Legal Department

MEREDITH MAYS
Senior Regulatory Counsel

BellSouth Telecommunications, Inc.
150 South Monroe Street
Suite 400
Tallahassee, Florida 32301
(404) 335-0750

June 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

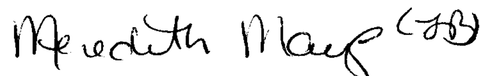
Re: Docket No. 040530-TP; Petition of FCCA, AT&T and MCI for Expedited Ruling to Require the Filing, Public Review and Approval of Agreements for the Provision of Wholesale Local Facilities and Services Between ILECs and CLECs

Dear Ms. Bayo:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s, Response in Opposition and Motion to Dismiss the Petition for Expedited Ruling Regarding the Filing of Commercial Agreements filed by FCCA, AT&T and MCI, which we ask that you file in the above referenced docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,



Meredith E. Mays

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

542609

CERTIFICATE OF SERVICE
DOCKET NO. 040530-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and Federal Express this 28TH day of June, 2004 to the following:

Felicia Banks
Staff Counsel
Florida Public Service
Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No. (850) 413-6175
ateitzma@psc.state.fl.us

Vicki Gordon Kaufman
Joseph McGlothin
McWhirter Reeves McGlothlin
Davidson Kaufman & Arnold, P.A.
117 South Gadsden Street
Tallahassee, FL 32301
Tel. No. (850) 222-2525
Fax. No. (850) 222-5606
vkaufman@mac-law.com
jmcglothlin@mac.law.com

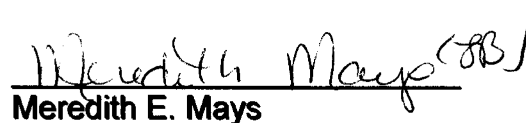
Richard Chapkis
Verizon Florida Inc.
P.O. Box 110, FLTC0007
Tampa, FL 33601-0110
Phone: (813) 483-1256
Fax: (813) 273-9825
richard.chapkis@verizon.com

David Christian
Verizon Florida, Inc.
106 East College Avenue
Tallahassee, FL 32301-7748
Tel. No. (850) 224-3963
Fax. No. (850) 222-2912
david.christian@verizon.com

Tracy Hatch
AT&T Communications
101 North Monroe Street, Ste. 700
Tallahassee, FL 32301-1556
Tel. No. (850) 224-7798
Fax. No. (850) 222-8640
thatch@att.com

Donna McNulty
MCI WorldCom Communications
1203 Governors Square Blvd.
Suite 201
Tallahassee, FL 32301-2960
Tel. No. (850) 219-1008
Fax. No. (850) 219-1018
donna.mcnulty@mci.com

Dulaney L. O'Roarke
MCI WorldCom Communications
Six Concourse Parkway
Suite 6000
Atlanta, GA 30328
Tel. No. (770) 284-5497
De.ORoark@mci.com



Meredith E. Mays

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition of Florida Competitive Carriers Association, AT&T, and MCI for Expedited Ruling to Require the Filing, Public Review and Approval of Agreements for the Provision of Wholesale Local Facilities and Services Between ILECs and CLECs	))))))	Docket No. 040530-TP Filed: June 28, 2004

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE IN OPPOSITION AND MOTION TO DISMISS PETITION FOR EXPEDITED RULING REGARDING THE FILING OF COMMERCIAL AGREEMENTS

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this response to the Petition for Expedited Ruling filed by the Florida Competitive Carriers Association, AT&T Communications of Southern States LLC, and MCImetro Access Transmission Services LLC and MCI WORLDCOM Communications, Inc. (collectively, "Petitioners"). Petitioners' Complaint seeks an order from this Commission requiring BellSouth to file for review and approval any commercial agreements entered into by it and a Competing Local Exchange Carrier ("CLEC"). Petitioners' request should be denied because: (1) requiring that commercial agreements be filed and approved would seriously impede the negotiation of such agreements; and (2) the commercial agreements at issue are not subject to the filing and approval requirements of the Telecommunications Act of 1996 ("1996"). Petitioners' request for an "expedited ruling" should also be denied, as it fails to meet the requirements for emergency relief under Florida law.

