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April 13, 2005

VIA HAND DELIVERY
Richard Melson, General Counsel
Office of the General Counsel
Legal Division
Florida Public Service Commission
2540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850

041269-TP
050171-TP
050172-TP

Re: Complaint

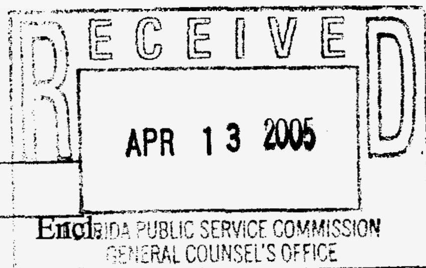
Dear Mr. Melson:

Enclosed please find two (2) courtesy copies of the Complaint Supra Telecom filed today against BellSouth and the FPSC, and the Emergency Motion filed contemporaneously thereto. Please let me know if you will be willing to accept service on behalf of the FPSC and/or the FPSC Commissioners in their official capacities. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Steven B. Chaiken

Encl.



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IN THE DISTRICT COURT OF THE
NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE, FLORIDA

SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC.

CASE NO. 4:05cv132-RH/WCS

Plaintiff

v.

BELLSOUTH TELECOMMUNICATIONS, INC., THE FLORIDA PUBLIC SERVICE COMMISSION, and THE COMMISSIONERS OF THE FLORIDA PUBLIC SERVICE COMMISSION, in their official capacities

Defendants.

EMERGENCY MOTION FOR EX-PARTE TEMPORARY RESTRAINING ORDER AND/OR PRELIMINARY INJUNCTIVE RELIEF

Supra Telecommunications and Information Systems, Inc. ("Supra"), by and through its undersigned counsel, pursuant to the Federal Rule of Civil Procedure § 65(B), Local Rule 7.1(E), N.D.Fla., Sections 16.1 and 25.1 of the parties' Interconnection Agreement ("Agreement"), and the decisional authorities, hereby files its Emergency Motion for Ex-Parte Temporary Restraining Order and Motion for Preliminary Injunctive Relief and states as follows:

I. IMMEDIATE IRREPARABLE HARM

Immediate action by this Court is necessary to relieve Supra from an erroneous order[1] issued by the Florida Public Service Commission ("FPSC") on April 5, 2005 (the

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[1] This order was issued orally at the FPSC's Agenda Conference on April 5, 2005. See Vote Sheet attached hereto as **Exhibit A**. Supra will supplement the record once it receives a copy of the FPSC's written order.

"Order") that serves to alter the status quo and impose irreparable harm upon Supra and the public. The FPSC issued the Order which allows BellSouth Telecommunications, Inc. ("BellSouth") to abrogate its voluntarily negotiated Agreement with Supra and to immediately refuse to provide Supra and its end-users with services ordered pursuant to the Agreement. Supra will suffer irreparable harm as a result of this Order.

Under the Parties' Agreement, BellSouth is obligated to accept and provision Supra orders for a telecommunications service known as UNE-P. Supra currently has approximately 250,000 customers serviced through UNE-P. During any given week, Supra adds between 1,000 to 3,000 new customers. On February 4, 2004, the Federal Communications Commission ("FCC") issued its Triennial Review Remand Order ("*TRRO*"). As a result of the *TRRO*, on February 8, 2005, BellSouth issued a Carrier Notification[2] stating that as of March 11, 2005, BellSouth will no longer accept new UNE-P orders. On March 4, 2005 Supra filed a Petition and Request for Emergency Relief ("Supra's Petition") before the FPSC to prevent BellSouth from taking any unilateral actions in breach of the Parties' Agreement. On March 7, 2005, BellSouth issued a second Carrier Notification[3] stating "BellSouth would continue to receive CLEC orders for 'new adds' 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." On March 21, 2005, BellSouth issued a third Carrier Notification[4] stating "Due 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."

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2 A copy of BellSouth's February 8, 2005 Carrier Notification is attached hereto as **Exhibit B**.

3 A copy of BellSouth's March 7, 2005 Carrier Notification is attached hereto as **Exhibit C**.

4 A copy of BellSouth's March 21, 2005 Carrier Notification is attached hereto as **Exhibit D**.

As Supra will suffer irreparable and immediate harm should the FSPC enforce its order and should BellSouth undertake its stated intent to take unilateral action in breach of the Parties' Agreement, Supra requests that this Court issue an **IMMEDIATE ORDER** - preferably no later than 5:00 pm, Friday, April 15, 2005 - restraining and/or enjoining (a) the FPSC from enforcing its erroneous order, and (b) BellSouth from taking any actions based on the *TRRO* until the Parties' have effectuated a proper amendment to their Agreement. If Supra is denied the ability to obtain the services it is entitled to pursuant to its Agreement, Supra will incur incalculable harm, loss and damage.

Supra has been negotiating a commercial agreement with BellSouth since January 2005 in an attempt to prevent any disruptions in services as a result of the then-pending regulatory upheaval. Unfortunately, to date, the Parties have been unable to reach agreement as to such. Supra even offered to fly to Atlanta this week in an effort to finalize an agreement prior to BellSouth's self-imposed deadline for the disruption of services resulting from a failure to execute such an agreement. BellSouth's response was that it was not available until three days after it intends to disrupt Supra's services. In light of BellSouth's unavailability, Supra requested that BellSouth continue to provide services until April 24, 2005, to give the Parties additional time to "negotiate." BellSouth refused to accommodate this request. But for the FPSC's Order, BellSouth would not otherwise have the unfettered right to strong-arm Supra into entering into a commercially unfavorable agreement, using the threat of a disconnection of services as a hammer, thereby creating the present emergency.

Supra hereby certifies to this court that Supra will attempt to serve this motion on BellSouth today, Wednesday, April 13, 2005. Given the irreparable harm that will be

intentionally inflicted upon Supra and, more importantly, its customers, Supra seeks an immediate order from this Court under Rule 65(b).

It must be noted that the Eleventh Circuit Court of Appeals has before it, on an emergency basis, the identical issues present in this case. There, a group of similarly situated Competitive Local Exchange Carriers ("CLECs"), have filed an Emergency Motion to Stay the Preliminary Injunction Pending Appeal[5] and for an Expedited Appeal, resulting from BellSouth's successful appeal[6] of a Georgia Public Service Commission ("GPSC") Order[7] by the Northern District Court of Georgia. Supra respectfully suggests that any ruling emanating from the Eleventh Circuit Court of Appeals on this issue will be binding precedent upon this Court.

II. FACTUAL BACKGROUND

Supra is a telecommunications service provider that has negotiated and arbitrated a contractual agreement ("Agreement") with BellSouth. The Agreement specifies the terms and conditions under which Supra may lease or otherwise access various elements of BellSouth's network, including the methodology for provisioning and terminating such service and the rates charged for such access. While some of the terms of the Agreement are mandated by statutes, regulatory determinations, arbitration decisions, or judicial determinations, many result solely from the voluntary negotiation of the parties. Among the voluntarily negotiated provisions of the Agreement between Supra and BellSouth is a

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[5] See **Exhibit E**.

[6] See **Exhibit F**, a copy of the April 5th, 2005 Order No. 1:05-CV-0674-CC, wherein Judge Cooper issued a ruling enjoining the GPSC from enforcing its Order and thereby allowing BellSouth to abrogate the "change of law" provisions contained its various agreements with CLECs such as Supra.

[7] See **Exhibit G**, a copy of March 9, 2005 GPSC Order on MCI's Motion for Emergency Relief Concerning UNE-P Orders, requiring BellSouth to honor its various agreements and follow the "change of law" provisions contained therein.

provision commonly referred to as the "change of law" provision. In general, the change of law provision specifically contemplates that the FCC and FPSC will effect changes to the existing legal regime during the life of the Agreement. The change of law provision provides that if the regulatory, statutory or judicial regime under which the Agreement was negotiated changes in a material way, the Parties will adhere to a particular agreed upon procedure for implementation of those changes in the law.

The FCC caused precisely the type of change in the law anticipated by the Parties when it issued the *TRRO*. In an about-face from interpretation of past changes of law imposed by the FCC and state public service commissions, BellSouth contended before the FPSC that the changes of law in the FCC's latest order, the *TRRO*, must be implemented immediately, rather than pursuant to the "change of law" process set forth in the contracts governing the Parties' relationship. The only explanation for BellSouth's new desire to dispense with the contractual change of law process arises not from any special mandate from the FCC, but simply from the fact that, in this instance, BellSouth stands to benefit from the new legal ruling of the FCC.[8] Therefore, BellSouth insists that the FCC's ruling abrogated the "change of law provisions" contained in contracts between the Parties. Absurdly, however, BellSouth fails entirely to identify a legitimate basis in the law for the FCC to abrogate the Parties' contractual change of law provisions, and further fails to identify any language in the FCC's ruling even suggesting, let alone mandating, abrogation of the change of law provisions.

A. The General Scope of the Telecommunications Act of 1996

[8] As a result of BellSouth's position and stated intentions, BellSouth has successfully strong-armed numerous telecommunication providers into entering its one-sided commercial agreements.

Supra competes directly and indirectly with BellSouth to provide long distance and local telephone service to Florida customers at the most cost effective rates possible. Competition in the market for local telephone service is possible because of the Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.* ("1996 Act" or "Act"), which was intended to break the monopoly that incumbent local telephone companies ("ILECs" such as defendant BellSouth) had over the facilities and services through which consumers place and receive local and long distance calls.

Telecommunications services are made up of a combination of network elements. To facilitate competition and the breakup of BellSouth's monopoly, the Act requires BellSouth to allow Competitive Local Exchange Carriers ("CLECs" such as Supra here) to purchase unbundled, *i.e.*, distinct, elements of BellSouth's network and provides parameters for determining the rates that CLECs must pay to BellSouth for unbundled network elements ("UNEs").[9] 47 U.S.C. § 252(d)(1)(A) - (B).

Under § 252 of the Act, BellSouth and competing carriers must negotiate in good faith with each other to develop Interconnection Agreements. Any disputes that remain after these negotiations are resolved through arbitration proceedings before the public service commission or the FCC. Section 252(e)(6) of the Act gives any party aggrieved by a determination of a state commission a right to bring an action in federal district court to determine whether the Agreement's term are inconsistent with the Act and the FCC's implementing regulations. 47 U.S.C. § 252(e)(6). Although the Interconnection Agreements ultimately entered into pursuant to § 252 necessarily include certain terms required by statute, some terms of the Agreements are voluntarily adopted by the parties,

[9] Specifically, the rates for UNEs must be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element," be "nondiscriminatory," and "may include a reasonable profit." 47 U.S.C. § 252(d)(1)(A) - (B).

such as the change of law provision. These voluntary terms are subject to approval by state commissions, who may reject any terms that are not consistent with the public interest. *Id.* § 252(e)(2)(A)(ii). The change of law provision at issue in this case was long ago found to be in the public interest by the Florida Public Service Commission.

B. The FCC's Triennial Review and Remand Order and Unbundled Network Elements

To facilitate the goals of the 1996 Act, the FCC is responsible for making rules to determine which UNEs BellSouth and other incumbent LECs must provide to the CLECs. 47 U.S.C. § 251(d)(2). In August 2003, the FCC released the *Triennial Review Order*,[10] which addressed previous court decisions striking down portions of the FCC's UNE rules. Various telecommunications carriers appealed the *Triennial Review Order* and, on March 2, 2004, the D.C. Circuit remanded in part and vacated in part portions of that order, in particular, directing the FCC to reconsider certain of its unbundling rules. *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

On February 4, 2005, the FCC released its *TRRO*.[11] In the *TRRO*, the FCC further revised its unbundling rules, making substantial changes to the previously existing competitive regime. Specifically, the *TRRO* provides that the FCC no longer reads § 251(c)(3) of the Act to require incumbent LECs to provide certain transport lines, high-capacity loops, or mass market local circuit switching as UNEs.[12] (*TRRO* ¶¶ 5, 226.)

To implement these substantial changes, the *TRRO* provides for a twelve to

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[10] *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.* (CC Docket Nos. 01-338, 96-98, and 98-147), FCC 03-36 (released August 21, 2003), 68 Fed. Reg. 52276 (Sept. 2, 2003) ("*Triennial Review Order*").

[11] *In re Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.* (WC Docket No. 04-313 and CC Docket No. 01-338), FCC 04-290 (released Feb. 4, 2005) ("*Triennial Review Remand Order*").

[12] The *TRRO*'s analysis is limited to § 251 of the Act and does not address whether § 271 of the Act or provisions of state law require BellSouth to continue providing some or all of those elements on an unbundled basis (perhaps at different rates).

eighteen-month period from the effective date of the *TRRO* during which the CLECs must be allowed to "retain access to" these former UNE elements, and to a combination of these elements known as the UNE platform, or "UNE-P" (the combination of an unbundled loop, unbundled local circuit switching, and shared transport) as to existing customers ("embedded customers"). Per the *TRRO*, this transition period began on March 11, 2005. (*TRRO* ¶¶ 5, 227.)

The *TRRO* also addresses how the parties are to implement the new unbundling rules for customers not covered by the transition plan. In the *TRRO* section entitled "Implementation of Unbundling Determinations," the Commission ordered as follows:

> **C. Implementation of Unbundling Determinations**
>
> 233. We expect that incumbent LECs [such as BellSouth] 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.

(*TRRO* ¶ 233 (footnotes omitted and emphasis added).)

Although the *TRRO* undoubtedly effected dramatic changes to the understanding of the requirements of § 252, it is undisputed that nothing in the *TRRO* suggests a finding by the FCC that the change of law provisions in the parties' agreements are no longer in the public interest.

Notwithstanding the change of law provisions in its Agreement with Supra or the plain language of the *TRRO* requiring negotiation of the terms and conditions needed to

implement its findings, BellSouth first declared its intention, effective March 11, 2005, to refuse to accept orders for certain UNEs. In a Carrier Notification dated February 11, 2005, BellSouth asserted its interpretation of the *TRRO*, claiming 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." (*Id.*) BellSouth further asserted that it would return any orders for service from carriers refusing to sign the "take or leave it" commercial agreements offered by BellSouth. (*Id.*)

III. ARGUMENT AND LEGAL ANALYSIS

The Agreement's choice of law provision provides in relevant part that all general contract provisions shall be governed by the laws of the state of Georgia. In *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1448 (11th Cir. 1991), the Eleventh Circuit held that in the context of a preliminary injunction seeking specific performance with a contract governed by Georgia law, Georgia substantive law governed the substantive right to an injunction, while the federal court four-part test for a preliminary injunction governed the procedural aspects of the motion. Hence, in this motion, the substantive right to specific performance is governed by Georgia law, which is then interposed into the federal court four-part test.

Under federal law, to issue preliminary injunctive relief, "a district court need not find that the evidence positively guarantees a final verdict" in favor of the movant. *Levi*

Strauss & Co. v. Sunrise Int'l Trading Inc., 51 F.3d 982, 985 (11th Cir. 1995). Instead, courts must determine whether the evidence establishes: (1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable injury if the injunction were not granted; (3) that the threatened injury to the plaintiff outweighs the harm that an injunction may cause the defendant; and (4) that granting the injunction would not disserve the public interest. Id.; See also *Carillon Importers, Ltd. v. Frank Pesce Int'l Group*, 112 F.3d 1125, 1126 (11th Cir. 1997), citing *Café 207, Inc. v. St. Johns County*, 989 F.2d 1136, 1137 (11th Cir. 1993). When applying this standard, "a district court may rely on affidavits and hearsay materials which would not be admissible evidence for a permanent injunction, if the evidence is 'appropriate given the character and objectives of the injunction proceeding.'" *Levi Strauss, 51 F.3d at 985 citing Asseo v. Pan American Grain Co.*, 805 F.2d 23, 26 (1st Cir. 1986).

Under Georgia law, O.C.G.A. 23-2-130 provides in relevant part as follows: "Specific performance of a contract . . . will be decreed, generally, whenever the damages recoverable at law would not be an adequate compensation for nonperformance". Similarly, O.C.G.A. 9-5-1 deals with injunctions and states in pertinent part as follows: "Equity, by writ of injunction, may restrain . . . any . . . act of a private individual or corporation which is . . . contrary to equity and good conscience and for which no adequate remedy is provided at law." Thus the standards for an injunction and specific performance of a contract require a showing of inadequate compensation and/or remedy at law.

The Georgia Supreme Court has defined inadequate compensation and/or remedy at law as follows:

> "A remedy at law, to exclude appropriate relief in equity, must be complete and the substantial equivalent of the equitable relief. It is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and as efficient to the ends of justice and its prompt administration as the remedy in equity." *Concrete Coring Contractors, Inc. v. Mechanical Contractors & Engineers, Inc.*, 220 Ga. 714, 718-19, 141 S.E.2d 439, 442 (Ga. 1965)

In holding that equitable relief was warranted, the Georgia Supreme Court stated as follows: "Clearly, the plaintiff's legal remedy would not be complete or as effective and efficient to the ends of justice as that which could be afforded by a court of equity." Thus the standard under Georgia law for an inadequate remedy is whether or not the legal remedy and equitable remedy are virtually identical. Where the remedies are not substantially equivalent, equitable relief is warranted.

Moreover, under Georgia law, specific performance and recovery of damages are not mutually exclusive and can both be recovered in the same action for a breach of contract. *Claxton v. Small Business Administration*, 525 F.Supp. 777, 783 (S.D.Ga. 1981). In *Golden v. Frazier*, 244 Ga. 685, 688, 261 S.E.2d 703 (Ga. 1979), the Georgia Supreme Court noted that: "[S]pecific performance at the end of a protracted litigation under compulsion is practically never full performance of the contract; instead, there has been an extensive and injurious partial breach. In such case, the court should decree the payment of damages for the partial breach that has already occurred, even though obedience of the decree will prevent the commission of further breaches." Thus under Georgia law, a plaintiff is entitled to both specific performance of a contract and damages resulting from the partial breach thereof during the pendency of litigation. Accordingly, the existence of a damage remedy does not defeat a claim for specific performance.

A. SUCCESS ON THE MERITS

Supra is likely to prevail on its claims by virtue of the following:

The Parties' Agreement specifically provides a mechanism for the Parties' to implement a change of law (i.e the *TRRO*). Specifically, Section 9.3 of the Agreement provides:

> In the event that any final legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of Supra Telecom or BellSouth to perform any material terms of this Agreement, Supra Telecom or BellSouth may, on ninety (90) days' written notice (delivered not later than ninety (90) days following the date on which such action has become legally binding and has otherwise become final without regard to, the Parties rights to appeal) 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, the dispute shall follow the dispute resolution procedures set forth in Section 16 of the General Terms and Conditions of this Agreement.[13]

BellSouth has refused to adhere to its contractual obligations of this provision and has instead made its intentions known that it will unilaterally implement the changes provided in the *TRRO*.

BellSouth, in its *Response In Opposition to Petition for Emergency Relief Filed By NuVox, Xspedius, KMC III, and KMC V* before the FPSC, even recognized that "Florida law mandates that, in construing a contract, absurd or unreasonable results should be avoided.

> 'The words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one, and the court will likewise endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other. So that interpretation

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[13] See Section 9.3 of the Parties' interconnection agreement dated July 15, 2002.

> which evolves the more reasonable and probable contract should be adopted, and a construction leading to an absurd result should be avoided.'" (Citations omitted).[14]

By allowing BellSouth to unilaterally implement the changes of law found in the *TRRO* the FPSC rendered Section 9.3 of the Parties' negotiated Agreement meaningless. The Parties clearly and unambiguously addressed how they would handle changes of law, such as the *TRRO*.

Furthermore, after the FCC released a previous order which caused some concern regarding BellSouth's intended actions, on May 28, 2004, BellSouth sent a letter[15] to the FPSC promising that "BellSouth will not 'unilaterally disconnect services being provided to any CLEC under the CLEC's Interconnection Agreement.'"[16] BellSouth promised:

> With respect to new or future orders, 'BellSouth will not unilaterally breach its interconnection agreements.' If the D.C. Circuit issues its mandate on June 15, 2004, BellSouth will continue to accept an process new orders for services (including switching, high capacity transport, and high capacity loops) and will bill for those 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.[17]

BellSouth has since made it clear that it no longer desires to keep its promise or abide by its contractual obligations.

BellSouth's sole argument in support of its contention that it is not obligated to enter into negotiations as required by the change of law provisions is that the *TRRO*

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14 A copy of BellSouth's Response is attached hereto as **Exhibit H**.
15 A copy of BellSouth's letter dated May 28, 2004 is attached hereto as **Exhibit I**.
16 *Id.* at paragraph 3.
17 *Id.* at paragraph 4.

somehow implicitly abrogated such provisions because it is "self effectuating."[18] This argument fails because BellSouth, to date, has failed to identify any statement in the *TRRO* purporting to make such an abrogation. Moreover, even conceding for the moment that there exists a doctrine of law (the *Sierra-Mobile* doctrine[19]) that, in proper circumstances, might have permitted the FCC to accomplish such an abrogation, there is no indication in the text of the *TRRO* that the FCC had conducted the analysis that would have been required to defend a decision to directly impair the Parties' voluntarily negotiated contractual rights -- specifically, the change of law provision.

The power available pursuant to the *Sierra-Mobile* doctrine is highly circumscribed such that a contract cannot be changed in the absence of specific findings as to each "particular" provision to be modified that such provision is "detrimental to the public interest," accompanied by "adequate reasons for jettisoning the provisions." *Western Union Tel. Co.*, 815 F.2d at 1503. Even had the FCC "purport[ed] to abrogate [an] entire agreement as inconsistent with the public interest," which it did not do here, "very general treatment" of an entire agreement by the FCC is not sufficient to justify "abrogation" of any given term. *Id.* Absent discussion and a detailed weighing of the merits of the "particular provision" to be altered, "reiterat[ion] of rather conclusory

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[18] The *TRRO* does not state that it is "self-effectuating." It merely states that the FCC believes the "impairment framework" it adopts is "self-effectuating," (*TRRO* ¶ 3), i.e., capable of simple application across a number of differing circumstances.

[19] Where it applies, "the *Sierra-Mobile* doctrine has been held to allow agencies to change contract rates when it finds them unlawful, *see FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956), and to modify other provisions of private contracts when necessary to serve the public interest, *see United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956)." *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

arguments" regarding the public interest, cannot support a finding that the provision has been validly abrogated pursuant to the *Sierra-Mobile* doctrine.[20] *Id.*

As BellSouth's *Sierra-Mobile* argument is lacking, BellSouth may seek to rely instead upon *United Gas Imp. Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965). *Callery Properties*, however, does not advance BellSouth's assertion that the *TRRO* dispensed with the parties' change of law provisions. Reasoning that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order," the Supreme Court determined that the Federal Power Commission had not exceeded its power in ordering gas "producers to make refunds for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest." *Id.* at 229-30. Nothing in *Callery Properties* suggests that the FCC may abrogate privately negotiated contractual provisions found to be in the public interest pursuant to § 252, particularly in the absence of a specific finding by the FCC that abrogation of such provisions is, itself, in the public interest.

The absence of any clear authority for the purported abrogation of the change of law provisions dovetails with the fact that the FCC itself did not purport to effect any such abrogation through the *TRRO*. Conceding that the *TRRO* contains no express abrogation of the change of law provisions, BellSouth insists that the "transition plan" outlined in the *TRRO* renders such abrogation implicit. BellSouth contends that the transition plan's guarantee of continued provision of the UNE-P for twelve-months to the "embedded base," (*TRRO* ¶ 226), necessarily prohibits *any* continued provision of the

[20] The FCC is well aware of the steep threshold for "demonstrating sufficient harm to warrant contract reformation under the *Sierra-Mobile* doctrine." *In re IDB Mobile Comm.*, 16 FCC Rcd. 11474, 11480-81 (May 24, 2001). Moreover, the FCC itself has recognized that the *Sierra-Mobile* doctrine does not authorize amendment of the terms of Interconnection Agreements. *Id.* at 11481 n.50.

UNE-P to non-embedded customers, even where such provision of the UNE-P is secured by privately negotiated contractual terms. Neither logic, nor language in the *TRRO* supports this conclusory leap.

Contrary to BellSouth's contention, the *TRRO* does not outlaw provision of the UNE-P, but instead determines only that provision of the UNE-P (at certain rates) is no longer mandated by § 251.[21] Out of particular concern for "embedded" customers, the FCC imposed special protections in the form of a transition plan, so as to avoid disruption of service to millions of customers, as well as disruption of the business plans of CLECs. (*Id.* ¶¶ 226, 228.) Nothing in the FCC's elevated concern for embedded customers, however, translates into a determination that the procedures voluntarily employed by the parties to implement anticipated changes of law (and approved by the state commissions pursuant to § 252) cannot be permitted to proceed as usual. Furthermore, although BellSouth may have received relief from its obligations under § 251 of the Telecommunications Act, it did not receive such relief pursuant to § 271[22] or under Florida statutory law[23] which requires that such elements remain unbundled. This is precisely why the change of law provisions must be followed – to allow the parties to first attempt to negotiate the terms, conditions and rates that apply to the Agreement under the new law (i.e. remove BellSouth's § 251 obligations while incorporating BellSouth's § 271 and state law obligations). Allowing BellSouth to make unilateral changes without following the contractually agreed upon provisions massively shifts the

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[21] This fact is illustrated by BellSouth's attempt to force Supra to enter into a "commercial agreement" to secure continued access to the UNE-P platform, albeit upon terms unilaterally imposed by BellSouth.
[22] Paragraph 659 *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, CC Docket No. 96-98, CC Docket No. 98-147, FCC 03-236 (FCC released August 21, 2003) at pg. 410.
[23] Chapter 364, Florida Statutes.

bargaining power of the Parties in favor of BellSouth – another irreparable harm caused to Supra.

On multiple occasions in the past, the FCC imposed changes of law resulting from the same process of identifying the means by which to further the statutory intent of the Telecommunications Act and using the same style of mandatory language employed in the *TRRO*. *See* Local Comp Order (1996) ¶ 410 ("incumbent LECs must provide local switching as an unbundled network element"); Advanced Services Order (1999) ¶¶ 40-43 ("We *require* incumbent LECs to make cageless collocation arrangements available. . ."); *TRO* ¶ 579 ("We *require* incumbent LECs to perform the necessary functions to effectuate such commingling upon request"). In each of these prior instances, which notably resulted in changes of law to the benefit of the CLECs, BellSouth did not allow, let alone insist upon, immediate imposition of the new regime, but instead engaged the CLECs in negotiations pursuant to the change of law provisions in the parties' Interconnection Agreements.[24] **Nothing calls for a different result here.** In short, BellSouth can identify no doctrine, nor principle of law, nor portion of the *TRRO* that would suggest that the FCC had the authority to silently abrogate the Parties' change of law provision, nor that the FCC actually exercised any such authority.

BellSouth's argument that the *TRRO* abrogated the negotiation requirements under the change of law provision is untenable also since the second source of BellSouth's obligation to enter into good faith negotiations with Supra is the plain

[24] As the GPSC noted in its Order, when AT&T tried to take advantage of a GPSC pricing decision prior to the time permitted under its change of law provision, BellSouth implored the Commission not to permit AT&T "to ignore, and thereby circumvent the effect of the very language it negotiated and entered into in its [Interconnection Agreement] with BellSouth" so as to "unilaterally change the terms and conditions of the [Agreement]." (GPSC Ruling at 5-6 (citing GPSC Docket No. 17650, Document No. 68288 (BellSouth's Reply Brief to AT&T Brief in Support of its Complaint) at 2.)

language of the *TRRO* itself. In directing the implementation of the unbundling decisions reflected in the *TRRO*, the FCC states at Paragraph 233 that it expects "incumbent LECs (such as BellSouth) and competing carriers (such as Supra) 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.*" *Id.* ¶ 233 (emphasis added). The FCC further notes that "the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes" and states its expectation that "parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order." *Id.* (footnotes omitted). This recognition by the FCC that the *TRRO* must be implemented through negotiated amendments to the existing Interconnection Agreements both negates any suggestion that the FCC intended to abrogate the terms of the change of law provision and independently confirms that the *TRRO* does not give BellSouth the right to unilaterally change the terms and conditions under which it leases elements of its network to Supra.

Several other Public Service Commissions ("PSCs") throughout the country have already recently addressed this identical issue, and found in favor of the CLECs. On March 1, 2005, the Georgia Public Service Commission ("GPSC") unanimously approved the staff's recommendation on this very issue and ordered BellSouth to comply with the change of law provisions of their existing interconnection agreements.[25]

Other courts and commissions that have ruled in favor of requiring incumbent providers to follow their contractual "change of law" provisions include: (1) the

[25] The Northern District Court of Georgia subsequently enjoined the GPSC from enforcing its order, as set forth hereinabove. The Joint CLECs have filed an emergency appeal of the Northern District Court's ruling with the Eleventh Circuit of Appeals, a ruling on which is pending.

Michigan Public Service Commission[26], (2) United States District Court, Northern District of Illinois[27], (3) United States District Court, Eastern District of Michigan[28], (4) Kentucky Public Service Commission[29], (5) Public Utility Commission of Texas[30], (6) Illinois Commerce Commission[31], (7) Mississippi Public Service Commission[32].

In addition, there exists a ruling by at least one state commission which requires the incumbent LEC to continue to provide access to de-listed unbundled network elements (such as mass market switching) under Section 271 of the Telecommunications Act at TELRIC prices until such time as the state commission or the FCC rules otherwise or sets new "just and reasonable" rates under that Section. In that instance, the state commission ruled that the incumbent LEC need not follow their contractual "change of law" provisions, and may immediately stop providing the de-listed elements under Section 251 – of course, they must still provide them under Section 271 (at the same rates as if they were being provided under Section 251), so the CLECs in that state suffer no harm. See Order of the Maine Public Utilities Commission.[33] The Florida Public

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26 In the matter of application of competitive local exchange carriers to initiate a Commission investigation of issues related to the obligation of incumbent local exchange carriers in Michigan to maintain terms and conditions for access to unbundled network elements, etc., Case No. U-14303, March 29, 2005 (**Exhibit J**).

27 *Illinois Bell Telephone Company v. Hurley*, 2005 WL 735968 (N.D.Ill.) (March 29, 2005) (**Exhibit K**).

28 Order Granting Preliminary Injunction, *MCIMetro Access Transmission Services LLC v. Michigan Bell Telephone Company*, Civil Action No. 05-70885, March 11, 2005 (**Exhibit L**).

29 In the matter of Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law, Case No. 2004-0427, March 10, 2005 (**Exhibit M**).

30 Order No. 39 Issuing Interim Agreement Amendment, Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement, Docket No 28821, February 25, 2005 (**Exhibit N**).

31 Order Granting Emergency Relief, *Cbeyond Communications, LLP, et al. v. Illinois Bell Telephone Company*, Docket No. 05-0154, March 9, 2005 (**Exhibit O**).

32 Order Establishing Generic Docket, In re: Order Establishing Generic Docket to Consider Change-of-Law to Existing Interconnection Agreements, Docket No. 2005-AD-139, March 9, 2005 (**Exhibit P**).

33 Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21), Docket No. 2002-682, Order issued March 17, 2005 (**Exhibit Q**).

Service Commission has ignored the precedent set by the Maine Public Utilities Commission as well as Supra's arguments on this front, and BellSouth has refused to address Supra's inquiries as to whether it will provide such unbundled network elements under Section 271 or applicable state law.

Based upon the above, it is clear that this factor of success on the merits, weighs heavily in favor of the issuance of injunctive relief.

B. IRREPARABLE INJURY

Even if Supra can "establish a likelihood of success on the merits, the absence of a substantial likelihood of irreparable injury would, standing alone, make preliminary injunctive relief improper." *Siegel v. Lepore*, 234 F.3d 1163, 1176 (11th Cir. 2000); *Snook v. Trusts Co. of Georgia Bank of Savannah, N.A.*, 909 F.2d 480, 486 (11th Cir. 1990). "The asserted irreparable injury 'must be neither remote nor speculative, but actual and imminent.'" *Sierra Club v. Atlanta Regional Commission*, 171 F.Supp.2d 1349, 1358 (N.D.Ga. 2001) citing *Northeastern Fla. Chapter of the Ass'n of Gen. Contractors v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990) (quoting *Tucker Anthony Realty Corp. v. Schlesinger*, 888 F.2d 969, 973 (2d Cir.1989).

Supra is able to show that it will suffer actual and imminent irreparable injury by virtue of the following:

BellSouth's stated actions will prevent Supra from, *inter alia*, obtaining any new UNE-P customers. As a result, Florida consumers will be unable to select their desired service provider. Moreover, while the number of new UNE-P orders requested as of March 11, 2005 may be a quantifiable amount, the loss of customers, Supra's good will and reputation are not quantifiable.

In *Michigan Bell Telephone Company v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001), the Court stated as follows:

> The plaintiffs assert that they will lose customer good will if they are forced to recoup losses by substantially raising rates and fees for the period during which this action may be litigated. This court has held that even if higher rates and fees do not drive customers away, loss of established goodwill may irreparably harm a company. *See Basicomputer Corp. v. Scott,* 973 F.2d 507, 512 (6th Cir.1992) (Because "damages flowing from such losses [of customer goodwill] are difficult to compute," that loss too "amounts to irreparable injury"); *see also Gateway E. Ry. Co. v. Terminal R.R. Ass'n,* 35 F.3d 1134, 1140 (7th Cir.1994) ("[S]howing injury to goodwill can constitute irreparable harm that is not compensable by an award of money damages"). There is sufficient evidence in the record to support a finding that the plaintiffs will be irreparably harmed if they are compelled to recoup their substantial projected losses through increased rates and fees.

The Eleventh Circuit has also held that the potential loss of good will and customers satisfies a showing of irreparable harm. *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991). In *Ferrero*, the Eleventh Circuit affirmed the issuance of a preliminary injunction for specific performance of a non-compete agreement arising under Georgia law. In doing so, the Eleventh Circuit ruled that the potential loss of good will and customers caused by the competition, was sufficient to demonstrate irreparable harm. No amount of money damages can adequately compensate Supra in these circumstances since the extent of such damage inflicted by BellSouth would be impossible to measure accurately. As noted by the former Fifth Circuit, the possibility of customers being permanently discouraged from patronizing one's business equates to a substantial threat of harm that can not be undone through monetary remedies. *Spiegel v. City of Houston*, 636 F.2d 997 (5th Circuit 1981); *See also Tally-Ho, Inc., v. Coast Community College District*, 889 F.2d 1018 (11th Cir. 1990) (injury to a business' reputation and revenues equated to irreparable injury). Likewise, the Georgia Supreme

Court has held that the potential of not being able to conduct business is certainly the kind of irreparable harm that can be remedied by injunctive relief. *Georgia Department of Agriculture v. Georgia Crown Distributing Co.*, 262 Ga. 761, 425 S.E.2d 876 (Ga. 1993).

Additionally, should BellSouth carry out its stated threat to deny Supra's ability to add new UNE-P customers, Supra's customer service centers will be overwhelmed with calls from customers demanding answers as to why they have not been provisioned to Supra. Supra cannot afford to simply increase its capacity to deal with this increased call volume, which can only lead to Supra having to defend itself against a voluminous amount of lawsuits instituted from irate customers. This is a significant issue, as Supra will unnecessarily be forced to expend its resources responding to these calls and/or suits, instead of expending its resources responding to customers who are calling to switch to Supra.

Finally, as mentioned above, allowing BellSouth to immediately begin rejecting orders without first negotiating an amendment to the parties' Agreement ensures that Supra will have virtually no bargaining power when attempting to negotiate reasonable rates for mass market local switching under state law and under Section 271 of the Telecommunications Act. If Supra seeks to continue to have the ability to provide service to new customers, Supra will have no choice but to accept what BellSouth offers it as far as price goes, irrespective of whether the price is commercially just and reasonable. This harm cannot be measured, much less repaired.

