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March 7, 2005

RECEIVED
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PUBLIC SERVICE
COMMISSION

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

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
PSC 2004-00044

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of BellSouth Telecommunications, Inc.'s Response in Opposition to Petition for Emergency Relief Filed by NuVox, Xspedius, KMC III, and KMC.

Very truly yours,

Dorothy J. Chambers

Enclosures

cc: Parties of Record

575503

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by mailing a copy thereof, this 7th day of March 2005.

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Dorothy J. Chambers

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

JOINT PETITION FOR ARBITRATION OF NEWSOUTH COMMUNICATIONS, CORP., NUVOX COMMUNICATIONS, INC., KMC TELECOM V, INC., KMC TELECOM III LLC, AND XSPEDIUS [AFFILIATES] OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTION 252(B) OF THE COMMUNICATIONS ACT OF 1934, AS AMENDED	)	CASE NO. 2004-00044

BELLSOUTH TELECOMMUNICATIONS INC.'S
RESPONSE IN OPPOSITION TO PETITION FOR EMERGENCY RELIEF
FILED BY NUVOX, XSPEDIUS, KMC III, AND KMC

BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Kentucky Public Service Commission ("Commission") deny the Petition for Emergency Relief ("Petition") filed by NuVox, Xspedius, KMC III, and KMV V ("Joint Petitioners") on March 1, 2005. Many of the arguments raised by the Joint Petitioners mirror those made by Cinergy Communications Company in Case No. 2004-00427. BellSouth reiterates its response to such arguments and responds to an additional argument raised by the Joint Petitioners. This Commission should reject the Petition.

Without waiving BellSouth's position, because of the delay in the filing of emergency motions by certain CLECs, and to allow the Kentucky and other Commissions to have a full and adequate opportunity to consider the FCC's ruling in the Triennial Review Remand Order

("TRRO"), as described further herein, BellSouth today has issued Carrier Notification letter SN91085061, which addresses issues raised in Cinergy's motion.

BACKGROUND

On February 4, 2005, the Federal Communications Commission ("FCC") released its permanent unbundling rules in the Triennial Review Remand Order ("TRRO"). The *TRRO* identified a number of former Unbundled Network Elements ("UNEs"), such as switching, for which there is no section 251 unbundling obligation.[1] In addition to switching, former UNEs include high capacity loops in specified central offices,[2] dedicated transport between a number of central offices having certain characteristics,[3] entrance facilities,[4] and dark fiber.[5] The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers, adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] In each instance, the FCC unequivocally stated that the transition period for each of these former UNEs -- loops, transport, and switching -- would commence on March 11, 2005.[7]

While the FCC explicitly addressed how to transition the embedded base of these former UNEs through change of law provisions in existing interconnection agreements, the FCC took a different direction with regard to the issue of "new adds." For new adds, the FCC's belief "that the impairment framework we adopt is self-effectuating" controls.[8] Instead of requiring that the ILECs continue to allow CLECs to order more of the former UNEs during the transition period,

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[1] *TRRO*, ¶ 199 ("Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide." (footnote omitted).

[2] *TRRO*, ¶¶ 174 (DS3 loops), 178 (DS1 loops).

[3] *TRRO*, ¶¶ 126 (DS1 transport), 129 (DS3 transport).

[4] *TRRO*, ¶ 137 (entrance facilities).

[5] *TRRO*, ¶¶ 133 (dark fiber transport), 182 (dark fiber loops).

[6] *TRRO*, ¶¶ 142 (transport), 195 (loops), 226 (switching).

[7] *TRRO*, ¶¶ 143 (transport), 196 (loops) 227 (switching).

[8] *TRRO*, ¶3.

the FCC provided that no "new adds" would be allowed. For example, with regard to switching the FCC explained "[t]his transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[9] The FCC made similar findings concerning certain transport routes and certain high capacity loops.[10] The FCC specifically found: "[t]his transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order."[11]

The FCC clearly intended these provisions regarding "new adds" to be self-effectuating. First, the FCC specifically stated that "[g]iven the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005 ...."[12] Second, the FCC expressly stated its order would not "... supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis ..."[13] conspicuously omitting any similar intent not to supercede conflicting provisions of existing interconnection agreements. Consequently, in order to have

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[9] *TRRO*, ¶ 199; *see also* 47 C.F.R. § 51.319(d)(2)(iii) ("[r]equesting carrier may not obtain new local switching as an unbundled network element."). The new local switching rule makes clear that the prohibition against new UNE-Ps applies to new lines. Switching is defined to include line-side facilities, trunk side facilities, and all the features, functionalities and capabilities of the local switch. *TRRO*, ¶ 200. When a requesting carrier purchases the unbundled local switching element, it obtains all switching features in a single element on a per-line basis. *TRO*, at 433; the TRRO retained this definition (TRRO, n. 529). Thus, the switching UNE means the port and functionalities on a per-line basis and the prohibition against new adds applies to the *element* itself – thus, the federal rule applies to lines.

