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March 3, 2005

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 MCImetro Access Transmission Services, LLC ("MCI") are an original and fifteen copies of MCI's Motion for Expedited Relief Concerning UNE-P Orders 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,

Floyd R. Self

FRS/amb
Enclosures
cc: Parties of Record

DOWNTOWN OFFICE, 215 South Monroe Street, Suite 701 • Tallahassee, Fl 32301 • Phone (850) 222-0720 • Fax (850) 224-4359
NORTHEAST OFFICE, 3116 Capital Circle, NE, Suite 5 • Tallahassee, Fl 32308 • Phone (850) 668-5246 • Fax (850) 668-5613

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition to establish a generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.	))))	Docket No. 041269-TP Filed: March 3, 2005

MCI'S MOTION FOR EXPEDITED RELIEF CONCERNING UNE-P ORDERS

MCImetro Access Transmission Services, LLC ("MCI") files this Motion for Expedited Relief Concerning UNE-P Orders because BellSouth Telecommunications, Inc. ("BellSouth") has stated that it intends to take actions that will breach its interconnection agreement ("Agreement") with MCI. Specifically, BellSouth has stated that it will reject UNE-P orders beginning March 11, 2005 pursuant to its interpretation of the FCC's recently issued Triennial Review Remand Order ("*TRRO*"). This course of action would breach MCI's Agreement in at least two respects: (i) by rejecting UNE-P orders that BellSouth is obligated by the Agreement to accept and process; and (ii) by refusing to comply with the change of law procedure established by the Agreement. Contrary to statements in BellSouth's Carrier Notifications that have been issued to competitive local exchange companies ("CLECs") , including MCI, the *TRRO* does not excuse or justify BellSouth's stated intention of rejecting MCI's UNE-P orders beginning March 11, 2005 and ignoring the change of law process with respect to such UNE-P orders.

MCI wants to continue placing UNE-P orders in Florida after March 10, 2005. Unless this Commission declares that BellSouth may not reject such UNE-P orders, and instead must comply with the change of law provision in its Agreement, MCI will sustain immediate and irreparable injury. MCI therefore requests that the Commission consider this matter on an expedited basis and grant the relief requested in this Motion prior to March 11, 2005.

PARTIES

1. MCI is a Delaware company with its principal place of business at 22001 Loudoun County Parkway Ashburn, VA 20147. MCI has a Certificate of Authority issued by the Commission that authorizes MCI to provide local exchange service in Florida. MCI is a "telecommunications carrier" and "local exchange carrier" under the Telecommunications Act of 1996 ("Federal Act").

2. BellSouth is a Georgia corporation, having offices at 675 West Peachtree Street, Atlanta, Georgia 30375. BellSouth is an incumbent local exchange carrier ("ILEC"), as defined in Section 251(h) of the Federal Act and is a local exchange telecommunications company as defined by Section 364.02(7), Florida Statutes.

JURISDICTION

3. MCI and BellSouth are subject to the jurisdiction of the Commission with respect to the matters raised in this Motion.

4. The Commission has jurisdiction with respect to the matters raised in this Motion pursuant to Chapters 120 and 364, Florida Statutes, and Chapters 25-22 and 28-106, Florida Administrative Code.

5. The Commission also has jurisdiction under the Federal Act under 47 U.S.C. § 251(d) (3) (conferring authority to State commissions to enforce any regulation, order or policy that is consistent with the requirements of Section 251) with respect to the matters raised in this Motion.

FACTS

6. MCI and BellSouth entered into the Agreement, effective March 30, 2001, that was approved by the Commission by Order No. PSC-01-0824-FOF-TP, in Docket No.000649-TP. The Agreement provides that BellSouth shall provision UNE combinations including "the combination of Network Element Platform or UNE-P." (Agreement, Att. 3, § 2.4.) The Agreement goes on to provide that "[t]he price for these combinations of Network Elements shall be based upon applicable FCC and Commission rules and shall be set forth in Attachment 1 of this Agreement." (*Id.*) The parties have amended the Agreement several times, including on or about March 6, 2003, when rates from the decision regarding BellSouth's Unbundled Network Elements docket were incorporated. These rates remain in effect today.

7. The Agreement specifies the steps to be taken if a party wants to amend the Agreement because of a change in the law. The Agreement's language, which was voluntarily negotiated and agreed to by BellSouth, provides:

> In the event that any effective and applicable legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of MCIm or BellSouth to perform any material terms of this Agreement, or imposes new or modified rights or obligations on the Parties, or makes any provision hereof unlawful, or in the event a judicial or administrative stay of such action is not sought or granted, MCIm or BellSouth may, on thirty (30) days written notice (delivered not later than thirty (30) days following the date on which such action has become legally binding and effective) require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, either Party may invoke the procedures of Section 22 (Dispute Resolution Procedures) of this Part A.

(Agreement, Part A, § 2.3.)

8. When the parties are unable to agree on how to implement a change in the law, they are directed to pursue dispute resolution. The Agreement's dispute resolution provision provides as follows:

> The Parties recognize and agree that the Commission has continuing jurisdiction to enforce all terms and conditions of this Agreement. Accordingly, the Parties agree that any dispute arising out of or relating to this Agreement that the Parties themselves cannot resolve, may be submitted to the Commission for resolution. Either Party may seek expedited resolution by the Commission. . . . During the Commission proceeding each Party shall continue to perform its obligations under this Agreement; provided, however that neither Party shall be required to act in any unlawful fashion. This provision shall not preclude the Parties from seeking relief available in any other forum.

(Agreement, Part A, § 22.1.)

9. In August 2003 the FCC released its Triennial Review Order ("*TRO*") that found impairment nationally with regard to mass markets local switching, but requested a granular review by state public service commissions of the conditions for competitive local exchange service in geographic markets in each state. These rulings were vacated and remanded by *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") on March 2, 2004. The D.C. Circuit's mandate initially was scheduled to issue on May 1, 2004, but the court later granted an extension to June 15, 2004. During the time before the mandate issued, great uncertainty arose as to whether BellSouth would continue to process UNE-P orders.

