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January 6, 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 and Opposition to Motion to Dismiss*. Copies of the enclosed are being provided to counsel of record.

Cordially,

Joelle Phillips

JJP: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 AND OPPOSITION TO MOTION TO DISMISS

BellSouth Telecommunications Inc. ("BellSouth") respectfully submits this *Response and Opposition to the Motion to Dismiss* (*"Response"*) filed by KMC, Nuvox/NewSouth, and Xspedius ("the Joint CLECs").

I. INTRODUCTION AND SUMMARY OF ARGUMENT

For more than eight years, BellSouth has been subjected to federal unbundling rules that have consistently been struck down by the Courts. The Joint CLECs have essentially joined CompSouth in asking the Authority to delay an appropriate transition away from the most recent set of unbundling rules to have been struck down by the Courts. Their reason for seeking a delay is obvious – those unlawful rules grant them rights to which they are not entitled. By seeking to delay the transition away from these invalid rules, however, the Joint CLECs are, in effect, asking the Authority to further delay relieving BellSouth of obligations that are simply not lawful. The Authority should deny this request, convene a generic proceeding, and appoint a hearing officer to set a procedural schedule.

As background, in August 2003, the Federal Communications Commission ("FCC") released its *Triennial Review Order (TRO)*,[1] which set forth new unbundling obligations for ILECs. When the *TRO* became effective, BellSouth acted in accordance with the "modification of agreement" language in its interconnection agreements by sending change of law amendments to competitive local exchange carriers ("CLECs") to begin negotiations to effectuate the changes ordered by the *TRO*. BellSouth sent *TRO* change of law amendments to over 450 CLECs in nine states. To date, fewer than one third of these CLECs have executed amendments to effectuate this change in law.

On March 2, 2004, the D.C. Circuit Court of Appeals released its *USTA II* decision,[2] in which it vacated certain sections of the *TRO* and affirmed others. Once again, BellSouth sent change of law amendments to CLECs to effectuate the D.C. Circuit's Ruling. To date, fewer than 30 CLECs have executed an amendment to implement this change in law resulting from *USTA II*.

In August 2004, the FCC released its *Interim Rules Order*,[3] further modifying the rights and obligations of ILECs and CLECs. Again, BellSouth sent a supplemental change of law notice to CLECs to effectuate the additional changes ordered by the FCC in its *Interim Rules Order*. To date, fewer than 20 CLECs have

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[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; and Deployment of Wireline Service Offering Advanced Telecommunications Capability*, 2003 WL 22175730 (F.C.C.), 30 Communications Reg. (P&F) 1 (Rel. August 21, 2003).

[2] See *United States Telecom Ass'n v.* FCC, 359 F.3d 554 (D.C. Circuit 2004)(*"USTA II"*)

[3] See *Order and Notice of Proposed Rulemaking,* WC Docket No. 04-313, released August 20, 2004, effective September 13, 2004 (*"Interim Rules Order"*)

executed an amendment to effectuate the changes required by the *Interim Rules Order*.

Finally, on December 15, 2004 the FCC voted to adopt final rules as it promised it would in the *Interim Rules Order*. While the written order has not been released, the FCC has evidently made significant changes concerning the availability of UNEs. Assuming that the FCC does not otherwise provide a path forward, what BellSouth has proposed is the adoption of a process that that will allow for the timely amendment of existing interconnection agreements. That process, should it turn out to be necessary, needs to be put in place now, not months after the FCC finally releases its final written order.

The *TRO* was quite clear in establishing guidelines for ILECs and CLECs to follow in negotiating the changes required by the *TRO*. These guidelines are as follows:

> ***We find that delay in the implementation of the new rules we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry.***[4]
>
> Once a contract change is requested by either party, we expect that negotiations and any timeframe for resolving the dispute would commence immediately. We also find that the section 251(c)(1) duty to negotiate in good faith applies to these contract modification discussions, as they do under the section 252 process. Accordingly, any refusal to negotiate or cooperate with the contractual dispute resolution process, including taking actions that unreasonably delay these processes, could be considered a failure to negotiate in good faith and a violation of section 251(c)(1). Finally, to the extent a contractual change of law provision envisions a state role, we believe a state commission should be able to resolve a dispute over contract

[4] *TRO* at ¶ 703 (*emphasis added*).