C. BALANCE OF HARDSHIPS

The balance of hardship favors Supra. BellSouth will not be harmed, as BellSouth will have the opportunity to fairly resolve any resulting monetary issues in a legal forum. Supra, on the other hand, BellSouth's largest competitor in Florida, will likely be unable to regain the customer loyalty and good reputation which it fought for and was successful in acquiring from BellSouth. Supra will suffer actual damages including, but not necessarily limited to, increased costs, loss of customers, lost profits and injury to Supra's business reputation and good will as it has effectively been denied the benefits of competing within the framework of free markets and providing lower prices to telecommunications consumers. Moreover, consumers in the relevant market have been harmed because they have been deprived of the benefits of meaningful competition, which in turn assures lower prices and better services.

Furthermore, any loss of customers during the time the parties are effectuating the rulings of the *TRRO* through the change of law provisions cannot legitimately be considered an undue injury to BellSouth. BellSouth negotiated the change of law provisions with the full knowledge that such provisions would allow it to reap the benefit of delay, often unwanted by the CLECs when the changes inured to their benefit, and that, in fairness, BellSouth would have to bear the consequences of such limited delay where the changes inured to BellSouth's ultimate benefit. *See Sierra Pac. Power Co.*, 350 U.S. at 355 ("[A] contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable . . . ."). As such, BellSouth's claimed irreparable injury in the form of lost customers is, at best, an injury of its own making that needs no emergency remedy. Certainly such "injury," if established, cannot be shown to outweigh

the harm that undoubtedly will befall Supra as a result of a preliminary injunction

Again, this factor favors issuance of injunctive relief.

D. PUBLIC INTEREST

The issuance of an injunction against BellSouth's unlawful action is in the public interest. Supra is seeking to properly implement its Agreement and provide much needed competition in Florida, as envisioned by Congress by passing the 1996 Telecommunications Act, the passing of which was "[t]o promote competition and reduce regulations in order to secure lower prices and higher quality of services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." By issuing Supra's requested injunction, Florida customers will be able to continue to receive telephone service from their desired provider. The denial of an injunction will allow BellSouth to evade its contractual obligations and deny Florida consumers the power of choice. This factor also supports issuance of injunctive relief.

WHEREFORE, Supra requests that this Court enter an Order:

1) Restraining and/or enjoining BellSouth from taking any actions based on the *TRRO* until either the 11th Circuit has ruled or the Parties' have effectuated a proper amendment to their Agreement;

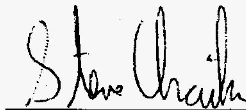
2) Restraining and/or enjoining the Florida Public Service Commission from enforcing its oral ruling of April 5, 2005 until either the 11th Circuit has ruled or the Parties' have effectuated a proper amendment to their Agreement; and

3) For any other mete and proper relief as this Court deems proper.

I HEREBY CERTIFY that a true and correct copy of the foregoing Emergency Motion and Complaint filed contemporaneously herewith shall be served via process server upon Defendants' Registered Agents.

Respectfully Submitted,

SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC.
2901 S.W. 149th Avenue
Suite 300
Miramar, Florida 33027
Voice: 786.455.4239
Fax: 786.455.4600



STEVEN B. CHAIKEN, ESQ.
FBN: 0626791
BRIAN CHAIKEN, ESQ.
FBN: 0118060

April 13, 2005

IN THE DISTRICT COURT OF THE
NORTHERN DISTRICT OF FLORIDA

TALLAHASSEE, FLORIDA

SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC., **CASE NO. ________________**

Plaintiff,

v.

BELLSOUTH TELECOMMUNICATIONS, INC., THE FLORIDA PUBLIC SERVICE COMMISSION, and THE COMMISSIONERS OF THE FLORIDA PUBLIC SERVICE COMMISSION, in their official capacities,

Defendants.

VERIFIED COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF

Supra Telecommunications and Information Systems, Inc. ("Supra"), by and through its undersigned counsel, pursuant to 28 U.S.C. § 1332, Federal Rule of Civil Procedure 65, Sections 16.1 and 25.1 of the General Terms and Conditions and Attachment 1 of the parties' Interconnection Agreement effective July 15, 2002 ("Agreement"), and the decisional authorities, hereby files its Verified Complaint for Declaratory, Injunctive and Other Relief ("Complaint") and states:

JURISDICTION AND VENUE

1. At all times mentioned, petitioner was, and still is, a corporation duly organized and existing under the laws of Florida, with its principal office located at 2901 S.W. 149th Avenue, Miramar, Florida 33027.

OFFICE OF CLERK
U.S. DISTRICT CT.
NORTHERN DIST. FLA.
TALLAHASSEE, FLA.

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2. At all times mentioned, respondent, BellSouth Telecommunications, Inc. ("BellSouth") was, and still is, a corporation duly organized and existing under the laws of Georgia, with its principal office located in 675 W. Peachtree Street, N.E., Atlanta, GA. At all times material hereto, BellSouth engaged in, conducted and continues to engage in and conduct extensive intrastate and interstate business and commerce in the United States and within this district. BellSouth maintains offices and conducts business in the county in which this action has been filed.

3. The Commissioners are the commissioners of the FPSC, which is an administrative agency of the State of Florida and, in general, a "State Commission" within the meaning of 47 U.S.C. § 153(41) of the 1996 Act. The Commissioners conduct business in this District and the FPSC's offices are located in this District.

4. Venue is proper in this district pursuant to 28 U.S.C. § 1391 as BellSouth and the Commissioners transact and conduct business in this district, reside in this district and are subject to personal jurisdiction in this district.

5. This Court has subject matter jurisdiction over this Petition pursuant to 28 U.S.C. § 1331 (diversity jurisdiction); in that the subject matter of this dispute involves a federal question, namely, the Commission's interpretation of the Federal Communications Commission's *Order on Remand ("TRRO")*[1].

6. **All conditions precedent to this cause of action have occurred, been complied with, and/or** waived.

BACKGROUND

7. The Parties' Agreement became effective on July 15, 2002.

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[1] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket NO. 04-313, CC Docket No. 01-338, FCC 02-290 (FCC released February 4, 2005)

8. The Agreement was entered into to allow Supra to compete with BellSouth by allowing Supra, among other things, to purchase/lease and provision service to its end-users using portions of BellSouth's existing physical network.

9. Section 9.3 of the Agreement provides:

> In the event that any final legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of Supra Telecom or BellSouth to perform any material terms of this Agreement, Supra Telecom or BellSouth may, on ninety (90) days' written notice (delivered not later than ninety (90) days following the date on which such action has become legally binding and has otherwise become final without regard to, the Parties rights to appeal) 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, the dispute shall follow the dispute resolution procedures set forth in Section 16 of the General Terms and Conditions of this Agreement.[2]

10. On February 4, 2005, the Federal Communications Commission ("FCC") issued the *TRRO*. The FCC determined on a nationwide basis that Incumbent Local Exchange Carriers ("ILECs"), like BellSouth, are no longer 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 Competitive Local Exchange Carriers ("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.)

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[2] See Section 9.3 of the Parties' interconnection agreement dated July 15, 2002.

11. BellSouth issued a Carrier Notification dated February 8, 2005[3] in which it notified CLECs, including Supra, 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." On March 7, 2005, BellSouth issued a second Carrier Notification[4] stating "BellSouth would continue to receive CLEC orders for 'new adds' 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." On March 21, 2005, BellSouth issued a third Carrier Notification[5] stating "Due 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."

12. 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, and therefore breach, the Parties' Agreement.

13. **On March 1, 2005, 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") filed a Petition and Request for Emergency Relief ("NuVox Petition") and on March 3, 2005, MCImetro Access Transmission Services, LLC ("MCI") filed a Motion for Expedited Relief Concerning UNE-P Orders ("MCI Motion") before the Florida Public Service Commission ("FPSC").

14. On March 4, 2005, Supra filed its Petition and Request for Emergency Relief ("Supra's Petition") before the FPSC and adopted and incorporated both the NuVox Petition and MCI

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3 A true and correct copy of the February 8 Carrier Notice is attached hereto as **Exhibit A**.

4 A copy of BellSouth's March 7, 2005 Carrier Notification is attached hereto as **Exhibit B**.

5 A copy of BellSouth's March 21, 2005 Carrier Notification is attached hereto as **Exhibit C**.

Motion.[6] Therein, Supra requested that the FPSC enter, on an emergency basis, an order declaring that BellSouth may not unilaterally implement changes in law without following the applicable provisions of the parties' Agreement, and ordering BellSouth to comply with the Agreement as well as to continue accepting and processing Supra's UNE-P orders under the rates, terms and conditions of their Agreement, until such time as the Agreement is properly amended pursuant to its own terms.

15. On April 5, 2005, the FPSC held a hearing on the issues raised by Supra and the other CLECs. At that hearing, the FPSC ruled that BellSouth need not follow the Parties' contractual "change of law" provisions, and instead may unilaterally effectuate the provisions of the *TRRO*.[7]

COUNT I
DECLARATORY RELIEF

16. Supra realleges ¶¶ 1 through 15 as if fully set forth herein.

17. The Parties have entered into an Agreement which became effective July 15, 2002 and remains in effect to date.

18. According to Section 1.1 of the General Terms and Conditions ("GT&C") of the Agreement[8], BellSouth agreed to provide Supra with "certain Unbundled Network Elements ("Network Elements") and certain combinations of such unbundled Network Elements ("Combinations").

19. According to Section 9.3 of the Agreement, the Parties agree to renegotiate the terms of the Agreement in the event "any final legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement". In the event the Parties are unable to

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[6] A copy of Supra's Petition is attached hereto as **Exhibit D.**

[7] A copy of the FPSC's April 5, 2005 Vote Sheet is attached hereto as **Exhibit E**.

[8] A copy of the GT&C of the Agreement is attached hereto as **Exhibit F**.

reach an agreement, the Parties agree to follow the dispute resolution provisions under the Agreement.

20. This action involves an actual controversy in which the FPSC has taken actions that are not authorized by the 1996 Act and which are in direct contradiction of the plain meaning of the Parties' voluntarily negotiated Agreement. Specifically, Supra is respectfully requesting that this Court take jurisdiction over this controversy and, pursuant to 28 U.S.C. § 2201, make a declaration with respect to the following controversies:

a) Whether Section 9.3 of the Parties' Agreement requires an amendment in order to effectuate changes of law.

b) Whether the *TRRO* constitutes a change of law, a final legislative, regulatory, judicial or other legal action which materially affects any material term of the Parties' Agreement, pursuant to Section 9.3 of the Agreement.

c) Whether the FCC intended to abrogate the Parties' voluntarily negotiated Agreement.

d) Whether the FCC did abrogate the Parties' voluntarily negotiated Agreement.

e) Whether BellSouth's intended unilateral actions constitute a breach of the Parties' Agreement.

f) Whether the FPSC erred in ruling that BellSouth may immediately cease accepting Supra's orders for new lines to be provisioned using de-listed Section 251 network elements.

21. Pursuant to 28 U.S.C. 2202, Supra respectfully requests that this Court take such further necessary and/or proper relief based upon any declaratory judgment or decree which may be granted by this Court.

WHEREFORE, Supra respectfully requests that this Court take jurisdiction over this cause, and enter a judgment finding the following:

a) Section 9.3 of the Parties' Agreement requires an amendment in order to effectuate changes of law;

b) The *TRRO* constitutes a change of law, a final legislative, regulatory, judicial or other legal action which materially affects any material term of the Parties' Agreement, pursuant to Section 9.3 of the Agreement;

c) The FCC did not intend to abrogate the Parties' voluntarily negotiated Agreement.

d) The FCC did not abrogate the Parties' voluntarily negotiated Agreement;

e) BellSouth's intended unilateral actions constitute an anticipatory breach of the Parties' Agreement;

f) The FPSC erred in ruling that BellSouth may immediately cease accepting Supra's orders for new lines to be provisioned using de-listed Section 251 network elements; and

g) Any other relief this Court deems just and proper under the circumstances.

COUNT II
INJUNCTIVE RELIEF

22. Supra realleges ¶¶ 1 through 21 as if fully set forth herein.

23. This is an action for temporary injunctive relief seeking specific performance of the Parties' Agreement and enjoining BellSouth from taking any unilateral action until either the 11th Circuit[9] has decided the issue or the parties' have properly amended their Agreement.

24. There is a substantial likelihood that Supra will prevail on its claims against BellSouth.

25. Supra will suffer irreparable harm based on BellSouth's actions, if this Court does not enjoin BellSouth from unilaterally taking action until the 11th Circuit has ruled. Supra will be immediately and irreparably harmed and left without adequate legal remedies.

26. As of April 17, 2005, BellSouth will prevent Supra from being able to add new customers.

[9] The GPSC previously issued an order which is in direct opposition to the FPSC's oral ruling of April 5, 2005. BellSouth appealed the GPSC's decision to the Northern District of Georgia in Case No. 1:05-CV-0674-CC. The District Court reversed the GPSC's decision in its Order dated April 5, 2005. This Order has been appealed to the United States Court of Appeals for the 11th Circuit in Case No. 05-11880(D).

27. In addition from being prevented from adding new customers, Supra anticipates receiving numerous customer lawsuits and complaints with the FPSC, the Better Business Bureau, the FCC, and other regulatory and/or consumer bodies.

28. Supra will continue to suffer loss of customers, business reputation and good will if BellSouth is allowed to breach the Agreement and deny Supra the ability to add new customers.

29. Finally, should BellSouth be allowed to prevent Supra from being able to add new customers without first negotiating an appropriate amendment to the Parties' Agreement, BellSouth will have gained tremendous bargaining power in the negotiations of any commercial agreement for the provision of such services in the future. The loss of any negotiating leverage with respect to a commercial agreement is irreparable.

30. Based upon the allegations of this complaint, the potential harm to Supra from a failure to grant injunctive relief outweighs any potential harm to BellSouth if the requested injunctive relief is granted.

31. BellSouth will not be harmed as BellSouth will have the opportunity to fairly resolve any resulting monetary issues in a legal forum. Supra, on the other hand, will be unable to regain the lost customers, customer loyalty and goodwill.

32. The public interest will not be adversely impacted if the requested injunctive relief is granted. To the contrary, if the requested injunctive relief is not granted, the public interest will be adversely affected.

33. **As a direct result of BellSouth's actions, many customers will be unable to receive their** desired services.

34. **It should also be noted that BellSouth previously promised the FPSC that it would abide** by the terms of its interconnection agreements.

35. After the FCC released a previous order which caused some concern regarding BellSouth's intended actions, on May 28, 2004, BellSouth sent a letter[10] to the FPSC promising that "BellSouth will not 'unilaterally disconnect services being provided to any CLEC under the CLEC's Interconnection Agreement.'"[11] BellSouth further promised:

> With respect to new or future orders, 'BellSouth will not unilaterally breach its interconnection agreements.' If the D.C. Circuit issues its mandate on June 15, 2004, BellSouth will continue to accept an process new orders for services (including switching, high capacity transport, and high capacity loops) and will bill for those 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.[12]

WHEREFORE, Supra requests that this Court grant the following relief:

a.) An order enjoining the Florida Public Service from enforcing its Order, issued orally on April 5, 2005;

b.) An order enjoining BellSouth from refusing to accept and process new orders for UNE-P service until the Parties' have properly amended their Agreement;

c.) And for any other mete and proper relief.

I HEREBY CERTIFY that a true and correct copy of the foregoing Complaint shall be served via process server upon the Defendants' Registered Agents.

Respectfully Submitted,

SUPRA TELECOMMUNICATIONS AND INFORMATION SYSTEMS, INC.
2901 S.W. 149th Avenue
Suite 300
Miramar, Florida 33027

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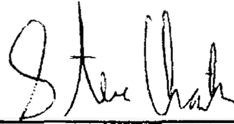
[10] A copy of BellSouth's letter dated May 28, 2004 is attached hereto as **Exhibit G**.
[11] *Id.* at paragraph 3.
[12] *Id.* at paragraph 4.

Voice: 786.455.4239
Fax: 786.455.4600



STEVEN B. CHAIKEN, ESQ.
FBN: 0626791
BRIAN CHAIKEN, ESQ.
FBN: 0118060

VERIFICATION OF COMPLAINT

I, David A. Nilson, hereby affirm under penalty of perjury that all of the allegations, matters and facts set forth this Supra Telecommunication and Information Systems, Inc.'s VERIFIED COMPLAINT FOR DECLARATORY, INJUNCTIVE AND OTHER RELIEF are true and correct upon personal knowledge, information and belief.

Supra Telecommunications and
Information Systems, Inc.

By: ______________________

Dated: ______________________

FLORIDA PUBLIC SERVICE COMMISSION

VOTE SHEET

APRIL 5, 2005

RE: Docket No. 041269-TP - Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.
Docket No. 050171-TP - 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. 050172-TP - 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).

Issue 1: Should the Commission grant BellSouth's Motion to Consolidate Docket No. 050171-TP into Docket No. 041269-TP?
Recommendation: No. Staff does not believe it is necessary to consolidate these dockets. However, the petition of American Dial Tone is substantially similar to the petitions filed by MCI and Supra in Docket No. 041269-TP, and therefore, for purposes of this recommendation the petitions should be addressed together.

~~DENIED - The dockets will be consolidated.~~

APPROVED - Following the decision in Issues 2 and 3, the Commissioners, on their own motion, reconsidered the decision in Issue 1 and approved staff's rec.

COMMISSIONERS ASSIGNED: All Commissioners

COMMISSIONERS' SIGNATURES

MAJORITY	DISSENTING
[signature]	
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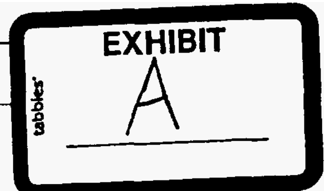
[signature]	
[signature]	

REMARKS/DISSENTING COMMENTS:



DOCUMENT NUMBER-DATE
03321 APR-5 05
FPSC-COMMISSION CLERK

VOTE SHEET
APRIL 5, 2005
Docket No. 041269-TP - Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.
Docket No. 050171-TP - 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. 050172-TP - 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).

(Continued from previous page)

Issue 2: Should the Commission find that BellSouth and Verizon are required to continue accepting "new add" orders for the delisted UNEs identified by the FCC in its Triennial Review Remand Order after March 11, 2005?
Recommendation: If a timely petition is filed with the FCC requesting reconsideration and/or clarification of the TRRO before March 28, 2005, staff believes it would then be appropriate for the Commission to require the ILECs to continue accepting "new adds" for delisted UNEs, pursuant to the rates, terms and conditions set forth in their interconnection agreements, and subject to a true-up to an appropriate rate if the FCC later clarifies that "new adds" were to stop on March 11, 2005. If, however, reconsideration or clarification is not timely requested prior to this Commission's consideration of this matter, staff recommends that the arguments of both the ILECs and the CLECs find support in the language of the TRRO and, thus, both arguments have significant merit. Staff believes that attempts to divine the FCC's intent in this instance could run afoul of the D.C. Circuit Court's admonitions in USTA II that sub-delegation by the FCC in this area is unlawful. As such, staff recommends that the Commission decline to make a finding as to the FCC's intent and require that the status quo be maintained, subject to a true-up to an appropriate rate, until either clarification from the FCC is obtained or the parties are otherwise able to reach a business solution of this dispute, but in no event beyond the term of the 12-month transition period contemplated in the TRRO.

DENIED Staff's recommendation was denied as follows: with regard to high-capacity loops and transport, pending the outcome of BellSouth's appeal to the FCC, BellSouth will follow Mr. Lackey's outlined procedure that (1) the requesting CLEC will certify its order for loops and/or transport and (2) BellSouth will either provision the high-capacity loop or transport or will dispute such provisioning pursuant to the parties' existing dispute resolution process.

Issue 3: Should these dockets be closed?
Recommendation: No. Docket 041269-TL is currently set for hearing and should remain open to address the remaining open issues. Docket Nos. 050171-TP and 050172-TP should be held in abeyance pending clarification from the FCC or until the parties are otherwise able to reach a business solution of this dispute.

MODIFIED Dockets 050171 and 050172 will be closed.

→ On switching, there shall be no new adds after March 11, 2005 (requesting carriers may not obtain new local switching as an unbundled network element

BELLSOUTH

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

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BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085061

Date: March 7, 2005

To: Competitive Local Exchange Carriers (CLEC)

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

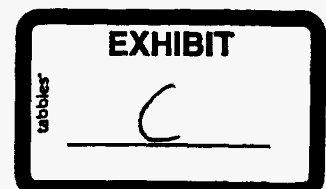
On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO).

On February 11, 2005, BellSouth released Carrier Notification letter SN91085039, in which BellSouth set forth its understanding of the TRRO, particularly as it affected BellSouth's obligations to provide a number of former Unbundled Network Elements ("UNEs") after March 11, 2005. Specifically, BellSouth acknowledged that there would be a transition period for the embedded base of these former UNEs, but concluded that the FCC had intended to stop all "new adds" of these former UNEs effective March 11, 2005.

BellSouth posted this Carrier Notification letter on February 11, 2005, in order to provide the CLECs with as much lead time as possible in order to allow the CLECs to take whatever steps were necessary to adjust to the new situation created by the TRRO. Unfortunately, the step chosen by a number of CLECs in response to the clear language of the FCC dealing with "new adds" has been to ask various state commissions to order BellSouth to continue to accept such "new adds." Indeed, this approach has, to date, been successful in at least one jurisdiction, Georgia.

Furthermore, notwithstanding the fact that BellSouth's Carrier Notification SN91085039 was posted on February 11, 2005, various CLECs continue, as recently as March 3, 2005, to file requests with state commissions that have not addressed this question. These requests remain pending before state commissions and it is not clear, because of the delay in filing of these requests by the CLECs, that all state commissions will have a full and adequate opportunity to consider the important issue of whether the FCC actually meant what it said in its order when it indicated that there would be no "new adds." Indeed, at the present time there are at least two commissions in BellSouth's region that have scheduled consideration of the CLECs' requests at a date beyond March 11, 2005, the effective date of the TRRO, and the date that BellSouth had established to prevent unlawful "new adds."

Because of these events, BellSouth herewith revises the implementation date contained in Carrier Notification SN91085039 in the following respects. BellSouth will continue to receive, and will not reject, CLEC orders for "new adds" as they relate to the former UNEs as identified by the FCC for a short period of time. BellSouth will continue to accept CLEC orders for these "new adds" 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 doing this, BellSouth intends to allow those commissions who have not had the opportunity to fully and carefully consider the requests of the CLECs and the responses of BellSouth, to do so in a measured way, rather than via various "emergency" proceedings created by the dilatory tactics of a number of CLECs.



By extending the time during which BellSouth will accept these orders, BellSouth does not abandon its legal position that the clear words of the FCC mean exactly what they say. BellSouth will continue to pursue that position before the state commissions, and to the extent that a commission has ruled adversely to BellSouth's position, in the courts. Specifically, BellSouth will be asking the appropriate courts to stay any such adverse order we receive.

In addition, BellSouth hereby puts the CLECs on notice that it intends to pursue the various CLECs who place orders for "new adds" after March 10, 2005 to the greatest extent of the law, in an effort to recover the revenue that BellSouth loses as a result of the placement of these unlawful orders. Should any state commission be inclined to ignore the plain language of the FCC's TRRO, and to order BellSouth to continue accepting "new adds" until the issue is fully resolved, BellSouth will ask that commission to require CLECs to compensate BellSouth, in the event BellSouth ultimately prevails in its legal claim, for any former UNE added after March 10, 2005, in an amount equal to the difference in the rate paid by the CLEC and the appropriate rate BellSouth should have collected (either commercial or resale, depending on which service option the CLEC ultimately elects).

As noted in Carrier Notification SN91085039, 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-Platform (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. With regard to the former high capacity loops and transport UNEs, 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.

Finally, as stated in Carrier Notification letter SN91085032 concerning the availability of a long term commercial agreement, through March 10, 2005, BellSouth will continue to offer its current DS0 Wholesale Local Voice Platform Services Commercial Agreement ("DS0 Agreement") with transitional discounts off of BellSouth's market rate for mass market platform services. Beginning March 11, 2005, BellSouth will offer a DS0 Agreement, but the existing transitional discounts will not be available.

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

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BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085070

Date: March 21, 2005

To: Competitive Local Exchange Carriers (CLEC)

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

On March 7, 2005, BellSouth posted Carrier Notification letter **SN91085061**, advising CLECs that, for reasons set forth therein, BellSouth would continue to receive CLEC orders for "'new adds' 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". In this same Carrier Notification letter, BellSouth reminded CLECs that while the current Commercial Agreement offer would no longer be available after March 10, 2005, BellSouth would offer a new Commercial Agreement after that date, but the existing transitional discounts would no longer be available. BellSouth also posted Carrier Notification letter **SN91085064** on March 9, 2005, to remind CLECs of this fact.

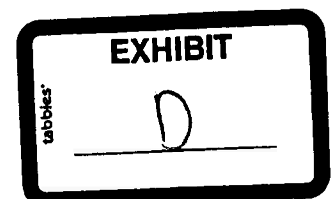
Over 100 CLECs have now signed Commercial Agreements, and BellSouth is enthusiastic about having the opportunity to continue to serve these CLECs through these agreements in the coming years. BellSouth would like to encourage CLECs who have not signed a Commercial Agreement to contact their negotiator to find out more about BellSouth's Commercial Agreement. Due 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.

BellSouth welcomes the opportunity to serve CLECs through its Commercial Agreements. Please contact your negotiator to find out more about BellSouth's current offer.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services



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CASE NO. 05-__________-

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BELLSOUTH TELECOMMUNICATIONS, INC.,

Plaintiff-Appellee,

v.

MCIMETRO ACCESS TRANSMISSION SERVICES LLC, et al.,

Defendants-Appellants.

On Appeal From The United States District Court
For The Northern District of Georgia

JOINT DEFENDANTS' EMERGENCY MOTION TO STAY THE PRELIMINARY INJUNCTION PENDING APPEAL AND FOR AN EXPEDITED APPEAL

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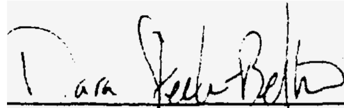
AO 1294727.2

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned, counsel for Appellants ITC^DeltaCom Communications, Inc.; Business Telecom, Inc.; Cbeyond Communications, LLC; LecStar Telecom, Inc.; Talk America, Inc.; US Carrier Telecom; Covad Communications Corp.; Southern Digital Network, Inc.; Broadriver Communications Corp.; NuVox Communications, Inc.; Xspedius Management Co. Switched Services, Inc. LLC; Xspedius Management Co. of Atlanta, LLC; KMC Telecom Holdings, Inc.; KMC Telecom V, Inc.; and KMC Telecom III, LLC ("Joint Defendants" or "Defendants") hereby certify that the following is a full and complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations (including those related to a party as a subsidiary, conglomerate, affiliate and parent corporation), known to the undersigned, that have an interest in the outcome of this case or appeal, including any publicly held company that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

Respectfully submitted this 6th day of April, 2005.



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AT&T Communications of the Southern States, L.L.C.

Baker, Robert B.

BellSouth Telecommunications, Inc.

Broadriver Communication Corporation

Brooks, Michael E.

Burgess, David L.

Burwell, Kaye Woodward

Business Telecom, Inc.

Cbeyond Communications, LLC

Competitive Carriers of the South, Inc.

Cooper, Honorable Clarence

Dieca Communications, Inc.

Everett, H. Doug

EZ Communications Inc.

Florida Digital Network, Inc.

Galloway & Lyndall, LLP

Galloway, Newton M.

Goldman, Marc A.

Governor's Office of Consumer Affairs

ITC^DeltaCom Communications, Inc.

Jenner & Block, LLP

Kellogg Huber Hansen Todd Evans & Figel

Kilpatrick Stockton

KMC Telecom Holdings, Inc.

KMC Telecom III, LLC

KMC Telecom V, Inc.

Lecstar Telecom, Inc.

Lev, Sean A.

Lewis, Anne Ware

Lyndall, Terri Mick

MCImetro Access Transmission Services, LLC

McKenna Long & Aldridge

Nuvox Communications, Inc.

O'Roark, Dulaney

Ockleberry, Suzanne W.

Patton, Matthew Henry

Rackow, Jeffrey A.

Roseborough, Teresa Wynn

Smith Galloway Lyndall & Fuchs

Sommer, Christiane L.

Southern Digital Network, Inc.

Speir, Angela E.

Sprint Communications Company, L.P.

Steele-Belkin, Dara L.

Strickland Brockington Lewis

Strickland, Frank B.

Supra Telecommunications and Information Systems, Inc.

Sutherland Asbill & Brennan LLP

Talk America

Teleport Communications Atlanta, Inc.

United States District Court, Northern District of Georgia

US LEC of Georgia, Inc.

USCarrier Telecom

Walsh, Daniel S.

Welsh Carson Anderson &Stowe

Wise, Stan

WorldCom, Inc. (now known as "MCI, Inc.")

XO Communications Services, Inc.

Xspedius Management Co. Switched Services, LLC

Xspedius Management Co. of Atlanta, LLC

Corporations and other identifiable entities related to the Defendants who are not parties to this appeal, including subsidiaries, affiliates, conglomerates and parent corporations:

For Defendant Broadriver Communication Corporation

1. Broadriver Communication Corporation
2. Integracore Incorporated

For Defendant Cbeyond Communications, L.L.C.

1. Cbeyond Communications, L.L.C.

<u>For Defendant Dieca Communications, Inc., d/b/a Covad Communications Co. ("Covad")</u>

1. BlueStar Communications Group, Inc., Affiliate of Covad

2. BlueStar Communications, Inc., Affiliate of Covad

2. BlueStar Networks, Inc., Affiliate of Covad

3. Covad Communications Company, Defendant

4. Covad Communications Group, Inc., Parent of Covad

5. Covad Communications International B.V., Affiliate of Covad

6. Covad Communications Investment Corp., Affiliate of Covad

7. Covad Europe Sarl, Affiliate of Covad

8. Dieca Communications, Inc., Defendant

9. Laser Link.Net, Inc., Affiliate of Covad

10. Loop Holdings Europe ApS, Affiliate of Covad

<u>For Defendants ITC^DeltaCom Communications, Inc., and Business Telecommunications, Inc., a subsidiary of ITC^DeltaCom</u>

1. Business Telecommunications, Inc.

2. Business Telecommunications, Inc. of Georgia
3. Interstate FiberNet, Inc.
4. ITC^DeltaCom, Inc.

For Defendants KMC Telecom Holdings, Inc.; KMC Telecom V, Inc.; KMC Telecom III,LLC

All are parties to the appeal.

For Defendant MCImetro Access Transmission Services, LLC

1. 1-800-Collect, Inc.
2. Access Network Services, Inc.
3. Access Virginia, Inc.
4. ALD Communications, Inc.
5. BC Yacht Sales, Inc.
6. BCT Holdings, LLC
7. BCT Real Estate, LLC
8. BFC Communications, Inc.
9. Bittel Telecommunications Corporation
10. Brooks Fiber Communications of Arkansas, Inc.
11. Brooks Fiber Communications of Bakersfield, Inc.

12. Brooks Fiber Communications of Connecticut, Inc.
13. Brooks Fiber Communications of Fresno, Inc.
14. Brooks Fiber Communications of Idaho, Inc.
15. Brooks Fiber Communications of Massachusetts, Inc.
16. Brooks Fiber Communications of Michigan, Inc.
17. Brooks Fiber Communications of Minnesota, Inc.
18. Brooks Fiber Communications of Mississippi, Inc.
19. Brooks Fiber Communications of Missouri, Inc.
20. Brooks Fiber Communications of Nevada, Inc.
21. Brooks Fiber Communications of New England, Inc.
22. Brooks Fiber Communications of New Mexico, Inc.
23. Brooks Fiber Communications of New York, Inc.
24. Brooks Fiber Communications of Ohio, Inc.
25. Brooks Fiber Communications of Oklahoma, Inc.
26. Brooks Fiber Communications of Rhode Island, Inc.
27. Brooks Fiber Communications of Sacramento, Inc.
28. Brooks Fiber Communications of San Jose, Inc.

29. Brooks Fiber Communications of Stockton, Inc.
30. Brooks Fiber Communications of Tennessee, Inc.
31. Brooks Fiber Communications of Texas, Inc.
32. Brooks Fiber Communications of Tucson, Inc.
33. Brooks Fiber Communications of Tulsa, Inc.
34. Brooks Fiber Communications of Utah, Inc.
35. Brooks Fiber Communications of Virginia
36. Brooks Fiber Communications-LD, Inc.
37. Brooks Fiber Properties, Inc.
38. BTC Finance Corp.
39. B.T.C. Real Estate Investments, Inc.
40. BTC Transportation Corporation
41. Business Internet, Inc.
42. CC Wireless, Inc.
43. Chicago Fiber Optic Corporation
44. Com Systems, Inc.
45. COM/NAV Realty Corp.

46. Compuplex Incorporated
47. Cross Country Wireless, Inc.
48. CS Network Services, Inc.
49. CS Wireless Battle Creek, Inc.
50. CS Wireless Systems, Inc.
51. Digex, Incorporated
52. Digex International Holding Company
53. E.L. Acquisition, Inc.
54. Embratel Participações S.A.
55. Express Communications, Inc.
56. Fibercom of Missouri, Inc.
57. FiberNet Rochester, Inc.
58. Fibernet, Inc.
59. Healan Communications, Inc.
60. ICI Capital LLC
61. Institutional Communications Company - Virginia
62. Intelligent Investment Partners, Inc.

63. Intermedia Capital, Inc.
64. Intermedia Communications Inc.
65. Intermedia Communications of Virginia, Inc.
66. Intermedia Investment, Inc.
67. Intermedia Licensing Company
68. Intermedia Services LLC
69. J.B. Telecom, Inc.
70. Jones Lightwave of Denver, Inc.
71. Marconi Telegraph-Cable Company, Inc.
72. MCI Canada, Inc.
73. MCI Communications Corporation
74. MCI Equipment Acquisition Corporation
75. MCI Galaxy III Transponder Leasing, Inc.
76. MCI Global Access Corporation
77. MCI Global Support Corporation
78. MCI International Services, L.L.C.
79. MCI International Telecommunications Corporation

80. MCI International Telecommunications Holding Corporation
81. MCI International, Inc.
82. MCI Investments Holdings, Inc.
83. MCI Network Technologies, Inc.
84. MCI Omega Properties, Inc.
85. MCI Payroll Services, LLC
86. MCI Research, Inc.
87. MCI Systemhouse L.L.C.
88. MCI Transcon Corporation
89. MCI Wireless, Inc.
90. MCI WORLDCOM Brands, L.L.C.
91. MCI WORLDCOM Brazil LLC
92. MCI WORLDCOM Brooks Telecom, LLC
93. MCI WORLDCOM Capital Management Corporation
94. MCI WORLDCOM Communications of Virginia, Inc.
95. MCI WORLDCOM Communications, Inc.
96. MCI WORLDCOM Financial Management Corporation

97. MCI WORLDCOM International, Inc.

98. MCI WorldCom Management Company, Inc.

99. MCI WORLDCOM MFS Telecom, LLC

100. MCI WORLDCOM Network Services of Virginia, Inc.

101. MCI WORLDCOM Network Services, Inc.

102. MCI WORLDCOM Receivables Corporation

103. MCI WORLDCOM Synergies Management Company, Inc.

104. MCI/OTI Corporation

105. MCImetro Access Transmission Services LLC

106. MCImetro Access Transmission Services of Virginia, Inc.

107. Metrex Corporation

108. Metropolitan Fiber Systems of Alabama, Inc.

109. Metropolitan Fiber Systems of Arizona, Inc.

110. Metropolitan Fiber Systems of Baltimore, Inc.

111. Metropolitan Fiber Systems of California, Inc.

112. Metropolitan Fiber Systems of Columbus, Inc.

113. Metropolitan Fiber Systems of Connecticut, Inc.

114. Metropolitan Fiber Systems of Dallas, Inc.
115. Metropolitan Fiber Systems of Delaware, Inc.
116. Metropolitan Fiber Systems of Denver, Inc.
117. Metropolitan Fiber Systems of Detroit, Inc.
118. Metropolitan Fiber Systems of Florida, Inc.
119. Metropolitan Fiber Systems of Hawaii, Inc.
120. Metropolitan Fiber Systems of Houston, Inc.
121. Metropolitan Fiber Systems of Indianapolis, Inc.
122. Metropolitan Fiber Systems of Iowa, Inc.
123. Metropolitan Fiber Systems of Kansas City, Missouri, Inc.
124. Metropolitan Fiber Systems of Kansas, Inc.
125. Metropolitan Fiber Systems of Kentucky, Inc.
126. Metropolitan Fiber Systems of Massachusetts, Inc.
127. Metropolitan Fiber Systems of Minneapolis/St. Paul, Inc.
128. Metropolitan Fiber Systems of Nebraska, Inc.
129. Metropolitan Fiber Systems of Nevada, Inc.
130. Metropolitan Fiber Systems of New Hampshire, Inc.

