONS COMPANY, L.P.
Carolina Telephone and Telegraph Company
Central Telephone Company
14111 Capital Boulevard
NCWKFR0313
Wake Forest, North Carolina 27587-5900

Janette Luehring, Esq.
Sprint
6450 Sprint Parkway
KSOPHN0212-2A511
Overland Park, KS 66251

Attorneys for Sprint

By: Henry C. Campen, Jr.

Henry C. Campen, Jr., Esq.
N.C. State Bar No. 13346
Parker, Poe, Adams & Bernstein, LLP
Wachovia Capitol Center
150 Fayetteville Street Mall, Suite 1400
P.O. Box 389
Raleigh, North Carolina 27602-0389
(919) 828-0564 (voice)
(919) 834-4565 (facsimile)
henrycampen@parkerpoe.com

Edward A. Yorkgitis, Jr.
Enrico C. Soriano
Kelley Drye & Warren LLP
1200 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(202) 955-9600 (voice)
(202) 955-9792 (facsimile)
EYorkgitis@KelleyDrye.com
ESoriano@KelleyDrye.com

Marva Brown Johnson
KMC Telecom Holdings, Inc.
1755 North Brown Road
Lawrenceville, GA 30043
(678) 985-6220 (voice)
(678) 985-6213 (facsimile)
marva.johnson@kmctelecom.com

Attorneys for KMC

CERTIFICATE OF SERVICE

I, Henry C. Campen, Jr., do hereby certify that I have on this 2nd day of December, 2004, served a copy of the foregoing JOINT MOTION OF KMC TELECOM III LLC, KMC TELECOM V, INC., KMC DATA LLC AND SPRINT COMMUNICATIONS, LP TO HOLD PROCEEDING IN ABEYANCE, by electronic mail or first class U.S. mail, postage prepaid, upon the following individuals:

Jack H. Derrick, Senior Attorney
Edward Phillips, Attorney
Sprint Communications Company, L.P.
Carolina Telephone and Telegraph Company
Central Telephone Company
14111 Capital Boulevard
NCWKFR0313
Wake Forest, North Carolina 27587-5900

Janette Luehring, Esq.
Sprint
6450 Sprint Parkway
KSOPHN0212-2A511
Overland Park, KS 66251

Henry C. Campen, Jr.

DOCKET NO. 28821

ARBITRATION OF NON-COSTING ISSUES FOR SUCCESSOR INTERCONNECTION AGREEMENTS TO THE TEXAS 271 AGREEMENT	§ § § §	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER NO. 39
ISSUING INTERIM AGREEMENT AMENDMENT

Upon consideration of the parties' filings and discussion at the February 24, 2005, Open Meeting, and the expiration of the Texas 271 Agreement (T2A) and T2A-based interconnection agreements between Southwestern Bell Telephone, L P d/b/a SBC Texas (SBC Texas) and competitive local exchange carriers (CLECs), the Public Utility Commission of Texas (Commission or PUC) issues the attached interim agreement amendment to govern parties' contractual relationships for the period of March 1 through July 31, 2005 [1] In issuing this interim agreement amendment, the Commission finds it necessary to act to prevent a lapse in the parties' contracts that could affect telecommunications services to end-user customers pending the completion of this docket.

The PUC seeks to ensure that the aforementioned expired agreements are made current to reflect recent changes in law under the Federal Communications Commission's (FCC) *Triennial Review Order* (TRO)[2] and *Triennial Review Remand Order* (TRRO) [3] The attached interim agreement amendment represents the Commission's preliminary determinations of the impacts of the TRO and TRRO. Parties are not precluded from arguing the merits of these issues in Track II of this proceeding and as appropriate, requesting relief, including, but not limited to, seeking true-up.

SBC Texas is directed to issue the attached interim agreement amendment through an Accessible Letter to all CLECs operating under the T2A, T2A-based interconnection agreements, or the contract developed in Docket No 24542 no later than March 4, 2005. SBC Texas is further ordered to post this interim agreement amendment in a conspicuous location on its CLEC website, with appropriate links

[1] The deadline of July 31, 2005 is the date under the current proposed procedural schedule by which parties expect to have completed this docket and have replacement contracts in place

[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competitive Provisions of the Telecommunications Act of 1996,* and *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-388, 96-98, 98-147, Order, FCC 03-36 (Aug. 21, 2003) (*Triennial Review Order*)

[3] *Unbundled Access to Network Elements* and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 01-388 and CC Docket No 01-388, Order on Remand, FCC 04-290 (Feb 4, 2005) (*Triennial Review Remand Order*)

SIGNED AT AUSTIN, TEXAS the 25th day of February 2005.

PUBLIC UTILITY COMMISSION OF TEXAS

JULIE PARSLEY, COMMISSIONER

PAUL HUDSON, CHAIRMAN

BARRY T. SMITHERMAN, COMMISSIONER

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INTERIM AGREEMENT AMENDMENT WITH UNE CONFORMING LANGUAGE TO INTERCONNECTION AGREEMENT - TEXAS

This Interim Agreement Amendment with UNE Conforming Language is to the approved Interconnection Agreement entered into by and between Southwestern Bell Telephone, L.P. d/b/a SBC Texas ("SBC Texas") and CLEC NAME ("CLEC")

WHEREAS, the original Agreement modified by way of this Amendment is the result of CLEC's decision to opt into the Texas 271 Agreement ("T2A") or parts thereof pursuant to Order 55 in Project 16251 dated October 13, 1999, or as a result of the Final Order issued in Docket No. 24542, as such Agreement may have been modified from time to time, and to the extent the original Agreement was only a partial election by CLEC to opt into the T2A, such Agreement may also include certain voluntarily negotiated or arbitrated appendices/provisions (hereinafter collectively "the T2A Agreement"); and

WHEREAS, the T2A Agreement expired October 13, 2003; and

WHEREAS, on April 11, 2003, SBC Texas delivered to CLEC a timely request to negotiate a successor agreement to CLEC's T2A Agreement ("Notice to Negotiate"), and

WHEREAS, Section 4.2 of CLEC's T2A Agreement provides that if either party has served a Notice to Negotiate then, notwithstanding the expiration of the T2A Agreement on October 13, 2003, the terms, conditions and prices of the T2A Agreement will remain in effect for a maximum period of 135 days after such expiration for completion of negotiations and any necessary arbitration, and

