STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO. P-55, SUB 1550

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Complaints Against BellSouth Telecommunications, Inc. Regarding Implementation of the Triennial Review Remand Order	)))))	ORDER CONCERNING NEW ADDS

HEARD IN: Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina, Wednesday, April 6, 2005.

BEFORE: Commissioner Sam J. Ervin, IV, Presiding
Chair Jo Anne Sanford
Commissioner J. Richard Conder
Commissioner Lorinzo L. Joyner
Commissioner James Y. Kerr, II
Commissioner Howard N. Lee
Commissioner Robert V. Owens, Jr.

APPEARANCES:

For BellSouth Telecommunications, Inc.:

Edward L. Rankin, III
General Counsel — NC
P.O. Box 30188
Charlotte, NC 28230

R. Douglas Lackey
Senior Corporation Counsel — Regulatory
675 W. Peachtree Street, Suite 4300
Atlanta, GA 30375

For MCIMetro Access Transmission Services, LLC:

Cathleen M. Plaut
Bailey & Dixon, LLP
P.O. Box 1351
Raleigh, NC 27602

Kennard B. Woods
Six Concourse Parkway, Suite 600
Atlanta, GA 30328

For KMC Telecom, NuVox Communications and Xspedius Communications:

Henry Campen
Parker, Poe, Adams & Bernstein
P. O. Box 389
Raleigh, NC 37608

For US LEC of North Carolina, Inc.:

Marcus Trathen
Brooks, Pierce, McLendon, Humphrey & Leonard
P. O. Box 1800
Raleigh, NC 37602

For The Using and Consuming Public:

Lucy E. Edmondson
Public Staff— North Carolina Utilities Commission
4326 Mail Service Center
Raleigh, NC 27699-4326

BY THE COMMISSION: On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO), FCC Docket No. WC-04313 and CC 01-338. 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

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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).

arrangements.[6] In each instance, the FCC stated that the transition period for each of these former UNEs — loops, transport, and switching — would commence on March 11, 2005.[7]

On February 28, 2005, ITC^DeltaCom Communications, Inc. (DeltaCom) filed a letter with the Commission that it had sent to BellSouth Telecommunications, Inc. (BellSouth) on February 21, 2005, on behalf of itself and Business Telecom, Inc. (BTI). The letter responded to a BellSouth carrier notification letter dated February 11, 2005, in which BellSouth outlined actions it planned to take in light of the FCC *TRRO*. DeltaCom argued that the *TRRO* did not allow BellSouth to refuse UNE-P orders associated with the embedded base of UNE-P customers or orders for new UNE-P customers on its effective dates.

On March 1, 2005, MCImetro Access Transmission Services LLC (MCI) filed a Motion for Expedited Relief Concerning UNE-P Orders that set forth similar arguments to those advanced by DeltaCom in its February 28, 2005, letter. MCI asked the Commission to order BellSouth to continue to accept and process MCI's UNE-P orders after March 11, 2005.

Likewise, on March 2, 2005, NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC and Xspedius Communications LLC (collectively, Joint Petitioners) filed a Petition for Emergency Declaratory Ruling based on similar grounds to those set forth by DeltaCom and MCI. In addition, the Joint Petitioners alleged that they had executed a separate agreement with BellSouth through which BellSouth was required to allow access to all de-listed UNEs after March 11, 2005.

On March 3, 2005, the Commission consolidated these filings in a single docket — Docket No. P-55, Sub 1550— and ordered BellSouth to respond to the MCI and Joint Petitioners' motions by March 8, 2005. The Commission also set the dispute for oral argument on March 9, 2005.

On March 4, 2005, LecStar Telecom, Inc. filed with the Commission its February 24, 2005, responsive letter to BellSouth's February 11 carrier notification letter, and CTC Exchange Services, Inc. (CTC) filed Comments in Support and Request for Expanded Relief. On March 7, 2005, Amerimex Communications Corp. filed an Emergency Petition seeking relief similar to that sought by MCI and the Joint Petitioners, and US LEC of North Carolina, Inc. (US LEC), Time Warner Telecom of North Carolina, LP and XO North Carolina, Inc. filed a Supportive Petition.

