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April 8, 2005

Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-5050

Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*
Docket number: 04-00381

Dear Chairman Miller:

As the Authority prepares to consider the CLECs' emergency motion to require BellSouth to comply with the "change-of-law" provisions in their interconnection agreements, there are three recent developments which I would like to bring to your attention.

1. As BellSouth informed you two days ago, a United States District Court in Georgia has entered a preliminary injunction overturning the pro-CLEC decision of the Georgia Public Service Commission. The Court noted that the FCC has clearly announced a change in the federal unbundling rules ie., CLECs cannot continue to add new UNE-P customers under Section 251(c)(3) of the Federal Telecommunications Act. The Court did not, however, recognize or give effect to BellSouth's contractual obligations to continue accepting UNE-P orders until such time as the FCC's order has been incorporated into the parties' interconnection agreements. The Court, incredibly, assumed that the FCC intended to override by fiat the parties' state-approved contracts without any explicit discussion of this rarely invoked and legally controversial federal power.

On April 6, 2005, the CLECs filed an emergency appeal with the United State Court of Appeals for the Eleventh Circuit. A copy of the CLECs' motion to stay the lower court's ruling is attached. The CLECs hope that the court will rule shortly on their appeal. This decision will not only determine, in the short run, the outcome of the Georgia case but will have a strong impact on similar proceedings in Alabama and Florida, the other two states in the Eleventh Circuit.

2. Tennessee, of course, is in the Sixth Judicial Circuit, along with Kentucky, Michigan and Ohio. As you know, the Kentucky Public Service Commission, like the Georgia Commission, granted the CLECs' motion for emergency relief. BellSouth has appealed that decision to the United States District Court in Lexington. Briefs are being filed today and next week; oral argument is scheduled on April 18, 2005. The outcome of that appeal will likely influence pending dockets in this Circuit.

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3. On March 29, 2005, the Michigan Public Service Commission entered an order recognizing that the FCC has declared that CLECs "no longer have a right under Section 251(c)(3) to order UNE-P" but that CLECs may still have the right to order delisted (non-251) UNEs pursuant to Section 271. Order, at 9. The Commission also recognized, however, that no such change of law could become effective until after the parties have amended their interconnection agreements and gave the parties "60 days from the date of this order to complete the requirements of their change of law and dispute resolution provisions" under the Commission's supervision. Order at 12-13.

BellSouth filed a copy of the Michigan decision with the TRA on April 6, 2005. BellSouth quotes only from the portion of the decision which discusses the FCC's decision and seems to believe that the Michigan Order supports BellSouth's decision. That is incorrect. In that state, SBC is obligated to continue taking new UNE-P orders until the change-of-law process is complete.[1]

I apologize for the lateness of this filing, but I thought it was important that you be informed of these new developments.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Henry Walker

HW/d

[1] Yesterday, I confirmed this understanding of the Michigan Order with Talk America, the largest CLEC in that state.

CASE NO. 05-_____-

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BELLSOUTH TELECOMMUNICATIONS, INC.,

Plaintiff-Appellee,

v.

MCIMETRO ACCESS TRANSMISSION SERVICES LLC, et al.,

Defendants-Appellants.

On Appeal From The United States District Court
For The Northern District of Georgia

JOINT DEFENDANTS' MOTION TO STAY THE PRELIMINARY INJUNCTION PENDING APPEAL AND FOR AN EXPEDITED APPEAL

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Pursuant to Fed. R. App. P. 8(a)(2), Appellants ITC^DeltaCom Communications, Inc., Business Telecom, Inc., Cbeyond Communications, LLC, LecStar Telecom, Inc., Talk America, Inc., US Carrier Telecom, Dieca Communications, Inc. d/b/a Covad Communications Corp., Southern Digital Network, Inc. d/b/a FDN Communications, BroadRiver Communication Corporation, NuVox Communications, Inc., Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Atlanta, LLC, KMC Telecom Holdings, Inc., KMC Telecom V, Inc., and KMC Telecom III, LLC ("Joint Defendants") move this Court to stay the District Court's April 5, 2005, preliminary injunction order pending appellate review and to grant an expedited appeal. Joint Defendants moved the District Court to stay its grant of the preliminary injunction, and such motion was denied by the District Court.

