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November 22, 2004

BY HAND DELIVERY

Ms. Blanca Bayó, Director
Commission Clerk and Administrative Services
Room 110, Easley Building
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, Florida 32399-0850

Re: Docket No. 041269-TP

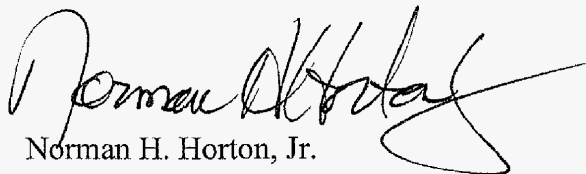
Dear Ms. Bayó:

Enclosed for filing on behalf of Xspedius Communications, LLC on behalf of its operating affiliates, Xspedius Management Co. of Jacksonville, LLC and Xspedius Management Co. Switched Services, LLC, NuVox, Inc. on behalf of its operating entities NuVox Communications, Inc. and NewSouth Communications Corp., and KMC Telecom V, Inc. and KMC Telecom III, LLC are an original and fifteen copies of their Joint Opposition to BellSouth's Petition in the above referenced docket.

Please acknowledge receipt of these documents by stamping the extra copy of this letter "filed" and returning the same to me.

Thank you for your assistance with this filing.

Sincerely yours,


Norman H. Horton, Jr.

NHH/amb
Enclosures

cc: John Heitmann, Esq.
Parties of Record

DOCUMENT NUMBER-DATE

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:

In re: Petition to establish generic docket to)
consider amendments to interconnection) Docket No. 041269-TP
agreements resulting from changes in law,) Filed: November 22, 2004
by BellSouth Telecommunications, Inc.)
_____)

**OPPOSITION OF KMC, NUVOX/NEWSOUTH
AND XSPEDIUS¹**

KMC, NuVox/NewSouth, and Xspedius (collectively “Joint Arbitration Petitioners”), through their undersigned counsel, respectfully submit this Opposition in response to the recent pleading filed with this Commission by BellSouth Telecommunications, Inc. (“BellSouth”) requesting that the Commission establish a generic proceeding to examine issues related to BellSouth’s obligations to provide unbundled network elements.²

1. Joint Arbitration Petitioners have a pending arbitration proceeding with BellSouth in Docket 040130-TP. As contemplated by Sections 251 and 252 of the Communications Act of 1934, as amended (“Federal Act”), these parties negotiated with BellSouth and then sought arbitration of issues that could not be resolved through voluntary negotiation. The parties, through voluntary negotiation, have resolved many issues related to BellSouth's obligations to

¹ NuVox Communications, Inc. on behalf of its operating entities NuVox Communications, Inc. and NewSouth Communications Corporation (collectively “NuVox/NewSouth”), KMC Telecom V, Inc. and KMC Telecom III, LLC (collectively “KMC”), and Xspedius Communications, LLC on behalf of its operating subsidiaries, Xspedius Management Co. Switched Services, LLC, and Xspedius Management Co. of Jacksonville, LLC (collectively “Xspedius”).

² It is the Joint Arbitration Petitioners understanding that CompSouth will also file a Motion to Dismiss in the above-captioned docket today. Joint Arbitration Petitioners do not join CompSouth’s Motion to Dismiss, so that they may focus on the specific and unique concerns raised by their pending arbitration and abeyance agreement with BellSouth.

provide unbundled network elements. They have been unable to resolve and have requested Commission arbitration of others.