On March 8, 2005, BellSouth sought an extension of time within which to both respond in writing to the various filings described above and to appear for oral argument. Attached to BellSouth's motion was a new carrier notification letter issued by

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

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

BellSouth on March 7, 2005, in which BellSouth extended the deadline for accepting "'new adds' as they relate to the delisted UNEs until the earlier of 1) an order from an appropriate body, either a commission or a court, allowing BellSouth to reject these orders, or 2) April 17, 2005."

On March 8, 2005, the Commission issued an order rescheduling the oral argument for April 6, 2005, and granting BellSouth an extension until March 15, 2005, to respond to the various motions, complaints and letters that had been received in this docket.

On March 9, 2005, the Commission received a letter from CTC in which it advised the Commission that it would rely on its written comments and the arguments of other CLPs and accordingly would not participate in the oral argument. On the same date, the Commission received a copy of a letter from Navigator Telecommunications, LLC to BellSouth dated February 28, 2005, in which Navigator objected to BellSouth's proposed implementation of the *TRRO*.

On March 14, 2005, BellSouth moved to strike the filing by Amerimex on the grounds that the filing had not been signed by an attorney licensed to practice in North Carolina. The Commission subsequently concluded that good cause existed to grant the motion unless Amerimex cured the deficiency noted by BellSouth by March 31, 2005. Amerimex withdrew its Emergency Petition on March 22, 2005, stating that it had entered into a commercial agreement with BellSouth that mooted its Petition.

On March 15, 2005, BellSouth filed its responses to the relief sought by MCI, Joint Petitioners and the other parties listed above. On March 16, 2005, AT&T of the Southern States, LLC (AT&T) asked the Commission, to the extent it awarded any relief to the various petitioners, to award the same relief to AT&T. Prior to the oral argument, the Commission received several submissions from the parties conveying "supplemental authority" supporting their various positions.

Oral argument took place as scheduled on April 6, 2005. Counsel for various parties appeared at that time and argued their respective positions before the full Commission. At the conclusion of the argument, the Presiding Commissioner asked the parties to submit post-argument briefs and/or proposed orders. MCI, US LEC, BellSouth, Joint Petitioners, Public Staff, and CTC made post-hearing filings.

On April 15, 2005, the Commission issued a Notice of Decision and Order containing the conclusions set out below.

1. With respect to the provision of UNE-P, DS1, and DS3, the Commission declines to declare that BellSouth must provide "new adds" of these UNEs outside of the embedded customer base. Nevertheless, BellSouth must continue to process orders for the existing base of CLP customers pending completion of the transition process.

2. With respect to the issue of the provision of loop and transport, the Commission finds that the representation of BellSouth at the oral argument that it will follow the procedures outlined therefor in the TRRO renders this issue moot.

POSITIONS OF PARTIES

BellSouth argued that the FCC's ban on "new adds" of former UNEs –i.e., the addition of new customers using unbundled access to local circuit switching—was "self-effectuating" and relieved BellSouth of any obligation under its interconnection agreements to provide such "new adds" to CLPs. *See, e.g.,* TRRO, para. 3. BellSouth relied on what it believed to be the plain language of the TRRO. It argued that the FCC's new rules unequivocally state that carriers may not obtain new UNEs, and noted that the FCC had stated that there would be a transition period for *embedded UNEs* to begin on March 11, 2005, which would last for 12 months. *See,* TRRO, para. 199. The FCC made almost identical findings with respect to high-capacity loops and transport. *See, TRRO*, para. 142, 195, also 47 C.F.R. 51.319(e)(2)(i), (ii),(iii), and (iv) and 51.319(a)(4)(iii), (a)(5)(iii), and (a)(6). The FCC also said that the transition period was to apply only to the embedded customer base and does not permit CLPs to add new customers using unbundled access to local circuit switching. *Id.* There are at least a dozen instances in the TRRO where it is made clear that there are to be no new adds for these UNEs. *See*, paras. 3, 4, 142, 145, 195, 198, 227; Rules at p. 147, 148, and pp. 150-152.