REQUEST FOR STAY AND EXPEDITED APPEAL

Immediate action by this Court is necessary to relieve Joint Defendants from a preliminary injunction that serves to alter the status quo and impose irreparable harm upon Joint Defendants and the public. The U.S. District Court for the Northern District of Georgia issued a preliminary injunction enjoining the enforcement of prior order of the Georgia Public Service Commission. (Exhibit 1, Order.) The District Court's injunction effectively allows BellSouth to violate the express terms of its contracts with Defendants and to cut off the provision of

certain services to Defendants at will, which BellSouth has indicated it will do as to any Defendants who have not entered into a "commercial agreement" with BellSouth as of April 8, 2005.

Relying on nothing stronger than negative inference, the District Court held that an order of the Federal Communications Commission ("FCC") had abrogated a negotiated provision of the parties interconnection agreements dictating how changes in law were to be incorporated into the agreements. In doing so, the District Court also refused to give any meaning to provisions of the FCC's Order expressly reminding the parties that they remained free to negotiate for services not no longer required under the Order and directing that the parties follow the negotiation procedures set out in Section 252 of the Telecommunications Act to give effect to the new unbundling rules announced in the Order. As the District Court acknowledged, Joint Defendants will undoubtedly suffer irreparable harm as a result of his grant of a preliminary injunction. The District Court erred, however, by failing to weigh this undoubted harm against that claimed by BellSouth. Instead, the District Court made inferences as to what the FCC must have intended, confusing the undisputed fact that the FCC Order changed applicable law with the parties obligations to comply with the freely negotiated terms of their contracts. The Georgia Public Service Commission ("GPSC") ordered BellSouth to comply with its contractual agreements with Defendants. By enjoining enforcement of that

order, the District Court has effectively granted affirmative injunctive relief that alters the status quo that has existed between the parties for several years. Moreover, the only way Defendants can avoid the loss of service threatened by BellSouth is to sign new contracts with BellSouth by April 8th. If they do so, however, they risk being found to have extinguished their right to insist on BellSouth's compliance with their existing contracts.

The District Court's grant of an extraordinary mandatory injunction was contrary to law and threatens Defendants with irreparable harm. The Order should be stayed immediately pending this Court's expedited review of the Preliminary Injunction Order.

MEMORANDUM OF LAW

Joint Defendants are telecommunications service providers that have negotiated contractual agreements ("Interconnection Agreements") with BellSouth Telecommunications, Inc. ("BellSouth"). These contracts specify the terms and conditions under which Joint Defendants may lease or otherwise access various elements of BellSouth's network, including the methodology for provisioning and terminating such service and the rates charged for such access. While some of the terms of the agreements are mandated by statutes, regulatory determinations, arbitration decisions, or judicial determinations, many result solely from the voluntary negotiation of the parties. Among the voluntarily negotiated provisions

of the agreements between Defendants and BellSouth are "change of law" provisions that specifically contemplate that the FCC will effect changes to the existing legal regime during the life of the agreement. The change of law provisions provide that if the regulatory, statutory or judicial regime changes in a material way, the parties will adhere to a particular procedure for amending their agreements to implement those changes in the law.

The FCC caused precisely the type of change in the law anticipated by the parties when it issued the *Triennial Review Remand Order* ("*TRRO*") (Exhibit 2, *TRRO*) and changed the listing unbundled network elements BellSouth is required to provide to Defendants. In an about-face, however, from its past insistence on strict compliance with the change of law provisions, BellSouth contended before the Georgia Public Service Commission ("GPSC") that the changes of law in the *TRRO* had to be implemented immediately, rather than pursuant to the "change of law" process or the negotiation process contemplated by Paragraph 233 of the *TRRO*.[1] To give effect to Paragraph 233 and to maintain the status quo long enough to allow the orderly amendment of the interconnection agreements, the GPSC enjoined BellSouth from refusing to comply with its contracts and directed

[1] BellSouth apparently believes that the choice of law provisions apply only when they work in its favor – they apply when BellSouth is required to change its business model to comply with new rulings but not when competitors such as Defendants are required to make changes. (Exhibit 15, Transcript pp.135:11-25 at.)

the parties to act expeditiously to negotiate the necessary changes to their agreements. The District Court has erroneously granted a preliminary injunction barring enforcement of the GPSC order and BellSouth has informed Joint Defendants that any carrier that has not entered into a "commercial agreement" proposed by BellSouth by April 8, 2005 will no longer be able to place new orders for certain services, and that it will begin rejecting such orders on April 17, 2005. (Exhibit 3, 3/21/05 Carrier Notification.)