II. DISCUSSION

A. Petitioners Have Not Alleged Any "Emergency" that Requires Expedited Relief.

This Commission has explained that its rules do not specifically address expedited review

of petitions. *Order No.* PSC-03-0622-PCO-TP. Instead, this Commission has articulated three criteria for the expeditious processing of interconnection agreement complaints, which require that: (1) the complaint is limited to three issues, without subparts; (2) the complaint is limited to issues of contract interpretation; and (3) the parties do not dispute the actions each took *under the contract*. *Id.* (emphasis supplied). The Petitioners' Complaint does not satisfy these criteria; accordingly there is no legal basis for expedited relief. Moreover, as set forth below, there is no basis to grant Petitioners' request in any event.

B. The Regulatory Oversight Espoused By Petitioners Would Hinder Commercial Negotiations.

In response to the recent decision of the D.C. Circuit that rejected for a third time unbundling rules adopted by the Federal Communications Commission ("FCC"),[1] the FCC urged CLECs and Incumbent Local Exchange Carriers ("ILECs") such as BellSouth to commence "good faith" "commercial negotiations" "to arrive at commercially acceptable arrangements" in order "to restore certainty and preserve competition in the telecommunications market."[2] The National Association of Regulatory Utility Commissioners ("NARUC") echoed this sentiment, noting that several state public service commissions "had issued similar calls for commercial negotiations."[3] In response to these calls for "commercial negotiations," BellSouth commenced voluntary, good faith discussions with numerous CLECs, which have resulted in commercial agreements with eleven CLECs to date. BellSouth has also entered into over one hundred

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *reversed in part on other grounds, United States Telecom. Ass'n v. FCC*, Nos. 00-1012, *et al.* (D.C. Cir. Mar. 2, 2004) ("*USTA II*").

[2] 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, rel. March 31, 2004.

[3] NARUC Applauds FCC Efforts To Find Consensus On Competition Rules, rel. March 31, 2004.

nondisclosure agreements, which protect the confidential nature of such negotiations.

Despite the FCC's and NARUC's desire for commercially reasonable wholesale service arrangements as an alternative to the regulatory uncertainty the industry currently faces, commercial agreements are proving to be the exception rather than the rule. This is due in no small measure to the threat of the type of regulation espoused by Petitioners. Rather than allowing the parties to negotiate commercial wholesale service arrangements, Petitioners want to subject such arrangements to the requirements of Section 252 of the 1996 Act, which governs the negotiation and arbitration of interconnection agreements. In addition to being legally unsustainable (as discussed below), injecting the threat of regulatory intervention through the filing and approval process set forth in Section 252 stands as an obstacle to the fulfillment of the FCC's and NARUC's goal of reaching market-based, commercially acceptable agreements and avoiding additional litigation and uncertainty.

For example, commercial negotiations for wholesale services provided on a voluntary rather than a mandatory basis – such as for services replacing network elements that no longer satisfy the impairment standard – involve a substantial amount of give and take. During such negotiations, the parties may choose to make certain concessions in exchange for benefits contained elsewhere in the agreement. There would be no incentive for a carrier to make such concessions in the first place if another carrier could pick and choose only the beneficial aspects of a commercial agreement under Section 252(i), as urged by Petitioners.

Likewise, under Section 252(e), states have discretion to reject an interconnection agreement and could require that the parties modify terms and conditions of the agreements prior to approval. If Section 252(e) were applied to commercial agreements, as Petitioners advocate, parties would understandably be hesitant to enter into negotiations when there is a risk that the

agreements will be subject to subsequent state commission modification. Furthermore, given Petitioners' Complaint threatening additional regulatory hurdles, it appears unlikely that litigation surrounding commercial agreements will decrease, further undermining the incentive of either party to negotiate such a deal.

Requiring that commercial agreements be filed with and approved by the Commission under Section 252 of the 1996 Act injects an unacceptable level of uncertainty into the negotiating process. Carriers will be loath to negotiate when they risk exposure of agreements to pick-and-choose, potential revisions by state commissions on a state-by-state basis of commercially-determined provisions, and even just the prospect of delay in obtaining approval. Thus, in order to further "pave the way for further negotiations and contracts,"[4] the Commission should find that the commercial agreements which are the subject of Petitioners' Complaint are not subject to the filing and approval requirements of Section 252.