WHEREAS, a series of extensions of the T2A have occurred, and the termination of the T2A occurred as of February 17, 2005; and

WHEREAS, on January 23, 2004, SBC Texas filed its Omnibus Petition for Arbitration in Docket No. 28821 against all Texas CLECs with interconnection agreements originally expiring on October 13, 2003. Additionally, also on January 23, 2004, separate petitions of arbitration were filed against SBC Texas by the following CLECs: Stratos Telecom, Inc., Comcast Phone of Texas, LLC, Heritage Technologies, Ltd., FamilyTel of Texas, LLC and Navigator Telecommunications, LLC; Birch Telecom of Texas Ltd L.L.P. and Ionex Communications South, Inc; CLEC Joint Petitioners, MCImetro Access Transmission Services, LLC, MCI Worldcom Communications and Brooks Fiber Communications of Texas, Inc.; Sage Telecom of Texas, L.P.; AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications Houston, Inc., and CLEC Coalition.

WHEREAS, it appears that a successor interconnection agreement will not be approved in the Arbitration until after February 17, 2005, the termination date of CLEC's T2A Agreement; and

WHEREAS, pursuant to Order No. 34 in Docket No. 28821 and the Texas Public Utility Commission's 2/10/05 ruling extending the effective date of the T2A from 2/17/05 to 2/28/05, the Texas PUC has ordered extension of the term of CLEC's T2A agreement beyond the termination date of February 17, 2005 to February 28, 2005, and has instructed the parties to create an amendment to incorporate its decision on TRO elements Order Addressing Threshold Issues dated April 19, 2004 and Order Addressing Motion for Reconsideration of Threshold Issues dated August 18, 2004 in Docket No. 28821, along with the transition periods/pricing from the FCC's TRO Remand Order, released February 4, 2005, and scheduled to become effective March 11, 2005. The Texas PUC has stated that the amendment will, along with the CLEC's T2A agreement, Attachments 6-10, and the Arbitration Award on Track One Issues in Docket No. 28821, and the Texas UNE Rate Amendment resulting from the September 9, 2004 Revised

Arbitration Award in Docket No. 28600, govern as an interim interconnection agreement approved by the Texas PUC during the period between the TPUC-established termination of the T2A Agreement (i e., February 28, 2005) and the earlier of· (i) the date a successor agreement between SBC Texas and CLEC is approved or is deemed to have been approved by the Texas PUC; or (ii) July 31, 2005; and

WHEREAS, the interim agreement will automatically terminate the earlier of (i) the date a successor agreement between SBC Texas and CLEC is approved or is deemed to have been approved by the TPUC; or (ii) July 31, 2005; and full intervening law rights are available to both parties under the interim agreement notwithstanding any language in CLEC's T2A Agreement, Attachments 6-10 to the contrary;

NOW, THEREFORE, in consideration of the foregoing, and the promises and mutual agreements set forth herein, and to facilitate the orderly progress of the Arbitration to conclusion, the T2A Agreement is hereby amended, as follows, to be effective only on an interim basis, for the purposes herein expressed, and for a finite, interim term to expire the earlier of (i) the date a successor agreement between SBC and CLEC is approved or is deemed to have been approved by the TPUC, or (ii) July 31, 2005; and to make full intervening law rights available to both parties:

1. The Whereas clauses contained herein are incorporated into this Agreement.

2. The title of the T2A Agreement is hereby changed to "Interim Interconnection Agreement – Texas." All internal references to the "Agreement" are hereby changed to "Interim Agreement."

3. Sections 4.1, including Sections 4.1.1 and 4.1.2, Sections 4.2, 4.2.1 and 4.3 of the General Terms and Conditions of the Agreement are hereby deleted in their entirety and replaced with the following:

   4.1 **Effective Date and Expiration/Termination**. The Interim Agreement shall be deemed effective following approval by the TPUC and commencing on the TPUC-established termination of the T2A Agreement February 28, 2005, and shall terminate, without any further action on the part of either Party, the earlier of·

   4.1.1 The effective date of approval by the TPUC of a successor agreement to the T2A or partial-T2A Agreement(s) in the above referenced Arbitration; or
   4.1.2 The date a successor agreement between SBC and CLEC is approved or is deemed to have been approved by the TPUC; or
   4.1.3 The effective date of a written and signed agreement between the parties that the Interim Agreement is terminated; or
   4.1.4 A proper request by CLEC that the Interim Agreement be terminated (subject to CLEC's post-termination obligations, such as CLEC's payment obligation(s) and the other obligations set forth in Section 44.0 "Survival of Obligations" of the General Terms and Conditions); or
   4.1 5 Termination for any other reason, such as non-payment (as set forth in Section 10 of the General Terms and Conditions), subject to CLEC's post-termination obligations, such as CLEC's payment obligation(s) and the other obligations set forth in Section 44.0 "Survival of Obligations" of the General Terms and Conditions; or
   4.1.6 July 31, 2005.

4 Sections 2.0 and 2.1 ("Effective Date") of the General Terms and Conditions of the Agreement are deleted in their entirety.

5. Nothing in this Agreement is to be interpreted as an agreement by SBC Texas to an extension of the T2A or any Section 271 obligations. The Interim Agreement, notwithstanding any provision to the contrary, is not based upon the same consideration or conditions as the T2A Agreement, and, regardless of when this Amendment is executed or effective, it shall not have the effect of extending the T2A Agreement, even if the

Agreement contained or contains, in whole or in part, provisions identical or substantially similar to provisions contained in the T2A Agreement Any issues relating to Section 271 and any disputed issues with respect to language in the preamble to the underlying Agreement will be addressed in the proceedings related to the Parties' successor Interconnection Agreement, and the parties reserve their rights to all arguments related to the disposition of such issues.