The District Court's order wrongfully, and potentially forever, allows BellSouth to avoid the freely negotiated terms of its contracts. BellSouth insists that the FCC's ruling abrogated the "change of law provisions" in contracts between the parties, but neither it nor the District Court identifies any legitimate basis in the law for the FCC to abrogate the parties' contractual change of law provisions, and further fails to identify any language in the FCC's ruling even suggesting, let alone mandating, abrogation of the change of law provisions. Moreover, no harm BellSouth faces can outweigh the permanent harm that will be caused Defendants by the District Court's Preliminary Injunction Order. The District Court's order should be stayed by this Court.

I. FACTUAL BACKGROUND

A. The FCC's Triennial Review and Remand Order and Unbundled Network Elements

The Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.* ("1996 Act"

or "Act") requires BellSouth to allow Competitive Local Exchange Carriers ("CLECs" such as Joint Defendants here) to purchase unbundled, *i.e.*, distinct, elements of BellSouth's network and provides parameters for determining the rates that CLECs must pay to BellSouth for unbundled network elements ("UNEs"). 47 U.S.C. § 252(d)(1)(A) - (B). The FCC is responsible for making rules to determine which UNEs BellSouth and other incumbent LECs must provide to the CLECs. *Id.* § 251(d)(2). In August 2003, the FCC released the *Triennial Review Order*,[2] which addressed previous court decisions striking down portions of the FCC's UNE rules. Various telecommunications carriers appealed the *Triennial Review Order* and, on March 2, 2004, the D.C. Circuit remanded in part and vacated in part portions of that order, in particular, directing the FCC to reconsider certain of its unbundling rules. *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

On February 4, 2005, the FCC released its *Triennial Review Remand Order* ("*TRRO*").[3] In the *TRRO*, the FCC further revised its unbundling rules, making substantial changes to the previously existing competitive regime. Specifically, the

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[2] *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.* (CC Docket Nos. 01-338, 96-98, and 98-147), FCC 03-36 (released August 21, 2003), 68 Fed. Reg. 52276 (Sept. 2, 2003) ("*Triennial Review Order*").

[3] *In re Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.* (WC Docket No. 04-313 and CC Docket No. 01-338), FCC 04-290 (released Feb. 4, 2005) ("*Triennial Review Remand Order*").

TRRO provides that the FCC no longer reads § 251(c)(3) of the Act to require incumbent LECs to provide mass market local circuit switching as a UNE.[4] (*TRRO* ¶¶ 5, 226.) It also held that whether BellSouth had to provide transport lines and high-capacity loops as UNEs would depend on the size of the wire center involved. (*Id.*)

To implement these substantial changes, the *TRRO* provides for a twelve to eighteen-month period from the effective date of the *TRRO* during which the CLECS must be allowed to "retain access to" these former UNE elements, and to a combination of these elements known as the UNE platform, or "UNE-P" (the combination of an unbundled loop, unbundled local circuit switching, and shared transport) as to existing customers ("embedded customers"). Per the *TRRO*, this transition period began on March 11, 2005. (*TRRO* ¶¶ 5, 227.)

The *TRRO* also addresses how the parties are to implement the new unbundling rules for customers not covered by the transition plan. In the *TRRO* section entitled "Implementation of Unbundling Determinations," the Commission ordered as follows:

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[4] The *TRRO*'s analysis is limited to § 251 of the Act and does not address whether § 271 of the Act or provisions of state law require BellSouth to continue providing some or all of those elements on an unbundled basis (perhaps at different rates).

B. Implementation of Unbundling Determinations

> 233. We expect that incumbent LECs [such as BellSouth] 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.

(*TRRO* ¶ 233 (footnotes omitted and emphasis added).)

