COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF BELLSOUTH TELECOMMUNICATIONS, INC. TO ESTABLISH GENERIC DOCKET TO CONSIDER AMENDMENTS TO INTERCONNECTION AGREEMENTS RESULTING FROM CHANGES OF LAW	))))))	CASE NO. 2004-00427

ORDER TO SATISFY OR ANSWER

BellSouth Telecommunications, Inc. ("BellSouth") is hereby notified that it has been named in an emergency petition of AmeriMex Communications Corp., which the Commission will treat as a formal complaint, filed on March 7, 2005, a copy of which is attached hereto. The Commission, on its own motion, incorporates this petition into Case No. 2004-00427 because the issues presented are pending in this proceeding.

Pursuant to 807 KAR 5:001, Section 12, BellSouth is HEREBY ORDERED to satisfy the matters complained of or file a written answer to the complaint no later than March 8, 2005.[1]

Should documents of any kind be filed with the Commission in the course of this proceeding, the documents shall also be served on all parties of record.

[1] Due to the similarity between this complaint and others pending before the Commission for which BellSouth was required to respond by March 7, 2005, BellSouth agrees to this short notice to respond herein.

Done at Frankfort, Kentucky, this 7th day of March, 2005.

By the Commission

Commissioner W. Gregory Coker did not participate in the deliberations or decision concerning this case.

ATTEST:

Executive Director

DUPLICATE

ShawPittman LLP

A Limited Liability Partnership Including Professional Corporations

GLENN RICHARDS
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RECEIVED
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PUBLIC SERVICE COMMISSION

March 4, 2005

Michael F. Burford
Division of Filings
Public Service Commission of Kentucky
P.O. Box 615
211 Sower Boulevard
Frankfort, Kentucky 40602-0615

2004-427

Re: Emergency Petition of AmeriMex Communications Corp. for a Commission Order Directing BellSouth Telecommunications, Inc. to Continue to Accept New Unbundled Network Element Orders

Dear Mr. Burford:

On behalf of our client, AmeriMex Communications Corp. ("AmeriMex"), we submit an original and ten (10) copies of the enclosed "Emergency Petition of AmeriMex Communications Corp."

Please date-stamp the "Receipt" copy of this filing and return it in the enclosed self-addressed, stamped envelope. Please contact the undersigned if you have any questions or concerns.

Sincerely,

Glenn Richards
Counsel for AmeriMex Communications Corp.

BEFORE THE
PUBLIC SERVICE COMMISSION OF KENTUCKY

In the Matter of Emergency Petition of AmeriMex Communications Corp. For a Commission Order Directing BellSouth Telecommunications, Inc. to Continue to Accept New Unbundled Network Element Orders	)))))))))	Case No. _____

EMERGENCY PETITION OF AMERIMEX COMMUNICATIONS CORP.

AmeriMex Communications Corp. ("AmeriMex"), by and through its attorneys, hereby files the instant Emergency Petition for a Commission Order directing BellSouth Telecommunications Inc. ("BellSouth") to continue to accept new unbundled network element orders until AmeriMex and BellSouth have completed the negotiations required by the "change of law" provisions of their interconnection agreement ("Agreement") in order to address the FCC's recent *Triennial Review Remand Order* ("*TRRO*").[1]

On February 11, 2005, BellSouth informed AmeriMex by letter of BellSouth's intent to discontinue its provision of certain unbundled network elements ("UNEs") pursuant to BellSouth's unilateral interpretation of the *TRRO*. AmeriMex understands BellSouth's letter to reflect the mistaken view that BellSouth can unilaterally discontinue its provision of these UNEs, raise rates for existing services, and refuse to accept orders for new UNEs without first concluding good faith negotiations with AmeriMex. In fact, the Agreement bars BellSouth from taking any of these actions.

[1] *Triennial Review Remand Order, Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, FCC 04-290 (Feb. 4, 2005).