[10] *TRRO*, ¶ 142, 195; *see also* 47 C.F.R. § 51.319 (e)(2)(i), (ii), (iii), and (iv) (ILEC is not require to provide unbundled access to entrance facilities; requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements); *and* 47 C.F.R. § 51.319 (a)(4)(iii), (a)(5)(iii), and (a)(6) (requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements). Attached as Exhibit A is BellSouth's letter to the FCC in which it specifies the nonimpairment wire centers. BellSouth stated plainly that "[t]o the extent any party is concerned about the methodology BellSouth has employed or the wire centers identified on the enclosed list in which the nonimpairment thresholds have been met, it should bring that concern to the [FCC's] attention." Thus, BellSouth is not seeking "unilaterally" to determine where no obligation to unbundle high-capacity loops, transport, and dark fiber exists.

[11] *TRRO*, ¶ 227 (footnote omitted).

[12] *TRRO*, ¶ 235.

[13] *TRRO*, ¶ 199. *Also* ¶¶ 148, 198.

any meaning the *TRRO*'s provisions precluding the ordering of "new adds" have to have effect as of March 11, 2005.

Joint Petitioners cannot circumvent the FCC's intention by relying on paragraphs 227 and 233 of the *TRRO*. Paragraph 227 provides that "[t]he transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order." Paragraph 233 of the *TRRO* addresses changes to interconnection agreements.

Footnote 627 of Paragraph 227 modifies the "except as otherwise specified" clause. Footnote 627 makes clear that when the FCC stated "except as otherwise specified in the Order" it was referring to continued access to shared transport, signaling and call-related databases and was not making an implicit reference to the change of law process. In addition, the clear meaning of the "except as otherwise specified" language in paragraph 227 is obvious from the very next paragraph of the *TRRO*. In paragraph 228, the FCC held that the "transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period." The availability of voluntarily negotiated interconnection agreements for interested carriers is also "otherwise specified in the Order" but has no impact on the prohibition against new adds. Consequently, if a CLEC and an ILEC had voluntarily negotiated an agreement pursuant to which the ILEC voluntarily agreed to provide UNE-P or switching, the FCC did not intend to interfere with that voluntarily adopted obligation. For instance, BellSouth has agreed to provide switching to customers with four lines or more in certain Metropolitan Statistical Areas (e.g., enterprise customers) at a market rate of $14. By including the "except as otherwise specified"

in paragraph 227 and acknowledging carriers' ability to freely negotiate alternative arrangements in paragraph 228, the FCC made clear that it did not intend to override those provisions.

Likewise, Joint Petitioners' focus on the interconnection agreement portion of the sentence in paragraph 233, ignores the "consistent with our conclusions in this Order" clause. To be consistent with the conclusions in the Order, the transition plan for the embedded base of UNE-Ps will be implemented via the change of law process, but the prohibition against new UNE-Ps (and other UNEs) is self-effectuating. The first two sentences of paragraph 233 simply confirm that changes to the interconnection agreement should be consistent with the framework established in the *TRRO,* whether self-effectuating or via change of law.

Thus, Joint Petitioners have ignored the FCC's clear statement of intent and their complaints concerning BellSouth's announced intent to reject orders for these former UNEs on March 11, 2005 is meritless. Joint Petitioners' raise two arguments. First, Joint Petitioners argues that BellSouth has obligations under existing interconnection agreements to continue to accept orders for these former UNEs until those interconnection agreements are changed. This argument is nearly identical to an argument made by Cinergy in Case No. 2004-00427 and BellSouth reiterates its response to this argument below. Second, Joint Petitioners contends an abeyance agreement between the parties requires BellSouth to continue to provide these UNEs. Neither argument is correct.

Despite BellSouth's posting of its Carrier Notification letter on February 11, 2005, various CLECs[14] have delayed in filing requests with this and other Commissions for "emergency relief." In order to give this Commission adequate opportunity to consider the important issue of whether the FCC language in the TRRO actually means what it says, that is, that there are to be no "new adds," BellSouth has issued Carrier Notification SN91085061.[15]

ARGUMENT

A. The FCC's Bar On "New Adds" Is Self-Effectuating And Relieves BellSouth Of Any Obligation Under Its Interconnection Agreements To Provide These Former UNEs To Joint Petitioners.

BellSouth does not dispute that its interconnection agreements contain change of law provisions; however, that is not the issue here. If the FCC had held that Joint Petitioners could continue to add more former UNEs until the interconnection agreements were changed pursuant to the change of law provisions found in interconnection agreements, or even if it had been silent on the question of "new adds," then presumably no dispute would exist between Joint Petitioners and BellSouth. Neither situation is the case here, however, and Joint Petitioners' motion disregards what the FCC actually said in the *TRRO*.