In addition, Joint Defendants' Interconnection Agreements with BellSouth specify how changes of law, like those imposed by the *TRRO*, are to be implemented. For example, Defendant ITC^DeltaCom Communications, Inc.'s ("ITC^DeltaCom") Interconnection Agreements with BellSouth provides:

> In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of ITC^DeltaCom or BellSouth to perform any material terms of this Agreement, ITC^DeltaCom or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution Procedure set forth in Section 11.

(Exhibit 3, Excerpts from ITC^DeltaCom/BellSouth Interconnection Agreement §

15.4.)[5] Although the *TRRO* undoubtedly effected dramatic changes to the understanding of the requirements of § 252, it is undisputed that nothing in the *TRRO* suggests a finding by the FCC that the change of law provisions in the parties' agreements are no longer in the public interest.

Notwithstanding the change of law provisions in its Interconnection Agreements[6] with Joint Defendants or the plain language of the *TRRO* requiring

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[5]ITC^DeltaCom's Interconnection Agreement with BellSouth also contains a provision post-dating the issuance of the D.C. Circuit's opinion in *USTA II* wherein the parties confirm that changes to the Agreement necessitated by *USTA II* (and ultimately imposed by the *TRRO*) will be implemented according to the change of law provision in § 15.4. (Dist. Ct. Docket No. 22, Supp. Appendix, Exhibit A, ITC^DeltaCom/BellSouth Interconnection Agreement, Attach. 2, § 1.1.) In addition, NuVox Communications, Inc, KMC Telecom Holdings, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Atlanta, LLC, all have a separate Abeyance Agreement with BellSouth, as part of their ongoing arbitration before the GPSC, which provides that changes of law resulting from the *TRO*, *USTA II* and its progeny will not be the subject of amendments to the existing Interconnection Agreements but will be incorporated into the new Interconnection Agreements that result from the ongoing arbitration. (Dist. Ct. Docket Nos. 33, 48 and 50). Therefore, while NuVox, KMC and Xspedius concur that the change of law provisions are not abrogated by the TRRO, they have a separate Abeyance Agreement which exempts them from amending their current interconnection agreements. The District court did not reach the issue of the Abeyance Agreement, concluding that matter was still "pending before the PSC, and this [the District] Court's decision does not affect the PSC's authority to resolve it." (District Court Order at 6). ITC^DeltaCom's Interconnection Agreement with BellSouth also contains a provision post-dating the issuance of the D.C. Circuit's opinion in *USTA II* wherein the parties confirm that changes to the Agreement necessitated by *USTA II* (and ultimately imposed by the *TRRO*) will be implemented according to the change of law provision in § 15.4. (Dist. Ct. Docket # 22, Supp. Appendix, Exhibit A, ITC^DeltaCom/BellSouth Interconnection Agreement, Attach. 2, § 1.1.)

[6] There is no dispute that similar provisions are contained in the Interconnection Agreements of the other Joint Defendants. Those Agreements were filed with the District

negotiation of the terms and conditions needed to implement its findings, in a Carrier Notification dated February 11, 2005, BellSouth asserted its interpretation of the *TRRO*, claiming that "the FCC's actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to 'new adds' for these former UNEs." (Exhibit 4, 2/11/05 Carrier Notification.) BellSouth went on to state that "effective March 11, 2005, for 'new adds,' BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ('TELRIC') rates or unbundled network platform ('UNE-P') and as of that date, BellSouth will no longer accept orders that treat those items as UNEs." (*Id.*) BellSouth further asserted that it would return any orders for service from carriers refusing to sign the "take or leave it" commercial agreements offered by BellSouth, which provide access to the same facilities formerly available as the UNE-P, but at much higher rates. (*Id.*; *see also* Exhibit 5, Edwards Letter; Exhibit 6, 3/21/05 Carrier Notification.)

Moreover, although the *TRRO* requires that CLECs be allowed to self-certify the size of the wire centers associated with orders for loops or transports, BellSouth sought to circumvent this process by publishing the list of wire centers it deemed to qualify for UNE orders. BellSouth later had to admit that its list was

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Court at Docket No. 22, Joint Defendants' Second Supplemental Appendix.

erroneous and that employed a flawed methodology. (Exhibit 15, 3/24/05 Notice.)