BellSouth also argued that the FCC has the legal authority to implement self-effectuating changes to existing interconnection agreements. This is implied by the FCC's decision in the TRO *not* to make its decisions in that order self-executing and is recognized by case law, notably *Cable & Wireless, PLC v. FCC,* 166 F.3d 1224, 1231-32 (D.C. Cir. 1999)(*Cable and Wireless) (quoting Western Union Tel. Co. v. FCC,* 815 F.2d 1495, 1501 (D.C. Cir. 1987). *See, also, United Gas Improvement Co. v. Callery Properties, Inc.* 382 U.S. 223, 229 (1965)(*Callery Properties*)(agencies can undo what is wrongfully done by virtue of their orders). The FCC had also made the requisite public interest findings under the *Mobile-Sierra* doctrine[8] inasmuch as the FCC in various places noted that certain unbundling proposals constituted a disincentive to CLP infrastructure investment. Even apart from the *Mobile-Sierra* doctrine, the FCC has the authority to create a self-effectuating change because interconnection agreements are not truly "private contracts," but rather arise within the context of ongoing federal and state regulation. Numerous state commissions have rejected the relief sought by the CLPs (Ohio, Indiana, New York, California, Texas, Kansas, New Jersey, Rhode Island, Maine, Massachusetts, Delaware, Michigan, Maryland, Florida, Virginia and Pennsylvania). On April 5, 2005, the United States District Court for the North District of Georgia entered a preliminary injunction against enforcement of the Georgia Public Service Commission's order favorable to the CLPs on the same subject matter, finding a significant likelihood that BellSouth would prevail on the merits. The Court found that reliance on the *Mobile-Sierra* doctrine was unnecessary because, among other things,

[8] Under the *Mobile-Sierra,* doctrine the FCC may modify the terms of a private contract if the modification will serve the public interest.

the FCC "was undoing the effects of the agency's own prior decisions, which have repeatedly been vacated by the federal courts as providing overly broad access to UNEs." Order, *BellSouth Telecommunications, Inc. v. MCIMetro Transmission Services, Inc.* No. 1:05-CV-0674-CC (April 5, 2005) (Georgia District Court Order).

BellSouth further maintained that CLPs are not entitled to UNE-P under state law because, even if North Carolina were not preempted by federal law, the Commission has not conducted the required impairment analysis. In any event, CLPs are not entitled to UNE-P under Section 271 of the Telecommunications Act because, among other things, there is no obligation for BellSouth to combine Section 251 and Section 271 elements, much less at TELRIC rates. Section 271 elements fall within the exclusive jurisdiction of the FCC.

As for the Abeyance Agreement between BellSouth and the Joint Petitioners (Nuvox, KMC, and Xspedius), this was a procedural agreement between BellSouth and those parties entered into in July, 2004. It provided that, during their arbitration proceeding, BellSouth would afford the Joint Petitioners "full and unfettered access to BellSouth UNEs provided for in their existing interconnection agreements on and after March 11, 2005, until such...agreements are replaced by new interconnection agreements...." This Agreement does not restrict BellSouth's rights under the TRRO. The Abeyance Agreement is limited in application to "changes of law," and the FCC's bar on new adds beginning on March 11, 2005, does not trigger the parties' "change of law" obligations under current interconnection agreements because it is self-effectuating. Moreover, the implementation of the TRRO is not covered by the Abeyance Agreement. The language of the Abeyance Agreement 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*. It is not reasonable to believe 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 could be tangentially related to *USTA II*. BellSouth also noted that the deadline to add new issues under the Abeyance Agreement expired on October 2004. This means that, while parties could add issues arising out of *USTA II*, they could not add issues arising out of the TRRO because it had not been issued. As for the phrase in the Abeyance Agreement, "*USTA II* and its progeny," the term "progeny" cannot refer to the TRRO because "progeny" means a line of opinions that succeed a leading case and could therefore only refer to opinions of a court or a state commission reaffirming or restating the D.C. Circuit's decision in *USTA II*.

Public Staff identified the major issue as being whether the FCC intended for an ILEC to be able to refuse to provide new UNE-P adds as of March 11, 2005, or whether it intended for such provision to cease after the ILEC and the interconnecting CLP had arrived at a new agreement through the change of law provisions of their existing interconnection agreement. The Public Staff believes that the FCC did intend that ILECs no longer be compelled to provide new adds after March 11, 2005. This is based upon a reading of the TRRO as a whole. The TRRO states some fifteen times that

