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December 17, 2004

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

Re: Docket No. 041269-TL
In re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Response to Motion of CompSouth and the FCCA to Dismiss BellSouth's Petition to Establish Generic Docket, 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,

Nancy B. White /RN

Nancy B. White

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

CERTIFICATE OF SERVICE
Docket No. 041269-TL

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U.S. Mail this 17th day of December, 2004 to the following:

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Nancy B. White /RN
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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In Re:	)	
		Docket No. 041269-TL
Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law	)	Filed: December 17, 2004

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO MOTION OF COMPSOUTH AND THE FCCA TO DISMISS BELLSOUTH'S PETITION TO ESTABLISH GENERIC DOCKET

BellSouth Telecommunications Inc. ("BellSouth") files this response in opposition to the *Motion* of the Competitive Carriers of the South, Inc. ("CompSouth) and the Florida Competitive Carriers Association, Inc. ("FCCA") (hereinafter jointly called "movants") and respectfully shows the Florida Public Service Commission ("Commission") as follows:

INTRODUCTION

All players in the telecommunications market have watched with great interest and concern the developments since the issuance of the Federal Communications Commission's ("FCC") *Triennial Review Order* ("TRO") and the subsequent District of Columbia Circuit Court ("DC Circuit") *Opinion* and FCC *Interim Rules Orders* ("IRO"). In Florida, just as elsewhere in the country. It is clear from those orders that changes in existing Interconnection agreements are required, and must be implemented. The issue that BellSouth, the Competitive Local Exchange Carriers ("CLECs"), and the various state commissions face is how those changes are going to be implemented. That is, will we proceed in an efficient, timely fashion, or will we spread the process out over months in hundreds of separate hearings. The answer should be obvious, and the

Movants' objections to using the most efficient manner of accomplishing this task is not only inconsistent with prior positions taken by the Movants, but is intended solely to delay changes that are simply not favorable to the Movants.

Finally, on December 15, 2004 the FCC voted to adopt final rules as it promised it would in the *Interim Rules Order*. While the written order has not been released, the FCC has evidently made significant changes concerning the availability of UNEs. Assuming that the FCC does not otherwise provide a path forward, what BellSouth has proposed is the adoption of a process that that will allow for the timely amendment of existing interconnection agreements. That process, should it turn out to be necessary, needs to be put in place now, not six months after the FCC finally releases its final written order.

The present position of the Movants is clearly inconsistent with their past view of what the law allowed or required when they perceived a generic proceeding to be in their own interests. For instance, on May 28, 2004, the FCCA filed an Emergency Petition ("Petition") in Florida (Docket No. 040520-TP) to require BellSouth to follow certain change of law proceedings in order to involve the Commission in the modifications to interconnection agreements in light of the *TRO* and DC Circuit *Opinion*. While the Commission ordered the dockets to be held in abeyance pending resolution by the D.C. Circuit Court of the Mandamus Petition, arguments the CLECs made in the Petition however, are quite relevant to this case. See Order No. PSC-04-1083-PCO-TP, issued on November 4, 2004.

In their Petition, the CLECs insisted that BellSouth was planning to implement changes arising from these developments in federal law without the involvement of the

Commission and that all the CLECs were trying to accomplish was to insure that the Commission would be involved in the implementation of these new developments in federal law.

When it was convenient, the CLECs cast their effort as nothing more than an attempt to include the Commission in the process. With its *Motion to Dismiss*, however, CompSouth and FCCA make clear that in fact what they want today is something quite different. Now, the Movants seek delay by embroiling the Commission in numerous successive and redundant hearings to implement the outcome of the *Triennial Review Order*, the *Interim Rules Order* and the DC Circuit *Opinion*. It is now painfully clear that what the Movants seek is not the involvement of the Commission but, instead, to bury the Commission in numerous proceedings in order to delay the implementation of these federal decisions. The Movants' various "legal" arguments, as discussed below, are not persuasive. Instead, they seek to force the Commission into wasteful and duplicative decisions as if the Commission had no choice but to proceed in that fashion. This is simply not the case. The Commission is well within its jurisdiction and legal authority to proceed in this case by a generic docket, open to all interested parties.