131. Metropolitan Fiber Systems of New Jersey, Inc.

132. Metropolitan Fiber Systems of New Orleans, Inc.

133. Metropolitan Fiber Systems of New York, Inc.

134. Metropolitan Fiber Systems of North Carolina, Inc.

135. Metropolitan Fiber Systems of Ohio, Inc.

136. Metropolitan Fiber Systems of Oklahoma, Inc.

137. Metropolitan Fiber Systems of Oregon, Inc.

138. Metropolitan Fiber Systems of Philadelphia, Inc.

139. Metropolitan Fiber Systems of Pittsburgh, Inc.

140. Metropolitan Fiber Systems of Rhode Island, Inc.

141. Metropolitan Fiber Systems of Seattle, Inc.

142. Metropolitan Fiber Systems of St. Louis, Inc.

143. Metropolitan Fiber Systems of Tennessee, Inc.

144. Metropolitan Fiber Systems of Virginia, Inc.

145. Metropolitan Fiber Systems of Wisconsin, Inc.

146. Metropolitan Fiber Systems/McCourt, Inc.

147. MFS CableCo U.S., Inc.

148. MFS Datanet, Inc.

149. MFS Foreign Personnel, Inc.

150. MFS Global Communications, Inc. (f/k/a MCI WorldCom Services Co.)

151. MFS Globenet, Inc.

152. MFS International Holdings, L.L.C.

153. MFS International Opportunities, Inc. (f/k/a MCI WorldCom Marketing Co.)

154. MFS Telecom, Inc.

155. MFS Telephone of Missouri, Inc.

156. MFS Telephone of New Hampshire, Inc.

157. MFS Telephone of Virginia, Inc.

158. MFS Telephone, Inc.

159. MFS/C-TEC (New Jersey) Partnership

160. MFSA Holding, Inc.

161. Military Communications Center, Inc.

162. MobileComm Europe Inc.

163. Mtel American Radiodetermination Corporation

164. Mtel Asia, Inc.

165. Mtel Cellular, Inc.

166. Mtel Digital Services, Inc.

167. Mtel International, Inc.

168. Mtel Latin America, Inc.

169. Mtel Microwave, Inc.

170. Mtel Service Corporation

171. Mtel Space Technologies Corporation

172. Mtel Technologies, Inc.

173. N.C.S. Equipment Corporation

174. National Telecommunications of Florida, Inc.

175. Netwave Systems, Inc.

176. networkMCI, Inc.

177. New England Fiber Communications L.L.C.

178. Northeast Networks, Inc.

179. Nova Cellular Co.

180. NTC, Inc.

181. Overseas Telecommunications, Inc.

182. Savannah Yacht & Ship, LLC

183. SkyTel Communications, Inc.

184. SkyTel Corp.

185. SkyTel Payroll Services, LLC

186. Southern Wireless Video, Inc.

187. Southernnet of South Carolina, Inc.

188. Southernnet Systems, Inc.

189. Southernnet, Inc.

190. Telecom*USA, Inc.

191. Teleconnect Company

192. Teleconnect Long Distance Services & Systems Company

193. Tenant Network Services, Inc.

194. TMC Communications, Inc.

195. TransCall America, Inc.

196. Tru Vision Wireless, Inc.

197. Tru Vision-Flippin, Inc.

198. TTI National, Inc.
199. UUNET Australia Limited
200. UUNET Caribbean, Inc.
201. UUNet Global Alliances, Inc. (f/k/a MCI WorldCom Transmission Co.)
202. UUNET Holdings Corp.
203. UUNET International Ltd.
204. UUNET Japan Ltd.
205. UUNET Payroll Services, LLC
206. UUNET Technologies, Inc.
207. Virginia Metrotel, Inc.
208. Western Business Network, Inc.
209. Wireless Enterprises LLC
210. Wireless One of Bryan, Texas, Inc.
211. Wireless One, Inc.
212. Wireless Video Enhanced Services
213. Wireless Video Enterprises, Inc.
214. Wireless Video Services

215. WorldCom Broadband Solutions, Inc.

216. WorldCom Caribbean, Inc.

217. WorldCom East, Inc.

218. WorldCom ETC, Inc.

219. WorldCom Federal Systems, Inc.

220. WorldCom Funding Corporation

221. WorldCom Global Strategic Alliances, Inc.

222. WorldCom Global Strategic Alliances International, Inc.

223. WorldCom ICC, Inc.

224. WorldCom Intermedia Communications Corporation (f/k/a Shared Technologies Fairchild Communications Corporation)

225. WorldCom Intermedia Telecom, Inc. (f/k/a Shared Technologies Fairchild Telecom, Inc.)

226. WorldCom Intermedia, Inc. (f/k/a Shared Technologies Fairchild, Inc.)

227. WorldCom International Data Services, Inc.

228. WorldCom International Mobile Services LLC

229. WorldCom International Mobile Services, Inc.

230. WorldCom Overseas Holdings, Inc.

231. WorldCom Payroll Services, LLC

232. WorldCom Purchasing, LLC

233. WorldCom Switzerland LLC

234. WorldCom Ventures, Inc.

235. WorldCom Wireless, Inc.

For Defendant NuVox Communications, Inc.

1. NuVox, Inc.

For Defendant Southern Digital Network, Inc.

1. Broadline Communications, Inc.

2. Florida Digital Network, Inc.

3. Southern Digital Network, Inc.

4. Supra Telecommunications and Information Systems, Inc.

For Defendant Talk America

1. Access One Communications Inc. dba The Other Phone Company Inc.

2. Talk America Holdings, Inc.

For Defendants Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Atlanta, LLC

1. Xspedius Holding Corp., Inc.
2. Xspedius Management Co., LLC
3. Xspedius Communications, LLC
4. Xspedius Management Co. International, LLC
5. Xspedius Management Co. of Albuquerque, LLC
6. Xspedius Management Co. of Austin, LLC
7. Xspedius Management Co. of Baton Rouge, LLC
8. Xspedius Management Co. of Birmingham, LLC
9. Xspedius Management Co. of Charleston, LLC
10. Xspedius Management Co. of Chattanooga, LLC
11. Xspedius Management Co. of Colorado Springs, LLC
12. Xspedius Management Co. of Columbia, LLC
13. Xspedius Management Co. of D.C., LLC
14. Xspedius Management Co. of Dallas/Fort Worth, LLC
15. Xspedius Management Co. of El Paso, LLC
16. Xspedius Management Co. of Fort Worth, LLC
17. Xspedius Management Co. of Greenville, LLC
18. Xspedius Management Co. of Irving, LLC
19. Xspedius Management Co. of Jackson, LLC

20. Xspedius Management Co. of Jacksonville, LLC
21. Xspedius Management Co. of Kansas City, LLC
22. Xspedius Management Co. of Las Vegas, LLC
23. Xspedius Management Co. of Lexington, LLC
24. Xspedius Management Co. of Little Rock, LLC
25. Xspedius Management Co. of Louisiana, LLC
26. Xspedius Management Co. of Louisville, LLC
27. Xspedius Management Co. of Maryland, LLC
28. Xspedius Management Co. of Mobile, LLC
29. Xspedius Management Co. of Montgomery, LLC
30. Xspedius Management Co. of Pima County, LLC
31. Xspedius Management Co. of San Antonio, LLC
32. Xspedius Management Co. of Shreveport, LLC
33. Xspedius Management Co. of South Florida, LLC
34. Xspedius Management Co. of Spartanburg, LLC
35. Xspedius Management Co. of Tampa, LLC
36. Xspedius Management Co. of Tulsa, LLC
37. Xspedius Management Co. of Virginia, LLC
38. Xspedius Equipment Leasing LLC

39. NT Assets, LLC d/b/a Xspedius Fiber Group

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Pursuant to Fed. R. App. P. 8(a)(2), Appellants ITC^DeltaCom Communications, Inc., Business Telecom, Inc., Cbeyond Communications, LLC, LecStar Telecom, Inc., Talk America, Inc., US Carrier Telecom, Dieca Communications, Inc. d/b/a Covad Communications Corp., Southern Digital Network, Inc. d/b/a FDN Communications, BroadRiver Communication Corporation, NuVox Communications, Inc., Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Atlanta, LLC, KMC Telecom Holdings, Inc., KMC Telecom V, Inc., and KMC Telecom III, LLC ("Joint Defendants") move this Court to stay the District Court's April 5, 2005, preliminary injunction order pending appellate review and to grant an expedited appeal. Joint Defendants moved the District Court to stay its grant of the preliminary injunction, and such motion was denied by the District Court.

REQUEST FOR STAY AND EXPEDITED APPEAL

Immediate action by this Court is necessary to relieve Joint Defendants from a preliminary injunction that serves to alter the status quo and impose irreparable harm upon Joint Defendants and the public. The U.S. District Court for the Northern District of Georgia issued a preliminary injunction enjoining the enforcement of prior order of the Georgia Public Service Commission. (Exhibit 1, Order.) The District Court's injunction effectively allows BellSouth to violate the express terms of its contracts with Defendants and to cut off the provision of

certain services to Defendants at will, which BellSouth has indicated it will do as to any Defendants who have not entered into a "commercial agreement" with BellSouth as of April 8, 2005.

Relying on nothing stronger than negative inference, the District Court held that an order of the Federal Communications Commission ("FCC") had abrogated a negotiated provision of the parties interconnection agreements dictating how changes in law were to be incorporated into the agreements. In doing so, the District Court also refused to give any meaning to provisions of the FCC's Order expressly reminding the parties that they remained free to negotiate for services not no longer required under the Order and directing that the parties follow the negotiation procedures set out in Section 252 of the Telecommunications Act to give effect to the new unbundling rules announced in the Order. As the District Court acknowledged, Joint Defendants will undoubtedly suffer irreparable harm as a result of his grant of a preliminary injunction. The District Court erred, however, by failing to weigh this undoubted harm against that claimed by BellSouth. Instead, the District Court made inferences as to what the FCC must have intended, confusing the undisputed fact that the FCC Order changed applicable law with the parties obligations to comply with the freely negotiated terms of their contracts. The Georgia Public Service Commission ("GPSC") ordered BellSouth to comply with its contractual agreements with Defendants. By enjoining enforcement of that

order, the District Court has effectively granted affirmative injunctive relief that alters the status quo that has existed between the parties for several years. Moreover, the only way Defendants can avoid the loss of service threatened by BellSouth is to sign new contracts with BellSouth by April 8th. If they do so, however, they risk being found to have extinguished their right to insist on BellSouth's compliance with their existing contracts.

The District Court's grant of an extraordinary mandatory injunction was contrary to law and threatens Defendants with irreparable harm. The Order should be stayed immediately pending this Court's expedited review of the Preliminary Injunction Order.

MEMORANDUM OF LAW

Joint Defendants are telecommunications service providers that have negotiated contractual agreements ("Interconnection Agreements") with BellSouth Telecommunications, Inc. ("BellSouth"). These contracts specify the terms and conditions under which Joint Defendants may lease or otherwise access various elements of BellSouth's network, including the methodology for provisioning and terminating such service and the rates charged for such access. While some of the terms of the agreements are mandated by statutes, regulatory determinations, arbitration decisions, or judicial determinations, many result solely from the voluntary negotiation of the parties. Among the voluntarily negotiated provisions

of the agreements between Defendants and BellSouth are "change of law" provisions that specifically contemplate that the FCC will effect changes to the existing legal regime during the life of the agreement. The change of law provisions provide that if the regulatory, statutory or judicial regime changes in a material way, the parties will adhere to a particular procedure for amending their agreements to implement those changes in the law.

The FCC caused precisely the type of change in the law anticipated by the parties when it issued the *Triennial Review Remand Order* ("*TRRO*") (Exhibit 2, *TRRO*) and changed the listing unbundled network elements BellSouth is required to provide to Defendants. In an about-face, however, from its past insistence on strict compliance with the change of law provisions, BellSouth contended before the Georgia Public Service Commission ("GPSC") that the changes of law in the *TRRO* had to be implemented immediately, rather than pursuant to the "change of law" process or the negotiation process contemplated by Paragraph 233 of the *TRRO*.[1] To give effect to Paragraph 233 and to maintain the status quo long enough to allow the orderly amendment of the interconnection agreements, the GPSC enjoined BellSouth from refusing to comply with its contracts and directed

[1] BellSouth apparently believes that the choice of law provisions apply only when they work in its favor – they apply when BellSouth is required to change its business model to comply with new rulings but not when competitors such as Defendants are required to make changes. (Exhibit 15, Transcript pp.135:11-25 at.)

the parties to act expeditiously to negotiate the necessary changes to their agreements. The District Court has erroneously granted a preliminary injunction barring enforcement of the GPSC order and BellSouth has informed Joint Defendants that any carrier that has not entered into a "commercial agreement" proposed by BellSouth by April 8, 2005 will no longer be able to place new orders for certain services, and that it will begin rejecting such orders on April 17, 2005. (Exhibit 3, 3/21/05 Carrier Notification.)

The District Court's order wrongfully, and potentially forever, allows BellSouth to avoid the freely negotiated terms of its contracts. BellSouth insists that the FCC's ruling abrogated the "change of law provisions" in contracts between the parties, but neither it nor the District Court identifies any legitimate basis in the law for the FCC to abrogate the parties' contractual change of law provisions, and further fails to identify any language in the FCC's ruling even suggesting, let alone mandating, abrogation of the change of law provisions. Moreover, no harm BellSouth faces can outweigh the permanent harm that will be caused Defendants by the District Court's Preliminary Injunction Order. The District Court's order should be stayed by this Court.

I. FACTUAL BACKGROUND

A. The FCC's Triennial Review and Remand Order and Unbundled Network Elements

The Telecommunications Act of 1996, 47 U.S.C. §§ 151 *et seq.* ("1996 Act"

or "Act") requires BellSouth to allow Competitive Local Exchange Carriers ("CLECs" such as Joint Defendants here) to purchase unbundled, *i.e.*, distinct, elements of BellSouth's network and provides parameters for determining the rates that CLECs must pay to BellSouth for unbundled network elements ("UNEs"). 47 U.S.C. § 252(d)(1)(A) - (B). The FCC is responsible for making rules to determine which UNEs BellSouth and other incumbent LECs must provide to the CLECs. *Id.* § 251(d)(2). In August 2003, the FCC released the *Triennial Review Order*,[2] which addressed previous court decisions striking down portions of the FCC's UNE rules. Various telecommunications carriers appealed the *Triennial Review Order* and, on March 2, 2004, the D.C. Circuit remanded in part and vacated in part portions of that order, in particular, directing the FCC to reconsider certain of its unbundling rules. *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

On February 4, 2005, the FCC released its *Triennial Review Remand Order* ("*TRRO*").[3] In the *TRRO*, the FCC further revised its unbundling rules, making substantial changes to the previously existing competitive regime. Specifically, the

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[2] *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.* (CC Docket Nos. 01-338, 96-98, and 98-147), FCC 03-36 (released August 21, 2003), 68 Fed. Reg. 52276 (Sept. 2, 2003) ("*Triennial Review Order*").

[3] *In re Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.* (WC Docket No. 04-313 and CC Docket No. 01-338), FCC 04-290 (released Feb. 4, 2005) ("*Triennial Review Remand Order*").

TRRO provides that the FCC no longer reads § 251(c)(3) of the Act to require incumbent LECs to provide mass market local circuit switching as a UNE.[4] (*TRRO* ¶¶ 5, 226.) It also held that whether BellSouth had to provide transport lines and high-capacity loops as UNEs would depend on the size of the wire center involved. (*Id.*)

To implement these substantial changes, the *TRRO* provides for a twelve to eighteen-month period from the effective date of the *TRRO* during which the CLECS must be allowed to "retain access to" these former UNE elements, and to a combination of these elements known as the UNE platform, or "UNE-P" (the combination of an unbundled loop, unbundled local circuit switching, and shared transport) as to existing customers ("embedded customers"). Per the *TRRO*, this transition period began on March 11, 2005. (*TRRO* ¶¶ 5, 227.)

The *TRRO* also addresses how the parties are to implement the new unbundling rules for customers not covered by the transition plan. In the *TRRO* section entitled "Implementation of Unbundling Determinations," the Commission ordered as follows:

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[4] The *TRRO*'s analysis is limited to § 251 of the Act and does not address whether § 271 of the Act or provisions of state law require BellSouth to continue providing some or all of those elements on an unbundled basis (perhaps at different rates).

B. Implementation of Unbundling Determinations

> 233. We expect that incumbent LECs [such as BellSouth] 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.

(*TRRO* ¶ 233 (footnotes omitted and emphasis added).)

In addition, Joint Defendants' Interconnection Agreements with BellSouth specify how changes of law, like those imposed by the *TRRO*, are to be implemented. For example, Defendant ITC^DeltaCom Communications, Inc.'s ("ITC^DeltaCom") Interconnection Agreements with BellSouth provides:

> In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of ITC^DeltaCom or BellSouth to perform any material terms of this Agreement, ITC^DeltaCom 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. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution Procedure set forth in Section 11.

(Exhibit 3, Excerpts from ITC^DeltaCom/BellSouth Interconnection Agreement §

15.4.)[5] Although the *TRRO* undoubtedly effected dramatic changes to the understanding of the requirements of § 252, it is undisputed that nothing in the *TRRO* suggests a finding by the FCC that the change of law provisions in the parties' agreements are no longer in the public interest.

Notwithstanding the change of law provisions in its Interconnection Agreements[6] with Joint Defendants or the plain language of the *TRRO* requiring

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[5]ITC^DeltaCom's Interconnection Agreement with BellSouth also contains a provision post-dating the issuance of the D.C. Circuit's opinion in *USTA II* wherein the parties confirm that changes to the Agreement necessitated by *USTA II* (and ultimately imposed by the *TRRO*) will be implemented according to the change of law provision in § 15.4. (Dist. Ct. Docket No. 22, Supp. Appendix, Exhibit A, ITC^DeltaCom/BellSouth Interconnection Agreement, Attach. 2, § 1.1.) In addition, NuVox Communications, Inc, KMC Telecom Holdings, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Atlanta, LLC, all have a separate Abeyance Agreement with BellSouth, as part of their ongoing arbitration before the GPSC, which provides that changes of law resulting from the *TRO*, *USTA II* and its progeny will not be the subject of amendments to the existing Interconnection Agreements but will be incorporated into the new Interconnection Agreements that result from the ongoing arbitration. (Dist. Ct. Docket Nos. 33, 48 and 50). Therefore, while NuVox, KMC and Xspedius concur that the change of law provisions are not abrogated by the TRRO, they have a separate Abeyance Agreement which exempts them from amending their current interconnection agreements. The District court did not reach the issue of the Abeyance Agreement, concluding that matter was still "pending before the PSC, and this [the District] Court's decision does not affect the PSC's authority to resolve it." (District Court Order at 6). ITC^DeltaCom's Interconnection Agreement with BellSouth also contains a provision post-dating the issuance of the D.C. Circuit's opinion in *USTA II* wherein the parties confirm that changes to the Agreement necessitated by *USTA II* (and ultimately imposed by the *TRRO*) will be implemented according to the change of law provision in § 15.4. (Dist. Ct. Docket # 22, Supp. Appendix, Exhibit A, ITC^DeltaCom/BellSouth Interconnection Agreement, Attach. 2, § 1.1.)

[6] There is no dispute that similar provisions are contained in the Interconnection Agreements of the other Joint Defendants. Those Agreements were filed with the District

negotiation of the terms and conditions needed to implement its findings, in a Carrier Notification dated February 11, 2005, BellSouth asserted its interpretation of the *TRRO*, claiming 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." (Exhibit 4, 2/11/05 Carrier Notification.) 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." (*Id.*) BellSouth further asserted that it would return any orders for service from carriers refusing to sign the "take or leave it" commercial agreements offered by BellSouth, which provide access to the same facilities formerly available as the UNE-P, but at much higher rates. (*Id.*; *see also* Exhibit 5, Edwards Letter; Exhibit 6, 3/21/05 Carrier Notification.)

Moreover, although the *TRRO* requires that CLECs be allowed to self-certify the size of the wire centers associated with orders for loops or transports, BellSouth sought to circumvent this process by publishing the list of wire centers it deemed to qualify for UNE orders. BellSouth later had to admit that its list was

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Court at Docket No. 22, Joint Defendants' Second Supplemental Appendix.

erroneous and that employed a flawed methodology. (Exhibit 15, 3/24/05 Notice.)

MCImetro Access Transmission Services, LLC ("MCI") and other CLEC's sought an emergency determination by the GPSC of whether the *TRRO* authorized BellSouth unilaterally and without negotiation to refuse to honor its Interconnection Agreements. Finding no support in the *TRRO* for BellSouth's argument that the *TRRO* had effected an immediate abrogation of the contractual change of law provisions, the GPSC held that all parties were required to abide by the change of law provisions in their Interconnection Agreements to implement the terms of the *TRRO*. (Exhibit 7, (hereinafter "GPSC Ruling") at 5-6.) The GPSC further held that it would resolve the questions of whether BellSouth might be entitled to a true-up and whether BellSouth was separately obligated to provide unbundled network elements to the CLECs under § 271 of the Act or under state law in the regular course of its docket. (*Id.* at 6-7.)

II. ARGUMENT

To obtain a stay of an injunction pending appeal, a party must demonstrate that "four familiar considerations[—]likelihood of success on the merits, risk of irreparable harm without relief, risk of injury to the party opposing the relief, and the public interest"—on the whole favor a stay. *Weng v. United States Att'y Gen.*, 287 F.3d 1335, 1337-38 & n.5 (11th Cir. 2002). Here, each factor is satisfied.

C. <u>The District Court Erred in Finding That BellSouth was Likely to Succeed on its Argument that the TRRO Abrogated the Choice of Law Provisions in its Contracts.</u>

BellSouth's obligation to negotiate the terms and conditions necessary to implement the provisions of the *TRRO* derives from two independent sources. First, BellSouth voluntarily entered into agreements with Joint Defendants that specifically detail how the parties will go about the work of incorporating into their Interconnection Agreements changes in terms and conditions necessitated by material changes in the law. BellSouth does not dispute that the *TRRO* is a "regulatory . . . action" that "materially affects . . . material terms of [the Interconnection] Agreements" within the meaning of the change of law provisions of the Interconnection Agreements. (Exhibit 8, BellSouth GPSC Opp'n at 3.) BellSouth does not dispute that some carriers attempted to open negotiations to amend their Interconnection Agreements as early as December 2004, nor dispute that such negotiations would have led to the implementation of reasonable and lawful terms, conditions, and rates.

BellSouth's sole argument in support of its contention that it is not obligated to enter into negotiations as required by the change of law provisions is that the *TRRO* somehow implicitly abrogated such provisions because it is "self

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effectuating."[7] The GPSC emphatically rejected this argument, pointing out that BellSouth could not identify any statement in the *TRRO* purporting to make such an abrogation. (GPSC Ruling at 3-5.) Moreover, even conceding for the moment as the GPSC did that there exists a doctrine of law (the *Sierra-Mobile* doctrine[8]) that, in proper circumstances, might have permitted the FCC to accomplish such an abrogation, the GPSC found no indication in the text of the *TRRO* that the FCC had conducted the analysis required to defend a decision to directly impair the parties' contractual rights—specifically, the change of law provision. (*Id.*)

The power available pursuant to the *Sierra-Mobile* doctrine is highly circumscribed. It requires specific findings as to each "particular" provision of the contract to be modified that such provision is "detrimental to the public interest," accompanied by "adequate reasons for jettisoning the provisions." *Western Union Tel. Co.*, 815 F.2d at 1503. Nothing in the *TRRO* even purports to be an effort to abrogate choice of law provisions and such abrogation cannot be accomplished through the negative inference employed by the District Court. Absent discussion

[7] The *TRRO* does not state that it is "self-effectuating." It merely states that the FCC believes the "impairment framework" it adopts is "self-effectuating," (*TRRO* ¶ 3), i.e., capable of simple application across a number of differing circumstances.

[8] Where it applies, "the *Sierra-Mobile* doctrine has been held to allow agencies to change contract rates when it finds them unlawful, *see FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956), and to modify other provisions of private contracts when necessary to serve the public interest, *see United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956)." *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).

and a detailed weighing of the merits of the "particular provision" to be altered, "reiterat[ion] of rather conclusory arguments" regarding the public interest, cannot support a finding that the provision has been validly abrogated pursuant to the *Sierra-Mobile* doctrine.[9] *Id.*

Although the *Sierra-Mobile* doctrine was only authority BellSouth identified in proceedings before the GPSC for the alleged abrogation of the Interconnection Agreements, BellSouth all but abandoned reliance upon the doctrine at the District Court, relying instead upon a singular citation to *United Gas Imp. Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965). *Callery Properties*, however, does not advance BellSouth's assertion that the *TRRO* dispensed with the parties' change of law provisions. Reasoning that "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order," the Supreme Court determined that the Federal Power Commission had not exceeded its power in ordering gas "producers to make refunds for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest." *Id.* at 229-30. Nothing in *Callery Properties* suggests that the FCC may abrogate privately negotiated

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[9] Conceding that the *TRRO* contains no express abrogation of the change of law provisions, BellSouth insists that the "transition plan" outlined in the *TRRO* renders such abrogation implicit. Such an inference is not permitted by the *Sierra-Mobile* doctrine and in any event is negated by the TRRO's own direction to the parties to implement its rules through § 252 negotiations.

contractual provisions, much less abrogate them with no reflection on the record of any intent to do so or that abrogation was in the public interest.

On multiple occasions in the past, the FCC imposed changes of law resulting from the same process of identifying the means by which to further the statutory intent of the Telecommunications Act and using the same style of mandatory language employed in the *TRRO*. *See First Report and Order,* 11 FCCR 15499, ¶ 410 (1996) ("We conclude that incumbent LECs must provide local switching as an unbundled element"); Advanced Services Order, 14 FCCR 4761, ¶¶ 40-43 (1999) ("We *require* incumbent LECs to make cageless collocation arrangements available. . ."); *TRO* ¶ 579 ("We *require* incumbent LECs to perform the necessary functions to effectuate such commingling upon request"). In each of these prior instances, which notably resulted in changes of law to the benefit of the CLECs, BellSouth insisted that these changes could not become effective until the parties had engaged in the negotiations contemplated by the change of law provisions in the parties' Interconnection Agreements.[10] BellSouth's insistence on a different result here is pure self-interested duplicity.

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[10] As the GPSC noted in its Order, when AT&T tried to take advantage of a GPSC pricing decision prior to the time permitted under its change of law provision, BellSouth implored the Commission not to permit AT&T "to ignore, and thereby circumvent the effect of the very language it negotiated and entered into in its [Interconnection Agreement] with BellSouth" so as to "unilaterally change the terms and conditions of the [Agreement]." (GPSC Ruling at 5-6 (citing GPSC Docket No. 17650, Document No.

BellSouth's argument that the *TRRO* abrogated the negotiation requirements under the change of law provisions is untenable also since the second source of BellSouth's obligation to enter into good faith negotiations with Joint Defendants is the plain language of the *TRRO* itself. In directing the implementation of the unbundling decisions reflected in the *TRRO*, the FCC states at Paragraph 233 that it expects "incumbent LECs [such as BellSouth] 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.*" (*Id.* ¶ 233 (emphasis added).) The FCC further notes that "the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes" and states its expectation that "parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order." (*Id.* (footnotes omitted).) This recognition by the FCC that the *TRRO* must be implemented through negotiated amendments to the existing Interconnection Agreements both negates any suggestion that the FCC intended to abrogate the terms of change of law provisions where they exist and independently confirms

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68288 (BellSouth's Reply Brief) at 2.) Additional examples of BellSouth's insistence on rigid compliance with the change of law provisions to amend Interconnection Agreements to reflect even the most simple, straightforward changes in rates or other terms imposed by the FCC or state PSCs are set forth in the record. (*See* Exhibits 9-12.)

that the *TRRO* does not give BellSouth the right to unilaterally change the terms and conditions under which it leases elements of its network to Joint Defendants.

In light of the foregoing, there is little likelihood that BellSouth can succeed on the merits, much less meet the heightened showing required for issuance of a mandatory injunction. *Martinez v. Matthews*, 544 F.2d 1233, 1243 (5th Cir. 1976).

D. Bellsouth Has Not Shown that the Balance of Harms Favors Granting Injunctive Relief.

The injunction sought by BellSouth threatens injury to Joint Defendants and to consumers, allowing BellSouth to implement its refusal to provide access to elements of its network unless Joint Defendants enter into coerced "commercial agreements" with BellSouth.[11] Consumers who are currently being served by Joint Defendants will lose service or the opportunity to effect changes in their service, and Joint Defendants will lose the ability to provide service to new customers. This harm to Joint Defendants' ability to serve their customers far exceeds any harm BellSouth, which is purely economic.

The only issue for BellSouth is the rate it can charge for certain network

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[11] BellSouth's offer to provide service under its unilateral commercial agreements does not mitigate this harm since companies signing those agreements will lose the benefit of *TRO* or *TRRO* rulings in their favor, will lose the opportunity to negotiate the availability of various elements of current technology and the terms for transfer from those agreements to other means of providing the service, will not have answers a myriad of implementation questions, and will suffer other impairments of their ability to provide telecommunication services to their customers. (*See* Exhibit 13, Decl. of Mary Conquest.)

elements, this issue is inherently subject to remedy by money damages and therefore does not constitute the type of irreparable harm necessary to support a preliminary injunction.[12] *See, e.g.*, *Northeastern Florida Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990) ("An injury is 'irreparable' only if it cannot be undone through monetary remedies."). To the extent that BellSouth has made a showing of lost customers, these loses are exactly offset by the customers the CLECs will lose upon issuance of an injunction, and CLECs, unlike BellSouth, will completely lose their ability to add new customers and have their reputations injured in the process.

Furthermore, any loss of customers during the time the parties are effecting the rulings of the *TRRO* through the change of law provisions cannot legitimately be considered an undue injury to BellSouth. BellSouth negotiated the change of law provisions with the full knowledge that such provisions would allow it to reap the benefit of delay, often unwanted by the CLECs when the changes inured to their benefit, and that, in fairness, BellSouth would have to bear the consequences of such limited delay where the changes inured to BellSouth's ultimate benefit. *See Sierra Pac. Power Co.*, 350 U.S. at 355 ("[A] contract may not be said to be either 'unjust' or 'unreasonable' simply because it is unprofitable . . . ."). As such,

[12] Moreover, the GPSC already has committed to giving consideration to whether BellSouth should receive a true-up in the course of the proceedings in the current docket.

BellSouth's claimed irreparable injury in the form of lost customers is, at best, an injury of its own making that needs no emergency remedy. Certainly such "injury," if established, cannot be shown to outweigh the harm that undoubtedly will befall Joint Defendants as a result of the preliminary injunction.

Moreover, the preliminary injunction imposes a particular harm on carriers who seek to provision high-capacity loops and transport from BellSouth. BellSouth has admitted that it lacks a methodology at present for accurately determining the number of lines present in a wire center. Without the negotiation between the parties contemplated by the *TRRO* and the interconnection agreements, egregious errors, such as the ones to which BellSouth already has admitted, are likely to continue to occur. The harm caused by these predictable errors will be born entirely by the CLECs as they and their customers suffer otherwise avoidable losses in service.

The public interest also favors a stay of the District Court's order. BellSouth has dragged its heels in engaging in negotiations with Joint Defendants to put in place mutually agreeable provisions resolving issues associated with implementation of the *TRRO*. "[E]quity aids the vigilant and not those who slumber on their rights." *NAACP v. NAACP Legal Defense & Educ. Fund, Inc.*,

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That determination, once made, will be subject to judicial review. (GPSC Ruling at 6.)

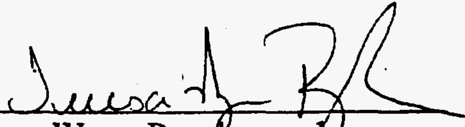
753 F.2d 131, 137 (D.C. Cir. 1985). Accordingly, "[c]ourts of equity frequently decline to interfere on behalf of a complainant whose attitude is unconscientious in respect of the matter concerning which it seeks relief." *Nat'l Fire Ins. Co. v. Thompson*, 281 U.S. 331, 338 (1930). BellSouth's lack of conscientiousness in pursuing its obligations, as well as its flagrant refusal to negotiate illustrates the error in the District Court's ruling and the need for a stay pending appeal.

The public interest further weighs in favor of a stay as the preliminary injunction sought by BellSouth would dramatically change the negotiated terms of the Interconnection Agreements without adequate justification. "[T]he public interest does not favor forcing parties to a agreement to conduct themselves in a manner directly contrary to the express terms of the agreement." *Frank B. Hall & Co. v. Alexander & Alexander, Inc.*, 974 F.2d 1020, 1025-26 (8th Cir. 1992). Such would be the precise result here, as the parties bargained and agreed to a particular procedure to implement amendments to their Interconnection Agreements prompted by changes of law.

III. CONCLUSION

For the foregoing reasons, the Court should stay the District Court's Order pending appellate review and expedite this appeal.

Respectfully submitted,



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CERTIFICATE OF SERVICE

This is to certify that I have this day served via electronic mail a true and correct copy of the within and foregoing **JOINT DEFENDANTS' MOTION TO STAY THE PRELIMINARY INJUNCTION PENDING APPEAL AND FOR AN EXPEDITED APPEAL** on the following counsel:

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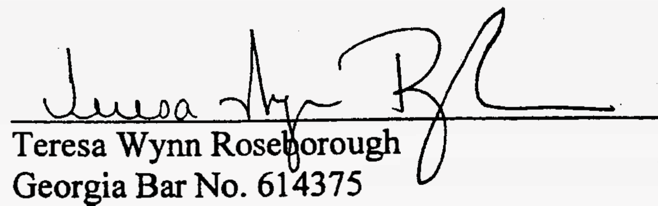
This 6th day of April, 2005.



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AO 1296421.1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

BELLSOUTH TELECOMMUNICATIONS, INC.,	)
Plaintiff,	) No. 1:05-CV-0674-CC
v.	)
MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, et al.,	)
Defendants.	)

ORDER

Before the Court is the Emergency Motion for a Preliminary Injunction filed by plaintiff BellSouth Telecommunications, Inc. ("BellSouth"). Having reviewed the motion, the opposing memoranda, and the extensive record material that has been filed, and having heard argument on April 1, 2005, the Court finds that BellSouth has satisfied each aspect of the four-prong test for preliminary injunctive relief. *See, e.g.*, *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205 (11th Cir. 2003); *American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir. 1998).

Accordingly, the Court grants BellSouth a preliminary injunction against the March 9, 2005 Order of the Georgia Public Service Commission ("PSC") in Docket

No. 19341-U to the extent that PSC Order requires BellSouth to continue to process new competitive LEC orders for switching as an unbundled network element ("UNE") as well as new orders for loops and transport as UNEs (in instances where the Federal Communications Commission ("FCC") has found that unbundling of loops and transport is not required). Consistent with the FCC's ruling in the *Order on Remand*[1] at issue here, to the extent that a competitor has a good faith belief that it is entitled to order loops or transport, BellSouth will provision that order and dispute it later through appropriate channels.