there will be no new adds. While the TRRO does refer to the change of law process in Paragraph 227, the reference comes immediately after discussion of the transition process for the embedded base of UNE-P customers. At the oral argument, the CLPs placed much reliance on their reading of the *Mobile-Sierra* doctrine, specifically that the FCC may modify a contract only if it has made particularized findings that the public interest demands such modification. The CLPs appear to make two alternative arguments: either the failure to meet the standards for application of the doctrine shows that the FCC did not intend to modify interconnection agreements to disallow new adds until the conclusion of any change of law negotiation or, if the FCC did intend to modify the contracts, it did so improperly by failing to make particularized findings that the public interest demanded the abrogation of interconnection agreements. While it is not clear why the FCC did not address the application of the *Mobile-Sierra* doctrine, this omission is not persuasive evidence that the FCC intended anything other than to eliminate the requirement to provide new UNE-P adds. The proposition that the Commission should reject the FCC's attempt to abrogate private interconnection agreements because it failed to comply with the *Mobile-Sierra* doctrine should also be rejected. The role of the Commission is generally not to determine whether an FCC Order complies with the law but rather to interpret and apply FCC Orders as best it can. Federal courts are in a much better position to determine if the FCC exceeded its authority or complied with all applicable law than the Commission. Finally, the Public Staff argued that it would be illogical for the FCC to prescribe a 12 month period to perform tasks for an orderly transition and at the same time require BellSouth to provide new UNE-P arrangements until the end of the 12 months or the conclusion of the change of law process, whichever comes sooner. This would undermine the orderly transition process prescribed by the FCC. Also, CLPs are not left without alternatives to new UNE-P adds, since they can negotiate commercial agreements or serve the customer through resale or UNE-L.

US LEC argued that the interconnection agreements between BellSouth and the CLPs are valid and enforceable and have not been changed in a self-effectuating manner by the TRRO. Rather, it is contemplated both in the interconnection agreements and in the TRRO that the change-of-law process will be observed, including in the matter of new adds.

US LEC maintained that the Commission has the authority to rule on matters pertaining to the enforcement of interconnection agreements. It observed that the FCC does not set the terms of interconnection agreements, but rather such agreements are the product of negotiations between the parties and, in some cases, arbitration by state commissions. These agreements are neither filed nor approved by the FCC and the FCC plays no role in their enforcement. The principal connection of the agreements with the FCC is that the FCC's rules provide the back-drop for the parties' negotiations and the decisions of state commissions. Parties can negotiate and agree to terms that deviate from the rules established by the FCC. Thus, it does not follow that any changes to the FCC's rules of interconnection automatically and by operation of law override contrary provisions of negotiated and approved interconnection agreements. Specifically, the change-of-law provisions in BellSouth's interconnection agreements

have not been abrogated by the TRRO. The FCC has stated plainly that the *Mobile-Sierra* doctrine does not apply to interconnection agreements. *See In the Matter of IDB Mobile Communications, Inc. v. Comsat Corp.*, FCC 01-173 (released May 24, 2001) (*IDB Mobile*). US LEC also noted that the FCC had specifically refused to overrule provisions of interconnection agreements in the TRO. The *Mobile-Sierra* doctrine is not mentioned anywhere in the TRRO, nor are there any words in the TRRO definitively stating as such an intent to override change-of-law provisions. BellSouth's various citations to that effect in the TRRO are inapposite and fall far short of a clear statement. In any event, the *Sierra-Mobile* doctrine is not applicable to state-approved agreements. Even if it were, it would require factual findings not present in the TRRO to support explicit findings of the public interest determination.

US LEC further maintained that BellSouth's position as to loop and transport provisioning is inconsistent with the express provisions of the TRRO. This, too, BellSouth wishes to deny as to new adds. The TRRO sets up a self-certification procedure by CLPs, which the ILECs must accept but could challenge through dispute resolution procedures. US LEC did note that BellSouth had backed off this position at the oral argument, where it stated that it would follow the procedures set forth by the TRRO with respect to high capacity loops and dedicated transport.

US LEC pointed out that, if BellSouth's views are countenanced, there would be controversy over the meaning of "embedded customer." The TRRO text speaks repeatedly of the "embedded customer," while the new rule adopted in the TRRO speaks in terms of embedded lines and loops. It is unknown at this point what interpretation BellSouth will take with respect to this question. Perhaps BellSouth will tell CLPs that they can no longer serve an "embedded customer" because they seek a change to an embedded line or because they seek a new line. These are the types of disruptions that the change-in-law negotiations are intended to prevent.

