BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	
Proceeding to Address Actions Necessary	)	Docket No. 040489-TP
To Respond to the Federal Communications	)	
Commission Triennial Review Order	)	Filed: June 10, 2004
Released August 21, 2003	)	

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE IN OPPOSITION AND MOTION TO DISMISS THE EMERGENCY COMPLAINT OF XO FLORIDA, INC. AND ALLEGIANCE TELECOM OF FLORIDA, INC.

INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits its Response in Opposition and Motion to Dismiss the *Joint CLECs' Emergency Complaint Seeking An Order Requiring BellSouth and Verizon to Continue to Honor Existing Interconnection Obligations* ("*Complaint*") filed by XO Florida, Inc. and Allegiance Telecom of Florida, Inc. (collectively, "Joint CLECs"). The Joint CLECs seeks an emergency order requiring BellSouth "to continue to honor [its] existing obligations . . . in interconnection agreements." Complaint, p. 1. Specifically, the Joint CLECs ask that the Commission order BellSouth "to continue to provide service" claiming BellSouth has an imminent intent to disrupt service and that BellSouth may "... possibly even refus[e] to process any new CLEC orders for UNEs after June 15, 2004."[1] Nothing could be further from the truth. As set forth more fully below, the Joint CLECs' Complaint has no substantive merit and BellSouth respectfully requests that the Commission dismiss the Complaint, or in the alternative, given that the issues related to an orderly transition in the event the D.C. Circuit Court's mandate takes effect on June 16, 2004 are not going to go

[1] See Complaint, p. 1 and p. 5.

away, that this Commission hold this Complaint in abeyance and address issues for the industry as a whole rather than on a piecemeal basis.

DISCUSSION

The Joint CLECs purportedly filed their Complaint in response to Carrier Notification Letters issued by BellSouth on March 23 and April 22, 2004. Both letters invited Competing Local Exchange Carriers ("CLECs") to enter into discussions with BellSouth. The March 23, 2004 letter invited CLECs to negotiate the purchase of mass market switching at commercially reasonable rates. The April 22, 2004 letter invited CLECs to negotiate a transition plan for CLECs' access to dedicated transport and high capacity loops. Both letters were the result of the call by Federal Communications Commission ("FCC") Chairman Michael Powell, echoed by the other members of the FCC, for carriers to enter into negotiations to resolve the uncertainty created by the D.C. Circuit Court of Appeals' decision vacating portions of the *Triennial Review Order*.[2]

Importantly, neither of these Carrier Notification Letters threatens nor even suggests that, as the Joint CLECs claim, BellSouth intends to disrupt service to its wholesale customers or unilaterally discontinue the offering of local switching, dedicated transport, high capacity loops and dark fiber at the rates, terms, and conditions in their respective interconnection agreements. Rather, the March 23, 2004 Carrier Notification Letter simply advised CLECs that:

- On March 2, 2004, the United States Court of Appeals for the District of Columbia vacated and/or remanded significant portions of the TRO including the FCC's rules associated with mass-market switching;

- In light of the Court's Order, BellSouth is prepared to offer switching and DS0 loop/switching combinations (including what is currently known as UNE-P) at

[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978 (2003) ("Triennial Review Order"), reversed in part on other grounds, United States Telecom. Ass'n v. FCC, Nos. 00-1012, et al. (D.C. Cir. Mar. 2, 2004).

commercially reasonable and competitive rates. BellSouth invited CLECs to enter into good faith negotiations of a market-based commercial agreement aimed at benefiting the end user, establishing stability in the industry and allowing real competition to continue throughout the BellSouth region.

Likewise, the April 22, 2004 Carrier Notification Letter simply advised CLECs that:

- Once the D.C. Circuit's order vacating portions of the FCC's *Triennial Review Order* becomes effective, which is expected to occur on June 15, 2004, "BellSouth's obligation to provide dedicated transport and high capacity loops as an unbundled network element pursuant to Section 251 of the Telecommunications Act of 1996 will be eliminated";

- With the prospect of the D.C. Circuit's vacatur taking effect and as a result of "regulatory uncertainty," BellSouth advised that it was "preparing to offer its dedicated transport and high capacity loops products solely via its access tariffs";

- Until June 15, 2004, BellSouth indicated that it was "offering a two-party transition plan to effect an efficient and coordinated transition" from dedicated transport and high capacity loops purchased at TELRIC rates under existing interconnection agreements to services offered via BellSouth's tariffs and invited CLECs "to enter into good faith negotiations of this plan as soon as possible in order to complete these negotiations by June 15, 2004."