First, BellSouth has a high likelihood of success in showing that, contrary to the conclusion of the PSC, the FCC's *Order on Remand* does not permit new UNE orders of the facilities at issue.[2] BellSouth's position is consistent with the conclusions of a significant majority of state commissions that have decided this issue (BellSouth has provided the Court with decisions from 11 state commissions that

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

[2] In evaluating the merits of BellSouth's legal argument, this Court owes no deference to the PSC's understanding of federal law. *See, e.g., MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 112 F. Supp. 2d 1286, 1291 (N.D. Fla. 2000), *aff'd*, 298 F.3d 1269 (11th Cir. 2002).

support its conclusion) and with what the Court is likely to conclude is the most reasonable interpretation of the FCC's decision.

The language of the *Order on Remand* repeatedly indicates that the FCC did not allow new orders of facilities that it concluded should no longer be available as UNEs. The FCC held that there would be a "nationwide bar" on switching (and thus UNE Platform) orders, *Order on Remand* ¶ 204. The FCC's new rules thus state that competitors "may not obtain" switching as a UNE. 47 C.F.R. § 51.319(d)(2)(iii) (App. B. to *Order on Remand*); *see also* 47 C.F.R. § 51.319(d)(2)(i) ("An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops."); *Order on Remand* ¶ 5 ("Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching"); *id.* ¶ 199 ("[W]e impose no section 251 unbundling requirement for mass market local circuit switching nationwide"). The FCC likewise established that competitive LECs are no longer allowed to place new orders for loops and transport in circumstances where, under the FCC's decision, those facilities are not available as UNEs. *Id.* ¶¶ 142, 195.

The FCC also created strict transition periods for the "embedded base" of customers that were currently being served using these facilities. Under the FCC transition plan, competitive LECs may use facilities that have already been provided to serve their existing customers for only 12 more months and at higher rates than they were paying previously. *See id.* ¶¶ 142, 195, 199, 227. The FCC made plain that these transition plans applied only to the embedded base and that competitors were "not permit[ed]" to place new orders. *Id.* ¶¶ 142, 195, 199. The FCC's decision to create a limited transition that applied *only* to the embedded base and required higher payments even for those existing facilities cannot be squared with the PSC's conclusion that the FCC permitted an indefinite transition during which competitive LECs could order new facilities and did not specify a rate that competitors would pay to serve them.

In arguing for a different result, the PSC and the other defendants primarily rely on paragraph 233 of the *Order on Remand*, which they contend requires BellSouth to follow a contractual change-of-law process before it can cease providing these facilities. That provision, however, states that "carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order." *Order on Remand* ¶ 233. In conflict with that language, the PSC's reading of the FCC's

order would render paragraph 233 inconsistent with the rest of the FCC's decision. Instead of not being permitted to obtain new facilities, as the FCC indicated should be the rule, *see, e.g., Order on Remand* ¶ 199, competitive LECs would be permitted to do so for as long as the change-of-law process lasts. Moreover, it is significant that the FCC expressly referred to the possible need to modify agreements to deal with the transition as to the embedded base, *see id.* ¶ 227, but did not mention a need to do so to effectuate its "no new orders" rule, *see id.* In sum, the Court believes that there is a significant likelihood that it will agree with the conclusion of the New York Public Service Commission that paragraph 233 "must be read together with the FCC directives that [UNE Platform] obligations for new customers are eliminated as of March 11, 2005." *New York Order*[3] at 13, 26. Any result other than precluding new UNE Platform customers on March 11 would "run contrary to the express directive . . . that no new [UNE Platform] customers be added" and thus result in a self-contradictory order. *Id.*

Finally, the Court notes that the PSC does not dispute that the FCC has the authority to make its order immediately effective regardless of the contents of particular interconnection agreements. *See* PSC Order at 3. The Court concludes that

[3] Order Implementing TRRO Changes *Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand*, Case No. 05-C-0203 (N.Y. PSC Mar. 16, 2005) ("*New York Order*").

it is likely to find that the FCC did that here. The Court further notes that it would be particularly appropriate for the FCC to take that action because it was undoing the effects of the agency's own prior decisions, which have repeatedly been vacated by the federal courts as providing overly broad access to UNEs. *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *see also USTA v. FCC*, 359 F.3d 554, 595 (D.C. Cir. 2004) (highlighting the FCC's "failure, after eight years, to develop lawful unbundling rules, and [its] apparent unwillingness to adhere to prior judicial rulings"). In any event, any challenge to the FCC's authority to bar new UNE- Platform orders must be pursued on direct review of the FCC's order, not before this Court.

In concluding that BellSouth has a substantial likelihood of success on the merits, the Court does not reach the issue whether an "Abeyance Agreement" between BellSouth and a few of the defendants authorizes those defendants to continue placing new orders. That issue is pending before the PSC, and this Court's decision does not affect the PSC's authority to resolve it.

Second, BellSouth has demonstrated that it is currently suffering significant irreparable injury as a result of the PSC's decision. BellSouth has shown that as a

direct result of the PSC's decision, it is currently losing retail customers and accompanying goodwill. For instance, BellSouth has demonstrated that it is losing approximately 3200 customers per week to competitors that are using the UNE Platform. The defendants do not seriously dispute that BellSouth is losing these customers; on the contrary, MCI confirms that it is using the UNE Platform to sign up 1500 BellSouth customers per week. Under Eleventh Circuit precedent, losses of customers are irreparable injury. *See, e.g.*, *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (holding that loss of customers is irreparable injury and agreeing with district court that, if a party "lose[s] its long-time customers," the injury is "difficult, if not impossible, to determine monetarily") (internal quotation marks omitted); *see also Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (finding irreparable harm where FCC rules implementing this same statute "will force the incumbent LECs to offer their services to requesting carriers at prices that are below actual costs, causing the incumbent LECs to incur irreparable losses in customers, goodwill, and revenue"). BellSouth has therefore demonstrated the existence of very significant immediate and irreparable injury.

Third, the Court finds that BellSouth's injury outweighs the injury that will be suffered by the private defendants. The Court concludes that, although some

competitive LECs may suffer harm in the short-term as a result of this decision, they will do so only if they intended to compete by engaging in conduct that the FCC has concluded is anticompetitive and contrary to federal policy. In particular, paragraph 218 of the *Order on Remand* states that the UNE Platform "hinder[s] the development of genuine, facilities-based competition," contrary to the federal policy reflected in the Telecommunications Act of 1996. Thus, although defendants are free to compete in many other ways, their interest in continuing practices that the FCC has condemned as anticompetitive are entitled to little, if any, weight, and do not outweigh BellSouth's injury. *See, e.g., Graphic Communications Union, Local No. 2 v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985) (holding that private interest in avoiding arbitration could not count as evidence of "irreparable harm," because such a holding "would fly in the face of the strong federal policy in favor of arbitrating disputes"). Moreover, the Court notes that competitive LECs have been on notice at least since the FCC's August 2004 *Interim Order*[4] that soon they might well not be able to place new orders for these UNEs.

[4] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783, ¶ 29 (2004) (proposing a transition plan that "does not permit competitive LECs to add new customers").

Fourth, the Court concludes that BellSouth's motion is consistent with and will advance the public interest, as authoritatively determined by the FCC. As discussed, the FCC has determined that the UNE Platform harms competition and thus is contrary to the public interest. The FCC explained that its prior, overbroad unbundling rules had "frustrate[d] sustainable, facilities-based competition," *Order on Remand* ¶ 2, that its new rules would "best allow[] for innovation and sustainable competition," *id.*, and that it would be "contrary to the public interest" to delay the effectiveness of the *Order on Remand* for even a "short period of time," *id.* ¶ 236. The FCC further concluded that immediate implementation of the *Order on Remand* is necessary to avoid "industry disruption arising from the delayed applicability of newly adopted rules." *Order on Remand* ¶ 236 (emphasis added). Unless and until a federal court of appeals overturns the FCC *Order on Remand* on direct review, the FCC's judgment establishes the relevant public-interest policy here.

* * *

As BellSouth has satisfied the test for preliminary injunctive relief, it is hereby ORDERED AND ADJUDGED that Plaintiff's Emergency Motion for Preliminary Injunction is GRANTED. The Court hereby preliminarily enjoins the Georgia Public Service Commission and the other defendants from seeking

to enforce the PSC Order to the extent that order requires BellSouth to process new UNE orders for switching and, in the circumstances described above, for loops and transport.

For the same reasons as those set forth above with respect to this Court's grant of preliminary injunctive relief to BellSouth, the Joint Defendants' Motion for Stay is DENIED.

BellSouth's motion for preliminary injunction having now been considered and determined, all Defendants are DIRECTED to answer or otherwise respond to BellSouth's Complaint within seven (7) days of the date of this Order. Any answers or responses already submitted to the Court by Defendants shall be deemed filed as of the date of this Order for all purposes under the Federal Rules of Civil Procedure and the local rules of this Court.

ORDERED this 5th day of April 2005.

s/ *CLARENCE COOPER*

CLARENCE COOPER
UNITED STATES DISTRICT JUDGE

COMMISSIONERS:
ANGELA ELIZABETH SPEIR, CHAIRMAN
ROBERT B. BAKER, JR.
DAVID L. BURGESS
H. DOUG EVERETT
STAN WISE

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DOCKET # 19341
DOCUMENT # 80721

Docket No. 19341-U

In Re: **Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements**

ORDER ON MCI'S MOTION FOR EMERGENCY RELIEF CONCERNING UNE-P ORDERS

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:

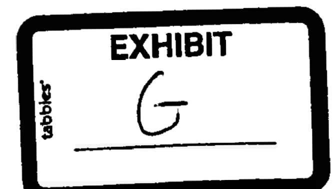
(1) Order BellSouth Telecommunications, Inc. ("BellSouth") to continue accepting and processing MCI's unbundled network platform ("UNE-P") orders under the rates, terms and conditions of the parties' interconnection agreement ("Agreement");

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

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

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

MCI's Motion was in response to Carrier Notification Letters received from 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.*



The FCC also made non-impairment findings with regard to dedicated loop and transport. For DS3-capacity loops, requesting carriers were found not to be impaired at any location within the service area of a wire center containing 38,000 or more business lines and four or more fiber-based collocators. (TRRO ¶146). The FCC found that "requesting carriers are not impaired without access to DS-1 capacity loops at any location within the service area of a wire center containing 60,000 or more business lines and four or more fiber-based collocators." *Id.* The FCC's non-impairment finding with respect to dark fiber loops applied to any instance. *Id.*

For DS1 transport, the FCC concluded that competing carriers were not impaired "on routes connecting a pair of wire centers, each of which contains at least four fiber-based collocators *or* 38,000 or more business lines." (TRRO ¶ 66) (emphasis in original). Competing carriers were also found to be not impaired without access to DS3transport "on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators *or* at least 24,000 business lines." *Id.* (emphasis in original). For dark fiber transport, competing carriers were found not to be impaired "without access on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators *or* at least 24,000 business lines." *Id.* (emphasis in original). The FCC made an across the board non-impairment finding for entrance facilities. *Id.*

I. 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 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 . . . [MCI] 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.

II. 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.*

III. Conclusions of Law

A. 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 ("FERC"), 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 does not cite to any 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, at minimum, 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 Commission's decision is consistent with the conclusion it reached 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, and concludes that such reasoning applies in this instance as well.

While MCI's Motion was entitled "Motion for Emergency Relief Concerning UNE-P Orders," the relief sought included could apply to both mass market local switching and dedicated loop and transport. MCI asked that BellSouth be ordered to implement the TRRO using the change of law provisions in the Agreement. In addition, MCI asked that the Commission order the relief it deemed just and reasonable. The Commission finds it just and reasonable to order parties to abide by the change of law provisions in their interconnection agreements for all changes, regardless of whether the change is on UNE-P or loops and transport. The analysis illustrating that the FCC did not intend to abrogate the parties' rights under their contracts applies as well to dedicated loop and transport.

In addition, the Commission concludes that it is just and reasonable to impose the requirement that parties abide by the terms of their interconnection agreements to implement the TRRO on all parties and the modification of all interconnection agreements. The question of whether the TRRO must be implemented pursuant to the parties' interconnection agreements must be resolved on an expedited basis. This same threshold question applies equally to all carriers. There is no reason why the TRRO would be deemed to abrogate some parties' contractual rights and not others. In light of the preceding, the most just and administratively efficient manner to resolve MCI's Motion is to apply the conclusions to the implementation of the TRRO in all interconnection agreements.

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

The Commission finds that it is prudent to 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 was 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. The Commission determines that it may be of assistance for the Commission to confirm, prior to voting on this issue, 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.

C. 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 Commission will decide those issues in the regular course of this docket.

IV. Ordering Paragraphs

WHEREFORE IT IS ORDERED, parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the Triennial Review Remand Order and this condition applies to all carriers, not just MCI and BellSouth, and to all changes, regardless of whether the change is on UNE-P or loops and transport.

ORDERED FURTHER, that issues related to a possible true-up mechanism should be decided at a later time.

ORDERED FURTHER, that issues related to BellSouth's obligations to continue to provide mass market unbundled local switching or dedicated loop and transport under either Georgia law or Section 271 should be resolved by the Commission in the regular course of this docket.

ORDERED FURTHER, that all findings, conclusions and decisions contained within the preceding sections of this Order are adopted as findings of fact, conclusions of law, and decisions of regulatory policy of this Commission.

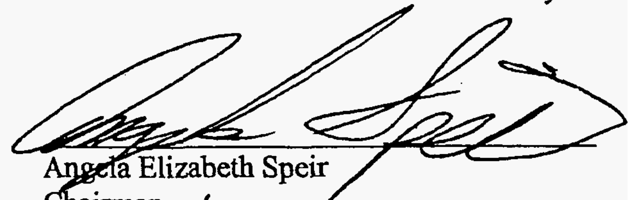
ORDERED FURTHER, that any motion for reconsideration, rehearing or oral argument shall not stay the effectiveness of this Order unless expressly so ordered by the Commission.

ORDERED FURTHER, that jurisdiction over this proceeding is expressly retained for the purpose of entering such further order or orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 1st day of March, 2005.

Reece McAlister
Executive Secretary

Date: 3-8-05



Angela Elizabeth Speir
Chairman

Date: 3/8/05

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	
	)	Docket No. 041269-TL
Petition to Establish Generic Docket to	)	
Consider Amendments to Interconnection	)	
Agreements Resulting From Changes of Law	)	Filed: March 4, 2005

BELLSOUTH TELECOMMUNICATIONS INC.'S RESPONSE IN OPPOSITION TO PETITION FOR EMERGENCY RELIEF FILED BY NUVOX, XSPEDIUS, KMC III, AND KMC V

BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Florida Public Service Commission ("Commission") deny the Petition for Emergency Relief ("Petition") filed by NuVox, Xspedius, KMC III, and KMV V ("Joint Petitioners") on March 1, 2005. The Petition misconstrues binding federal law as well as the parties' agreement regarding procedural matters in the pending 252 arbitration, and this Commission should reject it.

BACKGROUND

On February 4, 2005, the Federal Communications Commission ("FCC") released its permanent unbundling rules in the Triennial Review Remand Order ("TRRO"). The *TRRO* identified a number of former Unbundled Network Elements ("UNEs"), such as switching, for which there is no section 251 unbundling obligation.[1] In addition to switching, former UNEs include high capacity loops in specified central offices,[2] dedicated transport between a number of central offices having certain characteristics,[3] entrance facilities,[4] and dark fiber.[5] The FCC,

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[1] *TRRO*, ¶ 199 ("Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide." (footnote omitted).

[2] *TRRO*, ¶¶ 174 (DS3 loops), 178 (DS1 loops).

[3] *TRRO*, ¶¶ 126 (DS1 transport), 129 (DS3 transport).

[4] *TRRO*, ¶ 137 (entrance facilities).

[5] *TRRO*, ¶¶ 133 (dark fiber transport), 182 (dark fiber loops).

EXHIBIT H

recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers, adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] In each instance, the FCC unequivocally stated that the transition period for each of these former UNEs -- loops, transport, and switching -- would commence on March 11, 2005.[7]

While the FCC explicitly addressed how to transition the embedded base of these former UNEs through change of law provisions in existing interconnection agreements, the FCC took a different direction with regard to the issue of "new adds." For new adds, the FCC's belief "that the impairment framework we adopt is self-effectuating" controls.[8] Instead of requiring that the ILECs continue to allow CLECs to order more of the former UNEs during the transition period, the FCC provided that no "new adds" would be allowed. For example, with regard to switching the FCC explained "[t]his 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."[9] The FCC made similar findings concerning certain transport routes and certain high capacity loops.[10] The FCC specifically found: "[t]his transition period shall apply only to the

[6] *TRRO*, ¶¶ 142 (transport), 195 (loops), 226 (switching).

[7] *TRRO*, ¶¶ 143 (transport), 196 (loops) 227 (switching).

[8] *TRRO*, ¶3.

[9] *TRRO*, ¶ 199; *see also* 47 C.F.R. § 51.319(d)(2)(iii) ("[r]equesting carrier may not obtain new local switching as an unbundled network element."). The new local switching rule makes clear that the prohibition against new UNE-Ps applies to new lines. Switching is defined to include line-side facilities, trunk side facilities, and all the features, functionalities and capabilities of the local switch. *TRRO*, ¶ 200. When a requesting carrier purchases the unbundled local switching element, it obtains all switching features in a single element on a per-line basis. *TRO*, at 433; the TRRO retained this definition (TRRO, n. 529). Thus, the switching UNE means the port and functionalities on a per-line basis and the prohibition against new adds applies to the *element* itself – thus, the federal rule applies to lines.

[10] *TRRO*, ¶ 142, 195; *see also* 47 C.F.R. § 51.319 (e)(2)(i), (ii), (iii), and (iv) (ILEC is not require to provide unbundled access to entrance facilities; requesting carrier may not obtain *new DS1, DS3, and dark fiber* transport as unbundled network elements); *and* 47 C.F.R. § 51.319 (a)(4)(iii), (a)(5)(iii), and (a)(6) (requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements). Attached as

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."[11]

The FCC clearly intended these provisions regarding "new adds" to be self-effectuating. First, the FCC specifically stated that "[g]iven the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005 ...."[12] Second, the FCC expressly stated its order would not "... supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis ...,"[13] conspicuously omitting any similar intent not to supercede conflicting provisions of existing interconnection agreements. Consequently, in order to have any meaning, the *TRRO*'s provisions precluding the ordering of "new adds" have to have effect as of March 11, 2005.

Joint Petitioners cannot circumvent the FCC's intention by relying on paragraphs 227 and 233 of the *TRRO*. Paragraph 227 provides that "[t]he 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." Paragraph 233 of the *TRRO* addresses changes to interconnection agreements.

Footnote 627 of Paragraph 227 modifies the "except as otherwise specified" clause. Footnote 627 makes clear that, when the FCC stated "except as otherwise specified in the

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Exhibit A is BellSouth's letter to the FCC in which it specifies the nonimpairment wire centers. BellSouth stated plainly that "[t]o the extent any party is concerned about the methodology BellSouth has employed or the wire centers identified on the enclosed list in which the nonimpairment thresholds have been met, it should bring that concern to the [FCC's] attention." Thus, BellSouth is not seeking "unilaterally" to determine where no obligation to unbundle high-capacity loops, transport, and dark fiber exists.

[11] *TRRO*, ¶ 227 (footnote omitted).

[12] *TRRO*, ¶ 235.

[13] *TRRO*, ¶ 199. *Also* ¶¶ 148, 198.

Order," it was referring to continued access to shared transport, signaling and call-related databases and was not making an implicit reference to the change of law process. In addition, the clear meaning of the "except as otherwise specified" language in paragraph 227 is obvious from the very next paragraph of the *TRRO*. In paragraph 228, the FCC held that the "transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period." The availability of voluntarily negotiated interconnection agreements for interested carriers is also "otherwise specified in the Order" but has no impact on the prohibition against new adds. Consequently, if a CLEC and an ILEC had voluntarily negotiated an agreement under Section 252 pursuant to which the ILEC voluntarily agreed to provide UNE-P or switching at a rate other than TELRIC, the FCC did not intend to interfere with that voluntarily adopted obligation. For instance, BellSouth has agreed to provide switching to customers with four lines or more in certain Metropolitan Statistical Areas (e.g., enterprise customers) at a market rate of $14. By including the "except as otherwise specified" in paragraph 227 and acknowledging carriers' ability to freely negotiate alternative arrangements in paragraph 228, the FCC made clear that it did not intend to override those provisions.

Likewise, Joint Petitioners' focus on the interconnection agreement portion of the sentence in paragraph 233, ignores the "consistent with our conclusions in this Order" clause. To be consistent with the conclusions in the Order, the transition plan for the embedded base of UNE-Ps will be implemented via the change of law process, but the prohibition against new UNE-Ps (and other UNEs) is self-effectuating. The first two sentences of paragraph 233 simply confirm that changes to the interconnection agreement should be consistent with the framework established in the *TRRO*, whether self-effectuating or via change of law.

Thus, Joint Petitioners have ignored the FCC's clear statement of intent and their complaints concerning BellSouth's announced intent to reject orders for these former UNEs on March 11, 2005 is meritless. Joint Petitioners' raise two arguments. First, Joint Petitioners argue that BellSouth has obligations under existing interconnection agreements to continue to accept orders for these former UNEs until those interconnection agreements are changed. Second, Joint Petitioners contends a procedural agreement in the pending arbitration between the parties requires BellSouth to continue to provide these UNEs. Neither argument is correct.

ARGUMENT

A. The FCC's Bar On "New Adds" Is Self-Effectuating And Relieves BellSouth Of Any Obligation Under Its Interconnection Agreements To Provide These Former UNEs To Joint Petitioners.

BellSouth does not dispute that its interconnection agreements contain change of law provisions; however, that is not the issue here. If the FCC had held that Joint Petitioners could continue to add more former UNEs until the interconnection agreements were changed pursuant to the change of law provisions found in interconnection agreements, or even if it had been silent on the question of "new adds," then presumably no dispute would exist between Joint Petitioners and BellSouth. Neither situation is the case here, however, and Joint Petitioners' motion disregards what the FCC actually said in the *TRRO*.

The new rules unequivocally state carriers that may not obtain new UNEs, and the FCC said unequivocally that there would be a transition period for embedded UNEs that would begin on March 11, 2005 that would last 12 months: "we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order."[14] The FCC made almost identical

[14] *TRRO*, ¶199.

findings with respect to high-capacity loops and transport, holding that its transition rules "do not permit competitive LECs to add new [high capacity loops and transport on an unbundled basis] . . . where the Commission has determined that no section 251(c)(3) unbundling requirement exists."[15] The FCC also said unequivocally that 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."[16] How much clearer could the FCC be?

Joint Petitioners contend that notwithstanding the clear language of the *TRRO* -- there will be a transition period, it will begin on March 11, 2005, and there will be no "new adds" during that transition period -- the FCC really didn't mean what it said. Evidently, Joint Petitioners believe that BellSouth is obligated to continue to provide new UNEs until its contract with BellSouth is amended pursuant to change of law provisions therein. Joint Petitioners' belief is wholly inconsistent with the language of the *TRRO* and is flatly contradicted by the federal

First, the FCC understood that existing interconnection agreements often contained "change of law" provisions. For instance, the FCC specifically contemplated that the contract provisions for the transition of the embedded base of former UNEs would be effectuated through the change of law process. Further, the FCC provided that throughout the 12-month transition period (during which the FCC clearly said there would be no "new adds") CLECs would continue to have access to the embedded UNE-Ps during the transition period, but at the commission-approved TELRIC rate "plus one dollar", until the migration of the embedded base

[15] *TRRO,* ¶ 142, 195; *see also* 47 C.F.R. § 51.319 (e)(2)(i), (ii), (iii), and (iv) (ILEC is not require to provide unbundled access to entrance facilities; requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements); *and* 47 C.F.R. § 51.319 (a)(4)(iii), (a)(5)(iii), and (a)(6) (requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements).

[16] *Id.*

[17] Notably, Joint Petitioners' Motion is devoid of a single reference to the *rules*.

was complete.[18] Finally, the FCC made the increase in the rates of the former UNEs retroactive to the effective date of the order to preclude gaming by the CLECs during the negotiation process.[19]

The FCC's obvious reason for making the increased rates retroactive is to keep CLECs from unnecessarily delaying the amendment process and gaming the system by postponing the date for the higher rates applicable to the embedded base of UNEs. It is equally clear that the FCC did not directly address amending existing interconnection agreements to eliminate any requirement that incumbent local exchange carriers ("ILECs") provide new UNEs. If the FCC had intended to allow CLECs to continue to add new UNEs until the interconnection agreements were amended, it could have easily said so. It did not. Instead, it specifically provided that the transition period did not authorize new adds.[20] The only reasonable, logical and legally sound conclusion is that the provisions prohibiting new adds was intended by the FCC to be self-effectuating.

There is no question that the FCC has the legal authority to create a self-effectuating change to existing interconnection agreements as it has done here. Indeed, in the TRO, the FCC decided not to make its decisions self-executing. *See TRO*, ¶ 700 ("many of our decisions in this order will not be self-executing"). The FCC's authority to make self-effectuating changes exists under the *Mobile-Sierra* doctrine, which allows the FCC to negate any contract terms of regulated carriers so long as the FCC makes adequate public interest findings. Thus, "[f]or all

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[18] *Id.*

[19] *TRRO*, n. 630. Thus, if Joint Petitioners ultimately executed a interconnection agreement amendment on May 11, 2005, the transition period rates would apply as of March 11, 2005 and Joint Petitioners would need to make a true-up payment to BellSouth.

[20] BellSouth will permit feature changes on Joint Petitioners embedded base of customers; however, the FCC was clear that CLECs could not continue to *increase* its embedded base. *See* 51.319(d)(2)(iii); 51.319 (e)(2)(i), (ii), (iii), and (iv); and 51.319 (a)(4)(iii), (a)(5)(iii), and (a)(6).

contracts filed with the FCC, it is well-established that 'the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest.'" *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999) (*quoting Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).[21]

The FCC was very clear in the *TRRO* that access to UNEs without impairment was contrary to the public interest and must stop. Notably, the FCC held that "it is now clear . . . that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment."[22] Also, the FCC held "we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine facilities-based competition."[23] Likewise, the FCC held that "the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives."[24]

The FCC has applied *Mobile-Sierra* to require a fresh look at contracts between ILECs and CMRS providers executed before the 1996 Telecommunications Act in light of the reciprocal compensation provisions of §251(b)(5) of the Act. In relevant part, citing *Western Union Tel. Co. v. FCC*, the FCC explained that "[c]ourts have held the Commission has the power ... to modify ... provisions of private contracts when necessary to serve the public

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[21] *Citing, in turn, FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956) *and United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956) (the FCC has the power to set aside any contract which it determines to be "unjust, unreasonable, unduly discriminatory, or preferential.").

[22] *TRRO*, ¶ 218.

[23] *TRRO*, ¶ 218.

[24] *TRRO*, ¶ 199.

interest." *First Report and Order,* 11 FCC Rcd 15499, ¶ 1095 (1996) (additional citations omitted).[25]

That these interconnection agreements are filed with and approved by the state commissions, rather than the FCC, has no impact on the FCC's ability to change these contracts when it is in the public interest to do so. While *Cable & Wireless P.L.C. v. FCC* applied to "all contracts filed with the FCC,"[26] the reference to "filing" means that decision applies to all contracts and other agreements *that are subject to the FCC's authority not just contracts actually filed with the FCC. See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 380, 381 (1999). Thus, as the Supreme Court made clear in *Iowa Utilities Bd.*, state commissions perform their functions subject to FCC rules designed to implement the statute and establish the public interest. The FCC has enacted new rules designed to further the public interest by finding "the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives"[27]. As a matter of national public policy, unbundled switching adversely impacts the public by creating disincentives for the creation of facilities-based competition – which competition has been found to be the fundamental objective of the Act. The FCC has spoken – and Joint Petitioners cannot ignore its message by hiding behind interconnection agreements that have been modified by the self-effectuating new rules to address the national public policy and the objectives of the Act.

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[25] In the *Local Competition Order,* the FCC modified pre-existing agreements as of the effective dates of its new rules – **just as it did in the *TRRO*.**

[26] *Cable & Wireless,* 166 F.3d at 1231.

[27] *See* n. 16, *IBD Mobile Communications, Inc. v. COMSAT Corp,* Memorandum Opinion and Order, 16 FCC Rcd 11474, ¶ 16 n. 50 (2001). (The FCC explained that "Sierra-Mobile analysis does not apply to interconnection agreements simply cannot apply, particularly where the FCC's current order, by its own terms, appears to dictate a different requirement").

The FCC has full authority to issue a self-effectuating order that eliminated CLECs' ability to add new UNEs after March 11, 2005. That existing interconnection agreements have not been formally modified to implement that finding is irrelevant. Through the *TRRO* the FCC has exercised its authority in a manner that trumps Joint Petitioners' individual contracts and BellSouth has no obligation to provide new UNEs to Joint Petitioners on or after March 11, 2005.

B. The Joint Petitioners' Claims Regarding the Scope of the Abeyance Agreement Are Meritless and Should Be Rejected.

The Joint Petitioners' second argument in support of the Emergency Petition is premised on an erroneous interpretation of the parties' procedural agreement in June 2004 to suspend the current arbitration proceedings for 90 days ("Abeyance Agreement"). Specifically, the Joint Petitioners are attempting to manipulate the Abeyance Agreement by improperly expanding its scope to apply to the *TRRO*. This manipulation is designed to avoid operating pursuant to the FCC's most recent pronouncement of BellSouth's obligations under the Act. Indeed, the Joint Petitioners' entire argument is premised on a fictitious (and nonsensical) agreement between the parties to not invoke the change in law obligations in the current Interconnection Agreement ("Current Agreement") for the *TRRO* or for any other FCC Order that follows or is tangentially related to *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Circuit 2004) ("*USTA II*"). There was never such an agreement. And, as established below, the Joint Petitioners' arguments are nothing more than a desperate ploy to gain a competitive advantage over other CLECs that is devoid of any evidence in support and is ultimately irrelevant to implementing the FCC's "no new adds" requirements on March 11, 2005.

a. The Abeyance Agreement Only Applies to Change of Law Obligations and Thus Is Inapplicable.

First, assuming *arguendo* that there was no dispute as to the scope of the Abeyance Agreement (which is denied by BellSouth), that agreement does not in any way restrict BellSouth's rights under the *TRRO*. In the Emergency Petition, the Joint Petitioners effectively concede that the Abeyance Agreement is limited in application to "changes of law" requiring negotiation and amendment under the Current Agreement. As stated above, the FCC's bar on "new adds" beginning March 11, 2005 does not trigger the parties' "change of law" obligations under the Current Agreement because it is self-effectuating. Simply put, the FCC trumped the parties' change of law obligations as well as any ancillary agreement, if one existed, regarding those obligations.[28] Consequently, the parties are relieved of those obligations in order to implement the FCC's "no new adds" requirement from the *TRRO*. Thus, even accepting the Joint Petitioners' description and interpretation of the Abeyance Agreement (which BellSouth does not), that agreement does not impact BellSouth's rights under the *TRRO* for "new adds."[29]

b. The Parties Never Agreed to Expand the Abeyance Agreement to Include the *TRRO*.

While BellSouth submits that the FCC's no "new adds" requirement is not a change of law that requires amendment of the Current Agreement under the terms thereof, the Joint Petitioners' arguments still fail if the Commission finds differently. Contrary to the Joint

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[28] For the reasons discussed above, even assuming that BellSouth agreed with the Joint Petitioners' description of the scope of the Abeyance Agreement (which it does not), the *Mobile-Sierra* doctrine mandates that the parties be relieved of complying with those obligations to serve the public interest. *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999) (*quoting Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) ("For all contracts filed with the FCC, it is well-established that 'the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest.'").

[29] If the Commission rejects this argument, there is no need to address the Abeyance Agreement argument at this time because there is no emergency. Moreover, as the following argument makes clear, there are factual disputes about the scope of the Abeyance Agreement that the Commission will need to resolve. In the event the Commission is not inclined to rule in BellSouth's favor on the interpretation of the Abeyance Agreement, the only means by which the Commission can adequately resolve those factual disputes is through an evidentiary, including pre-filed testimony and briefing.

Petitioners' claims, the implementation of the *TRRO* is not covered by the Abeyance Agreement. Rather, the parties limited their agreement to not invoke change of law process to changes set forth in *USTA II* only.

On June 15, 2004, the D.C. Circuit's stay of the *USTA II* decision expired. This expiration triggered the parties' change of law obligations in their existing agreements. Rather than exercise those obligations, in light of the on-going negotiations for a new agreement and the parties' pending arbitration, the parties decided to a 90 day abeyance of the pending arbitration proceeding to "consider how the post-*USTA II* regulatory framework should be incorporated into the new agreements currently being arbitrated and to identify what arbitration issues may be impacted and what additional issues, if any, need to be identified for arbitration." *See* Joint Motion at 2. The parties further agreed "that no new issues may be raised in this arbitration proceeding other than those that result from the Parties' negotiations regarding the post-*USTA II* regulatory framework." *Id.* Additionally, because the parties agreed to raise issues relating to *USTA II* into the pending arbitrations, the parties also agreed to not engage in separate change of law negotiations/arbitrations for *USTA II*:

> With this framework, the Joint Petitioners and BellSouth have 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. Accordingly, the Parties have agreed that they will continue operating under their current Interconnection Agreements until they are able to move into the new arbitrated/negotiated agreements that ensue from this proceeding.

See Joint Motion at 2. In other words, the parties agreed to hold the arbitration in abeyance for 90 days to do the following: (1) negotiate *USTA II* changes into the new interconnection agreements; and (2) for those *USTA II* changes that could not be negotiated, to agree on *USTA II* issues to add to the arbitration.

The language of the Joint Motion itself and the timing of the parties' agreement to hold the change of law process in abeyance both demonstrate that the scope of the agreement was limited only to changes resulting from *USTA II.* Contrary to this clear interpretation of the Abeyance Agreement, the Joint Petitioners' argue that, eight months before the release of the *TRRO*, BellSouth voluntarily waived its right to amend its existing interconnection agreements with the Joint Petitioners for the *TRRO* or any other FCC Order that is tangentially related to *USTA II*. Nothing can be farther from the truth and the Commission should reject this erroneous manipulation of the Abeyance Agreement for the following reasons.

First, the Joint Petitioners argument directly conflicts with the purpose of the Abeyance Agreement. As stated above, BellSouth agreed to avoid the separate/second process for negotiating/arbitrating change of law for "*USTA II* and its progeny" because those issues would be raised in the pending arbitrations. *See* Joint Motion; June 29, 2004 e-mail from counsel for Joint Petitioners to counsel for BellSouth, attached hereto as Exhibit B (stating that "purpose of abatement would be to consider how the post USTA II regulatory framework should be incorporated into the new agreements currently being arbitrated by Joint Petitioners and to identify what arbitration issues may be impacted and what additional issues, if any, need to be identified for arbitration – ***and that by doing so***, we'd be avoiding a separate/second process of negotiating/arbitrating change-of-law amendments to the current agreement . . . .") (emphasis added).

The parties entered the Abeyance Agreement to address a timing issue arising out of *USTA II.* The Agreement went no further. As the Commission is aware, the deadline to add new issues to the parties' arbitration was October 2004. Thus, while the parties could add issues arising out of *USTA II*, they certainly could not add issues arising out of the *TRRO* because it had

not yet been issued! It makes no sense to assume that BellSouth would have agreed to waive its change of law rights with respect to the *TRRO,* particularly in light of the fact that there was no opportunity and still no opportunity to include *TRRO* issues in the arbitration.

