State of Florida

Public Service Commission

CAPITAL CIRCLE OFFICE CENTER • 2540 SHUMARD OAK BOULEVARD
TALLAHASSEE, FLORIDA 32399-0850

-M-E-M-O-R-A-N-D-U-M-

DATE: March 24, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Teitzman)
Division of Competitive Markets & Enforcement (T. Brown, Lee)

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*).

AGENDA: 04/05/05 – Regular Agenda – Final Agency Action - Interested Persons May Participate

CRITICAL DATES: April 8, 2005 per BellSouth Carrier Notification SN91085070

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\GCL\WP\041269.RCM.DOC

Case Background

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

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

As a result of the Court's mandate, the FCC released an *Order and Notice*[4] (Interim Order) on August 20, 2004, requiring ILECs to continue providing unbundled access to mass market local circuit switching, high capacity loops and dedicated transport until the earlier of the effective date of final FCC unbundling rules or six months after Federal Register publication of the *Interim Order*. Additionally, the rates, terms, and conditions of these UNEs were required to be those that applied under ILEC/CLEC interconnection agreements as of June 15, 2004.[5] In the event that the interim six months expired without final FCC unbundling rules, the *Interim Order* contemplated a second six-month period during which CLECs would retain access to these network elements for existing customers, at transitional rates.

On November 1, 2004, BellSouth Telecommunications, Inc. (BellSouth) filed its Petition to establish a generic docket to consider amendments to interconnection agreements resulting from changes of law. Specifically, BellSouth requests that the Commission determine what changes are required in existing approved interconnection agreements between BellSouth and

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

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

[3] 359 F. 3d 554 (D.C. Cir. 2004) (*USTA II*), pets. for cert. filed, Nos. 04-12, 04-15, 04-18 (June 30, 2004).

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

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

competitive local exchange carriers (CLECs) in Florida by recent decisions[6] from the Federal Communications Commission (FCC) and the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit). On February 15, 2005, Order No. PSC-05-0171-FOF-TP was issued denying the Florida Competitive Carriers Association (FCCA) and the Competitive Carriers of the South's (CompSouth) Motion to Dismiss, as well as the Motion to Dismiss filed by Xspedius Communications, LLC on behalf of its operating affiliates, Xspedius Management Co. of Jacksonville, LLC and Xspedius Management Co. Switched Services, LLC, NuVox, Inc. on behalf of its operating entities NuVox Communications, Inc. and NewSouth Communications Corp., and KMC Telecom V, Inc. and KMC Telecom III, LLC (Joint CLECs).

On February 4, 2005, the FCC released its Order on Remand (*TRRO*) which included its Final Unbundling Rules.[7] In the *TRRO*, the FCC found that requesting carriers are not impaired without access to local switching and dark fiber loops. Additionally, the FCC established conditions under which ILECs would be relieved of their obligation to provide, pursuant to section 251(c)(3) of the Act, unbundled access to DS1 and DS3 loops, as well as DS1, DS3 and dark fiber dedicated transport. On February 11, 2005, BellSouth issued Carrier Notification SN91085039 in which it declared that switching,[8] certain high capacity loops in specified central offices,[9] and dedicated transport between a number of central offices having certain characteristics,[10] as well as dark fiber[11] and entrance facilities[12] will no longer be available as of March 11, 2005, because certain provisions of the *TRRO* regarding new orders for delisted UNEs (new adds) are self effectuating as of that date.

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

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

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[6] See *United States Telecom Ass'n v. FCC*, 359 F. 3d 554 (D.C. Cir. 2004) (USTA II); In the Matter of Unbundling Access to Network Elements, WC Docket No. 04-313; In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Order and Notice of Proposed Rulemaking, FCC 04-179, rel. August 20, 2004 (Interim Order)

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

[8] *TRRO* ¶199

[9] *TRRO* ¶¶174, 178

[10] *TRRO* ¶¶126, 129

[11] *TRRO* ¶¶133, 182

[12] *TRRO* ¶141

(XO), CompSouth, US LEC of Florida, Inc. (US LEC), and AT&T Communications of the Southern States, LLC (AT&T) have all filed letters in support of the motions. BellSouth filed its Response to the Joint CLECs' Motion on March 4, 2005.