6. Sections 1.3, 18.2, 18.3, and 30.2 of the General Terms and Conditions of the Agreement are hereby deleted in their entirety, and replaced with the following:

2.0 Intervening Law

2 1 In entering into this Amendment and Interim Agreement, neither Party is waiving, and each Party hereby expressly reserves, any of the rights, remedies or arguments it may have at law or under the intervening law or regulatory change provisions in the underlying Agreement (including intervening law rights asserted by either Party via written notice predating this Amendment) with respect to any orders, decisions, legislation or proceedings and any remands thereof, including, without limitation, the following actions, which the Parties have not yet fully incorporated into this Agreement or which may be the subject of further review: *Verizon v FCC, et. al*, 535 U.S 467 (2002); *USTA, et. al* v. FCC, 290 F 3d 415 (D.C. Cir. 2002) ("*USTA I*") and following remand and appeal, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"); the FCC's 2003 Triennial Review Order and 2005 Triennial Review Remand Order; and the FCC's Order on Remand and Report and Order in CC Dockets No 96-98 and 99-68, 16 FCC Rcd 9151 (2001), (rel. April 27, 2001), which was remanded in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D C Cir. 2002).

7. Sections 14 1, 14.5, and 14 8 of Attachment 6: Unbundled Network Elements are hereby deleted and Section 1.0 ("Introduction") of Attachment 6. Unbundled Network Elements of the Agreement is hereby deleted and replaced with the following:

1.0 Declassified Network Elements No Longer Required

1.1 TRO-Declassified Elements. Notwithstanding anything in this Interim Agreement, pursuant to the *TRO* and to the decision in *USTA II*, except as provided in Paragraph 3 0 below, nothing in this Interim Agreement requires SBC Texas to provide to CLEC any of the following items as an unbundled network element, either alone or in combination (whether new, existing, or pre-existing) with any other element, service or functionality: (i) entrance facilities; (ii) OCn dedicated transport; (iii) "enterprise market" local circuit switching for DS1 and higher capacity switching; (iv) OCn loops; (v) the feeder portion of the loop; (vi) any call-related database (other than the 911 and E911 databases), that is not provisioned in connection with CLEC's use of embedded base SBC Texas unbundled local circuit switching (as provided in Section 1.3, below); (vii) Operator Services and Directory Assistance that is not provisioned in connection with CLEC's use of embedded base SBC Texas unbundled local circuit switching (as provided in Section 1.3 below); (viii) Shared Transport and SS7 signaling that is not provisioned in connection with CLEC's use of embedded base SBC Texas unbundled local circuit switching (as provided in Section 1 3 below); (ix) packet switching, including routers and DSLAMs; (x) the packetized bandwidth, features, functions, capabilities, electronics and other equipment used to transmit packetized information over hybrid loops (as defined in 47 C.F.R. § 51.319(a)(2)), including without limitation, xDSL-capable line cards installed in digital loop carrier ("DLC") systems or equipment used to provide passive optical networking ("PON") capabilities; (xi) fiber-to-the-home Loops and fiber-to-the-curb Loops (as defined in 47 C.F R. § 51.319(a)(3)) ("FTTH Loops" and "FTTC Loops"), except to the extent that SBC Texas has deployed such fiber in parallel to, or in replacement of, an existing copper loop facility and elects to retire the copper loop, in which case SBC Texas will provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the FTTH Loop or

FTTC Loop on an unbundled basis to the extent required by terms and conditions in the Agreement

1.1.1 SBC Texas will provide written notice to CLEC of its intention to discontinue the provision of one or more of the TRO-Declassified Elements identified in Section 1 1, above under the Agreement. During a transitional period of thirty (30) days from the date of such notice, SBC Texas agrees to continue providing such TRO-Declassified Elements under the terms of the Agreement, to the extent required by the Agreement

1.1.1 1 Upon receipt of such written notice, CLEC will cease new orders for such network element(s) that are identified in the SBC Texas notice letter. SBC Texas reserves the right to monitor, review, and/or reject CLEC orders transmitted to SBC Texas and, to the extent that the CLEC has submitted orders and such orders are provisioned after this 30-day transitional period, such network elements are still subject to this Paragraph Section 1, including the CLEC options set forth in subparagraph 1.1.1.1.1 below, and SBC Texas's right of conversion in the event the CLEC options are not accomplished by the end of the 30-day transitional period

1.1 1 1.1 During such 30-day transitional period, the following options are available to CLEC with regard to the network element(s) identified in the SBC Texas notice, including the combination or other arrangement in which the network element(s) were previously provided·

(i) CLEC may issue an LSR or ASR, as applicable, to seek disconnection or other discontinuance of the network element(s) and/or the combination or other arrangement in which the element(s) were previously provided, or

(ii) SBC Texas and CLEC may agree upon another service arrangement (e.g. via a separate agreement at market-based rates or resale), or may agree that an analogous resale service or access product or service may be substituted, if available.

Notwithstanding anything in the Agreement, including any amendments to the Agreement, at the end of the thirty (30) day transitional period, unless CLEC has submitted a disconnect/discontinuance LSR or ASR, as applicable, under subparagraph (i), above, and if CLEC and SBC Texas have failed to reach agreement, under subparagraph (ii), above, as to a substitute service arrangement or element, then SBC Texas will convert the subject element(s), whether alone or in combination with or as part of any other arrangement to an analogous resale or access service or arrangement, if available, at rates applicable to such analogous service or arrangement.

1.2 TRO Remand Order – Declassified High-Capacity Loop and Dedicated Transport Elements No Longer Required. Notwithstanding anything in the Agreement, effective March 11, 2005, pursuant to Rule 51.319(a) and Rule 51.319(e) as set forth in the TRO Remand Order, the following high-capacity loop and dedicated transport elements are no longer required to be provided by SBC Texas on an unbundled basis under the Agreement, whether alone, in combination, or otherwise:

- Dark Fiber Loops;
- DS1 Loops or DS3 Loops in excess of the caps or to any building served by a wire center described in Rule 51.319(a)(4) or 51.319(a)(5), as set forth in the TRO Remand Order, as applicable;

- DS1 Dedicated Transport or DS3 Dedicated Transport in excess of the caps or between any pair of wire centers as described in Rule 51.319(e)(2)(ii) or 51.319(e)(2)(iii), as set forth in the TRO Remand Order, as applicable; and/or
- Dark Fiber Dedicated Transport, between any pair of wire centers as described in Rule 51.319(e)(2)(iv), as set forth in the TRO Remand Order

The above-listed element(s) are referred to herein as the "Affected Loop-Transport Element(s)."