That is not to say that BellSouth is seeking to shield these commercial agreements from public inspection. On the contrary, while these commercial agreements are not subject to Section 252, they are governed by Section 211 of the Communications Act because they are federal agreements. Section 211(a) provides that "[e]very carrier subject to this Act shall file with the [FCC] copies of all contracts, agreements, or arrangements with other carriers ... in relation to any traffic affected by the provisions of this Act to which it may be a party." 47 U.S.C. § 211(a). Commission Rule 43.51(c), which implements Section 211(a), provides in relevant part as follows:

> [w]ith respect to contracts coming within the scope of paragraph (a)(1)(ii) of this section between subject telephone carriers and connecting carriers ... such documents shall not be filed with the Commission; but each subject telephone

[4] *See* FCC Chairman Michael Powell's Comments on SBC's Commercial Agreement with Sage Telecom Concerning Access to Unbundled Network Elements (April 5, 2004).

> carrier shall maintain a copy of such contracts to which it is a party in appropriate files at a central location upon its premises, copies of which shall be readily accessible to Commission staff and members of the public upon reasonable request therefore; and upon request by the Commission, a subject telephone carrier shall promptly forward individual contracts to the Commission.

47 C.F.R. § 43.51(c). In compliance with Section 211 and the FCC's rules, BellSouth will make its commercial agreements available in appropriate files at a central location in Atlanta and will make copies readily accessible to FCC staff and members of the public upon reasonable request.[5]

The Petitioners fail to even acknowledge that BellSouth's commercial agreements are available for public inspection. This failure speaks volumes, particularly since CompSouth, an organization comprised of most of the same companies that are FCCA members, characterized BellSouth's act of making its commercial agreements available as a "concession" in a May 25, 2004 Petition filed in Georgia, which Petition mirrors this Complaint. *See* Georgia Docket No. 18948-U, CompSouth's Petition for Expedited Ruling, ¶¶ 6 & 20. It is hardly a "concession" for BellSouth to adhere to the requirements of Section 211 and binding FCC rules, which only mandate public inspection of federal agreements of the type at issue in this case. Moreover, Petitioners' omission of this fact suggests they are more interested in a vortex of never-ending regulation than in reaching viable, negotiated commercial agreements.

Furthermore, the filing of commercial agreements with and approval by the state public service commissions is not necessary to protect CLECs against discrimination, as Petitioners erroneously contend. Complaint ¶¶ 17 & 28. Indeed, the FCC repeatedly has found that "competition is the most effective means of ensuring that the charges, practices, classifications, and regulations ... are just and reasonable, and not unjust and unreasonably discriminatory." *Petition of US West Communications, Inc. for Declaratory Ruling Regarding the Provision of*

[5] *See* Attachment 1, consisting of BellSouth's Carrier Notification Letters outlining the actions it has taken to allow the public inspection of commercial agreements. In addition, BellSouth will continue to file its Section 251 agreements with state public service commissions.

National Directory Assistance; Petition of US West for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements, 14 FCC Rcd 16252. ¶ 31 (1999). Once competitors are no longer impaired without access to a particular network element, there is no need to file or seek regulatory approval of a commercial agreement to provide an equivalent to that element in order to assure nondiscriminatory rates. The absence of impairment signifies that there are meaningful alternatives to the ILEC's network – including cable systems, other wireline networks, and even wireless services. Given the existence of such alternatives, the ILEC has every incentive to reach commercially reasonable wholesale arrangements in order to maintain traffic on its network, and CLECs have other options if they cannot or do not wish to agree to terms with the ILEC. Accordingly, the marketplace can be relied upon to assure that the rates in BellSouth's commercial agreements are not discriminatory, without subjecting such agreements to the filing and approval process under Section 252.

As a backstop, BellSouth's compliance with Section 211 will enable the FCC to view the rates, terms, and conditions contained in the commercial agreements. The FCC, therefore, will be able to ensure compliance with the nondiscrimination requirements of Sections 201 and 202, without resorting to yet another level of regulatory oversight urged by Petitioners. Furthermore, other interested parties, including state commission personnel, will be able to view the terms and conditions of the agreements at a central location in Atlanta.

