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Sent: Friday, May 21, 2004 3:42 PM
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Cc: Kristin U. Shulman; Dana Shaffer; Richard Chapkis; Nancy White; Beth Keating
Subject: E Filing: Joint CLECs Emergency Complaint

040489-TP

Pursuant to the Commission's procedures for e-filing, the Joint CLECs (XO Florida, Inc., Allegiance Telecom of Florida, Inc.) provide the attached e-filing.

a. The attorney responsible for the filing is:

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b. This filing creates a new docket.

c. The document is filed on behalf of the Joint CLECs (XO Florida, Inc., Allegiance Telecom of Florida, Inc.)

d. The document is 11 pages long.

e. The document is called: Joint CLECs Emergency Complaint Seeking an Order Requiring BellSouth and Verizon to Continue to Honor Existing Interconnection Obligations.

DOCUMENT NUMBER-DATE

05874 MAY 21 3

FPSC-COMMISSION CLERK

ORIGINAL

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Proceeding to Address Actions
Necessary to Respond to the Federal
Communications Commission Triennial
Review Order Released August 21, 2003

Docket No. 040489-
Filed: May 21, 2004

**JOINT CLECS' EMERGENCY COMPLAINT SEEKING AN ORDER REQUIRING
BELLSOUTH AND VERIZON TO CONTINUE TO HONOR EXISTING
INTERCONNECTION OBLIGATIONS**

XO Florida, Inc. (XO) and Allegiance Telecom of Florida, Inc. (Allegiance), (collectively, Joint CLECs), pursuant to rules 25-22.036 and 28-106.201, Florida Administrative Code, request the Commission to enter an order requiring BellSouth Telecommunications, Inc. (BellSouth) and Verizon Florida, Inc. (Verizon) (collectively, the ILECs) to continue to honor their existing obligations, under state and federal law, as set forth in Commission-approved interconnection agreements (ICAs) and to continue to provide service pursuant to those agreements pending resolution of judicial review of the Federal Communications Commission's (FCC's) Triennial Review Order (TRO)¹ and any resulting FCC action or additional Commission action. Because the ILECs' intent to disrupt service is imminent, the Joint CLECs request that this matter be processed on an emergency, expedited basis.

¹ *In re Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket Nos. 01-338, 96-98 & 98-147, Report and Order and Order on Remand (rel. Aug. 21, 2003).

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INTRODUCTION

1. Petitioners in this case are:

XO Florida, Inc.
105 Molloy Street, Suite 300
Nashville, TN 37201-2315

Allegiance Telecom of Florida, Inc.
700 E. Butterfield Road, Suite 400
Lombard, IL 60148

PARTIES

2. XO is a telecommunications carrier, as defined by 47 U.S.C. § 153(44), with a regional office at 105 Molloy Street, Suite 300, Nashville, Tennessee 37201-2315. XO has a certificate to provide local exchange telecommunications services in the State of Florida on file with the Commission.

3. Allegiance is a telecommunications carrier, as defined by 47 U.S.C. § 153(44), with a regional office at 700 E. Butterfield Road, Suite 400, Lombard, Illinois 60148. Allegiance has a certificate to provide local exchange telecommunications services in the state of Florida on file with the Commission.

4. BellSouth is an incumbent local exchange carrier and a Regional Bell Operating Company (RBOC), as defined by 47 U.S.C. § 251(h)(1) and 47 U.S.C. § 153(4), respectively. Its offices are located at 675 W. Peachtree Street, Atlanta, Georgia 30375.

5. Verizon is an incumbent local exchange carrier as defined by 47 U.S.C. § 251(h)(1). Its offices are located at 600 Hidden Ridge, Texas 75038.

6. All pleadings, notices and other documents related to this proceeding should be provided to:

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JURISDICTION

7. The Commission has jurisdiction to hear this matter pursuant to Chapter 120, Florida Statutes, §364.01, Florida Statutes, which provides the Commission with the power to regulate telecommunication companies, promote competition, and prevent anticompetitive behavior and 47 U.S.C. § 252(e)(3), and 47 U.S.C. § 253 (b). The Telecommunications Act of 1996 (Act) confers jurisdiction on the Commission to adjudicate disputes arising out of interconnection agreements.

ALLEGATIONS

8. On March 2, 2004, the D.C. Circuit Court of Appeals vacated portions of the TRO in which the FCC established unbundling requirements for local switching, transport, and other unbundled network elements (UNEs).² The Court temporarily stayed its vacatur for 60 days, or until May 2, 2004. The D.C. Circuit recently granted the FCC's unopposed motion to

² *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

extend the stay until June 15, 2004. If there are no further extensions and the stay expires, no FCC rules governing the unbundling requirements under § 251 of the Telecommunications Act of 1996 (Act) will exist for local switching, transport, and other UNEs.

