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March 1, 2005

BY ELECTRONIC FILING
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 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 (hereinafter "Joint Petitioners") is an electronic version of Joint Petitioners' Petition and Request for Emergency Relief in the above referenced docket.

Thank you for your assistance with this filing.

Sincerely yours,

Norman H. Horton, Jr.

NHH/amb
Enclosures

BEFORE THE FLORIDA 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 Filed: March 1, 2005

PETITION AND REQUEST FOR EMERGENCY RELIEF

COMES NOW, NuVox Communications, Inc. ("NuVox"), Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC ("Xspedius"), KMC Telecom III, LLC ("KMC III") and KMC Telecom V, Inc. ("KMC V") (collectively, "Joint Petitioners") pursuant to section 364.01(g), Florida Statutes, requesting that the Florida Public Service Commission ("Commission") issue an order finding that BellSouth Telecommunications Inc. ("BellSouth") may not unilaterally amend or breach its existing interconnection agreements with the Joint Petitioners or the Abeyance Agreement entered into by and between BellSouth and Joint Petitioners (collectively, "the Parties"). As basis Joint Petitioners would show:

PARTIES

1. NuVox is a Delaware corporation with its principal place of business at 2 Main Street, Greenville, SC 29601. NuVox is a certificated competitive local exchange carrier that is authorized to provide local exchange service in Florida. NuVox is a "telecommunications carrier" and "local exchange carrier" under the Communications Act of 1934, as amended ("the Act") and is a party to an interconnection agreement with BellSouth.

2. KMC III is a Delaware limited liability company and KMC V is a Delaware corporation. Both entities have their principal place of business at 1755 North Brown Road,

Lawrenceville, Georgia 30043. KMC III and KMC V are certificated competitive local exchange carriers that are authorized to provide local exchange service in Florida. Each entity is a "telecommunications carrier" and "local exchange carrier" under the Act and is a party to an interconnection agreement with BellSouth.

3. Xspedius is a Delaware limited liability company with its principal place of business at 5555 Winghaven Boulevard, O'Fallon, Missouri 63366. Xspedius is a certificated competitive local exchange carrier that is authorized to provide local exchange service in Florida. Xspedius is a "telecommunications carrier" and "local exchange carrier" under the Act and is a party to an interconnection agreement with BellSouth.

4. 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 Act, and section 364, Florida Statutes.

5. Notices and communications with respect to this petition and docket should be addressed to:

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BASIS FOR RELIEF REQUESTED

6. Joint Petitioners bring the instant matter before the Commission in light of BellSouth's February 11, 2005 Carrier Notification and February 25, 2005 Revised Carrier Notification stating that certain provisions of the FCC's *Triennial Review Remand Order* ("*TRRO*") regarding new orders for de-listed UNEs ("new adds") are self-effectuating as of March 11, 2005.[1] BellSouth's pronouncement is based on a fundamental misreading o the *TRRO*. As with any change in law, the *TRRO* is a change that must be incorporated into interconnection agreements prior to being effectuated. It is not self-effectuating, as BellSouth claims. To the contrary, the FCC clearly stated that the *TRRO* and the new Final Rules issued therewith would be incorporated into interconnection agreements via the section 252 process, which requires negotiation by the Parties and arbitration by the Commission of issues which Parties are unable to resolve through negotiations.

7. Thus, as with any change in law, the *TRRO* is a change that must be incorporated into interconnection agreements prior to being effectuated. NuVox, KMC and Xspedius have agreed with BellSouth that the *TRRO*, as well as the older *TRO* changes in law will be incorporated into their new arbitrated interconnection agreements. Accordingly, the Parties' new interconnection agreements will incorporate, *inter alia*, older *TRO* changes of law more-favorable-to-Joint Petitioners (such as commingling rights and clearer EEL eligibility criteria), as well as newer *TRRO* changes of law more-favorable-to-BellSouth (such as limited section 251 unbundling relief). The Parties' new Florida interconnection agreements certainly will not be in place by March 11, 2005.

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[1] BellSouth Carrier Notification at 1. A copy of the Carrier Notification is attached hereto as Exhibit A. BellSouth revised its Carrier Notification on February 25, 2005. A copy of the Revised Carrier Notification is attached hereto as Exhibit B.

