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December 3, 2004

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

Re: Docket No.: 040130-TP
Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications Corp., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on Behalf of its Operating Subsidiaries Xspedius Management Co. Switched Services, LLC and Xspedius Management Co. of Jacksonville, LLC

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Brief in Opposition to Inclusion of Issues 112(B) and 113(B), which we ask that you file in the captioned docket.

Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

James Meza III

James Meza III

Enclosures

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

CERTIFICATE OF SERVICE
DOCKET NO. 040130-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U. S. Mail this 3rd day of December, 2004 to the following:

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James Meza III (BSS)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of	)
Joint Petition for Arbitration of NewSouth	)
Communications Corp., NuVox Communications Corp.	) Docket No. 040130-TP
KMC Telecom V, Inc., KMC Telecom III LLC, and	)
Xspedius Communications, LLC on Behalf of its	)
Operating Subsidiaries Xspedius Management Co.	) Filed: December 3, 2004
Switched Services, LLC and Xspedius Management Co.	)
Of Jacksonville, LLC,	)

BRIEF IN OPPOSITION TO INCLUSION OF ISSUES 112(B) AND 113(B)

BellSouth Telecommunications Inc. ("BellSouth"), pursuant to the Issue Identification meeting held on November 15, 2004, submits this Brief in Opposition to the inclusion of CLEC Issues 112(B) and 113(B) (the "Issues") in this § 252 arbitration.

BACKGROUND

On July 15, 2004, the Parties filed a Joint Motion for Abeyance with the Florida Public Service Commission ("Commission") where the Parties asked for 90-day abatement of the arbitration proceeding so that they could include issues relating to the D.C. Circuit's decision in *United States Telecom Ass'n v.* FCC, 359 F.3d 554 (D.C. Circuit 2004) ("*USTA II*") in this § 252 arbitration. During this 90-day abatement period, the Federal Communications Commission ("FCC") issued its *Order and Notice of Proposed Rule Making* in WC Docket No. 04-313 ("*Interim Rules Order*"). Consequently, the parties agreed to include issues relating to the *Interim Rules Order* in this § 252 arbitration as well. In this regard, the parties discussed issues relating to *USTA II* and the *Interim Rules Order* ("Supplemental Issues") and submitted several agreed-upon Supplemental Issues in the Matrix filed on October 15, 2004.[1] In addition, the CLECs also unilaterally included in the Matrix Issues 112 and 113 over BellSouth's objection.

[1] As an initial matter, BellSouth's position is that all Supplemental Issues addressing BellSouth's federal obligations resulting from *USTA II*, the *Interim Rules Order* or the Final Unbundling Rules should be deferred to the generic change of law proceeding filed by BellSouth. In no event, however, should issues addressing any state-law obligations be included in such a generic proceeding.

At the Issue Identification meeting, BellSouth continued to assert its objection to the inclusion of the Issues and now specifically objects to the inclusion of the Issues.

Subpart (A) for the Issues asks whether BellSouth has an obligation to provide unbundled access to DS1 loops and transport, DS3 loops and transport, and dark fiber loops and transport. Subpart (B) for both Issues states as follows: "If so, under what rates, terms and conditions."

ARGUMENT

To understand why the Commission should refuse to consider the Issues, a brief discussion of subpart (A) is necessary. Specifically, *USTA II* vacated the FCC's impairment findings relating to high-capacity loops and transport. *See USTA II* at 222; *Interim Rules Order* at ¶ 8. Without a finding of impairment, there can be no § 251 unbundling obligation. 47 U.S.C. § 251(d)(2). In light of this vacatur, the FCC in the *Interim Rules Order* set forth how high-capacity loops and transport will be provisioned during the twelve-month transition period it established in the *Interim Rules Order* for existing CLEC customers. *Interim Rules Order* at ¶ 1. Clearly, *USTA II* vacated any obligation for BellSouth to provide high-capacity loops and transport on an unbundled basis and the *Interim Rules Order* established how these elements would be provided post-*USTA II* until the FCC issued its Final Unbundling Rules. There should be no dispute on this issue. Unfortunately, this is not the case.

Consistent with the CLECs' approach to ignore the regulatory changes that resulted from *USTA II* and the *Interim Rules Order*, the CLECs have taken the position that, notwithstanding *USTA II* and the *Interim Rules Order*, the Commission can order BellSouth to unbundle high capacity loops and transport pursuant to § 251,[2] § 271, or state unbundling laws. And, with the

[2] This argument is entirely nonsensical and does not merit a full response. Currently, there is no impairment finding relating to high-capacity loops and transport. Without an impairment finding, there can be no § 251 unbundling obligation. Thus, the CLECs' § 251 argument is simply not plausible.