1.2.1 After March 11, 2005, pursuant to Rules 51.319(a) and (e), as set forth in the TRO Remand Order, SBC Texas shall continue to provide unbundled access to the Affected Loop-Transport Element(s) to CLEC, if and as provided by Attachment 6· UNE, only for CLEC to serve its embedded base. "Embedded base" shall refer only to Affected Loop-Transport Element(s) ordered by CLEC prior to March 11, 2005. The price for the embedded base Affected Loop-Transport Element(s) shall be the higher of (A) the rate CLEC paid for the embedded base Affected Loop-Transport Element(s) as of June 15, 2004 plus 15% or (B) the rate the state commission has established or establishes, if any, between June 16, 2004 and March 11, 2005 for the Affected Loop-Transport Element(s), plus 15%. CLEC shall be fully liable to SBC to pay such pricing under the Agreement, including applicable terms and conditions setting forth damages, interest, and/or late payment charges for failure to comply with payment terms, notwithstanding anything to the contrary in the underlying Agreement.

1.3 TRO Remand Order – Mass Market ULS/UNE-P -- Notwithstanding anything in the underlying Agreement, effective March 11, 2005, pursuant to Rule 51.319(d) as set forth in the TRO Remand Order, Mass Market Local Circuit Switching, whether alone, in combination (as with UNE-P), or otherwise, is no longer required to be provided by SBC on an unbundled basis under the Agreement. Pursuant to the TRO Remand Order, "Mass Market" Local Circuit Switching means unbundled local circuit switching arrangements used to serve a customer at less than the DS1 capacity level (e.g. , 23 or fewer Local Circuit Switching DS0 ports or the equivalent switching capacity).

1.3.1 After March 11, 2005, pursuant to Rule 51.319(d)(2)(iii), as set forth in the TRO Remand Order, SBC shall continue to provide unbundled access to Mass Market Local Circuit Switching/UNE-P to CLEC, if and as provided by Attachment 6: UNE, only for CLEC to serve its embedded base "Embedded base" shall refer only to Mass Market Local Circuit Switching/UNE-P ordered by CLEC prior to March 11, 2005. The price for the embedded base Mass Market Local Circuit Switching/UNE-P shall be the higher of (A) the rate CLEC paid for the embedded base Mass Market Local Circuit Switching/UNE-P as of June 15, 2004 *plus one dollar* or (B) the rate the state commission has established or establishes, if any, between June 16, 2004 and March 11, 2005 for the Mass Market Local Circuit Switching/UNE-P, *plus one dollar*. CLEC shall be fully liable to SBC to pay such pricing under the Agreement, including applicable terms and conditions setting forth damages, interest, and/or late payment charges for failure to comply with payment terms, notwithstanding anything to the contrary in the underlying Agreement.

1.3.2 Consistent with Paragraphs 199 and 216 of the TRO Remand Order, which recognize that CLECs must have time to transition their embedded customer-base that is served using Mass-Market Local Circuit Switching and UNE-P combinations to other facilities, including self-deployed switching and UNE loops, CLEC shall not be prohibited from ordering and SBC shall provision (i) additional UNE-P access lines to serve CLEC's embedded

7

customer-base and (ii) moves and changes in UNE-P access lines to serve CLEC's embedded customer-base during the time that this Amendment is in effect.

1.4 Consistent with Paragraph 100 of the TRO Remand Order, CLEC shall have the right to verify and challenge SBC's identification of fiber-based collocation arrangements in the listed Tier 1 and Tier 2 wire centers as part of Track 2 of the Arbitration.

1.4.1 If the PUC determines that SBC's identification of fiber-based collocation arrangements is in error and if the correction of such error results in change to one or more wire center's classification as a Tier 1 or Tier 2 wire center, the rates paid by CLEC for High-Capacity Loops and Transport shall be subject to true-up.

1.5 Consistent with Paragraph 234 of the TRO Remand Order, and recognizing that the designation of wire centers as Tier 1 and Tier 2 is dependent on facts not within CLEC's knowledge or control, CLEC shall undertake a reasonably diligent inquiry and shall self-certify, based on that inquiry, that its request for a High-Capacity Loop and/or Transport is consistent with the requirements of the TRO Remand Order. SBC shall provision the requested High-Capacity Loop and/or Transport according to standard provisioning intervals and only after provisioning may it challenge CLEC's ability to obtain the High-Capacity Loop and/or Transport.

1.5.1 If it is subsequently determined that the CLEC's request for a High-Capacity Loop and/or Transport is inconsistent with the requirements of the TRO Remand Order, the rates paid by CLEC for High-Capacity Loops and Transport shall be subject to true-up.

1.5.2 Consistent with footnote 524 of the TRO Remand Order, High-Capacity Loops no longer subject to unbundling under Section 251, shall be subject to true-up to the applicable transition rate.

1.6 Consistent with Paragraph 133 of the TRO Remand Order, CLEC shall have the right to retain and obtain dark fiber transport as an unbundled network element under Section 251 only on routes for which the wire center on one end is neither Tier 1 nor Tier 2.

1.7 CONVERSIONS: CLEC shall have the right to order and SBC shall provision conversions of special access services to UNEs and UNE Combinations during the time this Amendment is in effect, provided however, that CLEC (1) satisfies the tests set out in Paragraphs 591 through 599 of the TRO and (2) the UNE or the UNE Combination requested is not subject to any of the transition plans identified in the TRO Remand Order. That is, CLEC may not seek to request the conversion of a special access circuit to a UNE or UNE combination unless the UNE itself or each of the UNEs sought to be combined is ordered to be provided on an unbundled basis in the TRO Remand Order.

1.8 COMMINGLED ARRANGEMENTS: CLEC shall have the right to order and SBC shall provision the following commingled arrangements consisting of the following High-Capacity Loops and Transport required to be unbundled under Section 251 or subject to the transition plan set out in the TRRO:

(a) UNE DS1 loop connected to:

(1) a commingled wholesale/special access 3/1 mux and DS3 or higher capacity interoffice transport,[1]
(2) a UNE DS1 transport which is then connected to a commingled wholesale/special access 3/1 mux and DS3 or higher capacity interoffice transport;
(3) a commingled wholesale/special access DS1 transport

(b) UNE DS1 transport connected to:
(1) a commingled wholesale/special access 3/1 mux and DS3 or higher capacity interoffice transport.