8. BellSouth has taken an all or nothing approach to the *TRO* and past changes of law and it should not be permitted to pick-and-choose out of the *TRRO* the changes-of-law that are most favorable to it, while making NuVox and others wait-out arbitrations and/or the generic UNE proceeding to get the *TRO* changes, such as commingling and clearer EEL eligibility criteria that are more favorable to them. In Florida, the process for implementing these changes-of-law is already well under way in the Joint Petitioners' arbitration as well as in the generic UNE change-of-law docket. Until the Parties are through these proceedings (or otherwise reach negotiated resolution) they must abide by their existing interconnection agreements. That is what the interconnection agreements require. That is what the Parties' Abeyance Agreement requires. That also is what the *TRRO* requires. And that is what is fair.

9. The Commission must act now to prevent BellSouth from taking unilateral action on March 11, 2005 that would effectively breach and/or unilaterally amend Joint Petitioners' existing interconnection agreements. Importantly, the Commission's action must address all "new adds."[2] For facilities-based carriers like Joint Petitioners, high capacity loops and high capacity transport UNEs are essential and they are jeopardized by BellSouth's Carrier Notifications.

10. Joint Petitioners will suffer imminent and irreparable harm if BellSouth is allowed to breach or unilaterally modify the terms of the Parties' existing interconnection agreements and Abeyance Agreement by refusing to accept local service requests ("LSRs") for new DS1 and DS3 loops and transport that BellSouth claims is delisted by application of the Final Rules.

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[2] On March 1, 2005, the Georgia Commission voted to prevent BellSouth from taking action to unilaterally implement the *TRRO* with respect to all "new adds" as proposed in BellSouth's Carrier Notification. In voting to adopt the Georgia Commission Staff's recommendation, the Georgia Commission made clear that the Commission's decision applied to all carriers and all "new adds" (*i.e.*, it is not limited to MCI or UNE-P). A copy of the Georgia Commission's Staff Recommendation is attached hereto as Exhibit C. A final written order from the Georgia Commission is not yet available.

Although used by Joint Petitioners to a lesser extent, the same is true for UNE-P. Furthermore, Florida consumers relying on Joint Petitioners' services will be harmed if BellSouth is permitted to implement its announced plan to breach and/or unilaterally modify interconnection agreements by refusing to accept LSRs for "new adds" as of March 11, 2005. Florida businesses and consumers could be left without ordered services while the Parties sort-out the morass that will be created by BellSouth's unilateral decision to reject certain UNE orders. The resulting morass also likely would lead to a flood of litigation and complaint dockets before the Commission.

11. Accordingly, Joint Petitioners seek expeditious consideration of this matter and an Order declaring *inter alia* that Joint Petitioners shall have full and unfettered access to BellSouth UNEs provided for in their existing interconnection agreements on and after March 11, 2005, until such time that those agreements are replaced by new interconnection agreements resulting from the arbitration in Docket No. 040130-TP.

JURISDICTION

12. BellSouth and Joint Petitioners are subject to the jurisdiction of the Commission respecting matters raised in this Petition.

13. The Commission has jurisdiction over the matters raised in this Petition pursuant to Chapters 120 and 364, Florida Statutes and Chapters 25-22 and 28-106, Florida Administrative Code.

14. The Commission also has jurisdiction under §251(d) (3) of the Act (conferring authority to State commissions to enforce any regulation, order or policy that is consistent with the requirements of Section 251) respecting matters raised in this Petition.

STATEMENT OF FACTS

15. On February 11, 2004, Joint Petitioners filed jointly with this Commission a petition for arbitration of an interconnection agreement with BellSouth. The matter was assigned Docket No. 040130-TP. A hearing is scheduled to begin March 22, 2005.

16. On March 2, 2004, the U.S. Court of Appeals for the D.C. Circuit in *United States Telecom Ass'n v. FCC* ("*USTA II*")[3] affirmed in part, and vacated and remanded in part, the FCC's *Triennial Review Order* ("*TRO*"), which obligated ILECs to provide requesting telecommunications carriers with access to certain UNEs.[4] The D.C. Circuit initially stayed its *USTA II* mandate for 60 days. The stay of the *USTA II* mandate later was extended by the D.C. Circuit for a period of 45 days, until June 15, 2004 on which date the D.C. Circuit's *USTA II* mandate issued. At that time, certain of the FCC's rules applicable to BellSouth's obligation to provide CLECs with UNEs were vacated.