9. ⁶ Since the issuance of the D.C. Circuit Court's decision, BellSouth has notified CLECs that its obligation to provide UNEs was eliminated by the Court and that those UNEs will become unavailable to CLECs. Specifically, on March 23, 2004, BellSouth issued a Carrier Notification stating that "the Court vacated the FCC's rules associated with, among other items, mass-market switching, thereby *eliminating* BellSouth's obligation to provide unbundled switching and, therefore Unbundled Network Elements-Platform (UNE-P) at TELRIC rates."³ Thereafter, on April 22, 2004, BellSouth issued another Carrier Notification, stating that "upon the [Court's] effective *vacatur* of portions of the FCC's [TRO], BellSouth's obligation to provide dedicated transport and high capacity loops⁴ as an unbundled network element pursuant to § 251 of the Telecommunications Act of 1996 *will be eliminated*."⁵ Based on those Carrier Notification letters, Joint CLECs understand that -- after June 15, 2004 -- BellSouth only intends to offer local switching and UNE-P pursuant to so-called "commercial agreements" and that BellSouth intends to require that high capacity transport and loop UNEs (including dark fiber) be converted to special access circuits at significantly higher prices.

10. BellSouth, moreover, has not represented that it will continue to honor its obligation to provide access to network elements pursuant to its § 251 obligations and its

³ BellSouth Carrier Notification SN91084043 to All CLECs Regarding Commercial Agreement for BellSouth DS0 Wholesale Local Voice Platform Service (March 23, 2004) (emphasis added).

⁴ Despite BellSouth's reference to loops, *USTA II* addressed the nationwide impairment finding only with respect to switching and dedicated transport, and states that "the petitions for review are otherwise denied" (*USTA II* at page 62); thus, the court did not upset the impairment finding for high capacity loops. Without in any way conceding that the D.C. Circuit's decision has any impact on high capacity loops, the Joint CLECs include high capacity loops among the UNEs at issue in this pleading to ensure that the requested order applies to all UNEs affected by the D.C. Circuit's decision.

⁵ BellSouth Carrier Notification SN91084063 to All CLECs Regarding Commercial Offering for BellSouth Unbundled Network element (UNE) Transport Transition (April 22, 2004) (emphasis added).

obligations under its existing ICAs and the SGAT, nor has BellSouth represented that it will not seek to either have those agreements declared void *ab initio* or to amend those ICAs and its SGAT to eliminate switching, transport, and high capacity loop UNEs after June 15, 2004. BellSouth's silence in this regard is deafening because, upon expiration of the D.C. Circuit Court's stay, BellSouth has every incentive to seek to revise all of its ICAs to eliminate those UNEs, including possibly even refusing to process any new CLEC orders for UNEs after June 15, 2004, initiating billing for existing circuits at special access tariff rates, and requiring mass migration of customers from dark fiber facilities to special access circuits. If BellSouth were to seek to do so, the Commission should expect CLECs to initiate multiple individual Commission proceedings challenging BellSouth's actions and interpretations of its interconnection agreements and applicable law.

11. Similarly, Verizon has not represented that it will continue to honor its obligations to provide access to network elements pursuant to its § 251 obligations and its obligations under existing interconnection agreements, nor has Verizon represented that it will not seek to either have those agreements declared void *ab initio* or to amend those ICAs⁶ to eliminate switching, transport, and high capacity loop UNEs after June 15, 2004.

12. The ILECs' response to the D.C. Circuit Court's decision has created tremendous uncertainty with respect to the continued availability of local switching, transport, high capacity loop and dark fiber UNEs. Joint CLECs currently obtain those UNEs under their ICAs with the ILECs and use those UNEs to provide service to Florida end user customers. Indeed, availability of UNE-P, unbundled transport, high capacity loops and dark fiber UNEs was a critical element in the decision to endorse BellSouth's entry into Florida's interLATA marketplace. It was

⁶ In fact, Verizon has an amendment proceeding before the Commission. Docket No. 040156-TP.

similarly critical to the approval of the Bell Atlantic/GTE merger.⁷ An immediate elimination of those UNEs at Commission-prescribed rates developed using § 252(d) pricing standards would have a devastating impact on Florida local exchange competitors. But, more importantly, the elimination of UNEs has the potential to disrupt service to end user customers, particularly those customers who obtain service from providers other than the ILECs.

13. Accordingly, Joint CLECs urge the Commission to issue an order requiring the ILECs to continue to honor all of their obligations under existing ICAs and SGATs, including, but not limited to, the provisioning of unbundled local switching (including UNE-P), transport, dark fiber, and high capacity loops at § 252(d) compliant rates, until final federal unbundling rules are in place or until the Commission can undertake a generic proceeding to determine the impact of the D.C. Circuit's decision on the ILECs' existing obligations to provide these UNEs. A generic proceeding would most efficiently make use of Commission and affected party resources to determine issues of general applicability, including, but not limited to, the following:

- a. Whether the D.C. Circuit's *USTA II* decision represents a "change in law" and, thus, permits the ILECs to seek to amend or modify their obligations to provide UNEs, or whether the ILECs remain obligated to provide UNEs pursuant to § 251 of the Act. The Act establishes the ILECs' obligation to provide UNEs. Even in the absence of FCC rules, existing ICAs and SGAT provisions require the ILECs to provide UNEs and are fully consistent with, and required by, the Act.
- b. Whether BellSouth remains obligated to provide the subject UNEs under § 271 of the Act under the rates, terms, and conditions the Commission has established. BellSouth obtained authority to provide interLATA services in Florida in

⁷ See, *Memorandum Opinion and Order*, 15 FCC Rcd 14032 (2000).

reliance on compliance with the competitive checklist, and having now received the benefit of its bargain, BellSouth should not be permitted to deprive competitors and consumers of the benefit of their bargain.