(c) UNE DS3 transport connect to.
(1) a commingled wholesale/special access higher capacity interoffice transport.

1 8.1 SBC and CLEC shall establish and agree to a manual ordering process for the commingled arrangements identified in 1.6 above no later than 10 business days following the effective date of this Amendment. Commingled arrangements ordered by CLEC using the agreed-upon manual ordering process shall be provisioned within the provisioning intervals already established by SBC for the wholesale service(s) with which CLEC requests a UNE be commingled.

1.8.2 SBC shall charge the rates for UNEs (or UNE combinations) that are commingled with facilities or service obtained at wholesale (including, for example, special access services) on an element-by-element basis, and such wholesale facilities and services on a facility-by-facility, service-by-service basis

1.8 3 The Parties agree that the list of commingled arrangements identified in 1.6 above is not a complete list of all commingled arrangements that ultimately may be made available to CLEC following the conclusion of Track 2 of the Arbitration The Parties' disputes regarding the availability of other commingled arrangements as well as the process and procedures for ordering commingled arrangements are part of Track 2 of the Arbitration.

8. TO THE EXTENT THE UNDERLYING AGREEMENT INCLUDES LINE SHARING PROVISIONS INCLUDE THE FOLLOWING: The following provisions are hereby added to the Agreement specific to the High Frequency Portion of the Loop" ("HFPL"):

Grandfathered and New End-Users: SBC Texas will continue to provide access to the HFPL, where: (i) prior to October 2, 2003, CLEC began providing DSL service to a particular end-user customer and has not ceased providing DSL service to that customer ("Grandfathered End-Users"); and/or (ii) CLEC begins/began providing xDSL service to a particular end-user customer on or after October 2, 2003, and on or before the close of business December 3, 2004 ("New End-Users"). Such access to the HFPL shall be provided at the same monthly recurring rate that SBC Texas charged prior to October 2, 2003 and shall continue for Grandfathered End-Users until the earlier of: (1) CLEC's xDSL-base service to the end-user customer is disconnected for whatever reason, or (2) the FCC issues its Order in its Biennial Review Proceeding or any other relevant government action which modifies the FCC's HFPL grandfather clause established in its Triennial Review Order and as to New End-Users, the earlier of: (1) and (2) immediately above; or (3) October 2, 2006.

[1] "Higher capacity interoffice transport" must include any technology that is offered or made available with that transport on a regular or routine basis, e g , SONET This requirement applies to all references to "higher capacity interoffice transport" in this Section 1.6

Beginning October 2, 2006, SBC Texas shall have no obligation to continue to provide the HFPL for CLEC to provide xDSL-based service to any New End-Users that CLEC began providing xDSL-based service to over the HFPL on or after October 2, 2003 and before December 3, 2004. Rather, effective October 2, 2006, CLEC must provide xDSL-based service to any such new end-user customer(s) via a line splitting arrangement, over a stand-alone xDSL Loop purchased from SBC Texas, or through an alternate arrangement, if any, that the Parties may negotiate. Any references to the HFPL being made available as an unbundled network element or "UNE" are hereby deleted from the underlying Agreement.

9. Except as prohibited or otherwise affected by the *Interim Order*, nothing in this Amendment shall affect the general application and effectiveness of the Interim Agreement's "change of law," "intervening law", "successor rates" and/or any other similar provisions and/or rights under the Interim Agreement. The rights and obligations set forth in this Amendment apply in addition to any other rights and obligations that may be created by such intervening law, change in law or other substantively similar provision.

10. This Amendment shall be deemed to revise the rates, terms and provisions of the Agreement, including without limitation all associated prices in the Agreement to the extent necessary to give effect to the terms and conditions of this Amendment. In the event of a conflict between the terms and conditions of this Amendment and the rates, terms and conditions of the Agreement, this Amendment shall govern. By way of example only, if the Agreement provides that a combination of UNEs must be provided by SBC Texas, CLEC may not obtain a combination including one or more elements affected by Section 1.0 "Declassified Elements No Longer Required," above By way of additional example only, if the Agreement provides (or assumes) that a UNE must be provided by SBC Texas, elements affected by Section 1.0 "Declassified Elements No Longer Required" are, nonetheless, not required to be provided, except to the limited extent set forth in Section 1 0 "Elements No Longer Required" and in such case, any rates for Elements No Longer Required under the Agreement shall be deemed removed from the Pricing Schedule to the Agreement.

11. This Amendment may require that certain sections of the Agreement shall be replaced and/or modified by the provisions set forth in this Amendment including without limitation certain sections not explicitly identified in this Amendment. The Parties agree that such replacement and/or modification shall be accomplished without the necessity of physically removing and replacing or modifying such language throughout the Agreement. Rather, the Agreement shall automatically be deemed to be modified by way of this Amendment to the extent necessary to implement the provisions of this Amendment.

12. Nothing in this Amendment shall be deemed to affect the right of a Party to exercise any rights it may have under the Interim Agreement including, without limitation, its intervening law rights, any rights of termination, and/or any other rights available to either Party under the Interim Agreement.

13. Although it is not necessary to give effect to the terms and conditions of this Amendment, including pricing provisions, upon written request of either Party, the Parties may amend any and all Interim Agreement rates and/or pricing schedules to formally conform the Interim Agreement to reflect the terms and conditions of this Amendment.

14. Notwithstanding any contrary provision in the Interim Agreement, this Amendment, or any applicable SBC tariff, nothing contained in the Interim Agreement, this Amendment, or any applicable SBC tariff shall limit SBC Texas's right to appeal, seek reconsideration of or otherwise seek to have stayed, modified, reversed or invalidated any order, rule, regulation, decision, ordinance or statute issued by the Texas PUC, the FCC, any court or any other governmental authority related to, concerning, or that may affect SBC Texas's obligations under the Interim Agreement, this Amendment, any applicable SBC tariff, or applicable law.

15. PERFORMANCE MEASURES and REMEDY PLAN: The performance measures and the existing remedy plan contained in the T2A for ordering, provisioning and maintenance shall apply to all High-Capacity Loops and Transport, and all Mass-Market Switching/UNE-P access lines during the period in which this Amendment is effective.