> language at least within the nine-month timeframe envisioned for new contract arbitrations under section 252.[5]

The situation has now progressed even further beyond the *Interim Rules Order* at this point, because the FCC has now voted to establish its final rules. Although the FCC's order establishing its final unbundling rules has not yet been released, the FCC announced its findings with respect to unbundling on December 15, 2004. It is clear that, as of the effective date of the rules, there will be certain network elements that CLECs will no longer be able to order as UNEs. Hopefully, the FCC in its written order will obviate the necessity to amend existing agreements to remove those elements that BellSouth is no longer obligated to provide, but in the event it does not, the FCC was clear in its *Interim Rules Order* that ILECs should be permitted to seek change of law amendments expeditiously so that the final unbundling rules can be implemented without delay once they become effective.[6] A process that ensures implementation without delay is just what BellSouth is requesting in the amendments it has asked the CLECs to adopt, and that is just what the CLECs have refused to implement. The process that BellSouth has proposed needs to be adopted so that the FCC's final unbundling rules can be implemented promptly. More than 14 months have passed since the *TRO* became effective, and not even one-third of the CLECs in BellSouth's region have negotiated and signed a *TRO* amendment with BellSouth.

This pattern of delay must end. It is clear from the FCC orders described above that changes in existing Interconnection agreements are required, and must

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[5] *TRO* at ¶ 704.
[6] *IRO* at ¶¶22-23.

be implemented. The issue that BellSouth, the CLECs, and the various state commissions face is how those changes are going to be implemented. That is, will we proceed in an efficient, timely fashion, or will we spread the process out over months in hundreds of separate hearings addressing each individual interconnection agreement. The answer should be obvious, and the CLECs' objections to using the most efficient manner of accomplishing this task is inconsistent with prior positions taken by the CLECs, and it is intended solely to delay changes that are simply not favorable to the CLECs.

As discussed below, the various "legal" arguments espoused by the Joint CLECs are not persuasive.[7] Instead, they seek to force the Authority into wasteful and duplicative dockets as if the Authority had no choice but to proceed in that fashion. This is simply not the case. The Authority is well within its jurisdiction and legal authority to proceed in this case by way of a generic docket, open to all interested parties. As explained below, use of a generic docket is consistent with common sense, principles of administrative efficiency, the Authority's own rules, past positions taken by CLECs (including parties to this docket), and past Authority practice.

For these reasons, and for the additional reasons discussed below, BellSouth urges the Authority to deny the *Motion* filed by the Joint CLECs and to instead take up these issues in the reasonable generic format suggested by BellSouth in its *Petition* – ***a format where all affected parties may participate in one practicable***

[7] Some of these arguments are the same as those made by CompSouth. BellSouth has already responded to CompSouth's *Motion*. *See* BellSouth's *Response to Motion of CompSouth to Dismiss Bellsouth's Petition To Establish Generic Docket* filed December 3, 2004.

process. To do otherwise would simply permit the Joint CLECs to force the Authority to expend needless time and administrative resources administering hundreds of separate dockets all in the name of delay, rather than in an effort to implement (not avoid) these significant federal decisions.

II. ARGUMENT

A. Convening a Single Generic Proceeding to Address the Issues Presented in Bellsouth's *Petition* is Consistent with Common Sense, Principles of Administrative Efficiency, the Authority's Rules, Past Positions Taken by Parties to this Docket, and Past Authority Practice.

