

**Dinsmore & Shohl** LLP  
ATTORNEYS

Holly C. Wallace  
502-540-2309  
holly.wallace@dinslaw.com

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MAY 31 2005

PUBLIC SERVICE  
COMMISSION

May 31, 2005

Hon. Beth O'Donnell  
Executive Director  
Public Service Commission  
211 Sower Blvd.  
P. O. Box 615  
Frankfort, KY 40601

***Re: Joint Petition for Arbitration of NewSouth Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on Behalf of Its Operating Subsidiaries, Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Lexington, LLC, and Xspedius Management Co. of Louisville, LLC of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended, before the Public Service Commission of the Commonwealth of Kentucky, Case No. 2004-00044***

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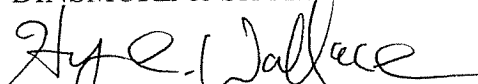
Dear Ms. O'Donnell:

I am enclosing with this letter and original and 11 copies of the Joint Petitioners' Opposition to BellSouth's Motion to Remove Certain Issues from the Joint Petitioners' Section 252 Arbitration Proceeding.

Thank you, and if you have any questions with regard to this matter, please call me.

Very truly yours,

DINSMORE & SHOHL LLP

  
Holly C. Wallace

HCW/kwi

cc: Amy E. Dougherty, Esq.  
All Parties of Record

**BEFORE THE  
KENTUCKY PUBLIC SERVICE COMMISSION**

**JOINT PETITION FOR ARBITRATION OF )  
NEWSOUTH COMMUNICATIONS CORP., )  
NUVOX COMMUNICATIONS, INC., )  
KMC TELECOM V, INC., KMC )  
TELECOM III, AND XSPEDIUS )  
COMMUNICATIONS, LLC ON BEHALF OF )  
ITS OPERATING SUBSIDIARIES XSPEDIUS )  
MANAGEMENT CO. SWITCHED SERVICES, )  
LLC, XSPEDIUS MANAGEMENT CO. OF )  
LEXINGTON, LLC, AND XSPEDIUS )  
MANAGEMENT CO. OF LOUISVILLE, LLC )**

CASE NO. 2004-00044

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PUBLIC SERVICE  
COMMISSION

**JOINT PETITIONERS' OPPOSITION TO BELL SOUTH'S MOTION TO REMOVE  
CERTAIN ISSUES FROM THE JOINT PETITIONERS'  
SECTION 252 ARBITRATION PROCEEDING**

NewSouth Communications Corp. ("NewSouth"), NuVox Communications, Inc. ("NuVox"), and Xspedius Communications, LLC on behalf of its operating subsidiaries named in this proceeding ("Xspedius") (collectively, the "Joint Petitioners"), by and through their undersigned counsel, hereby oppose BellSouth's May 20, 2005, Motion to move certain issues from this arbitration proceeding to the Generic Proceeding ("Motion").<sup>1</sup> Specifically, BellSouth seeks to move Issues 26, 36, 37, 38 and 51 ("Original Arbitration Issues") to the Generic Proceeding or, in the alternative, defer resolution of these issues until completion of the Generic Proceeding.<sup>2</sup> As the Kentucky Public Service Commission ("Commission") is aware, the Joint Petitioners joined BellSouth in a motion to move certain unresolved supplemental issues (Issues 23, 108, 111, 113 and 114) to the Commission's Generic Proceeding and to declare certain

<sup>1</sup> BellSouth Motion to Move *TRO* Arbitration Issues to Generic Proceeding (filed May 20, 2005) ("Motion").

<sup>2</sup> *Id.* at 1.

unresolved supplemental issues (Issues 109, 110 and 112) moot.<sup>3</sup> In support of their motion, the Parties stated the following: Issues 23, 108, 111, 113 and 114 should be moved to the Generic Proceeding, as these particular issues are impacted by the FCC's release of the *Triennial Review Remand Order* and thus, should be addressed in the Commission's Generic Proceeding after the Parties have determined the *Triennial Review Remand Order's* impact on their positions (if any) and have attempted to negotiate resolution of the issues. Moreover, the Parties' joint motion requested that the Commission declare Issues 109, 110 and 112 moot as these issues specifically address the interim regime established by the FCC in the *Triennial Review Order*, which has been superceded by the release of the *Triennial Review Remand Order*. The Commission granted the Parties' joint motion on May 17, 2005. The Joint Petitioners, however, oppose BellSouth's new attempt to move certain Original Arbitration Issues into the Generic Proceeding, as they are based on the *Triennial Review Order*, which has been the law of the land **since October 2003**. In support of this opposition, Joint Petitioners provide the following:

As a general matter, under section 252, Joint Petitioners have the right to have the Original Arbitration Issues resolved in their section 252 arbitration being conducted before the Commission. Section 252(b)(1) provides Joint Petitioners the right to "petition a State commission to arbitrate *any* open issues." 47 U.S.C. § 252(b)(1) (emphasis added). Indeed, this Commission has held that the Communications Act of 1934, as amended requires "that a state commission is to resolve 'each issue' in a petition for arbitration of an interconnection agreement...."<sup>4</sup> The Generic Proceeding is not a section 252 arbitration and, even if it were, it is

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<sup>3</sup> See Joint Motion to Move Issues to Generic Proceeding, Docket No. 2004-00044 (filed May 5, 2005). The Commission approved this Motion on May 17, 2005.

<sup>4</sup> In the Matter of: Petition by MCI, *et. al.* for Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Order, Case Nos. 96-431, 96-482 (Aug. 27, 1997).

certainly not the one filed by Joint Petitioners. Accordingly, the Joint Petitioners are unwilling to waive this right or any other established in section 252. In its Motion, BellSouth makes the illogical argument that it is not requesting the Commission to decide these issues *outside* the 252 arbitration, but rather to address these issues “*in conjunction* with the Commission’s consideration of identical or similar issues in the Generic Proceeding.”<sup>5</sup> BellSouth’s argument is nonsensical as the decisional date set for this proceeding is well in advance of the hearing date proposed for the generic proceeding.<sup>6</sup>

Moreover, each of the Original Arbitration Issues is part of the original set of issues on which arbitration was sought in February 2004. There is no agreement between the Parties to move these issues into the Generic Proceeding, as was the case with the supplemental issues. The law has been long settled on these particular issues. Although BellSouth argues in its Motion that that it would be a waste of time and resources to address these issues in our section 252 arbitration,<sup>7</sup> the time and resources have already been spent in drafting written testimony, engaging in discovery, and participating in the Commission’s hearing. Thus, there is no question that an ample record has been developed in the proceeding for the Parties to brief these issues and for timely resolution by the Commission.

This is not the first time BellSouth has attempted to remove issues from a section 252 arbitration proceeding that it did not want to address, and state commissions have properly rejected such requests. In the recent ITC^DeltaCom/BellSouth arbitration, BellSouth attempted to remove arbitration issues it claimed were better addressed in other forums. The Tennessee Regulatory Authority and the North Carolina Utilities Commission rejected BellSouth’s

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<sup>5</sup> BellSouth Motion at 4-5.

<sup>6</sup> The Commission’s decision in this docket is due 45 days from the close of briefing. This mid-September date is well before the October hearing date proposed for the generic proceeding.

<sup>7</sup> *Id.* at 2-3.

motions.<sup>8</sup> BellSouth filed a similar motion with the North Carolina Public Utilities Commission in the ITC^DeltaCom arbitration and, like the Tennessee Authority, the North Carolina Commission rejected BellSouth's motion in its entirety. In the current case, BellSouth has tried to remove these same Original Arbitration Issues from the Parties' current arbitration in Florida and such effort has been similarly rejected by the Florida Public Service Commission.<sup>9</sup>

BellSouth argues that the Original Arbitration Issues should be removed from this proceeding because they are identical to issues identified in the Generic Proceeding for resolution. While such a claim is irrelevant, as the Joint Petitioners have a right to have these issues decided by the Commission in our 252 arbitration whether they are identified in the Generic Proceeding or not, BellSouth's claim is, for the majority of issues identified, simply not accurate. There are no corresponding issues identified to date for the Line Conditioning issues raised by Joint Petitioners in Issues 36, 37 and 38.<sup>10</sup> While broad issues that correspond to Issues 26 (commingling) and 51 (EEL audits) have been identified in the preliminary issues list developed for the Generic Proceeding, it is not at all clear that the language that will be reviewed for these issues will mirror those proposed by the Joint Petitioners. As the Commission is aware, the Joint Petitioners are facilities-based carriers. Thus, commingling and EEL-related issues are