Notably, the parties' revised matrix, submitted in October 2004, contained several Supplemental Issues relating to *USTA II* and the *Interim Rules Order*[30] but none of these Supplemental Issues substantively addressed the *TRRO* because the FCC did not even issue that decision until February 4, 2005. Consequently, the parties could not have included the *TRRO* in the Abeyance Agreement because the parties could not, and currently cannot, raise *TRRO* issues in the arbitration proceeding. Indeed, adopting the Joint Petitioners' interpretation is impermissible because it would result in the complete frustration of the Abeyance Agreement as the parties would have no venue (either through the pending arbitration or through a change of law arbitration) to address disputes relating to the *TRRO. See Philip Morris, Inc. v. French*, 2004 WL 1955179 *7 (Fla. 3rd DCA Dec. 22, 2004) (citing *Wright & Seaton, Inc. v. Prescott*, 420 SO. 2d 623, 629 (Fla. 4th DCA 1982) ("'The court should arrive at [a contract] consistent with reason, probability, and the practical aspect of the transaction between the parties.'")); *see also, City of Homestead v. Johnson*, 760 So. 2d 80, 84 (Fla. 2000) (finding that Commission's interpretation of a contract was correct because it gave effect to the purpose of the agreement.).

Second, although the Commission approved the Joint Motion, nothing in the Commission's Order ("Order") supports the Joint Petitioners' argument. In fact, the Order is completely silent on the issue. In contrast, the Tennessee Regulatory Authority, in reviewing the identical Joint Motion, specifically found that the parties' agreement to avoid a second/separate

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[30] Although the parties agreed to limit new issues being raised to those resulting from the "post-*USTA II* regulatory framework", the parties subsequently agreed to also include issues relating to the *Interim Rules Order* in the arbitrations because the FCC issued that decision during the 90 day abeyance.

change of law process was limited to *USTA II* ("Tennessee Order"): "Within this framework, the Parties agree to avoid a separate process of negotiating change-of-law amendments to the current interconnection agreements ***to address USTA II*** . . ." *See* July 16, 2004 TRA Order, attached hereto as Exhibit C (emphasis added). The Joint Petitioners have never challenged the Tennessee Order and instead are articulating a completely contrary position with the Emergency Petition.

Third, the crux of the Joint Petitioners' argument is that the parties cannot "continue operating under their current Interconnection Agreements until they are able to move into the new arbitrated/negotiated agreements that ensue from this proceeding" if the parties amend those agreements to incorporate the *TRRO*. Simply stated, the Joint Petitioners improperly read into the Joint Motion and the Abeyance Agreement a requirement that the rates, terms, and conditions of the Current Agreement were frozen as of June 30, 2004, until such time as the parties move onto the new arbitrated agreements. This interpretation is not only factually incorrect but also expressly rejected by the custom of the parties.

Indeed, there is nothing in the Joint Motion, the Order, or in the Abeyance Agreement that supports this interpretation. Further, it should be undisputed that the parties can and are continuing to operate under the Current Agreement until such time as the new arbitrated agreements become effective, even if certain provisions of the Current Agreement are modified to reflect changes of law. Further, as evidenced by recent amendment filings in Tennessee by NewSouth, NuVox, and BellSouth on February 22, 2005, (both of which are attached hereto as Exhibit D), the custom of the parties is to amend the Current Agreement and to continue operating under the Current Agreement, as amended. Accordingly, the practice and custom of the parties is directly contrary to the arguments asserted by the Joint Petitioners and thus the

Commission should reject them. *See D.G.D., Inc. v. Berkowitz*, 605 So. 2d 496, 497 (Fla. 3rd DCA 1992) (affirming trial court's consideration of custom and trade usage to determine parties' intention in a contract); *see also, Farr v. Poe & Brown, Inc.*, 756 So. 2d 151, 152 (Fla. 4th DCA 200) (explaining when custom and usage can be used to interpret a contract); *National Merchandise Co., Inc. v. United Service Automobile Association*, 400 So. 2d 526, 531 (Fla. 1st DCA 1981) ("Commercial transactions and contracts should be interpreted in light of custom or trade usage.").

Fourth, the express language of the Abeyance Agreement does not support the Joint Petitioners' interpretation. The Abeyance Agreement provides that the parties would avoid a second/separate change of law negotiation/arbitration for "*USTA II* and its progeny." "Progeny" has a specific legal definition, and the Commission should give effect to this specific definition. Indeed, *Black's Law Dictionary* (2000 ed.) defines "progeny" as a "line of opinions that succeed a leading case <*Erie* and its progeny>." Accordingly, as used in the Joint Motion, "*USTA II* and its progeny" means opinions of a court or state commission reaffirming or restating the D.C. Circuit's vacatur of certain unbundling obligations in *USTA II*. The *TRRO* does neither. Rather, it is an administrative decision setting forth new rules and thus does not meet this legal definition of "progeny."

Unlike the Joint Petitioners' argument, this interpretation of the Abeyance Agreement is entirely consistent with the intent of the parties to limit their agreement to *USTA II*. The reason for this is clear: Because the parties agreed to incorporate *USTA II* issues into pending arbitrations, the agreement also encompassed any subsequent court or state commission decision making the same conclusions as did the D.C. Circuit in *USTA II*. To hold otherwise would frustrate the entire purpose of the Abeyance Agreement as the parties would still be subject to

change of law negotiations/arbitrations for these subsequent decisions, which only reaffirmed or restated the findings of *USTA II*.

The use of the phrase "USTA II and its progeny" was no accident as the parties specifically negotiated and reached a compromise with this agreed-upon language while drafting the Joint Motion. In fact, the original draft of the Motion presented by the Joint Petitioners contained the phrase "post-USTA II regulatory framework" instead of "*USTA II* and its progeny." *See* July 9, 2004 e-mail and attachment from counsel for BellSouth to counsel to Joint Petitioners, attached hereto as Exhibit E. In response, BellSouth struck the phrase "post-*USTA II* regulatory framework" and inserted "*USTA II*" because it was concerned that the Joint Petitioners' language was too broad as it could encompass the FCC's Final Rules (ultimately set forth in the *TRRO*), which was never the intent of the parties. *Id.* Accordingly, BellSouth proposed that the subject sentence should read: "With this framework, the Joint Petitioners and BellSouth have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreement based on *USTA II*." *Id.*

In the next draft, the Joint Petitioners reasserted the phrase "post-*USTA* II regulatory framework," which was still unacceptable to BellSouth.[31] Consequently, the parties discussed the impasse, wherein BellSouth specifically informed the Joint Petitioners of its concern with their language and the parties agreed to "*USTA II* and its progeny." This negotiation history

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[31] Interestingly, under the Joint Petitioners' own interpretation, even the broader phrase "post-*USTA II* regulatory framework" does not result in the inclusion of the *TRRO* and the Final Rules that resulted. KMC, one of the Joint Petitioners, used this exact same phrase to mean solely the *USTA II* decision. Specifically, in filing a similar motion in North Carolina to postpone its pending arbitration proceeding with Sprint, KMC stated that the "Parties respectfully request that the Commission hold this proceeding in abeyance to provide additional time for the Parties to address the ***effect of the post-USTA II regulatory framework, the Interim Order, and the forthcoming unbundling rules on the terms, conditions and rates that should be included in the Agreement*** . . . ." *See* December 2, 2004 Motion at 2, attached hereto as Exhibit F (emphasis added). This express inclusion of the *Interim Rules Order* and the *TRRO* proves that, at least KMC (and presumably all of the Joint Petitioners because their position on all the issues are allegedly the same) construes the phrase "post-*USTA II* regulatory framework to be limited to *USTA II* and does not encompass the FCC's *Interim Rules Order* or the *TRRO*.

definitively establishes that (1) BellSouth never agreed to the interpretation now set forth by the Joint Petitioners; (2) BellSouth expressly advised the Joint Petitioners that it objected to the interpretation that the Joint Petitioners are now espousing; and (3) the parties agreed to language to address BellSouth's concerns. The Joint Petitioners conveniently fail to disclose these facts, in obvious recognition of their fatal effect.

Fifth, adopting the Joint Petitioners' argument would lead to an absurd or unreasonable result as it would require this Commission to find that BellSouth indefinitely agreed to waive contractual rights related to the incorporation of the *TRRO* in the Current Agreement eight months prior to those changes even being issued. In effect, the Joint Petitioners argue that BellSouth essentially gave up the right to implement those new rules for the Current Agreement even before any party knew what those rules would contain and without any venue to address disputes related to those new rules. Not only is this factually incorrect but it also leads to absurd and unreasonable results that only benefit the Joint Petitioners.

Florida law mandates that, in construing a contract, absurd or unreasonable results should be avoided.

> "The words of a contract will be given a reasonable construction, where that is possible, rather than an unreasonable one, and the court will likewise endeavor to give a construction most equitable to the parties, and one which will not give one of them an unfair or unreasonable advantage over the other. So that interpretation which evolves the more reasonable and probably contract should be adopted, and a construction leading to an absurd result should be avoided."

See James v. Gulf Life Ins. Co., 66 So. 2d 62, 63 (Fla. 1953); *Am. Employers' Ins. Co. v.* Taylor, 476 So. 2d 281 (Fla. 1st DCA 1985) (holding contracts should be interpreted so as to avoid an absurd result). For this additional reason, the Commission should reject the Joint Petitioners' arguments.

C. If BellSouth Is Ordered To Provide New UNE-P Circuits After March 11, 2005, It Is Entitled To A Retroactive True-Up To An Appropriate Rate.

For all the reasons set forth in this pleading, BellSouth is not obligated to provide new UNEs circuits after March 11, 2005. If, however, the Commission is inclined to grant Joint Petitioners any emergency relief (which it should not do), the Commission should explicitly direct that if Joint Petitioners order new UNEs on or after March 11, 2005, Joint Petitioners must compensate BellSouth for those UNEs at an appropriate rate retroactive to March 11, 2005.

The retroactive payment is important not only as a legal matter but as a policy matter. The FCC was unequivocal in its holding that no CLEC is entitled to new UNE-P circuits after March 11, 2005. Short of an order denying Joint Petitioners' request, the *only* way for the Commission to comply with the FCC's order is to require Joint Petitioners to pay BellSouth the difference between the UNE-P rate and an appropriate rate back to March 11, 2005. Other states have adopted true-ups. For instance, the Texas Commission adopted an interim agreement that does not require SBC to add new UNE-P orders and includes a true-up provision.[32] The Michigan Commission has decided to complete expedited proceedings in 45 days, during which new orders can apparently be issued subject to a true-up.[33] A true-up is the only way to equalize the risk between the parties – if ordered to provision new UNEs after March 11, BellSouth unquestionably is bearing the risk associated with the continuation of an unlawful unbundling

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[32] *See* Exhibit G for orders from the Texas PUC. The orders from the Texas Commission appear to diverge from action taken by the Georgia Commission, which, in addressing a motion similar to the one filed by Joint Petitioners, ruled against BellSouth. The Georgia Commission has not yet released a written order. The Alabama Commission has required BellSouth to provide MCI with access to new UNE-Ps until it can address this matter at its April 2005 meeting.

[33] *See* Exhibit H for an order from the Michigan Commission.

regime. Joint Petitioners should bear the risk of a true-up if its position is determined to be wrong.

A true-up is also necessary in the interests of fairness. The FCC has also been clear that commercial negotiations can produce pro-competitive and pro-consumer outcomes.[34] BellSouth has successfully negotiated, to date, 48 commercial agreements with CLECs for the purchase of a wholesale local voice platform service, which agreements cover in excess of 310,000 access lines. If this Commission disregards the self-effectuating portion of the *TRRO,* the progress BellSouth has achieved in reaching commercial agreements could come to a halt, at least in the near term. If CLECs know that they can continue adding new unbundled network elements at TELRIC rates until the amendment and arbitration process is completed, which can take up to twelve months under the *TRRO*, they will have no reason to pay more than TELRIC by entering into a commercial agreement at this juncture. Significantly, allowing CLECs to continue adding unbundled network elements until the amendment and arbitration process has been completed, even though they are not impaired, unfairly prejudices those carriers that have entered into commercial agreements. Carriers that entered into commercial agreements will be forced to compete for new customers against CLECs that can undercut their prices solely by virtue of these CLECs getting to pay TELRIC rates, unless this Commission requires a true-up.

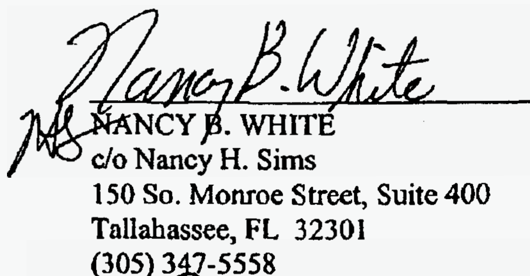
CONCLUSION

[34] Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein On Triennial Review Next Steps, March 31, 2004; *see also* FCC Chairman Michael K. Powell's Comments on SBC's Commercial Agreement With Sage Telecom Concerning The Access To Unbundled Network Elements, April 5, 2004 (expressing hope "for further negotiations and contracts - so that America's telephone consumers have the certainty they deserve"); FCC Chairman Michael K. Powell Announces Plans For Local Telephone Competition Rules, June 14, 2004 (strongly encouraging "carriers to find common ground through negotiation" because "[c]ommercial agreements remain the best way for all parties to control their destiny").

For the reasons set forth therein, the Commission, in accordance with the Final Rules, should not order BellSouth to provide new UNEs after March 11, 2005. If, however, the Commission requires new UNEs after March 11, 2005, the Commission should order a retroactive true-up back to March 11, 2005.

Respectfully submitted, this 4th day of March, 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.



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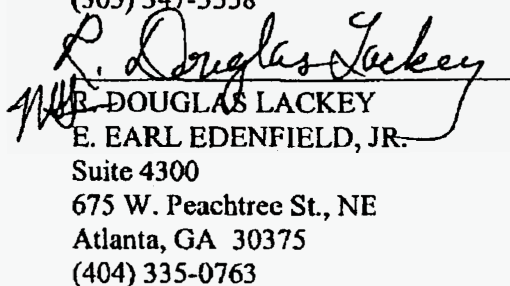

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May 28, 2004

Mrs. Blanca S. Bayó
Director, Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 040489-TP; *Joint CLECs' Emergency Complaint Seeking an Order Requiring BellSouth and Verizon to Continue to Honor Existing Interconnection Agreements*

Dear Ms. Bayo:

On May 21, 2004, XO Florida, Inc. and Allegiance Telecom of Florida, Inc. ("Joint CLECs") filed an Emergency Complaint, which purports to require expedited action from this Commission due to the Joint CLECs' perception of an imminent service disruption. BellSouth will file its formal response to this Complaint on or before June 10, 2004; in the meantime this letter responds to the Joint CLECs' request for expedited relief. As set forth more fully herein, such emergency relief is not necessary.

During this Commission's May 11, 2004 teleconference in Docket Nos. 030851-TP and 030852-TP, BellSouth clarified its position concerning the D.C. Circuit Court of Appeals decision vacating portions of the *Triennial Review Order.* BellSouth also posted a Carrier Notification Letter on May 24, 2004 to set forth its position, which is attached hereto.

BellSouth intended to alleviate apparent uncertainty on the part of some carriers. Apparently, some carriers purport to remain confused. As provided in BellSouth's May 24, 2004 Carrier Letter Notification, BellSouth will not "unilaterally disconnect services being provided to any CLEC under the CLEC's Interconnection Agreement." Consequently, there will be no chaos as the Joint CLECs allege. BellSouth will effectuate changes to its interconnection agreements via established legal procedures.

With respect to new or future orders, "BellSouth will not unilaterally breach its interconnection agreements." If the D.C. Circuit issues its mandate on June 15, 2004, BellSouth will continue to accept and process new orders for services (including switching, high capacity transport, and high capacity loops) and will bill for those 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. As it is legally entitled to do, BellSouth reserves all rights, arguments, and remedies it has under the law with respect to the rates, terms, and conditions in the agreements.

I trust this information adequately addresses the Joint CLECs' concerns relating to service disruption and demonstrates that expedited action by this Commission is unnecessary. If I can be of further assistance, please let me know.

Sincerely,

Nancy B. White

cc: Parties of Record
Beth Keating

539595

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of competitive local exchange carriers to initiate a Commission investigation of issues related to the obligation of incumbent local exchange carriers in Michigan to maintain terms and conditions for access to unbundled network elements or other facilities used to provide basic local exchange and other telecommunications services in tariffs and interconnection agreements approved by the Commission, pursuant to the Michigan Telecommunications Act, the Telecommunications Act of 1996, and other relevant authority.	Case No. U-14303
In the matter of the application of **SBC MICHIGAN** for a consolidated change of law proceeding to conform 251/252 interconnection agreements to governing law pursuant to Section 252 of the Communications Act of 1934, as amended.	Case No. U-14305
In the matter of the application of **VERIZON NORTH INC. and CONTEL OF THE SOUTH, INC., d/b/a VERIZON NORTH SYSTEMS**, for a consolidated change-of-law proceeding to conform interconnection agreements to governing law.	Case No. U-14327
In the matter on the Commission's own motion, to resolve certain issues regarding hot cuts.	Case No. U-14463

At the March 29, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chairman
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER

On September 30, 2004, the Competitive Local Exchange Carriers Association of Michigan (CLEC Association), LDMI Telecommunications, Inc. (LDMI), MCImetro Access Transmission Services LLC (MCI), XO Michigan, Inc. (XO), AT&T Communications of Michigan, Inc. (AT&T), TCG Detroit, TDS Metrocom, LLC (TDS), Talk America Inc., TelNet Worldwide, Inc., Quick Communications, Inc., d/b/a Quick Connect USA, Superior Technologies, Inc., d/b/a Superior Spectrum, Inc., Grid 4 Communications, Inc., CMC Telecom, Inc., C.L.Y.K. Inc., d/b/a Affinity Telecom, Inc., JAS Networks, Inc., Climax Telephone Company, and ACD Telecom, Inc. (ACD), (collectively, the CLEC coalition), petitioned the Commission to conduct an investigation pursuant to its authority under the Michigan Telecommunications Act (MTA), 1991 PA 179, as amended, MCL 484.2101 *et seq.*, to investigate the effect, if any, in Michigan of the *vacatur* of the rules promulgated by the Federal Communications Commission (FCC) in its Triennial Review Order[1] and the effect of the FCC's August 20, 2004 interim order on remand.[2] To the extent that these developments are determined by the Commission to constitute a change of law, the CLEC coalition seeks a decision from the Commission on the appropriate procedures for modification of the terms in current tariffs and interconnection agreements. The CLEC coalition also requests the Commission to order SBC Michigan (SBC) and Verizon North Inc. and Contel of the South, Inc., d/b/a Verizon North Systems (Verizon), to show cause why the Commission should not order

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[1]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, 18 FCC Rcd. 16978, 16984 (2003) (*TRO*), vacated in part, *United States Telecom Assn* v *FCC*, 359 F3d 554 (DC Cir 2004) (*USTA* II).

[2]In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (rel'd August 20, 2004).

them to continue to provide competitive local exchange carriers (CLECs) with nondiscriminatory access to network elements and facilities as currently required by tariffs and interconnection agreements approved by the Commission pursuant to the MTA and Sections 251 and 252 of the federal Telecommunications Act of 1996 (FTA), 47 USC 251 *et seq.*, at cost-based rates.

On the same day, SBC filed an application requesting that the Commission convene a proceeding to ensure that SBC's interconnection agreements adopted under Sections 251 and 252 of the FTA remain consistent with federal law. In so doing, SBC alleged that its existing interconnection agreements continue to include network elements that the FCC previously required incumbent local exchange carriers (ILECs) to provide on an unbundled basis, but which are no longer required to be unbundled by FCC order or judicial decision. SBC asserted that, by addressing all out-of-compliance interconnection agreements in a single proceeding, the Commission could fulfill the FCC's goal of a speedy transition, while preserving the scarce resources of the Commission, SBC, and the CLECs.

On October 26, 2004, Verizon petitioned the Commission to approve amendments to the interconnection agreements between itself and certain CLECs. According to Verizon, the agreements of these CLECs could be interpreted to require amendment before Verizon may cease providing unbundled network elements (UNEs) eliminated by the TRO or *USTA II*. Verizon insisted that absent the Commission's intervention, "the CLECs will not conform their agreements to governing law, despite the FCC's directives to do so and contractual requirements to undertake good faith negotiation of contract amendments." Verizon application, ¶ 16, p. 7. Verizon also maintained that a number of CLECs have sought to impede and delay the process by asking this Commission to investigate the legal effect of the *USTA II* mandate and the FCC's interim order. Verizon contended that its proposed interconnection amendment makes clear that Verizon's

unbundling obligations will be governed exclusively by Section 251(c)(3) of the FTA, 47 CFR Part 51, and the FCC's interim order. Further, the proposed language indicates that, when federal law no longer requires unbundled access to particular elements, Verizon may cease providing such access upon appropriate notice.

Given the commonality of the issues raised by these three applications, in an order dated November 9, 2004, the Commission consolidated these matters and set a schedule for the filing of comments and reply comments by December 22, 2004 and January 18, 2005, respectively.

On December 22, 2004, the Commission received initial comments from SBC, Sprint Communications Company, L.P., Allegiance Telecom of Michigan, Inc., MCI, the CLEC Association, ACD Telecom, Inc., Talk America, TDS and XO, the Commission Staff (Staff), and Verizon.

On January 18, 2005, the Commission received reply comments from SBC, Verizon, the CLEC Coalition, Talk America, TDS, and XO, and the Staff.

On February 4, 2005, the FCC issued its order on remand[3] adopting new rules governing the network unbundling obligations of ILECs in response to *USTA II*, which overturned portions of the FCC's UNE rules announced in the *TRO*. Because the new rules issued by the FCC in the *TRRO* appeared to significantly affect the outcome of this proceeding, the Commission provided that all interested persons should be given an additional opportunity to submit comments and reply comments by February 24, 2005 and March 3, 2005, respectively. Those parties filing such additional comments or replies include: SBC, Verizon, the CLEC Coalition, MCI, AT&T and TCG Detroit, Clear Rate Communications, Inc., and the Staff.

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[3]In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313 and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, rel'd February 4, 2005. (*TRRO*)

Thereafter, the Commission determined in an order dated February 24, 2005, that the parties should be given an opportunity to present oral argument directly before the Commission. It therefore scheduled a public hearing for March 17, 2005, at which the parties were invited to present their positions and respond to questions posed by the Commission. The Commission stated its intent to issue an order in these proceedings by March 29, 2005.

On March 15, 2005, Attorney General Michael A. Cox (Attorney General) filed comments.[4]

On March 17, 2005, the Commission was present for a public hearing during which the following parties acted on the opportunity to present oral argument and to respond to the Commission's questions: SBC, Verizon, the CLEC Coalition, LDMI, Talk America, TDS and XO, the CLEC Association, MCI, AT&T, CIMCO Communications, Inc., CoreComm Michigan, Inc., and PNG Telecommunications Inc., and the Attorney General.

Discussion

Certain critical issues arise in these proceedings. First, the parties dispute whether the Commission may or should require the ILECs to continue providing unbundled network element platform (UNE-P) or other elements for which the FCC has found no impairment. A finding of impairment is necessary to require provision of any UNE pursuant to Sections 251 and 252 of the FTA. Second, they do not agree on the appropriate method for transitioning ILEC/CLEC contractual relations from where the Michigan industry is now and where it must be by the FCC's deadline of March 11, 2006. Third, MCI raises issues regarding the availability and process of hot cuts to transition UNE-P customers to other service platforms.

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[4]SBC initially objected to the filing of those comments as untimely, but withdrew the objection at the March 17, 2005 public hearing.

Provision of UNEs

The CLECs argue that the Commission has the authority and the responsibility to require that the ILECs continue to provide UNEs pursuant to state law, which authority, they argue, is expressly preserved by the FTA. They argue that, pursuant to Section 355 of the MTA, MCL 484.2355, at a minimum, the ILECs must unbundle the loop and the port of all telecommunications services. The Commission's authority to require this unbundling, they argue, is preserved by §§251(d)(3), 252(e)(3), and 261(c) of the FTA. They quote the United States Court of Appeals for the Sixth Circuit (Sixth Circuit), as follows:

> When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. In fact, it expressly *preserved* existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition, stating that the Act does not prohibit state commission regulations "if such regulations are not inconsistent with the provisions of the [FTA]." 47 USC 261. Additionally, Section 251(d)(3) of the Act states that the [FCC] shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act.
>
> The Act permits a great deal of state commission involvement in the new regime it sets up for the operation of local telecommunications markets, "as long as state commission regulations are consistent with the Act."

Michigan Bell v MCIMetro Access Transmission Services Inc, 323 F3d 348, 358 (CA 6, 2003).

Further, they argue, the Sixth Circuit expressly rejected SBC's argument that a requirement would be inconsistent with federal law if it merely were different. They state that the Court determined that a state commission may enforce state law regulations "even where those regulations differ from the terms of the Act." *Id.* at 359. The CLECs take the position that as long as the disputed state regulation promotes competition, it is not inconsistent with the federal Act. Therefore, they argue, the Commission is not preempted by the FCC's orders from requiring the ILECs to provision UNEs pursuant to the terms and conditions in the Commission-approved interconnection agreements. They urge the Commission to take prompt action to prevent SBC

from acting unilaterally to either withdraw its wholesale tariffs for UNEs or to alter the interconnection agreements to exclude these UNEs.

Moreover, the CLECs argue, SBC has a duty to provide unbundled loops, transport, and switching pursuant to Section 271 of the FTA. MCI and AT&T agree and argue that irrespective of the ILECs' duties under Section 251, SBC must comply with the conditions required for the FCC's approval of its application pursuant to Section 271. Thus, these parties argue, SBC may not unilaterally remove local switching, loops, or transport from its interconnection agreements or its tariffs. Rather, it must negotiate pursuant to the provisions of its interconnection agreements any amendments, including pricing. Although the FCC provided a procedure for SBC to request forbearance from enforcement of its Section 271 obligations, MCI argues, SBC has not yet taken any of the steps laid out to obtain such a ruling.

Further, MCI argues, if a carrier believes a state law requirement is inconsistent with the federal Act, it must seek a declaratory ruling to that effect from the FCC. It argues that the FCC's brief to the United States Supreme Court in opposition to the petitions for *certiorari* from *USTA II* reflects that the FCC has not preempted any state law on unbundling. In that brief, the FCC denied that it had preempted any state unbundling rule, and stated that it "is uncertain whether the FCC ever will issue a preemptive order of this sort in response to a request for declaratory ruling." Brief at 20.

Verizon and SBC argue that the Commission is preempted from requiring the ILECs to provide any UNE for which the FCC has found there is no impairment. They argue that the Commission should promptly approve their respective proposed amendments to bring interconnection agreements into conformity with the FCC's *TRO* and *TRRO*. Because the FCC's orders preempt the Commission, they argue, there is no reason to waste time considering whether the

Commission may re-impose unbundling obligations that the FCC has eliminated. Therefore, they argue, the Commission should dismiss the CLECs' application and approve the ILECs' proposed amendments.

SBC and Verizon further argue that the Commission's authority under state law may be lawfully exercised only in a manner that is consistent with the federal Act and FCC rules and regulations. MCL 484.2201. In their view, the Commission may not require the ILECs to provide UNEs that the FCC has found are not required to alleviate impairment.

SBC adds that the FCC is the sole enforcer of any obligations pursuant to Section 271 of the federal Act. Thus, it argues, this proceeding is not an appropriate forum for a Commission determination as to whether SBC is required to provide certain UNEs solely under Section 271, without reference to the duties imposed under Sections 251 and 252 of the FTA.

The Commission is not persuaded that it is preempted by either the federal Act or the FCC's orders from requiring the ILECs to provide UNEs under authority granted by the MTA and preserved in the FTA. The Commission's authority to impose requirements on telecommunications carriers in addition to, but consistent with, those prescribed by the FCC is preserved in the FTA sections cited by the CLECs. Moreover, that authority has been affirmed by the Sixth Circuit as argued by the CLECs. Thus, the Commission finds that it also possesses the authority necessary to appropriately direct the resolution of the method of industry transition as addressed in the following section. However, the Commission notes that Section 201(2) of the MTA, MCL 484.2201(2), requires Commission action to be consistent with the FTA and the FCC's rules and orders. Requiring the continued provision of UNE-P would be inconsistent with the FCC's detailed findings and plan for transition in the *TRO* and *TRRO*.

Moreover, at this time, the Commission is not persuaded that competition would be advanced by exercising its authority to require the provision of UNEs in addition to those that the FCC has found must be provided pursuant to 47 USC 251(c)(3). Such a finding likely would lead to further litigation and promote confusion rather than competition, which would be inconsistent with the intent of the MTA as well as the FTA. If a CLEC believes that the FCC has erroneously found no impairment on a particular UNE, it may take steps provided by law to seek a change in that ruling.

The *TRRO* provides a period of transition to the UNEs available under its new final rules from the UNEs now available pursuant to the current interconnection agreements, which were negotiated and arbitrated under previous determinations concerning what elements must be provided by the ILECs pursuant to Section 251(c)(3) of the FTA. For most of the UNEs that were available, but are no longer under that subsection, the *TRRO* provides a 12-month transition period. For dark fiber related elements, the FCC provided 18 months. During the transition, the FCC directed that ILECs must permit CLECs to serve their embedded customer base with UNEs available under their interconnection agreements, but with an increased price. However, the FCC stated that CLECs would not be permitted to expand the use of UNE-P or the use of other UNEs no longer required to be made available pursuant to Section 251(c)(3).

In the March 9, 2005 order in Case No. U-14447, the Commission found that ILECs must honor new orders to serve a CLEC's embedded customer base. The Commission stopped short of stating that CLECs were not entitled to new orders of UNEs for new customers. At this time, the Commission affirmatively finds that the CLECs no longer have a right under Section 251(c)(3) to order UNE-P and other UNEs that have been removed from the list that must be offered to serve new customers. This does not, however, foreclose any right that may exist pursuant to Section 271 for a CLEC to order these UNEs. Moreover, the Commission notes that although certain UNEs

are no longer required to be provided pursuant to Section 251(c)(3), parties may negotiate for provision of those same facilities and functions on a commercial market basis.

Transition

SBC and Verizon propose that the Commission review and approve their respective proposed amendments to the interconnection agreements and then impose those amendments on the CLECs where necessary.[5] These parties point to the provisions in the *TRO* and *TRRO* that indicate the FCC's intent that the transition away from the provision of the elements no longer required should be swift.

Verizon notes that the Commission has already initiated a collaborative to address the transition issues concerning the amendments of interconnection agreements to conform to federal law. It argues that the Commission need not consider those same transitional questions here.

In its reply comments, Verizon recognizes that many of the changes wrought by the *TRO* and the *TRRO* require the parties to negotiate amendments, which are being addressed in the Case No. U-14447 collaborative process. However, it argues, the prohibition on CLECs obtaining new UNE-Ps or high-capacity facilities no longer subject to unbundling does not depend on the particular terms of any interconnection agreement and should be implemented immediately. Verizon argues that the transition rules bar CLECs from ordering new UNEs that are no longer subject to unbundling under section 251(c)(3), without regard to the terms of any agreement.

SBC argues that the Commission is legally bound to implement the FCC's determinations, consistent with the pertinent court rulings including *USTA II* for all ILECs and CLECs. It argues that the Commission should move quickly to ensure that the unbundling rights and obligations of

[5]Verizon asserts that only the interconnection agreements with the CLECs named in Verizon's application are at issue here. The remaining agreements, according to Verizon, need no amendment to comply with federal law.

all carriers operating in Michigan comport with governing law and mandates of the FCC. It argues that it is appropriate for the Commission to ensure compliance with the federal unbundling regime in a single consolidated proceeding, pursuant to Section 252(g) of the FTA, 47 USC 252(g), instead of on a carrier-by-carrier basis.

The CLECs argue that the FCC explicitly contemplated that parties would negotiate amendments to their interconnection agreements pursuant to their change of law or dispute resolution provisions. They argue that the FCC could not and did not order a unilateral change to contracts that the parties currently have in place. They argue that the Commission should dismiss the applications by SBC and Verizon to approve their proposed amendments, and require instead that the parties negotiate in good faith in light of the change in law that the *TRO* and *TRRO* represent. The CLECs propose that the Commission adopt a process that allows parties initially to attempt to negotiate implementation of the *TRRO* and the resulting new unbundling rules. However, if negotiations fail on some issues, consistent with the terms and conditions for dispute resolution, the Commission should resolve disputes that arise in the most efficient manner available.

AT&T recommends the following steps to preserve the CLEC's right to negotiate under the FTA, and to promote uniformity and efficiency:

1. Consistent with the terms of their respective interconnection agreements, following the effective date of the FCC's rules (March 11, 2005) carriers shall attempt to negotiate any required changes to their interconnection agreements. As required by the *TRRO*, these negotiations should proceed without "unreasonable delay."[6]

2. At the end of such negotiations, the parties should submit amendments to their interconnection agreements for Commission approval or file petitions identifying their individual dispute. To the extent necessary, and consistent with any notice and due process requirements, the Commission may entertain any filed disputes in party-to-party and or consolidated proceedings.

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[6] *TRRO*, ¶ 233.

3. To the extent the Commission believes necessary, it should schedule collaboratives to identify the common and unique issues in the individual petitions for dispute resolutions. At that time, the Commission should also establish an efficient framework for resolving the identified issues.
4. Nothing in this proposal should be construed to prohibit individual parties from requiring that the individual terms and conditions of the change of law and/or dispute resolution provisions of their respective interconnection agreements continue to apply, including any right to seek bilateral arbitration of disputes by the Commission. Similarly, nothing in this proposal should be construed to prohibit individual parties from negotiating amendments to an interconnection agreement in a time frame shorter than what is proposed herein, and the Commission should make this statement in any order issued.

AT&T Supplemental Comments, pp. 7-8.

In its initial comments, the CLEC coalition proposed a framework that contemplated significantly more time. It argued that the CLECs should be given 45 days after March 11, 2005 to study the new rules and prepare proposed amendments to their interconnection agreements. Thereafter, the CLEC coalition noted that most interconnection agreements have a 60- or 90-day time frame for negotiations before dispute resolution procedures begin. Then, according to the CLEC coalition, the parties should have a two-week window to either submit an amendment or file petitions identifying their individual disputes. Finally, the CLEC coalition proposed that the Commission should entertain any filed disputes in a consolidated docket, with time limits for submitting those disputes.

The Commission finds that the most appropriate process for moving the industry through the transition period provided in the *TRRO* is to close these three cases and open up the interconnection agreements for negotiation, within the collaborative initiated in Case No. U-14447. The parties will be provided 60 days from the date of this order[7] to complete the requirements of their change of law and dispute resolution provisions, and to negotiate for and submit a joint application

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[7]The 45-day period established for the collaborative is, therefore, extended.

for approval of an amendment to their interconnection agreements to bring their contracts into compliance with the requirements of the *TRO* and the *TRRO*. During that same 60-day period, the parties in the collaborative shall work to establish no more than four versions of an amendment to the interconnection agreements. All parties to the collaborative that have not otherwise agreed to an amendment, must agree to one of the four or fewer versions established in the collaborative. If the parties to a single contract do not agree which of the versions should be included in the interconnection agreement, the parties shall submit that disagreement to the Commission, which will determine the appropriate amendment through baseball-style arbitration.

Hot Cuts

MCI argues that in the *TRRO*, the FCC ruled that for purposes of Section 251, there is no impairment without unbundled local switching. That ruling, according to MCI, was based on the availability of batch hot cut processes. See, *TRRO*, ¶¶ 211, 217. Thus, MCI argues, batch hot cuts must be included in any amendments to the interconnection agreement to comply with the FCC's recent rulings. Moreover, MCI argues, the FCC explicitly indicated that forums to address concerns about the sufficiency of batch hot cut processes include state commission enforcement processes and Section 208, 47 USC 208, complaints to the FCC.