The existing Agreement between AmeriMex and BellSouth requires BellSouth to engage in good faith negotiations with AmeriMex before implementing any change in law that BellSouth believes may have occurred. Section 14.3 provides that, "In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of [AmeriMex] or BellSouth to perform any material terms of this Agreement, [AmeriMex] or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in this Agreement."[2]

Thus, to the extent that BellSouth believes that the Applicable Law governing the Agreement has changed in a material way as a result of the *TRRO*, Section 14.3 of the Agreement requires BellSouth to engage in good faith negotiations with AmeriMex on a contractual amendment that reflects this purported change of law. For these reasons, if BellSouth were to unilaterally discontinue its provision of UNEs as specified in its letter to AmeriMex, BellSouth would be in breach of the Agreement. BellSouth's letter does not constitute an attempt to negotiate in good faith, but rather an attempt to unilaterally circumvent BellSouth's obligations under the Agreement.

Moreover, the *TRRO* does not purport to abrogate the Agreement's "change of law" provisions. Rather, the *TRRO* confirms that the FCC expects that "incumbent LECs and competing carriers will implement the [FCC's] findings as directed by Section 252 of the Act" by "implement[ing] changes to their interconnection agreements consistent with [the FCC's]

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[2] Agreement §14.3.

conclusions in this Order." The FCC further establishes that parties "must negotiate in good faith regarding any rates, terms and conditions necessary to implement [the FCC's] rule changes," and threatens that "the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action."[3] The FCC also clearly states that the *TRRO* transition mechanisms are "simply a default process" that could be superceded by prior or subsequent contractual obligations.[4]

Thus, it is clear that the *TRRO* does not permit BellSouth to unilaterally circumvent the change of law process, but rather requires BellSouth to engage in good faith negotiations with AmeriMex pursuant to the "change of law" provisions of the Agreement. Any contrary reading would not only conflict with the plain language of the *TRRO*, but would also render it null and void. Under the *Sierra-Mobile* doctrine, while federal agencies like the FCC may revise the terms of a private contract between two carriers concerning communications services, they may do so only when the contract's terms "adversely affect the public interest" to a degree that is "much higher than the threshold for demonstrating unreasonable conduct under sections 201(b) and 202(a) of the Act."[5] Agencies must make a "particularized finding that the public interest requires modification."[6] The threshold for this finding is "more exacting" than the ordinary public interest standard, and "is sufficiently more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or

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[3] *TRRO* at ¶ 233.

[4] *TRRO* at ¶ 228.

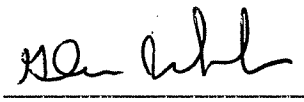
[5] *See, e.g., IDB Mobile Communications, Inc. v. COMSAT Corporation,* 16 FCC Rcd 11474 at ¶¶ 14-16 (2001).

[6] *See Atlantic City Electric Company v. FERC*, 295 F.3d 1, 40-41 (2002).

reformation mitigates the contract's deleterious effect."[7] The *TRRO* contains no such particularized showing, and as such cannot be interpreted to supercede the existing "change of law" provisions in the Agreement.[8]

Accordingly, AmeriMex respectfully requests that the Commission (1) order BellSouth to comply with the "change of law" provisions of the Agreement in order to implement the *TRRO*; and (2) order BellSouth to continue to accept and process AmeriMex's orders for unbundled network elements under the rates, terms, and conditions of the Agreement, until the parties complete the process envisioned by the "change of law" provisions of the Agreement.

Respectfully submitted,



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[7] *Texaco Inc. v. FERC*, 148 F.3d 1091 (1998).

[8] This reasoning has been adopted in at least one other state to block BellSouth's unilateral decision to discontinue its provision of these UNEs, raise rates for existing services, and refuse to accept orders for new UNEs without first concluding good faith negotiations with CLECs. *See* Georgia Public Service Commission, *Generic Proceding to Examine Issues Related to BellSouth's Obligation to Provide Unbundled Network Elements: Consideration of Staff's Recommendation regarding MCI's Motion for Emergency Relief Concerning UNE-P Orders*, Docket No. 19341-U (March 1, 2005).

CERTIFICATE OF SERVICE

I, Sylvia Davis, a secretary in the law firm of Shaw Pittman LLP, do hereby certify that a copy of the foregoing "Emergency Petition of AmeriMex Communications Corp." was sent via U.S. mail, first-class or by hand-delivery, on this 4th day of March 2005, to the following:

Joan Coleman
Vice President - Regulatory & External Affairs
BellSouth Telecommunications, Inc.
601 West Chestnut Street, Room 410
P. O. Box 32410
Louisville , KY 40232

Sylvia Davis