10. On March 23, 2004, BellSouth issued a Carrier Notification stating that *USTA II* "vacated the FCC's rules associated with, among other things, mass-market switching thereby eliminating BellSouth's obligation to provide unbundled switching and, therefore, Unbundled Network Elements-Platform at TELRIC rates." BellSouth's Carrier Notification further noted that the court's order eliminating its obligation to provide UNE-P would become effective on May 1, 2004. Because of the uncertainty generated by this Carrier Notification and other

statements by BellSouth, the Florida Competitive Carriers Association ("FCCA" which has become part of the Competitive Carriers of the South, Inc. ("CompSouth")) and other parties filed an emergency petition seeking an order from this Commission requiring that BellSouth continue to honor CLECs' interconnection agreements and preventing BellSouth from restricting access to UNEs or unilaterally changing its UNE rates. (Docket No. 040520-TP). BellSouth replied that it "will continue to accept and process new orders for services...in accordance with the terms of existing interconnection agreements, until such time as those agreements have been amended, reformed, or modified consistent with the D.C. Circuit's decision pursuant to established legal processes." (BellSouth Telecommunications, Inc.'s Response in Opposition to the Petition of FCCA, AT&T, and MCI, p. 3; CompSouth Petition for Declaratory Ruling, p. 3.) BellSouth also stated that it intended to utilize the change of law provisions in the individual CLEC's interconnection agreements to effectuate the USTA II decision (BellSouth Response, p. 7), and asked to hold open one of the four related open dockets to consolidate appropriate issues into a single proceeding. Accordingly, the Commission held Docket No. 040520-TP in abeyance pending resolution by the D.C. Circuit Court of the Petition for a Writ of Mandamus filed on August 23, 2004.

11. On November 1, 2004, BellSouth filed its Petition to Establish a Generic Docket, in order to engage in a change of law process to modify existing interconnection agreements. In response to BellSouth's petition, the Commission established this proceeding to determine the changes that recent decisions by the FCC and the D.C. Circuit will require in existing interconnection agreements between BellSouth and CLECs in Florida. Issues that have been identified by BellSouth include the rates, terms and conditions for network elements that are no longer required to be unbundled under section 251 of the Federal Act. (See BellSouth's Petition to Establish Generic Docket, issue matrix p. 2.) Further, in denying CompSouth's Motion to

Dismiss, this Commission stated that it did not agree with CompSouth's contention that BellSouth's Petition is an attempt to create an alternative route around negotiation and arbitration process required by the Act. (Order No. PSC-05-0171-FOF-TP, issued February 15, 2005, p. 6.) The Commission also stated that "it may be appropriate to address certain issues regarding UNEs once the FCC has issued its final unbundling rules and *the parties have had an opportunity to enter into negotiations addressing those final unbundling rules.*" (*Id.*, emphasis added)

12. The FCC issued the *TRRO* on February 4, 2005. The FCC determined on a nationwide basis that ILECs are not obligated to provide unbundled local switching pursuant to section 251(c)(3) of the Federal Act. The FCC adopted a transition plan that calls for CLECs to move to alternative service arrangements within twelve months of the effective date of the *TRRO*. (*TRRO* § 227.) The FCC determined that the price for section 251(c)(3) unbundled switching during the transition period would be the higher of (i) the CLEC's UNE-P rate as of June 15, 2004 plus one dollar, or (ii) the rate established by a state commission between June 16, 2004 and the effective date of the *TRRO* plus one dollar. (*TRRO* § 228.)

13. With respect to new UNE-P orders after the effective date of the *TRRO*, the FCC stated: "The transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) *except as otherwise specified in this Order.*" (*TRRO* § 227.) (Emphasis added.)

14. The *TRRO* does not purport to abrogate the change of law provisions of carriers' interconnection agreements. To the contrary, the *TRRO* directs carriers to implement its rulings by negotiating changes to their interconnection agreements:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must

> implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

(*TRRO* § 233, footnotes omitted.)

15. BellSouth issued a Carrier Notification dated February 8, 2005 in which it notified CLECs that the *TRRO* had been released. Among other things, BellSouth stated that the *TRRO* "precludes CLECs from adding new UNE-P lines starting March 11, 2005." A true and correct copy of the February 8 Carrier Notice is attached hereto as Exhibit A.

16. In an attempt to clarify BellSouth's intent, on February 11, 2005 MCI sent a letter to BellSouth asking whether BellSouth intended to reject its UNE-P orders or charge a higher rate for new UNE-P lines if MCI did not sign a "commercial agreement" with BellSouth by March 11, 2005. An unsigned copy of MCI's February 11 letter is attached hereto as Exhibit B.

17. BellSouth issued a second Carrier Notification dated February 11, 2005 in which it expanded on its interpretation of the *TRRO*. BellSouth claimed that "the FCC's actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to 'new adds' for these former UNEs." BellSouth went on to state that "effective March 11, 2005, for 'new adds,' BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ('TELRIC') rates or unbundled network platform ('UNE-P') and as of that date, BellSouth will no longer accept orders that treat those items as UNEs." A true and correct copy of the February 11 Carrier Notice is attached hereto as Exhibit C.

18. BellSouth issued a change request along with the February 11 Carrier Notice that creates a new edit in its operations support systems to reject all new orders for UNE-P effective March 11, 2005. A true and correct copy of the change request is attached hereto as Exhibit D.

19. BellSouth responded to MCI's February 11 letter in a February 17, 2005 e-mail that referred MCI to the February 11 Carrier Notification.

20. By letter dated February 18, 2005 MCI responded to the February 11 Carrier Notification. MCI notified BellSouth that the actions it threatens would constitute breaches of the Agreement. MCI requested BellSouth to provide adequate assurance by February 25, 2005 that it will perform the Agreements. No such assurance has been given by BellSouth. MCI also informed BellSouth that it might file legal pleadings before BellSouth responded to the letter. MCI stated that it remains willing to resolve this matter outside the legal process. A true and correct copy of MCI's February 18 letter is attached hereto as Exhibit E.

21. On February 23, 2005, MCI sent a letter to BellSouth requesting that the parties negotiate to implement the change of law necessitated by the *TRRO*. In that letter, MCI noted that the negotiation and amendment process "need not be a lengthy process." A true and correct copy of MCI's February 23 letter is attached hereto as Exhibit F. MCI has not yet received a response from BellSouth.

BELLSOUTH'S REFUSAL TO ACCEPT AND PROCESS ORDERS

22. The Agreement requires BellSouth to provide UNE-P to MCI at the rates specified in the Agreement. (Agreement, Att. 3, § 2.4.) Unless and until the Agreement is amended pursuant to the change of law process specified in the Agreement, BellSouth must continue to accept and provision MCI's UNE-P orders at the specified rates. By stating that it

will not accept UNE-P orders beginning March 11, 2005, BellSouth has breached the Agreement.

23. The *TRRO* does not excuse or justify BellSouth's stated intention of refusing to accept MCI's UNE-P orders beginning March 11, 2005, because the *TRRO* requires that its rulings be implemented through changes to parties' interconnection agreements. Implementing the change of law with respect to new UNE-P orders will not be an academic exercise because the parties will need to address, among other issues, BellSouth's duty to continue to provide UNE-P to MCI at current rates under state law and under section 271 of the Federal Act.

