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ALABAMA PUBLIC SERVICE COMMISSION
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SECRETARY

COMPETITIVE CARRIERS OF THE SOUTH, INC.,

DOCKET 29393

Petitioners

**TEMPORARY STANDSTILL ORDER AND
ORDER SCHEDULING ORAL ARGUMENT**

BY THE COMMISSION:

I. Introduction and Background

This Docket was originally established to address the May 27, 2004 Petition of the Competitive Carriers of the South, Inc. ("CompSouth")¹ wherein CompSouth requested that the Alabama Public Service Commission (the "Commission") issue a Declaratory Ruling pursuant to Rule 22 of the Commission's Rules of Practice holding that the obligations of parties to interconnection agreements filed with the Commission should remain in effect unless and until such agreements are modified by amendments filed with, and approved by, the Commission. CompSouth asserted that the relief requested in its May 27, 2004 Petition was necessary due to various actions and statements by BellSouth Telecommunications, Inc. ("BellSouth") following the issuance of the opinion of the United States Court of Appeals for the D.C. Circuit in *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*" and sometimes "D.C. Circuit Decision").

CompSouth specifically asserted that certain statements made by BellSouth in various state commission proceedings and in carrier notification letters had created a question as to whether BellSouth intended to continue to honor its existing interconnection agreements with respect to the provision of certain Unbundled Network Elements ("UNEs")² CompSouth accordingly requested that the Commission issue an Emergency Declaratory Ruling specifying that: (1) BellSouth must continue to honor the

¹ CompSouth represented that its members included Access Integrated Networks, Inc.; Access Point, Inc.; AT&T; Birch Telecom; Covad Communications Company; IDS Telecom, LLC; ITC DeltaCom; KMC Telecom; LecStar Telecom, Inc.; MCI; Momentum Business Solutions; Network Telephone Corp.; NewSouth Communications Corp.; NuVox Communications, Inc.; Talk America, Inc.; Xspedius Communications; and Z-Tel Communications. DSLnet Communications, LLC also joined the Petition of CompSouth.

obligations contained in its interconnection agreements, including its obligation to seek amendments to such agreements through the processes spelled out therein to effectuate changes in law, unless and until the Commission approves any modifications to those agreements; and (2) BellSouth may not undertake unilateral actions under color of *USTA II* to restrict the access of CLECs to UNEs or to change prices for UNEs unless and until the Commission approves such changes.

On May 28, 2004, BellSouth submitted its Initial Response to CompSouth's Petition for an Emergency Declaratory Ruling. BellSouth noted in its May 28, 2004 Response that it would file a formal response as directed by the Commission, but sought to initially advise the Commission that the CLEC industry had either misunderstood or was affirmatively misrepresenting BellSouth's position concerning the D.C. Circuit Court of Appeals decision in *USTA II*. BellSouth appended to its May 28, 2004 Initial Response a copy of a May 24, 2004 carrier notification letter in which BellSouth advised the CLEC industry that it would not "unilaterally disconnect services being provided to any CLEC under the CLEC's interconnection agreement" and would not "unilaterally breach its interconnection agreements"³ BellSouth noted that the D.C. Circuit's issuance of a mandate in *USTA II* would not affect BellSouth's continued acceptance and processing of new orders for services including switched, high capacity transport and high capacity loops. BellSouth noted that it would bill for such services in accordance with the terms of existing interconnection agreements until such time as those agreements were amended, reformed and/or modified in a manner consistent with the D.C. Circuit's decision in *USTA II* and established legal processes⁴ BellSouth did, however, reserve all rights, arguments and remedies available to it under the law with respect to the rates, terms and conditions in existing interconnection agreements.

On June 22, 2004, BellSouth filed its formal Response in Opposition and Motion to Dismiss the Petition of CompSouth for an Emergency Declaratory Ruling. In said Response, BellSouth argued that there was no "emergency" with respect to the relief requested by CompSouth and no merit to CompSouth's Petition because BellSouth had clearly, consistently and without exception stated that it

² CompSouth Petition for Emergency Declaratory Ruling at pp. 1-7.

³ BellSouth's Initial Response at p. 2.