The new rules unequivocally state carriers may not obtain new UNEs, and the FCC said unequivocally that there would be a transition period for embedded UNEs that would begin on March 11, 2005 and that would last 12 months: "we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements

[14] Cinergy's Emergency Motion was filed in this proceeding on February 28, 2005. The Joint Petitioners', Newsouth Communications Corp., Nuvox Communications, Inc., KMC Telecom III LLC, and Xspedius [Affiliates], Emergency Motion was filed March 1, 2005 in Case No. 2004-00044. An additional emergency petition was filed by AmeriMex Communications Corp. ("AmeriMex") on or about March 7, 2005, also seeking emergency relief.

[15] *See,* http://interconnection.bellsouth.com/notifications/carrier/index.html.

within twelve months of the effective date of this order."[16] The FCC made almost identical findings with respect to high-capacity loops and transport, holding that its transition rules "do not permit competitive LECs to add new [high capacity loops and transport on an unbundled basis] . . . where the Commission has determined that no section 251(c)(3) unbundling requirement exists."[17] The FCC also said unequivocally that this "transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[18] The FCC's determination is straightforward and clear.

Joint Petitioners contend that notwithstanding the clear language of the *TRRO* -- there will be a transition period, it will begin on March 11, 2005, and there will be no "new adds" during that transition period -- the FCC really didn't mean what it said. Evidently Joint Petitioners believe that BellSouth is obligated to continue to provide new UNEs until its contract with BellSouth is amended pursuant to change of law provisions therein. Joint Petitioners' belief is wholly inconsistent with the language of the *TRRO* and is flatly contradicted by the federal rules.[19]

First, the FCC understood that existing interconnection agreements often contained "change of law" provisions. For instance, the FCC specifically contemplated that the contract provisions for the transition of the embedded base of former UNEs would be effectuated through the change of law process. Further, the FCC provided that throughout the 12-month transition period (during which the FCC clearly said there would be no "new adds") CLECs would

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[16] *TRRO*, ¶199.

[17] *TRRO*, ¶ 142, 195; *see also* 47 C.F.R. § 51.319 (e)(2)(i), (ii), (iii), and (iv) (ILEC is not require to provide unbundled access to entrance facilities; requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements); *and* 47 C.F.R. § 51.319 (a)(4)(iii), (a)(5)(iii), and (a)(6) (requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements).

[18] *Id.*

[19] Notably, Joint Petitioners' Motion is devoid of a single reference to the *rules*.

continue to have access to the embedded UNE-Ps during the transition period, but at the commission-approved TELRIC rate "plus one dollar", until the migration of the embedded base was complete.[20] Finally, the FCC made the increase in the rates of the former UNEs retroactive to the effective date of the order to preclude gaming by the CLECs during the negotiation process.[21]

The FCC's obvious reason for making the increased rates retroactive is to keep CLECs from unnecessarily delaying the amendment process and gaming the system by postponing the date for the higher rates applicable to the embedded base of UNEs. It is equally clear that the FCC did not directly address amending existing interconnection agreements to eliminate any requirement that incumbent local exchange carriers ("ILECs") provide new UNEs. If the FCC had intended to allow CLECs to continue to add new UNEs until the interconnection agreements were amended, it could have easily said so. It did not. Instead, it made specific provision that the transition period did not authorize new adds.[22] The only reasonable, logical and legally sound conclusion is that the provisions prohibiting new adds was intended by the FCC to be self-effectuating.

There is no question that the FCC has the legal authority to create a self-effectuating change to existing interconnection agreements as it has done here. Indeed, in the TRO, the FCC decided not to make its decisions self-executing. *See TRO*, ¶ 700 ("many of our decisions in this order will not be self-executing"). The FCC's authority to make self-effectuating changes exists under the *Mobile-Sierra* doctrine, which allows the FCC to negate any contract terms of

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[20] *Id.*

[21] *TRRO*, n. 630. Thus, if Joint Petitioners ultimately executed a interconnection agreement amendment on May 11, 2005, the transition period rates would apply as of March 11, 2005 and Joint Petitioners would need to make a true-up payment to BellSouth.