Joint Petitioners rejected BellSouth view that aspects of the TRRO are self-effectuating. To the contrary, any change in law must be incorporated into interconnection agreements before becoming effective. The TRRO has expressed no clear intent that existing interconnection agreements should be abrogated, and the legal doctrine on which BellSouth relies does not apply to interconnection agreements. Even if it did, the TRRO does not contain the analysis required to invoke the doctrine.

With respect to the "self-effectuating language" in Para. 3, Joint Petitioners noted that this was the single use of this term in the TRRO. It means nothing more than that the FCC adopted an impairment test that did not require delegation to the states for specific impairment findings. The test itself is self-effectuating. The importance attached by BellSouth to the March 11, 2005, "effective date" is also misplaced. All FCC rules have an effective date, but this does not mean that they are automatically incorporated into interconnection agreements as of this date.

Joint Petitioners maintained that the *Mobile-Sierra* doctrine does not apply to interconnection agreements under Section 252. *See, IDB Mobile.* The doctrine only

applies to contracts *filed* with the FCC and does not extend to contracts that are construed to be subject to the FCC's jurisdiction. *See, Cable and Wireless.* In any event, the TRRO contains none of the analysis required under *Mobile-Sierra.*

Joint Petitioners also responded to the rhetorical question at oral argument as to what public interest would be served by permitting new adds by pointing to the sanctity of contracts. The question is not whether the Commission has authority under North Carolina law to invalidate certain anticompetitive contracts but whether the integrity of contracts can be violated by the FCC absent proper application of the *Mobile-Sierra* doctrine. The *Callery Properties* case, which BellSouth cited for the proposition that an agency "can undo what is wrongfully done by virtue of its order," is not apposite. It pertained to the Federal Power Commission and concerned the making of refunds. It does not suggest that the FCC may abrogate privately negotiated contractual provisions with no reflection in the record of its intent to do so or that such action is in the public interest.

Significantly, the FCC refused to override the negotiation process in the TRO, and indeed the language of the TRRO obligates BellSouth to negotiate (Para. 233). The language relied upon by BellSouth simply says that the transition period does not allow new adds, but the FCC did not prohibit new adds under existing interconnection agreements. The TRRO does not preclude new adds before a transition plan is adopted, but it clearly contemplates that a transition plan will be incorporated into existing interconnection agreements for delisted UNEs. The TRRO does expressly state that the parties are free to negotiate alternatives to the transition plan included in the Order. *See,* Para. 145. Fundamental fairness requires BellSouth to follow the Section 252 process.

Finally, the Joint Petitioners argued that BellSouth's refusal to process new adds is contrary to the Abeyance Agreement. The Joint Petitioners, among other arguments, placed particular stress on the provision that the parties "have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreements to address *USTA and it progeny.* (Abeyance Agreement at 2, emphasis added). BellSouth's reading of the term "progeny" is too narrow. It is not limited to court or state commission decisions but has the wider meaning of "offspring." Surely, the TRRO is the "offspring" of *USTA II.* Moreover, the parties had anticipated this contingency because of the reference in the Joint Issues Matrix submitted in October 2004 concerning "Final Rules," defined as "an effective order of the FCC adopted pursuant to the Notice of Proposed rulemaking [NPRM], WC Docket No. 04-313, released August 20, 2004, and effective September 13, 2004." The NPRM referenced in this definition is the *Interim Rules Order.* The "Final Rules" referenced in the revised matrix cannot refer to anything other than the TRRO, which is the order promulgating "Final Rules."

Lastly, the Joint Petitioners argued that the weight of authority from other jurisdictions favors Joint Petitioners' position. This is especially so in the BellSouth region.

MCI echoed many of the arguments made by the other CLPs. MCI particularly stressed that the FCC had nowhere expressed an intent to abrogate existing contracts and, even if it had, it had nowhere discussed or met the high standards for abrogation under the *Sierra-Mobile* doctrine. BellSouth appears to argue that the FCC's intent to abrogate was implied, but this runs afoul of the relevant standards that must be met. Notably, the Georgia District Court Order did not discuss the *Mobile-Sierra* doctrine. BellSouth's citation to the public interest involved in the demise of UNE-P—that it does not promote investment—is insufficient to justify sidelining the interconnection agreement change-of-law process. There are serious questions as to whether the FCC has the authority to abrogate interconnection agreements (*IDB Mobile),* or whether it can abrogate contracts over which it lacks exclusive authority (*Cable & Wireless). Callery Properties* is inapposite because it was not the unbundling conclusions *per se* that were found to be wrongful, but rather there was no longer impairment because of changed circumstances. Indeed, the principal "wrong" found by the court in *USTA II* was the FCC's sub-delegation scheme. Thus, the TRRO cannot be said to be "undoing" anything "wrongfully done." MCI also stated that there had been numerous decisions, especially in the BellSouth region, that have favored the CLPs. MCI also argued in its Motion that it should be entitled to UNE-P under Section 271.

