BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.	DOCKET NO. 041269-TP
In re: Emergency petition of Ganoco, Inc. d/b/a American Dial Tone, Inc. for Commission order directing BellSouth Telecommunications, Inc. to continue to accept new unbundled network element orders pending completion of negotiations required by "change of law" provisions of interconnection agreement in order to address the FCC's recent Triennial Review Remand Order (TRRO).	DOCKET NO. 050171-TP
In re: Emergency petition of Ganoco, Inc. d/b/a American Dial Tone, Inc. for Commission order directing Verizon Florida Inc. to continue to accept new unbundled network element orders pending completion of negotiations required by "change of law" provisions of interconnection agreement in order to address the FCC's recent Triennial Review Remand Order (TRRO).	DOCKET NO. 050172-TP ORDER NO. PSC-05-0492-FOF-TP ISSUED: May 5, 2005

The following Commissioners participated in the disposition of this matter:

BRAULIO L. BAEZ, Chairman
J. TERRY DEASON
RUDOLPH "RUDY" BRADLEY
CHARLES M. DAVIDSON
LISA POLAK EDGAR

ORDER DENYING EMERGENCY PETITIONS

BY THE COMMISSION:

Case Background

On August 21, 2003, the Federal Communications Commission (FCC) released its *Triennial Review Order*[1], which contained revised unbundling rules and responded to the D.C. Circuit Court of Appeals' remand decision in *USTA I*.[2] The *TRO* eliminated enterprise switching as a UNE on a national basis. For other UNEs (e.g., mass market switching, high capacity loops, dedicated transport), the *TRO* provided for state review on a more granular basis to determine whether and where impairment existed, to be completed within nine months of the effective date of the order.

On March 2, 2004, the D.C. Circuit Court of Appeals released its decision in *United States Telecom Ass'n v. FCC*[3] which vacated and remanded certain provisions of the *TRO*. In particular, the D.C. Circuit held that the FCC's delegation of authority to state commissions to make impairment findings was unlawful, and further found that the national findings of impairment for mass market switching and high-capacity transport were improper and could not stand on their own. Accordingly, the Court vacated the *TRO's* subdelegation to the states for determining the existence of impairment with regard to mass market switching and high-capacity transport. The D.C. Circuit also vacated and remanded back to the FCC the *TRO's* national impairment findings with respect to these elements.

As a result of the Court's mandate, the FCC released an *Order and Notice*[4] (Interim Order) on August 20, 2004, requiring ILECs to continue providing unbundled access to mass market local circuit switching, high capacity loops and dedicated transport until the earlier of the effective date of final FCC unbundling rules or six months after Federal Register publication of the *Interim Order*. Additionally, the rates, terms, and conditions of these UNEs were required to

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[1] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, rel. August 21, 2003 (*Triennial Review Order or TRO*).

[2] United States Telecom Association v. FCC, 290 F.3d 415 (D.C. Cir. 2002) (USTA I).

[3] 359 F. 3d 554 (D.C. Cir. 2004) (*USTA II*), cert. denied, 160 L. Ed. 2d 223, 2004 U.S. LEXIS 671042 (October 12, 2004).

[4] In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313; In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, rel. August 20, 2004 (*Interim Order*).

be those that applied under ILEC/CLEC interconnection agreements as of June 15, 2004.[5] In the event that the interim six months expired without final FCC unbundling rules, the *Interim Order* contemplated a second six-month period during which CLECs would retain access to these network elements for existing customers, at transitional rates.

On November 1, 2004, BellSouth Telecommunications, Inc. (BellSouth) filed its Petition to establish a generic docket to consider amendments to interconnection agreements resulting from changes of law. Specifically, BellSouth asked that we determine what changes are required in existing approved interconnection agreements between BellSouth and competitive local exchange carriers (CLECs) in Florida as a result of *USTA II* and the *Interim Order*.

On February 15, 2005, Order No. PSC-05-0171-FOF-TP was issued denying the Florida Competitive Carriers Association (FCCA) and the Competitive Carriers of the South's (CompSouth) Motion to Dismiss BellSouth's Petition, as well as the Motion to Dismiss filed by 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., NewSouth Communications Corp., KMC Telecom V, Inc., and KMC Telecom III, LLC (Joint CLECs).

