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

BELLSOUTH TELECOMMUNICATIONS, INC.'S BRIEF IN RESPONSE TO THE COMMISSION'S MARCH 30, 2005 ORDER

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, respectfully files this Brief in Response to the Commission's March 30, 2005 Order. As discussed herein, this Commission should affirm that commercial agreements are not subject to the filing and approval requirements of the Telecommunications Act of 1996 ("1996"), specifically 47 U.S.C. Section 252(e) and (h). Not only is there no legal basis for requiring the filing of commercial agreements, but such filing requirement would create an unnecessary and redundant regulatory burden that would hinder good faith commercial negotiations necessary to continued competition in the telecommunications industry.

II. STATEMENT OF FACTS

For purposes of this discussion, contractual arrangements voluntarily entered into between ILECs and CLECs that are not the result of a request for interconnection, services, or network elements pursuant to 47 U.S.C. Section 251 are referred to as commercial agreements. Such commercial arrangements have been specifically encouraged by the FCC as well as by the National Association of Regulatory Utility Commissioners ("NARUC").[1] Typically, negotiated commercial arrangements govern the terms and conditions between the parties for the provision of various services and/or elements for which the FCC has not made an affirmative finding of impairment pursuant to 47 U.S.C. Section 251.

The Commission's March 30, 2005 Order establishing briefing on this issue appears to have resulted from AmeriMex's March 22, 2005 letter to the Commission. Therein AmeriMex sought to withdraw its March 4, 2005 Petition for Emergency Relief on the basis that AmeriMex had entered into a commercial arrangement with BellSouth, rendering its Petition moot. This Commission's March 10, 2005 Order[2] requiring BellSouth *inter alia* to continue to allow CLECs to place new orders for switching and thus, the UNE platform, has been appealed in federal court.[3] As a result of AmeriMex's withdrawal of its Petition for Emergency Relief, on March 31, 2005, BellSouth filed a stipulation of dismissal as to AmeriMex (as well as another CLEC) with the Court. The dismissal subsequently has been ordered by the Court.

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[1] See, 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, rel. March 31, 2004, and NARUC Applauds FCC Efforts to Find Consensus on Competition Rules, rel. March 31, 2004.

[2] March 10, 2005 Order, KPSC Case No. 2004-00427, *Petition of BellSouth Telecommunications, Inc., to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law.*

[3] *BellSouth Telecommunications, Inc. v. Cinergy Communications, Inc., et al.* No. 3:05-CV-16-JMH (E.D. Ky. filed March 18, 2005)

III. DISCUSSION

A. Commercial Agreements Are Not Subject To The Filing And Approval Requirements Of Section 252 Under The Plain Language Of The Statute And FCC Precedent.

The language of 47 U.S.C. Section 252, the terms of Section 251, and Federal Communications Commission ("FCC") precedent all make clear that commercial agreements need not be filed with, or approved by, state public service commissions pursuant to Section 252.

1. 47 U.S.C. Section 252 Applies Only to Section 251 Interconnection Agreements.

By its terms, 47 U.S.C. Section 252 applies only to interconnection agreements negotiated after an ILEC receives "a request for interconnection, services, or network elements *pursuant to Section 251*."[4] This critical limitation governs all Section 252 obligations. Thus, only agreements requested "pursuant to Section 251" "shall be submitted to the State commission" for approval under Section 252(e).[5] Similarly, only those agreements filed pursuant to Section 252(e) are required to be available for public inspection under Section 252(h),[6] and only such agreements are available to other telecommunications carriers under Section 252(i).[7]

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[4] 47 U.S.C. §252(a)(1) (emphasis added). The fact that Section 252(a)(1) provides that such agreements may be negotiated "without regard to the standards set forth in subsections (b) and (c) of Section 251" does not impact the necessary precondition: the request for interconnection must be for network elements and services required under Section 251 of the 1996 Act. If the contract is not requested pursuant to Section 251, Section 252(a)(1) does not apply.

[5] 47 U.S.C. §§ 252(a)(1) & (e). And, a state may only reject an agreement "if it finds that the agreements do not meet the requirements of Section 251." 47 U.S.C. §252(e)(2)(B).

[6] 47 U.S.C. §252(h) ("A State commission shall make a copy of each agreement approved under subsection (e) ... available for public inspection and copying within 10 days after the agreement or statement is approved").

[7] 47 U.S.C. §252(i) ("A local exchange carrier shall make available any interconnection, service, or network elements provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement").

A competitive carrier's initial "request" for an agreement "pursuant to Section 251" triggers the state arbitration period in Section 252(b),[8] and only such agreements are available for arbitration by state commissions under Section 252(c) and (d).[9] In short, if the agreement is not requested for network elements and services required "pursuant to Section 251," Section 252 by its express terms does not apply.