B. Commercial Agreements Are Not Subject To The Filing And Approval Requirements Of Section 252 Under The Plain Language Of The Statute And FCC Precedent.

In addition to seeking to undermine the very negotiation process that the FCC and NARUC have encouraged, Petitioners' Complaint is legally flawed. In particular, the language of Section 252, the terms of Section 251, and FCC precedent all make clear that commercial

agreements need not be filed with or approved by state commissions pursuant to Section 252, notwithstanding Petitioners' claims to the contrary.

1. Section 252

By its terms, Section 252 applies only to interconnection agreements negotiated after the ILEC receives "a request for interconnection, services, or network elements *pursuant to Section 251*."[6] This critical limitation governs all the Section 252 obligations – a limitation that Petitioners conveniently ignore. Thus, only agreements requested "pursuant to Section 251" "shall be submitted to the State commission" for approval under Section 252(e).[7] Similarly, only those agreements filed pursuant to Section 252(e) are required to be available for public inspection under Section 252(h),[8] and only such agreements are available to other telecommunications carriers under Section 252(i).[9] Likewise, the competitive carrier's initial "request" for an agreement "pursuant to Section 251" triggers the state arbitration period in Section 252(b),[10] and only such agreements are available for arbitration by state commissions

---

[6] 47 U.S.C. §252(a)(1) (emphasis added). The fact that Section 252(a)(1) provides that such agreements may be negotiated "without regard to the standards set forth in subsections (b) and (c) of Section 251" does not impact the necessary precondition: the request for interconnection must be for network elements and services required under Section 251 of the 1996 Act. If the contract is not requested pursuant to Section 251, Section 252(a)(1) does not apply.

[7] 47 U.S.C. §§ 252(a)(1) & (e). And, a state may only reject an agreement "if it finds that the agreements do not meet the requirements of Section 251." 47 U.S.C. §252(e)(2)(B).

[8] 47 U.S.C. §252(h) ("A State commission shall make a copy of each agreement approved under subsection (e) ... available for public inspection and copying within 10 days after the agreement or statement is approved").

[9] 47 U.S.C. §252(i) ("A local exchange carrier shall make available any interconnection, service, or network elements provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement").

[10] 47 U.S.C. § 252(b)(1).

under Section 252(c) and (d).[11] In short, if the agreement is not requested for network elements and services required "pursuant to Section 251," Section 252 does not apply by its express terms.

A request "pursuant to 251" must be for resale, unbundled network elements or interconnection to be offered by Section 251. To constitute a Section 251 unbundling obligation, the Commission must make an affirmative finding of impairment. 47 U.S.C. § 251(d)(2)(B). The 1996 Act obligates the Commission "in determining what network elements should be made available for purposes of subsection (c)(3)" to consider whether "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."[12]

In *USTA II,* the D.C. Circuit confirmed that the responsibility for determining 251 elements rests solely with the FCC. *USTA II,* slip. op. at 18 ("[w]e therefore vacate, as an unlawful subdelegation of the [FCC's] responsibilities, those portions of the Order that delegate to the state commissions the authority to determine whether CLECs are impaired without access to network elements ..."). If the Commission makes an affirmative finding of "no impairment" for a particular element, or in the absence of any Commission finding at all, the element is not a Section 251 element and, therefore, Section 252 does not apply.

The obligations in Section 252, including filing with the state commission and pick-and-choose, only apply to 251 elements. Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements. Under Section 252, there are two types of agreements, voluntarily negotiated agreements and arbitrated agreements. Both types of agreements

---

[11] 47 U.S.C. §§ 252(b) & (c).

[12] *Id.*; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Supplemental Order Clarification, 15 FCC Rcd 9587, 9596, ¶ 16 (2000) (Commission must determine "impairment" "before imposing additional unbundling obligations on incumbent LECs" rather than "impos[ing] such obligations first and conduct[ing] [its] 'impair' inquiry afterwards"), *petitions for review denied, Competitive Telecomms. Ass'n v. FCC,* 309 F.3d 8 (D.C. Cir. 2002).

regulated by Section 252, by definition, only govern Section 251 elements. Section 252(a)(1), which defines voluntarily negotiated agreements, provides that carriers may enter into such agreements "upon receiving a request...pursuant to Section 251." As discussed above, elements for which there is no impairment finding are not Section 251 elements and therefore not subject to a request "pursuant to section 251." Similarly, Section 252(b), which defines arbitrated agreements, refers back to "a request for negotiation under this section" – in other words, a "request pursuant to Section 251." Thus, the statute expressly provides that both types of agreements defined in Section 252, to which the Section 252 obligations apply, involve Section 251 elements.