⁴ *Id.*

would honor its existing interconnection agreements. BellSouth reiterated its commitment to continue honoring its existing interconnection agreements until those agreements have been conformed to be consistent with the D.C. Circuit's mandate in *USTA II*.⁵

BellSouth also committed that it would not unilaterally increase the prices that it charged for mass market switching, high capacity dedicated transport, dark fiber, or high capacity loops for those carriers with existing interconnection agreements. Furthermore, BellSouth noted that it intended to implement the D.C. Circuit's mandate in *USTA II* via the "change of law" provisions in each CLEC's interconnection agreement.⁶ BellSouth accordingly urged the Commission to dismiss the Petition of CompSouth, or in the alternative, to hold the Petition in abeyance.⁷

Upon review of the foregoing pleadings, the Commission concluded that BellSouth had provided adequate assurances that it would not attempt to unilaterally modify existing interconnection agreements with respect to the provision of services including mass market switching, high-capacity dedicated transport, dark fiber and high-capacity loops. The Commission further noted that BellSouth had conceded that its existing interconnection agreements must be amended in accordance with the "change of law" provisions in those agreements. The Commission accordingly found that CompSouth's Petition for an Emergency Declaratory Ruling should be held in abeyance so long as BellSouth continued to act in accordance with the representations made in the pleadings submitted in Response to CompSouth's Petition for Emergency Relief. The Commission did, however, afford the parties leave to submit supplemental pleadings in response to definitive rulings from the FCC and/or courts of competent jurisdiction with respect to the matters under review in this cause.

**II. BellSouth's February 15, 2005 Notice of Issuance of
Triennial Review Remand Order and Posting of Carrier Letter**

On February 15, 2005, BellSouth filed with the Commission a Notice of Issuance of Triennial Review Remand Order and Posting of Carrier Letter. BellSouth therein advised the Commission that the Federal Communications Commission (the "FCC") had on February 4, 2005 released its permanent

⁵ *Id.* at p. 3.

⁶ *Id.*

⁷ *Id.*

unbundling rules in its *Triennial Review Remand Order*.⁸ BellSouth further advised the Commission that it had on February 11, 2005 issued a carrier notification advising that the FCC had identified a number of former Unbundled Network Elements that will no longer be available as of March 11, 2005 except as provided in the *TRRO*. In particular, BellSouth stressed that the February 11, 2005 notification advised carriers that with regard to each of the former UNEs discussed in the *TRRO*, the FCC had provided that no "new adds" will be allowed as of March 11, 2005.⁹ BellSouth further asserted that the *TRRO*'s provisions as to "new adds" were effective March 11, 2005 without the necessity of formal amendments to any existing interconnection agreements.¹⁰

In conclusion, BellSouth advised the Commission that in accordance with the terms of the *TRRO*, BellSouth had informed its carrier customers that effective March 11, 2005, BellSouth will no longer accept orders which treat the items affected by the *TRRO* as UNEs. In particular, BellSouth notified the Commission that it had informed its customers that as of March 11, 2005, BellSouth is no longer required to provide high capacity UNE loops in certain central offices, to provide UNE transport between certain central offices, or to provide new UNE dark fiber loops or UNE entrance facilities.¹¹

III. The February 25, 2005 Petition of MCI for Emergency Relief

By filing of February 25, 2005, MCImetro Access Transmission Services, LLC ("MCI") sought permission to intervene in this cause and Petitioned the Commission to issue a Declaratory Ruling requiring BellSouth to: (1) Continue accepting and processing MCI's UNE-P orders under the rates, terms and conditions of MCI's current interconnection agreement with BellSouth (the "MCI/BellSouth interconnection agreement"), and (2) Comply with the "change of law" provisions of the MCI/BellSouth interconnection agreement with regard to the implementation of the FCC's *TRRO* issued on February 4, 2005. As discussed in more detail below, MCI surmised that circumstances now exist that should cause this Commission to allow MCI to intervene and reactivate this matter.¹²

⁸ *In the matter of Unbundled Access to Network Elements; Review of the §251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, *Order on Remand*, FCC 04-290 (released February 4, 2005) (the "*TRRO*").

⁹ BellSouth Notice at pp. 1-2; *Citing TRRO* at ¶227.

¹⁰ *Id.*; *Citing Attachment A*, p. 2.

¹¹ *Id.* at p. 2.

¹² MCI's Petition to Intervene is hereby granted.

MCI notes that it entered into an interconnection agreement with BellSouth on June 17, 2002. According to MCI, that agreement requires BellSouth to provide UNE combinations including "the combination of network element platform or UNE-P."¹³ MCI asserts that said agreement further provides that "[t]he price for these combinations of network elements shall be based upon applicable FCC and Commission rules and shall be set forth in Attachment 1 of this agreement."¹⁴ MCI maintains that those rates remain in effect today.