A request "pursuant to 251" must be for resale, unbundled network elements or interconnection to be offered by Section 251. To constitute a Section 251 unbundling obligation, the FCC must make an affirmative finding of impairment. 47 U.S.C. § 251(d)(2)(B). The 1996 Act obligates the FCC "in determining what network elements should be made available for purposes of subsection (c)(3)" to consider whether "the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[10]

In *USTA II,* the D.C. Circuit confirmed that the responsibility for determining 251 elements rests solely with the FCC. *USTA II,* 359 F.3d 554 at 18 ("[w]e therefore vacate, as an unlawful subdelegation of the [FCC's] responsibilities, those portions of the Order that delegate to the state commissions the authority to determine whether CLECs are impaired without access to network elements ..."). If the FCC makes an affirmative finding of "no impairment" for a particular element, or in the absence of any FCC finding at all, the element is not a Section 251 element and, therefore, Section 252 does not apply.

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[8] 47 U.S.C. § 252(b)(1).

[9] 47 U.S.C. §§ 252(b) & (c).

[10] *Id.*; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Supplemental Order Clarification, 15 FCC Rcd 9587, 9596, ¶ 16 (2000) (FCC must determine "impairment" "before imposing additional unbundling obligations on incumbent LECs" rather than "impos[ing] such obligations first and conduct[ing] [its] 'impair' inquiry afterwards"), *petitions for review denied, Competitive Telecomms. Ass'n v. FCC,* 309 F.3d 8 (D.C. Cir. 2002).

The obligations in Section 252, including filing with the state commission, apply only to 251 elements. Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements. Under Section 252, there are two types of agreements, voluntarily negotiated agreements and arbitrated agreements. Both types of agreements regulated by Section 252, by definition, only govern Section 251 elements. Section 252(a)(1), which defines voluntarily negotiated agreements, provides that carriers may enter into such agreements "upon receiving a request...pursuant to Section 251." As discussed above, elements for which there is no impairment finding are not Section 251 elements and therefore not subject to a request "pursuant to section 251." Similarly, Section 252(b), which defines arbitrated agreements, refers back to "a request for negotiation under this section" – in other words, a "request pursuant to Section 251." Thus, the statute expressly provides that both types of agreements defined in Section 252, to which the Section 252 obligations apply, involve Section 251 elements.

Subsections (c), (d), (e), and (i) of 252 all set forth procedures for handling "the agreements" defined in Section 252, i.e. either negotiated or arbitrated. Because "the agreements" by definition must relate to 251 elements, it necessarily follows that the subsections of 252 do not apply to agreements that cover non-251 elements and services, such as the commercial agreement at issue in this case. Thus, commercial agreements do not need to be filed with or approved by the state commissions under 252(e). Moreover, if the parties are unable to agree on commercial terms, neither party is entitled to invoke the state commission's authority under Section 252(b) to arbitrate the dispute.

Any other reading of Section 252(a)(1) (or 252(b), which refers back to 252(a)(1)) would impermissibly negate the clause "pursuant to section 251." This clause limits the applicability of the requirements of 252 to those agreements entered into pursuant to the obligations of section

251. Interpreting 252(a)(1) as requiring parties to comply with Section 252 for commercial agreements would impose obligations on commercial negotiations that Congress did not intend, would stymie the parties' ability to enter into these agreements, and would inhibit the marketplace certainty the industry so desperately needs.

2. 47 U.S.C. Section 251 Also Confirms Commercial Agreements Do Not Need to be Filed with and Approved by State Commissions.

The plain language of 47 U.S.C. Section 251 also demonstrates that commercial agreements need not be filed and approved under Section 252. Section 251(c)(1) explains that ILECs have an obligation to negotiate "in accordance with Section 252 the particular terms and conditions of the agreements to fulfill the duties described in paragraphs (1) through (5) of subsection [251] (b) and this subsection [251(c)]."[11] Accordingly, if the agreement does not include the ILEC's "duties" in Sections 251(b)(1-5) or Section 251(c), it falls outside the ILEC's Section 252 duty to negotiate and corresponding Section 252 obligations.

3. FCC Precedent Also Confirms that Section 252 Does Not Apply to Commercial Agreements.

FCC precedent confirms that 47 U.S.C. Section 252 does not apply to commercial agreements entered into for services not required under Section 251. For example, in the *Qwest*

[11] 47 U.S.C. § 251(c)(1).