On February 4, 2005, the FCC released its Order on Remand (*TRRO*), which included its Final Unbundling Rules.[6] In the *TRRO*, the FCC found that requesting carriers are not impaired without access to local switching and dark fiber loops. Additionally, the FCC established conditions under which ILECs would be relieved of their obligation to provide, pursuant to section 251(c)(3) of the Act, unbundled access to DS1 and DS3 loops, as well as DS1, DS3, and dark fiber dedicated transport. On February 11, 2005, BellSouth issued Carrier Notification SN91085039 in which it declared that switching,[7] certain high capacity loops in specified central offices,[8] and dedicated transport between a number of central offices having certain characteristics,[9] as well as dark fiber[10] and entrance facilities,[11] will no longer be available as of

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[5] Except to the extent the rates, terms, and conditions have been superseded by 1) voluntarily negotiated agreements, 2) an intervening FCC order affecting specific unbundling obligations (e.g., an order addressing a petition for reconsideration), or 3) a state commission order regarding rates.

[6] In the Matter of Unbundling Access to Network Elements, WC Docket No. 04-313; In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order on Remand, FCC 04-290, rel. Feb. 4, 2005 (*TRRO*).

[7] *TRRO* ¶199

[8] *TRRO* ¶¶174, 178

[9] *TRRO* ¶¶126, 129

[10] *TRRO* ¶¶133, 182

[11] *TRRO* ¶141

March 11, 2005, because certain provisions of the *TRRO* regarding new orders for delisted UNEs (new adds) are self-effectuating as of that date.

On February 10, 2005, Verizon posted a letter on its website notifying CLECs that effective on or after March 11, 2005, CLECs may not submit orders for delisted UNEs.

Several motions and letters have been filed in Docket No. 041269-TL in response to BellSouth's February 11th Carrier Notification. On March 1, 2005, the Joint CLECs filed their Petition and Request for Emergency Relief in which the Joint CLECs ask that we issue an order finding that BellSouth may not unilaterally amend or breach either its existing interconnection agreements with the Joint CLECs or the Abeyance Agreement entered into between BellSouth and the Joint CLECs in Docket No. 040130-TP and approved by Order No. PSC-04-0807-PCO-TP, issued August 19, 2004. Likewise, on March 3, 2005, MCImetro Access Transmission Services, LLC filed its Motion for Expedited Relief Concerning UNE-P Orders and on March 4, 2005, Supra Telecommunications and Information Systems, Inc. filed its Petition and Request for Emergency Relief. Furthermore, XO Communications Services, Inc. (XO), CompSouth, US LEC of Florida, Inc. (US LEC), and AT&T Communications of the Southern States, LLC (AT&T) have all filed letters in support of the motions. BellSouth filed its Response to the Joint CLECs' Motion on March 4, 2005.

Additionally, AmeriMex Communications Corp. (AmeriMex) initiated Docket No. 050170-TP and Ganoco Inc. d/b/a American Dial Tone, Inc. (American Dial Tone) initiated Docket No. 050171-TP by filing their Emergency Petitions for an Order directing BellSouth to continue to accept new unbundled network element orders pending the completion of change-of-law negotiations required by their interconnection agreements with BellSouth. On March 15, 2005, BellSouth filed its Response in Opposition to the emergency petitions and a Motion to Consolidate Docket Nos. 041269-TP, 050171-TP, and 050172-TP. On March 23, 2005, Amerimex filed a letter stating it had signed a commercial agreement with BellSouth which rendered its Petition moot. Thus, Docket No. 050170-TP has been closed. We have, however, addressed herein the question raised by American Dial Tone in Docket No. 050171-TP.

This order also addresses American Dial Tone's Emergency Petition for an order directing Verizon to continue to accept new unbundled network element orders for de-listed UNEs pending the completion of change-of-law negotiations required by its interconnection agreements with Verizon filed in Docket No. 050172-TP.

On March 7, 2005, BellSouth issued Carrier Notification SN91085061, which stated that in light of the various objections filed with state commissions, BellSouth was revising the implementation date contained in Carrier Notification SN91085039. BellSouth stated it would continue to accept CLEC orders for "new adds" as they relate to the former UNEs as identified by the FCC until the earlier of (1) an order from an appropriate body, either a commission or a court, allowing BellSouth to reject these orders; or (2) April 17, 2005. By Carrier Notification SN91085070 issued March 21, 2005, BellSouth clarified that "(d)ue to the system changes being implemented on April 17, 2005, CLECs who intend to continue to place new orders with BellSouth for switching or port/loop combinations must sign a Commercial Agreement by April 8, 2005, to ensure ordering continuity."