MCI acknowledges the January 6, 2005 order in *Michigan Bell* v *Lark et al.*(ED MI, Southern Division, Case No. 04-60128, Hon Marianne O. Battanni) prevents the Commission from enforcing the Commission's June 28, 2004 order in Case No. U-13891 regarding batch hot cuts. However, it insists that Judge Battanni's order does not prevent the Commission from addressing and resolving disputes about batch hot cuts as part of the amendment process to interconnection agreements. It says that the basis of Judge Battanni's ruling was that the Commission was acting on unlawfully delegated authority from the FCC in determining whether impairment existed with

respect to unbundled switching. Because the FCC has now made its determination concerning impairment, the Commission is free to act on batch hot cut issues. It says that the exact process to be used and the rates will need to be addressed in the interconnection agreement amendments.

SBC responds that, in the *TRRO*, the FCC approved the hot cut processes presented by SBC as adequate to avoid a finding of impairment. It argues that parties are free to negotiate mutually acceptable "refinements" in batch hot cut processes. However, SBC argues, batch hot cut processes have nothing to do with conforming the parties' interconnection agreements to the requirements of federal law.

Verizon responds that it has not named MCI as a party to its application to conform its contracts to federal law, and MCI does not mention Verizon in its hot cuts discussion. However, Verizon argues that the FCC did not instruct states to address hot cuts in *TRRO* amendments (or elsewhere). It argues that the FCC expressly found that the ILECs' hot cut processes—pointing in particular to Verizon's—were sufficient and that the concerns about the ILECs' ability to convert the embedded base of UNE-P customers in a timely manner are rendered moot by the transition period. *TRRO* ¶ 216. Verizon argues that no authority cited by MCI permits the Commission to ignore a federal court decision forbidding it to pursue adoption of batch hot cut processes.

The Commission is persuaded that it should promote settlement of hot cut process issues and doing so does not contravene Judge Battani's order. To that end, the Commission opens a new docket for resolving those issues, Case No. U-14463, in which all filings and actions related to hot cuts will be determined. The Commission finds that within 14 days of the date of this order, the CLECs shall submit to the ILECs the number of lines that need to be moved via hot cut and a plan for those moves, i.e., from and to what configuration and the process desired. Within 14 days after receipt of the plan, if the parties cannot agree on the process or price, they shall submit their last

best offer to Orjiakor Isiogu, Director of the Commission's Telecommunications Division, who will act as mediator. Within 30 days of receipt of those last best offers, Mr. Isiogu shall submit his recommended plan to the Commission. The parties will have seven days to object. However, any objection must in good faith assert that the recommendation is technically infeasible or unlawful. Without timely objections, the mediator's recommendation will be final. If the parties are able to agree, no filing need be made.

The Commission has selected Case No. U-14463 for participation in its Electronic Filings Program. The Commission recognizes that all filers may not have the computer equipment or access to the Internet necessary to submit documents electronically. Therefore, filers may submit documents in the traditional paper format and mail them to the: Executive Secretary, Michigan Public Service Commission, 6545 Mercantile Way, P.O. Box 30221, Lansing, Michigan 48909. Otherwise, all documents filed in this case must be submitted in both paper and electronic versions. An original and four paper copies and an electronic copy in the portable document format (PDF) should be filed with the Commission. Requirements and instructions for filing electronic documents can be found in the Electronic Filings Users Manual at: http://efile.mpsc.cis.state.mi.us/efile/usersmanual.pdf. The application for account and letter of assurance are located at http://efile.mpsc.cis.state.mi.us/efile/help. You may contact Commission staff at (517) 241-6170 or by e-mail at mpscefilecases@michigan.gov with questions and to obtain access privileges prior to filing.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 *et seq.*; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151

et seq.; 1969 PA 306, as amended, MCL 24.201 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. Case No. U-14303, Case No. U-14305, and Case No. U-14327 should be closed.

c. The parties should be directed to negotiate amendments to their interconnection agreements consistent with the discussion in this order, within the Commission-initiated collaborative proceeding in Case No. U-14447.

d. Case No. U-14463 should be opened for the purpose of resolving issues concerning hot cuts.

THEREFORE, IT IS ORDERED that:

A. Case No. U-14303, Case No. U-14305, and Case No. U-14327 are closed.

B. The parties are directed to negotiate amendments to their interconnection agreements consistent with the discussion in this order, within the Commission-initiated collaborative proceeding in Case No. U-14447.

C. Case No. U-14463 is opened for the purpose of resolving issues concerning hot cuts, as discussed in this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chairman

(S E A L)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of March 29, 2005.

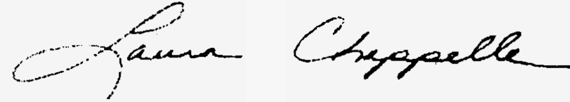
/s/ Mary Jo Kunkle
Its Executive Secretary

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

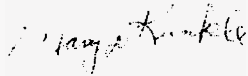
Chairman

Commissioner



Commissioner

By its action of March 29, 2005.



Its Executive Secretary

CERTIFICATE OF SERVICE

I hereby certify that on April 6, 2005, a copy of the foregoing document was served on the following, via the method indicated:

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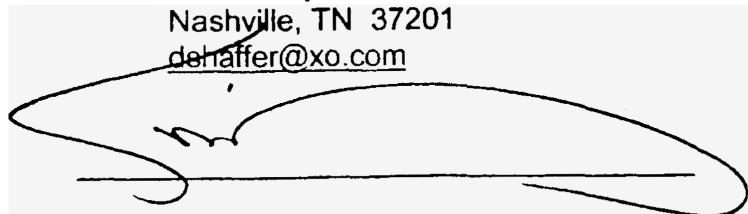

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Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court,
N.D. Illinois, Eastern Division.
ILLINOIS BELL TELEPHONE COMPANY,
Plaintiff,
v.
Edward C. HURLEY, Chairman, Erin M. O'Connell-Diaz, Lula M. Ford, Robert F. Lieberman and Kevin K. Wright, in Their Official Capacities as Commissioners Of the Illinois Commerce Commission and Not as Individuals, Defendants,
and
ACCESS ONE, INC., et al.; Covad Communications Co., et al.; Data Net Systems, L.L.C., et al., Globalcom, Inc.; and McImetro Access Transmission Services LLC,
Defendants/Intervenors.
No. 05 C 1149.

March 29, 2005.

Theodore A. Livingston, Demetrios G. Metropoulos, Hans J. Germann, John E. Muench, Mayer, Brown, Rowe & Maw LLP, Chicago, IL, for Plaintiff.

Thomas R. Stanton, John P. Kelliher, Office of General Counsel, Illinois Commerce Commission, Henry T. Kelly, Shane D. Fleener, Kelley, Drye & Warren, Joseph E. Donovan, O'Keefe, Ashenden, Lyons & Ward, Chicago, IL, Michael Walter Ward, Michael W. Ward, P.C., Buffalo Grove, IL, Thomas H. Rowland, Kevin D. Rhoda, Stephen James Moore, Rowland & Moore, Chicago, IL, for Defendants.

MEMORANDUM OPINION AND ORDER

GOTTSCHALL, J.

*1 Illinois Bell Telephone Company ("SBC") has brought suit challenging determinations made by the Illinois Commerce Commission ("ICC") that require SBC to provide its competitors, including defendants/intervenors (the "Competing Carriers"), with access to certain portions of SBC's network. Presently before the court is SBC's motion for a preliminary injunction requesting relief from an ICC order pending this court's consideration of the merits of SBC's complaint. For the reasons set forth below, that motion is denied.

I. BACKGROUND

Until the 1990s, the market for local telephone service was widely viewed as a natural monopoly. The federal Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 151 *et seq.*, sought to promote competition in that market by requiring established telephone service providers ("incumbent local exchange carriers" or "ILECs") to provide new market entrants ("competing local exchange carriers" or "CLECs") with access to certain portions of the ILECs' networks ("network elements") at a fair price, a process known as "unbundling." The rationale for this requirement was that new entrants could not be expected to compete immediately with the infrastructure that ILECs had built up over years of operating as legally sanctioned monopolies. *See Ind. Bell Tel. Co. v. McCarty*, 362 F.3d 378, 382 (7th Cir.2004). The Act tasks the Federal Communications Commission ("FCC") with determining which network elements should be unbundled, requiring the FCC to "consider, at a minimum, whether--(A) access to such network elements as are proprietary in nature is necessary; and (B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2).

Prior to the passage of the Act, several states, including Illinois, already had taken steps to promote local telephone competition. SBC, an Illinois ILEC that previously had been regulated by the state using a traditional "rate of return" [FN1] framework, petitioned for an alternative form of regulation with fewer earnings restrictions to enable it to respond to the advent of new local competition. In exchange for this alternative regulation, SBC agreed to open up portions of its network to its new competitors.

FN1. This form of regulation, often used with public utilities to stop them from exploiting monopoly power, capped the rates SBC could charge at an amount necessary to recoup costs and provide a "reasonable" rate of return on SBC's equity.

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EXHIBIT
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Section 13-801 of the Illinois Public Utilities Act (the "Illinois Act"), 220 ILCS § 5/1-101, *et seq.*, sets forth the obligations of ILECs that have opted for alternative regulation status. [FN2] On June 11, 2002, the ICC issued an order further specifying SBC's obligations under Section 13-801. *See generally Ill. Bell. Filing to Implement the Public Utils. Act,* Doc. No. 01- 0614, 2002 Ill. PUC LEXIS 564 (Ill. Comm. Comm'n June 11, 2002). SBC brought suit in this court two months later, arguing among other things that the federal Act preempted the ICC order because the order imposed unbundling requirements absent an FCC determination that denial of access would "impair" a CLEC's ability to compete.

FN2. As a practical matter, Section 13-801 applies only to SBC because it is the only Illinois ILEC that has opted for alternative regulation.

*2 At SBC's request, this court suspended briefing on the preemption claims until the FCC issued its August 13, 2003 Triennial Review Order ("TRO"). *See* 18 FCC Rcd. 16978 (F.C.C.rel. Aug. 21, 2003). The TRO set forth a new regulatory policy in response to court criticism of the FCC's earlier efforts to implement unbundling requirements, *see United States Telecom Ass'n v. FCC,* 290 F.3d 415, 422 (D.C.Cir.2002) (*"USTA I"*), and specifically mandated that state regulatory agencies review and amend their decisions to conform to the new federal regulatory framework. The ICC accordingly reopened proceedings examining Section 13-801, and requested that this court "remand" the case to the ICC while the commission completed its review. The court granted the ICC's request on May 17, 2004. *Ill. Bell. Tel. Co. v. Wright,* No. 02 C 6002, Doc. No. 66 (N.D.Ill. May 17, 2004).

SBC is back in court because of additional recent changes to the federal regulatory framework. The parties' current dispute arises out of the ICC's requirement that SBC provide its competitors with unbundled access to mass market local circuit switching and a platform of network elements commonly referred to as UNE-P. [FN3] This requirement was not directly at issue in the previous proceeding because the FCC required ILECs to provide mass market switching at that time. However, the D.C. Circuit in *United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C.Cir.2004) (*"USTA II"*) subsequently rejected that requirement. In response to *USTA II,* the FCC issued a Triennial Review Remand Order ("TRO Remand Order") on February 4, 2005. *See* 2005 WL 289015 (F.C.C. Feb.4, 2005). The TRO Remand Order states that ILECs no longer have an obligation to provide CLECs with additional access to mass market local circuit switching, and provides a 12 month transition period for existing CLEC customers for whom service is provided via UNE-P. TRO Remand Order ¶ 199. The FCC found that removal of the unbundling requirement was justified because newer, more efficient switching technologies are now widely available and continued dependence on the ILECs' infrastructure negatively affects incentives to invest in new technologies. *Id.*

FN3. Switches are specialized computers that direct calls to their destinations; that is, the devices that "make the connection" when one places a call. UNE-P (unbundled network element-platform) consists of switches, local loops (the "last mile" of wire that connects switches to telephones) and transport facilities (equipment that directs calls between switches).

Shortly after the TRO Remand Order issued, SBC sent a series of "Accessible Letters" to Illinois CLECs, informing them that as of March 11, 2005 (the effective date of the order), SBC would refuse new requests for unbundled mass market local switching. After several CLECs questioned the validity of SBC's "unilateral implementation" of the TRO Remand Order, SBC brought this suit seeking a declaration that the FCC's order allows SBC to stop providing mass market switching as an unbundled network element. The Competing Carriers oppose SBC's present request for a preliminary injunction on the merits, while the ICC, through its commissioners, argues that it should be allotted time to finish considering the effect of the TRO before this court takes any action.

II. ANALYSIS

*3 Because the ICC has raised questions of standing and abstention, the court will address the ICC's arguments before proceeding to the merits of SBC's request. The ICC opposes SBC's motion because the ICC has not yet completed the review contemplated by this court's May 17, 2004 remand order. Specifically, the ICC argues that SBC is trying to circumvent that order by returning to federal court, that SBC's claims are unripe because the ICC has yet to take final action, and that SBC has failed to exhaust its administrative remedies. The court disagrees. Although SBC's complaint raises many of the same issues that were before this court in the previous action, SBC now seeks preliminary relief

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based solely on a federal order issued subsequent to the TRO that the ICC currently is considering. The ICC maintains that it has "bifurcated" its proceedings to address the new federal unbundling rules SBC is relying on, and that the ICC will deal with those questions as part of "Phase II" of those proceedings in due course once Phase I has completed. But this new and separate "phase" of proceedings was not contemplated by the court's May 17, 2004 order, so the court does not see how SBC could be circumventing the court's prior directive by seeking new relief pursuant to new federal rules. [FN4]

FN4. The ICC also argues briefly that the court should abstain from reaching the merits of the preliminary injunction arguments out of concerns for "comity and federalism." While the ICC correctly notes that the Supreme Court has sanctioned abstention in favor of pending state administrative proceedings on two occasions, "it has never been suggested that [comity] requires deference to a state judicial proceeding reviewing legislative or executive action. Such a broad abstention requirement would make a mockery of the rule that only exceptional circumstances justify a federal court's refusal to decide a case in deference to the States." *New Orleans Public Service, Inc. v. Council of New Orleans,* 491 U.S. 350, 368, 109 S.Ct. 2506, 105 L.Ed.2d 298 (1989). The court does not believe that the parties' preliminary injunction arguments present an exceptional circumstance warranting abstention.

The court similarly rejects the ICC's argument that SBC's claims are "unripe" because there is no final agency action to consider. The parties do not dispute that SBC has been operating under the ICC's June 11, 2002 order and must continue to obey that order. The very reason SBC has come to court is because it maintains that the recent TRO Remand Order preempts a portion of the state regulations under which it currently must operate. In other words, SBC is seeking review of an administrative decision that has been sufficiently "formalized" to have its effects felt "in a concrete way by the challenging part[y]." *Patel v. City of Chicago,* 383 F.3d 569, 572 (7th Cir.2004). Finally, the court finds that, to the extent that SBC was required to exhaust its administrative remedies with the ICC before seeking a preliminary injunction, it has done so. SBC filed an emergency petition with the ICC requesting action after the TRO Remand Order was issued, which the ICC denied two days before the TRO Remand Order was to take effect. Accordingly, the court will consider the merits of the parties' preliminary injunction arguments.

A. Legal Standard.

A party seeking a preliminary injunction has "the burden of demonstrating that it has a reasonable likelihood of success on the merits of its underlying claim, that it has no adequate remedy at law, and that it will suffer irreparable harm without the preliminary injunction." *AM Gen. Corp. v. Daimlerchrysler Corp.,* 311 F.3d 796, 803 (7th Cir.2002). If the moving party meets these requirements, the court then considers "any irreparable harm the preliminary injunction might impose upon [non-movants] and whether the preliminary injunction would harm or foster the public interest." *Id.* at 803-04. In weighing the parties' respective harms, "the court bears in mind that the purpose of a preliminary injunction is to minimize the hardship to the parties pending the ultimate resolution of the lawsuit." *Id.* at 804 (internal citation omitted).

B. Likelihood of Success on the Merits.

***4** The 1996 Telecommunications Act contains "an unusual-and unequal-blending of federal and state authority." *Ind. Bell Tel. Co. v. Ind. Util. Regulatory Comm'n,* 359 F.3d 493, 494 (7th Cir.2004). Although state utility commissions have a role in carrying out the Act, "Congress 'unquestionably' took 'regulation of local telecommunications competition away from the State' on all 'matters addressed by the 1996 Act'; it required that the participation of the state commissions in the new federal regime be guided by federal-agency regulations." *Id.* (quoting *AT & T Corp. v. Iowa Utils. Bd.,* 525 U.S. 366, 378 n. 6, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999)). SBC argues that the FCC's determination of the network elements to be unbundled pursuant to Section 251(d)(2) of the Act is one of the most significant components of the federal regime, and that the ICC's order therefore must yield to the FCC's recent finding that "[i]ncumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local switching." TRO Remand Order ¶ 5. The parties do not dispute that the TRO Remand Order and the ICC's June 11, 2002 order command different results with respect to the provision of mass market switching and UNE-P, but the Competing Carriers nevertheless argue that the ICC's order is not preempted and that, even if it is, the TRO Remand Order does not countenance the "unilateral" implementation attempted in SBC's Accessible

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Letters.

1. Preemptive Effect of the TRO Remand Order.

The Competing Carriers first argue that Illinois law does not impose any mandatory requirements that conflict with federal law because SBC voluntarily agreed to the provisions of Section 13-801 of the Illinois Act (and the subsequent ICC order) as a *quid pro quo* when it opted for the benefits of alternative regulation status. As both SBC and the Competing Carriers have observed, Section 13-801 does not apply to Verizon, another Illinois ILEC that has not sought alternative regulation under Illinois law. According to the Competing Carriers, "SBC is free to end both its alternative regulation status, and the obligations that go along with it, any time it chooses to do so." Competing Carriers' Opp. Br. at 13.

SBC contends that when it sought alternative regulation status it could not possibly have foreseen the ICC's June 11, 2002 order. SBC focuses on the fact that it never explicitly signed away its future federal rights, but this argument ignores the Competing Carriers' main point, which is that the state requirements were not mandatory. SBC's better argument is that, now that SBC has opted for alternative regulation, it cannot act unilaterally to get out of that regulatory scheme, an argument the Competing Carriers impliedly concede when they recommend that SBC "simply petition the ICC for an end to its alternative regulation status." *Id.*

Unfortunately, none of the parties has explained what petitioning the ICC for an end to alternative regulation would entail. SBC maintains that it would be required to proceed under its current regulatory plan until the ICC approves a new one, but this does not provide the court with any indication as to the likelihood of approval, how long the process would take, or even what the approval process might look like. The court imagines that this process would take some time and that the requirements of Section 13-801 would remain mandatory during the transition, but it may well be the case, as the Competing Carriers suggest, that renouncing alternative regulation status is merely *pro forma* and can be done immediately. In any event, the court is reluctant to make a definitive assessment of the preemption question at this point, based on the possibility that the ICC requirements of which SBC complains were voluntarily assumed and can be voluntarily abrogated, an issue which the present record only superficially addresses. *See* Clinton v. Jones, 520 U.S. 681, 690, 117 S.Ct. 1636, 137 L.Ed.2d 945 (1997) ("[W]e have often stressed the importance of avoiding the premature adjudication of constitutional questions.") (citing *Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S.Ct. 152, 89 L.Ed. 101 (1944)("[W]e have insisted that federal courts do not decide questions of constitutionality on the basis of preliminary guesses regarding local law."))

*5 The Competing Carriers also argue that a finding of preemption is premature because the FCC did not state explicitly that state commissions are preempted from making unbundling determinations. In a portion of the TRO undisturbed by *USTA II*, the FCC noted that states are not "preempted from regulating in [the area of unbundled network elements] as a matter of law." TRO ¶ 192. Rather, the FCC invited parties to seek a declaratory ruling to determine if a state unbundling requirement is inconsistent with the federal regime. *Id* . at ¶ 195. SBC has not petitioned the FCC for a ruling regarding the Illinois UNE-P unbundling requirements.

SBC argues that the FCC's invitation to seek a declaratory ruling does not strip this court of jurisdiction to determine the preemption question. This is almost certainly the case, as the FCC's invitation is permissive rather than mandatory. *Id.* However, the FCC's decision not to declare that state law unbundling requirements are preempted weakens SBC's preemption argument, albeit only slightly. In the TRO, the FCC observed that "[i]f a decision pursuant to state law were to require the unbundling of a network element for which the Commission has either found no impairment ... or otherwise declined to require unbundling on a national basis, we believe it unlikely that such decision would fail to conflict with and 'substantially prevent' implementation of the federal regime." *Id.* This language suggests that there is a *possibility* that a state unbundling requirement would not be preempted, although a modest one, and the court does not believe that it would exist in the present case. *Accord* Ind. Bell. Tel. Co., 362 F.3d at 395 ("[W]e observe that only in very limited circumstances, which we cannot now imagine, will a state be able to craft [an unbundling] requirement that will comply with the Act."). The court finds that, while the preemption question is not as clear as SBC suggests, the likelihood of success on this issue favors SBC.

2. Implementation of the Order.

The Competing Carriers argue that even if the TRO Remand Order is applicable, the FCC still requires

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that the parties implement the requirements via negotiation rather than unilateral action by an ILEC. The TRO Remand Order provides that "the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes." TRO Remand Order ¶ 233. Additionally, the TRO Remand Order provides a 12 month transition period for the CLECs' existing customers that are provided with service via UNE-P, during which time ILECs and CLECs are to "modify their interconnection agreements, including completing any change of law process." *Id.* at ¶ 227. Therefore, according to the Competing Carriers, federal law does not support the "immediate" relief that SBC requests by way of an injunction.

SBC responds that the requirement that the parties negotiate their interconnection agreements in Paragraph 227 of the TRO Remand Order is applicable only to the "embedded base" of existing customers rather than new customers. SBC has the better of this issue, because that paragraph sets forth a transition plan for moving existing customers away from UNE-P; it does not appear to contemplate new customers. SBC maintains that it is "nonsensical" to think that the FCC would countenance additional new UNE-P arrangements while at the same time providing a discrete time period for CLECs to transition off their existing customer base. According to SBC, the fact that the TRO Remand Order took effect on March 11, 2005 and is "self-effectuating," TRO Remand Order ¶ 3, justifies its unilateral action.

***6** Although the court agrees that the TRO Remand Order does not require ILECs to engage in protracted negotiations simply to stop doing what the FCC has said they are no longer required to do, the court is troubled by SBC's view that it can alter the partes' arrangements unilaterally and without meaningful notice. Unlike Paragraph 227, Paragraph 233 of the TRO Remand Order does not address only existing customers. Rather, it falls under the general heading of "Implementation of Unbundling Decisions" and mandates that the parties "negotiate in good faith regarding *any* rates, terms, and conditions necessary to implement" the rule changes. This requirement presumably would include the substantially increased rate SBC now wishes to charge the CLECs seeking access to SBC's switches. SBC has denied that its actions constitute bad faith because: 1) many of the Competing Carriers participated in the "rulemaking" that resulted in the TRO Remand Order; 2) it issued the "Accessible Letters" a month before it intended to stop provision of UNE-P; 3) it filed a petition with the ICC and "served notice on a host of [common] carriers"; and 4) it served notice on interested competitors that it was bringing the present action and did not oppose their motions to intervene. SBC Competing Carrier Reply Mem. at 9. To the extent that Paragraph 233 of the TRO Remand Order requires good faith negotiations, the court does not see how any these activities qualify.

The March 23, 2005 ICC "Amendatory Order," submitted by SBC as supplemental authority for the proposition that SBC is no longer required under the federal Act to provide UNE-P to new CLEC customers as of March 11, is not to the contrary. *See Cbeyond Communications, LLP v. Ill. Bell. Tel. Co.,* No. 05- 0154 (Ill. Comm. Comm'n Mar. 23, 2005). In fact, that decision specifically recognized that the TRO Remand Order contemplates implementation of the new federal framework through negotiation rather than unilateral action. *Id.* at 6 ("[The Complainant CLECs] have presented a fair question of whether the use of the unilateral Accessible Letters ... to modify the terms under which the parties presently transact business is authorized by the [TRO Remand Order]. Indeed, our preliminary conclusion is that the [TRO Remand Order] does not permit such self help.") Perhaps, as SBC suggests, it would be futile for the parties to sit down and negotiate as long as the preemption question has not been definitively resolved, but in this court's view that speculation does not excuse SBC from complying with the negotiation process. Paragraph 233 of the TRO Remand Order mandates that "the parties to the negotiating process will not unreasonably dely implementation of the conclusions adopted in this Order," strongly implying that the FCC envisioned negotiations as a predicate to implementation of the TRO Remand Order's requirements. Indeed, at least one of the Competing Carriers already has pledged that it will negotiate and implement the law changes "expeditiously and smoothly." In short, the Paragraph 233 negotiation provisions weaken SBC's claim that immediate injunctive relief is required to implement the TRO Remand Order.

C. Irreparable Harm/Adequate Legal Remedy.

***7** SBC urges that failure to enjoin the ICC's order will result in irreparable harm to the competitive marketplace and "frustrate the will of Congress and the FCC." Additionally, SBC maintains that it will continue to lose customers to CLECs who compete with SBC by reselling access to SBC's technology to consumers on terms no longer sanctioned by the

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FCC, citing *Merrill Lynch v. Salvano,* 999 F.2d 211, 215 (7th Cir.1993) (upholding finding that solicitation and loss of clients "is a harm for which there is no adequate legal remedy"). Although the court recognizes that there is some disagreement as to when loss of customers constitutes irreparable harm, *see, e.g., Central & S. Motor Freight Tariff Ass'n v. United States,* 757 F.2d 301, 309 (D.C.Cir.1985) ("revenues and customers lost to competition which can be regained through competition are not irreparable"), the court agrees with SBC that it will suffer irreparable harm because, even if its losses are quantifiable, there is no entity against which SBC could recover money damages. *Accord Iowa Utils. Bd. v. FCC,* 109 F.3d 418, 426 (8th Cir.1996) ("threat of unrecoverable economic loss ... does qualify as irreparable harm"). The court therefore finds that SBC has demonstrated irreparable harm.

D. Balance of Harms and Public Interest.

The Competing Carriers echo SBC's argument that loss of customers and goodwill amounts to irreparable injury. However, the Competing Carriers draw the distinction that, if the preliminary injunction is denied, public perception of SBC's competence will remain largely unchanged, while if the preliminary injunction is granted, the Competing Carriers will be forced to turn away potential new customers and will be unable to service existing customers insofar as they require new or additional services. As SBC's own Accessible Letters indicate, SBC intends to reject requests from the Competing Carriers to add new telephone lines to existing accounts (apparently a common request for small businesses served by UNE-P) or move local phone service to Competing Carriers' customers' new homes if they change addresses. The court agrees that the Competing Carriers have a legitimate apprehension that, if SBC's requested injunction is granted, their ability to service new customers, as well as their ability to address the needs of existing customers for normal and routine modifications of service, will be significantly impaired. Additionally, the Competing Carriers argue that if SBC is permitted to carry out its plan immediately to cut off their access to mass market local circuit switching, their relationships with large businesses could also be severely negatively impacted, because those businesses' satellite offices often are served via UNE-P. Thus, the Competing Carriers face serious reputational injury which, in some cases, could be of fatal proportions.

The court agrees with the Competing Carriers that the loss of goodwill they face if SBC's requested injunction is granted is likely to be far more devastating than anything SBC faces if its requested injunction is denied. SBC may continue to lose customers and revenue to competition if it is required to provide UNE-P during the pendency of this litigation, but if the preliminary injunction issues, the Competing Carriers run a very real risk of being rendered incompetent, and perceived as being so, since they will be unable to deliver some of the basic services they are in business to provide. SBC counters that the Competing Carriers in fact have acted incompetently, or at least improvidently, by failing to plan after *USTA II* and subsequent FCC statements intimated that the end of the federal UNE-P requirement was near. But the federal regulatory framework has not been a model of clarity. As SBC itself notes, CLECs have been able to obtain UNE-P under every prior applicable FCC rule. On this record, it is hardly clear that the Competing Carriers' decision to wait for the ICC's determination of ILEC obligations in light of new federal law was unreasonable. The balance of harms strongly favors the Competing Carriers in this case.

***8** Finally, the court considers the effect of SBC's requested relief on the public interest. SBC argues that the public interest is best served by providing relief that effectuates the "national policy" of eliminating mandated unbundled mass market switching. Granted, there is a strong public interest in providing the Illinois consumer with the technical innovation and competition which the FCC has predicted will result from the elimination of mandated unbundled switching. But SBC's requested relief would allow it, without meaningful notice and without meaningful negotiation, to cut off the Competing Carriers' access to what for them, at least in the short term, is an important resource. The innovation and competition which the FCC hoped to promote, and the public interest served thereby, will not be promoted if SBC is permitted to use the FCC order to cut off its competitors' legs overnight. [FN5]

FN5. SBC does not dispute the Competing Carriers' contention that at least some of SBC's sister ILECs have chosen to continue to provide UNE-P beyond the March 11 deadline. Moreover, a district court in Michigan recently granted a preliminary injunction in favor of a CLEC preventing SBC Michigan from refusing to provide UNE-P. *See Order Granting Preliminary Injunction, MCIMetro Access Transmission Serv. LLC v. Mich. Bell Tel. Co.,* No. 05-

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70885 (E.D.Mich. Mar. 11, 2005). The parties in that case settled before the judge could issue his formal written opinion, thus mooting the preliminary injunction. However, the fact remains that despite the March 11 effective date of the TRO Remand Order, UNE-P will still be provided in some places by ILECs for some period of time.

Moreover, if the requested preliminary injunction issues, there will be an immediate negative impact on individuals and small business owners currently doing business with the Competing Carriers. CLEC customers who want to add additional telephone or fax lines will be forced to change providers or deal with two providers simultaneously, and customers who move will be forced to switch their local telephone service provider entirely. Saddling the public with these transaction costs in order to permit SBC to take unilateral and immediate action, which may not have been what the FCC contemplated, is contrary to the public interest.

This court has no intention of delaying the resolution of this case. As long as this case moves expeditiously toward a resolution on the merits, neither the balance of harms, nor the public interest, favors SBC. Rather, both the balance of harms and the public interest favor the maintenance of the status quo, as long as the issues raised by SBC are resolved in an orderly fashion through negotiations, before the ICC, before the FCC, or by this court.

III. CONCLUSION

Although the court concludes that likelihood of success on the preemption question favors SBC, the case for the allowance of unilateral and immediate cessation of SBC's provision of UNE-P to the Competing Carriers is far weaker. The court further finds that while denial of preliminary relief threatens some harm to SBC, the threat of irreparable injury to the Competing Carriers if an injunction is granted is incomparably greater. Moreover, the court finds that as long as this case can move forward at an efficient pace, the public interest favors maintenance of the status quo and argues against the entry of an injunction. SBC's motion for a preliminary injunction is denied.

2005 WL 735968 (N.D.Ill.)

Motions, Pleadings and Filings (Back to top)

- 1:05CV01149 (Docket) (Feb. 25, 2005)

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MAR 11 2005
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U. S. DISTRICT COURT
EASTERN MICHIGAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN

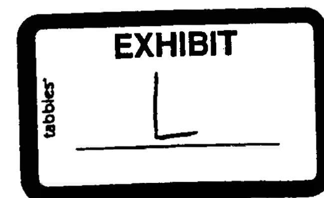
MCIMETRO ACCESS TRANSMISSION SERVICES LLC,	)	
Plaintiff,	)	
v.	)	Civil Action No. 05-70885
	)	Hon. Arthur J. Tarnow
MICHIGAN BELL TELEPHONE COMPANY, d/b/a SBC MICHIGAN,	)	Magistrate Judge Pepe
Defendant.	)	

ORDER GRANTING PRELIMINARY INJUNCTION

Before the Court is the Motion for a Temporary Restraining Order and Preliminary Injunction filed on March 8, 2005 by plaintiff MCImetro Access Transmission Services LLC's ("MCI"). MCI's Motion seeks a preliminary injunction against defendant Michigan Bell Telephone Company, d/b/a SBC Michigan ("SBC"). The Court, having reviewed MCI's Motion and supporting papers and SBC's response in opposition, and having heard argument from both MCI and SBC on MCI's Motion on March 11, 2005, hereby **ORDERS** as follows:

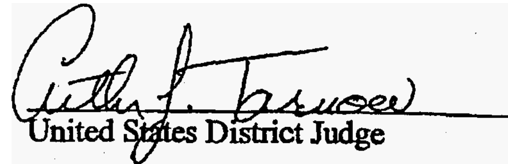
IT IS HEREBY ORDERED THAT MCI's motion is **GRANTED**, and :

(1) SBC, as well as its agents, successors, assigns, and all those acting in concert with them, are hereby **ENJOINED**, pending further Order of this Court, from rejecting orders placed by MCI to establish telephone service for new MCI customers in Michigan using the services set forth in Appendix XXIII (the "UNE" Appendix) including but not limited to "NEW UNE-P" as set forth in section 16.5 of the UNE Appendix, under the terms and conditions set forth in the parties' interconnection agreement;

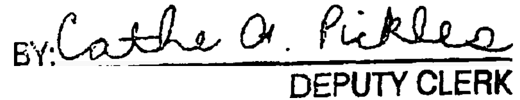


(2) The Court will issue a written opinion setting forth specific findings regarding the preliminary injunction factors forthwith.

IT IS SO ORDERED THIS 11TH DAY OF MARCH, 2005, 11:55 p.m.



United States District Judge



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CLERK, U.S. DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
BY: Cathe A. Pickles
DEPUTY CLERK

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

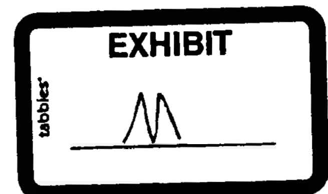
PETITION OF BELLSOUTH TELECOMMUNICATIONS, INC. TO ESTABLISH GENERIC DOCKET TO CONSIDER AMENDMENTS TO INTERCONNECTION AGREEMENTS RESULTING FROM CHANGES OF LAW	))))))	CASE NO. 2004-00427

O R D E R

On February 28, 2005, Cinergy Communications Corp. ("Cinergy"), a competitive local exchange carrier ("CLEC"), filed a complaint and motion for emergency order preserving status quo. On March 1, 2005, the Commission required BellSouth Telecommunications, Inc. ("BellSouth") to satisfy the complaint or file a written response thereto by no later than March 7, 2005. BellSouth has timely responded to the complaint.

On March 7, 2005, AmeriMex Communications Corp. ("AmeriMex"), another CLEC, filed an emergency petition addressing the same issues as those addressed in Cinergy's complaint. The Commission, on its own motion, incorporated AmeriMex's petition into this docket and required BellSouth to respond as if to a formal complaint. On March 8, 2005, BellSouth responded to Amerimex.

The CLECs assert that despite BellSouth's carrier notification indicating to the contrary, BellSouth must continue to accept unbundled network element orders until it and the CLECs have completed their negotiations required by change of law provisions in their currently effective interconnection agreements. The matters complained of



arose on February 11, 2005 with BellSouth's notification to CLECs that it intended to discontinue providing certain unbundled network elements pursuant to its understanding of the Federal Communications Commission ("FCC") Triennial Review Remand Order.[1] BellSouth asserts that the plain reading of the Triennial Review Remand Order authorizes it to cease providing certain unbundled network elements as of March 11, 2005, the FCC's designated effective date for its order.

The Commission, having considered the emergency petitions and BellSouth's responses thereto, and having been otherwise sufficiently advised, finds that a change of law within the meaning of the existing effective contract terms between BellSouth and these CLEC carriers has occurred. Because these contracts are in effect, BellSouth must follow the contract language to change its interconnection agreements. Nothing in the Triennial Review Remand Order justifies an immediate change without the parties having an opportunity to negotiate a new contract. In fact, the FCC contemplates negotiated changes to these contracts:

> 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.[2]

---

[1] Triennial Review Remand Order, Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carrier, FCC 04-290(Feb. 4, 2005)

[2] *Id.* at ¶ 233 (footnotes omitted)

IT IS THEREFORE ORDERED that:

1. BellSouth shall follow its contractual obligation to negotiate the effect of changes of law on its interconnection agreements regarding the discontinuation of unbundled network elements.