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

Because staff believes it addresses the same underlying issues, staff's recommendation will also address American Dial Tone's Emergency Petition for a Commission Order directing Verizon to continue to accept new unbundled network element orders pending the completion of change-of-law negotiations required by its interconnection agreements with Verizon (filed in Docket No. 050172-TP.)

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

Staff notes further that Requests for reconsideration or clarification of the *TRRO* must be filed by March 28, 2005.

The Commission has jurisdiction pursuant to Section 364.162, Florida Statutes, and under §251(d)(3) of the Act.

Discussion of Issues

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. **(TEITZMAN)**

Positions of the Parties

BellSouth: In its Motion, BellSouth asserts that the petitions of AmeriMex and American Dial Tone are substantially similar to petitions filed by MCI and Supra in Docket No. 041269-TP. BellSouth contends that although it disagrees that the emergency relief requested by these parties is appropriate, there would be no value in duplicating the Commission's effort by addressing the same issues in different proceedings. BellSouth argues further that because these petitions have been recently filed, no party would be harmed or prejudiced by consolidating all requests for "emergency" relief into a single proceeding.

No responses to BellSouth's Motion were filed.

Staff Analysis: Staff agrees with BellSouth that American Dial Tone's Petition is substantially similar to the petitions filed by MCI and Supra in Docket No. 041269-TP. However, staff does not believe these dockets need to be consolidated for the sole purpose of addressing these petitions. There will remain several open issues in Docket 041269-TL regardless of the Commission's decision on this specific matter. Accordingly, staff recommends the Commission deny BellSouth's Motion to Consolidate Docket No. 050171-TP into Docket No. 041269-TP. However, the petitions should be addressed together for purposes of this recommendation.

Issue 2: Should the Commission find that BellSouth and Verizon are required to continue accepting "new add" orders for the de-listed 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* on or 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*. **(TEITZMAN)**

Positions of the Parties

041269-TL

Joint CLECs: In their Petition, the Joint CLECs argue that BellSouth's pronouncement that certain provisions of the *TRRO* regarding new orders for delisted UNEs are self-effectuating is based on a fundamental misreading of the *TRRO*. The Joint CLECs assert that, like with any change-of-law, the *TRRO* is a change that must be incorporated into interconnection agreements prior to being effectuated, and it is not self-effectuating as BellSouth claims. Contrary to BellSouth's position, the Joint CLECs argue that the FCC clearly stated that the *TRRO* and the Final Rules would be incorporated into interconnection agreements via the process provided for in Section 252 of the Act. Section 252 of the Act would require negotiation by the parties and arbitration by the Commission of any issues the parties fail to resolve.

The Joint CLECs argue that the decision by the FCC to employ the traditional process by which changes of law are implemented is reflected in several instances throughout the *TRRO*. With regards to high capacity loops, high capacity transport, and UNE-P arrangements, the Joint CLECs point out that the FCC stated in the *TRRO* that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change-of-law processes."[13] And the FCC also stated "we expect incumbent LECs and requesting carriers to negotiate appropriate transition mechanisms for such facilities through the section 252 process."[14]

[13] *TRRO* ¶¶143, 196, and 227.
[14] *TRRO* at notes 339 and 519

Thus, the Joint CLECs argue the FCC in no way indicated it was unilaterally modifying state commission approved interconnection agreements or that the changes of law that would become effective on March 11, 2005, would automatically supplant provisions of existing interconnection agreements as of that date.

The Joint CLECs argue that pursuant to their Commission-approved Abeyance Agreement, BellSouth is required to continue to provision UNEs under the terms of the parties' existing interconnection agreements, until those agreements are replaced with new agreements. The Joint CLECs contend that this new interconnection agreement would therefore incorporate changes that were more favorable to the Joint CLECs, as well as those which are more favorable to BellSouth. The Joint CLECs assert that the process for implementing these changes of law is under way in the parties' current arbitration, but a new interconnection agreement would not be in place by March 11, 2005. Consequently, the Joint CLECs assert that BellSouth should not be permitted to pick-and-choose the implementation of changes of law more favorable to its interests, while the Joint CLECs wait out arbitrations to benefit from the changes of law more favorable to the Joint CLECs' interests.