MCImetro Access Transmission Services, LLC ("MCI") and other CLEC's sought an emergency determination by the GPSC of whether the *TRRO* authorized BellSouth unilaterally and without negotiation to refuse to honor its Interconnection Agreements. Finding no support in the *TRRO* for BellSouth's argument that the *TRRO* had effected an immediate abrogation of the contractual change of law provisions, the GPSC held that all parties were required to abide by the change of law provisions in their Interconnection Agreements to implement the terms of the *TRRO.* (Exhibit 7, (hereinafter "GPSC Ruling") at 5-6.) The GPSC further held that it would resolve the questions of whether BellSouth might be entitled to a true-up and whether BellSouth was separately obligated to provide unbundled network elements to the CLECs under § 271 of the Act or under state law in the regular course of its docket. (*Id.* at 6-7.)

II. ARGUMENT

To obtain a stay of an injunction pending appeal, a party must demonstrate that "four familiar considerations[—]likelihood of success on the merits, risk of irreparable harm without relief, risk of injury to the party opposing the relief, and the public interest"—on the whole favor a stay. *Weng v. United States Att'y Gen.*, 287 F.3d 1335, 1337-38 & n.5 (11th Cir. 2002). Here, each factor is satisfied.

C. The District Court Erred in Finding That BellSouth was Likely to Succeed on its Argument that the TRRO Abrogated the Choice of Law Provisions in its Contracts.

BellSouth's obligation to negotiate the terms and conditions necessary to implement the provisions of the *TRRO* derives from two independent sources. First, BellSouth voluntarily entered into agreements with Joint Defendants that specifically detail how the parties will go about the work of incorporating into their Interconnection Agreements changes in terms and conditions necessitated by material changes in the law. BellSouth does not dispute that the *TRRO* is a "regulatory . . . action" that "materially affects . . . material terms of [the Interconnection] Agreements" within the meaning of the change of law provisions of the Interconnection Agreements. (Exhibit 8, BellSouth GPSC Opp'n at 3.) BellSouth does not dispute that some carriers attempted to open negotiations to amend their Interconnection Agreements as early as December 2004, nor dispute that such negotiations would have led to the implementation of reasonable and lawful terms, conditions, and rates.

BellSouth's sole argument in support of its contention that it is not obligated to enter into negotiations as required by the change of law provisions is that the *TRRO* somehow implicitly abrogated such provisions because it is "self

effectuating."[7] The GPSC emphatically rejected this argument, pointing out that BellSouth could not identify any statement in the *TRRO* purporting to make such an abrogation. (GPSC Ruling at 3-5.) Moreover, even conceding for the moment as the GPSC did that there exists a doctrine of law (the *Sierra-Mobile* doctrine[8]) that, in proper circumstances, might have permitted the FCC to accomplish such an abrogation, the GPSC found no indication in the text of the *TRRO* that the FCC had conducted the analysis required to defend a decision to directly impair the parties' contractual rights—specifically, the change of law provision. (*Id.*)

The power available pursuant to the *Sierra-Mobile* doctrine is highly circumscribed. It requires specific findings as to each "particular" provision of the contract to be modified that such provision is "detrimental to the public interest," accompanied by "adequate reasons for jettisoning the provisions." *Western Union Tel. Co.*, 815 F.2d at 1503. Nothing in the *TRRO* even purports to be an effort to abrogate choice of law provisions and such abrogation cannot be accomplished through the negative inference employed by the District Court. Absent discussion

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[7] The *TRRO* does not state that it is "self-effectuating." It merely states that the FCC believes the "impairment framework" it adopts is "self-effectuating," (*TRRO* ¶ 3), i.e., capable of simple application across a number of differing circumstances.