[22] BellSouth will permit feature changes on Joint Petitioners embedded base of customers; however, the FCC was clear that CLECs could not continue to *increase* its embedded base. *See* 51.319(d)(2)(iii); 51.319 (e)(2)(i), (ii), (iii), and (iv); and 51.319 (a)(4)(iii), (a)(5)(iii), and (a)(6).

regulated carriers so long as the FCC makes adequate public interest findings. Thus, "[f]or all contracts filed with the FCC, it is well-established that 'the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest.'" *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999) (*quoting Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).[23]

The FCC was very clear in the *TRRO* that access to UNEs without impairment was contrary to the public interest and must stop. Notably, the FCC held that "it is now clear . . . that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment."[24] Also, the FCC held "we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine facilities-based competition."[25] Likewise, the FCC held that "the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives."[26]

The FCC has applied *Mobile-Sierra* to require a fresh look at contracts between ILECs and CMRS providers executed before the 1996 Telecommunications Act in light of the reciprocal compensation provisions of §251(b)(5) of the Act. In relevant part, citing *Western Union Tel. Co. v. FCC*, the FCC explained that "[c]ourts have held the Commission has the power ... to modify ... provisions of private contracts when necessary to serve the public

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[23] *Citing, in turn, FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956) *and United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956) (the FCC has the power to set aside any contract which it determines to be "unjust, unreasonable, unduly discriminatory, or preferential.").

[24] *TRRO*, ¶ 218.

[25] *TRRO*, ¶ 218.

[26] *TRRO*, ¶ 199.

interest." *First Report and Order,* 11 FCC Rcd 15499, ¶ 1095 (1996) (additional citations omitted).[27]

That these interconnection agreements are filed with and approved by the state commissions, rather than the FCC, has no impact on the FCC's ability to change these contracts when it is in the public interest to do so. While *Cable & Wireless P.L.C. v. FCC* applied to "all contracts filed with the FCC,"[28] the reference to "filing" means that decision applies to all contracts and other agreements *that are subject to the FCC's authority not just contracts actually filed with the FCC. See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 380, 381 (1999). Thus, as the Supreme Court made clear in *Iowa Utilities Bd.,* state commissions perform their functions subject to FCC rules designed to implement the statute and establish the public interest. The FCC has enacted new rules designed to further the public interest by finding "the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives"[29]. As a matter of national public policy, unbundled switching adversely impacts the public by creating disincentives for the creation of facilities-based competition – which competition has been found to be the fundamental objective of the Act. The FCC has spoken – and Joint Petitioners cannot ignore its message by hiding behind interconnection agreements that have been modified by the self-effectuating new rules to address the national public policy and the objectives of the Act.

The FCC has full authority to issue a self-effectuating order that eliminated CLECs' ability to add new UNEs after March 11, 2005. That existing interconnection agreements have

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[27] In the *Local Competition Order,* the FCC modified pre-existing agreements as of the effective dates of its new rules – just as it did in the *TRRO.*

[28] *Cable & Wireless,* 166 F.3d at 1231.

[29] *See* n. 16, *IBD Mobile Communications, Inc. v. COMSAT Corp*, Memorandum Opinion and Order, 16 FCC Rcd 11474, ¶ 16 n. 50 (2001). (The FCC explained that "Sierra-Mobile analysis does not apply to interconnection agreements." This simply cannot apply, particularly where the FCC's current order, by its own terms, appears to dictate a different requirement.)

not been formally modified to implement that finding is irrelevant. Through the *TRRO* the FCC has exercised its authority in a manner that trumps Joint Petitioners' individual contracts and BellSouth has no obligation to provide new UNEs to Joint Petitioners on or after March 11, 2005.

B. THE JOINT PETITIONERS' CLAIMS REGARDING THE SCOPE OF THE ABEYANCE AGREEMENT ARE MERITLESS AND SHOULD BE REJECTED.

The Joint Petitioners' second argument in support of the Emergency Petition is premised on an erroneous interpretation of the parties' agreement in June 2004 to suspend the current arbitration proceedings for 90 days ("Abeyance Agreement"). Specifically, the Joint Petitioners are attempting to manipulate the Abeyance Agreement by improperly expanding its scope to apply to the *TRRO*. This manipulation is designed to avoid operating pursuant to the FCC's most recent pronouncement of BellSouth's obligations under the Act. Indeed, the Joint Petitioners' entire argument is premised on a fictitious (and nonsensical) agreement between the parties to not invoke the change in law obligations in the current Interconnection Agreement ("Current Agreement") for the *TRRO* or for any other FCC Order that follows or is tangentially related to *USTA II*. There was never such an agreement. And, as established below, the Joint Petitioners' arguments are nothing more than a desperate ploy to gain a competitive advantage over other CLECs that is devoid of any evidence in support and is ultimately irrelevant to implementing the FCC's "no new adds" requirements on March 11, 2005.