The Joint CLECs argue they will suffer imminent and irreparable harm if BellSouth is allowed to breach or unilaterally modify the terms of the parties' existing interconnection agreements and the Abeyance Agreement by refusing to accept local service requests (LSRs) for new DS1 and DS3 loops and transport that BellSouth claims are delisted by application of the Final Rules and the same would be true for UNE-P. The Joint CLECs contend further that Florida consumers relying on the Joint CLECs' services will be harmed if BellSouth is permitted to refuse LSRs for "new adds" as of March 11, 2005.

MCI: In its Motion, MCI argues that pursuant to Attachment 3, § 2.4 of the parties' interconnection agreement, BellSouth is required to provision UNE combinations including UNE-P. Furthermore, MCI asserts that Part A, § 2.3 of the interconnection agreement governs changes of applicable law and requires the parties negotiate for a period of ninety (90) days. If new terms are not renegotiated, then either party may invoke Part A, § 22, which provides for arbitration before the Commission. Accordingly, MCI contends that by stating it will not accept UNE-P orders beginning March 11, 2005, BellSouth is in breach of the parties' interconnection agreement.

MCI argues that the *TRRO* does not excuse or justify BellSouth's failure to comply with the change-of-law provisions of their interconnection agreement. MCI points out that Paragraph 233 of the *TRRO* requires parties to implement the FCC's findings by making changes to their interconnection agreements consistent with the conclusions of the Order, and it does not exclude its provisions relating to new UNE-P orders from this requirement. Consequently, MCI concludes that BellSouth must undertake the change-of-law process to implement the changes specified in the *TRRO* with respect to new UNE-P orders.

Even if the *TRRO* abrogated BellSouth's duty to provision UNE-P, MCI argues BellSouth would not be entitled to change the unbundling and UNE rate sections of the interconnection agreement unilaterally, because Florida law and the Orders the Commission has issued pursuant to Florida law independently support MCI's right to obtain UNE-P from BellSouth at the rates set forth in the interconnection agreement. MCI contends that when the

Commission set UNE rates, the Commission repeatedly acknowledged its jurisdiction under state law, specifically, Sections 364.161 and 364.162, Florida Statutes, to determine rates for interconnection.[15] Thus, MCI contends the rates that have been incorporated into the parties' interconnection agreement are independently supported by Florida law. The Commission necessarily has found that these rates are not below cost and are not set so high that they would serve as a barrier to competition. MCI argues that until the Commission changes the UNE rates as a result of evidence demonstrating that new rates are just and reasonable, in this or some other docket, the rates in the interconnection agreement remain in full force and effect.

In support of this position, MCI argues further that the Commission's authority has not been preempted by federal law. MCI asserts that federal preemption occurs when (i) Congress "occupies the field" in the area the state seeks to regulate; (ii) the federal government expressly preempts state regulation; or (iii) there is a conflict between state and federal law. MCI contends that none of these conditions have occurred.

Finally, MCI contends that section 271 of the Act independently supports MCI's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the parties' interconnection agreement. MCI asserts that, as affirmed by the FCC in the *TRO*, so long as BellSouth wishes to provide in-region interLATA services under section 271 of the Act, it must continue to comply with the conditions required for approval, regardless of whether or not a particular network element must be made available under section 251 of the Act. MCI argues that one of the central requirements of section 271 of the Act is that a Bell Operating Company (BOC) enter into binding agreements that have been approved under Section 252 of the Act specifying the terms and conditions under which it is providing access and interconnection to its network facilities. Furthermore, the agreements must provide access to facilities that meet the requirements of the so-called section 271 checklist, which includes local switching at just and reasonable rates.

MCI asserts that although the FCC in the *TRO* declined to require BellSouth to combine section 271 local switching with other UNEs pursuant to section 251(c)(3) of the Act and that decision was upheld in *USTA II*, the D.C. Circuit noted that the general nondiscrimination requirement of section 202 of the Act might provide an independent basis for requiring the combination of section 271 switching with other UNEs. MCI argues that if BellSouth were to provide unbundled switching to its retail business combined with all other elements needed to provide service, BellSouth would discriminate against CLECs in violation of section 202 of the Act. Consequently, MCI concludes that BellSouth must provide switching in accordance with section 271 and in combination with the other elements that make up UNE-P, and that the rates in the parties' interconnection agreement should be determined to be "just and reasonable" under section 271 of the Act.