The Joint CLECs do not, and cannot, dispute the fact that many of the factual issues and most, if not all, of the legal issues set out in BellSouth's *Petition* will be the same regardless of which of the hundreds of interconnection agreements between BellSouth and CLECs in Tennessee is involved. Despite this obvious commonality of factual and legal issues, CompSouth and the Joint CLECs seem to suggest that the Authority is not allowed to consider these issues in a single proceeding but, instead, must convene hundreds of separate proceedings to address these issues. This defies common sense – clearly, it is more efficient and more prudent to address these common issues of law and fact in a single proceeding than it is to attempt to address them piecemeal in hundreds of individual proceedings.

The common-sense notion of addressing common issues between multiple parties in a single proceeding is expressly permitted by law. Rule 42.01 of the Tennessee Rules of Civil Procedure provides that

> [w]hen actions involving a common question of law or fact are pending before a court, the court may order all the actions

> consolidated or heard jointly and may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay...."

Similarly, the Authority's rules provide that:

> [T]he Authority ... may, on its own motion or the motion of any party, . . consolidate cases, ... or otherwise order the course of proceedings in order to further the just, efficient and economical disposition of cases consistent with the statutory policies governing the Authority ....[8]

Clearly, these rules allow the Authority the procedural flexibility to convene a generic docket as requested by BellSouth.

In fact, several of the parties that argue that the Authority cannot convene a generic proceeding to address BellSouth's *Petition* have successfully argued that this Rule allows a state commission to convene a single proceeding to address similar issues among multiple parties. Indeed, the Joint CLECs themselves sought and obtained Authority approval to proceed in a joint proceeding.[9] The Joint CLECs stated in their *Petition*, filed February 11, 2004, that "[b]ecause there are common questions of law and fact ..., separate filings and hearings would result in unwarranted expense to the parties and the Authority, as well as unnecessary delay." The Joint CLECs further submitted that "for reasons of administrative efficient and economy", the joint petition was "appropriate".[10] Furthermore, last year, KMC, Nuvox, NewSouth, and Xspedius sought to jointly arbitrate an

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[8] *See* TRA Rule 1220-1-2.22(2).

[9] *See Order Accepting Petitions for Arbitration*, Docket No. 04-00046, *Joint Petition for Arbitration of NewSouth Communications Corp, et al., of an Interconnection Agreement with BellSouth* (June 8, 2004). Moreover, as shown in BellSouth's *Response* to CompSouth's *Motion to Dismiss*, many CLECs have previously argued in support of generic proceedings. *See* pp. 2-3 of BellSouth's December 3, 2004 *Response*.

[10] *Petition*, ¶12.

interconnection agreement with BellSouth pursuant to Section 252 of the federal Telecommunications Act of 1996. The South Carolina Public Service Commission entered an Order allowing them to do so, succinctly explaining that a joint proceeding was appropriate in light of common fact and legal issues:

> ***We agree with [KMC, Nuvox, NewSouth, and Xspedius] that efficiency and benefits will result to all parties and to the Commission by continuing the hearing as a joint proceeding.*** We note that this consolidated hearing is consistent with the intent of 26 S.C. Code Ann. Regs. 103-864, which notes that two or more formal proceedings may be consolidated for hearing which involve a similar question of law or fact, and where rights of the parties of the public interest will not be prejudiced by such procedure. ***We hold that, even though the original Petition was filed jointly, this proceeding meets the tests stated in the Regulation, in that there are similar questions of law an/or fact involving all the [parties].***[11]

Likewise, in the instant proceeding, efficiency and benefits will result to all parties and to the Authority by continuing this docket as a generic proceeding, and BellSouth's request for a generic proceeding meets the tests stated in these rules.