MCI further asserts that the MCI/BellSouth agreement specifies the steps to be taken if a party wishes to amend the MCI/BellSouth agreement because of a change in law. When the parties are unable to agree on how to implement a change in the law, MCI notes that the MCI/BellSouth interconnection agreement sets forth a dispute resolution process that is to be followed.¹⁵

MCI does not dispute that the FCC in its February 4, 2005 *TRRO* determined on a nationwide basis that ILECs are not obligated to provide unbundled local switching pursuant to §251(c)3 of the Telecommunications Act of 1996. MCI also does not dispute that the FCC adopted a transition plan that calls for CLECs to move to alternative service arrangements within 12 months of the effective date of the *TRRO* and determined that the price for §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.¹⁶

With respect to new UNE-P orders after the effective date of the *TRRO*, MCI notes that the FCC stated that: "the 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 §251(c)3 except as otherwise specified in this order."¹⁷ MCI argues, however, that the *TRRO* does not purport to abrogate the "change of law" provisions of carriers' interconnection agreements and in fact directs carriers to implement the rulings set forth in the *TRRO* by negotiating changes to those interconnection agreements.¹⁸

¹³ MCI's Motion for Emergency Relief at p. 3; *Citing MCI/BellSouth agreement at Attachment 3, §2.4*

¹⁴ *Id.*

¹⁵ *Id.* at p. 4; *Citing MCI/BellSouth agreement Part A, §§2.3 and 22.1*

¹⁶ *Id.* at pp. 5-6; *Citing TRRO at §§227 and 228*

¹⁷ *Id.* at p. 6; *Citing TRRO §227.*

¹⁸ *Id.*; *Citing TRRO at §233.*

MCI points out that BellSouth issued a carrier notification dated February 8, 2005, wherein BellSouth noted the FCC's release of the *TRRO* and claimed that the *TRRO* precludes CLECs from adding new UNE-P lines starting March 11, 2005.¹⁹ In an attempt to clarify BellSouth's intent, MCI asserts that on February 11, 2005, it sent a letter to BellSouth asking whether BellSouth intends to reject its UNE-P orders or charge a higher rate for new UNE-P lines in the event that MCI does not sign a "commercial agreement" with BellSouth by March 11, 2005.²⁰

MCI notes that BellSouth issued a second carrier notification dated February 11, 2005 in which BellSouth expanded its interpretation of the *TRRO*. According to MCI, BellSouth claimed that "the FCC's actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to 'new adds' for ... former UNEs."²¹ MCI further notes that BellSouth's February 11, 2005 carrier notification 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 for Unbundled Network Element Platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs."²² According to MCI, BellSouth also issued a change request along with the February 11 carrier notification that creates a new edit in its Operations Support Systems to reject all new orders for UNE-P effective March 11, 2005.²³

MCI represents that it notified BellSouth on February 18, 2005, that the actions BellSouth had proposed would constitute a breach of the MCI/BellSouth interconnection agreement. MCI accordingly requested that BellSouth provide adequate assurances that it will perform pursuant to its existing interconnection agreements.²⁴

In conclusion, MCI argues that the MCI/BellSouth interconnection agreement requires BellSouth to provide UNE-P to MCI at the rates specified in the agreement unless and until the agreement is amended pursuant to the "change of law" process specified therein. MCI thus asserts that BellSouth must continue to accept and provision MCI's UNE-P orders at the rates specified in the existing MCI/BellSouth

¹⁹ *Id*

²⁰ *Id* at p. 7; *Citing Exhibit B*

²¹ *Id* at p. 7

²² *Id*; *Citing Exhibit C*.

²³ *Id*; *Citing Exhibit D*

²⁴ *Id* at pp. 7-8.

interconnection agreement. By stating that it will not accept UNE-P orders beginning March 11, 2005, MCI asserts that BellSouth has breached the aforesaid agreement.²⁵

MCI further concludes that the *TRRO* does not excuse or justify BellSouth's stated intention of refusing to accept MCI's UNE-P orders beginning March 11, 2005. To the contrary, MCI asserts that the *TRRO* requires that its rulings be implemented through changes to parties' interconnection agreements. According to MCI, implementing the change of law with respect to new UNE-P orders will not be an academic exercise because the parties will need to address, among other issues, BellSouth's duty to continue to provide UNE-P to MCI at current rates under state law and under §271 of the federal act.²⁶

