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Cc: A. McGlothlin Joseph
Subject: Docket No. 041269-TL

Florida Competitive Carriers Association and Competitive Carriers of the South provides the following information pursuant to the Florida Public Service Commission's guidelines on electronic filings

1. The attorney responsible for this filing is:

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2. The filing is to be made in Docket No.: 041269-TL, In re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law.

3. This filing is made on behalf of Florida Competitive Carriers Association and Competitive Carriers of the South

4. The total number of pages is 13.

5. The document is Motion to Dismiss of FCCA and Compsouth.

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law	DOCKET NO. 041269-TL Filed: November 22, 2004

MOTION OF FCCA AND COMPSOUTH TO DISMISS BELLSOUTH'S PETITION TO ESTABLISH GENERIC DOCKET

COME NOW the Florida Competitive Carriers Association ("FCCA") and Competitive Carriers of the South ("CompSouth")[1] , pursuant to Rules 28-106.204, Florida Administrative Code, and requests the Florida Public Service Commission (Commission) to enter an order dismissing BellSouth Telecommunications, Inc.'s ("BellSouth's") "Petition To Establish Generic Docket."

I. INTRODUCTION

In its "Petition to Establish Generic Docket," BellSouth Telecommunications, Inc. ("BellSouth") urges this Commission to engage in an exercise that is inconsistent with BellSouth's interconnection agreements with CLECs in Florida, is destined to result in duplicative and unnecessary litigation, and would result in a substantial waste of Commission resources. In the process, BellSouth asks the Commission to approve contract amendments that would violate the requirements of § 252 of the Telecommunications Act of 1996 ("1996 Act"), and would invite even more duplicative litigation. BellSouth's appeals to "efficiency" in this

1 The members of FCCA include AT&T, MCI Access Integrated Networks, Inc., ICG Communications, Inc., IDS Telcom LLC, ITC DeltaCom, Inc., KMC Telecom, Network Telephone Corporation, NewSouth Communications, Inc., Supra Telecommunications and Information Systems, Inc., and Z-Tel Communications, Inc. With the exceptions of Supra and ICG, each of these members, is also a member of the Competitive Carriers of the South, Inc. (CompSouth). The members of CompSouth participating in this filing include: Access Point Inc., Birch Telecom, Covad Communications Company, Talk America, ITC^DeltaCom, Momentum Telecom, Inc., Network Telephone Corp., LecStar Telecom, Inc., and InLine. CompSouth members KMC Telecom, NuVox Communications, Inc. and Xspedius Communications support but are not participating in this filing and will make separate filings in oppostition to BellSouth's Petition as a result of unique circumstances that face those companies as a result of their pending arbitration with BellSouth. Movants will herinafter be collectively referred to as "CompSouth".

context are not borne out by the facts and circumstances facing the parties. Moreover, initiating a proceeding now, before the FCC issues its final rules on the Unbundled Network Elements ("UNEs") that are to be made available by incumbent LECs under Section 251 of the 1996 Act, would be a waste of the scarce resources of the parties and this Commission. The North Carolina Utilities Commission recently dismissed a similar filing in that state, finding a generic proceeding is premature, and would unnecessarily tax Commission resources.[2] For the reasons stated herein, BellSouth's Petition For Generic Proceeding should be dismissed.

II. BACKGROUND FACTS

1. BellSouth filed its Petition with this Commission on November 1, 2004.

2. In its Petition, BellSouth requested that the Commission "institute a generic proceeding to consider what changes recent decisions from the FCC and DC Circuit require in existing approved interconnection agreements."[3] The BellSouth Petition does not request that the Commission amend a particular CLEC's interconnection agreement, or amend or establish a Statement of Generally Available Terms ("SGAT"), but rather asks for generic declaratory rulings approving various BellSouth legal positions and proposed contract language.

3. The BellSouth Petition fails to identify any legal basis for this proceeding in the provisions of the 1996 Act or Florida law. Furthermore, BellSouth's Petition does not state the basis for this Commission's jurisdiction to conduct the proceeding it proposes.