Indeed, the Commission has entertained numerous generic proceedings relating to 252 obligations in the past. Many of CompSouth's members and those of the FCCA participated in such proceedings such as two generic UNE dockets in which the Commission established generally available rates for UNEs under Section 252. (Docket No. 990649-TP Investigation into pricing of unbundled network elements.) Likewise the Commission has engaged in generic proceedings to establish rules and rates for collocation under Section 252. (Consolidated Docket Nos. 981834-TP Petition of

Competitive Carriers for Commission action to support local competition in BellSouth Telecommunications, Inc.'s service territory and Docket No. 990321-TP Petition of ACI Corp. d/b/a Accelerated Connections, Inc. for generic investigation to ensure that BellSouth Telecommunications, Inc., Sprint-Florida, Incorporated, and GTE Florida Incorporated comply with obligation to provide alternative local exchange carriers with flexible, timely, and cost-efficient physical collocation.) As these precedental proceedings made clear, the Commission is well within its authority and jurisdiction to commence a generic change of law proceeding just as the North Carolina Utility Commission, the Georgia Public Service Commission and the South Carolina Public Service Commission have already done. Indeed, the South Carolina proceeding is presently scheduled to be tried in January 2005.

For these reasons and the reasons discussed more fully below, BellSouth urges the Commission to deny the *Motion* to dismiss BellSouth's *Petition* to establish this generic docket and to instead take up these issues in this reasonable format, a format where ***all affected parties*** may participate in one practicable process. To do otherwise would simply permit the Movants to force the Commission to expend needless time in administrative resources all in the name of delay, rather than in an effort to implement (not avoid) these significant federal decisions.

DISCUSSION

I. The Movants' Discussion Of "Background Facts" Is Misleading.

The Movants' attempt to suggest, in their recitation of so-called "facts", that BellSouth is proceeding in an incorrect fashion. BellSouth corrects these statements of facts in this section.

First, BellSouth engaged in a significant amount of negotiation with CLECs in order to implement the changes in federal law relevant to their interconnection agreements. BellSouth has clearly abided by the dispute resolution processes in place in those agreements. BellSouth has sent letters giving notice of the change of law. During this negotiation period, most CLECs have not even agreed to negotiate.[1] Attached as Exhibit A are examples of letters received by BellSouth making the outrageous claim that the *Orders* on which these change of law notifications were based did not constitute a change of law. Far from seeking to avoid the change of law process, as the Movants' suggest, BellSouth seeks the Commission's assistance in getting the change of law process on the right track and moving. The Movants' on the other hand, seek to avoid Commission involvement unless they can use the Commission's involvement to entangle the matter into numerous successive duplicative proceedings all designed to delay, not implement, these important changes.

Attempting to suggest (wrongly) that other states are not proceeding on generic dockets, the Movants also grossly mischaracterized the November 10, 2004 *Order* of the Chairman of the North Carolina Utilities Commission by characterizing it as an *Order* dismissing BellSouth's *Petition.* Quite the contrary, the *Order,* which is attached as Exhibit B to this *Response,* ***specifically opens a generic docket***, orders BellSouth to provide additional information and clearly states that a schedule for that proceeding will be set for a later date.

[1] Bellsouth has reached agreement on change of law contract language with certain CLECs. *See*, for example, BellSouth Interconnection Agreements with Time Warner Telecom (Docket No. 04-00157, approved July 26, 2004), One Point Communications-Georgia, LLC (Docket No. 04-00064, approved April 12, 2004), and NOW Communications, Inc. (Docket No. 04-00080, approved May 10, 2004).

Most importantly, the *Motion* completely fails to recognize its members' former actions and statements in support of a generic change of law docket in Florida and elsewhere.

II. The Commission Is Well Within Its Jurisdiction To Entertain A Generic Docket On This Matter.

As an initial matter BellSouth notes that, if the CLECs really wanted the Commission to be involved in this matter, then the CLECs could certainly ***agree*** to the generic proceeding sought by BellSouth clearly resolving any legal or jurisdictional issue.

It is particularly noteworthy that many of the members of CompSouth have actually ***sought*** the opening of generic dockets. For example, here in Florida, ITC^DeltaCom, Birch, Covad and FDN have petitioned the Commission to convene a generic proceeding to set rates and terms for hot cuts (Docket No. 041338-TP). These same CLECs cannot seriously expect to argue that this sort of generic proceeding is illegal while, from the other side of their collective mouths, seeking the opening of such dockets.[2]

BellSouth's proposed generic docket is not a novel approach. The Commission has entertained generic proceedings related to 252 issues on numerous occasions. See. Docket Nos. 990649-TP, 981834-TP, 990321-TP and 041338-TP. The *Pacific Bell v. PacWest Telecom* decision cited and relied upon by CompSouth does not prohibit all such proceedings. Unlike the action of the California Commission at issue in that case,

[2] In addition, CompSouth members Access Integrated, Birch, ITC^DeltaCom, Momentum, and TalkAmerica have intervened in Georgia Docket No. 19341-U, *Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements* without any objection to that Commission proceeding in such a fashion and have filed a matrix of proposed issues. These CompSouth members have proposed a number of issues that address interconnection agreement changes. Apparently, CompSouth is amenable to proceedings in Georgia, but finds a similar docket objectionable in Florida.

the Commission is not being asked to interpret any "standard" agreement. Instead, these proceedings, like the generic UNE docket, would simply resolve the common questions of law and fact relating to the *TRO*, *IRO* and DC Circuit *Opinion*. Under the rationale in the *Motion*, the Commission would have also been prohibited from holding a generic UNE rate docket, a position which clearly would not be advanced by these CLECs who have participated in such dockets in Florida.