BELLSOUTH'S REFUSAL TO FOLLOW THE CHANGE OF LAW PROCESS

24. The Agreement does not permit parties to implement changes in law unilaterally. To the contrary, the Agreement's voluntarily negotiated change of law provision requires that a party wishing to implement a change in law take specified steps, including (i) ensuring that the governmental action in question has taken effect; (ii) providing notice of the change of law to the other party; (iii) undertaking negotiations for the specified period; and (iv) if necessary, pursuing dispute resolution. (Agreement, Part A, § 22.1.) By stating its intention to ignore the change of law provision in the parties' Agreement, BellSouth has breached the Agreement.

25. The *TRRO* does not excuse or justify BellSouth's failure to comply with the change of law provisions of the Agreement. The *TRRO* requires that parties "implement the Commission's findings" by making "changes to their interconnection agreements consistent with our conclusions in this Order." (*TRRO* § 233.) The *TRRO* does not exclude its provisions relating to new UNE-P orders from this requirement. Under the *TRRO* and the Agreement, therefore, BellSouth must undertake the change of law process to implement the changes specified in the *TRRO* with respect to (among other issues) new UNE-P orders. Accordingly, the

Commission should make clear that BellSouth cannot unilaterally shut off MCI and other CLECs on March 11, 2005, as it has threatened.

26. Foremost among the difficult issues that the parties must resolve through negotiation and arbitration are (i) whether BellSouth can use the *TRRO* to evade its independent UNE unbundling obligations and rates under state law and (ii) whether BellSouth can use the *TRRO* to evade its independent UNE unbundling obligations and rates under section 271 of the Federal Act. It was precisely because parties and state commissions must resolve these and other issues that the FCC mandated that the terms of the *TRRO* be implemented through changes to the parties' interconnection agreements. And, as shown below, they also serve as independent grounds for continuing to enforce the Agreement as written and approved.

A. BellSouth's Duty to Provide UNE-P Under State Law

27. Even if BellSouth were empowered by the *TRRO* unilaterally to change MCI's UNE-P rights that arise out of section 251(c)(3) (which it was not), BellSouth would not be entitled to change the unbundling and UNE rate sections of the Agreement unilaterally because Florida law and the orders the Commission has issued pursuant to Florida law independently support MCI's right to obtain UNE-P from BellSouth at the rates set forth in the Agreement.

28. The Commission has the express authority under Florida law to require BellSouth to unbundle its network. *See* Sections 364.161 and 364.162, Florida Statutes. In exercising its state law authority with respect to unbundled switching, the Commission must establish rates that are not below cost and that are not set so high that they would serve as a barrier to competition.

29. When the Commission set rates for unbundled network elements, it repeatedly acknowledged its jurisdiction under state law, specifically, Sections 364.161 and 364.162, Florida Statutes, to determine rates for interconnection. (*See Final Order on Rates on Rates for*

Unbundled Network Elements Provided by BellSouth, Order No. PSC- 01-1181-FOF-TP, May 25, 2001, *Order on Motions for Reconsideration and Motion to Conform Analysis,* Order No. PSC-01-2051-FOF-TP, issued October 18, 2001, *Order Holding Proceedings in Abeyance for 60 Days*, Order No. PSC-02-0841-PCO-TP, issued June 19, 2002, and *Order Denying Motion for Reconsideration*, Order No. PSC-02-1724-FOF-TP, issued December 9, 2002). Thus, the rates that have been incorporated into the Agreement are independently supported by Florida law and the Commission necessarily has found that these rates are not below cost and are not set so high that they would serve as a barrier to competition. Until the Commission changes the UNE rates as a result of evidence demonstrating that new rates are just and reasonable, in this or some other docket, the rates in the Agreement remain in full force and effect.

30. This Commission's authority to require BellSouth to unbundle its network has not been preempted by federal law. Preemption occurs when (i) Congress "occupies the field" in the area the state seeks to regulate; (ii) the federal government expressly preempts state regulation; or (iii) there is a conflict between state and federal law. None of these conditions has occurred.

31. In the *TRO*, the FCC recognized that provisions in the Federal Act preserving state authority demonstrate that Congress did not intend to occupy the field with respect to unbundling. For example, the FCC ruled: "We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act." (*TRO* ¶ 192, footnotes omitted.)

32. None of the pronouncements of the FCC in the *TRRO* or the *TRO* demonstrate that agency's intent to preempt state unbundling. Although the *TRO* contained what the D.C. Circuit dubbed the FCC's "general prediction" about when state agency actions regarding unbundling might be preempted, the *USTA II* court held that the "general prediction voiced in ¶

195 does not constitute final agency action, as the [FCC] *has not taken any view on any attempted state unbundling order*." *USTA II*, 359 F.3d at 594 (emphasis added). The court therefore found claims of preemption based on the *TRO* "unripe," and upheld the FCC's actions against such claims. *Id.* In the *TRRO*, the FCC addressed "those issues that were remanded to us" by *USTA II*. (TRRO ¶ 19.) Because the D.C. Circuit in *USTA II* found no preemption had been attempted in the *TRO*, preemption was not one of the issues remanded to the FCC for consideration in the *TRRO*.

33. Under the Federal Act, BellSouth is still required to provide access to unbundled local switching under section 271, so this Commission's requirement that BellSouth unbundle local switching plainly is consistent with federal law. Moreover, the FCC has held that section 271 checklist elements must be provided at "just and reasonable" rates, which is not inconsistent with the Florida requirement that rates must not be below cost. This Commission's pricing standard therefore does not conflict with federal law and thus this Commission's exercise of unbundling and pricing authority under state law, including but not limited to Sections 364.161 and 364.162, Florida Statutes, is not preempted.

34. In any event, however, the proper way to resolve any dispute concerning this point is not self-help on BellSouth's part, but rather by working through the change of law process in the Agreement. Until that process has been completed, BellSouth should not be allowed to change the rates ordered by the Commission and incorporated into the Agreement.

B. BellSouth's Duty to Provide UNE-P Under Section 271 of the Federal Act

35. Even if BellSouth were empowered by the *TRRO* unilaterally to change MCI's UNE-P rights that arise out of section 251(c)(3) (which it was not), BellSouth would not be entitled to change the unbundling and UNE rate sections of the Agreement unilaterally because

section 271 of the Federal Act independently supports MCI's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the Agreement.