Indeed, the Joint CLECs' own *Motion to Dismiss* acknowledged it may be prudent to consolidate arbitrations of the same or similar issues raised in separate arbitrations. The Joint CLECs' own advocacy goes on to state that "[i]t may be appropriate for the Authority to employ a generic proceeding to address issues of import to a variety of carriers who have interconnection agreements with BellSouth."[12]

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[11] *See* Order Ruling on Two Motions, *In Re. Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc. KMC Telecom III LLC, and Xspedius (Affiliates) of an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Order No. 2004-470 in Docket No. 2004-42-C at p. 3 (October 6, 2004)(emphasis added).

[12] See p. 4 of *Motion to Dismiss.*

BellSouth's proposed generic docket is not a novel approach. The TRA has entertained numerous generic proceedings relating to 252 obligations in the past. Many of CompSouth's members participated in such proceedings such as the Generic UNE docket in which the TRA established generally available rates for UNEs under Section 252. (*Petition to Convene a Contested Case Proceeding to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements*, Docket No. 97-01262). Likewise the TRA has engaged in generic proceedings to establish rules for arbitrations under Section 252. CLECs have also sought generic proceedings, such as the petition addressing the rate for switching filed by "the UNE-P Coalition" of CLECs (*Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to Declare Switching an Unrestricted Unbundled Network Element;* Docket No. 02-00207). As these precedential proceedings made clear, the TRA is well within its authority and jurisdiction to commence a generic change of law proceeding just as the Utility Commissions of North Carolina and Georgia have already decided to do – and, importantly, just as CompSouth advocated to the TRA in Tennessee in June.

BellSouth has initiated and followed the change of law process outlined in existing interconnection agreements – it is the vast majority of the CLECs that have refused to join BellSouth at the negotiating table. In seeking this generic proceeding BellSouth is simply asking the Authority to resolve common questions of law relating to these federal decisions that follow from the change of law letters that have been sent, rather than conducting hundreds of separate proceedings to achieve that same result. BellSouth has complied with the interconnection

agreements of the Joint CLECs regarding change of law process. The Joint CLECs' disingenuous suggestion that allowing negotiations in dispute resolutions processes to play out would somehow narrow issues is outrageous and not borne out by past experience. In fact, the Joint CLECs candidly acknowledge in their *Motion to Dismiss* that "on some issues, negotiations are almost certain to fail." The Joint CLECs' *Motion* further states that unbundling of related issues "... may eventually be among those more efficiently handled in a consolidated or generic proceeding."[13] The Joint CLECs are now attempting to string out as long as possible the implementation of changes in the law, which are inevitable.

B. The Authority Should Reject the Arguments Presented in the Joint CLECs' *Motion*.

The Joint CLECs' argument that BellSouth is seeking to evade negotiations is meritless. As noted above, BellSouth sent change of law letters to each of the Joint CLECs and remains willing to negotiate these issues with the Joint CLECs. BellSouth also remains willing to negotiate change of law issues in the context of the arbitration proceedings the Joint CLECs reference on pages 2-3 of their *Motion*.[14] To the extent that any such negotiations are successful, those negotiated provisions (and not the Authority's determinations in this docket) will govern the relationship between BellSouth and the Joint CLECs.[15] However, the

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[13] *See* p. 5 of Joint CLECs' *Motion to Dismiss*.

[14] In the agreement between BellSouth and the Joint CLECs that is referenced on pages 2-3 of the *Motion*, BellSouth does not agree with the Joint CLECs' characterization of the scope of that agreement. For instance, nothing in that document remotely suggests that BellSouth will not or cannot ask the Authority to convene a generic change-of-law docket or that BellSouth cannot invoke the change-of-law provisions in any of the Joint CLECs' existing arbitration agreements to implement the FCC's Interim Rules Order or the FCC's Final Rules.

[15] *Cf. TRO* at ¶ 29 ("Incumbent LECs shall continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and

vast majority of the CLECs operating in Tennessee have shown no interest in such negotiations, and negotiations with the Joint CLECs have not been fruitful to date.