Likewise, the Sixth Circuit case cited by the Movants' is equally inapplicable. This generic proceeding does not seek to create an alternative route around the negotiation and arbitration process required in the 1996 Act. BellSouth has initiated and followed the change of law process outlined in existing Interconnection Agreements. In seeking this generic proceeding BellSouth is simply asking the Commission to resolve common questions of law relating to these federal decisions that follow from the change of law letters that have been sent, rather than conducting hundreds of separate proceedings to achieve that same result. BellSouth has complied with the interconnection agreements of the Movants' members regarding change of law process. The Movants' disingenuous suggestion that allowing negotiations in dispute resolutions processes to play out would somehow narrow issues is outrageous. In fact, the Commission is well aware that these recent federal decisions have made dramatic changes in rules invalidated by the courts that BellSouth has been forced to live under for eight years. The CLECs are now attempting to string out as long as possible the implementation of changes in the law, which are inevitable.

III. The Petition For A Generic Docket Is Not Premature And, In Fact Is Now More Pressing Than Ever In Light Of The Decision Of The Hearing Officer In The Joint CLECS Arbitration.

As BellSouth explained in its *Motion* to establish the docket, time is of the essence. The changes allowed by the TRO and the USTA II decision should have been implements months ago. With regard to the *Interim Rules Order*, the first six month period established by the FCC in its *Interim Rules Order*, will expire in March, 2005, or earlier in the event that the FCC's final unbundling rules become effective prior to that date. In its *Interim Rules Order*, the FCC explicitly noted that ILECs were free to initiate change of law proceedings that "presume the absence of unbundling requirements for switching, enterprise market loops, and dedicated transport, so long as they reflect the transition regime" set forth in that *Order*.[3] The FCC noted that this process would enable these changes to "take effect quickly."[4] For that reason, BellSouth respectfully requested that the Commission accept its Petition, establish a procedural schedule, and hear this Petition in an expeditious matter so that at the appropriate time, the necessary modifications to existing interconnection agreements can be made without further delay.

Further, we have actually moved beyond the Interim Rules Order at this point, because the FCC has voted to establish its final rules. Although the FCC's order establishing its final unbundling rules has not yet been released, the FCC announced its findings with respect to unbundling on December 15, 2004. It is clear that, as of the effective date of the rules, there will be certain network elements that CLECs will no longer be able to order as UNEs. Hopefully, the FCC in its written order will obviate the necessity to amend existing agreements to remove those elements that BellSouth is no

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3 IRO at ¶ 23.
4 IRO at ¶ 23.

longer obligated to provide, but in the event it does not, the FCC was clear in its *Interim Rules Order* that ILECs should be permitted to seek change of law amendments expeditiously so that the final unbundling rules can be implemented without delay once they become effective. *IRO* ¶¶ 22-23. That is what BellSouth is requesting in the amendments it has asked the CLECs to adopt, and what the CLECs have refused to implement. The process that BellSouth has proposed needs to be implemented, so that the FCC's final unbundling rules can be implemented promptly.

In short, the Movants cannot have it both ways. Back in May, they argued that is was necessary for the Commission to immediately jump in to ensure that it would be involved in any changes to Movants contracts resulting from these federal decisions. Now they argue instead that the Commission should wait – that the Commission should not even hear argument about how to proceed. Such delay will require BellSouth to live for even more time under a set of rules that have been held to be illegal. It will place Florida out-of-synch and behind other states who are moving ahead on generic dockets.

If the Movants truly want the Commission's involvement, it is time for them to step up to the plate and work reasonably for that involvement. If, on the other hand, the Movants continue to argue to delay the implementation of these federal decisions, then the Commission should again consider whether it even has the jurisdiction to address elements no longer required as a result of the DC Circuit *Opinion*.

CONCLUSION

For all the reasons discussed above, BellSouth respectfully urges the Commission deny the *Motion*.

Respectfully submitted this 17th day of December, 2004.

BELLSOUTH TELECOMMUNICATIONS, INC.

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