17. On June 30, 2004, BellSouth and Joint Petitioners entered into an Abeyance Agreement which was later memorialized in a July 20, 2004 Joint Motion to Hold Proceeding in Abeyance ("Abeyance Agreement") with the expectation that the FCC would soon issue additional and new rules governing ILECs' obligations to provide access to UNEs.[5] Specifically, the Abeyance Agreement provided for a 90-day abatement of the Parties' ongoing arbitration in order to consider *inter alia* how the post-*USTA II* regulatory framework should be incorporated

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3 359 F.3d 554 (D.C. Cir. 2004).

4 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, CC Docket Nos. 01-338, 96-98, 98-147 (rel. Aug. 21, 2003)("*Triennial Review Order*") ("*TRO*").

5 The Abeyance Agreement was filed in the form of a Joint Motion in Docket No. 040130-TP (filed July 20, 2004).

into the new agreements being arbitrated.[6] The Parties agreed therein to avoid negotiating/arbitrating change-of-law amendments to their existing interconnection agreements and agreed instead to continue to operate under their existing interconnection agreements until their arbitrated successor agreements become effective.[7]

18. The Commission through the Prehearing Officer in the docket issued an order granting the Parties' Abeyance Agreement (*i.e.,* the Joint Motion) on August 19, 2004.

19. On August 20, 2004, the FCC released its *Interim Rules Order*, which held *inter alia* that ILECs shall continue to provide unbundled access to switching, enterprise market loops and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004.[8] The FCC required that those rates, terms and conditions remain in place until the earlier of the effective date of final unbundling rules, or six months after publication of the *Interim Rules Order* in the Federal Register.[9]

20. On February 4, 2005, the FCC released the *TRRO*, including its latest Final Unbundling Rules.[10] In the *TRRO*, the FCC found *inter alia* that requesting carriers are not impaired without access to local switching and dark fiber loops. The FCC also established conditions under which ILECs would be relieved of their obligation to provide pursuant to

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6 Abeyance Agreement at 2.

7 *Id.*

8 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order and Further Notice of Proposed Rulemaking, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Aug. 20, 2004) ("*Interim Rules Order*").

9 *Id.* ¶ 21.

10 *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* Order on Remand, WC Docket No. 04-313, CC Docket No. 01-338 (rel. Feb. 4, 2005)("*Triennial Review Remand Order*") ("*TRRO*"). BellSouth already has sought to overturn this order. *United States Telecom Ass'n et. al. v. FCC*, Supplemental Petition for Writ of Mandamus, Nos. 00-1012 *et. al.* (D.C. Cir.), filed Feb. 14, 2005 (BellSouth, Qwest, SBC and Verizon were parties to the pleading).

section 251(c)(3) unbundled access to DS1 and DS3 loops, as well as DS1, DS3 and dark fiber dedicated transport.

21. In the section of the *TRRO* entitled "Implementation of Unbundling Determinations" the FCC held that "incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act."[11]

22. The *TRRO* will become an effective FCC order on March 11, 2005.[12]

23. On February 11 2005, BellSouth issued a Carrier Notification in which BellSouth alerted carriers to the issuance of the *TRRO* and made certain unfounded pronouncements regarding the effects of that order. Specifically, BellSouth claimed that "with regard to the issue of 'new adds'... the FCC provided that no 'new adds' would be allowed as of March 11, 2005, the effective date of the *TRRO*."[13] BellSouth further claimed that "[t]he FCC clearly intended the provisions of the *TRRO* related to 'new adds' to be self-effectuating," *i.e.*, "without the necessity of formal amendment to any existing interconnection agreements."[14] BellSouth stated that as of March 11, 2005 it would reject UNE-P orders and orders for high capacity loops and transport where it has been relieved of its obligation to provide such UNEs, except where such orders are certified in accordance with paragraph 234 of the *TRRO*.[15] BellSouth also announced that it would not accept new orders for dedicated transport "UNE entrance facilities" or "UNE dark fiber loops" under any circumstances.[16] On February 28, 2005, BellSouth issued a revised

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11 *Id.* ¶ 233.

12 *Id.* ¶ 235.

13 Carrier Notification at 1.

14 *Id.* at 2.

15 *Id.*

16 *Id.*

Carrier Notification indicating that it would refuse to provision copper loops capable of providing HDSL on March 11, 2004, as well.