We note that several Petitions for Reconsideration and/or Clarification of the *TRRO* have been filed with the FCC. Among them are two petitions, one filed jointly by CTC Communications Corp., Gillette Global Network, Inc. d/b/a Eureka Networks, GlobalCom, Inc., Lightwave Communications, LLC, McLeodUSA, Inc., Mpower Communications Corp., PacWest Telecomm, Inc., TDS Metrocom, LLC and US LEC Corp. and one filed by the Pace Coalition, which ask the FCC to reconsider and/or clarify whether the *TRRO's* prohibition on "new adds" is self-effectuating

We have jurisdiction to resolve this matter pursuant to Section 364.162, Florida Statutes, and under §251(d)(3) of the Act.

Arguments

Petitioners

The Petitioners[12] argue that BellSouth and Verizon's position that the provisions of the *TRRO* regarding new orders for delisted UNEs are self-effectuating is based on a fundamental misreading of the *TRRO*. The Petitioners assert that, as with any change-of-law, the conclusions of the *TRRO* must be incorporated into interconnection agreements prior to being effectuated; they are not self-effectuating as BellSouth and Verizon claim. The Petitioners argue that the FCC clearly stated in Paragraph 233 of the *TRRO* that the Final Rules would be incorporated into interconnection agreements through the negotiation or arbitration of amendments to the interconnection agreements, in accordance with Section 252 of the Act. They argue that Paragraph 233 clearly indicates that the FCC did not intend to abrogate the parties' current interconnection agreements, most of which include change-of-law provisions, and add that it is unclear whether the FCC has the authority to abrogate such contractual provisions. Thus, they ask this Commission to require BellSouth and Verizon to continue to accept new orders for delisted UNEs throughout the transition period set forth in the *TRRO* in order to allow the parties to negotiate amendments to their interconnection agreements that conform with the FCC's findings.

BellSouth and Verizon

BellSouth and Verizon argue the FCC's new unbundling rules unequivocally state that carriers may not obtain certain new UNEs, and that the 12-month transition period for embedded UNEs began on March 11, 2005. BellSouth and Verizon assert that the Petitioners' contention that BellSouth and Verizon are required to provide new, delisted UNEs until their interconnection agreements are amended is wholly inconsistent with the language of the *TRRO* and is flatly contradicted by the federal rules. They emphasize that Paragraph 233 was intended only to require the parties to negotiate with regard to the transition of the embedded UNE-P base,

[12]MCImetro Access Transmission Services, LLC, Supra Telecommunications and Information Systems, Inc., Ganoco Inc. d/b/a American Dial Tone, Inc., Xspedius Communications, LLC on behalf of its operating affiliates, Xspedius Management Co. of Jacksonville, LLC and Xspedius Management Co. Switched Services, LLC, and NuVox, Inc. on behalf of its operating entities NuVox Communications, Inc., NewSouth Communications Corp., KMC Telecom V, Inc., KMC Telecom III, LLC.

not to further perpetuate UNE-P throughout the transition period. They contend that the FCC clearly stated throughout the *TRRO* that the 12-month transition period applied solely to the embedded UNE-P base, and that after March 11, 2005, there could be no new UNE-P orders. Thus, BellSouth and Verizon contend that the CLECs' position is based on a misapplication of the FCC's statements in Paragraph 233 of the *TRRO*.

BellSouth and Verizon add that they have offered CLECs commercial agreements that would enable CLECs to continue to order UNE-like services while they are either negotiating a permanent commercial agreement covering these orders or otherwise completing the FCC's transition away from the delisted UNEs. BellSouth and Verizon further assert the agreements permit CLECs to continue to place new orders for platform services. Thus, they argue that the options available to prevent any lapse in a CLEC's ability to place new orders negate the Petitioners claim of injury, let alone irreparable injury, caused by implementation of the FCC's "no new adds" mandate.