A. The Abeyance Agreement Only Applies to Change of Law Obligations and Thus Is Inapplicable.

First, assuming *arguendo* that there was no dispute as to the scope of the Abeyance Agreement (which is denied by BellSouth), that agreement does not in any way restrict BellSouth's rights under the *TRRO*. In the Emergency Petition, the Joint Petitioners effectively

concede that the Abeyance Agreement is limited in application to "changes of law" requiring negotiation and amendment under the Current Agreement. As stated above, the FCC's bar on "new adds" beginning March 11, 2005 does not trigger the parties' "change of law" obligations under the Current Agreement because it is self-effectuating. Simply put, the FCC trumped the parties' change of law obligations as well as any ancillary agreement, if one existed, regarding those obligations.[30] Consequently, the parties are relieved of those obligations in order to implement the FCC's "no new adds" requirement from the *TRRO*. Thus, even accepting the Joint Petitioners' description and interpretation of the Abeyance Agreement (which BellSouth does not), that agreement does not impact BellSouth's rights under the *TRRO* for "new adds."[31]

B. The Parties Never Agreed to Expand the Abeyance Agreement to Include the *TRRO*.

While BellSouth submits that the FCC's no "new adds" requirement is not a change of law that requires amendment of the Current Agreement under the terms thereof, the Joint Petitioners' arguments still fail if the Commission finds differently. Contrary to the Joint Petitioners' claims, the implementation of the *TRRO* is not covered by the Abeyance Agreement. Rather, the parties limited their agreement to not invoke change of law process to changes set forth in *USTA II* only.

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[30] For the reasons discussed above, even assuming that BellSouth agreed with the Joint Petitioners' description of the scope of the Abeyance Agreement (which it does not), the *Mobile-Sierra* doctrine mandates that the parties be relieved of complying with those obligations to serve the public interest. *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999) (*quoting Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) ("For all contracts filed with the FCC, it is well-established that 'the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest.'").

[31] If the Commission rejects this argument, there is no need to address the Abeyance Agreement argument at this time because there is no emergency. Moreover, as the following argument makes clear, there are factual disputes about the scope of the Abeyance Agreement that the Commission will need to resolve. In the event the Commission is not inclined to rule in BellSouth's favor on the interpretation of the Abeyance Agreement, the only means by which the Commission can adequately resolve those factual disputes is through an evidentiary, including pre-filed testimony and briefing.

On June 15, 2004, the D.C. Circuit's stay of the *USTA II* decision expired. This expiration triggered the parties' change of law obligations in their existing agreements. Rather than exercise those obligations, in light of the on-going negotiations for a new agreement and the parties' pending arbitration, the parties decided to a 90 day abeyance of the pending arbitration proceeding to "consider how the post-*USTA II* regulatory framework should be incorporated into the new agreements currently being arbitrated and to identify what arbitration issues may be impacted and what additional issues, if any, need to be identified for arbitration." *See* Joint Motion at 2. The parties further agreed "that no new issues may be raised in this arbitration proceeding other than those that result from the Parties' negotiations regarding the post-*USTA II* regulatory framework." *Id.* Additionally, because the parties agreed to raise issues relating to *USTA II* into the pending arbitrations, the parties also agreed to not engage in separate change of law negotiations/arbitrations for *USTA II*:

> With this framework, the Joint Petitioners and BellSouth have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreements to address *USTA II* and its progeny. Accordingly, the Parties have agreed that they will continue operating under their current Interconnection Agreements until they are able to move into the new arbitrated/negotiated agreements that ensue from this proceeding.

See Joint Motion at 2. In other words, the parties agreed to hold the arbitration in abeyance for 90 days to do the following: (1) negotiate *USTA II* changes into the new interconnection agreements; and (2) for those *USTA II* changes that could not be negotiated, to agree on *USTA II* issues to add to the arbitration.

The language of the Joint Motion itself and the timing of the parties' agreement to hold the change of law process in abeyance both demonstrate that the scope of the agreement was limited only to changes resulting from *USTA II*. Contrary to this clear interpretation of the

Abeyance Agreement, the Joint Petitioners' argue that, eight months before the release of the *TRRO,* BellSouth voluntarily waived its right to amend its existing interconnection agreements with the Joint Petitioners for the *TRRO* or any other FCC Order that is tangentially related to *USTA II.* Nothing can be farther from the truth and the Commission should reject this erroneous manipulation of the Abeyance Agreement for the following reasons.

First, the Joint Petitioners argument directly conflicts with the purpose of the Abeyance Agreement. As stated above, BellSouth agreed to avoid the separate/second process for negotiating/arbitrating change of law for "*USTA II* and its progeny" because those issues would be raised in the pending arbitrations. *See* Joint Motion; June 29, 2004 e-mail from counsel for Joint Petitioners to counsel for BellSouth, attached hereto as Exhibit B (stating that "purpose of abatement would be to consider how the post USTA II regulatory framework should be incorporated into the new agreements currently being arbitrated by Joint Petitioners and to identify what arbitration issues may be impacted and what additional issues, if any, need to be identified for arbitration – ***and that by doing so***, we'd be avoiding a separate/second process of negotiating/arbitrating change-of-law amendments to the current agreement . . . .") (emphasis added).