[15] See Final Order on Rates for Unbundled Network Elements Provided by BellSouth, Order No. PSC-01-1181-FOF-TP, May 25, 2001; Order on Motions for Reconsideration and Motion to Conform analysis, Order No. PSC-01-2051-FOF-TP, issued October 18, 2001;Order Holding Proceedings in Abeyance for 60 days, Order No. PSC-02-0841-PCO-TP, issued June 19, 2002, and Order Denying Motion for Reconsideration, Order No. PSC-02-1724-FOF-TP, issued December 9, 2002.

Supra: In its Petition, Supra adopted the petitions of the Joint CLECs and MCI and did not raise any additional arguments.

050171-TP

American Dial Tone:

American Dial Tone also asserts that if BellSouth discontinues provision of the delisted UNEs, BellSouth will be in breach of their interconnection agreements. American Dial Tone agrees with MCI and Supra that its interconnection agreement contains change-of-law provisions that were not abrogated by the *TRRO* and requires that parties engage in good-faith negotiations before implementing any change in law.

American Dial Tone asserts that under the *Sierra-Mobile* doctrine, while federal agencies like the FCC may revise the terms of a private contract between two carriers concerning communications services, they may do so only when the contract's terms "adversely affect the public interest" to a degree that is "much higher than the threshold for demonstrating unreasonable conduct under sections 201(b) and 202(a) of the Act."[16] Furthermore, American Dial Tone argues agencies must make a "particularized finding that the public interest requires modification."[17] Accordingly, American Dial Tone asserts that the *TRRO* contains no such particularized showing, and as such cannot be interpreted to supersede the existing change-of-law provisions in their interconnection agreements.

050172-TP

American Dial Tone

Staff notes that American Dial Tone's petition in this docket is identical to its petition filed in Docket No. 050171-TP with two distinctions: (1) this petition is filed against Verizon, and (2) in addition to the change-of-law provision in its interconnection agreement with Verizon, American Dial Tone also cites to Amendment No. 1 of the interconnection agreement as the basis for an alleged breach. American Dial Tone points out that pursuant to Amendment No.1, if the FCC determines that Verizon is no longer required to provide any combination of UNEs to American Dial Tone, and American Dial Tone decides to purchase alternate services to replace that combination, Verizon must reasonably cooperate with [American Dial Tone] to coordinate the termination of such combination and installation of such services to minimize the interruption of services to Customers of [American Dial Tone]. American Dial Tone asserts that Verizon has an affirmative obligation to engage in good faith negotiations in order to develop a reasonable and cooperative framework for the transition from the affected UNEs to alternative arrangements. Moreover, until such framework is in place, Verizon must necessarily continue to provide the affected UNEs under existing contractual arrangements, so as not to interfere with American Dial Tone's ability to provide service to its customers.

[16] See, e.g. IDB Mobile Communications, Inc. v. COMSAT Corporation, 16 FCC Rcd 11474 at ¶14-16 (2001)
[17] See Atlantic City Electric Company v. FERC, 295 f.3d 1, 40-41 (2002)

BellSouth's Responses

In its responses, BellSouth states that the FCC's new unbundling rules unequivocally state that carriers may not obtain new UNEs, and that there would be a 12-month transition period for embedded UNEs that would begin on March 11, 2005. BellSouth asserts that the petitioners' contention that BellSouth is required to provide new, delisted UNEs until their interconnection agreements are amended is wholly inconsistent with the language of the *TRRO* and is flatly contradicted by the federal rules. BellSouth argues that 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, but it did not.

BellSouth contends that the FCC understood that existing interconnection agreements often contain change-of-law provisions. As an example, BellSouth points out that 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. BellSouth argues the FCC provided that throughout the 12-month transition period CLECs would continue to have access to the embedded UNE-Ps, but at the commission-approved TELRIC rate "plus one dollar", until the migration of the embedded base was completed. Furthermore, BellSouth contends 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.

BellSouth disagrees with American Dial Tone and AmeriMex that the FCC did not make a particularized finding that the public interest required a modification. Rather, BellSouth asserts that the FCC was very clear in the *TRRO* that access to UNEs without impairment was contrary to the public interest and must stop. In support of its position, BellSouth cites to the FCC's findings in ¶ 218 of the *TRRO* where the FCC held that "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."