4. BellSouth correctly states that it discussed filing such a generic proceeding with CLECs, including representatives of CompSouth. While BellSouth states that "some consensus seems to exist supporting a generic proceeding," CompSouth can report definitively that no consensus was reached regarding the filing of this proceeding before this Commission.

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[2] North Carolina Utilities Commission, Docket No. P-100, Sub. 133U, Order of the Chair, November 10, 2004 ("NCUC Order").

[3] BellSouth Petition, at ¶ 13.

BellSouth has acted unilaterally in filing its Petition, and does not have the agreement of CLECs to waive their contractual rights (including the normal operation of contractual Change of Law provisions). As a result, there is no legal basis to contractually bind any individual CLEC by the terms of any conclusions reached in BellSouth's proposed "generic" proceeding.

5. BellSouth has filed nearly duplicate petitions in nearly all the states in its 9-state region. At least one of these Petitions has already been dismissed, *sua sponte*, by a state commission. On November 10, 2004, the Chair of the North Carolina Utilities Commission ("NCUC") issued an Order dismissing BellSouth's Petition, finding that it would "obviously be better, other things being equal, to have final rules in place rather than interim rules before one undertakes a comprehensive change of law proceeding."[4] In addition, the NCUC found that "scheduling a generic proceeding would be premature at this point, given the various contingencies involved."[5]

6. Members of CompSouth were first presented with BellSouth's proposed interconnection agreement amendment language attached as Exhibit B to the BellSouth Petition (the "Interim Rules Amendment") in late September 2004. While BellSouth has negotiated with some CLECs regarding its proposed Interim Rules Amendment, none of the members of CompSouth have negotiated for a period of time sufficient to trigger dispute resolution by this Commission under the terms of existing interconnection agreements.[6] In its Petition, BellSouth seeks to "skip over" the contractual Change of Law process by suggesting a generic proceeding

[4] NCUC Order, at 1.
[5] *Id.*
[6] Although BellSouth submitted its proposed contract amendments to CompSouth members KMC, NuVox and Xspedius, those carriers have reached an agreement that amendments to reflect the changes in law will be reflected in their new interconnection agreements that result from the pending arbitrations, rather than as an amendment to their existing interconnection agreements.

to resolve disputes that may not even have been subject to good faith negotiation with many CLECs at the time of its filing.

7. The BellSouth Petition reaches well beyond an attempt to receive approval its proposed Interim Rules Amendment. To understand the true scope of the relief BellSouth requests, one need look no further than BellSouth's "Change of Law Generic Docket Issues Matrix," attached to its Petition as Exhibit A. In its issues list, BellSouth suggests that the Commission fundamentally alter the process for Change of Law amendments now contained in binding interconnection agreements. On numerous issues, BellSouth asks that "all Interconnection Agreements ("ICAs") negotiated or arbitrated under Section 251 and 252 of the 96 Act be deemed amended" upon the occurrence of certain events. These events include the FCC's issuance of final unbundling rules or a court action to vacate the FCC's Interim Order on UNEs.[7] BellSouth also seeks the right to have ICAs "deemed amended" on numerous specific issues addressed in FCC Orders including the *Triennial Review Order* and the recent "all or nothing" order regarding § 252(i) rights.[8]

8. As an initial matter, most interconnection agreements have provisions which explicitly indicate that the obligations contained in the interconnection agreement constitutes the "entire agreement" between the parties and requires any changes or amendments to those contractual obligations must be reduced to writing and signed by the parties. ICAs have never been "deemed amended" in any circumstances. Rather, the 1996 Act requires the parties to negotiate contract changes, and take them to state commissions for arbitration if portions of the contract language remain in dispute. BellSouth thus asks this Commission to re-formulate the entire Change of Law process included in BellSouth ICAs – but only on issues related to UNEs

[7] BellSouth Petition, Exhibit A: "Change of Law Generic Docket Issues Matrix," Issues 1-3.
[8] *See id.*, Issues 8-23

and § 252(i). In essence, BellSouth seeks an order in this "generic" docket that would allow it to avoid negotiating with CLECs altogether regarding the contract language necessary to implement the FCC's final unbundling rules. BellSouth does not bring this issue to the Commission in the context of a § 252 arbitration. Rather, BellSouth asks for a declaration that it can make substantial changes to its existing ICAs without bothering to negotiate or arbitrate the issues as required by the 1996 Act. BellSouth requests a form of relief this Commission may not grant under the 1996 Act, and urges the Commission to undertake a proceeding that is premature.