Nothing in either of these Carrier Notification Letters can reasonably be read to suggest that BellSouth intends to "... refuse to process any new CLEC orders..." or disrupt service, as the Joint CLECs allege.

However, in the event the Joint CLECs were laboring under a genuine misunderstanding about the meaning of BellSouth's Carrier Notification Letters, any such misunderstanding should have been resolved by BellSouth's May 10, 2004 letter to XO, a copy of which is attached as Exhibit 1. In this letter, BellSouth pointed out to XO that "[n]owhere in the Carrier Notification Letter was there any discussion or indication that BellSouth will unilaterally breach the Interconnection Agreement and ***it is not BellSouth's intent to do so.***" BellSouth's letter further advised XO that BellSouth "recognizes its obligations under the existing Interconnection Agreements, but will pursue the legal and regulatory options available to it once the *vacatur*

becomes effective." Finally, the May 10 letter reiterated that BellSouth is offering a transition plan for CLECs' access to high capacity dedicated transport and high capacity loops.

As a result of BellSouth's May 10, 2004 letter, which XO had before it filed its *Complaint*, the Joint CLECs cannot seriously believe that BellSouth intends to "refuse to process any new CLEC orders" or that BellSouth had an imminent intent to disrupt service.

Moreover, following the May 10, 2004 letter to XO, BellSouth issued a Carrier Notification Letter dated May 24, 2004 to all CLECs that stated:

> The District of Columbia Circuit Court of Appeals' March 2, 2004, Opinion vacating certain Federal Communications Commission (FCC) Unbundled Network Element (UNE) rules is scheduled to become effective on June 16, 2004. ***This letter is to affirm that BellSouth will not unilaterally breach its interconnection agreements.*** Upon vacatur of the rules, BellSouth does intend to pursue modification, reformation or amendment of existing Interconnection Agreements (with the exception of new commercial and transition agreements) to properly reflect the Court's mandate. Rumors have been circulating that, upon vacatur, services that BellSouth now provides to CLECs under their Interconnection Agreements will be disconnected. Contrary to such rumors, if the rules are vacated, BellSouth will not, as a result of the vacatur, unilaterally disconnect services being provided to any CLEC under the CLEC's Interconnection Agreement.

BellSouth also filed a letter on May 28, 2004, with this Commission responding to the Joint CLECs' request for expedited relief, a copy of which is attached as Exhibit 2. Specifically addressing the May 24, 2004 Carrier Notification Letter, BellSouth's letter plainly states that "BellSouth will not 'unilaterally disconnect services being provided to any CLEC under the CLEC's Interconnection Agreement.'" Moreover, the letter states "BellSouth will effectuate changes to its interconnection agreements via established legal procedures." Finally, BellSouth recently filed the Declaration of Keith O. Cowan and Jerry D. Hendrix in the D.C. Circuit Court of Appeals, which provides further assurance of BellSouth's position. That Declaration is attached as Exhibit 3.

In light of the foregoing, Joint CLECs cannot seriously contend they believe BellSouth has an imminent intent to disrupt service. Under the circumstances, there is simply no basis for proceeding further with the Joint CLECs Complaint. Because BellSouth has repeatedly stated that it will not "unilaterally breach its interconnection agreements" there is no need for this Commission to order BellSouth "to continue to honor [its] existing obligations" or to order BellSouth "to continue to provide access to UNEs" as requested by the Joint CLECs. It is difficult to see how it could be any clearer. BellSouth will honor its existing Interconnection Agreements until such time as established legal processes relieve BellSouth of that obligation. That may occur through the "change of law" provisions in the Interconnection Agreements themselves, by a generic proceeding held by the appropriate state or federal agencies, or by a proceeding filed in the appropriate court. However, BellSouth has stated clearly and without exception that it will not act unilaterally to modify or change the existing agreements. As a result, it should be clear that there is no "emergency" and further that there is no substantive merit to the Joint CLECs' Petition.[3]