16. In entering into this Amendment, neither Party is waiving, and each Party hereby expressly reserves, any of the rights, remedies or arguments it may have at law or under the intervening law or regulatory change provisions in the underlying Agreement (including intervening law rights asserted by either Party via written notice predating this Amendment) with respect to any orders, decisions, legislation or proceedings and any remands thereof, including, without limitation, the following actions, to the extent the Parties have not yet fully incorporated them into this Agreement or which may be the subject of further government review: *Verizon v FCC, et. al*, 535 U.S. 467 (2002); *USTA, et. al* v. *FCC*, 290 F.3d 415 (D.C. Cir. 2002) and following remand and appeal, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004); the FCC's Triennial Review Order (rel. Aug. 21, 2003) including, without limitation, the FCC's MDU Reconsideration Order (FCC 04-191) (rel. Aug. 9, 2004) and the FCC's Order on Reconsideration (FCC 04-248) (rel. Oct. 18, 2004); the FCC's Triennial Review Remand Order (rel Feb. 4, 2005), WC Docket No 04-313; CC Docket No 01-338, and the FCC's Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, 16 FCC Rcd 9151 (2001), (rel. April 27, 2001), which was remanded in *WorldCom, Inc v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). The Parties further acknowledge and agree that this Amendment is to effectuate an Interim Agreement for a finite period of time to afford the Texas PUC and the Parties additional time to finalize a successor interconnection agreement based upon the provisions set forth herein. Therefore, the Parties acknowledge and agree that: (i) because this Amendment is to effectuate an Interim Agreement and not a final 251/252 Interconnection Agreement between the Parties; and (ii) effectively incorporates pricing changes into the Interim Agreement; and (iii) the Interim Agreement contains certain arbitrated provisions; and (iii) portions of the Interim Agreement are the result of CLEC's prior decision to opt into the T2A Agreement or parts thereof; that no aspect/provisions of this Interim Agreement qualify for portability into Illinois or any other state under 220 ILCS 5/13-801(b) ("Illinois Law"), Condition 27 of the Merger Order issued by the Illinois Commerce Commission in Docket No 98-0555 ("Condition 27") or any other state or federal statute, regulation, order or legal obligation (collectively "Law"), if any.

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter, on the Commission's own motion, to consider Ameritech Michigan's compliance with the competitive checklist in Section 271 of the federal Telecommunications Act of 1996	Case No U-12320
In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC Michigan and Verizon.	Case No. U-14447

At the February 28, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan

PRESENT Hon J Peter Lark, Chair
Hon. Robert B Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER COMMENCING A COLLABORATIVE PROCEEDING

On February 16, 2005, MCImetro Access Transmission Services LLC (MCImetro), which is a competitive local exchange carrier (CLEC) pursuant to the federal Telecommunications Act of 1996, 47 USC 251 et seq. (FTA), filed objections to certain proposals and pronouncements made in five "Accessible Letters" dated February 10 and 11, 2005 by SBC Michigan (SBC), which is an incumbent local exchange carrier (ILEC) under the FTA Other CLECs quickly followed suit

On February 18, 2005, LDMI Telecommunications, Inc (LDMI), also filed objections to the five Accessible Letters.

On February 23, 2005, Talk America Inc , filed objections to one of the five Accessible Letters.

On February 23, 2005, TelNet Worldwide, Inc , Quick Communications, Inc d/b/a Quick Connect USA, Superior Technologies, Inc d/b/a/ Superior Spectrum, Inc , CMC Telecom, Inc , Grid4 Communications, Inc , and Zenk Group Ltd. d/b/a Planet Access filed comments in support of the objections raised by MCImetro and LDMI

On February 23, 2005, XO Communications, Inc (XO), filed objections to one of the five Accessible Letters

On February 23, 2005, SBC filed its response to the objections filed by MCImetro and LDMI

Accessible Letter No CLECAM05-037 (AL-37), which is dated February 10, 2005, states that SBC will be withdrawing its wholesale unbundled network element (UNE) tariffs "beginning as early as March 10, 2005." AL-37, p.1. Accessible Letter No CLECALL05-017 (AL-17) and Accessible Letter No. CLECALL05-018 (AL-18), which are each dated February 11, 2005, state that SBC will not accept new, migration, or move local service requests (LSRs) for mass market unbundled local switching (ULS) and unbundled network element-platform (UNE-P) on or after March 11, 2005, notwithstanding the terms of any interconnection agreements or applicable tariffs. In AL-18, SBC additionally states that effective March 11, 2005, it will begin charging CLECs a $1 surcharge for mass market ULS and UNE-P. Accessible Letter No CLECALL05-019 (AL-19) and Accessible Letter No. CLECALL05-020 (AL-20), which are each dated February 11, 2005, state that as of March 11, 2005 SBC will no longer accept new, migration, or move LSRs for certain DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops. Also, in AL-20, SBC states that beginning March 11, 2005, it will be

charging increased rates for the embedded base of DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops.[1]

The CLECs maintain that SBC has no unilateral right to change its wholesale tariffs. According to them, the Commission established a procedure in Case No U-12320 whereby SBC must provide the CLECs with a 30-day notice of its intent to change any of its tariff provisions The CLECs also point out that the Commission allowed a CLEC to object to SBC's proposed actions within two weeks of SBC's notice In short, the CLECs insist that SBC may not unilaterally revise the rates, terms, and conditions under which SBC provisions wholesale telephone services The CLECs seek a Commission order (1) establishing a proceeding to address the changes proposed by SBC, (2) prohibiting SBC from withdrawing its wholesale tariff until completion of this proceeding, (3) compelling SBC to honor its tariffs and interconnection agreements as they presently exist, (4) barring SBC from enforcing or implementing the Accessibility Letters until issuance of a final order in this proceeding, (5) directing SBC to continue to accept and provision new, migration, or move LSRs for mass market unbundled local switching (ULS) and unbundled network element-platform (UNE-P) until further order of the Commission, (6) directing SBC to continue to accept and provision new, migration, or move LSRs for certain DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops until further order of the Commission, and directing SBC not to increase the rates it charges for UNE-P, DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops until further order of the Commission.