II. BELLSOUTH FAILS TO STATE A CLAIM FOR WHICH THIS COMMISSION MAY GRANT RELIEF, AND ITS PETITION SHOULD BE DISMISSED

9. The Commission lacks jurisdiction to grant the relief requested by BellSouth. BellSouth's Petition makes no reference to, and completely ignores the terms of existing ICAs, in particular the Change of Law and dispute resolution provisions. Instead, BellSouth seeks a generic Commission decision imposing its proposed Interim Rules Amendment upon all carriers.

10. The Commission, however, may not lawfully entertain such a case. The Commission is precluded from considering BellSouth's Petition under the rationale of *Pacific Bell v. Pac West Telecomm, Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003) ("*Pac West Telecomm*") and because BellSouth has failed to follow the Change of Law and dispute resolution requirements of its interconnection agreements with all Florida CLECs. In *Pac West Telecomm*, the Ninth Circuit Court of Appeals found that state utility commissions do not have the authority to engage in dispute resolution proceedings in generic proceedings without reference to the specific terms and conditions of the agreements. See 325 F.3d at 1128-29. The court held that "generic" orders promulgated without reference to the specific terms contained in any particular interconnection agreements were unenforceable. *Id.* at 1125-1126. The court noted:

> By promulgating a generic order binding on existing interconnection agreements without reference to a specific agreement or agreements, the CPUC acted contrary to the Act's requirement that interconnection agreements are binding on the parties, or, at the very least, it acted arbitrarily and capriciously in purporting to interpret "standard" interconnection agreements. *Id.*

The Ninth Circuit went on to explain: "To suggest that the CPUC could interpret an agreement without reference to the agreement at issue is inconsistent with the CPUC's weighty responsibilities of contract interpretation under section 252." *Id* at 1128.

11. The rationale of *Pac-West Telecomm* mandates that the Commission dismiss BellSouth's Petition. The fact that BellSouth, and not the Commission, attempted to initiate this proceeding with its Petition does not affect the principle or applicability of *Pac-West Telecomm*. The key holding in the decision is that a generic commission action to amend all interconnection agreements violates the 1996 Act by failing to take into account the specific provisions of each interconnection agreement at issue. *See id.,* 325 F.3d at 1125-26. That is exactly what BellSouth is asking the Commission to do with its Petition -- to enter an order amending all interconnection agreements without taking account of the particular change in law procedures in those agreements. *See Id.* at 1128.

12. Other federal court precedent also holds that state utility commissions are expressly forbidden from providing an alternative route around the entire interconnection agreement process required by sections 251 and 252, including the attendant negotiation/arbitration, state commission approval, FCC oversight and federal court review procedures. *See Verizon North, Inc. v. Strand*, 309 F.3d 935, 942 (6th Cir. 2002). BellSouth's Petition attempts to create just such an alternative route around the negotiation and arbitration process required by the 1996 Act.

13. The interconnection agreements of FCCA and CompSouth members require any dispute regarding the implementation of legally binding changes in law to be resolved through informal dispute resolution, and then if the matter is not resolved, to be addressed via formal dispute resolution. In other words, BellSouth is well aware of -- through numerous interconnection agreements -- the proper procedural mechanism for amending interconnection agreements to reflect changes that have occurred in the law and it is *not* the route BellSouth has suggested in its Petition. Under the applicable Change of Law provisions, any disagreement between the parties over a change in law must first be addressed in accordance with the dispute resolution provisions of interconnection agreements.

14. Allowing the negotiations and dispute resolution processes to play out as anticipated under the interconnection agreements serves a very useful purpose from the Commission's standpoint. As the Commission knows from the arbitration proceedings, the usual process results in the issues being framed -- on both sides -- and presents the decision-maker with proposed language -- again on both sides -- for resolving the differences that remain. This is an orderly, familiar and ultimately efficient process for identifying and deciding issues. It should be followed here, not abandoned for the unilateral generic proceeding BellSouth has proposed here and in other states. The process suggested in BellSouth's Petition eliminate the entire negotiation and arbitration process established by the 1996 Act and embodied in dozens of its interconnection agreements with CLECs and is in violation of controlling law. Consequently, the Commission lacks jurisdiction to entertain BellSouth's Petition, and it should be dismissed with prejudice.