2. On October 15, 2004, Joint Arbitration Petitioners filed jointly with BellSouth a revised issues matrix incorporating nine new issues related to the post-*USTA II* regulatory framework, and, on November 10, 2004, Joint Arbitration Petitioners filed an updated version of this matrix in preparation for the issue identification conference held on November 15, 2004.³ The revised issues matrix, adding new issues to the pending arbitration, was the result of a voluntarily negotiated agreement by Joint Arbitration Petitioners with BellSouth which was memorialized in a joint motion for abeyance filed with the Commission on July 20, 2004 and incorporated into the Commission's August 19, 2004 Order granting (and denying in part) the joint motion for abeyance. As stated in the Commission's Order, Joint Arbitration Petitioners reached an agreement with BellSouth wherein Joint Arbitration Petitioners would not amend their existing interconnection agreement UNE provisions (Attachment 2), but would rather operate pursuant to those provisions until the parties were able to move into new interconnection agreements (incorporating the post-*USTA II* regulatory framework) that result from the conclusion of the arbitration in Docket 040130-TP. Thus, Joint Arbitration Petitioners respectfully request the Commission to be mindful of that agreement memorialized in its August 19, 2004 Order in Docket No. 040130-TP and to clarify in any order resulting from the above-captioned generic docket, that such order does not alter their agreement with BellSouth to operate under and not to amend their existing interconnection agreements, but to instead address

³ Of the nine Supplemental Issues added, one has been resolved and two sub-issues will be the subject of short briefing regarding whether they are appropriately part of the arbitrations (as Joint Arbitration Petitioners maintain) or not (as BellSouth maintains).

(and arbitrate) changes-of-law associated with the post-*USTA II* regulatory framework in their new interconnection agreements already set for arbitration by this Commission.⁴

3. Petitioners, however, understand that BellSouth sometimes insists that the Commission arbitrate the same or similar issues repetitively, especially when the Commission's rulings depart from those sought by BellSouth. Different CLECs also can ask the Commission to resolve the same or similar issues in separate arbitration proceedings. Thus, it may be prudent for the Commission to bar BellSouth (or any party) from forcing the re-arbitration of issues on which that same party already has lost and to consolidate (in a manner that prejudices no individual party) arbitration of the same or similar issues raised in separate arbitrations. It may also be appropriate for the Commission to employ a generic proceeding to address issues of import to a variety of carriers who have interconnection agreements with BellSouth. For example, the Commission has conducted generic TELRIC rate and performance measurements/SEEMs proceedings. The results of these proceedings have subsequently been incorporated into existing agreements by amendment and into new agreements by the negotiation arbitration process.

4. As a general principle, the Commission should require, as the Federal Act does, that parties negotiate first and arbitrate only if such negotiations fail. Indeed, BellSouth shared with Petitioners a preliminary version of the matrix it was preparing for this proceeding (it did so

⁴ If the Commission were to proceed with a generic proceeding and some of the issues set for arbitration in Docket No. 040130-TP were deferred to such a generic docket for resolution, the Commission would need to establish an appropriate procedure for folding the results of the generic docket back into the arbitration docket. In particular, such procedure would need to provide an opportunity to establish contract language that reflects any Commission decision in such a generic proceeding while not conflicting with language established as a result of voluntary negotiation or Commission resolution of issues in the arbitration docket. Notably, BellSouth attaches to its Petition an entirely new "Attachment 2". Joint Arbitration Petitioners believe that the Commission should reject that attachment and require (if it were at some point to proceed with a generic) BellSouth to re-file issue specific language proposals in a matrix that features alongside those proposals the language BellSouth seeks to replace from an existing agreement or the language proposed by various CLECs, as a result of efforts to negotiate or arbitrate such provisions. Not every provision of Attachment 2 was called into question by *USTA II* and the decisions that follow in its wake (the FCC Interim Rules Order and the widely anticipated, so-called FCC Final Rules Order).

with other CLECs as well) and it was immediately apparent that the majority of the issues proposed already were resolved vis-a-vis BellSouth and Petitioners through voluntary negotiations. Other issues had never been negotiated. Notably, BellSouth filed its proposed contract language in this proceeding *before* it had proposed similar language to the Joint Arbitration Petitioners as part of their ongoing arbitration. Thus, with respect to the Joint Arbitration Petitioners, and likely many others, BellSouth's representation that it has been unable to agree on language with many CLECs (BellSouth Petition at para. 8) should certainly have been accompanied by the admission that BellSouth simply had not tried, but instead was trying to upend statutory and contractual negotiations requirements.