36. As the FCC affirmed in the *TRO,* so long as BellSouth wishes to continue to provide in-region interLATA services under section 271 of the 1996 Act, it "must continue to comply with any conditions required for [§271] approval" (*TRO* § 665), and that is so whether or not a particular network element must be made available under section 251. One of the central requirements of section 271 is that a Bell Operating Company enter into "binding agreements that have been approved under Section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities." (Federal Act, § 271(c)(1)(A).) Those agreements must provide access to facilities that meet the requirements of the so-called section 271 checklist. (*Id.* §271(c)(2)(A)(ii).) That checklist requires that the agreement must provide for local switching. (*Id.* § 271(C)(2)(B)(vi).) To satisfy the requirements of the checklist the interconnection agreement must provide switching at a rate deemed just and reasonable. (*Id.*; *TRO,* ¶¶ 662-664.).

37. BellSouth is required to provide section 271 local switching as part of the UNE-P combination. Although the FCC in the *TRO* declined to require BellSouth to combine section 271 local switching with other UNEs pursuant to section 251(c)(3), (*see* TRO ¶ 655 & n.1989), and that decision was upheld in *USTA II*, the D.C. Circuit noted that the general nondiscrimination requirement of section 202 might provide an independent basis for requiring the combination of section 271 switching with other UNEs. *USTA II*, 359 F.3d at 590. See also *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 395 (1999) (discussing disconnection of previously combined elements as potentially discriminatory and "not for any productive reason, but just to impose wasteful reconnection costs on new entrants.")

38. Providing unbundled mass market switching in isolation provides nothing of value to CLECs because BellSouth owns the loop plant that serves consumers in its service territory. If BellSouth were to provide unbundled switching to CLECs in isolation, while providing switching to its retail business combined with all the other elements needed to provide service, BellSouth would discriminate against CLECs in violation of section 202 of the Federal Act. BellSouth therefore must provide section 271 switching in combination with the other elements that make up UNE-P.

39. MCI submits, therefore, that until this Commission or the FCC reaches some other conclusion, the rates in the Agreement should be determined to be "just and reasonable" under section 271.

RULINGS OF OTHER COMMISSIONS

40. Commissions in other states have supported similar motions filed by MCI. To date three commissions have issued rulings on these motions. On March 1, 2005, the Georgia Public Service Commission unanimously directed BellSouth to continue providing UNE-P pursuant to the parties' interconnection agreements. The staff recommendation that was approved by the Georgia commission is attached as Exhibit G. Likewise, the Alabama Public Service Commission unanimously voted on March 1, 2005 to require BellSouth to continue providing UNE-P under MCI's interconnection agreement until the commission can consider that matter further at a subsequent session. The Louisiana Public Service Commission voted on February 23, 2005 to authorize its staff to issue a temporary restraining order against BellSouth if appropriate until the commission can consider MCI's motion at its March 23, 2005 meeting.

PRAYER FOR RELIEF

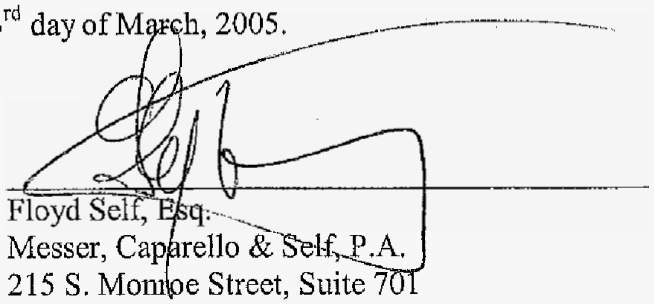
WHEREFORE, for the foregoing reasons, MCI respectfully requests that the Commission:

(1) Before March 11, 2005, Order BellSouth to continue accepting and processing MCI's UNE-P orders under the rates, terms and conditions of the Agreement;

(2) Order BellSouth to comply with the change of law provisions of the Agreement with regard to the implementation of the *TRRO*;

(3) Order such further relief as the Commission deems just and appropriate.

Respectfully submitted, this 3rd day of March, 2005.



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BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085032

Date: February 8, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – Commercial Agreement for BellSouth DS0 Wholesale Local Voice Platform Services

On February 4, 2005, the Federal Communications Commission (FCC) released its Order on Remand ("Order"), which, among other things, relieved Incumbent Local Exchange Carriers ("ILEC") of their obligation to provide unbundled access to mass market switching and Unbundled Network Element-Platform ("UNE-P") services, on a nationwide basis, pursuant to Section 251 of the Act. The Order establishes a twelve-month transition period commencing March 11, 2005, during which CLECs must transition their embedded base of mass market switching and UNE-P lines to alternative arrangements. The Order further precludes CLECs from adding new UNE-P lines starting March 11, 2005.

As a result of these ordered changes, BellSouth would like to inform CLEC customers that through March 10, 2005, the day before the Order becomes effective, BellSouth will continue to offer its current DS0 Wholesale Local Voice Platform Services Commercial Agreement ("DS0 Agreement") with transitional discounts off of BellSouth's current market rate for mass market platform services. As of March 11, 2005, although BellSouth will continue to offer commercial agreements for DS0 switching and platform services, the pricing set forth in the current DS0 Agreement will no longer be available.

BellSouth encourages CLECs to contact their negotiator to find out more about its DS0 Agreement while the transitional discounts remain available.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

EXHIBIT "A"

Norbert White
Director
Carrier Relations
500 Technology Drive
Weldon Spring, MO 63003
636-793-3028

February 11, 2005

Jerry Hendrix
Assistant Vice President
Bell South Interconnection Services
675 West Peachtree Street
Atlanta. GA 30375

RE: Carrier Notification SN 91085032

Jerry,

Yesterday, we received the above mentioned carrier notification regarding commercial agreements for Bell South DSO Wholesale Local Voice Platform Services. As you are aware, we have been in discussions now for over a month regarding Bell South's wholesale offering and we anticipate continuing those discussions with you. We have two specific questions as to this communication.

- If we have not signed a commercial agreement by March 11, 2005, does BellSouth intend to reject MCI LSRs ordering new UNEP lines?
- If we have not signed a commercial agreement by March 11, 2005, does BellSouth intend to charge MCI a higher rate for those new UNEP lines?

We would appreciate a response to this letter by February 16, 2005.

Sincerely,

Norbert White

EXHIBIT "B"

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085039

Date: February 11, 2005

To: **Competitive Local** Exchange Carriers (CLEC)

Subject: **CLECs – (Product/**Service) – Triennial Review Remand Order (TRRO) - Unbundling Rules

On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO).