Subsections (c), (d), (e), and (i) of 252 all set forth procedures for handling "the agreements" defined in Section 252, i.e. either negotiated or arbitrated. Because "the agreements" by definition must relate to 251 elements, it necessarily follows that the subsections of 252 do not apply to agreements that cover non-251 elements and services, such as the commercial agreements at issue in this case. Thus, the commercial agreements about which Petitioners are complaining do not need to be filed with or approved by the state commissions under 252(e). Moreover, and importantly, the agreements are not subject to the pick-and-choose obligations of Section 252(i). Finally, if the parties are unable to agree on commercial terms, neither party is entitled to invoke the state commission's authority under Section 252(b) to arbitrate the dispute.

Any other reading of Section 252(a)(1) (or 252(b), which refers back to 252(a)(1)) would impermissibly negate the clause "pursuant to section 251." This clause limits the applicability of the requirements of 252 to those agreements entered into pursuant to the obligations of section 251. Interpreting 252(a)(1) as requiring parties to comply with Section 252 for commercial

agreements, as urged by Petitioners, would impose obligations on commercial negotiations that Congress did not intend and would stymie the parties' ability to enter into these agreements and achieve the marketplace certainty that the industry so desperately needs.

2. Section 251

The plain language of Section 251 also demonstrates that commercial agreements need not be filed and approved under Section 252. Section 251(c)(1) explains that ILECs have an obligation to negotiate "in accordance with Section 252 the particular terms and conditions of the agreements to fulfill the duties described in paragraphs (1) through (5) of subsection [251] (b) and this subsection [251(c)]."[13] Accordingly, if the agreement does not include the ILEC's "duties" in Sections 251(b)(1-5) or Section 251(c), it falls outside the ILEC's Section 252 duty to negotiate and corresponding Section 252 obligations.

3. FCC Precedent

Further, the FCC's precedent confirms that Section 252 does not apply to commercial agreements entered into for services not required under Section 251. For example, in the *Qwest ICA Order*, the Commission found that "*only* those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under [section] 252(a)(1)."[14] The

---

[13] 47 U.S.C. § 251(c)(1).

[14] *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, n. 26 (2002) ("Qwest ICA Order") (emphasis added). This finding is consistent with the FCC's recent Notice of Apparent Liability for Forfeiture against Qwest for failing to file interconnection agreements and provisions containing and relating to Section 251(b) and (c) obligations. *See Qwest Corporation, Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, FCC 04-57 (2004). Although Petitioners place considerably reliance upon the Forfeiture Notice, such reliance is misplaced. Complaint ¶ 15. While the FCC indicated that an "agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation" is subject to the filing and approval requirements of Section 252, the FCC did not address the type of agreement at issue here – namely, a commercial agreement entered into for services not offered pursuant to Section 251 Furthermore, such a commercial agreement would not be subject to the filing and approval requirements of Section 252 under the FCC's analysis because the services under

Commission reiterated this interpretation throughout the Order, noting that while "a settlement agreement that contains an ongoing obligation relating to Section 251(b) or (c) must be filed under section 252(a)(1)," "settlement contracts that *do not affect an incumbent LEC's ongoing obligations relating to section 251 need not be filed*."[15]

In the *Triennial Review Order,* the Commission reaffirmed the conclusion that Section 252 applies only to 251 elements. Specifically, the Commission held that that the pricing standard set forth in Section 252(d) applies only to Section 251 elements. The Commission held that "[w]here there is no impairment under section 251 and a network element is no longer subject to unbundling, we look to *section 271* and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements."[16] The Commission went on to hold that "[s]ection 252(d)(1) provides the pricing standard 'for network elements for purposes of [section 251(c)(3)], and does not, by its terms, apply to network elements that are required only under section 271."[17]

To be sure, as Petitioners point out, some state public service commissions have issued orders or letters directing or inquiring about the filing of commercial agreements. Complaint ¶ 19. However, none of these state commissions are located within BellSouth's service area; rather, on June 25, 2004, the North Carolina Utilities Commission entered an order holding in

---

such an agreement are being provided in lieu of resale, interconnection, or unbundled network elements offered under Section 251.