ICA Order, the FCC found that "*only* those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under [section] 252(a)(1)."[12] The FCC reiterated this interpretation throughout the Order, noting that while "a settlement agreement that contains an ongoing obligation relating to Section 251(b) or (c) must be filed under section 252(a)(1)," "settlement contracts that *do not affect an incumbent LEC's ongoing obligations relating to section 251 need not be filed.*"[13]

In the *Triennial Review Order,* the FCC reaffirmed the conclusion that Section 252 applies only to 251 elements. Specifically, the FCC held that that the pricing standard set forth in Section 252(d) applies only to Section 251 elements. The FCC held that "[w]here there is no impairment under section 251 and a network element is no longer subject to unbundling, we look to *section 271* and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements."[14] The FCC went on to hold that "[s]ection 252(d)(1) provides the pricing standard

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[12] *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337, n. 26 (2002) ("Qwest ICA Order") (emphasis added). This finding is consistent with the FCC's Notice of Apparent Liability for Forfeiture against Qwest for failing to file interconnection agreements and provisions containing and relating to Section 251(b) and (c) obligations. *See Qwest Corporation, Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, FCC 04-57 (2004). While the FCC indicated that an "agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation" is subject to the filing and approval requirements of Section 252, the FCC did not address the type of agreement at issue here – namely, a commercial agreement entered into for services not offered pursuant to Section 251 Furthermore, such a commercial agreement would not be subject to the filing and approval requirements of Section 252 under the FCC's analysis because the services under such an agreement are being provided in lieu of resale, interconnection, or unbundled network elements offered under Section 251.

[13] *Qwest ICA Order*, ¶ 12 (emphasis added); *see also Id.*, ¶ 9 (only those "agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c)" must be filed under Section 252).

[14] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capabilities*, Report And Order And Order On Remand And Further Notice Of Proposed Rulemaking, 30 CR 1, ¶¶ 656-657 (2003) (emphasis added).

'for network elements for purposes of [section 251(c)(3)], and does not, by its terms, apply to network elements that are required only under section 271."[15]

Furthermore, to the extent there could be any doubt on the issue of filing requirements with respect to commercial agreements, BellSouth has filed with the FCC an Emergency Petition seeking a declaration that commercial agreements are subject to Section 211 of the Communications Act of 1934, as amended, not Section 252, and an order preempting inconsistent state action. BellSouth also has filed a Petition for Forbearance requesting that the FCC forbear from applying Section 252 to commercially negotiated agreements for the provision of wholesale services that are not required under Section 251. Both of BellSouth's petitions, as well as a similar petition filed by SBC, [16] are pending at the FCC. Judicial economy and avoidance of a possibly inconsistent ruling strongly suggest that, at a minimum, this Commission not enter any order requiring the filing with this Commission of commercial agreements until the FCC has acted on these pending petitions. See similar decisions to hold in abeyance.[17]

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[15] *Id.* ¶ 657 (brackets in original).

[16] *In re: SBC Communications, Inc.'s Emergency Petition for Declaratory Ruling, Preemption And For Standstill Order To Preserve The Viability Of Commercial Negotiations,* WC Docket No. 04-172 (May 3, 2004).

[17] Order Holding Docket in Abeyance dated November 3, 2004, Docket No. 040530-TP, Florida Public Service Commission and Order Holding Matter in Abeyance dated June 25, 2004, Docket No. P-100, Sub 133, North Carolina Utilities Commission. But see, Order, *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC,* No. 1:05-CV-0674-CC, 2005 WL 807062 (N.D. Ga. Apr. 5, 2005), from which BellSouth has taken an appeal.

B. Regulatory Oversight Would Hinder Commercial Negotiations.

The Federal Communications Commission ("FCC"),[18] has urged CLECs and Incumbent Local Exchange Carriers ("ILECs") such as BellSouth to commence "good faith" "commercial negotiations" "to arrive at commercially acceptable arrangements" in order "to restore certainty and preserve competition in the telecommunications market."[19] The National Association of Regulatory Utility Commissioners ("NARUC") echoed this sentiment, noting that several state public service commissions "had issued similar calls for commercial negotiations."[20] In response to these calls for "commercial negotiations," BellSouth has commenced voluntary, good faith discussions with numerous CLECs which have resulted in over one hundred commercial agreements, including the commercial agreement with AmeriMex Communications Corp. ("AmeriMex") that is the subject of this Commission's March 30, 2005 Order in this matter.

If the threat of regulatory intervention through the filing and approval process set forth in Section 252 were injected into the process of reaching commercial agreements, such additional and unnecessary regulatory oversight would be a further obstacle to the fulfillment of the FCC's and NARUC's goal of reaching market-based, commercially acceptable agreements.