The TRRO has identified a number of former unbundled network elements ("UNEs") that will no longer be available as of March 11, 2005, except as provided in the TRRO. These former UNEs include all switching[1], as well as certain high capacity loops in specified central offices[2], and dedicated transport between a number of central offices having certain characteristics,[3] as well as dark fiber[4] and entrance facilities[5].

The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers (ILEC), adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] The FCC provided that the transition period for each of these former UNEs (loops, transport and switching), would commence on March 11, 2005.[7] The FCC made provisions to include these transition plans in existing interconnection agreements through the appropriate change of law provisions. It also provided that rates for these former UNEs during the transition period would be trued up back to the effective date of the TRRO to reflect the increases in the prices of those former UNEs that were approved by the FCC in the TRRO.

The FCC took a different direction with regard to the issue of "new adds" involving these former UNEs. With regard to each of the former UNEs the FCC identified, the FCC provided that no "new adds" would be allowed as of March 11, 2005, the effective date of the TRRO. For instance, with regard to switching, the FCC said, "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[8] The FCC also said "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order." (footnote omitted)[9]

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[1] TRRO, ¶199
[2] TRRO, ¶¶174 (DS3 loops), 178 (DS1 loops)
[3] TRRO, ¶¶126 (DS1 transport), 129 (DS3 transport),
[4] TRRO, ¶¶133 (dark fiber transport), 182 (dark fiber loops)
[5] TRRO, ¶141
[6] TRRO, ¶¶142 (transport), 195 (loops), 226 (switching)
[7] TRRO, ¶¶143 (transport), 196 (loops) 227 (switching)
[8] TRRO, ¶199
[9] TRRO, ¶227

The FCC clearly intended the provisions of the TRRO related to "new adds" to be self-effectuating. First, the FCC specifically stated that "Given the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005.. .."[10] Further, the FCC specifically stated that its order would not "...supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis...,"[11] but made no such finding regarding existing interconnection agreements. Consequently, in order to have any meaning, the TRRO's provisions regarding "new adds" must be effective March 11, 2005, without the necessity of formal amendment to any existing interconnection agreements. Therefore, while BellSouth will not breach its interconnection agreements, nor act unilaterally to modify its agreements, the FCC's actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to "new adds" for these former UNEs.

Thus, pursuant to the express terms of the TRRO, effective March 11, 2005, for "new adds," BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates or unbundled network platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs.

Further, effective March 11, 2005, BellSouth is no longer required to provide high capacity UNE loops in certain central offices or to provide UNE transport between certain central offices. As of that date, BellSouth will no longer accept orders that treat these items as UNEs, except where such orders are certified pursuant to paragraph 234 of the TRRO. In addition, as of March 11, 2005 BellSouth is no longer required to provide new UNE dark fiber loops or UNE entrance facilities under any circumstances and we will not accept orders for these former UNEs.

Prior to the effective date of the TRRO, BellSouth will provide comprehensive information to CLECs regarding those central offices where UNE DS1 and DS3 loops are no longer available, and the routes between central offices where UNE DS1, DS3 and dark fiber transport are no longer available.

CLECs will continue to have several options involving switching, loops and transport available to serve their new customers. To this end, with regard to the combinations of switching and loops that constituted UNE-P, BellSouth is offering CLECs these options:

- Short Term (6 month) Commercial Agreement to provide a bridge between the effective date of the Order and the negotiation of a longer term commercial agreement,
- Long Term Commercial Agreement (3 years, effective January 1, 2005, with transitional discounts available under those agreements executed by March 10, 2005)

In addition, most CLECs, if not all, already have the option of ordering these former UNEs, and particularly the combination of loops and switching, as resale, pursuant to existing interconnection agreements.

To be clear, in the event one of the above options is not selected and a CLEC submits a request for new UNE-P on March 11, 2005 or after, the order will be returned to the CLEC for clarification and resubmission under one of the available options set forth above. CLECs that have already signed a Commercial Agreement may continue to request new service pursuant to their Commercial Agreement.

With regard to the former high capacity loop and transport UNEs, including dark fiber and entrance facilities, that BellSouth is no longer obligated to offer, BellSouth has two options for CLECs to consider. Specifically, CLECs may either elect to order resale of BellSouth's Private Line Services or alternatively, may request Special Access service in lieu of the former TELRIC-priced UNEs. Any orders submitted for new unbundled high capacity loops and unbundled dedicated interoffice transport

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[10] TRRO ¶235

[11] TRRO ¶199 Also see ¶ 198

in those non-impaired areas after March 11, 2005, without the required certifications, will be returned to the CLEC for clarification and resubmission under one of the above options.

To obtain more information about this notification, please contact your BellSouth contract negotiator.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

BELLSOUTH

CHANGE MANAGEMENT

CCP CHANGE REQUEST FORM (RF-1870)

DATE SENT:	02/11/05

CHANGE REQUEST #	CR2161

STATUS:	S

REQUEST TYPE *Check appropriate field:*												
TYPE 2 (REGULATORY)	X	TYPE 3 (INDUSTRY)		TYPE 4 (BST)		TYPE 5 (CLEC)		TYPE 6 (DEFECT)				

NAME:	Change Control	TEL NO:	205-714-0727
EMAIL:	Change.Control@BellSouth.com	FAX #	
COMPANY NAME	BellSouth	OCN	

TITLE OF REQUEST	Triennial Review Remand Order (TRRO) – Unbundling Rules – Ordering of new UNE-P lines

ASSESSMENT OF IMPACT:	HIGH	X	MEDIUM		LOW	

PRE-ORDERING		ORDERING	X	MAINTENANCE		MANUAL	X

INTERFACES IMPACTED:	LENS	X	TAG / XML	X	CSOTS		EDI	X	EC-TA		TAFI	

TYPE OF CHANGE: *Check appropriate field(s):*							
SOFTWARE	X	PRODUCT & SERVICES		DOCUMENTATION	X	HARDWARE	
REGULATORY		INDUSTRY STANDARDS		PROCESS		NEW OR REVISED EDITS	
DEFECT		EXCEPTION FEATURE		OTHER			

(Jointly Developed by the Change Control Sub-team comprised of BellSouth and CLEC Representatives)

Submit completed form to the BST CCP email box at: change.control@bellsouth.com

BELLSOUTH

CHANGE MANAGEMENT

CCP CHANGE REQUEST FORM (RF-1870)

DETAILED DESCRIPTION OF REQUESTED CHANGE OR DEFECT DESCRIPTION
In accordance with the Triennial Review Remand Order (TRO), effective March 11, 2005, BellSouth will no longer accept orders requesting new UNE-P without having negotiated a current Commercial Agreement. Please reference Carrier Notification Letter SN91085039, posted February 11, 2005 for specific rules and available options.