[15] *Qwest ICA Order*, ¶ 12 (emphasis added); *see also Id.*, ¶ 9 (only those "agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c)" must be filed under Section 252).

[16] *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 Capabilities*, Report And Order And Order On Remand And Further Notice Of Proposed Rulemaking, 30 CR 1, ¶¶ 656-657 (2003) (emphasis added).

[17] *Id.* ¶ 657 (brackets in original).

abeyance a similar petition filed by CompSouth.[18] Moreover, few of these state commission orders or letters contain any legal analysis that would support the imposition of filing and approval requirements upon commercial agreements of the sort at issue here, and those that do have been subject to legal challenge. For example, in response to some of the state commission decisions referenced by Petitioners, SBC Communications, Inc. ("SBC") has filed an emergency petition with the FCC seeking an order clarifying that Section 252 does not apply to commercial agreements for the provision of products or services outside the scope of Section 251 and preempting any state requirement that such agreements be filed with and approved by state commissions.[19]

More recently, BellSouth has filed with the FCC an Emergency Petition seeking a declaration that commercial agreements are subject to Section 211 of the Communications Act of 1934, as amended, not Section 252, and an order preempting inconsistent state action. BellSouth also has filed a Petition for Forbearance requesting that the FCC forbear from applying Section 252 to commercially negotiated agreements for the provision of wholesale services that are not required under Section 251. Both of BellSouth's petitions, as well as the petition filed by SBC, are pending at the FCC. Even putting aside the legal deficiencies underlying Petitioners' Complaint, the pending FCC proceedings involving the very same issues belie Petitioners' suggestion that a "summary decision" in their favor should be issued.

4. The FCC, Not this Commission, Has Section 271 Enforcement Authority

In a final ploy to salvage their legally deficient Complaint, Petitioners also imply that because BellSouth has been granted authority to provide interLATA long distance services under

---

[18] *See* Attachment 2, *Order Holding Matter in Abeyance,* Docket No. P-100, Sub 133, North Carolina Utilities Commission.

[19] *In re: SBC Communications, Inc.'s Emergency Petition for Declaratory Ruling, Preemption And For Standstill Order To Preserve The Viability Of Commercial Negotiations,* WC Docket No. 04-172 (May 3, 2004).

Section 271, that it must "negotiate interconnect agreement terms that satisfy" that section and that it cannot "simply remove unbundled local switching and other checklist items from its interconnection agreements." Under Petitioners' circular reasoning, even if a UNE is delisted under Section 251, BellSouth is *prohibited* from removing such a service from interconnection agreements and BellSouth is *required* to negotiate and obtain state commission approval of a section 271 agreement. Complaint, ¶¶ 29-32. To the extent that Petitioners intend to object to BellSouth's removal of services formerly known as UNEs from its interconnection agreements, and seek to require approval of any section 271 agreements, the appropriate forum to address such matters is the FCC.

Petitioners cannot realistically dispute that the plain terms of Section 271 provide the FCC, and not state commissions, with enforcement authority; the "Commission" referred to within subsection (6) of Section 271 is the *FCC.* Service that BellSouth provides under section 271 does not equate to "unbundled network elements" or "UNEs" because those terms are reserved for section 251 elements for which the FCC has made an affirmative finding of impairment. *See* 47 U.S.C. § 251(c)(3) ("nondiscriminatory access to network elements on an unbundled basis"). Moreover, the FCC and the D.C. Circuit have held that section 271 elements are governed by section 271 and the pricing and nondiscrimination standards of sections 201 and 202. *See Triennial Review Order,* at ¶ 656 ("[w]here there is no impairment under section 251...we look to section 271 and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements"); *see also USTA II,* at p. 53 ("[w]e agree with the Commission that none of the requirements of § 251(c)(3) applies to items four, five, six and ten on the § 271 checklist"). The power to enforce compliance with section 271 rests with the FCC, with respect to terms and