The parties entered the Abeyance Agreement to address a timing issue arising out of *USTA II.* The Agreement went no further. As the Commission is aware, the deadline to add new issues to the parties' arbitration was October 2004. Thus, while the parties could add issues arising out of *USTA II,* they certainly could not add issues arising out of the *TRRO* because it had not yet been issued! It makes no sense to assume that BellSouth would have agreed to waive its change of law rights with respect to the *TRRO,* particularly in light of the fact that there was no opportunity to include *TRRO* issues in the arbitration.

Notably, the parties' revised matrix, submitted in October 2004, contained several Supplemental Issues relating to *USTA II* and the *Interim Rules Order*[32] but none of these Supplemental Issues substantively addressed the *TRRO* because the FCC did not even issue that decision until February 4, 2005. Consequently, the parties could not have included the *TRRO* in the Abeyance Agreement because the parties could not, and currently cannot, raise *TRRO* issues in the arbitration proceeding. Indeed, adopting the Joint Petitioners' interpretation is impermissible because it would result in the complete frustration of the Abeyance Agreement as the parties would have no venue (either through the pending arbitration or through a change of law arbitration) to address disputes relating to the *TRRO*. S*ee generally Lafevers v. Lafevers*, Ky., 255 S.W.2d 985, 986 (1953) (universal rule in construing contracts is to attempt to arrive at the intention of the parties as expressed in the instrument as a whole, the situation of the parties, and conditions under which the agreement is written); *Keen v. Ross*, Ky., 216 S.W.605, 606 (1919) (contract should be interpreted and read in light of the circumstances of the parties at the time of executing the contract).

Second, although the Commission approved the Joint Motion, nothing in the Commission's August 3, 2004 Order ("Order") supports the Joint Petitioners' argument. In fact, the Order is completely silent on the issue. In contrast, the Tennessee Regulatory Authority, in reviewing the identical Joint Motion, specifically found that the parties' agreement to avoid a second/separate change of law process was limited to *USTA II* ("Tennessee Order"): "Within this framework, the Parties agree to avoid a separate process of negotiating change-of-law amendments to the current interconnection agreements ***to address USTA II***. . . ." *See* July 16, 2004 TRA Order, attached hereto as Exhibit C (emphasis added). The Joint Petitioners have

[32] Although the parties agreed to limit new issues being raised to those resulting from the "post-*USTA II* regulatory framework", the parties subsequently agreed to also include issues relating to the *Interim Rules Order* in the arbitrations because the FCC issued that decision during the 90 day abeyance.

never challenged the Tennessee Order and instead are articulating a completely contrary position with the Emergency Petition.

Third, the crux of the Joint Petitioners' argument is that the parties cannot "continue operating under their current Interconnection Agreements until they are able to move into the new arbitrated/negotiated agreements that ensue from this proceeding" if the parties amend those agreements to incorporate the *TRRO*. Simply stated, the Joint Petitioners improperly read into the Joint Motion and the Abeyance Agreement a requirement that the rates, terms, and conditions of the Current Agreement were frozen as of June 30, 2004, until such time as the parties move onto the new arbitrated agreements. This interpretation is not only factually incorrect but also expressly rejected by the custom of the parties.

Indeed, there is nothing in the Joint Motion, the Order, or in the Abeyance Agreement that supports this interpretation. Further, it should be undisputed that the parties can and are continuing to operate under the Current Agreement until such time as the new arbitrated agreements become effective, even if certain provisions of the Current Agreement are modified to reflect changes of law. Further, as evidenced by recent amendment filings in Tennessee by NewSouth, NuVox, and BellSouth on February 22, 2005, (both of which are attached hereto as Exhibit D), the custom of the parties is to amend the Current Agreement and to continue operating under the Current Agreement, as amended. Accordingly, the practice and custom of the parties is directly contrary to the arguments asserted by the Joint Petitioners and thus the Commission should reject them. *Cinelli v. Ward,* KY.App., 997 S.W.2d 474, 478 (1998) ("When construing a contract it is well established that the court may look to surrounding circumstances and the parties' conduct as a guide."; *see also Martin v. Ben P. Eubank Lumber Co.*, Ky., 395 S.W.2d 385, 386 (1965).

Fourth, the express language of the Abeyance Agreement does not support the Joint Petitioners' interpretation. The Abeyance Agreement provides that the parties would avoid a second/separate change of law negotiation/arbitration for "*USTA II* and its progeny." "Progeny" has a specific legal definition, and Kentucky law requires that the Commission give effect to this specific definition. *Sparks Milling Co. v. Powell,* Ky., 143 S.W.2d 75, 77 (1940) ("where words having a definite legal meaning are knowingly used in a writing the parties will be presumed to have intended such words to have their proper legal meaning in absence of any contrary intention appearing in the instrument."). Indeed, *Black's Law Dictionary* (2000 ed.) defines "progeny" as a "line of opinions that succeed a leading case <*Erie* and its progeny>." Accordingly, as used in the Joint Motion, "*USTA II* and its progeny" means opinions of a court or state commission reaffirming or restating the D.C. Circuit's vacatur of certain unbundling obligations in *USTA II.* The *TRRO* does neither. Rather, it is an administrative decision setting forth new rules and thus does not meet this legal definition of "progeny."