Addressing the claims of the Joint CLECs that, pursuant to the parties' Abeyance Agreement in Docket 040130-TP, BellSouth is required to continue to provision UNEs under the terms of the parties' existing interconnection agreements until those agreements are replaced with new agreements, BellSouth asserts that the Joint CLECs' claims are based on an erroneous interpretation. First, BellSouth contends that, putting aside the dispute regarding the scope of the agreement, it is limited in application to changes of law requiring negotiation and amendment under the parties' interconnection agreements. BellSouth asserts the FCC's bar on "new adds" beginning March 11, 2005, does not trigger the parties' change-of-law obligations because it is self-effectuating, and consequently, the parties are relieved of their change-of-law obligations.

Additionally, BellSouth contends the parties never agreed to expand the Abeyance Agreement to include the *TRRO*. BellSouth asserts the parties agreed to hold the docket 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 issues to add to the arbitration.

Finally, BellSouth asserts that if the Commission was inclined to grant the relief requested by the petitioners and require BellSouth to accept orders for new UNEs on or after

March 11, 2005, the Commission should require a retroactive true-up at an appropriate rate to March 11, 2005. BellSouth asserts a true-up is the only way to equalize the risk between the parties. BellSouth contends it would be bearing the risk associated with the continuation of an unlawful unbundling regime, and therefore, the petitioners should bear the risk of a true-up if, in fact, the pertinent provisions of the *TRRO* are self-effectuating. Additionally, BellSouth asserts that a true-up is necessary in the interests of fairness, because a CLEC that has entered into a commercial agreement with BellSouth would be placed at a competitive disadvantage against those that continue to pay TELRIC rates.

Verizon's Response

In its Response, Verizon argues that American Dial Tone seeks to forestall the implementation of federal law and the inevitable transition away from the discontinued UNEs by claiming that its interconnection agreement gives it the unilateral right to ignore the FCC's binding directive to cease placing new UNE orders as of March 11, 2005, unless and until American Dial Tone sees fit to agree to a contract amendment to memorialize the simple fact that it may not obtain new UNEs discontinued by the new federal rules. Verizon contends the Petition is based on the mistaken proposition that the parties' interconnection agreement overrides the explicit and unconditional directives by the FCC that carriers take specific action on a specific date. In support of its position, Verizon asserts three arguments: (i) The Petition seeks a preliminary injunction which the Commission lacks jurisdiction to grant nor does American Dial Tone meet the criteria that would entitle such relief; (ii) The parties' interconnection agreement cannot supersede the FCC's mandatory transition plan; (iii) The Commission cannot stay an FCC Order.

Verizon asserts that the legislature has authorized the courts, not the Commission, to issue injunctions, and thus the Commission lacks the power to grant injunctive relief.[18] Verizon argues further that even if the Commission were empowered to grant such relief, American Dial Tone has not met the burden of showing that it is entitled to the remedy of preliminary injunctive relief. To obtain such relief before a court, Verizon asserts American Dial Tone would have to establish that: (i) irreparable injury will result if the injunction is not granted; (ii) the party has a clear legal right to the requested relief; (3) the public interest will be served by the temporary injunction; and (4) there is no adequate remedy at law.[19]

Verizon contends that it has offered CLECs an interim commercial agreement that would enable CLECs to continue to order UNE-like services while they are either negotiating a permanent commercial agreement covering these orders or otherwise completing the FCC's transition away from the delisted UNEs. Verizon asserts the interim agreement, effective March 11, 2005, permits CLECs to continue to place new orders for platform service using existing ordering interfaces, subject to an additional per-line surcharge, while the parties negotiate long-term commercial alternatives. Verizon argues that in light of the options available to prevent any lapse in its ability to place new orders, American Dial Tone cannot claim any injury, let alone irreparable injury, caused by Verizon's implementation of the FCC's no-new-adds mandate on March 11.

[18] See Trawick v. Fla. Power & Light Co., 1997 Fla. PUC LEXIS 1444; 97 F.P.S.C. 10:573.
[19] See Liberty Fin. Mortg. Corp. v. Clampitt, 667 So. 2d 880, 881 (Fla. 2d DCA 1996).

Verizon argues further, that the FCC's *TRRO* rules reflect the FCC's attempt to apply the 1996 Act's impairment standard in a more targeted way and to eliminate unbundling where CLECs do not face impairment without such access. Verizon asserts that in applying this standard to dedicated transport and high-capacity loops, the FCC found that, where its non-impairment criteria were satisfied, CLECs have adequate replacement options, including "self-provided facilities, alternative facilities offered by other carriers, commercial agreements, or special access services offered by the ILEC. Consequently, Verizon asserts that American Dial Tone has failed to reconcile its claim of irreparable harm with the determination of the FCC that CLECs are not even impaired in those situations.