Requiring that commercial agreements be filed with and approved by the Commission under Section 252 of the 1996 Act also would result in an unacceptable level of uncertainty in

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[18] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *reversed in part on other grounds, United States Telecom. Ass'n v. FCC*, Nos. 00-1012, *et al.* (D.C. Cir. Mar. 2, 2004) ("*USTA II*").

[19] 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, rel. March 31, 2004.

[20] NARUC Applauds FCC Efforts To Find Consensus On Competition Rules, rel. March 31, 2004.

the negotiating process. For example, if Section 252 applied to commercial agreements, carriers could seek Commission intervention to resolve those issues where the parties have been unable to reach agreement. Carriers would be loath to negotiate when they risk exposure of agreements to potential revisions by state commissions in the arbitration process, creating differences on a state-by-state basis of commercially-determined provisions. The potential for exposure to the arbitration process also increases the potential for delay in obtaining approval of an agreement under which the parties can begin operating. Thus, in order to "pave the way for further negotiations and contracts,"[21] this Commission should affirm that commercial agreements are not subject to the filing and approval requirements of Section 252.

Furthermore, commercial agreements, such as the agreement with AmeriMex, are not sheltered from public inspection. On the contrary, while these commercial agreements are not subject to 47 U.S.C. Section 252 requirements, BellSouth has acknowledged they are governed by Section 211 of the Communications Act because they are federal agreements. Section 211(a) provides that "[e]very carrier subject to this Act shall file with the [FCC] copies of all contracts, agreements, or arrangements with other carriers ... in relation to any traffic affected by the provisions of this Act to which it may be a party." 47 U.S.C. § 211(a). The FCC Rule which implements Section 211(a), provides in relevant part as follows:

> [w]ith respect to contracts coming within the scope of paragraph (a)(1)(ii) of this section between subject telephone carriers and connecting carriers ... such documents shall not be filed with the Commission; but each subject telephone carrier shall maintain a copy of such contracts to which it is a party in appropriate files at a central location upon its premises, copies of which shall be readily accessible to Commission staff and members of the public upon reasonable request therefore; and upon request by the Commission, a subject telephone carrier shall promptly forward individual contracts to the Commission.

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[21] *See* FCC Chairman Michael Powell's Comments on SBC's Commercial Agreement with Sage Telecom Concerning Access to Unbundled Network Elements (April 5, 2004).

47 C.F.R. § 43.51(c). In compliance with Section 211 and the FCC's rules, BellSouth has made its commercial agreements available in appropriate files at a central location in Atlanta and permits inspection by members of the public upon reasonable request.[22]

As the FCC repeatedly has found, "competition is the most effective means of ensuring that the charges, practices, classifications, and regulations ... are just and reasonable, and not unjust and unreasonably discriminatory." *Petition of US West Communications, Inc. for Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of US West for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements,* 14 FCC Rcd 16252. ¶ 31 (1999). Once competitors are no longer impaired without access to a particular network element, there is no need to file or seek regulatory approval of a commercial agreement to provide an equivalent to that element in order to assure nondiscriminatory rates. The absence of impairment signifies that there are meaningful alternatives to the ILEC's network – including cable systems, other wireline networks, and even wireless services. Given the existence of such alternatives, the ILEC has every incentive to reach commercially reasonable wholesale arrangements in order to maintain traffic on its network, and CLECs have other options if they cannot or do not wish to agree to terms with the ILEC. Accordingly, the marketplace can be relied upon to assure that the rates in BellSouth's commercial agreements are not discriminatory. Furthermore, pursuant to 47 U.S.C. §§ 201 and 202, the FCC has jurisdiction over the commercial agreements and thus has the authority to ensure that the terms and conditions are just and reasonable, and that the agreements do not result in unjust discrimination against any carrier. There is no benefit to subjecting such agreements to the filing and approval process under Section 252; there is no legal requirement for such action; and there is

[22] *See* Attachment 1, consisting of BellSouth's Carrier Notification Letter outlining the actions it has taken to allow the public inspection of commercial agreements. In addition, BellSouth will continue to file its Section 251 agreements with state public service commissions.

considerable disincentive to imposing additional redundant regulatory requirements. Furthermore, BellSouth's compliance with Section 211 will enable the FCC to view the rates, terms, and conditions contained in the commercial agreements. The FCC, therefore, will be able to ensure compliance with the nondiscrimination requirements of Sections 201 and 202.

CONCLUSION

Accordingly, this Commission should affirm that commercial agreements are not subject to another level of duplicative regulatory oversight and do not fall within the province of 47 U.S. C. Section 252.

Respectfully Submitted,

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