Of course, the Joint CLECs' Complaint seeks more than a declaration concerning their existing interconnection agreements, which is not and never should have been an issue in dispute. Actually, the Joint CLECs are asking this Commission to enter a broad, open-ended injunction requiring BellSouth to maintain the status quo even though the law and rules are changing. (*See* Complaint p 9). The Joint CLECs really seek to lead the Commission into a thorny legal briar patch by asking the Commission to declare that BellSouth is obligated to

[3] The Tennessee Regulatory Authority ("TRA") voted to dismiss an almost identical complaint filed by XO on Monday, June 7, 2004. In addition, on June 8, 2004, BellSouth reiterated its commitments in the status call in Docket Nos. 030851 and 030852. Counsel for XO attended the TRA agenda conference on June 7, 2004 and participated in the June 8, 2004 call facilitated by this Commission. As a result, the Joint CLECs are well aware of BellSouth's commitments, and cannot realistically claim that the allegations in their Complaint have merit.

provide UNEs under state law and Section 271 of the federal Act.[4] The Commission should not follow the Joint CLECs' lead.

As an initial matter, the Joint CLECs carefully avoid mentioning some of the primary policies behind the Florida Statutes – namely, to "encourage investment in telecommunications infrastructure." § 364.01 (3). Likewise, the Florida Legislature requires that "*all* providers of telecommunications services are treated fairly" and prohibits "unnecessary regulatory restraint." *Id,* subsection (g) (emphasis supplied). Finally, this Commission must "eliminate any rules and/or regulations which will delay or impair the transition to competition." *Id.,* subsection (f).

Granting continued access to UNEs on a ubiquitous basis would not encourage investment in Florida's telecommunications infrastructure, would not treat BellSouth fairly, and would inhibit, rather than encourage, the transition to competition and lessened regulatory restraint. As the D.C. Circuit noted in striking down the FCC's second attempt at adopting unbundling rules, the "competition performed with ubiquitously provided ILEC facilities ..." is "completely synthetic competition" that does not fulfill Congress's purposes in enacting the 1996 Act. *See United States Telecom Association v. FCC,* 290 F.3d 415, 424 (D.C. Cir. 2002) ("*USTA I*"), *cert denied, WorldCom, Inc. v. United States Telecom Association,* 155 L.Ed.2d 344 (2003). The same is true with respect to the Florida statutes. Whatever "synthetic competition" that ubiquitous access to UNEs may bring about in Florida is inconsistent with the legislature's desire to encourage investment in the telecommunications infrastructure in the state, rather than artificial competition that relies solely upon BellSouth's network.

Another problem with the Joint CLECs' reliance on state unbundling law is the preemption standard in Section 251(d)(3) of the 1996 Act, which bars a state unbundling

[4] See Complaint p. 8.

requirement that "thwarts or frustrates the federal regime ...." *Triennial Review Order* ¶ 192.[5] Although the FCC did not determine that additional state unbundling requirements were unlawful per se and did not preempt any specific state requirements, the FCC made clear that:

> If a decision pursuant to state law were to require the unbundling of a network element for which the [FCC] has either found no impairment – and thus has found unbundling that element would conflict with the limits in Section 251(d)(2) – or otherwise declined to require unbundling on a national basis, *we believe it unlikely that such a decision would fail to conflict with and 'substantially prevent' implementation of the federal regime, in violation of Section 251(d)(3)(C).*

Id. ¶ 195 (emphasis added). Thus, the Joint CLECs' suggestion that the Commission can go beyond existing FCC rules (that currently are in effect at least for the time being) by requiring that BellSouth to continue to provide UNEs in circumstances where the FCC has determined that such unbundling should not be required, the Commission would be "thwarting" and "frustrating" federal law, and any such order would be preempted.

Even in the absence of binding FCC rules (which would be the case if the D.C. Circuit mandate is issued), the Commission is not at liberty to adopt whatever unbundling requirements it may desire. Rather, any unbundling requirements imposed by the Commission that are "inconsistent" with the 1996 Act would be preempted. Thus, to the extent the Commission were to apply an impairment analysis contrary to the views of the D.C. Circuit by proceeding from the belief that "more unbundling is better," the Commission's actions would be unlawful. *See USTA I,* 290 F.3d at 425. Furthermore, in the absence of binding FCC rules, the Commission would have to adhere to the D.C. Circuit's interpretation of the federal impairment standard, which, with respect to switching, would require consideration of: (1) BellSouth's hot cut performance; (2) "narrowly-tailored alternatives to a blank requirement that mass market switches be made