In support of its position that the parties' interconnection agreement cannot supersede the FCC's transition plan, Verizon argues that the FCC has the authority to issue immediately effective directives that supersede any change-of-law process under interconnection agreements, and that it is clear within the *TRRO* that the FCC did not intend that the start of the no-new adds period should be subject to a lengthy change-of-law process. Verizon contends that the FCC was explicit that its transition plan is necessary to the proper effectuation of the Act's goals and avoidance of market disruption.[20] Verizon points out that central to the transition plan is the FCC's requirement that the CLECs eliminate their current embedded base of UNE arrangements by converting them to other arrangements within twelve months, or in the case of dark fiber, eighteen months. Verizon argues further that the FCC has special discretion in adopting transition rules intended to smooth implementation of its new permanent rules,[21] and the prohibition on "new adds" is part of that transition.

Verizon argues March 11, 2005, was carefully selected as the beginning of the transition period to avoid having a period where no rules are in place, and the FCC clearly did not intend the start of the transition period to be delayed by any negotiations. Verizon asserts that because the rules set forth in the Interim Rules Order expired on March 11, 2005, the FCC wrote the *TRRO*'s new UNE rules and transition arrangements in a manner to avoid a hiatus in which no unbundling rules at all would be in place. Verizon contends further that just as the obligations imposed on ILECs in the Interim Rules Order were immediately effective without a contract amendment, the *TRRO*'s new transition rules, including the prohibition on adding new UNE-P arrangements, must also be immediately binding to avoid a situation in which no effective rules apply.

Staff Analysis:

Discussion

It is quite clear and undisputed that the FCC held, and the new unbundling rules state, that an ILEC is no longer required to accept new orders for delisted UNEs. The dispute between the parties arises regarding the implementation of this FCC finding. Paragraph 233 of the *TRRO* states that:

[20] *TRRO* ¶¶ 235-236
[21] Bachow Communications, Inc. v. FCC, 237 F.3d 683, 686 (D.C. Cir. 2001)

> 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 conclusion 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.

As a result of the conflicting language between paragraph 233 of the *TRRO*, which requires parties to implement the Commission's findings as directed by Section 252 of the Act, and the final rules which discuss no more "new adds" for delisted UNEs, staff believes both the ILECs and the CLECs have raised strong arguments in support of their positions.

The Petitioners argue that the FCC did not abrogate the parties' change-of-law provisions within their interconnection agreements, and in effect, permit parties to implement changes of law unilaterally. Staff believes pursuant to the *Mobile-Sierra* doctrine, the FCC may modify the terms of a contract upon a finding that such a modification will serve the public need. Cable & Wireless, P.L.C. v. FCC, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999). However, to alter the terms of a private contract 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. Texaco Inc. and Texaco Gas Marketing Inc. v. FERC et al., 148 F.3d 1091 (1998). Staff believes the *TRRO* is clear that the FCC made a finding that it is in the public interest to remove certain unbundling obligations. However, with regard to implementation of its findings, and specifically implementing the prohibition on "new adds", arguably the FCC's analysis does not reach a level which would satisfy the *Mobile-Sierra* doctrine.

Staff notes there is no finding by the FCC that it was modifying interconnection agreements to abrogate parties rights under "change-of-law" provisions nor that doing so would be in the public interest. In fact, the only guidance the FCC provides regarding parties' rights and responsibilities during implementation of its unbundling determinations is found in ¶233 of the *TRRO*, where it requires parties to implement its findings as directed by section 252 of the Act and enter into good faith negotiations. Accordingly, staff believes there is sufficient justification for a finding that BellSouth and Verizon are obligated to continue to accept "new add" orders for delisted UNEs while parties implement their "change-of-law" clauses and enter into good faith negotiations.

However, staff also believes there is sufficient justification for a finding that Verizon and BellSouth are not obligated to continue to accept "new add" orders for delisted UNEs as of March 11, 2005. Both Verizon and BellSouth point out that the transition plan requires that the CLECs eliminate their current embedded base of UNE arrangements by converting them to other arrangements within twelve months, or in the case of dark fiber, eighteen months and that the

transition is to begin on March 11, 2005. Arguably, it would not fit the framework of the FCC's transition plan if the Petitioners were able to continue ordering new arrangements during a transition period where they were to be converting their current embedded base of UNE arrangements. Furthermore, the language is quite clear throughout the body of the *TRRO* and in the final unbundling rules that ILECs would not be obligated to accept new orders for delisted UNEs.