IV. The February 25, 2005 Joint Petition of NuVox, Xspedius and KMC for Emergency Relief²⁷

On February 25, 2005, NuVox Communications, Inc. ("NuVox"); Xspedius Management Company Switched Services, LLC on behalf of its operating subsidiaries Xspedius Management Company of Birmingham, LLC, Xspedius Management Company of Mobile, LLC and Xspedius Management Company of Montgomery, LLC (collectively referred to as "Xspedius"); KMC Telecom III, LLC ("KMC III") and KMC Telecom V, Inc. ("KMC V"), (KMC III and KMC V are collectively referred to as "KMC") (collectively NuVox, Xspedius and KMC are referred to as the "Joint Petitioners") also jointly filed a Petition for Emergency Relief (the "Joint Petition for Emergency Relief") requesting that the Commission issue an Emergency Declaratory Ruling finding that BellSouth may not unilaterally amend or breach its existing interconnection agreements or the Ruling Granting Joint Motion to Hold Proceeding in Abeyance entered by the Commission in Docket 29242 on December 16, 2004.²⁸ The Joint Petitioners filed their request for relief in light of BellSouth's February 11, 2005 carrier notification wherein BellSouth stated that certain provisions of the FCC's *TRRO* regarding new orders for delisted UNEs ("new adds") are self-effectuating

²⁵ *Id.* at p. 8.

²⁶ *Id.*

²⁷ We note that ITC-DeltaCom Communications, Inc. ("ITC-DeltaCom") filed a letter in support of this Joint Petition of NuVox, Xspedius and KMC for Emergency Relief on February 28, 2004. To the extent that ITC-DeltaCom, NuVox, Xspedius and KMC have not been granted permission to intervene in Docket 29393 in their individual, company capacities, that permission is hereby granted.

²⁸ The proceedings in Docket 29242 concern the *Joint Petition of New South Communications Corp., et al. for Arbitration with BellSouth Telecommunications, Inc.* The Order entered herein is intended to address the generic issues raised in Docket 29393 regarding compliance with existing interconnection agreements and how those agreements must be amended in order to properly incorporate changes of law. It is, however, recognized by the Commission that this Standstill Order and any final rulings entered in this Docket 29393 will have an impact on the arbitration being conducted pursuant to Docket 29242.

as of March 11, 2005. The Joint Petitioners assert that BellSouth's pronouncement of February 11, 2005 is incorrect and based on a fundamental misreading of the *TRRO*.²⁹ As with any change in law, the Joint Petitioners assert that the *TRRO* is a change in law that must be incorporated into existing interconnection agreements prior to being effectuated.³⁰

Contrary to BellSouth's position, the Joint Petitioners vehemently assert that the *TRRO* is not self-effectuating with regard to "new adds" or in any other respects including any changes in rates or the availability of access to UNES. The Joint Petitioners in fact assert that the section of the *TRRO* entitled "Implementation of Unbundling Determinations" plainly states that "incumbent LECs and competing carriers will implement the Commission's findings as directed by §252 of the act." The Joint Petitioners note that §252 of the Telecommunications Act of 1996 requires negotiations and state commission arbitration of issues that cannot be resolved through negotiation.³¹

The Joint Petitioners further assert that the FCC's decision to employ the traditional process by which changes of law are implemented is reflected in several other instances throughout the *TRRO*. By way of example, the Joint Petitioners note that with regard to high capacity loops, the FCC held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."³² The Joint Petitioners noted that the FCC reached similar conclusions with respect to modifications necessary to address high capacity transport and UNE-P arrangements.³³

The Joint Petitioners also point out that in Alabama, the process for implementing the changes of law resulting from the *TRRO* are well underway in the Joint Petitioners' arbitration in Docket 29242 and the generic proceeding established by the Commission to address changes of law under Docket 29393. The Joint Petitioners assert that until these proceedings have been concluded and/or the parties reach negotiated resolution, the interconnection agreements in existence today must be abided by.³⁴

²⁹ Joint Petition for Emergency Relief at pp. 1-2.

³⁰ *Id.*

³¹ Joint Petition for Emergency Relief at pp. 9-10.

³² *Id.* at p. 10; *Citing TRRO at ¶196.*

³³ *Id.*; *Citing TRRO at ¶143 and 227.*

³⁴ *Id.* at p. 3.