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[1]Although not contained in the record of the Case No U-12320 docket, which is limited to consideration of issues related to Ameritech Michigan's compliance with the competitive checklist in Section 271 of the FTA, the Commission is also aware that Verizon has issued at least two similar Accessible Letters The arguments raised by the CLECs with regard to SBC's proposed actions apply with equal force to the actions proposed by Verizon

SBC responds by arguing that the modifications set forth in its Accessibility Letters are fully consistent with the Federal Communications Commission's (FCC) recent February 4, 2005 order regarding unbundling obligations of ILECs[2] and must therefore be honored by the CLECs and the Commission. According to SBC, the CLECs' objections are directly contrary to the recent rulings of the FCC. SBC states that the FCC has established a nationwide bar on unbundling as follows:

1. An ILEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops. 47 C.F.R. § 51.319(d)(2)(i).

2. Requesting carriers may not obtain new local switching as an UNE. *Id.* § 51.319(d)(2)(iii).

3. ILECs have no obligation to provide CLECs with unbundled access to mass market local circuit switching. *TRO Remand Order* ¶ 5.

4. The FCC's transition plan does not permit CLECs to add new switching UNEs. *Id.*

5. The FCC did not impose a Section 251 unbundling requirement for mass market local circuit switching nationwide. *Id.* ¶ 199.

6. The FCC found that the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify a nationwide bar on such unbundling. *Id.* ¶ 204.

7. The FCC found that continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and therefore determined not to unbundle that network element. *Id.* ¶ 210.

8. The FCC found that unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition. *Id.* ¶ 218.

According to SBC, the FCC's unbundling bar applies with equal force to network elements, such as shared transport, which can only be provided in conjunction with switching. SBC also

[2]In the Matter of 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. *(TRO Remand Order)*

asserts that the FCC reached a similar result with regard to signaling (¶ 544) and for certain databases used in routing calls (¶ 551) Therefore, SBC maintains that, given the FCC's bar on unbundled switching, it cannot be forced to provide unbundled access to any switch-related UNEs.

SBC next argues that the Commission should reject the CLECs' efforts to link their objections to Case No. U-12320 and Section 271 of the FTA According to SBC, the Commission has no decision making authority under Section 271 Further, SBC maintains that Section 271 focuses on "just, reasonable, and non-discriminatory" pricing rather than on total element long run incremental cost (TELRIC) pricing, which it claims will be perpetuated by adoption of the CLECs' objections Further, SBC insists that Section 271 provides no support for continuing its required provision of UNE combinations Finally, SBC argues that the Commission and the CLECs are powerless to ignore the FCC's holdings or otherwise delay SBC's implementation of the FCC's pricing determinations

The Commission finds that the objections filed by the CLECs have merit. In Paragraph No. 233 of the FCC's February 4 order, the FCC stated.

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. *Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order* We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order *We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.* Paragraph No. 233 (Emphasis added)

The emphasized portion of Paragraph No 233 indicates that the FCC did not contemplate that ILECs may unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings in the February 4 order It also clearly indicates that

this Commission has an important role in the process by which ILECs and CLECs resolve their differences through good faith negotiations Indeed, the Commission was specifically encouraged by the FCC to monitor implementation of the Accessible Letters issued by SBC and Verizon to ensure that parties do not engage in unnecessary delay. In addition, Paragraph No. 234 of the FCC's order indicates that SBC must immediately process a request for access to a dedicated transport or high capacity loop UNE and it can challenge the provision of such UNEs "through the dispute resolution procedures provided for in its interconnection agreements."

Given the urgency of the circumstances, the Commission finds that it should immediately commence a collaborative process for implementation of Accessible Letters issued by SBC Michigan and Verizon. In so doing, the Commission observes that the change of law provisions contained in the parties' interconnection agreements must be followed.

To avoid confusion, the Commission finds that a new proceeding that is devoted specifically to its monitoring and facilitating of the implementation of the Accessible Letters issued by SBC and Verizon should be commenced Docket items 6, 7, 8, 9, 10, 11, 12, and 13 that currently appear in Case No U-12320 should be placed into the docket file for Case No. U-14447. All additional pleadings related to implementation of Accessible Letters issued by SBC and Verizon should also be placed solely in the docket for Case No U-14447.

The Commission intends that the collaborative proceeding should be limited in scope and duration The Commission has selected the Director of its Telecommunications Division, Orjiakor Isiogu, to oversee all collaborative efforts The Commission also directs that the collaborative process be conducted in a manner that will bring it to a successful end in no more than 45 days

During the time that the collaborative process is ongoing, the Commission directs that SBC and Verizon may bill the CLECs at the rate effective March 11, 2005, however, the ILECs may

not take any collection actions against the CLECs for the portion of the bill caused by the increase on March 11, 2005. To ensure that there will be no undue benefit to the CLECs or harm to the ILECs due to the delay associated with the collaborative process, the Commission will also direct that there will be a true-up proceeding at the end of the collaborative process that will determine how rates and charges will be adjusted retroactively to March 11, 2005 [3]

The Commission has selected Case No U-14447 for participation in its Electronic Filings Program. The Commission recognizes that all filers may not have the computer equipment or access to the Internet necessary to submit documents electronically. Therefore, filers may submit documents in the traditional paper format and mail them to the: Executive Secretary, Michigan Public Service Commission, 6545 Mercantile Way, P.O. Box 30221, Lansing, Michigan 48909 Otherwise, all documents filed in this case must be submitted in both paper and electronic versions An original and four paper copies and an electronic copy in the portable document format (PDF) should be filed with the Commission Requirements and instructions for filing electronic documents can be found in the Electronic Filings Users Manual at. http.//efile.mpsc cis state mi us/efile/usersmanual pdf The application for account and letter of assurance are located at http'//efile.mpsc cis state mi us/efile/help. You may contact the Commission Staff at (517) 241-6170 or by e-mail at mpscefilecases@michigan.gov with questions and to obtain access privileges prior to filing

The Commission FINDS that

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq., the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151

[3] See, Paragraph 228 and footnote 630 of the FCC's February 4, 2005 order

et seq.; 1969 PA 306, as amended, MCL 24 201 et seq ; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq

b A collaborative process should be commenced in Case No U-14447 for monitoring and facilitating the implementation of the Accessible Letters issued by SBC and Verizon.

c Pending completion of the collaborative process, SBC and Verizon may bill the CLECs a the rate effective March 11, 2005, however, SBC and Verizon may not take any collection actions against the CLECs for the portion of the bill caused by the increase on March 11, 2005.

d Following completion of the collaborative process, a true-up proceeding should be conducted to adjust rates and charges retroactively to March 11, 2005.