[5] Section 251(d)(3) provides that the FCC "shall not preclude the enforcement of any regulation, order, or policy of a State commission" that "establishes access and interconnection obligations of local exchange carriers" and that "is consistent with the requirements of this section" and "does not substantially prevent implementation of the requirements of this section and the purposes of this part."

available as UNEs"; (3) a more thoroughly defined concept of "economic impairment"; (4) "intermodal alternatives," which, according to the D.C. Circuit, cannot be ignored "when evaluating impairment"; and (5) the extent to which below-cost retail rates are connected "either with structural features that would make competitive supply wasteful or with any other purposes of the [1996] Act." *See USTA II,* slip op. at 22-25. Concerning high capacity loops, dark fiber, and transport, the Commission would have to consider: (1) facilities deployment along similar routes and to buildings when assessing impairment; (2) the availability of special access services; and (3) a more thoroughly defined concept of "economic impairment."[6]

If the Commission were to adopt an unbundling requirement without considering the Court's required factors, as the Joint CLECs appears to urge the Commission to do, the limitations that Congress imposed in the 1996 Act would be undermined. Such a result would be "inconsistent" with the requirements of the 1996 Act and thus preempted by federal law. *See* 47 U.S.C. § 261(b), (c); *Triennial Review Order* ¶ 192 (noting disagreement "with those that argue that states may impose any unbundling framework they deem proper under state law, without regard to the federal regime." These commenters overlook the specific restraints on state actions found in Sections 261(b) and (c) of the Act") (footnotes omitted); *see also Indiana Bell v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004) (7th Cir. 2004) (finding that imposition of enforcement plan under Section 271 was inconsistent with the procedural scheme contemplated by the 1996 Act and thus was preempted); *AT&T Communications of Illinois v. Illinois Bell*, 349 F.3d 402 (7th Cir. 2003) (state statute mandating methodology for rates for unbundled network elements was inconsistent with TELRIC and thus preempted).

The uncertainty of the FCC's rules underscores the peril of the Commission's proceeding with the Joint CLECs' *Petition* to the extent it seeks a declaration based upon state law. If the

[6] See USTA II, slip op. at 22-30.

D.C. Circuit issues its mandate and the FCC's unbundling rules relating to UNEs are vacated, the FCC will be required to adopt new rules, which the Commission would be duty-bound to follow. Even in the interim, the Commission lacks a complete record to decide the issues that the D.C. Circuit held must be considered as part of any impairment analysis. In the event *certiorari* is sought and granted by the Supreme Court and a stay of the D.C. Circuit's mandate is issued (which is merely conjecture at this point), the Commission would have to adhere to the FCC's rules, and no need would exist for the Commission to rely upon state law in reaching its unbundling decision. However, until the status of the FCC's rules is resolved, the Commission cannot make any impairment findings, particularly given that further proceedings in Docket Nos. 030851-TP and 030852-TP have been stayed.

The Joint CLECs' state law arguments are an ill-conceived attempt to make an end-run around federal law, and the Joint CLECs' reliance upon federal law to obtain the relief it seeks fares no better. For example, even though BellSouth may be required to provide access to local switching, unbundled dedicated transport, unbundled high capacity loops and dark fiber under Section 271 of the 1996 Act, the Commission has no authority to establish rates for network elements offered pursuant to Section 271.

The 1996 Act only gives state commissions authority to establish rates for solely those network elements that are required to be unbundled pursuant to Section 251 of the 1996 Act.[7] Section 252(d)(1) specifically authorizes state commissions to "determin[e]" rates for unbundled network elements for "purposes of subsection (c)(3) of" Section 251. By contrast, the 1996 Act gives state commissions no pricing authority over network elements offered pursuant to Section 271.

[7] See 47 U.S.C. § 252(d).