In conclusion, the Joint Petitioners represent that the Commission must now act to prevent BellSouth from taking unilateral action on March 11, 2005, that will effectively breach and/or unilaterally amend the Joint Petitioners' existing interconnection agreements and most, if not all, other BellSouth Alabama interconnection agreements. The Joint Petitioners point out that for their operations, and those of other facilities-based carriers, essential UNEs such as high capacity loops and high capacity transport are jeopardized by BellSouth's February 11, 2005 carrier notification. The Joint Petitioners maintain that they and the Alabama consumers they serve will suffer imminent and irreparable harm if BellSouth is allowed to breach or unilaterally modify the terms of the parties' existing interconnection agreements. The Joint Petitioners accordingly seek expeditious consideration of this matter and an order declaring, among other things, that the Joint Petitioners shall have full and unfettered access to BellSouth's UNEs provided for in their existing interconnection agreements on and after March 11, 2005 and/or until such time as those agreements are replaced by new interconnection agreements resulting from the arbitration proceedings in Docket 29242 or the final conclusions of the Commission in Docket 29393.³⁵

V. Findings and Conclusions of the Commission

Having considered the foregoing pleadings, the findings and conclusions of the FCC in the *TRRO* and the conflicting language in the *TRRO* regarding implementation of the conclusions set forth therein, the Commission finds that the entire telecommunications industry in Alabama and the customers of that industry would be best served by further analysis of the issues set forth in the Petitions of MCI, NuVox, Xspedius and KMC. In order to facilitate that further analysis, the Commission finds that the Emergency Relief requested by MCI, NuVox, Xspedius and KMC is due to be granted for all CLECs operating in Alabama pursuant to existing interconnection agreements that have been submitted to and approved by this Commission.

In summary, BellSouth shall continue to honor the entirety of the rates, terms and conditions set forth in its existing interconnection agreements with CLECs in Alabama provided the agreements in question have been submitted to and approved by this Commission. BellSouth shall not, until further

³⁵ *Id.* at pp. 3-4.

notice from this Commission, cease the provision of any UNE required to be provided pursuant to an existing interconnection agreement and shall provide such UNEs according to the rates established or otherwise referenced in such agreements.

In order to hasten a conclusion on the merits of the issues set forth in the foregoing pleadings,³⁶ BellSouth and the CLEC parties identified herein are hereby ordered to participate in Oral Arguments to be held on March 29, 2005, in the Main Hearing Room of the Commission's Chief Administrative Law Judge Carl L. Evans Hearing Complex in Montgomery, Alabama. Said Arguments shall commence at 10:00 A.M. The various CLEC parties identified herein are collectively allotted a total of 45 minutes to initially argue in support of their position while BellSouth will be allowed an initial argument period of 25 minutes. The CLECs will be collectively allowed 15 minutes to rebut BellSouth's arguments while BellSouth will be allowed 10 minutes to rebut the arguments of the CLECs.

The parties are further advised that the Commission will endeavor to render a decision on the merits of the issues raised in the pleadings discussed herein and the Oral Arguments to be held on March 29, 2005 as soon as possible. In the event that the Commission ultimately rules in favor of BellSouth regarding the provision of UNEs and/or "new adds" on and after March 11, 2005, the parties are advised to carefully track any and all UNEs/"new adds" provided by BellSouth on and after March 11, 2005 for purposes of truing up the UNEs/"new adds" so provided by BellSouth in accordance with the provisions of the *TRRO* or any superseding commercial agreements entered by and between BellSouth and the affected carriers.

IT IS SO ORDERED BY THE COMMISSION.

IT IS FURTHER ORDERED BY THE COMMISSION, That jurisdiction in this cause is hereby retained for the issuance of any further order or orders as may appear to be just and reasonable in the premises.

³⁶ The Commission notes that BellSouth has not yet filed a Pleading in response to the Petitions of MCI, NuVox, Xspedius and KMC. BellSouth shall do so on or before March 22, 2005.

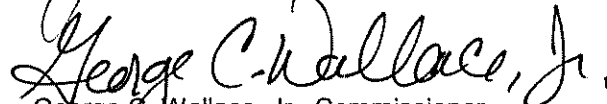
IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 9th day of March, 2005.

ALABAMA PUBLIC SERVICE COMMISSION


Jim Sullivan, President


Jan Cook, Commissioner


George C. Wallace, Jr., Commissioner

ATTEST: A True Copy


Walter L. Thomas, Jr., Secretary