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<sup>8</sup> See Petition for Arbitration of ITC^DeltaCom Communications, Inc. With BellSouth Telecommunications, Inc., Initial Order Regarding BellSouth's Motion to Remove Issues and Other Pre-Hearing Procedural Issues, TRA Docket No. 03-00119 (Aug. 20, 2003). The Tennessee Authority similarly rebuffed efforts by BellSouth to remove issues from an earlier section 252 arbitration involving ICG. See Petition by ICG Telecom Group, Inc., TRA Docket 99-00377, Final Arbitration Order at 9 (Aug. 4, 2000). In the Matter of Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc., Order Denying BellSouth Motion to Remove Issues, NCUC Docket No. P-500, Sub 18 (July 11, 2003) ("NCUC DeltaCom Order").

<sup>9</sup> See Order Granting in Part and Denying in Part BellSouth Telecommunications, Inc.'s Motion to Move Issues Into Docket No. 041269-TP, Docket No. 04013-TP (Apr. 26, 2005). As indicated in Joint Petitioners' Opposition to BellSouth's request in Florida, the Florida Public Service Commission has established precedent wherein it has refused requests to remove issues involuntarily from section 252 arbitrations.

<sup>10</sup> Issue 26 on the proposed generic proceeding issues matrix addresses the FCC's routine network modification rules – not its line conditioning rules.

critical to their ability to compete effectively through the use of UNEs, combinations and section 271 loop and transport offerings, in association with their own fiber, switches and collocated facilities in Kentucky.

BellSouth requests a transfer or, alternatively, to hold the Original Arbitration Issues in abeyance, so that the Commission can avoid the risk of conflicting results.<sup>11</sup> This argument, which is relevant to only Issues 26 and 51, as discussed above, is a red herring. There is little risk and no reason to assume that the Commission would reach conflicting results. BellSouth incorrectly relies on decisions of the North Carolina and Georgia commissions to support its argument that arbitration issues, which affect more than one CLEC, should be withdrawn from a 252 arbitration and resolved in a generic proceeding.<sup>12</sup> It is true that the North Carolina Commission, in the BellSouth/ALLTEL arbitration, decided to move certain issues that were already under consideration in the generic dockets out of the parties' arbitration proceeding.<sup>13</sup> However, the North Carolina Commission more recently denied a BellSouth request to remove issues from a section 252 arbitration and emphasized that its decision on moving issues is discretionary.<sup>14</sup> With respect to the Georgia Commission decision, it is critical to note that the Georgia Commission did not decide to remove issues at the request of one party over the opposition and objections of another.<sup>15</sup> As stated above, there are no Line Conditioning issues under consideration in the Generic Proceeding that are similar to Issues 36, 37 and 38.

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<sup>11</sup> BellSouth Motion at 3.

<sup>12</sup> *Id.* at 3-4.

<sup>13</sup> In the Matter of Petition of ALLTEL Communications, Inc. for Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 with BellSouth Telecommunications, Inc., Order Transferring Issues, Docket No. P-514, Sub 18 (Apr. 9, 2001).

<sup>14</sup> NCUC Deltacom Order at 3.

<sup>15</sup> Petition of MCImetro Access Transmission Services LLC and MCI WorldCom Communications, Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications Inc. Concerning Interconnection and Resale Under the Telecommunications Act of 1996, Docket No. 11901-U, Order at 11 and 14 (Feb. 6, 2001).

Additionally, although there are broad issues addressing commingling and EEL audits in the Generic Proceeding, it is not clear if the proposed contract language in that proceeding will reflect the language proposed by the Parties in this arbitration.

BellSouth's argument to transfer or hold these issues in abeyance because of the impact the Commission's decision may have on other Kentucky carriers is also a red herring. It is inevitable that section 252 arbitrations include issues that may indirectly impact other carriers.<sup>16</sup> This has been the case since the passage of the Act.