REQTYP(s) IMPACTED:	M
ACT TYP(s) IMPACTED:	
PON EXAMPLES:	
ERROR MESSAGE:	
ELECTRONIC MAP VERSION AFFECTED BY CHANGE OR DEFECT:	ELMS6, TCIF9

BELLSOUTH USE ONLY:

BELLSOUTH CHANGE REVIEW MEETING RESULTS (Types 2-5 Only):	
DEFECT VALIDATION RESULTS (Type 6 Only):	
DEFECT WORKAROUND (Type 6 Only):	

VALIDATED DEFECT SEVERITY LEVEL:	2		3		4	

CLARIFICATION SENT:	

TARGET IMPLEMENTATION DATE:	**03/11/05**
ACTUAL IMPLEMENTATION DATE:	

(Jointly Developed by the Change Control Sub-team comprised of BellSouth and CLEC Representatives)

Submit completed form to the BST CCP email box at: change.control@bellsouth.com

COPY

Michael A. Beach
Vice President – Carrier Management
6415 Business Center Drive
Highlands Ranch, CO 80130
(303) 305-5099

February 18, 2005

Via Overnight Courier & Email

Mr. Jerry Hendrix
Assistant Vice President
Interconnection Services
BellSouth Telecommunications
675 West Peachtree Street
Atlanta, GA 30375

RE: Carrier Notification SN91085039 Dated February 11, 2005

Dear Jerry:

I am writing you in reply to your Carrier Notification referenced above, in which you notify carriers that, effective March 11, 2005, BellSouth will cease accepting orders for, among other things, UNE switching and UNEP. While your letter is generic in nature, in that it is addressed to all carriers, it makes no mention of exceptions to BellSouth's plans. Thus, it does not appear that you intend to give appropriate consideration to existing interconnection agreements you have with any particular carriers.

Please take notice that BellSouth has existing interconnection agreements with various MCI CLEC entities (collectively, "MCIm"). Those agreements require that BellSouth provide UNE switching and UNEP, among other UNEs and UNE combinations. The agreements further require notice, negotiation, and either agreement or dispute resolution leading to an amendment in order to effectuate a change of law.

If BellSouth takes the action, threatened in the Carrier Notification, against MCIm, MCIm will view such action as intentional, willful, repeated breaches of the interconnection agreements, as well as intentional, willful tortious conduct. Such breaches and torts almost certainly would result in serious damages to MCIm, including (but not limited to) direct, incidental, and consequential damages, such as lost revenue, lost profits, loss of customers, and loss of good will. MCIm reserves all rights to seek any and all available legal and equitable remedies against BellSouth.

In addition, MCIm hereby demands adequate assurance from BellSouth that BellSouth will perform in accordance with the interconnection agreements. Because of the urgent nature of this

EXHIBIT "E"

matter, given BellSouth's notice of threatened breach to begin March 11, please provide such adequate assurance by February 25, 2005.

Due to the short time available, MCIm may file, before you reply to this letter, pleadings to commence legal actions, including regulatory proceedings, seeking emergency relief from BellSouth's anticipatory breach. However, MCIm remains highly interested in resolving this matter without court or regulatory intervention, and any such filings should not be viewed as a lack of interest in amicably resolving this matter.

Please contact me if you have any questions or would like to discuss this matter with me.

Sincerely,

Michael A. Beach

Peter H. Reynolds
Director
National Carrier Contracts and Initiatives
22001 Loudoun County Pkwy
Ashburn, VA 20147
(703) 886-1918

February 23, 2005

Re: Change of Law Process

Dear ILEC Negotiator:

As you know, the Communications Act of 1934, as amended by the Telecommunications Act of 1996, (the "Act") requires the FCC to establish rules regarding the availability and pricing of unbundled network elements ("UNEs"). These rules are then implemented individually between carriers through interconnection agreements ("ICAs") that are reached via a process of negotiation and arbitration before state commissions. Separate and distinct from FCC or State rules or regulations, ICAs are an independent source of rights and obligations—they are contracts, legally enforceable against the parties to them.

ICAs serve an important function in providing stability to carrier relationships in a contentious regulatory environment where the rules have been constantly subject to challenge. Where there has been an effective change in applicable law, MCI's ICAs contain provisions that address how the parties will implement those changes in their business relationship, via a change-of-law amendment to the ICAs. The Triennial Review Remand Order ("TRRO") constitutes the latest change-in-law event affecting some of MCI's rights and obligations under the ICAs. The TRRO, however, is not self-effectuating—the FCC expressly mandated that the TRRO be implemented through the change-of-law provisions in the parties' approved ICAs. The purpose of this letter is to emphasize that the changes created by the TRRO, along with many of the changes created by the FCC's Triennial Review Order ("TRO"), must now be implemented into our ICAs via these change-of-law provisions.

The change-of-law provisions may vary by contract, but in general they are designed to prevent unilateral or precipitous action by one or the other party. These provisions were negotiated and arbitrated at a point in time at which neither party knew whether application of them would work to its benefit or detriment, and these provisions reflect the State-approved mechanism for transforming contractual rights and responsibilities regardless of the nature of the subsequent change-of-law event.

The change-of-law provisions create processes that are designed to provide a smooth, prompt method for incorporating rule changes into the ICAs. Neither the TRRO nor the TRO preempted any of the change-of-law provisions set forth in our ICAs. In fact, the FCC refused to act on specific requests for such preemption.

To that end, MCI recommends the following general approach for implementing the TRRO and TRO:

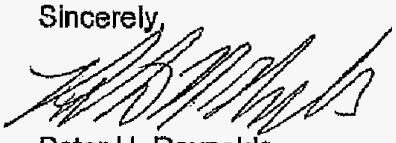
1) **Negotiate.** The ICAs are complex, operational agreements, customized to the unique business requirements of each CLEC-ILEC relationship. The rule changes of the TRRO and TRO represent more thana simple exercise of "cutting and pasting." The change-of-law provisions typically require a period of negotiation so that the parties can minimize and refine, if not eliminate, disputed issues in the context of their specific business relationship. Parties should attempt to resolve as many issues as possible.

2) **Where parties cannot resolve all of the issues, they can seek dispute resolution.** If after negotiations issues remain open, the parties can turn to the dispute resolution processes of our ICAs to resolve any remaining disputes. State commissions can and should do what is necessary to streamline the dispute resolution process by consolidating similar issues into generic proceedings and establishing expedited schedules.