Issues, the CLECs are attempting to force this Commission to establish rates, terms, and conditions pursuant to these alternative, non-applicable theories of unbundling relief that ultimately will conflict with *USTA II* and the *Interim Rules Order*. Indeed, if the CLECs would agree that the rates, terms, and conditions associated with BellSouth's obligation (if any) to provide high-capacity loops and transport were governed by the *Interim Rules Order* or the FCC's Final Unbundling Rules, then the Issues would not be controversial. However, as a result of their attempt to throw in the proverbial "kitchen sink" in an attempt to circumvent federal law, the Commission should refuse to consider the Issues for the following reasons.

First, the Commission is prohibited by the doctrine of preemption from establishing rates, terms and conditions different than what the FCC ordered in the *Interim Rules Order*. *See* § 251(d)(3); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338 ("*TRO*") at ¶¶ 194-95. Thus, there is no need to consider the Issues because the Commission is prohibited from ordering anything that conflicts with or frustrates the national regulatory scheme set forth by the FCC for high-capacity loops and transport.

Second, the FCC and not the Commission has jurisdiction over elements provided pursuant to § 271 for which no impairment finding has been made. 47 U.S.C. § 271(d)(1), (d)(3), (d)(6). The only role Congress gave state commissions in § 271 is a consultative role during the approval process. 47 U.S.C. § 271(d)(2)(B). This conclusion is bolstered by the plain text of § 252, which limits state commission authority to agreements entered into "pursuant to section 251." 47 U.S.C. § 252(a)(1). Simply put, Congress did not authorize a state commission to ensure that an agreement satisfies § 271 or to establish rates for any § 271 obligation. *See UNE Remand Order* at ¶ 470; *TRO* at ¶ ¶ 656, 664; *USTA II*, at 237-38. Accordingly, the

Commission is prohibited from finding in this arbitration that BellSouth has a § 271 obligation to provide high-capacity loops and transport or from establishing any rates, terms, and conditions associated with any such § 271 obligation.

Third, the instant arbitration is a § 252 arbitration and not an arbitration under state law. Accordingly, whether BellSouth has a state unbundling obligation to provide high-capacity loops and transport and the identification of the rates, terms, and conditions associated with such an obligation cannot be addressed in this proceeding. Further, in addition to the obvious preemption issue, there are currently no rates, terms, and conditions under state law for these elements and, importantly, the CLECs have not followed the process set forth in Section 364.162, Florida Statutes for the establishment of such rates, terms, and conditions. Simply put, the Commission should not use this arbitration proceeding established under ***federal*** law to establish new rates, terms, and conditions for unbundled elements under state law.

Fourth, the Issues are beyond the scope of the Commission's authority under § 252 as to what it can consider in federal arbitration proceeding under the Act. In *MCI Telecommunications, Corp. v. BellSouth Telecommunications, Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002), the Eleventh Circuit held that the Commission could arbitrate a non-251 issue if the issue was a condition required to implement the agreement. The rates, terms, and conditions associated with BellSouth's obligation under § 271 or state law to provide high-capacity loops and transport on an unbundled basis (if any such obligation exists) are not conditions required to implement a Section 251 agreement and thus should not be considered.

Fifth, BellSouth never agreed to consider state law or § 271 obligations in this § 252 arbitration proceeding.[3] In *Coserv Limited Liab. Corp. v. Southwestern Bell Telephone*, 350 F.3d

[3] The CLECs will probably argue that the parties agreed to raise new issues regarding the "post-*USTA II* regulatory framework." The CLECs' strained interpretation of this phrase is that it allows them to arbitrate any non-251 issue.

482, 487 (5th Cir. 2003), the Fifth Circuit held that an ILEC only has an obligation under the Act to negotiate those duties listed in § 251(b) and (c). The court further found that, only in cases where the parties voluntarily agree to negotiate "issues other than those duties required of an ILEC by § 251(b) and (c)" do non-251 issues become subject to compulsory arbitration under § 252. *Id.* As stated by the court, a state commission ". . . may arbitrate only issues that were the subject of the voluntary negotiations" and that "[a]n ILEC is clearly free to refuse to negotiate any issue other than those it has to duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252." Here, BellSouth never agreed to negotiate the rates, terms, and conditions that would apply to any non-251 obligation (whether it be under § 271 or state law) to provide unbundled DS1, DS3, and dark fiber loop and transport. Thus, these Issues are not appropriately the subject of a § 252 arbitration.

This is not the case and inconsistent with BellSouth's historical position in this proceeding that non-251 issues are not appropriately the subject of arbitration. In addition, it is beyond reason to suggest that state unbundling laws are somehow encompassed within a federal law framework. In any event, the purpose of the abatement was to address *USTA II* so that the agreement complies with the most current federal laws, not to provide the CLECs with an unlimited opportunity to raise non-251 issues.

Respectfully submitted this 3rd day of December, 2004.

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