A checklist item required under Section 271 that does not satisfy the unbundling requirements of under Section 251 is subject to the pricing standards of Sections 201(b) and 202(a), not Section 252.[8] Numerous cases hold that claims based on Sections 201(b) and 202(a) are within the jurisdiction of the FCC, not the state public service commissions. *See, e.g., In Re: Long Distance Telecommunications Litigation*, 831 F.2d 627, 631 (6th Cir. 1987) (Section 201(b) speaks in terms of justness and reasonableness, which are determinations that "Congress has placed squarely in the hands of the [FCC]") (quoting *Consolidated Rail Corp. v. National Association of Recycling Industries, Inc.*, 449 U.S. 609, 612 (1981)); *see also Total Telecommunications Services Inc. v. American Telephone & Telegraph Co.*, 919 F. Supp. 472, 478 (D.C. 1996) (FCC has primary jurisdiction over claims that telecommunications tariffs or practices are not just or reasonable), *aff'd.*, 99 F.3d 448 (D.C. Cir. 1997); *Competitive Telecommunications Association v. FCC*, 87 F.3d 522 (D.C. Cir. 1996) (Sections 201(b) and 202(a) "authorized the [FCC] to establish just and reasonable rates, provided that they are not unduly discriminatory").

Moreover, the FCC has held that the determination of "whether a particular checklist element's rate satisfies the just and reasonable pricing standard of Section 201 and 202 is a fact specific inquiry" that the FCC will undertake.[9] Because the FCC has held that it will "undertake" review of whether the just and reasonable pricing standard has been satisfied, the Joint CLECs cannot explain how the Commission can lawfully have the authority to do so.

Even assuming the Commission had the authority to set BellSouth's rates for UNEs under Section 271 (which is not the case), those rates cannot lawfully be set at TELRIC, as the

[8] Triennial Review Order ¶ 662.
[9] Triennial Review Order ¶ 664.

Joint CLECs urge.[10] The FCC considered and rejected the possibility that TELRIC should be used to establish rates for checklist items provided under Section 271. The FCC could not have been more clear that TELRIC "only applies for the purposes of implementation of section 251(c)(3) – meaning only where there has been a finding of impairment with regard to a given network element."[11] According to the FCC, "pricing pursuant to section 252 [i.e., TELRIC] does not apply to network elements that are not required to be unbundled ...."[12]

The FCC also rejected the use of TELRIC pricing for Section 271 elements that are not required to be unbundled in its Third Report and Order, *In re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996.*[13] In that case, the FCC noted that when

> a checklist network element is no longer unbundled, we have determined that a competitor is not impaired in its ability to offer services without access to that element. ... Under these circumstances, it would be counterproductive to mandate that the incumbent offers the element at forward-looking prices. Rather, the market price should prevail, as opposed to a regulated rate which, at best, is designed to reflect the pricing of a competitive market.[14]

The Joint CLECs apparently overlooked this language as well as the passages from the *Triennial Review Order* referenced above in arguing that the Commission can require BellSouth to continue offering local switching, dedicated transport, high capacity loops and dark fiber at TELRIC rates pursuant to Section 271.

CONCLUSION

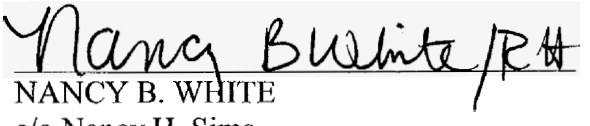
The Joint CLECs' Complaint seeks to create a crisis that does not exist. BellSouth has explicitly stated that it will not unilaterally cease providing service to the Joint CLECs or breach

[10] See Complaint at p. 6.
[11] Triennial Review Order ¶ 657.
[12] Triennial Review Order ¶ 661.
[13] **CC Docket No. 96-98, 15 FCC** Rcd 3696 (1999).
[14] Id. ¶ 473.

its existing Interconnection Agreement. BellSouth will not disconnect service or take unilateral action even though the law has changed and the rates applicable to certain services have changed. The Joint CLECs' filing of this Complaint despite such assurances and its references to state and federal law suggest that the Joint CLECs is seeking broader relief to which it is not legally entitled. The issues raised in the Joint CLECs' complaint relating to an orderly transition in the event the D.C. Circuit's mandate takes effect on June 16, 2004 are not going to go away, however. Accordingly, the Commission should dismiss the Joint CLECs' Complaint, or hold it in abeyance and consolidate appropriate issues in a single proceeding, which would allow the Commission to resolve such issues for the industry as a whole, rather than on a piecemeal basis, at such time as the Commission receives further guidance from the D.C. Circuit Court of Appeals or from the FCC.

Respectfully submitted, this 10th day of June, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.



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