

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Joint petition by NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC, on behalf of its operating subsidiaries Xspedius Management Co. Switched Services LLC and Xspedius Management Co. of Jacksonville, LLC, for arbitration of certain issues arising in negotiation of interconnection agreement with BellSouth Telecommunications, Inc.	DOCKET NO. 040130-TP ORDER NO. PSC-05-0018-PCO-TP ISSUED: January 4, 2005
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ORDER GRANTING JOINT PETITIONERS REQUEST  
FOR INCLUSION OF ISSUES 113(B) AND 114(B)

BY THE COMMISSION:

**Case Background**

On February 11, 2004, a joint petition for arbitration was filed on behalf of NewSouth Communications, Inc., NuVox Communications, Inc., KMC Telecom V, Inc. and KMC Telecom III, L.L.C., and Xspedius Communications LLC (collectively "Joint Petitioners") with BellSouth Telecommunications, Inc. (BellSouth). On March 8, 2004, BellSouth filed its Answer to the Petition, and on August 19, 2004, Order No. PSC-04-0807-PCO-TP was issued, holding the docket in abeyance until October 15, 2004.

On October 15, 2004, the parties submitted an updated joint matrix regarding the issues for arbitration, and on November 11, 2004, an issue identification meeting was held. The parties could not reach mutual agreement as to the inclusion of supplemental issues 113(b)<sup>1</sup> and 114(b).<sup>2</sup> Therefore, the parties were asked to submit briefs, no longer than five pages, regarding inclusion of the issues for this arbitration. On December 3, 2004, the parties submitted their briefs regarding issues 113(b) and 114(b).

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<sup>1</sup> Issue No. 113: (a) Is BellSouth obligated to provide unbundled access to DS1 loops, DS3 loops and dark fiber loops? (b) If so, under what rates, terms and conditions?

<sup>2</sup> Issue No. 114: (a) Is BellSouth obligated to provide unbundled access to DS1 dedicated transport, DS3 dedicated transport and dark fiber transports? (b) If so, under what rates, terms and conditions?

DOCUMENT NUMBER-DATE

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## **Parties Position**

### **Joint Petitioners**

First, the Joint Petitioners argue that in the event the answer is “yes” to the two issues, then BellSouth is obligated to provide the aforementioned UNEs; and the logical follow-up question is “under what rates, terms and conditions” should the network elements be unbundled. In other words, the Joint Petitioners argue that if the sub-part is excluded, a positive answer to the initial question would have no real meaningful effect.

Second, the Joint Petitioners argue that any failure to identify sub-part (b) of each issue in this arbitration would unjustly prejudice its rights by giving BellSouth an opportunity to avoid or delay compliance with its unbundling obligations and forcing the Joint Petitioners to file for arbitrations of appropriate rates at a later date.

Third, the Joint Petitioners argue that each issue is within the scope of the parties agreement to hold the proceeding in abeyance. It is the Joint Petitioners contention that the parties mutually agreed that potential issues raised by the post-USTA II regulatory framework could be raised for arbitration in this proceeding. The Joint Petitioners argue that each issue is related to the post-USTA II regulatory framework, and therefore appropriate for this proceeding.

### **BellSouth**

BellSouth notes at the outset that the parties were to submit an agreed-upon supplemental issues matrix on October 15, 2004, and that BellSouth never agreed to issues 113(b) and 114(b). Also, BellSouth notes that these network elements are non-251 network elements, and therefore not required to be unbundled.

Next, BellSouth argues that this Commission is prohibited by the doctrine of preemption from establishing rates, terms and conditions different from what the FCC ordered in the Interim Rules Order. The Commission is prohibited from ordering anything that conflicts with or frustrates the national regulatory scheme set forth by the FCC for high-capacity loops and transports.

Third, BellSouth argues that the FCC and not the Commission has jurisdiction over elements provided pursuant to §271 of the Act, for which no impairment finding has been made. 47 U.S.C. §271 (d)(1), (d)(3) and (d)(6). BellSouth argues that the only role Congress gave the states in a §271 proceeding is a consultative role, and that Congress did not authorize a state commission to ensure that an agreement satisfies §271 or to establish rates for a §271 obligation. Therefore, BellSouth argues that this Commission is prohibited from addressing each of the issues.

Fourth, BellSouth argues that the instant arbitration is a §252 arbitration and not an arbitration under state law. Therefore, it is of no consequence whether it has a state obligation to unbundle such network elements addressed in each issue. Further, BellSouth argues that

currently there are no rates, terms and conditions under state law for these elements and the Commission should not use this arbitration under federal law to establish rates, terms and conditions under state law.

Last, BellSouth argues that it never agreed to consider state law or §271 obligations in this §252 arbitration proceeding. In support of this argument, BellSouth cites Coserv Limited Liab. Corp. v. Southwestern Bell Telephone, 350 F.3d 482, 487 (5<sup>th</sup> Cir. 2003) which held that an ILEC only has an obligation under the Act to negotiate those duties listed in §251(b) and (c). BellSouth asserts that the court further stated that only where parties voluntarily agree to negotiate "issues other than those duties required of an ILEC by §251(b) and (c)" do non-§251 issues become subject to compulsory arbitration under §252, and that "[a]n ILEC is clearly free to refuse to negotiate any issue other than those it has a duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§251 and 252." Since BellSouth never agreed to negotiate rates, terms and conditions thus, the issues are not appropriate for a §252 arbitration.

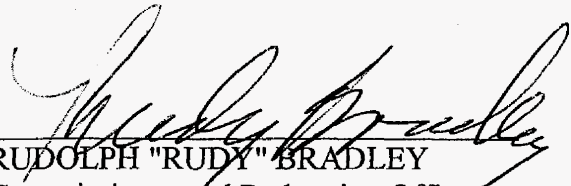
### **Decision**

Upon consideration, the issues identified as 113(b) and 114(b) shall be included in this proceeding. Including these issues does not appear to prejudice either party and better serves the interest of judicial economy. I note that the questions presented by Issues 113 and 114, as a whole, do not preclude jurisdictional arguments, such as those raised by BellSouth in its opposition to the inclusion of the respective subparts (b). Such arguments are, however, more appropriately addressed by the Commission panel assigned to this case either through the hearing process or other appropriate vehicle.

Based on the foregoing, it is

ORDERED by Commissioner Rudolph "Rudy" Bradley that issues 113(b) and 114(b) will be included in this arbitration proceeding.

By ORDER of Commissioner Rudolph "Rudy" Bradley, as Prehearing Officer, this  
4th day of January, 2005

  
RUDOLPH "RUDY" BRADLEY  
Commissioner and Prehearing Officer

( S E A L )

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NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code; or (2) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of the Commission Clerk and Administrative Services, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary, procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.