Staff notes that disputes regarding the implementation of the FCC's prohibition on "new adds" have been or are being addressed by state commissions all across the country. Recent decisions have varied greatly in their interpretation of the FCC's language and have resulted in disharmonious treatment from state to state. Some states have sided with the CLECs and determined that the *TRRO* did not supersede parties' interconnection agreements and are requiring ILECs to accept "new adds". In contrast, other states have given effect to the explicit language in the final rules and have ordered that ILECs are no longer required to accept "new add" orders after March 11, 2005. Staff does not believe the FCC envisioned disparate treatment of UNEs, much like a patchwork quilt, where each state would have its own interpretation of the FCC's UNE policy. Rather, staff believes it was the intention of the FCC to espouse a national policy governing the treatment of UNEs.

Despite the conflicting state decisions, staff notes that, to date, no party has filed a Motion for Reconsideration and/or Clarification before the FCC. Rather, parties have turned to the states to discern whether it was the FCC's intention that its prohibition on "new adds" was to take immediate effect and supersede "change-of-law" provisions contained in interconnection agreements. Staff does not believe this is an appropriate exercise for this Commission. As discussed above, there are valid arguments in support of both the ILECs' and the CLECs' interpretation of the pertinent *TRRO* paragraphs and final rules.

In its *USTA II* decision, the D.C. Circuit Court held that the FCC's subdelegation of 251(d)(2) impairment determinations to state commissions was unlawful. In reaching its decision the court raised concerns that " … delegation to outside entities increases risk that these parties will not share the agency's "national vision and perspective," and thus may pursue goals inconsistent with those of the agency and the underlying statutory scheme."[22] Staff believes a similar concern should be raised in this matter. In fact, staff believes the differing interpretations that have been made by state commissions in addressing this matter is demonstrative of the Court's concern that agencies will not share the same "national vision."

Consequently, staff believes it would be most appropriate for a party to file a petition for reconsideration and/or clarification with the FCC to address this matter. Staff believes all the parties' arguments are somewhat specious if they are unwilling to seek clarification from the FCC. Staff notes that the deadline for filing such a petition is March 28, 2005. If a petition is filed with the FCC requesting reconsideration and/or clarification of the *TRRO*, 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

[22] USTA II at 565-566. The court ultimately held that "while federal agency officials may subdelegate their decision-making authority to subordinates absent evidence of contrary congressional intent, they may not subdelegate to outside entities – private or sovereign—absent affirmative evidence of authority to do so."

interconnection agreements. Furthermore, staff believes the additional new orders should be subject to a true-up to an appropriate[23] rate if the FCC later clarifies that "new adds" were to stop on March 11, 2005. Staff believes a true-up is important to ensure that the CLECs do not have incentive to delay or not participate in negotiations.

Staff does not agree that such a decision is akin to a stay of the *TRRO* as asserted by Verizon, nor does it amount to an injunction as that argument assumes the *TRRO* clearly superseded the state commissions' authority to enforce otherwise valid interconnection agreements. As discussed earlier, staff believes it has become quite apparent based on the varied state decisions that the *TRRO* is not a model of clarity in setting forth the implementation regarding the prohibition on "new adds." As such, staff believes there is sufficient uncertainty regarding implementation that it is appropriate to enforce the parties' interconnection agreements while awaiting clarification from the FCC.

As discussed earlier in staff's analysis, staff believes both the ILECs' and the CLECs' arguments have significant merit. Furthermore, 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. Accordingly, staff recommends that if reconsideration or clarification is not timely requested prior to the Commission's consideration of this matter, the Commission should 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*.

Because Issue 2 involves a question of law, no party has raised a disputed issue of material fact, and all parties have had an opportunity to file written comments and to make oral presentations to the Commission, staff believes that the vote on this issue will constitute final agency action.

[23] Staff believes the appropriate rate should be the lower of the resale rate or a rate ultimately agreed to by the parties.

Issue 3: Should these dockets be closed?

Recommendation: No. Docket No. 041269-TP 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. (**TEITZMAN**)

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