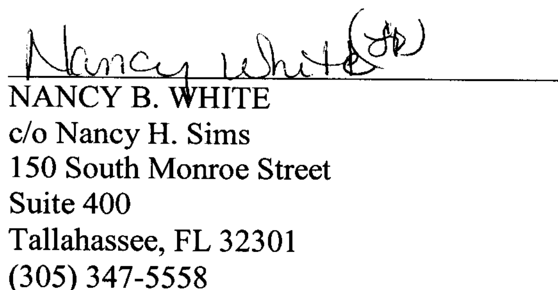
conditions and with respect to pricing. *See* § 271(d)(6); *Triennial Review Order,* at ¶ 656. Enforcement of sections 201-02 obviously rests with the FCC. Consequently, any agreements that BellSouth enters into concerning section 271 elements are federal agreements and governed by federal filing requirements. The statutory language, the *Triennial Review Order*, and *USTA II* are clear on this point, and Petitioners cannot transform Section 271 into a vehicle that requires the filing of commercial agreements with the Florida Public Service Commission by disregarding applicable law.

CONCLUSION

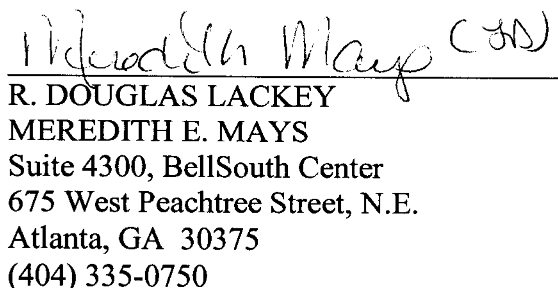
Contrary to Petitioners' contentions, an ordering requiring BellSouth to file commercial agreements with this Commission is not required. Neither public policy nor applicable law justifies the relief that Petitioners request and this Commission should penalize Petitioners for subjecting it and BellSouth to its frivolous complaint.

Respectfully submitted, this 28th day of June, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.



NANCY B. WHITE
c/o Nancy H. Sims
150 South Monroe Street
Suite 400
Tallahassee, FL 32301
(305) 347-5558



R. DOUGLAS LACKEY
MEREDITH E. MAYS
Suite 4300, BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0750

541747

040530-TP
BELLSOUTH'S
ATTACHMENT 1

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91084094

Date: May 20, 2004

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Interconnection/Contractual) - Public Inspection of Commercial Agreements

In accordance with 47 U.S.C. Section 211, BellSouth will make a copy of each commercial agreement executed between BellSouth and another carrier for the provisioning of wholesale telecommunications services available for public inspection by any individual or entity. Within 30 days following execution of a commercial agreement, BellSouth will notify Interconnection Services customers via a Carrier Notification letter that the agreement is available for review at BellSouth Center located at 675 W. Peachtree St., Atlanta, GA 30375. The following procedures will apply:

- Customer names will be redacted in the commercial agreements
- Note-taking will be permitted; however, no recording or reproduction of the commercial agreement may be made
- Commercial agreements will remain available for public inspection for the term of the commercial agreement

Once a commercial agreement is made available for public inspection, any nondisclosure agreement entered into regarding that commercial agreement would no longer apply to the commercial agreement itself. However, all discussions and correspondence exchanged during the negotiation of the commercial agreement will remain subject to the terms of the nondisclosure agreement.

If you wish to review these agreements, please send your request to the attention of Director, CLEC Negotiations via fax at 404.529.7839 or via mail to the following address:

Director, CLEC Negotiations
675 W Peachtree St NE
Room 34S91
Atlanta, GA 30375

Please include in your request your contact information and the date you wish to review the agreements. A BellSouth representative will contact you within two (2) business days to schedule a time for you to review the agreements.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

©2004 BellSouth Interconnection Services
BellSouth marks contained herein are owned by BellSouth Intellectual Property Corporation.

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91084097

Date: May 20, 2004

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Interconnection/Contractual) – Public Inspection of Commercial Agreements

Pursuant to Carrier Notification letter SN91084094, BellSouth is making a copy of all commercial agreements entered into between BellSouth and a CLEC for Market-Based Rate Agreements and BellSouth DS0 Wholesale Local Voice Platform Services executed as of April 30, 2004, available for public inspection. These agreements will be available for review beginning May 20, 2004.