5. At bottom, the Commission generally should not endeavor to encompass issues in a generic proceeding that are more likely to be the subject of negotiated resolution. At the very least, the Commission should order BellSouth to first abide by statutory and contractual negotiation requirements.

6. Joint Petitioners do note, however, that, on some issues, negotiations are almost certain to fail. Issues surrounding this Commission's authority to require unbundling in the absence of federal rules likely fall into this category. Petitioners already have identified such issues in their own arbitration proceeding. These issues deal with the Commission's authority to order the rates, terms and conditions for unbundling of a full array of network elements under state law, as well as under Sections 251 and 271 of the Federal Act. In their pending arbitration, Petitioners maintain that this Commission has ample authority to order unbundling of a full array of network elements in the absence of or in conjunction with FCC unbundling rules. These

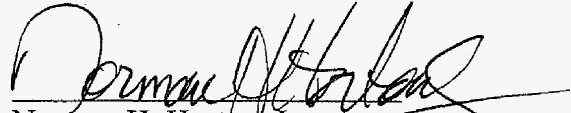
issues, along with pricing issues related thereto may eventually be among those more efficiently handled in a consolidated or generic proceeding.⁵

7. One thing that is absolutely certain, however, is that parties cannot effectively negotiate (and this Commission cannot effectively arbitrate) with respect to federal law that does not yet exist. It is expected that the FCC will adopt new so-called “final” unbundling rules within months. It is not at all clear what legal requirements will be adopted or whether those requirements will be voluntarily translated into negotiated contract language or whether arbitration issues will result. If past FCC UNE orders serve as any indication, the next one will likely have some aspects that will be voluntarily translated into contract language and others that will result in arbitration issues. The results are likely to vary among CLECs.

8. Expending resources in an attempt to resolve these issues now will be wasteful and inefficient. Although Petitioners, pursuant to their arbitration abatement agreement with BellSouth, agreed to identify a general “final” FCC unbundling rules issue in their own arbitration, their position is that parties will need to negotiate after those rules are released and should later proceed with arbitration of specific issues they are unable to resolve through negotiation. Given the uncertain timing of the release of the FCC's new rules, it is unclear whether such issues will be able to be addressed at the arbitration hearing scheduled for March 22-25, 2005 or whether subsequent procedures will have to be adopted to address these issues.

⁵ Joint Arbitration Petitioners note that BellSouth asserts that “everyone will have an opportunity to be heard” in the generic proceeding it requests. BellSouth Petition at para. 9. After fighting (with only mixed success) a series of BellSouth filings designed to ensure that each of the Joint Arbitration Petitioners could not be heard in their own arbitration proceeding, Joint Arbitration Petitioners view BellSouth’s assertion with a high degree of skepticism. In any generic proceeding, the Commission should adopt procedures to ensure that individual CLECs have the opportunity to participate and present witnesses freely (which may include independent presentations, group presentations or some combination thereof selected by an individual CLEC).

In light of the foregoing, Petitioners respectfully oppose BellSouth's petition and request that the Commission deny and dismiss BellSouth's request to establish a generic proceeding.



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November 22, 2004

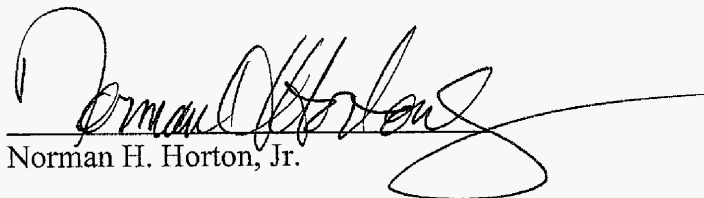
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served on the following parties by Hand Delivery(*) and/or U. S. Mail this 22nd day of November, 2004.

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