THEREFORE, IT IS ORDERED that:

A A collaborative process is commenced in Case No U-14447 for monitoring and facilitating the implementation of the Accessible Letters issued by SBC Michigan and Verizon

B Pending completion of the collaborative process and further order of the Commission, SBC Michigan and Verizon shall refraining from collecting any billed rate arising from implementation of any of the changes described in their Accessible Letters.

The Commission reserves jurisdiction and may issue further orders as necessary

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chair

(S E A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of February 28, 2005

/s/ Mary Jo Kunkle
Its Executive Secretary

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

Chair

Commissioner

Commissioner

By its action of February 28, 2005

Its Executive Secretary

August 13, 2004

Scott Kunze
BellSouth Account Manager
Interconnection Sales
Via email

Dear Scott:

I have reviewed your letter of July 21, 2004; your response is unacceptable. Contrary to your assertions, the conversion of the special access circuits of XO affiliates[1] to unbundled network element (UNE) pricing should be primarily a billing change only, with no physical change to the circuits.

In your letter, you take two single spaced pages attempting to avoid one simple fact: BellSouth should not, and, indeed, cannot charge for physical disconnect and new installation orders for the billing conversion of special access to UNE, nor should XO be required to pay additional project management fees to BellSouth for processing those "phantom" orders. Amazingly, your proposal that, for an additional project management fee, BellSouth could "coordinate these orders so that the "D" [disconnect] order is not physically worked" clearly indicates that the physical disconnection and re-installation of the circuit are not required.

The FCC has made clear that the special access to UNE conversion is largely a billing function for which conversion fees are inappropriate, and that such billing changes should be processed within one billing cycle of the request. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338 et al., FCC 03-36, 18 FCC Rcd 16978 (Aug. 21, 2003) ("TRO"), par. 586 - 589.

BellSouth attributed its delay in complying with the TRO's requirements to the absence of a TRO amendment. BellSouth is wrong[2]. The TRO was clear: the TRO's rules

[1] "XO" refers to all XO state affiliates doing business with BellSouth, including the newly acquired Allegiance entities.

[2] Moreover, BellSouth has not, contrary to the assertions in your letter, presented XO with an amendment that is TRO compliant; quite the contrary. If BellSouth truly "stands ready to amend the parties' Interconnection Agreements to be compliant with existing laws and orders," as you claim, then start with complying with the TRO's conversion requirements.

Exhibit I

regarding special access to UNE conversions are self-effectuating. In fact, the TRO clearly required that, to the extent pending requests at the time of the TRO were not converted, XO is entitled to the appropriate pricing as of the date of the order. Your letter is a clear admission that BellSouth has refused to comply with the TRO's conversion requirements.

With regard to the Global Crossing conversion project, XO understands that BellSouth's price for project management of the physical conversion of Global Crossing special access circuits to XO special access circuits is $135.00 per circuit. XO reserves the right to review the charges applicable to the special access conversion from one carrier to the other.[3] XO strenuously objects, however, to your attempt to characterize the conversion of the resulting XO special access circuits to UNE pricing as being in any way related to that project. The conversion of XO special access circuits to UNE pricing should not be subject to any "new business" request requirements; such conversion is required by the FCC rules to ensure access to the UNE pricing set forth in the parties' interconnection agreements.

If, in order to complete this project, XO is forced to process "D" and "N" orders to effectuate this billing conversion or to pay BellSouth additional fees to manage those orders to ensure its customers' services are not affected, XO will do so under protest, and will dispute any charges associated with those orders that exceeds a just and reasonable billing change charge. Moreover, XO reserves its right to bring appropriate action against BellSouth for its refusal to provide access to these conversions in a manner compliant with state and federal law as well the parties' interconnection agreements,[4] and will seek all appropriate relief, including retroactive billing adjustments and punitive damages for anticompetitive conduct. To that end, please accept this letter as official notice of dispute under the terms of the notice section of the parties' interconnection agreements.[5]

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[3] As you know, the conversion in this instance does not require all of the work processes normally associated with a new install, which is the basis for XO's original request that the conversion from Global Crossing directly to XO UNE be given a reduced price. BellSouth originally agreed, then withdrew its offer. In reserving its right to seek resolution of this dispute, as set forth below, XO also reserves the right to request that the reviewing commission require BellSouth to provide the originally requested conversion at a cost-based rate

[4] See "Resolution of Disputes," XO TN ICA General Terms and Conditions, Part A, section 10, GA and FL, section 12; Allegiance GA section 11, FL section 16.

[5] See e.g. "Notices", XO TN ICA General Terms and Conditions, Part A, section 19, GA and FL, section 22; Allegiance GA section 19, FL ICA adoption papers section 11

Please advise immediately whether BellSouth will provide these billing conversions, and at what rate. Also, please indicate whether BellSouth would consider honoring its original agreement to provide the conversions from Global Crossing special access directly to XO UNE circuits. Finally, please advise whether you are the appropriate contact now for discussions regarding past/pending special access to UNE conversion requests and billing adjustments owed to XO by BellSouth; if not, please give me the appropriate current contact.

Sincerely,

Dana Shaffer
Vice President, Regulatory Counsel

Cc: Jerry Hendrix, BellSouth, via email
BellSouth CLEC Account Team/Local Contract Manager, via certified mail
BellSouth ICS Attorney/General Attorney – COU, via certified mail
Dorothy Farmer, BellSouth, via email
Gegi Leeger, XO, via email
Alaine Miller, XO, via email
Doug Kinkoph, XO, via email

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2005, a copy of the foregoing document was served on the following, via the method indicated:

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[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight [✓] Electronic	James Murphy, Esquire Boult, Cummings, et al. 1600 Division Street, #700 Nashville, TN 37219-8062 jmurphy@boultcummings.com
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