2. By no later than April 15, 2005, the parties shall apprise the Commission, in writing, of the status of their negotiations, if they have not previously submitted negotiated agreements addressing these issues.

3. Issues not addressed herein shall remain pending in this docket.

Done at Frankfort, Kentucky, this 10th day of March, 2005.

By the Commission

Commissioner W. Gregory Coker did not participate in the deliberations or decision concerning this case.

ATTEST:

Executive Director

DOCKET NO. 28821

ARBITRATION OF NON-COSTING ISSUES FOR SUCCESSOR INTERCONNECTION AGREEMENTS TO THE TEXAS 271 AGREEMENT	§ § § §	PUBLIC UTILITY COMMISSION OF TEXAS

ORDER NO. 39
ISSUING INTERIM AGREEMENT AMENDMENT

Upon consideration of the parties' filings and discussion at the February 24, 2005, Open Meeting, and the expiration of the Texas 271 Agreement (T2A) and T2A-based interconnection agreements between Southwestern Bell Telephone, L.P. d/b/a SBC Texas (SBC Texas) and competitive local exchange carriers (CLECs), the Public Utility Commission of Texas (Commission or PUC) issues the attached interim agreement amendment to govern parties' contractual relationships for the period of March 1 through July 31, 2005.[1] In issuing this interim agreement amendment, the Commission finds it necessary to act to prevent a lapse in the parties' contracts that could affect telecommunications services to end-user customers pending the completion of this docket.

The PUC seeks to ensure that the aforementioned expired agreements are made current to reflect recent changes in law under the Federal Communications Commission's (FCC) *Triennial Review Order* (TRO)[2] and *Triennial Review Remand Order* (TRRO).[3] The attached interim agreement amendment represents the Commission's preliminary determinations of the impacts of the TRO and TRRO. Parties are not precluded from arguing the merits of these issues in Track II of this proceeding and as appropriate, requesting relief, including, but not limited to, seeking true-up.

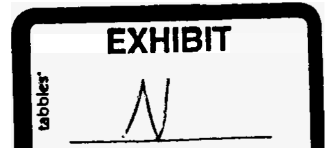
SBC Texas is directed to issue the attached interim agreement amendment through an Accessible Letter to all CLECs operating under the T2A, T2A-based interconnection agreements, or the contract developed in Docket No. 24542 no later than March 4, 2005. SBC Texas is further ordered to post this interim agreement amendment in a conspicuous location on its CLEC website, with appropriate links.

---

[1] The deadline of July 31, 2005 is the date under the current proposed procedural schedule by which parties expect to have completed this docket and have replacement contracts in place.

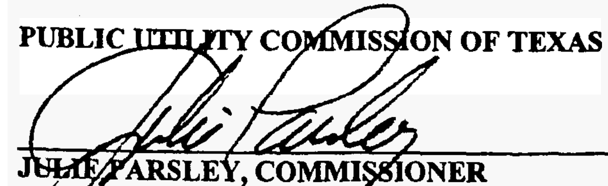
[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competitive Provisions of the Telecommunications Act of 1996,* and *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-388, 96-98, 98-147, Order, FCC 03-36 (Aug. 21, 2003) (*Triennial Review Order*).

[3] *Unbundled Access to Network Elements* and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 01-388 and CC Docket No. 01-388, Order on Remand, FCC 04-290 (Feb. 4, 2005) (*Triennial Review Remand Order*).



SIGNED AT AUSTIN, TEXAS the 25th day of February 2005.

PUBLIC UTILITY COMMISSION OF TEXAS



JULIE PARSLEY, COMMISSIONER

PAUL HUDSON, CHAIRMAN

BARRY T. SMITHERMAN, COMMISSIONER

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INTERIM AGREEMENT AMENDMENT WITH UNE CONFORMING LANGUAGE TO INTERCONNECTION AGREEMENT - TEXAS

This Interim Agreement Amendment with UNE Conforming Language is to the approved Interconnection Agreement entered into by and between Southwestern Bell Telephone, L.P. d/b/a SBC Texas ("SBC Texas") and CLEC NAME ("CLEC").

WHEREAS, the original Agreement modified by way of this Amendment is the result of CLEC's decision to opt into the Texas 271 Agreement ("T2A") or parts thereof pursuant to Order 55 in Project 16251 dated October 13, 1999, or as a result of the Final Order issued in Docket No. 24542, as such Agreement may have been modified from time to time, and to the extent the original Agreement was only a partial election by CLEC to opt into the T2A, such Agreement may also include certain voluntarily negotiated or arbitrated appendices/provisions (hereinafter collectively "the T2A Agreement"); and

WHEREAS, the T2A Agreement expired October 13, 2003; and

WHEREAS, on April 11, 2003, SBC Texas delivered to CLEC a timely request to negotiate a successor agreement to CLEC's T2A Agreement ("Notice to Negotiate"); and

WHEREAS, Section 4.2 of CLEC's T2A Agreement provides that if either party has served a Notice to Negotiate then, notwithstanding the expiration of the T2A Agreement on October 13, 2003, the terms, conditions and prices of the T2A Agreement will remain in effect for a maximum period of 135 days after such expiration for completion of negotiations and any necessary arbitration; and

WHEREAS, a series of extensions of the T2A have occurred, and the termination of the T2A occurred as of February 17, 2005; and

WHEREAS, on January 23, 2004, SBC Texas filed its Omnibus Petition for Arbitration in Docket No. 28821 against all Texas CLECs with interconnection agreements originally expiring on October 13, 2003. Additionally, also on January 23, 2004, separate petitions of arbitration were filed against SBC Texas by the following CLECs: Stratos Telecom, Inc., Comcast Phone of Texas, LLC, Heritage Technologies, Ltd., FamilyTel of Texas, LLC and Navigator Telecommunications, LLC; Birch Telecom of Texas Ltd. L.L.P. and Ionex Communications South, Inc; CLEC Joint Petitioners; MCImetro Access Transmission Services, LLC, MCI Worldcom Communications and Brooks Fiber Communications of Texas, Inc.; Sage Telecom of Texas, L.P.; AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications Houston, Inc.; and CLEC Coalition.

WHEREAS, it appears that a successor interconnection agreement will not be approved in the Arbitration until after February 17, 2005, the termination date of CLEC's T2A Agreement; and

WHEREAS, pursuant to Order No. 34 in Docket No. 28821 and the Texas Public Utility Commission's 2/10/05 ruling extending the effective date of the T2A from 2/17/05 to 2/28/05, the Texas PUC has ordered extension of the term of CLEC's T2A agreement beyond the termination date of February 17, 2005 to February 28, 2005, and has instructed the parties to create an amendment to incorporate its decision on TRO elements Order Addressing Threshold Issues dated April 19, 2004 and Order Addressing Motion for Reconsideration of Threshold Issues dated August 18, 2004 in Docket No. 28821, along with the transition periods/pricing from the FCC's TRO Remand Order, released February 4, 2005, and scheduled to become effective March 11, 2005. The Texas PUC has stated that the amendment will, along with the CLEC's T2A agreement, Attachments 6-10, and the Arbitration Award on Track One Issues in Docket No. 28821, and the Texas UNE Rate Amendment resulting from the September 9, 2004 Revised

Arbitration Award in Docket No. 28600, govern as an interim interconnection agreement approved by the Texas PUC during the period between the TPUC-established termination of the T2A Agreement (i.e., February 28, 2005) and the earlier of: (i) the date a successor agreement between SBC Texas and CLEC is approved or is deemed to have been approved by the Texas PUC; or (ii) July 31, 2005; and

WHEREAS, the interim agreement will automatically terminate the earlier of: (i) the date a successor agreement between SBC Texas and CLEC is approved or is deemed to have been approved by the TPUC; or (ii) July 31, 2005; and full intervening law rights are available to both parties under the interim agreement notwithstanding any language in CLEC's T2A Agreement, Attachments 6-10 to the contrary;

NOW, THEREFORE, in consideration of the foregoing, and the promises and mutual agreements set forth herein, and to facilitate the orderly progress of the Arbitration to conclusion, the T2A Agreement is hereby amended, as follows, to be effective only on an interim basis, for the purposes herein expressed, and for a finite, interim term to expire the earlier of (i) the date a successor agreement between SBC and CLEC is approved or is deemed to have been approved by the TPUC; or (ii) July 31, 2005; and to make full intervening law rights available to both parties:

1. The Whereas clauses contained herein are incorporated into this Agreement.

2. The title of the T2A Agreement is hereby changed to "Interim Interconnection Agreement – Texas." All internal references to the "Agreement" are hereby changed to "Interim Agreement."

3. Sections 4.1, including Sections 4.1.1 and 4.1.2, Sections 4.2, 4.2.1 and 4.3 of the General Terms and Conditions of the Agreement are hereby deleted in their entirety and replaced with the following:

4.1 **Effective Date and Expiration/Termination.** The Interim Agreement shall be deemed effective following approval by the TPUC and commencing on the TPUC-established termination of the T2A Agreement February 28, 2005, and shall terminate, without any further action on the part of either Party, the earlier of:

4.1.1 The effective date of approval by the TPUC of a successor agreement to the T2A or partial-T2A Agreement(s) in the above referenced Arbitration; or

4.1.2 The date a successor agreement between SBC and CLEC is approved or is deemed to have been approved by the TPUC; or

4.1.3 The effective date of a written and signed agreement between the parties that the Interim Agreement is terminated; or

4.1.4 A proper request by CLEC that the Interim Agreement be terminated (subject to CLEC's post-termination obligations, such as CLEC's payment obligation(s) and the other obligations set forth in Section 44.0 "Survival of Obligations" of the General Terms and Conditions); or

4.1.5 Termination for any other reason, such as non-payment (as set forth in Section 10 of the General Terms and Conditions), subject to CLEC's post-termination obligations, such as CLEC's payment obligation(s) and the other obligations set forth in Section 44.0 "Survival of Obligations" of the General Terms and Conditions; or

4.1.6 July 31, 2005.

4. Sections 2.0 and 2.1 ("Effective Date") of the General Terms and Conditions of the Agreement are deleted in their entirety.

5. Nothing in this Agreement is to be interpreted as an agreement by SBC Texas to an extension of the T2A or any Section 271 obligations. The Interim Agreement, notwithstanding any provision to the contrary, is not based upon the same consideration or conditions as the T2A Agreement, and, regardless of when this Amendment is executed or effective, it shall not have the effect of extending the T2A Agreement, even if the

Agreement contained or contains, in whole or in part, provisions identical or substantially similar to provisions contained in the T2A Agreement. Any issues relating to Section 271 and any disputed issues with respect to language in the preamble to the underlying Agreement will be addressed in the proceedings related to the Parties' successor Interconnection Agreement, and the parties reserve their rights to all arguments related to the disposition of such issues.

6. Sections 1.3, 18.2, 18.3, and 30.2 of the General Terms and Conditions of the Agreement are hereby deleted in their entirety, and replaced with the following:

2.0 Intervening Law

2.1 In entering into this Amendment and Interim Agreement, neither Party is waiving, and each Party hereby expressly reserves, any of the rights, remedies or arguments it may have at law or under the intervening law or regulatory change provisions in the underlying Agreement (including intervening law rights asserted by either Party via written notice predating this Amendment) with respect to any orders, decisions, legislation or proceedings and any remands thereof, including, without limitation, the following actions, which the Parties have not yet fully incorporated into this Agreement or which may be the subject of further review: *Verizon v. FCC, et. al*, 535 U.S. 467 (2002); *USTA, et. al* v. FCC, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*") and following remand and appeal, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"); the FCC's 2003 Triennial Review Order and 2005 Triennial Review Remand Order; and the FCC's Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, 16 FCC Rcd 9151 (2001), (rel. April 27, 2001), which was remanded in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

7. Sections 14.1, 14.5, and 14.8 of Attachment 6: Unbundled Network Elements are hereby deleted and Section 1.0 ("Introduction") of Attachment 6: Unbundled Network Elements of the Agreement is hereby deleted and replaced with the following:

1.0 Declassified Network Elements No Longer Required

1.1 TRO-Declassified Elements. Notwithstanding anything in this Interim Agreement, pursuant to the *TRO* and to the decision in *USTA II*, except as provided in Paragraph 3.0 below, nothing in this Interim Agreement requires SBC Texas to provide to CLEC any of the following items as an unbundled network element, either alone or in combination (whether new, existing, or pre-existing) with any other element, service or functionality: (i) entrance facilities; (ii) OCn dedicated transport; (iii) "enterprise market" local circuit switching for DS1 and higher capacity switching; (iv) OCn loops; (v) the feeder portion of the loop; (vi) any call-related database (other than the 911 and E911 databases), that is not provisioned in connection with CLEC's use of embedded base SBC Texas unbundled local circuit switching (as provided in Section 1.3, below); (vii) Operator Services and Directory Assistance that is not provisioned in connection with CLEC's use of embedded base SBC Texas unbundled local circuit switching (as provided in Section 1.3 below); (viii) Shared Transport and SS7 signaling that is not provisioned in connection with CLEC's use of embedded base SBC Texas unbundled local circuit switching (as provided in Section 1.3 below); (ix) packet switching, including routers and DSLAMs; (x) the packetized bandwidth, features, functions, capabilities, electronics and other equipment used to transmit packetized information over hybrid loops (as defined in 47 C.F.R. § 51.319(a)(2)), including without limitation, xDSL-capable line cards installed in digital loop carrier ("DLC") systems or equipment used to provide passive optical networking ("PON") capabilities; (xi) fiber-to-the-home Loops and fiber-to-the-curb Loops (as defined in 47 C.F.R. § 51.319(a)(3)) ("FTTH Loops" and "FTTC Loops"), except to the extent that SBC Texas has deployed such fiber in parallel to, or in replacement of, an existing copper loop facility and elects to retire the copper loop, in which case SBC Texas will provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the FTTH Loop or

FTTC Loop on an unbundled basis to the extent required by terms and conditions in the Agreement.

1.1.1 SBC Texas will provide written notice to CLEC of its intention to discontinue the provision of one or more of the TRO-Declassified Elements identified in Section 1.1, above under the Agreement. During a transitional period of thirty (30) days from the date of such notice, SBC Texas agrees to continue providing such TRO-Declassified Elements under the terms of the Agreement, to the extent required by the Agreement.

1.1.1.1 Upon receipt of such written notice, CLEC will cease new orders for such network element(s) that are identified in the SBC Texas notice letter. SBC Texas reserves the right to monitor, review, and/or reject CLEC orders transmitted to SBC Texas and, to the extent that the CLEC has submitted orders and such orders are provisioned after this 30-day transitional period, such network elements are still subject to this Paragraph Section 1, including the CLEC options set forth in subparagraph 1.1.1.1.1 below, and SBC Texas's right of conversion in the event the CLEC options are not accomplished by the end of the 30-day transitional period.

1.1.1.1.1 During such 30-day transitional period, the following options are available to CLEC with regard to the network element(s) identified in the SBC Texas notice, including the combination or other arrangement in which the network element(s) were previously provided:

(i) CLEC may issue an LSR or ASR, as applicable, to seek disconnection or other discontinuance of the network element(s) and/or the combination or other arrangement in which the element(s) were previously provided; or

(ii) SBC Texas and CLEC may agree upon another service arrangement (e.g. via a separate agreement at market-based rates or resale), or may agree that an analogous resale service or access product or service may be substituted, if available.

Notwithstanding anything to the contrary in the Agreement, including any amendments to the Agreement, at the end of the thirty (30) day transitional period, unless CLEC has submitted a disconnect/discontinuance LSR or ASR, as applicable, under subparagraph (i), above, and if CLEC and SBC Texas have failed to reach agreement, under subparagraph (ii), above, as to a substitute service arrangement or element, then SBC Texas will convert the subject element(s), whether alone or in combination with or as part of any other arrangement to an analogous resale or access service or arrangement, if available, at rates applicable to such analogous service or arrangement.

1.2 <u>TRO Remand Order – Declassified High-Capacity Loop and Dedicated Transport Elements No Longer Required.</u> Notwithstanding anything in the Agreement, effective March 11, 2005, pursuant to Rule 51.319(a) and Rule 51.319(e) as set forth in the TRO Remand Order, the following high-capacity loop and dedicated transport elements are no longer required to be provided by SBC Texas on an unbundled basis under the Agreement, whether alone, in combination, or otherwise:

- Dark Fiber Loops;
- DS1 Loops or DS3 Loops in excess of the caps or to any building served by a wire center described in Rule 51.319(a)(4) or 51.319(a)(5), as set forth in the TRO Remand Order, as applicable;

- DS1 Dedicated Transport or DS3 Dedicated Transport in excess of the caps or between any pair of wire centers as described in Rule 51.319(e)(2)(ii) or 51.319(e)(2)(iii), as set forth in the TRO Remand Order, as applicable; and/or
- Dark Fiber Dedicated Transport, between any pair of wire centers as described in Rule 51.319(e)(2)(iv), as set forth in the TRO Remand Order.

The above-listed element(s) are referred to herein as the "Affected Loop-Transport Element(s)."

1.2.1 After March 11, 2005, pursuant to Rules 51.319(a) and (e), as set forth in the TRO Remand Order, SBC Texas shall continue to provide unbundled access to the Affected Loop-Transport Element(s) to CLEC, if and as provided by Attachment 6: UNE, only for CLEC to serve its embedded base. "Embedded base" shall refer only to Affected Loop-Transport Element(s) ordered by CLEC prior to March 11, 2005. The price for the embedded base Affected Loop-Transport Element(s) shall be the higher of (A) the rate CLEC paid for the embedded base Affected Loop-Transport Element(s) as of June 15, 2004 plus 15% or (B) the rate the state commission has established or establishes, if any, between June 16, 2004 and March 11, 2005 for the Affected Loop-Transport Element(s), plus 15%. CLEC shall be fully liable to SBC to pay such pricing under the Agreement, including applicable terms and conditions setting forth damages, interest, and/or late payment charges for failure to comply with payment terms, notwithstanding anything to the contrary in the underlying Agreement.

1.3 <u>TRO Remand Order – Mass Market ULS/UNE-P</u> – Notwithstanding anything in the underlying Agreement, effective March 11, 2005, pursuant to Rule 51.319(d) as set forth in the TRO Remand Order, Mass Market Local Circuit Switching, whether alone, in combination (as with UNE-P), or otherwise, is no longer required to be provided by SBC on an unbundled basis under the Agreement. Pursuant to the TRO Remand Order, "Mass Market" Local Circuit Switching means unbundled local circuit switching arrangements used to serve a customer at less than the DS1 capacity level (e.g. , 23 or fewer Local Circuit Switching DS0 ports or the equivalent switching capacity).

1.3.1 After March 11, 2005, pursuant to Rule 51.319(d)(2)(iii), as set forth in the TRO Remand Order, SBC shall continue to provide unbundled access to Mass Market Local Circuit Switching/UNE-P to CLEC, if and as provided by Attachment 6: UNE, only for CLEC to serve its embedded base. "Embedded base" shall refer only to Mass Market Local Circuit Switching/UNE-P ordered by CLEC prior to March 11, 2005. The price for the embedded base Mass Market Local Circuit Switching/UNE-P shall be the higher of (A) the rate CLEC paid for the embedded base Mass Market Local Circuit Switching/UNE-P as of June 15, 2004 *plus one dollar* or (B) the rate the state commission has established or establishes, if any, between June 16, 2004 and March 11, 2005 for the Mass Market Local Circuit Switching/UNE-P, *plus one dollar*. CLEC shall be fully liable to SBC to pay such pricing under the Agreement, including applicable terms and conditions setting forth damages, interest, and/or late payment charges for failure to comply with payment terms, notwithstanding anything to the contrary in the underlying Agreement.

1.3.2 Consistent with Paragraphs 199 and 216 of the TRO Remand Order, which recognize that CLECs must have time to transition their embedded customer-base that is served using Mass-Market Local Circuit Switching and UNE-P combinations to other facilities, including self-deployed switching and UNE loops, CLEC shall not be prohibited from ordering and SBC shall provision (i) additional UNE-P access lines to serve CLEC's embedded

customer-base and (ii) moves and changes in UNE-P access lines to serve CLEC's embedded customer-base during the time that this Amendment is in effect.

1.4 Consistent with Paragraph 100 of the TRO Remand Order, CLEC shall have the right to verify and challenge SBC's identification of fiber-based collocation arrangements in the listed Tier 1 and Tier 2 wire centers as part of Track 2 of the Arbitration.

1.4.1 If the PUC determines that SBC's identification of fiber-based collocation arrangements is in error and if the correction of such error results in change to one or more wire center's classification as a Tier 1 or Tier 2 wire center, the rates paid by CLEC for High-Capacity Loops and Transport shall be subject to true-up.

1.5 Consistent with Paragraph 234 of the TRO Remand Order, and recognizing that the designation of wire centers as Tier 1 and Tier 2 is dependent on facts not within CLEC's knowledge or control, CLEC shall undertake a reasonably diligent inquiry and shall self-certify, based on that inquiry, that its request for a High-Capacity Loop and/or Transport is consistent with the requirements of the TRO Remand Order. SBC shall provision the requested High-Capacity Loop and/or Transport according to standard provisioning intervals and only after provisioning may it challenge CLEC's ability to obtain the High-Capacity Loop and/or Transport.

1.5.1 If it is subsequently determined that the CLEC's request for a High-Capacity Loop and/or Transport is inconsistent with the requirements of the TRO Remand Order, the rates paid by CLEC for High-Capacity Loops and Transport shall be subject to true-up.

1.5.2 Consistent with footnote 524 of the TRO Remand Order, High-Capacity Loops no longer subject to unbundling under Section 251, shall be subject to true-up to the applicable transition rate.

1.6 Consistent with Paragraph 133 of the TRO Remand Order, CLEC shall have the right to retain and obtain dark fiber transport as an unbundled network element under Section 251 only on routes for which the wire center on one end is neither Tier 1 nor Tier 2.

1.7 CONVERSIONS: CLEC shall have the right to order and SBC shall provision conversions of special access services to UNEs and UNE Combinations during the time this Amendment is in effect; provided however, that CLEC (1) satisfies the tests set out in Paragraphs 591 through 599 of the TRO and (2) the UNE or the UNE Combination requested is not subject to any of the transition plans identified in the TRO Remand Order. That is, CLEC may not seek to request the conversion of a special access circuit to a UNE or UNE combination unless the UNE itself or each of the UNEs sought to be combined is ordered to be provided on an unbundled basis in the TRO Remand Order.

1.8 COMMINGLED ARRANGEMENTS: CLEC shall have the right to order and SBC shall provision the following commingled arrangements consisting of the following High-Capacity Loops and Transport required to be unbundled under Section 251 or subject to the transition plan set out in the TRRO:

(a) UNE DS1 loop connected to:

(1) a commingled wholesale/special access 3/1 mux and DS3 or higher capacity interoffice transport;[1]

(2) a UNE DS1 transport which is then connected to a commingled wholesale/special access 3/1 mux and DS3 or higher capacity interoffice transport;

(3) a commingled wholesale/special access DS1 transport.

(b) UNE DS1 transport connected to:

(1) a commingled wholesale/special access 3/1 mux and DS3 or higher capacity interoffice transport.

(c) UNE DS3 transport connect to:

(1) a commingled wholesale/special access higher capacity interoffice transport.

1.8.1 SBC and CLEC shall establish and agree to a manual ordering process for the commingled arrangements identified in 1.6 above no later than 10 business days following the effective date of this Amendment. Commingled arrangements ordered by CLEC using the agreed-upon manual ordering process shall be provisioned within the provisioning intervals already established by SBC for the wholesale service(s) with which CLEC requests a UNE be commingled.

1.8.2 SBC shall charge the rates for UNEs (or UNE combinations) that are commingled with facilities or service obtained at wholesale (including, for example, special access services) on an element-by-element basis, and such wholesale facilities and services on a facility-by-facility, service-by-service basis.

1.8.3 The Parties agree that the list of commingled arrangements identified in 1.6 above is not a complete list of all commingled arrangements that ultimately may be made available to CLEC following the conclusion of Track 2 of the Arbitration. The Parties' disputes regarding the availability of other commingled arrangements as well as the process and procedures for ordering commingled arrangements are part of Track 2 of the Arbitration.

8. TO THE EXTENT THE UNDERLYING AGREEMENT INCLUDES LINE SHARING PROVISIONS INCLUDE THE FOLLOWING: The following provisions are hereby added to the Agreement specific to the High Frequency Portion of the Loop" ("HFPL"):

Grandfathered and New End-Users: SBC Texas will continue to provide access to the HFPL, where: (i) prior to October 2, 2003, CLEC began providing DSL service to a particular end-user customer and has not ceased providing DSL service to that customer ("Grandfathered End-Users"); and/or (ii) CLEC begins/began providing xDSL service to a particular end-user customer on or after October 2, 2003, and on or before the close of business December 3, 2004 ("New End-Users"). Such access to the HFPL shall be provided at the same monthly recurring rate that SBC Texas charged prior to October 2, 2003 and shall continue for Grandfathered End-Users until the earlier of: (1) CLEC's xDSL-base service to the end-user customer is disconnected for whatever reason, or (2) the FCC issues its Order in its Biennial Review Proceeding or any other relevant government action which modifies the FCC's HFPL grandfather clause established in its Triennial Review Order and as to New End-Users, the earlier of: (1) and (2) immediately above; or (3) October 2, 2006.

[1] "Higher capacity interoffice transport" must include any technology that is offered or made available with that transport on a regular or routine basis, e.g., SONET. This requirement applies to all references to "higher capacity interoffice transport" in this Section 1.6.

Beginning October 2, 2006, SBC Texas shall have no obligation to continue to provide the HFPL for CLEC to provide xDSL-based service to any New End-Users that CLEC began providing xDSL-based service to over the HFPL on or after October 2, 2003 and before December 3, 2004. Rather, effective October 2, 2006, CLEC must provide xDSL-based service to any such new end-user customer(s) via a line splitting arrangement, over a stand-alone xDSL Loop purchased from SBC Texas, or through an alternate arrangement, if any, that the Parties may negotiate. Any references to the HFPL being made available as an unbundled network element or "UNE" are hereby deleted from the underlying Agreement.

9. Except as prohibited or otherwise affected by the *Interim Order*, nothing in this Amendment shall affect the general application and effectiveness of the Interim Agreement's "change of law," "intervening law", "successor rates" and/or any other similar provisions and/or rights under the Interim Agreement. The rights and obligations set forth in this Amendment apply in addition to any other rights and obligations that may be created by such intervening law, change in law or other substantively similar provision.

10. This Amendment shall be deemed to revise the rates, terms and provisions of the Agreement, including without limitation all associated prices in the Agreement to the extent necessary to give effect to the terms and conditions of this Amendment. In the event of a conflict between the terms and conditions of this Amendment and the rates, terms and conditions of the Agreement, this Amendment shall govern. By way of example only, if the Agreement provides that a combination of UNEs must be provided by SBC Texas, CLEC may not obtain a combination including one or more elements affected by Section 1.0 "Declassified Elements No Longer Required," above. By way of additional example only, if the Agreement provides (or assumes) that a UNE must be provided by SBC Texas, elements affected by Section 1.0 "Declassified Elements No Longer Required" are, nonetheless, not required to be provided, except to the limited extent set forth in Section 1.0 "Elements No Longer Required" and in such case, any rates for Elements No Longer Required under the Agreement shall be deemed removed from the Pricing Schedule to the Agreement.

11. This Amendment may require that certain sections of the Agreement shall be replaced and/or modified by the provisions set forth in this Amendment including without limitation certain sections not explicitly identified in this Amendment. The Parties agree that such replacement and/or modification shall be accomplished without the necessity of physically removing and replacing or modifying such language throughout the Agreement. Rather, the Agreement shall automatically be deemed to be modified by way of this Amendment to the extent necessary to implement the provisions of this Amendment.

12. Nothing in this Amendment shall be deemed to affect the right of a Party to exercise any rights it may have under the Interim Agreement including, without limitation, its intervening law rights, any rights of termination, and/or any other rights available to either Party under the Interim Agreement.

13. Although it is not necessary to give effect to the terms and conditions of this Amendment, including pricing provisions, upon written request of either Party, the Parties may amend any and all Interim Agreement rates and/or pricing schedules to formally conform the Interim Agreement to reflect the terms and conditions of this Amendment.

14. Notwithstanding any contrary provision in the Interim Agreement, this Amendment, or any applicable SBC tariff, nothing contained in the Interim Agreement, this Amendment, or any applicable SBC tariff shall limit SBC Texas's right to appeal, seek reconsideration of or otherwise seek to have stayed, modified, reversed or invalidated any order, rule, regulation, decision, ordinance or statute issued by the Texas PUC, the FCC, any court or any other governmental authority related to, concerning, or that may affect SBC Texas's obligations under the Interim Agreement, this Amendment, any applicable SBC tariff, or applicable law.

15. PERFORMANCE MEASURES and REMEDY PLAN: The performance measures and the existing remedy plan contained in the T2A for ordering, provisioning and maintenance shall apply to all High-Capacity Loops and Transport, and all Mass-Market Switching/UNE-P access lines during the period in which this Amendment is effective.

16. In entering into this Amendment, neither Party is waiving, and each Party hereby expressly reserves, any of the rights, remedies or arguments it may have at law or under the intervening law or regulatory change provisions in the underlying Agreement (including intervening law rights asserted by either Party via written notice predating this Amendment) with respect to any orders, decisions, legislation or proceedings and any remands thereof, including, without limitation, the following actions, to the extent the Parties have not yet fully incorporated them into this Agreement or which may be the subject of further government review: *Verizon v. FCC, et. al*, 535 U.S. 467 (2002); *USTA, et. al* v. *FCC*, 290 F.3d 415 (D.C. Cir. 2002) and following remand and appeal, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004); the FCC's Triennial Review Order (rel. Aug. 21, 2003) including, without limitation, the FCC's MDU Reconsideration Order (FCC 04-191) (rel. Aug. 9, 2004) and the FCC's Order on Reconsideration (FCC 04-248) (rel. Oct. 18, 2004); the FCC's Triennial Review Remand Order (rel. Feb. 4, 2005), WC Docket No. 04-313; CC Docket No. 01-338; and the FCC's Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, 16 FCC Rcd 9151 (2001), (rel. April 27, 2001), which was remanded in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). The Parties further acknowledge and agree that this Amendment is to effectuate an Interim Agreement for a finite period of time to afford the Texas PUC and the Parties additional time to finalize a successor interconnection agreement based upon the provisions set forth herein. Therefore, the Parties acknowledge and agree that: (i) because this Amendment is to effectuate an Interim Agreement and not a final 251/252 Interconnection Agreement between the Parties; and (ii) effectively incorporates pricing changes into the Interim Agreement; and (iii) the Interim Agreement contains certain arbitrated provisions; and (iii) portions of the Interim Agreement are the result of CLEC's prior decision to opt into the T2A Agreement or parts thereof; that no aspect/provisions of this Interim Agreement qualify for portability into Illinois or any other state under 220 ILCS 5/13-801(b) ("Illinois Law"), Condition 27 of the Merger Order issued by the Illinois Commerce Commission in Docket No. 98-0555 ("Condition 27") or any other state or federal statute, regulation, order or legal obligation (collectively "Law"), if any.

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STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

Cbeyond Communications, LLP,	.	
Global TelData II, LLC f/k/a		
Global TelData, Inc.,		**05-0154**
Nuvox Communications of Illinois, Inc.		
and Talk America Inc.	:	
-vs-	:	
Illinois Bell Telephone Company	:	

ORDER GRANTING EMERGENCY RELIEF

By the Commission (through its Administrative Law Judge):

I. Procedural History

On March 7, 2005, Cbeyond Communications, LLP, Global TelData, Inc., Nuvox Communications of Illinois, Inc., and Talk America, Inc. ("Complainants"), filed this verified Complaint against Illinois Bell Telephone Company, d/b/a SBC Illinois ("SBC"), alleging that SBC is in violation of each of the following: its interconnection agreements ("ICAs") with each of the Complainants; its Illinois intrastate tariffs; Section 13-801 Illinois Public Utilities Act ("Illinois Act")[1]; the Commission's Order in Docket 01-0614; the Federal Communications Commission's ("FCC's") SBC/Ameritech Merger Order; provisions of the FCC's Triennial Review Remand Order ("TRRO")[2]; and Section 13-514[3] of the Illinois Act. Applicants contend that SBC has affronted these authorities by issuing Accessible Letters stating that, effective March 11, 2005, SBC will not accept new orders for certain unbundled network elements ("UNEs") and will increase certain UNE rates.

The Complaint also contains a request for emergency relief. The specific components of that request are set forth in Section III of this Ruling, below.

On March 8, 2005, SBC filed a Response in Opposition ("Response") to Complainants' request for emergency relief. SBC urges the Commission to deny that request in all respects.

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[1] 220 ILCS 5/13-801.

[2] Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313; CC Docket No. 01-338, Order on Remand, (released Feb. 4, 2005).

[3] 220 ILCS 5/13-514.

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II. The Complaint

As discussed above, the Complaint alleges violations of the parties' respective ICAs, the Illinois Act, SBC's Illinois tariffs, and Orders issued this Commission and the FCC. The Complaint seeks declaratory and injunctive relief with respect to these claims, as well as damages, costs and fees. Complainants also request the imposition of penalties on SBC. All of the purported violations arise from SBC's publication of Accessible Letters stating that SBC would not accept or process new orders for mass market switching, DS1, DS3 and dark fiber loops and dedicated DS1, DS3 and dark fiber transport.

Complainants aver that they have each satisfied the notice requirement in subsection 13-515(c) of the Illinois Act by sending letters to SBC on March 2 and 3, 2005, requesting that SBC correct certain conduct identified in that correspondence within 48 hours. Complaint, Ex. A. SBC apparently received that correspondence, as evidenced by electronic mail attached to the Complaint. *Id.*

III. Emergency Relief Requested

Complainants ask for emergency relief in the following manner: "Grant [Complainants] an emergency order pursuant to Section 13-515(e) of the [Illinois Act] as requested herein." The Commission assumes that this general request is associated with the following elements in the prayer for relief in the Complaint

> C. Order SBC Illinois to cease and desist from its breaching the terms of the current interconnection agreements between it and the individual Joint CLECs;
>
> ***
>
> E. Order SBC to cease and desist from violating Section 13-801(a), Section 13-801(d)(3) and Section 13-801(d)(4) of the Illinois Public Utilities Act;
>
> F. Order SBC to cease and desist from violating the Commissions findings in its Order in ICC Docket No. 01-0614;
>
> G. Order SBC to cease and desist from violating the provisions of its valid intrastate tariffs obligating SBC Illinois to provide unbundled access to network elements and combinations of network elements at the tariffed rates;
>
> H. Order SBC to cease and desist from violating the FCC's findings in the *SBC/Ameritech Merger Order*,

I. Order SBC to cease and desist from violating Sections 13-514(1), 13-514(2), 13-514(6), 13-514(8), 13-514(10), 13-514(11) and 13-514(12) of the Illinois Public Utilities Act;

J. Order SBC to cease and desist from any imposition of unreasonable obstacles or charges on the Joint CLECs attempts to commingle special access and UNEs.

IV. Applicable Statute

The law governing a request for emergency relief by a telecommunications provider is set forth in subsection 5/13-515(e) of the Illinois Act:

> If the alleged violation has a substantial adverse effect on the ability of the complainant to provide service to customers, the complainant may include in its complaint a request for an order for an order for emergency relief. The Commission, acting through its designated hearing examiner or arbitrator, shall act upon such a request within 2 business days of the filing of the complaint. An order for emergency relief may be granted, without an evidentiary hearing, upon a verified factual showing that the party seeking relief will likely succeed on the merits, that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and that the order is in the public interest. An order for emergency relief shall include a finding that the requirements of this subsection have been fulfilled and shall specify the directives that must be fulfilled by the respondent and deadlines for meeting those directives. The decision of the hearing examiner or arbitrator to grant or deny emergency relief shall be considered an order of the Commission unless the Commission enters its own order within 2 calendar days of the decision of the hearing examiner or arbitrator. The order for emergency relief may require the responding party to act or refrain from acting so as to protect the provision of competitive service offerings to customers. Any action required by an emergency relief order must be technically feasible and economically reasonable and the respondent must be given a reasonable period of time to comply with the order.