Unlike the Joint Petitioners' argument, this interpretation of the Abeyance Agreement is entirely consistent with the intent of the parties to limit their agreement to *USTA II.* The reason for this is clear: Because the parties agreed to incorporate *USTA II* issues into pending arbitrations, the agreement also encompassed any subsequent court or state commission decision making the same conclusions as did the D.C. Circuit in *USTA II.* To hold otherwise would frustrate the entire purpose of the Abeyance Agreement as the parties would still be subject to change of law negotiations/arbitrations for these subsequent decisions, which only reaffirmed or restated the findings of *USTA II.*

The use of the phrase "USTA II and its progeny" was no accident as the parties specifically negotiated and reached a compromise with this agreed-upon language while drafting

the Joint Motion. In fact, the original draft of the Motion presented by the Joint Petitioners contained the phrase "post-USTA II regulatory framework" instead of "*USTA II* and its progeny." *See* July 9, 2004 e-mail and attachment from counsel for BellSouth to counsel to Joint Petitioners, attached hereto as Exhibit E. In response, BellSouth struck the phrase "post-*USTA II* regulatory framework" and inserted "*USTA II*" because it was concerned that the Joint Petitioners' language was too broad as it could encompass the FCC's Final Rules (ultimately set forth in the *TRRO*), which was never the intent of the parties. *Id.* Accordingly, BellSouth proposed that the subject sentence should read: "With this framework, the Joint Petitioners and BellSouth have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreement based on *USTA II*." *Id.*

In the next draft, the Joint Petitioners reasserted the phrase "post-*USTA* II regulatory framework," which was still unacceptable to BellSouth.[33] Consequently, the parties discussed the impasse, wherein BellSouth specifically informed the Joint Petitioners of its concern with their language and the parties agreed to "*USTA II* and its progeny." This negotiation history definitively establishes that (1) BellSouth never agreed to the interpretation now set forth by the Joint Petitioners; (2) BellSouth expressly advised the Joint Petitioners that it objected to the interpretation that the Joint Petitioners are now espousing; and (3) the parties agreed to language

[33] Interestingly, under the Joint Petitioners' own interpretation, even the broader phrase "post-*USTA II* regulatory framework" does not result in the inclusion of the *TRRO* and the Final Rules that resulted. KMC, one of the Joint Petitioners, used this exact same phrase to mean solely the *USTA II* decision. Specifically, in filing a similar motion in North Carolina to postpone its pending arbitration proceeding with Sprint, KMC stated that the "Parties respectfully request that the Commission hold this proceeding in abeyance to provide additional time for the Parties to address the ***effect of the post-USTA II regulatory framework, the Interim Order, and the forthcoming unbundling rules on the terms, conditions and rates that should be included in the Agreement*** . . . ." *See* December 2, 2004 Motion at 2, attached hereto as Exhibit F (emphasis added). This express inclusion of the *Interim Rules Order* and the *TRRO* proves that, at least KMC (and presumably all of the Joint Petitioners because their position on all the issues are allegedly the same) construes the phrase "post-*USTA II* regulatory framework to be limited to *USTA II* and does not encompass the FCC's *Interim Rules Order* or the *TRRO*.

to address BellSouth's concerns. The Joint Petitioners conveniently fail to disclose these facts, in obvious recognition of their fatal effect.

Fifth, adopting the Joint Petitioners' argument would lead to an absurd, unreasonable, or oppressive result as it would require this Commission to find that BellSouth indefinitely agreed to waive contractual rights related to the incorporation of the *TRRO* in the Current Agreement eight months prior to those changes even being issued. In effect, the Joint Petitioners argue that BellSouth essentially gave up the right to implement those new rules for the Current Agreement even before any party knew what those rules would contain and without any venue to address disputes related to those new rules. Not only is this factually incorrect but it also leads to absurd and unreasonable results that only benefit the Joint Petitioners.

Kentucky law mandates that, in construing a contract, absurd, unreasonable, or oppressive results should be avoided. *See General Accident Fire & Life Assur. Corp., v. Louisville Home Telephone Co.,* Ky., 193 S.W. 1031, 1033 (1917) ("in the construction of all contracts the endeavor of the courts is to give the contract under investigation such a construction as will comport with the reasonable intent of the parties in making the contract . . ."). Indeed,

> The contract must be construed as a whole in light of its language, subject-matter, and surrounding circumstances. . . . It is an established rule of construction that in order to arrive at the intention of the parties, the contract itself must be read in light of the circumstances under which it was entered into. General or indefinite terms employed in a contract or apparently conflicting clauses may be thus explained as to their meaning and application. It must be so construed as to give it such effect and none other than as the parties intended at the time it was made. If its language or clauses are susceptible of two constructions, the court will not adopt the oppressive one.