III. EVEN IF THE COMMISSION FINDS IT HAS JURISDICTION TO CONDUCT THIS GENERIC CHANGE OF LAW PROCEEDING, THE PETITION FILED BY BELLSOUTH IS PREMATURE AND WILL RESULT IN A WASTE OF RESOURCES.

15. As the North Carolina Commission held in its November 10, 2004 order, "scheduling a generic proceeding" such as that advocated by BellSouth "would be premature at this point."[9] It is simple to understand why that state's commission reached such a conclusion. The rules and requirements for unbundling under 47 U.S.C. § 251 are currently under active consideration by the FCC in WC Docket No. 04-313 (CC Docket No. 01-338). Indeed, the *FCC Interim Order* mandates that BellSouth's obligations reflected in the existing terms and conditions of tariffs and interconnection agreements that were in place on June 15, 2004 will remain effective at least through March 13, 2005 or the effective date of permanent FCC unbundling rules, whichever occurs first. The FCC has proposed that a transition period of six additional months will occur once final unbundling rules are adopted. Final rules, however, are not expected before late December. The Commission should not proceed to act on BellSouth's erroneous interpretations of the *Triennial Review Order, USTA II,* or the *FCC Interim Order*, and indeed it should take no action prior to the FCC's order adopting permanent rules. Accordingly, BellSouth's Petition is premature, and should be dismissed.[10]

16. BellSouth's Petition is not compelled by the FCC's Interim Order, and to proceed in the manner suggested by BellSouth's Petition would be a waste of resources. Bellsouth references statements in the *FCC Interim Order* that "preserve" incumbent LECs' "contractual prerogatives" to petition state commissions to modify their existing agreements and asks this Commission to approve terms and conditions for interconnection, including BellSouth's view of the law (and of the outcome it hopes to achieve before the FCC on remand from *USTA II*), and order those provisions be implemented by the CLECs.

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[9] NCUC Order, at 1.

[10] BellSouth's Petition is not only premature; it is also incomplete. When the Commission has a proper dispute resolution proceeding before it to address the changes in law regarding UNE-related issues, numerous additional issues should be addressed that are not identified in BellSouth's Petition.

17. Nothing in the FCC's *Triennial Review Order* or *Interim Order* however, requires that the state commissions act upon an incumbent LEC-initiated Change of Law filing – much less generic petitions of the kind BellSouth has filed here that would amount to an "end around" maneuver in violation of the contractual Change of Law process. Notwithstanding the language in the *FCC Interim Order* that "preserve" incumbent LECs' "contractual prerogatives," this Commission retains full authority to manage its dockets and to dismiss actions on post-*USTA II* unbundling obligations until after those obligations have been duly determined before the FCC. Moreover, to proceed now in the manner proposed by BellSouth would be wasteful of the CLECs' and the Commission's scarce resources. The Commission should dismiss the Petition and not allow any refiling of this matter until after (1) the FCC adopts its final rules, and (2) BellSouth complies with the Change of Law and dispute resolution provisions of the parties' interconnection agreements.

18. The FCC is in the midst of the process of determining the nature and extent of BellSouth's unbundling obligations are under the federal Communications Act in the wake of *USTA II*:

> Today, we issue a Notice of Proposed Rulemaking (Notice) in which we solicit comment on alterative unbundling rules that will implement the obligations of section 25 I (c)(3) of the Communications Act of 1934, as amended, in a manner consistent with the U.S. Court of Appeals for the District of Columbia Circuit's (D.C. Circuit) decision in *United States Telecom Assn v. FCC.*[11] [Citations omitted.]