If you wish to review these agreements, please send your request to the attention of Director, CLEC Negotiations via fax at 404.529.7839 or via mail to the following address:

Director, CLEC Negotiations
675 W Peachtree St NE
Room 34S91
Atlanta, GA 30375

Please include in your request your contact information and the date you wish to review the agreements. A BellSouth representative will contact you within two (2) business days to schedule a time for you to review the agreements.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

©2004 BellSouth Interconnection Services
BellSouth marks contained herein are owned by BellSouth Intellectual Property Corporation.

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91084120

Date: June 10, 2004

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs - (Interconnection/Contractual) – Public Inspection of Commercial Agreements

Pursuant to Carrier Notification letter SN91084097, BellSouth has added to the Public Inspection file, new Commercial Agreements entered into between BellSouth and CLECs for agreements executed as of May 27, 2004. These additional agreements will be available for review beginning June 26, 2004.

If you wish to review these agreements, please send your request to the attention of Director, CLEC Negotiations via fax at 404.529.7839 or via mail to the following address:

Director, CLEC Negotiations
675 West Peachtree Street NE
Room 34S91
Atlanta, GA 30375

Please include in your request contact information and the date you wish to review the agreements. A BellSouth representative will contact you within two (2) business days to schedule a time for you to review the agreements.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

©2004 BellSouth Interconnection Services
BellSouth marks contained herein are owned by BellSouth Intellectual Property Corporation.

040530-TP
BELLSOUTH'S
ATTACHMENT 2

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-100, SUB 133

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition for a Ruling Regarding the Filing of Verizon and BellSouth Wholesale Local Phone Service Agreements	)))	ORDER HOLDING MATTER IN ABEYANCE

BY THE COMMISSION: On May 27, 2004, CompSouth, Inc. (CompSouth), an organization composed of several competing local providers, filed a Petition for Ruling Regarding the Filing of Verizon and BellSouth Wholesale Local Phone Service Agreements. Specifically, CompSouth requested that the Commission (i) issue a declaratory ruling that Verizon South, Inc. (Verizon), BellSouth Telecommunications, Inc. (BellSouth), and/or Dialogica Communications, Inc. (Dialogica), ABC Telecom, CI2, International Telnet, Inc. (ITI), KingTel, Inc. (KingTel), and WebShoppe Communications, Inc. (WebShoppe) must immediately file their "commercial agreements," and any other such commercial agreements with other carriers with the Commission; (ii) issue a declaratory ruling that the Commission has the authority over these agreements pursuant to the requirements of the Telecommunications Act of 1996 (TA96); (iii) determine that the BellSouth agreements and any other similar Verizon and BellSouth commercial agreements should be made publicly available and posted on the Commission's website, subject to reasonable but limited protections for proprietary data; and (iv) take such further action as the Commission deems necessary and appropriate.

On May 27, 2004, BellSouth filed with the Federal Communications Commission (FCC) a Petition for Forbearance pursuant to Section 10(c) of TA96 and Section 1.53 of the FCC's rules, seeking forbearance from Section 252 of TA96 with respect to commercially negotiated agreements with the provision of wholesale service that are not required under Section 251. If such forbearance were granted, BellSouth argued that this decision would be binding on the states.

After careful consideration, the Commission concludes that good cause exists to hold CompSouth's Petition in abeyance pending further Order. The Commission is, of course, aware that the question of whether wholesale commercial agreements must be filed with state commissions, with all the implications thereof (including opt-in), is currently agitating an already agitated telecommunications scene. As pointed out by the Petition, several states have already ruled on this question, but it cannot be said with any confidence that these state decisions have ultimately settled the question. That will be for the courts or the FCC to decide. The Commission also notes that BellSouth has filed a Petition for Forbearance with the FCC to seek just such a resolution. The Commission therefore concludes that administrative and judicial efficiency would be

best served by holding the Petition herein in abeyance pending further Order unless it should appear after a reasonable interval that no decision from the FCC or other authoritative body is forthcoming.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 25th day of June, 2004.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

dl062104.01