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December 3, 2004

**BY HAND DELIVERY**

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

Re: Docket 040130-TP

Dear Ms. Bayó:

Enclosed for filing on behalf of Joint Petitions are an original and fifteen copies of Joint Petitioners' Brief in Support of Including Supplemental Issues 113(B) and 114(B) Into The Arbitration in the above-referenced docket.

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

Thank you for your assistance with this filing.

Sincerely yours,



Norman H. Horton, Jr.

NHH/amb  
Enclosures

**BEFORE THE  
FLORIDA PUBLIC SERVICE COMMISSION**

<b>In the Matter of Joint Petition of</b>	)
<b>NewSouth Communications Corp. et al.</b>	) <b>Docket No. 040130-TP</b>
<b>For Arbitration with BellSouth</b>	) <b>Filed: December 3, 2004</b>
<b>Telecommunications, Inc.</b>	)

**JOINT PETITIONERS' BRIEF IN SUPPORT OF INCLUDING  
SUPPLEMENTAL ISSUES 113(B) AND 114(B) INTO THE ARBITRATION**

Joint Petitioners<sup>1</sup>, through counsel, hereby respectfully submit this brief pursuant to an agreement made between them, BellSouth Telecommunications, Inc. ("BellSouth") and the Florida Public Service Commission ("Commission") Staff at the November 15, 2004 issue identification conference held in this matter. Because Joint Petitioners and BellSouth (collectively, the "Parties") could not reach mutual agreement as to the inclusion of Supplemental Issue 113(B)/S-6(B) and Supplemental Issue 114(B)/S-7(B) in this arbitration proceeding (Joint Petitioners are in favor of identifying these issues for arbitration and BellSouth is opposed), it was agreed that the Parties would submit five-page briefs in support of their respective positions by December 3, 2004.

**I. INTRODUCTION AND ARGUMENT**

Section 251 and 252 of the Act were designed to promote competition by developing methods for competing carriers to interconnect with incumbent carriers. Section 252 requires, among other things, that a competing carrier and incumbent carrier enter negotiations when interconnection is desired by a party. However, in the event negotiations fail, as in the case here, Section 252 permits a party to the negotiation to seek state commission arbitration of any "open

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<sup>1</sup> NuVox Communications, Inc., on behalf of itself and its operating entity, NewSouth Communication Corp. (collectively "NuVox"), KMC Telecom V, Inc. and KMC Telecom III, LLC (collectively "KMC"), and Xspedius Communications, LLC, on behalf of its operating subsidiaries Xspedius Management Company Switched Services, LLC and Xspedius Management Co. of Chattanooga, LLC.

issues”. As a result of the Parties’ abatement agreement (which was memorialized in a joint motion filed with the Commission on July 20, 2004 and granted, in part, by the Commission on August 19, 2004) the Parties agreed to identify for arbitration issues related to “the post *USTA II* regulatory framework”. See Motion at 2. The supplemental issues that appear in the Parties’ Joint Issues Matrix reflect the their efforts to identify such issues.<sup>2</sup> At issue here are the secondary sub-parts of two issues addressing whether BellSouth has an obligation to provide unbundled access to DS1, DS3 and dark fiber facilities (one issue addresses loops and the other addresses transport). In whole, those issues are:

***Item No. 113, Issue No. S-6: (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?***

***Item No 114, Issue No. S-7: (A) Is BellSouth obligated to provide unbundled access to DS1 dedicated transport, DS3 dedicated transport and dark fiber transport? (B) If so, under what rates, terms and conditions?***

Only the identification of the issue raised by the second part – sub-part (B) – of these two issue statements remains in dispute. The identification of sub-part (A) of each issue, as proposed by Joint Petitioners, already has been accepted.

#### **A. The Two Sub-Parts of Each Issue Are Interdependent**

With these two issues, Joint Petitioners proposed essentially parallel issues (Issue 113 covers DS1, DS3 and dark fiber **loops** and Issue 114 covers DS1, DS3 and dark fiber **transport**) broken down into two sub-parts. **Sub-part (A)** of each of these issues asks whether is BellSouth obligated to provide unbundled access to DS1, DS3, and dark fiber loops (Issue 113) and transport (Issue 114). If the answer is “no”, as BellSouth maintains, there is no need to go further. However, if the answer is “yes”, as Joint Petitioners maintain, then the logical follow-up

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<sup>2</sup> The most recent version of the Joint Issues Matrix was filed in this docket on November 10, 2004.

question is “under what rates, terms and conditions” should these things be unbundled? This corollary is precisely the issue that Joint Petitioners propose and which BellSouth opposes as **sub-part (B)** of Issues 113 and 114.

Without this second sub-part, a positive answer to the initial question (sub-part (A)) would really have no meaningful effect (a result which BellSouth’s opposition to these sub-part (B)s appears designed to attain). If BellSouth was indeed obligated to unbundle DS1, DS3, and dark fiber loops (Issue 113) and transport (Issue 114), what meaning would that obligation have, if the Joint Petitioners were unable to have the Commission resolve through this arbitration the Parties’ apparent dispute over the rates, terms and conditions that should be incorporated into the Agreement to effectuate those requirements?<sup>3</sup> Unless the appropriate rates terms and conditions are incorporated into the Agreement, BellSouth is likely to argue that its unbundling obligations do not apply – even if the Commission finds in response to the questions raised by sub-part (A) of these two issues that unbundling obligations do indeed apply.