[8] Where it applies, "the *Sierra-Mobile* doctrine has been held to allow agencies to change contract rates when it finds them unlawful, *see FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956), and to modify other provisions of private contracts when necessary to serve the public interest, *see United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956)." *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

and a detailed weighing of the merits of the "particular provision" to be altered, "reiterat[ion] of rather conclusory arguments" regarding the public interest, cannot support a finding that the provision has been validly abrogated pursuant to the *Sierra-Mobile* doctrine.[9] *Id.*

Although the *Sierra-Mobile* doctrine was only authority BellSouth identified in proceedings before the GPSC for the alleged abrogation of the Interconnection Agreements, BellSouth all but abandoned reliance upon the doctrine at the District Court, relying instead upon a singular citation to *United Gas Imp. Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965). *Callery Properties*, however, does not advance BellSouth's assertion that the *TRRO* dispensed with the parties' change of law provisions. Reasoning that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order," the Supreme Court determined that the Federal Power Commission had not exceeded its power in ordering gas "producers to make refunds for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest." *Id.* at 229-30. Nothing in *Callery Properties* suggests that the FCC may abrogate privately negotiated

[9] Conceding that the *TRRO* contains no express abrogation of the change of law provisions, BellSouth insists that the "transition plan" outlined in the *TRRO* renders such abrogation implicit. Such an inference is not permitted by the *Sierra-Mobile* doctrine and in any event is negated by the TRRO's own direction to the parties to implement its rules through § 252 negotiations.

contractual provisions, much less abrogate them with no reflection on the record of any intent to do so or that abrogation was in the public interest.

On multiple occasions in the past, the FCC imposed changes of law resulting from the same process of identifying the means by which to further the statutory intent of the Telecommunications Act and using the same style of mandatory language employed in the *TRRO*. *See First Report and Order,* 11 FCCR 15499, ¶ 410 (1996) ("We conclude that incumbent LECs must provide local switching as an unbundled element"); Advanced Services Order, 14 FCCR 4761, ¶¶ 40-43 (1999) ("We *require* incumbent LECs to make cageless collocation arrangements available. . ."); *TRO* ¶ 579 ("We *require* incumbent LECs to perform the necessary functions to effectuate such commingling upon request"). In each of these prior instances, which notably resulted in changes of law to the benefit of the CLECs, BellSouth insisted that these changes could not become effective until the parties had engaged in the negotiations contemplated by the change of law provisions in the parties' Interconnection Agreements.[10] BellSouth's insistence on a different result here is pure self-interested duplicity.

[10] As the GPSC noted in its Order, when AT&T tried to take advantage of a GPSC pricing decision prior to the time permitted under its change of law provision, BellSouth implored the Commission not to permit AT&T "to ignore, and thereby circumvent the effect of the very language it negotiated and entered into in its [Interconnection Agreement] with BellSouth" so as to "unilaterally change the terms and conditions of the [Agreement]." (GPSC Ruling at 5-6 (citing GPSC Docket No. 17650, Document No.

BellSouth's argument that the *TRRO* abrogated the negotiation requirements under the change of law provisions is untenable also since the second source of BellSouth's obligation to enter into good faith negotiations with Joint Defendants is the plain language of the *TRRO* itself. In directing the implementation of the unbundling decisions reflected in the *TRRO*, the FCC states at Paragraph 233 that it expects "incumbent LECs [such as BellSouth] 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.*" (*Id.* ¶ 233 (emphasis added).) The FCC further notes that "the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes" and states its expectation that "parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order." (*Id.* (footnotes omitted).) This recognition by the FCC that the *TRRO* must be implemented through negotiated amendments to the existing Interconnection Agreements both negates any suggestion that the FCC intended to abrogate the terms of change of law provisions where they exist and independently confirms

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68288 (BellSouth's Reply Brief) at 2.) Additional examples of BellSouth's insistence on rigid compliance with the change of law provisions to amend Interconnection Agreements to reflect even the most simple, straightforward changes in rates or other terms imposed by the FCC or state PSCs are set forth in the record. (*See* Exhibits 9-12.)

that the *TRRO* does not give BellSouth the right to unilaterally change the terms and conditions under which it leases elements of its network to Joint Defendants.

In light of the foregoing, there is little likelihood that BellSouth can succeed on the merits, much less meet the heightened showing required for issuance of a mandatory injunction. *Martinez v. Matthews*, 544 F.2d 1233, 1243 (5th Cir. 1976).

D. Bellsouth Has Not Shown that the Balance of Harms Favors Granting Injunctive Relief.

The injunction sought by BellSouth threatens injury to Joint Defendants and to consumers, allowing BellSouth to implement its refusal to provide access to elements of its network unless Joint Defendants enter into coerced "commercial agreements" with BellSouth.[11] Consumers who are currently being served by Joint Defendants will lose service or the opportunity to effect changes in their service, and Joint Defendants will lose the ability to provide service to new customers. This harm to Joint Defendants' ability to serve their customers far exceeds any harm BellSouth, which is purely economic.