DISCUSSION

A. The *TRRO* Is Not Self-Effectuating

25. Contrary to assertions made by BellSouth in its Carrier Notifications, the *TRRO* is not self-effectuating with regard to "new adds" or, for that matter, in any other respect (including any changes in rates of the availability of access to UNEs). In fact, in the section of the *TRRO* entitled "Implementation of Unbundling Determinations" the FCC plainly states that "incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act."[17] Section 252 of the Act requires negotiations and state commission arbitration of issues that cannot be resolved through negotiation. This process is not "self effectuating."

26. This decision by the FCC to employ the traditional process by which changes of law are implemented is reflected in several instances throughout the *TRRO*.[18] With regard to high capacity loops, the FCC held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[19] The FCC also stated that "we expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities through the section 252 process."[20]

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17 *TRRO* ¶ 233.

18 The FCC also recognized that, pursuant to section 252(a)(1), carriers are free to negotiate alternative arrangements that would result in standards governing their relationships that differ from the rules adopted in the *TRRO*. *See id.* ¶¶ 145, 198, 228.

19 *Id.* ¶ 196.

20 *Id.* at note 519.

27. With regard to high capacity transport, the FCC also stated that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[21] And the FCC also stated that "we expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities through the section 252 process."[22]

28. With regard to UNE-P arrangements, the FCC also held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[23]

29. Thus, the FCC in no way indicated that it was unilaterally modifying state commission approved interconnection agreements or that the changes-of-law that would become effective on March 11, 2005 would automatically supplant provisions of existing interconnection agreements as of that date. The "different direction" BellSouth claims the FCC took with respect to "new adds" is not evident in the *TRRO*. Instead it is simply another diversion created by BellSouth.[24]

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21 *Id.* ¶ 143.

22 *Id.* at note 399.

23 *Id.* ¶ 227.

24 BellSouth, in a pleading on this issue filed with the Georgia Commission, argues that the FCC can and did modify existing interconnection agreements in the manner alleged in its Carrier Notification. Neither aspect of the assertion is true. In support of its contention that the FCC can modify existing interconnection agreements, BellSouth cites the *Mobile-Sierra* doctrine. In so doing, however, BellSouth fails to reveal that the FCC has expressly found that "the *Mobile-Sierra* analysis does not apply to interconnection agreements reached pursuant to sections 251 and 252 of the Act, because the Act itself provides the standard of review of such agreements." *IDB Mobile Communications, Inc. v. COMSAT Corp.*, 16 FCC Rcd 11475 at note 50 (May 24, 2001). Even if that were not the case, there is simply no evidence that the FCC employed the *Mobile-Sierra* doctrine and made the requisite public interest findings for doing so in the *TRRO*. There is no express statement in the *TRRO* that says that the FCC intended to reform existing interconnection agreements. And there is no discussion of why negating certain terms of existing interconnection agreements is compelled by the public interest. Instead, the FCC stated quite plainly in paragraph 233 that the normal section 252 negotiation/arbitration process applies.

30. Notably, the FCC's position in the *TRRO* also mirrors the position it took in the *TRO*. In the *TRO,* the FCC declined Bell Operating Company requests to override the section 252 process and unilaterally change all interconnection agreements to avoid any delay associated with the renegotiation of contract provisions, explaining that "[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of section 251 and section 252."[25]

31. BellSouth cannot escape the FCC's clear and unambiguous language requiring parties to amend their interconnection agreement pursuant to change of law processes. The Commission must not allow BellSouth to avail itself of its tortured interpretation of the *TRRO* with respect to "new adds." Accordingly, Joint Petitioners seek a declaration that the *TRRO*'s unbundling decisions and transition plans do not "self effectuate" a change to the Parties' existing interconnection agreements and that they will not govern the Parties relationships until such time as – and only to the extent – that the agreements currently being arbitrated are modified to incorporate such unbundling decisions and transition plans.

B. The Abeyance Agreement Requires BellSouth to Continue to Provision UNEs Under the Terms of the Parties Existing Agreements, Until those Agreements Are Replaced with New Agreements

32. The terms of the Abeyance Agreement clearly require BellSouth to abide by the terms of the Parties' existing interconnection agreements until such agreements are replaced with new agreements currently being arbitrated. BellSouth and Joint Petitioners voluntarily agreed to continue to operate under the Parties' existing interconnection agreements until they are able to move into the arbitrated agreements that result from Docket No. 040130-TP.