3) **Until changes to ICAs are effectuated, the existing terms of the ICAs remain in effect.** Amending the ICAs need not be a lengthy process. Because the ICAs define how MCI provides services to its customers, however, avoiding both unilateral implementation of the FCC's orders and ILEC selfhelp is critical to MCI's business continuity and to avoid service disruptions. MCI will seek to implement changes of law expeditiously and smoothly. If necessary, however, it will pursue any available legal or equitable remedies in order to rightfully protect its interests.

If you have any questions, please feel free to contact me.

Sincerely,



Peter H. Reynolds

R-1. DOCKET NO. 19341-U: **Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements**: Consideration of Staff's Recommendation regarding MCI's Motion for Emergency Relief Concerning UNE-P Orders. (Leon Bowles)

Summary of Staff Recommendation

1. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

2. Issues related to a possible true-up mechanism should be decided at a later time.

3. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

Background

On February 21, 2005, MCI MetroAccess Transmission Services, LLC ("MCI") filed with the Georgia Public Service Commission ("Commission") a Motion for Emergency Relief Concerning UNE-P Orders ("Motion"). The Motion asked for the following relief:

(1) Order BellSouth to continue accepting and processing MCI's unbundled network platform ("UNE-P") orders under the rates, terms and conditions of the Agreement;

(2) Order BellSouth to comply with the change of law provisions of the Agreement with regard to the implementation of the TRRO;

(3) Order such further relief as the Commission deems just and appropriate.

BellSouth Telecommunications, Inc. filed its Response in Opposition ("Response") on February 23, 2005.

MCI's Motion was in response to Carrier Notification Letters received from BellSouth Telecommunications, Inc. ("BellSouth"). The Carrier Notification Letters, in turn, were in response to the February 4, 2005, Triennial Review Remand Order issued by the Federal Communications Commission ("FCC"). The FCC determined on a nationwide basis that incumbent local exchange carriers ("ILECs") are not obligated to provide unbundled local switching pursuant to section 251(c)(3) of the Federal Telecommunications Act ("Federal Act"). (TRRO ¶ 199). For the embedded customer base, the FCC adopted a twelve-month transition period, but specified that this transition period would not permit competitive LECs ("CLECs") to add new customers using unbundled access to local circuit switching. *Id.*

MCI Motion

MCI asserted that its interconnection agreement with BellSouth includes a provision that specifies the necessary steps to be taken in the event of a change in law. (Motion, p. 4). MCI

states that on February 8, 2005, and then on February 11, 2005, it received from BellSouth Carrier Notification Letters stating that as a result of the Triennial Review Remand Order ("TRRO") it was no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost rates or unbundled network platform and as of that date, BellSouth will no longer accept orders that treat those items as unbundled network elements." *Id.* at 7-8.

On February 18, 2005, MCI sent a letter to BellSouth asserting that the actions referenced in its Carrier Notification Letters would constitute breach of the parties' agreement. *Id.* at 8. Specifically, MCI claims that the actions would breach the agreement (i) by rejecting UNE-P orders that BellSouth is obligated by the Agreement to accept and process; and (ii) by refusing to comply with the change of law procedure established by the Agreement. *Id.* at 1. MCI argues that the TRRO does not purport to abrogate the parties' rights under their interconnection agreement. *Id.* at 6. Therefore, MCI contends that BellSouth is required to follow the steps set forth in the parties' interconnection agreement. *Id.* at 9. The change of law provision states that in the event that "any effective and applicable . . . regulatory . . . or other legal action materially affects any material terms of this Agreement . . . or imposes new or modified rights or obligations on the Parties . . . MCIm or BellSouth may, on thirty (30) days written notice . . . require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required." (Agreement, Part A, § 2.3.)

MCI also argues that BellSouth is obligated to provide UNE-P under state law. *Id.* at 10. Finally, MCI states that section 271 of the Federal Act independently supports MCI's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the Agreement. *Id.* at 14.

BellSouth Response

BellSouth argues that the TRRO is self-effectuating, and that as of March 11, 2005 (effective date of TRRO), it does not have any obligation to provide unbundled mass market local switching. (Response, p. 3). BellSouth construes the TRRO to abrogate the change of law provisions of the parties' agreements. BellSouth argues that under the *Mobile-Sierra* doctrine the FCC has the authority to negate any contract terms of regulated carriers, under the condition that it makes adequate public findings of interest. *Id.* at 5.

BellSouth argues that MCI is not entitled to UNE-P under state law. First, BellSouth argues that the Commission has not held the necessary impairment proceedings. *Id.* at 8-9. Second, BellSouth argues the Commission is preempted from granting the relief sought by MCI on this issue. *Id. at* 9-11. Third, BellSouth states that state law does not provide for the combination of unbundled network elements. *Id.* at 11.

Finally, BellSouth rebuts MCI's section 271 arguments. BellSouth claims that although it is obligated to provide unbundled local switching under section 271, switching under this code section is not combined with a loop, is subject to exclusive FCC jurisdiction and is not provided via interconnection agreements. *Id.*

Staff Recommendation

1. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

At this time, there is no dispute between the parties as to the meaning or purpose of the change of law provision. The difference between the parties is over whether the TRRO alters the parties' rights under their interconnection agreement. That is, whether the TRRO should be construed to negate the change of law provision so that as of the effective date of the TRRO the parties rights under their agreement change. The first step in this analysis is to determine whether the FCC has the authority to issue an order that would alter the parties' rights under the interconnection agreements. If this question is answered in the affirmative, then the next question is whether the FCC exercised that authority in the TRRO with regard to the change of law provision.

BellSouth cites to the *Mobile-Sierra* doctrine in its Response. This doctrine allows for the modification to the terms of a contract upon a finding that such modification will serve the public need, and it has been held that the FCC has the authority to employ the doctrine. Cable & Wireless, P.L.C. v. FCC, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999). Therefore, it appears that the answer to the first question is that the FCC does have the authority under the proper circumstances to amend agreements between private parties.

In order to determine whether the FCC intended to employ the doctrine in this instance it is necessary to examine more closely what is required for its application. In a case involving the Federal Energy Regulatory Commission, the D.C. Circuit Court of Appeals held that it is a violation of the *Mobile-Sierra* doctrine for an agency to modify a contract without "making a particularized finding that the public interest requires modification . . ." Atlantic City Electric Company, et al. v. FERC, et al., 295 F.3d 1, 40-41 (2002). In Texaco Inc. and Texaco Gas Marketing Inc. v. FERC et al., 148 F.3d 1091 (1998), the Court of Appeals for the D.C. Circuit expanded on the high public interest standard necessary to invoke the *Mobile-Sierra* doctrine. The Court explained that the finding of public interest necessary to override the terms of a contract is "more exacting" than the public interest that FERC served when it promulgated its rules. 148 F.3d at 1097. The Court held that the public interest necessary to alter the terms of a private contract "is significantly more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract's deleterious effect." *Id.* Therefore, in order to determine whether the FCC intended to invoke the *Mobile-Sierra* doctrine, it is necessary to examine the analysis, if any, that the FCC conducted to decide whether modification of the agreements satisfied the public interest.