Finally, BellSouth is wrong that the Joint Petitioners would not be prejudiced by transferring these issues or delaying their resolution.<sup>17</sup> The Joint Petitioners want this arbitration concluded as fast as possible and their agreement to waive the statutory decision timeframe is not intended to be construed as indication that they did not want the arbitration decided in a reasonably timely manner. Issue 26 and 51 encompass commingling and EELs, which as noted above, are critical tools for carriers such as Joint Petitioners. BellSouth argues that any opposition by the Joint Petitioners to this Motion would be "disingenuous in that the Joint Petitioners jointly agreed with BellSouth to move other issues in the arbitration to the Generic Proceeding".<sup>18</sup> It is BellSouth that is being disingenuous, as BellSouth ignores the critical difference between the set of issues which Joint Petitioners agreed to move and those that they do not. The issue Joint Petitioners do not agree to move are TRO-related. The law is long resolved and the parties have fully attempted to negotiate their differences. With respect to the TRRO-related issues, the parties jointly agreed to move to the generic proceeding, as stated in

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<sup>16</sup> Section 252 arbitrations do not typically result in decisions of general applicability (a fact that BellSouth repeatedly has used to its advantage, by forcing competitive carriers to arbitrate the same issues over and over again). However, they do establish precedent and can form the basis for subsequent orders of general applicability by a state commission.

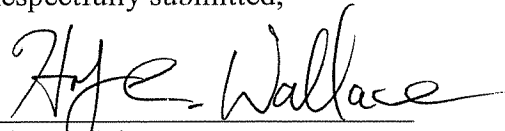
<sup>17</sup> *Id* at 4.

<sup>18</sup> *Id*.

that motion, these issues are related to a recent change of law and they have not been fully negotiated. Since the law impacting the Original Arbitration Issues has been clear since October 2003 and thus, the Original Arbitration Issues should be decided by the Commission in light of the full record developed in this proceeding. Indeed, in light of the importance of these issues, Joint Petitioners respectfully request that the Commission decide these issues in Joint Petitioners' favor.

WHEREFORE, for the foregoing reasons, Joint Petitioners request that the Commission reject BellSouth's effort to move the Original Arbitration Issues into the Generic Proceeding and find that these issues should be decided in the Joint Petitioners' favor without abeyance or delay based on the full record developed in this proceeding.

Respectfully submitted,



John E. Selent  
Holly C. Wallace  
Dinsmore & Shohl LLP  
1400 PNC Plaza  
500 West Jefferson Street  
Louisville, KY 40202  
(502) 540-2315 (phone)  
(502) 585-2207 (facsimile)

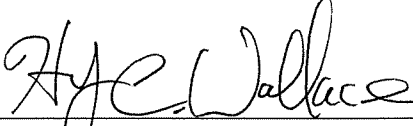
John J. Heitmann  
Heather T. Hendrickson  
KELLEY DRYE & WARREN LLP  
1200 19<sup>TH</sup> Street, N.W.  
Suite 500  
Washington, D.C. 20036  
(202) 955-9600 (phone)  
(202) 955-9792 (facsimile)

*Counsel to Joint Petitioners*



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on the following via U.S. Mail, first class, postage pre-paid, this 31st day of May, 2005.

  
Counsel to Joint Petitioners

**SERVICE LIST**  
**Case No. 2004-00044**

J. Phillip Carver  
BellSouth Telecommunications, Inc.  
1155 Peachtree Street  
Atlanta, GA 30309-3610

Dorothy J. Chambers  
General Counsel/Kentucky  
BellSouth Telecommunications, Inc.  
601 W. Chestnut Street, Room 410  
P.O. Box 32410  
Louisville, KY 40232  
BellSouthKY.CaseFilings@BellSouth.com

James C. Falvey  
Senior V.P. - Regulatory Affairs  
Xspedius Communications, LLC  
7125 Columbia Gateway Drive  
Suite 200  
Columbia, KY 21046  
jim.falvey@xspedius.com

Jake E. Jennings  
Senior Vice President  
NuVox Communications, Inc.  
16090 Swingley Ridge Road  
Suite 500  
Chesterfield, MO 63017  
jjennings@nuvox.com

Marva Brown Johnson  
Senior Regulatory Policy Advisor  
KMC Telecom V, Inc.  
1755 North Brown Road  
Lawrenceville, GA 30043  
mabrow@kmctelecom.com

Hamilton Bo E. Russell, III  
Senior V.P. - Legal & Reg. Affairs  
NuVox Communications, Inc.  
301 N. Main Street  
Suite 5000  
Greenville, SC 29601  
brussell@nuvox.com