The Joint CLECs also argue that before conducting this proceeding, the Authority should give the Joint CLECs an opportunity to respond to the issues as proposed by BellSouth and that the Authority should hold a prehearing conference or workshop to discuss various matters. These arguments ring hollow.

In an effort to facilitate an expeditious resolution of this proceeding, BellSouth served CompSouth, AT&T, KMC, Nuvox/NewSouth, Xspedius, and all other parties of record in the Triennial Review Dockets (Docket Nos. 03-00460, 03-00491, 03-00526 and 03-00527) with a copy of its *Petition* on October 29, 2004.[16] In the two months since the Joint CLECs were served with the *Petition*, BellSouth is unaware of any efforts the Joint CLECs have made with regard to their existing interconnection agreements with BellSouth to: "respond to the issues as proposed by BellSouth"; "create their own issues matrices"; determine if there are "issues upon which [they], other CLECs, and BellSouth may find agreement"; discuss a "proposed schedule for the proceeding"; or discuss "the process that should be adopted to get all of it done."[17] Again, the reason for this is clear – the Joint CLECs are more interested in delaying these proceedings in order to continue

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conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms, and conditions shall remain in place during the interim period, except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements . . . . As during the interim period, carriers shall remain free to negotiate alternative arrangements (including rates) superseding our rules (and state public utility commission rates) during the transition period.").

[16] See Exhibit A to this Response, which is a copy of BellSouth's cover letter and certificate of service that accompanied its *Petition*.

[17] *See* Joint CLEC's Motion at p. 6.

receiving the benefits of rules that are clearly invalid than they are in addressing the "issues" they raise in their *Motion*.

In any event, the Joint CLECs will have ample opportunity to respond to BellSouth's issues and to raise any additional issues they would like to raise when they file their direct and rebuttal testimony in this proceeding. In the meantime, BellSouth remains ready and willing to determine if there are issues upon which agreement can be reached and to discuss any other ideas the joint CLECs may wish to present. Rather than allowing this process to indefinitely perpetuate an invalid regime, however, the Authority should convene a generic docket and appoint a hearing officer to set a procedural schedule for these important issues.

C. BellSouth's Petition For A Generic Docket Is Not Premature And, In Fact, Is Pressing.

As BellSouth explained in its *Motion* to establish the docket, time is of the essence. The changes allowed by the *TRO* and the *USTA II* decision should have been implemented months ago. With regard to the *Interim Rules Order*, the first six month period established by the FCC in that Order will expire in March, 2005, or earlier in the event that the FCC's final unbundling rules become effective prior to that date. In its *Interim Rules Order*, the FCC explicitly noted that ILECs were free to initiate change of law proceedings that "presume the absence of unbundling requirements for switching, enterprise market loops, and dedicated transport, so long as they reflect the transition regime" set forth in that *Order*.[18] The FCC noted that this process would enable these changes to "take effect quickly."[19] For that

[18] *IRO* at ¶ 23.
[19] *IRO* at ¶ 23.

reason, BellSouth respectfully requested that the Authority accept its *Petition*, establish a procedural schedule, and hear this *Petition* in an expeditious matter so that at the appropriate time, the necessary modifications to existing interconnection agreements can be made without further delay.

This matter is now even more pressing in Tennessee. In the now-pending Joint CLEC Arbitration, the Hearing Officer has ruled that supplemental issues arising from the FCC and DC Circuit decisions will not be heard in that arbitration. It was clear from the Hearing Officer's discussion of this issue, during the recent status conference in that arbitration, that the availability of a Tennessee generic docket, in which to address these issues, influenced the decision to exclude those issues from the arbitration. [20]

Although the FCC's order establishing its final unbundling rules has not yet been released, the FCC announced its findings with respect to unbundling on December 15, 2004. It is clear that, as of the effective date of the rules, there will be certain network elements that CLECs will no longer be able to order as UNEs. Hopefully, the FCC in its written order will obviate the necessity to amend existing agreements to remove those elements that BellSouth is no longer obligated to provide, but in the event it does not, the FCC was clear in its *Interim Rules Order* that ILECs should be permitted to seek change of law amendments expeditiously so that the final unbundling rules can be implemented without delay

[20] Docket No. 04-00046, *See Order Directing Filing of Joint Issues Matrix and Amending Procedural Schedule*, entered January 4, 2005 and transcript of Pre-Hearing Conference held November 19, 2004, p. 14.

once they become effective.[21] The process that BellSouth has proposed needs to be adopted so that the FCC's final unbundling rules can be implemented promptly.