- c. Whether Verizon remains obligated to provide the subject UNEs pursuant to the Bell Atlantic/ GTE Merger Order. The merger was approved in reliance on the provision of such UNEs.
- d. Whether, as a matter of Florida law, the ILECs should be required to provide the subject UNEs at § 252(d) or comparable Commission-prescribed rates. Section 252(d)(3) of the Act expressly preserves the authority of state commissions to enforce their own requirements with respect to access to, and interconnection with, incumbent local exchange company facilities.

14. The Joint CLECs do not seek to preclude parties from voluntarily negotiating amendments to their interconnection agreements to incorporate all or part of the TRO or to prevent any commercial negotiations in the wake of the D.C. Circuit's decision. Rather, Joint CLECs' objective is to ensure that Florida's end users are protected from service disruption and to ensure that the ILECs will not unnecessarily expend party and Commission resources after June 15, 2004, by seeking to require Joint CLECs to amend their existing interconnection agreements (or act unilaterally) to eliminate provisioning of existing UNEs at § 252(d) rates until critical issues have been resolved at both the federal and state levels.⁸

15. The Commission has ample authority to require the ILECs to continue to comply with their obligations under existing ICAs and SGATs. The Commission has reviewed – and in many cases arbitrated – each effective ICA in Florida. The Commission has long asserted

⁸ Verizon has already started down this inefficient path in Docket No. 040156-TP.

jurisdiction to enforce those agreements.⁹ Issues concerning the extent to which the ILECs must comply with their obligations under those agreements fall squarely within the Commission's jurisdiction and authority to interpret applicable federal legal requirements and prescribe appropriate rates, terms, and conditions for unbundled access to the ILECs' network in Florida.

16. The Commission also has independent authority under state law to require the ILECs to continue to provide existing UNEs under current ICAs and SGATs. Florida's telecommunications legislation predates the federal Act and requires each ILEC to "unbundle all of its network features, functions, and capabilities, including access to signaling databases, systems and routing processes, and offer them to any other telecommunications provider requesting such features, functions or capabilities..." § 364.161(1), Florida Statutes. The Florida Legislature has made it clear that competitive telecommunications services are in the public interest and that the Commission should encourage such competition:

The Legislature finds that the competitive provision of telecommunications services, including local exchange telecommunications service, is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure.

§ 364.01(3), Florida Statutes. The Legislature gave this Commission exclusive jurisdiction to encourage and promote competition and to ensure that "all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior..." § 364.01(4)(b), (d), (g), Florida Statutes. Thus, Florida law thus provides more than ample authority for the Commission to enter the requested order and to preserve the nascent state of competition until the law has been settled. To do otherwise would run counter to this Commission's responsibilities, create chaos in the Florida marketplace, and cause irreparable harm to Florida end users.

⁹ See, *i.e.*, Order No. PSC-03-1082-FOF-TP at 14.

17. The Commission should exercise its authority to require the ILECs to continue to provide unbundled local switching, dark fiber, transport, and high capacity loops at existing rates, terms, and conditions. The Commission should not permit the potential chaos created by the FCC and the D.C. Circuit to affect the ability of Florida consumers to have an effective choice of local service providers. Accordingly, the Commission should require the ILECs to continue to provide service under the ICAs approved by this Commission until the federal dispute over local switching, dark fiber, transport, and high capacity UNEs has been resolved or until the Commission can conduct the appropriate proceedings to determine whether, in the absence of federal rules, the ILECs should be required to provide these UNEs on some other basis.

REQUEST FOR RELIEF

WHEREFORE, the Joint CLECs request the following relief:

- A. That the Commission process this request on an emergency, expedited basis given the serious potential for harm;
- B. That the Commission enter an order requiring the ILECs to continue to honor all of their obligations under existing state and federal law, and continue to provide access to UNEs under the current rates, terms, and conditions of their ICAs and SGATs, including the provisioning of unbundled local switching (including UNE-P), transport, high capacity loops, and dark fiber at Commission-prescribed rates established under Section 252(d) standards, until final federal unbundling rules are in place or until the Commission can undertake a generic proceeding to determine the impact of the D.C. Circuit's decision on the ILECs' existing obligations to provide these UNEs; and
- C. That the Commission grant such other or further relief as the Commission finds fair, just, reasonable, and sufficient.

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Attorney for Joint CLECs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Joint CLECs' Emergency Complaint Seeking an Order Requiring BellSouth and Verizon to Continue to Honor Existing Interconnection Obligations has been furnished by (*) electronic mail, (**) hand delivery, and (***) federal express, this 21st day of May 2004 to the following:

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