Decision

Although petitions have been filed with the FCC asking for clarification as to whether the *TRRO*'s prohibition on "new adds" is self-effectuating, those filings do not serve as a sufficient basis for us to forego consideration of this issue. This issue is appropriately before us and ripe for our consideration. As such, we have thoroughly considered the well-pleaded arguments of both sides and reach the following conclusions.

First, with regard to switching, the *TRRO* is quite specific, as is the revised FCC rule attached and incorporated in that Order, that the requesting carriers may not obtain new local switching as an unbundled element.[13] Having considered the arguments to the contrary, we are simply not persuaded that Paragraph 233 of the *TRRO* indicates that the FCC intended any other result. Rather, it is much more likely that Paragraph 233 of the *TRRO* was intended only to direct the parties with regard to the embedded UNE-P base. Any other conclusion would render the *TRRO* language regarding "no new adds" a nullity, which would, consequently, render the prescribed 12-month transition period a confusing morass ripe for further dispute. Thus, we find that, as of March 11, 2005, requesting carriers may not obtain new local switching as a UNE.

As for high capacity loops and dedicated transport, we find that a requesting CLEC shall self-certify its order for high-capacity loops or dedicated transport. Thereafter, the ILEC shall provision the high capacity loops or dedicated transport pursuant to the CLEC's certification. The ILEC may subsequently dispute whether the CLEC is entitled to such loop or transport, pursuant to the parties' existing dispute resolution provisions. This process, as delineated in Paragraph 234 of the *TRRO*, shall remain in place pending any appeals by BellSouth or Verizon of the FCC's decision on this aspect of the *TRRO*.

In conclusion, we find that further prolonging the availability of UNE-P and other delisted UNEs could cause competitive carriers to further defer investment in their own facilities,

[13] §51.319 (d)(2)(iii) C.F.R.

a result that would be clearly contrary to the FCC's intent, as well as the Court's decision in USTA II. Our conclusions herein are appropriate, effectuate the policy of encouraging facilities-based competition, and, on balance, find the greatest support in the language of the *TRRO* itself. We emphasize that nothing in this Order prevents the parties from negotiating commercial agreements to address the various issues raised by the *TRRO* and are encouraged that many commercial agreements between ILECs and CLECs have, in fact, been reached. Furthermore, it should go without saying that all parties have an obligation to negotiate in good faith and failure to faithfully adhere to that obligation may result in further legal recourse by the offended party.

Having reached the foregoing conclusions, we find it is not necessary to consolidate Docket Nos. 041269-TP and 050171-TP. Rather, having resolved all issues raised in Docket Nos. 050171-TP and 050172-TP, we find it appropriate to close those dockets. Docket No. 041269-TP shall remain open to address the remaining issues in that Docket.

Based on the foregoing, it is

ORDERED by the Florida Public Service Commission that the petitions and request for Emergency Relief filed by the Joint CLECs, Supra, MCI, and American Dial Tone are denied. It is further

ORDERED that as of March 11, 2005, requesting carriers may not obtain new local switching as an unbundled network element. It is further

ORDERED that pending the outcome of any appeals by BellSouth or Verizon of the *TRRO*, the ILECs shall comply with the self-certification process delineated in the *TRRO* for high-capacity loops and dedicated transport. It is further

ORDERED that BellSouth's Motion to Consolidate Docket Nos. 041269-TP and 050171-TP, is denied. Docket Nos. 050171-TP and 050172-TP shall be closed, and Docket 041269-TP shall remain open to address the remaining open issues.

By ORDER of the Florida Public Service Commission this 5th day of May, 2005.

BLANCA S. BAYÓ, Director
Division of the Commission Clerk
and Administrative Services

(SEAL)

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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.

Any party adversely affected by the Commission's final action in this matter may request: 1) reconsideration of the decision by filing a motion for reconsideration with the Director, Division of the Commission Clerk and Administrative Services, 2540 Shumard Oak Boulevard, Tallahassee, Florida 32399-0850, within fifteen (15) days of the issuance of this order in the form prescribed by Rule 25-22.060, 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 and/or wastewater utility by filing a notice of appeal with the Director, Division of the Commission Clerk and Administrative Services and filing a copy of the notice of appeal and the filing fee with the appropriate court. This filing must be completed within thirty (30) days after the issuance of this order, pursuant to Rule 9.110, Florida Rules of Appellate Procedure. The notice of appeal must be in the form specified in Rule 9.900(a), Florida Rules of Appellate Procedure.