The FCC and the Commissioners individually have gone to great efforts to emphasize their intent to adopt permanent rules on an expedited basis:

a. The Interim Order "explicitly warn[ed] parties that these requirements are being put into place to ensure that the issues in this proceeding are fully and fairly

[11] *FCC Interim Order*, ¶ 1.

presented *within the severe constraints placed on the Commission by the necessity of formulating permanent rules quickly.*"[12]

b. **Chairman Powell confirmed that the** *Interim Order* "starts a rulemaking to quickly replace rules within 6 months. . . ."[13]

c. **Commissioner Abernathy stated that the** Commissioners "must expeditiously build a record and develop a revised framework."[14]

19. BellSouth's Petition seeks to have the Commission anticipate the outcome of the FCC's rulemaking and to proceed to implementation before the fact -- before the FCC even reaches its determinations. That course would be not just precipitous, it would be foolhardy.[15]

20. While the FCC rulemaking continues, the *FCC Interim Order* states that ILECs must provide access to those UNEs set forth in the parties' interconnection agreements. In fact, the FCC made clear that BellSouth is required to provide unbundled network elements under the terms and conditions of the parties' existing *interconnection* agreements as they existed prior to *USTA II*:

> First, on an interim basis, we require incumbent local exchange carriers (LECs) to continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms, and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or six months after Federal Register publication of this Order . . . , except to the extent that they are or have been superseded by (1) voluntarily negotiated agreements, (2) an intervening Commission order affecting specific unbundling

[12] *FCC Interim Order*, ¶ 16.
[13] *FCC Interim Order*, Separate Statement by Chairman Powell.
[14] *FCC Interim Order*, Separate Statement by Commissioner Abernathy.
[15] "Commissioner Adelstein pointedly acknowledged that the *USTA II* decision, and the *FCC Interim Order*, do not provide finality on BellSouth's unbundling obligations. As he stated: "The Order leaves unclear which elements are available to competitors and at what prices they will be available." *FCC Interim Order*, dissenting statement of Commissioner Jonathan S. Adelstein the presence of such uncertainty, this Commission certainly should not put itself in the position of guessing the outcome of the FCC's remand proceeding.

> obligations (e.g., an order addressing a pending petition for reconsideration), or (3) (with respect to rates only) a state public utility commission order raising the rates for network elements. Second, we set forth transitional measures for the next six months thereafter. Under our plan, in the absence of a Commission holding that particular network elements are subject to the unbundling regime, those elements would still be made available to serve existing customers for a six-month period, at rates that will be moderately higher than those in effect as of June 15, 2004.[16] [Citations omitted.]

BellSouth's Petition, if granted by the Commission, would prejudge the outcome of the pending FCC proceeding, and the FCC's efforts to implement the Federal Communications Act and the *USTA II* decision.

21. BellSouth's proposed method of proceeding is further inconsistent with the logic of the FCC's *Interim Order*. The FCC clearly anticipated that some entities might rush to litigation in an attempt to have state commissions construe the *USTA II* decision while the FCC was still implementing that court's rulings. To avoid the chaos that might result, the FCC specifically preserved the status quo ante:

> Thus, by freezing in place carriers' obligations as they stood on June 15, 2004, we are in many ways preserving contract terms that predate the vacated rules. Moreover, if the vacated rules were still in place, competing carriers could expand their contractual rights by seeking arbitration of new contracts, or by opting into other carriers' new contracts. The interim approach adopted here, in contrast, does not enable competing carriers to do either.[17]

22. The FCC observed that "such litigation would be wasteful in light of the [FCC's] plan to adopt new permanent rules as soon as possible" and specifically pointed out that "the implementation of a new interim approach could lead to further disruption and confusion that would disserve the goals of Section 251." BellSouth's Petition represents a "new interim

[16] *FCC Interim Order*, ¶ 1
[17] *Id.*, ¶ 23.

approach" that would risk just such "disruption and confusion." The Commission should reject it out of hand by dismissing it.

23. Given the foregoing, it should be clear that the BellSouth Petition is not ripe for consideration and should be dismissed.

IV. CONCLUSION AND PRAYER FOR RELIEF

WHEREFORE, for all the reasons stated, CompSouth respectfully requests that this Commission dismiss BellSouth's "Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law."

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion of FCCA and COMPSOUTH to Dismiss BellSouth's Petition to Establish Generic Docket has been furnished by U.S. Mail this 22nd day of November 2004, to:

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