The only issue for BellSouth is the rate it can charge for certain network

[11] BellSouth's offer to provide service under its unilateral commercial agreements does not mitigate this harm since companies signing those agreements will lose the benefit of *TRO* or *TRRO* rulings in their favor, will lose the opportunity to negotiate the availability of various elements of current technology and the terms for transfer from those agreements to other means of providing the service, will not have answers a myriad of implementation questions, and will suffer other impairments of their ability to provide telecommunication services to their customers. (*See* Exhibit 13, Decl. of Mary Conquest.)

elements, this issue is inherently subject to remedy by money damages and therefore does not constitute the type of irreparable harm necessary to support a preliminary injunction.[12] *See, e.g., Northeastern Florida Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990) ("An injury is 'irreparable' only if it cannot be undone through monetary remedies."). To the extent that BellSouth has made a showing of lost customers, these loses are exactly offset by the customers the CLECs will lose upon issuance of an injunction, and CLECs, unlike BellSouth, will completely lose their ability to add new customers and have their reputations injured in the process.

Furthermore, any loss of customers during the time the parties are effecting the rulings of the *TRRO* through the change of law provisions cannot legitimately be considered an undue injury to BellSouth. BellSouth negotiated the change of law provisions with the full knowledge that such provisions would allow it to reap the benefit of delay, often unwanted by the CLECs when the changes inured to their benefit, and that, in fairness, BellSouth would have to bear the consequences of such limited delay where the changes inured to BellSouth's ultimate benefit. *See Sierra Pac. Power Co.*, 350 U.S. at 355 ("[A] contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable . . . ."). As such,

[12] Moreover, the GPSC already has committed to giving consideration to whether BellSouth should receive a true-up in the course of the proceedings in the current docket.

BellSouth's claimed irreparable injury in the form of lost customers is, at best, an injury of its own making that needs no emergency remedy. Certainly such "injury," if established, cannot be shown to outweigh the harm that undoubtedly will befall Joint Defendants as a result of the preliminary injunction.

Moreover, the preliminary injunction imposes a particular harm on carriers who seek to provision high-capacity loops and transport from BellSouth. BellSouth has admitted that it lacks a methodology at present for accurately determining the number of lines present in a wire center. Without the negotiation between the parties contemplated by the *TRRO* and the interconnection agreements, egregious errors, such as the ones to which BellSouth already has admitted, are likely to continue to occur. The harm caused by these predictable errors will be born entirely by the CLECs as they and their customers suffer otherwise avoidable losses in service.

The public interest also favors a stay of the District Court's order. BellSouth has dragged its heels in engaging in negotiations with Joint Defendants to put in place mutually agreeable provisions resolving issues associated with implementation of the *TRRO*. "[E]quity aids the vigilant and not those who slumber on their rights." *NAACP v. NAACP Legal Defense & Educ. Fund, Inc.*,

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That determination, once made, will be subject to judicial review. (GPSC Ruling at 6.)

753 F.2d 131, 137 (D.C. Cir. 1985). Accordingly, "[c]ourts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief." *Nat'l Fire Ins. Co. v. Thompson*, 281 U.S. 331, 338 (1930). BellSouth's lack of conscientiousness in pursuing its obligations, as well as its flagrant refusal to negotiate illustrates the error in the District Court's ruling and the need for a stay pending appeal.

The public interest further weighs in favor of a stay as the preliminary injunction sought by BellSouth would dramatically change the negotiated terms of the Interconnection Agreements without adequate justification. "[T]he public interest does not favor forcing parties to a agreement to conduct themselves in a manner directly contrary to the express terms of the agreement." *Frank B. Hall & Co. v. Alexander & Alexander, Inc.*, 974 F.2d 1020, 1025-26 (8th Cir. 1992). Such would be the precise result here, as the parties bargained and agreed to a particular procedure to implement amendments to their Interconnection Agreements prompted by changes of law.

III. CONCLUSION

For the foregoing reasons, the Court should stay the District Court's Order pending appellate review and expedite this appeal.

Respectfully submitted,

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