Thus, Joint Petitioners respectfully submit that the two sub-parts of each issue are interdependent, and to the extent that BellSouth is obligated to unbundle DS1, DS3 and dark fiber loops and transport, whether it be under section 251 or 271 of the Act, or under Florida state law, this Commission must resolve, with respect these UNEs, what rates, terms and conditions will be incorporated into the Parties’ Agreements.

**B. Joint Petitioners Would Be Unduly Prejudiced by a Failure to Include Sub-Part (B) of Supplemental Issues 113 and 114**

As indicated above, BellSouth’s opposition to the identification of the sub-part (B)s of Issues 113 and 114 appears to be designed to moot the effect of a likely loss (for BellSouth) on

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<sup>3</sup> Notably, Joint Petitioners propose to incorporate the TELRIC-compliant rates for these elements already ordered by the Commission. It is not Joint Petitioners’ intention or request to turn these issues into generic rate case issues.

sub-part (A) of each of these issues. If BellSouth does indeed have an obligation to unbundle DS1, DS3 and dark fiber loops and/or transport, BellSouth would certainly attempt to evade such an obligation(s) unless and until the question raised in sub-part (B) of each issue is answered.<sup>4</sup> By attempting to block identification of sub-part (B) of each issue, BellSouth is attempting to provide itself with a means by which to evade or delay complying with unbundling obligations even in the event it loses on sub-part (A) of either or both issues. As a result, any failure to identify sub-part (B) of each issue as an issue to be addressed in this arbitration would unjustly prejudice the rights of Joint Petitioners by giving BellSouth an opportunity to avoid or delay compliance with its unbundling obligations and by forcing Joint Petitioners to file for arbitration of appropriate rates, terms and conditions at a later date (which BellSouth undoubtedly would also oppose).

Moreover, as indicated above, BellSouth is not harmed or prejudiced by the identification of these sub-part (B)s as arbitration issues. If BellSouth prevails on the corresponding questions raised in sub-part (A) of each issue, these sub-part (B)s will become moot.

**C. Neither the Parties' Abeyance Agreement nor the Commission's Partial Grant of the Joint Motion re Abatement Gives a Party the Right to Veto the Identification of an Issue**

With their abeyance agreement, the Parties mutually agreed that potential issues raised by the post-*USTA II* regulatory framework could be raised for arbitration in this proceeding. Thus, no argument can be made that such issues are beyond the scope of the Agreement or the Commission's jurisdiction to arbitrate its terms.<sup>5</sup> Similarly, there can be no reasonable argument

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<sup>4</sup> For example, it is BellSouth's practice that it will not provision a facility unless a rate for such facility is included in the parties' interconnection agreement.

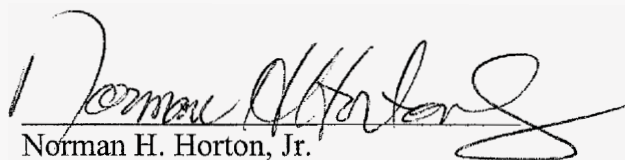
<sup>5</sup> Thus, any reliance BellSouth might seek to place on the Fifth Circuit's *Coserve* case would be misplaced. See *Coserv v. Southwestern Bell*, 350 F.3d 482 (5<sup>th</sup> Cir. 2003). That case actually supports Joint Petitioners' position, as the Parties voluntarily chose to include the post-*USTA II* regulatory framework within the scope of their negotiations and Agreement. *Id.* at 487.

that the issues raised as Issues 113 and 114 are not related to the post-*USTA II* regulatory framework.<sup>6</sup> Moreover, the Parties never agreed that mutual consent was required to raise an arbitration issue – and no such requirement exists otherwise. In other words, neither BellSouth nor the Joint Petitioners have the right to veto issues raised and incorporated into their post-abatement period updated matrix filings with respect to the post-*USTA II* regulatory framework.

## II. CONCLUSION

For the aforementioned reasons, Supplemental Issues 113(B)/S-6(B) and 114(B)/S-7(B) should be incorporated into this arbitration proceeding as unresolved issues.

Respectfully submitted,



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*Counsel to Joint Petitioners*

December 3, 2004

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<sup>6</sup> Such arguments would, in any event, be moot, as the identification of sub-part (A) of both Issue 113 and 114 already has been accepted.

## CERTIFICATE OF SERVICE

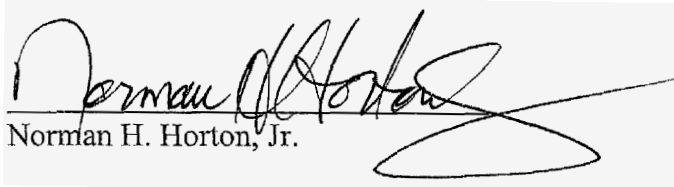
I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following parties by Hand Delivery (\*), and/or U. S. Mail this 3<sup>rd</sup> day of December, 2004.

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