220 ILCS 5/13-515(e).

V. Commission Analysis and Conclusion

Initially, the Commission concludes that discontinuing the offering of certain UNEs meets the threshold requirement in subsection 13-515(e) that the conduct alleged in a complaint must have "a substantial adverse effect on the ability of the complainant to provide service to customers." As Complainants argue, the sudden inability to offer certain products to end-users may result in the loss of customers and difficulty in competing for new customers.

In the context of ruling Complainant's request for emergency relief, we find it necessary to consider only whether the Federal Communications Commission ("FCC"), in the TRRO, held that any changes to an existing ICA for the purpose of implementing the TRRO must be accomplished through the negotiation, mediation and arbitration procedures contained in Section 252 and the parties' respective ICAs. If that claim is correct, it follows that unilateral implementation by SBC, in the manner set forth in the pertinent Accessible Letters, ignores Section 252 and the ICAs and contravenes the TRRO.

A. The basis for emergency relief

Subsection 13-515(c) establishes three conditions for emergency relief: "[1] that the party seeking relief will likely succeed on the merits, [2] that the party will suffer irreparable harm in its ability to serve customers if emergency relief is not granted, and [3] that the order is in the public interest." The Commission has addressed these conditions in previous proceedings. Order Granting Emergency Relief, Docket 02-0443, July 8, 2002, ("Ameritech Emergency Relief Order"); Order Granting Emergency Relief, Docket 02-0160, Feb. 27, 2002, ("Z-Tel Emergency Relief Order").

Regarding the likelihood of success on the merits, a party seeking a preliminary injunction in the Illinois courts need not prove its entire case with respect to an asserted right. Instead, it is required only to show that it raises a "fair question" about the existence of that right and "that the trial court should preserve the status quo until the case can be decided on its merits." C.D. Peters Co. v. Tri-City Regional Port District, 281 Ill. App. 3d 41, 47, 216 Ill. Dec. 876, 880, 666 N.E. 2d 44, 48 (5th Dist. 1996). The Commission applied that standard in the Ameritech Emergency Relief Order and in the Z-Tel Emergency Relief Order.

In the TRRO, the FCC plainly stated that "carriers must implement changes to their [ICAs] consistent with our conclusions in this Order." TRRO, ¶233. Thus, there is no question that the parties here will have to revise their ICAs to reflect the FCC's current view of availability and pricing for the UNEs addressed in the TRRO. Accordingly, SBC's intention to transact business with Complainants in a manner that differs from certain substantive provisions of the parties' existing ICAs is supported by the TRRO. For purposes of emergency relief, however, the question is whether SBC can ignore certain terms of its ICAs *now*, without first altering the terms of those ICAs

through bilateral negotiations and, if needed, dispute resolution proceedings, with each Complainant. In other words, the dispositive issue is not whether the parties' ICAs and business dealings must change, but *how* such change must occur and *when* the parties can begin operating under revised terms.

For the purpose of resolving Complainants' emergency relief request, the Commission concludes that Complainants have, at a minimum, raised a fair question of whether the parties must conduct negotiations and, if necessary, utilize dispute resolution mechanisms *prior to* modifying their existing ICAs and transacting business in a manner inconsistent with those ICAs. The FCC flatly stated: "We expect that [ILECs] and competing carriers will implement the Commission's findings as directed by section 252 of the [Federal] Act." TRRO, ¶233. Section 252 contemplates bilateral negotiation and, when needed, arbitration or mediation. It does not contemplate unilateral action, either to alter an ICA or to transact business as if that ICA had already been altered.

SBC expresses considerable concern that negotiation and dispute resolution will result in delayed implementation of the FCC's TRRO directives, adversely affecting SBC. However, the FCC anticipated that some delay would inevitably occur in implementation. The familiar processes described in Section 252 inherently take time, and the FCC did nothing to compress those processes. Instead, it warned carriers to not "unreasonably" delay implementation of the TRRO and encouraged state commissions to guard against "unnecessary" delay. Had the FCC intended that ILECs would unilaterally alter the ground-rules in existing ICAs, and to immediately conduct business under modified terms – that is, if the FCC had intended to avert *any* delay in implementation - it would have said so. But it did not. It prescribed a bilateral process with built-in time requirements.

SBC also takes the position that its Accessible Letters "faithfully track" the TRRO's provisions and, therefore, must be viewed as simple implementation of "unambiguous and unconditional" requirements, not unilateral terms. Response at 7. In effect, SBC is claiming that there is nothing for the parties to negotiate (although SBC does acknowledge that ICA negotiations must take place, albeit while the parties transact business under SBCs new terms). The Commission disagrees, for several reasons.

First, for some of the UNEs involved here, the FCC established numerical impairment thresholds in the TRRO[4]. SBC's Accessible Letters provide no process for determining, or disputing, whether those thresholds have been reached.

Second, the TRRO provides that a CLEC may self-certify that it is entitled to unbundled access to certain UNEs. TRRO, ¶233. When that occurs, the ILEC "must immediately process the request" and utilize ICA dispute resolution mechanisms if it questions the CLEC's self-certification. *Id.* SBC's Accessible Letters appear to turn this

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[4] With respect to DS1 loops, for example, the number of business lines or collocators at a wire center, or the number of loops in a building, will determine the availability of that UNE.

process around, permitting SBC to reject any request it regards as "new," and leaving the burden of dispute resolution to the CLEC.

Third, even when it is otherwise undisputed that a "new" UNE need not be provided, as with dark fiber, it must still be provided to the CLEC's "embedded base" during the applicable transition period created in the TRRO. The Accessible Letters assume that the "embedded base" refers to the specific UNEs that will be in place on March 11, 2005. Complainants argue, however, that the "embedded base" refers to existing customers on that date, rather than to the specific UNEs those customers are using. Complaint at 16. Without deciding now whose position is correct - we see support for both positions in the text of the TRRO - this very dispute indicates that implementation of the TRRO is not "unambiguous," as SBC views it.

Complainant's likelihood of success on the merits must also be determined in the context of Section 13-514 of the Illinois Act, which Section 13-515 helps implement. Section 13-514 states that a telecommunications carrier shall not knowingly impede the development of competition in any telecommunications service market. Complainants have raised a fair question as to whether SBC has violated Section 13-514's general prohibition, as well as the particular *per se* impediments included in subsections 13-514 (6), (8), and (10)[5].

To be clear, we do not find at this preliminary stage that the substantive provisions in SBC's Accessible Letters plainly contradict the TRRO or any other authority. Rather, we simply hold now that Complainants have presented a fair question of whether the use of the unilateral Accessible Letters, instead of Section 252 processes, to modify the terms under which the parties will presently transact business, is authorized by the TRRO. Indeed, our preliminary conclusion is that the TRRO does not permit such self-help. Moreover, the Accessible Letters do not address, or may wrongly decide, how some of the details of TRRO implementation will be accomplished. For the time being, we believe that the FCC intended for those details to be addressed through bilateral negotiations and, if needed, dispute resolution.

Concerning irreparable harm, we have previously that such harm need not be beyond the possibility of repair or beyond compensation in damages. Z-Tel Emergency Relief Order; Prentice Medical Corp. v. Todd, 145 Ill. App. 3d 692, 701 (1st Dist. 1986). Irreparable harm includes transgressions of a continuing nature, such as damage to the good will or competitive position of a business, which would be incalculable. *Id.* Further, prolonged interruptions in the continuity of business relationships can cause irremediable damages for which no compensation would be adequate. *Id.*

According to Complainants, the principal harm that would allegedly result here is that Complainants would be handicapped in their provision of services to both existing

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[5] *E.g.*, subsection 13-514(8) states that it is a *per se* impediment to the development of competition for a carrier to violate "the terms of or unreasonably delay[] implementation of an interconnection agreement entered into pursuant to Section 252 of the federal Telecommunications Act of 1996 in a manner that unreasonably delays, increases the cost, or impeded the availability.

and new customers. Complaint at 44. This would purportedly harm their customer relations and reputation in the marketplace. Moreover, Complainants emphasize that such harm would occur in a competitive context, in which SBC itself would derive benefit from the harm it ostensibly caused Complainants.

SBC responds that Complainants can readily obtain alternative services, whether from SBC or other providers. Indeed, SBC stresses, the FCC found in the TRRO that CLECs face no impairment in connection with certain UNEs precisely because market alternatives are easily obtained. Response at 23.

With respect to the availability of the UNEs involved here, the Commission finds that irreparable harm is a reasonably predictable outcome if SBC were permitted to insist upon immediate compliance with its Accessible Letters. The potential impact of sudden disruption of Complainants' operations, and of the services, service quality and reliability enjoyed by their customers, is sufficient to provide relief now. Moreover, the monetary value of such disruption, along with the value of lost goodwill in the market, cannot be readily quantified for compensation purposes. While alternative suppliers exist, the quality, reliability and cost of their offerings could cause service interruptions, diminished service quality and cash-flow or credit problems for Complainants. Further, Complainants would have to make immediate decisions on these matters (before March 11) and other providers would be aware of, and could exploit, such immediacy. We believe that the FCC, in the TRRO, was very mindful of the need for orderly transitions by carriers. Ultimately, if we denied emergency relief, Complainants might win the battle in this proceeding and still lose the war for customers, because of the repetition of service adjustments (i.e., an adjustment now to comply with Accessible Letters, and a subsequent adjustment if they prevailed on the merits later).

In contrast, with regard to pricing, the Commission cannot conclude that Complainants would suffer irreparable harm if the price increases in the Accessible Letters, which mirror the increases mandated by the TRRO, took immediate effect. Those increases are precisely quantified now and will remain so at the end of this case. Consequently, if Complainants prevail on their underlying Complaint, compensation can be precisely quantified. Thus, while Complainants would suffer harm if SBC incorrectly applies a price increase to a given UNE, that harm would not be irreparable.

Concerning the public interest, we discussed above some of the harm to Complainants' customers that is predictably associated with the harm that Complainants would likely incur from immediate changes to UNE availability. In addition, all telecommunications customers could be adversely affected by damage to the fair and effective competition promoted by the Illinois Act.

As previously stated, since we will order emergency relief with respect to UNE availability, based on our interpretation of the TRRO, Section 252 and the parties existing ICAs, we will not address Complainants' other basis for emergency relief.

B. The contents of emergency relief

The actions required by an emergency relief order under subsection 13-515(e) "must be technically feasible and economically reasonable and the respondent must be given a reasonable period to time to comply with the order." 220 ILCS 5/13-515(e). In this instance, we will require SBC refrain from implementing the terms and provisions of its Accessible Letters, except for pricing provisions that completely and accurately reflect the pricing provisions of the TRRO. Therefore, SBC must continue making the pertinent UNEs available to Complainants without reference to the Accessible Letters or the contents of those letters (except pricing provisions). This requirement to maintain the pre-March 11 status quo is unquestionably technically feasible. It is also economically reasonable, since the terms and conditions in the parties' ICAs have been approved by this Commission. SBC does not argue otherwise. Moreover, SBC is not precluded from implementing the price increases prescribed in the TRRO (because of our ruling, above, regarding irreparable harm).

This emergency Order is effective until the parties have an amended their ICAs pursuant to the process contained in Section 252 of the Federal Act or as directed by the Commission in a Order in this proceeding.

VI. Findings and Ordering Paragraphs

The Commission, having considered the entire record and being fully advised in the premises, is of the opinion and finds that:

(1) Complainants are telecommunications carriers within the meaning of Section 13-202 the Act and are authorized to provide local exchange service within the State of Illinois;

(2) SBC is a telecommunications carrier within the meaning of Section 13-202 of the Act and is authorized to provide local exchange service within the State of Illinois;

(3) the Commission has jurisdiction over the parties and the subject matter of this Complaint;

(4) Complainants have shown that the conduct alleged in the Complaint is likely to have a substantial adverse effect on it ability to provide service to customers;

(5) Complainants have also shown that they will likely succeed on the merits with regard to immediate implementation of SBC's Accessible Letters , that they will suffer irreparable harm in their ability to serve customers if emergency relief is not granted, and that certain emergency relief described in the prefatory portion of this Order is in the public interest;

(6) Complainants have shown that certain emergency relief described in the prefatory portion of this Order is technically feasible and economically reasonable;

(7) Complainants should be granted the following relief:

SBC should be ordered to continue to offer the same UNEs as required by the parties' current ICAs until those ICAs are amended pursuant to Section 252 or as directed by the Commission in its final order in this proceeding.

IT IS THEREFORE ORDERED that Complainants' Motion for Emergency Relief is granted in part and denied in part.

IT IS FURTHER ORDERED that SBC is ordered to continue to offer the same UNEs as required by the parties' current ICAs until those ICAs are amended pursuant to Section 252 or as directed by the Commission in its final order in this proceeding.

IT IS FURTHER ORDERED that the relief ordered herein is interim in nature and that the Commission shall conduct a hearing on the remaining allegations of the Complaint.

IT IS FURTHER ORDERED that this decision is not a final order and is not subject to the Administrative Review Law.

By decision of the Administrative Law Judge this 9th day of March, 2005.

David Gilbert
Administrative Law Judge

BEFORE THE PUBLIC SERVICE COMMISSION
OF
THE STATE OF MISSISSIPPI

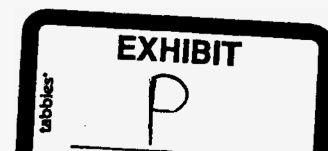
IN RE:	)	**DOCKET NO. 2005-AD-139**
	)	
Order Establishing Generic Docket to Consider Change-of-Law To Existing Interconnection Agreements	)))	

ORDER ESTABLISHING GENERIC DOCKET

COMES NOW, the Mississippi Public Service Commission ("Commission"), *sua sponte,* and directs the Executive Secretary to issue a notice to BellSouth Telecommunications, Inc. (BellSouth) and to all Competitive Local Exchange Carriers (CLECs) certificated by the Commission that the Commission hereby institutes a generic proceeding to address changes that may be required to existing approved interconnection agreements (ICAs) between BellSouth and various certificated CLECs as a result of decisions issued by the FCC and the reviewing court. These decisions include the FCC's *Triennial Review Order* (TRO) issued August of 2003; the *United States Court of Appeals for the District of Columbia Circuit Decision* (USTA II) issued March 2, 2004; the *FCC's Order Establishing Interim Rules* (Interim Rules) issued August 20, 2004; and the FCC's *Triennial Review Remand Order (*TRRO*)* recently issued on February 4, 2005.

The Commission takes note of the fact that on October 29, 2004, in Docket No. 2004-AD-0724, BellSouth filed a Petition to Establish Generic Docket. In that filing BellSouth requests the Commission to "institute a generic proceeding to consider what changes recent decisions from the FCC and DC Circuit require in existing approved interconnection agreements." The Commission did not establish the generic docket at that time because the TRRO had not been issued.

On March 1, 2005, a Joint Petition for Emergency Relief (Joint Petition) was filed by certain CLECs in Docket No. 2005-AD-138 seeking emergency declaratory relief. The Joint Petition is incorporated herein by reference. The Joint Petition was prompted by BellSouth's February 11, 2005, and February 25, 2005, Carrier Notification letters, stating, *inter alia,* that certain provisions of the FCC's



TRRO regarding new orders for certain elements are "self-effectuating" as of March 11, 2005, and that CLECs would not be able to order "new adds" for the "self-effectuating" elements. The letters indicated that BellSouth plans to unilaterally refuse to provide certain elements and to change certain pricing as of March 11, 2005, the effective date of the TRRO.[1] It appears from the letters and the Joint Petition that BellSouth's position is that the TRRO supersedes certain provisions of existing ICAs, and in particular, the "change-of-law" provisions in each ICA.

A standard "change-of-law" provision[2] is included in each ICA that the Commission has approved. This provision states, that in the event of a "change-of-law" – which the TRRO obviously is – the parties will negotiate revisions to the ICAs. If the parties cannot agree, the issues will then be presented to this Commission for a resolution. The applicable standard contractual language is as follows:

> In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of <<customer_short_name>> or BellSouth to perform any material terms of this Agreement, <<customer_short_name>> 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. In the event that such new terms are not renegotiated within forty-five (45) days after such notice, and either Party elects to pursue resolution of such amendment, such Party shall pursue the Dispute Resolution procedure set forth in this Agreement.
>
> ...if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved party shall petition the Commission for a resolution of the dispute...Furthermore, the Parties agree to carry on their respective obligations under this Agreement, while any dispute resolution is pending.

The preceding discussion requires the Commission to establish an orderly proceeding where any needed revisions to the ICAs can be accomplished. The Commission has determined that the most efficient means to address the issues raised is to consider the "change-of-law" issues in this docket,

[1] It should be noted that on March 7, 2005, BellSouth circulated another Carrier Notification letter advising that "BellSouth will continue to accept CLEC orders for these 'new adds' 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."

[2] The Commission finds that said Agreements contain identical or substantially similar contractual terms, with some variance of time periods to negotiate.

instead of opening approximately 300 separate arbitration dockets, should the parties involved be unable to negotiate an agreement. The Commission finds that conducting individual "change-of-law" proceedings for each ICA would be impractical, unduly burdensome, duplicative, and wasteful of this Commission's limited resources and the resources of the signatories to each ICA.

The Commission finds that Mississippi consumers currently benefiting from the services CLECs offer could be negatively impacted by BellSouth's proposed course of action ("self-effectuating position"). The Commission finds that the public interest requires it to establish this docket and create an orderly process to amend existing ICAs. It should be noted, that establishing this docket does not relieve the parties of their obligation to seek resolution through the "change-of-law" or § 252 provisions requiring negotiation. Both the "change-of-law" and § 252 provisions direct that this Commission be the final arbiter in the event that negotiations fail. The Commission, in this instance, will accomplish this through the medium of this generic docket.

The Commission finds that BellSouth should be directed to continue accepting and provisioning CLECs orders, as provided for in the ICAs. Additionally, BellSouth should be directed to maintain the same pricing that is established in the ICAs.

The Commission takes official notice that BellSouth, in its filings with other state commissions on this issue, has contended it will suffer financial harm if it cannot implement what it refers to as the "self-effectuating" provisions of the TRRO. Before the other commissions, BellSouth has sought a "true-up mechanism" to protect itself from financial harm arising from potential lost revenues. Balancing the public interest, with the interests of BellSouth and the CLECs, the Commission will, at a later time, if necessary, direct that there be a true-up proceeding that will determine how rates and charges will be adjusted retroactively to March 11, 2005.

IT IS THEREFORE, ORDERED, that BellSouth, in accordance with the terms of this Order, honor all valid existing ICAs approved by this Commission until the "change-of-law" issues raised herein have been addressed by this Commission or through negotiation.

IT IS FURTHER ORDERED, that the Executive Secretary of this Commission shall immediately issue notice to BellSouth and all CLECs of this proceeding and that all certificated CLECs who desire to participate in this proceeding shall file a Notice of Intervention no later than twenty (20) days from the receipt of notice.

IT IS FURTHER ORDERED, that a Scheduling Order will be forthcoming.

IT IS FURTHER ORDERED, that BellSouth file a comprehensive "Issues Matrix" designating the issues to be addressed in this docket no later than twenty (20) days from the date of issuance. The "Issues Matrix" shall be annotated with specific legal authority (TRO, USTA II, Interim Rules and/or TRRO) supporting BellSouth's position. CLECs who intervene in this proceeding, shall respond to BellSouth's "Issues Matrix" and may also provide a proposed "Issues Matrix" no later than twenty (20) days from the filing of BellSouth's "Issues Matrix"

IT IS FURTHER ORDERED, that this Order is effective upon issuance.

SO ORDERED, this the 9th day of March, 2005.

MISSISSIPPI PUBLIC SERVICE COMMISSION

Bo Robinson, Chairman

Nielsen Cochran, Vice-Chairman

Michael Callahan, Commissioner

ATTEST: A True Copy

Brian U. Ray
Executive Secretary

STATE OF MAINE
PUBLIC UTILITIES COMMISSION

Docket No. 2002-682

VERIZON-MAINE
Proposed Schedules, Terms,
Conditions and Rates for Unbundled
Network Elements and Interconnection
(PUC 20) and Resold Services (PUC 21)

March 17, 2005

ORDER

WELCH, Chairman; DIAMOND and REISHUS, Commissioners

I. SUMMARY

In this Order, we deny MCImetro Access Transmission Services LLC's (MCI) Petition for Emergency Declaratory Relief and the CLEC Coalition's[1] Motion for Temporary Order. We also remind Verizon of its obligation to follow federal law concerning certification of wire centers for purposes of ordering certain loop and transport unbundled network elements (UNEs). Finally, we put Verizon on notice that we may pursue the imposition of penalties for any failure to comply with our September 3, 2004 Order in this Docket, which requires Verizon to include all of its wholesale offerings in its wholesale tariff, including UNEs provided pursuant to section 271 of the Telecommunications Act of 1996 (TelAct), and to continue provisioning 271 UNEs at "Total Element Long Run Incremental Cost (TELRIC)" rates until we, or the Federal Communications Commission (FCC), approve new rates.

II. BACKGROUND

On February 4, 2005, the FCC issued its *Triennial Review Order Remand Order (TRRO).*[2] In the *TRRO*, the FCC eliminated certain unbundling requirements pursuant to section 251 of the TelAct and established new criteria for access to certain loop and transport UNEs. *TRRO* at ¶ 5. The effective date of the *TRRO* is March 11, 2005. On February 10, 2005, in a letter posted on its website (UNE Industry Letter), Verizon announced that on March 11, 2005, it would stop accepting orders for those UNEs which the FCC had de-listed in the *TRRO.*

On March 2, 2005, MCI filed a Petition for Emergency Declaratory Relief (Petition), asserting the need for injunctive relief to prevent Verizon from rejecting orders for de-listed UNEs, including UNE-Ps. In MCI's view, Verizon is obligated to provide

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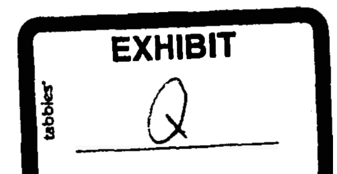
[1] A coalition comprised of Mid-Maine Communications, Oxford Networks and Pine Tree Network.

[2] *Triennial Review Remand Order, Unbundled Access to Network Elements Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers ("TRRO"),* FCC Docket Nos. 04-313, 01-338 *Order on Remand*, FCC 04-290, issued Feb. 4, 2005, effective Mar. 11, 2005.



access to the de-listed UNEs pursuant to the September 2, 1997 Interconnection Agreement between MCI and Verizon and, by announcing its intent to stop accepting orders for such UNEs on March 11, 2005, Verizon is in anticipatory breach of the agreement.

On March 2, 2005, Verizon issued a second Industry Letter (Wire Center Industry Letter) attaching a list of rate centers it asserted met the FCC's new business line/fiber collocator criteria related to submission of orders for DS1 and DS3 loops and transport. Verizon further stated that by issuing its letter it was placing CLECs "on notice of the Wire Center classifications" thereby providing them with "actual or constructive knowledge" of the wire center classification. Finally, Verizon informed CLECs that if they should "attempt to submit an order for any of the aforementioned network elements notwithstanding your actual or constructive knowledge . . . Verizon will treat each such order as a separate act of bad faith carried out in violation of federal regulations and a breach of your interconnection agreements, and will pursue any and all remedies available to it."

On March 4, 2005, the CLEC Coalition joined in MCI's request by filing a Motion for Temporary Order (Motion). On March 7, 2005, A.R.C. Networks Inc. d/b/a InfoHighway Communications Corporation (InfoHighway) filed a Petition to Intervene and Comments in Support of MCI's Petition.[3]

Verizon responded to MCI's Petition by filing opposition papers on March 8, 2005, (Ver. Opp.) arguing that the FCC's *TRRO* takes precedence over any provisions of the Interconnection Agreement that are contrary to it. Verizon also claims that we lack the authority to provide the relief sought by MCI's Petition.

On March 10, 2005, MCI withdrew its Petition, explaining that it had entered into an interim commercial agreement for UNE-P replacement services. Later that same day, the CLEC Coalition filed a letter-brief in which it addressed Verizon's response to the MCI Petition, and urged that its own request for injunctive relief be granted despite the fact that the party first seeking such relief (MCI) had withdrawn its request. Finally, in a series of e-mail messages sent on March 10 and 11, 2005, Verizon, the CLEC Coalition, and InfoHighway described the rulings of several regulatory agencies in other states that have recently confronted the same issues raised by the MCI Petition.

A special deliberative session was held on March 11, 2005, to consider the pending motions.

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[3] We grant InfoHighway's petition to intervene.

III. POSITIONS OF THE PARTIES

A. The CLECs

According to the CLECs,[4] Verizon's obligation to provide UNEs derives from their interconnection agreements with Verizon. The *TRRO* triggered the so-called "change of law" provisions in the interconnection agreements – provisions which require the parties to "arrive at mutually acceptable modifications or cancellations," of the interconnection agreement whenever such changes are "required by a regulatory authority or court in the exercise of its lawful jurisdiction." In the view of the CLECs, Verizon cannot unilaterally impose its understanding of what the *TRRO* requires. Instead, the parties must negotiate changes to the interconnection agreement in light of the *TRRO*. Injunctive relief is necessary to prevent Verizon from implementing its plan to discontinue the provision of certain UNEs, as described in Verizon's February 10, 2005, Industry Letter, and thereby disrupting the status quo during the negotiation period.

The CLECs also argue that while the *TRRO* removes certain UNEs from the list of those which must be offered pursuant to section 251(c)(3) of the TelAct, it has no bearing on Verizon's separate and continuing obligation to provide those UNEs pursuant to section 271 of the TelAct. Thus, the CLECs request that we enforce our September 3, 2004 Order requiring Verizon to meet its commitment to us in our 271 Proceeding[5] to file a wholesale tariff and to continue to provide 271 UNEs at TELRIC rates until the wholesale tariff is approved.

B. Verizon

Verizon takes issue with the CLECs' characterization of the "change of law" provisions of the interconnection agreements. According to Verizon, those provisions are meant merely to ensure that the language of interconnection agreements is updated to reflect new rules issued by the FCC – rules that Verizon insists are binding on the parties as soon as they are pronounced. The request for emergency injunctive relief is misguided, claims Verizon, because the *TRRO* changed the status quo, effective March 11, 2005, and subsequent changes to interconnection agreements will serve only to acknowledge the new state of affairs.

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[4] The CLEC Coalition and InfoHighway explicitly adopted the arguments of MCI before MCI withdrew its Petition, and also articulated their own arguments. For the purposes of this Order, we will treat the arguments of these parties collectively as those of the "CLECs."

[5] *Inquiry Regarding the Entry of Verizon-Maine into the InterLATA Telephone Market Pursuant to Section 271 of the Telecommunications Act of 1996*, Docket No. 2000-849.

Verizon also claims that its obligation to provide UNEs, as memorialized in the interconnection agreements, derives solely from section 251 of the TelAct, and "not state law, section 271, or anything else." Verizon Opp. at 4. Even if section 271 did form the basis for such obligations, Verizon adds, the Commission is powerless to act because the FCC is "solely responsible for interpretation and enforcement of any section 271 obligations." *Id.* Thus, Verizon contends not only that we should deny the petitions for emergency injunctive relief but also that we lack the authority, under concepts of federal preemption, to impose the relief sought by the CLECs and enforce our September 3, 2004 Order.

IV. DECISION

A. Implementation of the *TRRO*

We have considered the arguments of all parties, the language of the *TRRO*, decisions reached by other state commissions, and the practical implications of our decision. We find that the FCC intended that its new rules de-listing certain UNEs be implemented immediately rather than be the subject of interconnection agreement amendment negotiations before becoming effective. We further find that it is in the best interests of all parties to implement the changes required by the *TRRO* immediately and move forward on the pending litigation of other contested issues. The decisions set forth in the *TRRO* come after years of seemingly endless litigation involving the FCC and federal courts; delaying the implementation of the new rules will only delay the inevitable.

As a practical matter, it is not obvious to us what issues would remain to be negotiated concerning the section 251 UNEs de-listed by the FCC; the FCC has been clear that these UNEs are no longer required to be unbundled under section 251. The end result after going through the step of amending the interconnection agreements will be the same as enforcing the March 11th deadline immediately, *albeit* with some delay. We recognize that there may be other provisions in the *TRRO* which require negotiations before the interconnection agreements can be amended. We encourage parties to move forward swiftly with those negotiations and stand ready to address any disputes that may be brought before us.

In addition, we reject the reasoning of the Georgia Public Service Commission in its March 8, 2005 Order (Docket No. 19341-U) regarding the applicability of the *Mobile Sierra*[6] doctrine because the contracts at issue here contain change of law provisions and therefore already contemplate regulatory changes. Further, the Georgia PSC seems to be saying that, without a showing of heightened public interest, the FCC cannot unilaterally override an interconnection agreement but can, without a showing of

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[6] The *Mobile Sierra* doctrine allows the government to modify the terms of a private contract upon a finding that such modification will serve the public need. *United States Gas Pipeline Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956).

heightened public interest, order parties to amend their agreements to be consistent with the FCC's new rules. We do not find this distinction persuasive.

Finally, as Verizon correctly noted, the FCC stated repeatedly throughout its Order that ILECs would have no obligation to provide CLECs with access to the de-listed UNEs and that the transition plan does not permit CLECs to add new de-listed UNEs. We find the FCC's specificity regarding these issues to be clear and thus, we do not believe it to be appropriate or necessary to ascribe anything but their plain meaning to the FCC's directives. Accordingly, we deny the requests of MCI and the CLEC Coalition for an order staying implementation of the FCC's rules pending interconnection agreement negotiations.

B. **Self-Certification of Wire Centers**

As stated above, the FCC's new rules place limitations on a CLEC's ability to order certain loops and transport UNEs, depending upon the number of business lines and/or fiber collocators associated with the particular wire center in which it would like to purchase the UNE. The FCC, however, clearly found that CLECs, after a diligent inquiry, could self-certify that a particular wire center does not meet the FCC's criteria. *TRRO* at ¶ 234. Further, upon submission of an order involving self-certification, an ILEC must provision the order first and then dispute the classification of the wire center in front of a state commission pursuant to the dispute resolution procedures of most interconnection agreements. *Id.*

While the March 2, 2005 Industry Letter posted by Verizon on its website does not explicitly state that it will not follow the FCC's rules, i.e. that it will reject a CLEC order involving a rate center contained on Verizon's list, it comes very close. Indeed, apart from appearing unnecessarily hostile, the language is inconsistent with the spirit of the *TRRO* and with the specific findings in paragraph 234. Thus, we remind Verizon of its obligation to comply with the FCC's rules and paragraph 234 of the *TRRO*. We also remind CLECs that they must make a good faith inquiry concerning the characteristics of any wire center that might be implicated by the FCC's criteria. If necessary, we will investigate the factual underpinnings of Verizon and/or CLEC assertions concerning the characteristics of wire centers in Maine which may meet the FCC's criteria.

C. **Enforcement of Verizon's 271 Obligations**

Having resolved the motions pending before us, we need go no further. Nonetheless, prompted by certain comments made by Verizon in its Brief in Opposition to the motions, we remind Verizon of its continuing obligation to comply with both the standing orders of this Commission, including our Order of September 3, 2004, and section 271 of the TelAct. The following discussion is intended to summarize, but not in any way to supplant or modify, our findings of September 3, 2004. In our view, this summary is sufficient to put Verizon on notice that any failure on its part to comply with

our September 3rd Order may lead to the imposition of penalties pursuant to 35-A M.R.S.A. § 1508-A.

On September 3, 2004, we issued an order in this proceeding requiring Verizon to include all of its wholesale offerings in its state wholesale tariff, including UNEs provided pursuant to section 271 of the TelAct. We further specified that Verizon must file prices for all offerings contained in the wholesale tariff for our review for compliance with federal pricing standards, i.e. TELRIC for section 251 UNEs and "just and reasonable" rates pursuant to sections 201 and 202 of the Communications Act of 1934 for section 271 UNEs. Finally, we held that Verizon must continue to provision 271 UNEs at TELRIC prices pending approval of the wholesale tariff and/or new rates. Verizon did not seek reconsideration of the Order nor did it appeal the Order pursuant to 35-A M.R.S.A. § 1320.

Now, some six months after we issued our Order, Verizon asserts that the Order has no force and that Verizon has no obligation to comply with its requirements. We find Verizon's assertions both troubling and procedurally improper. Unless and until a Commission order is amended, vacated, or otherwise modified pursuant to the requirements of Title 35-A or other applicable law, the order retains the force of law and must be obeyed. Accordingly, our September 3, 2004 Order in this proceeding stands and Verizon must comply with it or risk being found in contempt of a Commission order and subject to the fining provisions of 35-A M.R.S.A. § 1508-A. Verizon remains free, as it has been since September 3rd, to request that the Commission alter or amend its September 3rd Order. It is not free, however, to unilaterally determine that it does not have to comply.

We take very seriously the commitments Verizon made to us during our 271 proceeding and expect that Verizon will honor those commitments. We will not repeat the reasoning and rationale supporting our assertion of jurisdiction to enforce Verizon's 271 commitments. We laid that reasoning out quite clearly in our September 3rd Order and find that there has been no intervening change in law that would impact our analysis.[7]

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[7]The cases cited by Verizon can, and have been, distinguished. First, in both *Verizon North Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002) and *Wisconsin Bell, Inc. v. Bie*, 340 F.3d 441 (7th Cir. 2003), the state commissions ordered the incumbent local exchange carrier (ILEC) to file a state wholesale tariff pursuant to state authority, which is entirely different from Verizon voluntarily agreeing to file a wholesale tariff in exchange for this Commission's support of its federal 271 application. Further, this Commission has never stated that the wholesale tariff would replace the obligation of parties to enter into interconnection agreements. Second, *Indiana Bell Telephone Company, Inc. v. Indiana Utility Regulatory Commission*, 359 F.3d 493 (7th Cir. 2004), involved a state commission's assertion of authority to order a performance assurance remedy plan under state law. Again, this is clearly distinguishable from the situation here in Maine where Verizon agreed to file a wholesale tariff.

Verizon has had over six months since our September 3rd Order to submit a tariff for its 271 obligations and/or obtain FCC approval of the specific rates it intends to charge for 271 UNEs. Verizon has taken no action. Thus, the interim provisions that we put in place, i.e. the requirement that Verizon continue to provision 271 UNEs at TELRIC rates until other rates are approved, continues to govern. To the extent that there is legitimate disagreement concerning which UNEs qualify as 271 UNEs, we encourage the parties to bring those issues to us as soon as possible. We note that the Hearing Examiner in this proceeding recently issued a procedural order with an attached matrix outlining the status of all UNEs and requesting legal argument from the parties concerning their correct categorization. Thus, we expect that in the absence of particular disagreements, we will have an opportunity to resolve the issue of which UNEs are considered 271 UNEs within the next couple of months.

A decision by Verizon to ignore the requirements of our September 3rd Order may trigger application 35-A M.S.A. §1508-A. Indeed, to the extent that Verizon fails to comply with the September 3rd Order by refusing to provision uncontested 271 UNEs, such as unbundled switching, on the grounds that our September 3rd Order is not enforceable, it is suspect to an enforcement proceeding pursuant to 35-A M.R.S.A. §1508-A(1)(B). If Verizon refuses to provision a 271 UNE based on a good faith disagreement concerning whether the UNE qualifies as a 271 UNE, we will conduct a proceeding to determine whether the UNE qualifies. If Verizon continues to refuse to provision the UNE after we find that it does qualify, it risks the initiation of enforcement and penalty proceedings.

Dated at Augusta, Maine, this 17th day of March, 2005.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
Diamond
Reishus

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.

2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within **21 days** of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Appellate Procedure.

3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.