Significantly, many aspects of the *TRO* have not been disturbed by any action of the D.C. Circuit or the FCC. These aspects of the *TRO* are in effect and they change the law that was in place when most of the existing interconnection agreements were entered into, but in many cases, they have not been incorporated into existing interconnection agreements. Additionally, there needs to be a process in place to govern the transition from existing arrangements to arrangements under the FCC's final rules. The industry – BellSouth and CLECs alike – and the financial community desperately need clarity regarding how these aspects of the *TRO* will be implemented (e.g. how will the transition away from elements that are no longer available as UNEs at TELRIC rates to other arrangements take place and what is the timing of that transition). Finally, as noted above, the FCC expressly authorized state Commissions to begin change of law proceedings ***before new rules become effective***.

III. CONCLUSION

For all the reasons discussed above, BellSouth respectfully urges the Authority to deny the Joint CLECs' *Motion to Dismiss* and to instead to convene a generic proceeding and appoint a hearing officer to set a procedural schedule, as requested by BellSouth in its *Emergency Motion to Establish Schedule* filed in this docket on November 23, 2004.

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[21] *IRO* at ¶¶ 22-23.

Respectfully submitted,

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October 29, 2004

VIA HAND DELIVERY

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Tennessee Regulatory Authority
460 James Robertson Parkway
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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 fifteen copies of a letter providing a courtesy copy of the *Petition* in the referenced docket to counsel who participated in the *Triennial Review* dockets in Tennessee.

Very truly yours,

Guy M. Hicks

GMH:ch

Exhibit A

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General Counsel

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October 29, 2004

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

Dear Counsel:

Attached is a courtesy copy of BellSouth's *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law.* This courtesy copy is being provided to counsel for parties who participated in the *Triennial Review* dockets in Tennessee.

Very truly yours,

Guy M. Hicks

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CERTIFICATE OF SERVICE

I hereby certify that on October 29, 2004, a copy of the foregoing document was served on the parties of record, via the method indicated:

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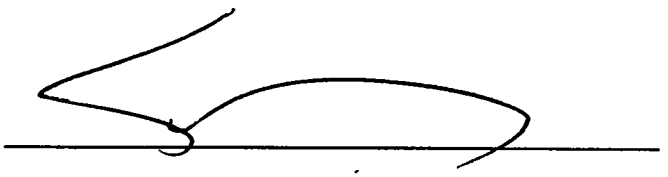

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I hereby certify that on January 6, 2005, a copy of the foregoing document was served on the following, via the method indicated:

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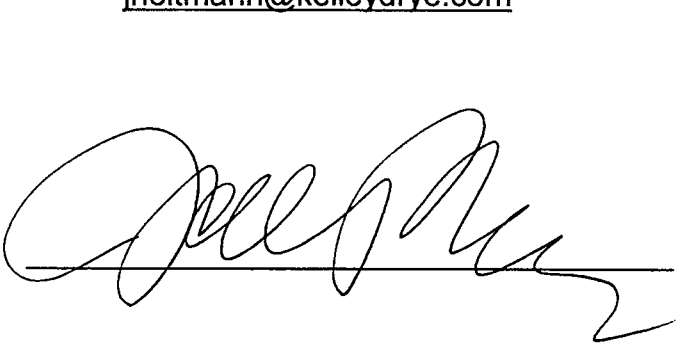

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