33. In the Abeyance Agreement, the Parties stated that they agreed to the abatement period so that "they can consider how the post *USTA II* regulatory framework should be

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[25] *TRO* ¶ 701.

incorporated" into their interconnection agreements being arbitrated before the Commission.[26] The Parties agreed to "avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreements to address *USTA II* and its progeny."[27] To implement this shared objective, BellSouth and the Parties agreed to "continue operating under their current Interconnection Agreements until they are able to move into the new arbitrated/negotiated agreements that ensue from [the arbitration] proceeding."[28]

34. In the Abeyance Agreement, BellSouth and the Joint Petitioners agreed to an orderly procedure for implementing whatever UNE rule changes ultimately resulted from *USTA II*. Since the Parties had all expended considerable resources in negotiating and arbitrating replacements to their expired interconnection agreements, and the process was closing in on an arbitrated resolution, it made no sense to anyone involved to waste time negotiating and arbitrating amendments to their soon-to-be-replaced expired interconnection agreements. Instead, all concerned agreed to identify the issues raised by *USTA II* and its "progeny" (i.e., the post-*USTA II* regulatory framework, including the FCC's Final Rules adopted in the *TRRO*[29]) and to resolve them in the context of their already ongoing proceedings to establish newly negotiated/arbitrated replacement interconnection agreements. As the Commission is well

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26 Abeyance Agreement, at 2.

27 *Id.*

28 *Id.*, at 2-3.

29 The arbitration issues identified include Issue 23 (post federal transition period migration process), Issue 108 (*TRRO* / Final Rules), Issue 109 (*Interim Rules Order* intervening federal or state orders); Issue 110 (*Interim Rules Order* intervening court orders); Issue 111 (*Interim Rules Order* – transition plan / *TRRO* transition plan); Issue 112 (*Interim Rules Order* – frozen terms); Issue 113 (High Capacity Loop Unbundling Under 251/*TRRO*, 271, state law); Issue 114 (High Capacity Transport Unbundling Under 251/*TRRO*, 271, state law). Joint Petitioners have agreed to having these issues resolved in the Commission's generic BellSouth UNE docket (041269-TP), provided that adequate procedures are established for translating the results of the generic resolution of these issues into compliant contract language that gets incorporated into the arbitrated Agreement. Joint Petitioners and BellSouth have agreed that they will not be amending their existing agreements but will incorporate changes of law establishing the post-*USTA II* regulatory framework into their new arbitrated Agreements.

aware, the arbitration proceeding is well under way. A Hearing is scheduled for later this month. A decision and resultant new interconnection agreements will follow.

35. Nonetheless, by self-proclaimed fiat, BellSouth now seeks to walk away from its commitments in the Abeyance Agreement and make an end run around the Commission's interconnection agreement arbitration process. By proclaiming that certain aspects of the *TRRO* are self-effectuating, and that BellSouth is entitled to unilaterally implement its disputed interpretation of those rule changes, BellSouth attempts to unilaterally amend the existing interconnection agreements that it previously agreed would not be changed, and renege on its agreement that the Parties would continue to operate under those agreements pending the outcome of the ongoing interconnection arbitration proceedings. As a simple matter of contract law and regulatory procedure, the Commission cannot allow BellSouth to simply abrogate the Abeyance Agreement and end run the arbitration process. Moreover, for BellSouth to ignore the commitments made to the Joint Petitioners in their Abeyance Agreement would constitute a breach of the duty to negotiate in "good faith" imposed on ILECs by Section 251(c)(1).

36. Joint Petitioners believe that BellSouth cannot implement the *TRRO* changes in law without modifying its interconnection agreements to reflect such rule changes. However, that is especially true with respect to the Joint Petitioners. BellSouth and the Joint Petitioners actually sat down and negotiated on that point immediately after *USTA II* became effective, agreed on the appropriate and orderly way to incorporate the post-*USTA II* rule changes into their new interconnection agreements, committed to continue operating under unchanged existing interconnection agreements until the newly negotiated/arbitrated agreements are finalized, and submitted this mutual agreement and understanding on how to implement *USTA II*/*TRRO* to the Commission for approval. BellSouth certainly cannot be permitted to usurp its commitments

made to the Joint Petitioners in the Abeyance Agreement and to this Commission. All concerned have acted in reliance upon those commitments, and proceeded through the arbitration process on that basis.