Lockwood's Trustee v. Lockwood, Ky., 62 S.W.2d 1053, 1054 (1933). For this additional reason, the Commission should reject the Joint Petitioners' arguments.

C. If BellSouth Is Ordered To Provide New UNE-P Circuits After March 11, 2005, It Is Entitled To A Retroactive True-Up To An Appropriate Rate.

For all the reasons set forth in this pleading, BellSouth is not obligated to provide new UNE-P circuits after March 11, 2005. If, however, Joint Petitioners are granted any emergency relief to which they are not entitled or Joint Petitioners or other CLECs place orders for "new adds" after March 11, 2005, BellSouth should be allowed to recover the revenues it loses as a result of the placement of these unlawful orders. This Commission should explicitly direct that in the event Joint Petitioners or other CLECs order new UNEs on or after March 11, 2005, and BellSouth ultimately prevails in its legal claim, Joint Petitioners must compensate BellSouth for those UNE orders at an appropriate rate retroactive to March 11, 2005.

The retroactive payment is important not only as a legal matter but as a policy matter. The FCC was unequivocal in its holding that no CLEC is entitled to new UNEs after March 11, 2005. Short of an order denying Joint Petitioners' request, the *only* way for the Commission to comply with the FCC's order is to require Joint Petitioners to pay BellSouth the difference between the UNE rate and an appropriate rate back to March 11, 2005. Other states have adopted true-ups. For instance, the Texas Commission adopted an interim agreement that does not require SBC to add new UNE-P orders and includes a true-up provision.[34] The Michigan Commission has decided to complete expedited proceedings in 45 days, during which new orders

[34] *See* Exhibit G for orders from the Texas PUC. The orders from the Texas Commission appear to diverge from action taken by the Georgia Commission, which, in addressing a motion similar to the one filed by Joint Petitioners, ruled against BellSouth. The Georgia Commission has not yet released a written order. The Alabama Commission has required BellSouth to provide MCI with access to new UNE-Ps until it can address this matter at its April 2005 meeting.

can apparently be issued subject to a true-up.[35] A true-up is the only way to equalize the risk between the parties – if ordered to provision new UNEs after March 11, BellSouth unquestionably is bearing the risk associated with the continuation of an unlawful unbundling regime. Joint Petitioners should bear the risk of a true-up if its position is determined to be wrong.

A true-up is also necessary in the interests of fairness. The FCC has also been clear that commercial negotiations can produce pro-competitive and pro-consumer outcomes.[36] BellSouth has successfully negotiated, to date, 48 commercial agreements with CLECs for the purchase of a wholesale local voice platform service, which agreements cover in excess of 310,000 access lines. If this Commission disregards the self-effectuating portion of the *TRRO,* the progress BellSouth has achieved in reaching commercial agreements could come to a halt, at least in the near term. If CLECs know that they can continue adding new unbundled network elements at TELRIC rates until the amendment and arbitration process is completed, which can take up to twelve months under the *TRRO*, they will have no reason to pay more than TELRIC by entering into a commercial agreement at this juncture. Significantly, allowing CLECs to continue adding unbundled network elements until the amendment and arbitration process has been completed, even though they are not impaired, unfairly prejudices those carriers that have entered into commercial agreements. Carriers that entered into commercial agreements will be forced to

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[35] *See* Exhibit H for an order from the Michigan Commission.

[36] 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, March 31, 2004; *see also* FCC Chairman Michael K. Powell's Comments on SBC's Commercial Agreement With Sage Telecom Concerning The Access To Unbundled Network Elements, April 5, 2004 (expressing hope "for further negotiations and contracts - so that America's telephone consumers have the certainty they deserve"); FCC Chairman Michael K. Powell Announces Plans For Local Telephone Competition Rules, June 14, 2004 (strongly encouraging "carriers to find common ground through negotiation" because "[c]ommercial agreements remain the best way for all parties to control their destiny").

compete for new customers against CLECs that can undercut their prices solely by virtue of these CLECs getting to pay TELRIC rates, unless this Commission requires a true-up.

CONCLUSION

For the reasons set forth therein, the Commission, in accordance with the Final Rules, should not order BellSouth to provide new UNE-P circuits after March 11, 2005. If, however, this Commission requires new UNE-Ps after March 11, 2005, or CLECs place orders for "new adds" after March 11, 2005, in accordance with BellSouth's Carrier Notification SN91085061 issued March 7, 2005, this Commission should order a retroactive true-up back to March 11, 2005.

Respectfully submitted, this 7th day of March 2005,

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