BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	**July 13, 2005**	
BELLSOUTH'S PETITION TO ESTABLISH GENERIC DOCKET TO CONSIDER AMENDMENTS TO INTERCONNECTION AGREEMENTS RESULTING FROM CHANGES OF LAW	)	**DOCKET NO. 04-00381**

DISSENT OF DIRECTOR SARA KYLE TO ORDER GRANTING ALTERNATIVE RELIEF

This matter came before Director Deborah Taylor Tate, Director Sara Kyle and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel ("Panel") assigned to this docket, for deliberations on several motions for emergency relief filed in the docket: the *Motion for Emergency Relief* filed February 25, 2005 by NuVox, KMC, and Xspedius;[1] *MCI's Motion For Expedited Relief Concerning UNE-P Orders* filed March 2, 2005; and *Cinergy Communications Company's Motion for Emergency Relief* filed March 2, 2005 (collectively "*Emergency Petitions*"). At the conclusion of deliberations, a majority of the voting panel denied the specific relief requested in the *Emergency Motions* but granted alternative relief. For the reasons set forth below, I respectfully dissent from this finding:

While the Joint Petitioners correctly state that the *TRRO* directs ILECs and CLECs to implement the *TRRO* changes pursuant to section 252 of the Act, which requires negotiations

[1] The *Motion for Emergency Relief* was filed by NewSouth/NuVox Communications, Inc. ("NuVox"), KMC Telecom V, Inc and KMC Telecom III, LLC (together "KMC"); and Xspedius Communications, LLC on behalf of its operating subsidiaries, Xspedius Management Co. Switched Services, LLC, and Xspedius Management Co of Chattanooga, LLC (together "Xspedius").

and/or arbitration,[2] I do not agree this applies to "new adds". I am of the opinion that when the *TRRO* is read in total, there are no rates, terms or conditions to be negotiated concerning new adds because the FCC expressly prohibited new adds after March 11, 2005, which has past. In short, there is nothing to negotiate in those instances where new adds are involved and where the FCC has found CLECs are not impaired if a UNE is not provided by the incumbent. This applies to mass market switching everywhere and also to DS1 & DS3 transport, dark fiber transport and high capacity loops in cases where the FCC has determined no impairment exists. To implement the commissions rules BellSouth may withdraw access to new adds, where no impairment exists, anytime after March 11, 2005. At that point, the only portion of the rules left to implement are those associated with the transition of the embedded base.

The FCC could very easily have said that new add UNE-Ps must continue to be provided consistent with the parties interconnection agreements or have provided a plan for the parties to transition away from mass market local switching new adds similar to the transition plan for the embedded base. This FCC did not do this. Therefore, I believe that the FCC did not intend for local circuit switching to be unbundled after March 11, 2005.

Both Cinergy and MCI assert that section 271 of the Federal Act independently supports the right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the agreement[3] Therefore, they argue that even if BellSouth were empowered by the *TRRO* to unilaterally change their rights to obtain UNE-P pursuant to section 251(c)(3), BellSouth would not be entitled to change the unbundling and UNE rate sections of their agreements unilaterally. In addition, MCI argues that BellSouth must continue to provide UNE-P under Tennessee law.[4] I disagree. In my opinion, Section 271 of the Federal Act does not allow a network element obtained pursuant to that section to be combined with any other 251 UNE. Section 271(c)(1)(B)

[2] Joint Petitioner's *Motion for Emergency Relief*, ¶ 16 , (February 25, 2005)
[3] *Cinergy's Motion*, p 10, ¶ 20 (March 2, 2003) and *MCI's Motion*, p 14, ¶ 36 (March 2, 2005)
[4] *MCI's Motion*, p 11, ¶ 28 (March 2, 2005)

contains the competitive checklist that specifies the network elements that are required to be provided by ILECs to CLECs. The list includes local loop transmission unbundled from local switching or other services, local transport unbundled from switching or other services and local switching unbundled from transport, local loop transmission or other services. Clearly, these network elements are to be provided unbundled from other services or network elements. The FCC did not require that these elements be made available combined with other services or elements. While I believe BellSouth is required to provide section 271 network elements to CLECs, BellSouth is only required to provide them at rates that are just and reasonable and unbundled from other services and network elements. Therefore, BellSouth is not required to provide combinations of 271 and 251 elements pursuant to paragraph 584 of the *TRO*.[5]

Additionally, I disagree with MCI that BellSouth is required to provide UNE-P under state law and therefore cannot unilaterally change the unbundling and rate sections of the agreement. While MCI is correct that its agreement with BellSouth[6] was approved by the Authority in part based on T.C.A. § 65-4-104 and T.C.A. § 65-4-123,[7] I believe MCI misses the mark. In addressing MCI's ability to use BellSouth's property which had been conveyed to a third party the Authority found pursuant to T.C.A. § 65-4-123 that BellSouth should not enter into contracts that do not recognize license agreements with MCI. Let me also state that I did not agree with the final determination in this issue. The order of this Authority in Docket 00-00309, dated September 20, 2002, specifically states "The Authority has jurisdiction over public utilities pursuant to Tenn. Code Ann §65-4-104". This finding is consistent with our general supervisory control of public utilities under state statute.

For all the reasons given, I am of the opinion that BellSouth's responsibility to continue to furnish the UNEs exempted by the *TRRO* ended on March 11, 2005. BellSouth is still

[5] *BellSouth's Response to Cinergy*, p. 15 (March 10, 2005) & *BellSouth's Response to MCI*, p 14 (March 10, 2005)
[6] *MCI's Motion*, pp.11-12, ¶ 28 (March 2, 2005)
[7] *Id.*, p.12

providing those UNEs pursuant to the existing agreements and has stated it will continue to do so until the earlier of a decision by a convening authority or April 17, 2005. While it is possible that the parties could come to some negotiated agreement within a period of time set by the Authority, past history has shown that such negotiations can take far longer than 90 days. From a practical point of view, the parties could spend such time negotiating, fail to reach agreement and the CLECs file another emergency motion at the end of the negotiating period. Action of this sort would introduce unnecessary delay into a process the FCC intended to move swiftly. Such delay would do nothing more than hinder the rapid advancement of facility based competition the FCC intended. If the CLECs did not have other alternatives it would be different. I am convinced that the CLECs are not unreasonably prejudiced since the FCC provided other alternatives for the CLECs in the form of building their own facilities, leasing the network of other CLECs or through the use of tariffed services offered by BellSouth. Therefore, BellSouth is not required to furnish mass market switching and DS1 and DS3 transport, dark fiber transport and high capacity loops "new adds" UNEs exempted by the *TRRO* after April 17, 2005. Any negotiated rates, terms and conditions for the provision of such UNEs by BellSouth should be be trued up back to the March 11, 2005 date referenced in the *TRRO*.

For the foregoing reasons, I respectfully dissent from the majority's decision to grant alternative relief.

Sara Kyle, Director

5/11/05
Date