BellSouth's Response does not include a single reference to a statement in the TRRO that modification of the agreements was in the public interest, much less a citation to analysis of why such reformation would be in the public interest. In fact, BellSouth does not cite to any express language in the TRRO at all that says that the FCC intends to reform the contracts. Instead, BellSouth quotes the FCC's statement that the transition period "shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using

unbundled access to local circuit switching." (BellSouth Response, p. 4, quoting TRRO ¶ 199). BellSouth follows this quotation with the question, "How much clearer could the FCC be?" (Response, p. 4). The answer to this question is provided in the very order cited by BellSouth later in its brief for support that the FCC has the authority to invoke the *Mobile-Sierra* doctrine. In its *First Report and Order,* prior to addressing contracts between ILECs and commercial mobile radio service providers, the FCC explained the basis for its authority to modify contracts when such modifications served the public interest. BellSouth cites to no language in the TRRO even approaching that level of clarity.

Even if the strict standard did not apply, the TRRO could not be read to abrogate the rights of the parties related to the change in law provisions of their agreements. To the contrary, parties are directed to implement the rulings of the TRRO into their agreements through negotiation.

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

(*TRRO* § 233, footnotes omitted).

If the FCC had not intended for parties to negotiate amendments related to their interconnection agreements related to new customers, then it seems likely that it would have made that exception clear in the above paragraph.

To support its position, BellSouth first cites to a portion of the order that states the requirements of the TRRO shall take effect March 11, 2005. (BellSouth Response, p. 2, citing TRRO, ¶ 235). However, examination of that paragraph makes it clear that all the FCC is addressing is that the TRRO would be effective March 11, 2005, "rather than 30 days after publication in the Federal Register." (TRRO, ¶ 235). It is not reasonable to construe this language as indicative of intent to abrogate the parties' interconnection agreements. Next, BellSouth claims that the FCC expressly stated that the TRRO would not supersede "any alternative arrangements that carriers voluntarily have negotiated on a commercial basis . . ." (BellSouth Response, pp. 2-3, quoting TRRO ¶199). BellSouth reasons that the express exemption for commercial agreements must mean that the lack of exemption for conflicting provisions in interconnection agreements means they are superseded. (Response, p.3). The flaw in BellSouth's analysis is that it fails to characterize the TRRO correctly. The FCC did not state that the TRRO would not supersede the commercial agreements; it stated that the *transition period* would not supersede the commercial agreements. (TRRO, ¶ 199). Nothing about the

transition period has any bearing on the application of the change of law provision to the question of "new adds" after March 11. Consequently, supersession is not an issue between the transition period and this application of the change of law provision.

BellSouth also relies upon the use of the term "self-effectuating" in paragraph 3 of the TRRO. However, BellSouth does not characterize this paragraph accurately. BellSouth states that the use of the term "self-effectuating" refers only to "new adds." (Response, p. 2). That is not a distinction the FCC makes. The FCC simply states that the impairment framework is, *inter alia,* "self-effectuating." (TRRO, ¶3). BellSouth must acknowledge that for the embedded customer base subject to the transition period the order recognizes the need for negotiations to implement the provisions into interconnection agreements. Therefore, unless it can link the FCC's use of the term "self-effectuating" solely to the "new adds," its argument cannot prevail. It cannot do so convincingly; however, and its argument on this issue must fail.

Finally, the Staff's recommendation is consistent with the Commission's decision in Docket No. 14361-U related to the effective date of the rates in that proceeding. In its September 2, 2003 Order on Reconsideration, the Commission held that "the rates ordered in the Commission's June 24, 2003 Order are available to CLECs on June 24, 2003, *unless the interconnection agreement indicates that the parties intended otherwise.*" (Order on Reconsideration, p. 4) (emphasis added). That this ordering paragraph contemplated consideration of change of law provisions was demonstrated in Docket No. 17650-U, *Complaint of AT&T Communications of the Southern States, LLC of the Southern States, LLC Against BellSouth Telecommunications, Inc.* In its Order Adopting Hearing Officer's Initial Decision, the Commission concluded that the change of law provision in the parties' interconnection agreement applied, and justified an effective date other than June 24, 2003. In its brief in that docket, BellSouth, then in a position to benefit from the application of the change of law provision, stated that, "The change-in-law provision contains specific steps which the parties must follow to change the terms, when a regulatory action materially affects any material terms of the Agreement." (BellSouth Brief in Support of its Motion to Dismiss and Response to Complaint and Request for Expedited Review, p. 3). The Commission agreed with this argument raised by BellSouth in that docket. The Staff believes that it would be consistent to apply that reasoning in this instance as well.

2. Issues related to a possible true-up mechanism should be decided at a later time.

Staff recommends that the Commission defer ruling on the question of a true-up mechanism until after it has had the opportunity to consider the issues more closely. This matter is being brought before the Commission on an expedited basis. While it is necessary for the Commission to resolve the issue related to the change of law provisions prior to March 11, 2005, the same urgency does not apply to the issue of a true-up mechanism. Prior to voting on this issue, it may be of assistance for the Commission to confirm that it has the benefit of all the arguments related to the appropriateness and operation of a true-up mechanism as well as any other potential issues involved. Staff intends to bring this issue back before the Commission in a timely manner.

3. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

The Order Initiating Docket set forth among the issues to be addressed: "whether BellSouth is obligated to provide Unbundled Network Elements ("UNEs") under section 271 of the Telecommunications Act of 1996," and "whether BellSouth is obligated to provide UNEs under Georgia State Law." Because those issues as well do not need to be decided prior to March 11, the Staff recommends that the Commission decide those issues in the regular course of this docket.

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 3rd day of March, 2005.

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c/o Nancy H. Sims
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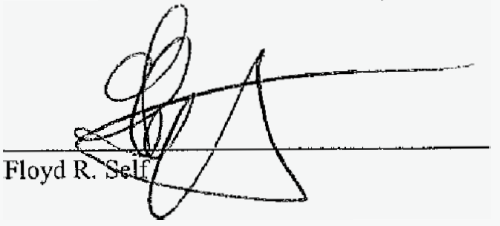

Floyd R. Self