CONCLUSION

37. BellSouth's recent Carrier Notice regarding the *TRRO* is a baseless and thinly veiled attempt to breach and or unilaterally amend the Parties' existing interconnection agreements. Moreover, it signals an intent to breach the Abeyance Agreement and to usurp the arbitration being conducted by the Commission. Joint Petitioners will be irreparably harmed and Florida consumers will suffer if BellSouth is permitted to breach the Parties' existing interconnection agreements or the Abeyance Agreement. Such action would also contravene the FCC's express directive that the *TRRO* is to be effectuated via the section 252 process. As a matter of law, this Commission must ensure that Joint Petitioners have full and unfettered access to UNEs provided for in their existing interconnection agreements until such time as their agreements are superceded by the agreements currently being arbitrated before the Commission.

38Moreover, principles of equity and fairness dictate that BellSouth and Joint Petitioners should stand on equal footing and play by the same rules. Joint Petitioners have waited a long time to avail themselves of pro-CLEC changes of law such as commingling rules and clearer EEL eligibility criteria ushered in by the *TRO*. Indeed, both of those issues have been issues in the ongoing arbitration.[30] Even if they hadn't been arbitration issues, BellSouth has insisted on an all-or-nothing approach to implementing the changes-of-law ushered in by the *TRO*.

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30 Issue 26 addresses whether BellSouth must abide by the FCC's commingling rules (BellSouth insists that it is entitled to an unwritten exception to the rules) and it remains unresolved. Issue 50 addressed whether the EEL eligibility criteria should be incorporated to the agreement using the term "customer" (as in the rule) or another term defined by BellSouth in a manner that could be construed to limit Joint Petitioners' access to UNEs. BellSouth recently agreed to abide by the rule and the issue was resolved using Joint Petitioner's proposed language.

BellSouth likewise must wait for the conclusion of the arbitration process to avail itself of *TRRO* changes of law favorable to it. This foundation of fairness is encapsulated in the Parties' Abeyance Agreement.

39. Joint Petitioners will be seriously and permanently affected if BellSouth is allowed to take this unilateral action and the Commission should direct that BellSouth not take any action as contemplated by its Carrier Notifications until the Commission has acted on this Petition.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, Joint Petitioners respectfully request that the Commission:

(1) declare that the transition provisions of the *TRRO* are not self-effectuating but rather are effective only at such time as the Parties' existing interconnection agreements are superseded by the interconnection agreements resulting from Docket No. 040130-TP;

(2) declare that the Abeyance Agreement requires BellSouth to continue to honor the rates, terms and condition of the Parties' existing interconnection agreements until such time as those Agreements are superseded by the agreements resulting from Docket No. 040130-TP;

(3) grant Joint Petitioners such other relief as the Commission deems just and reasonable.

Respectfully submitted,

By: 

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Dated: March 1, 2005

BELLSOUTH

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

EXHIBIT "A"

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 Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085051

Date: February 25, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – **REVISION To SN91085039** - Triennial Review Remand Order (TRRO) – Unbundling Rules

This is to advise that **Carrier Notification letter SN91085039**, originally posted on February 11, 2005, has been revised to include the TRRO rule regarding High-bit Rate Digital Subscriber Line (HDSL) loops. Specifically, the TRRO states that DS1 loops include copper loops capable of providing HDSL services.

Please refer to the revised letter for details.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

EXHIBIT "B"

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085039

Date: February 25, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – **REVISED** - Triennial Review Remand Order (TRRO) - Unbundling Rules (Originally posted on February 11, 2005)

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 ("UNE") 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 Element-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, **including copper loops capable of providing High-bit Rate Digital Subscriber Line (HDSL) services**, 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, **HDSL** 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 (3-6 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

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[10] TRRO ¶235

[11] TRRO ¶199 Also see ¶¶ 198

orders submitted for new unbundled high capacity loops and unbundled dedicated interoffice transport 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,

ORIGNAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

CERTIFICATE OF SERVICE

I, Norman H. Horton, Jr., do hereby certify that I have, on this 1st day of March, 2005, caused to be served upon the following individuals, by first class U.S. mail, postage prepaid, a copy of the foregoing:

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