CTC made a supplemental filing setting out various issues that there were to negotiate when the TRRO clearly eliminated certain UNEs. Such issues include combining multiple DS1 circuits to DS3 circuits, revising EEL conversion language, combining resale and UNE service on the same account, developing shared collocation arrangements, combining special access and UNE services, implementing a methodology for resolving disputes regarding UNE obligations, and working out connections to shared transport.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

1. New Adds

After careful consideration of the arguments and filings of all parties, the language of the TRRO, the decisions of other state commissions, and the practical implications of this decision, the Commission concludes that good cause exists to decline to declare that BellSouth must provide "new adds" of UNE-P, DS1, and DS3 UNEs outside of the embedded customer base after March 11, 2005, but that BellSouth should continue to process orders for the existing base of CLP customers pending completion of the transition process.

The principal question before the Commission is whether the FCC intended for an ILEC to be able to refuse to provide new UNE-P, DS1, and DS3 adds as of March 11, 2005, or whether it intended such provision to cease only after the ILEC and

the interconnecting CLP had arrived at new contractual language through the change of law provisions of the interconnection agreement.

As has been remarked by others, the TRRO is not in all respect a model of clarity. That is why there is a disagreement on the question of "new adds." However, one thing is clear about the TRRO. It is the culmination of a long and tortuous process in which the FCC has examined unbundling and has frequently made decisions concerning this subject that have repeatedly been found wanting by the federal courts, most recently by the D.C. Circuit in *USTA II*. The TRRO was the FCC's attempt to conform itself to the demands of that decision. In doing so, it de-listed certain UNEs and crafted a transition period for the embedded customer base for the purpose of providing an orderly transition to other arrangements.

The Commission is persuaded that the sounder reading of the TRRO is that the FCC intended that "new adds" outside the embedded customer base should go away immediately—i.e., as of March 11, 2005—for the reasons as generally set forth by BellSouth and the Public Staff. The alternative reading is too strained and involves the creation of various anomalies and even absurdities. For example, if "new adds" outside of the embedded customer base were allowed, how does this assist in an orderly transition *away* from such arrangements, which, however obscure the FCC may have been in other matters, was its plain intent here? How sensible is it to have the question of "new adds" outside the embedded customer base to be the subject of negotiations in the transition period when that question has already been decided in the TRRO?

At the oral argument and in their filings, the CLPs argued that the FCC did not meet the requirements of the *Mobile-Sierra* doctrine said to be necessary for the FCC to abrogate contract provisions. Broadly speaking, this doctrine states that the FCC may modify the terms of private contracts if the modification serves the public interest. Essentially, the CLPs maintained that the FCC's intent to abrogate was less than plain and its public interest finding was not expressed with sufficient particularity.

The Commission is not convinced that the *Mobile-Sierra* doctrine is the only avenue by which the FCC can abrogate contract provisions. For example, an agency may abrogate a contract provision when it is undoing "what is wrongfully done by virtue of a previous order." *Callery Properties*, cited with approval in the *Georgia District Court Order*. The context here is important, since in *USTA II,* the D.C. Circuit made harsh observations about the FCC's "failure, after eight years, to develop lawful unbundling rules."

But even if *Mobile-Sierra* is the appropriate approach to contract modification, the Commission believes that the FCC has expressed its belief as to the overriding public interest with sufficient particularity given the general nature of the subject-matter, which is the broader subject of the availability of certain classes of UNEs. The public interest the FCC expressed is related to the investment in infrastructure and the efficient allocation of resources in the economy.

In any event, the contracts that are being modified are not strictly private in nature but are rather contracts which, if negotiated, are approved by government, and, if not negotiated, are arbitrated by government. The entire process, from start to finish, is implicated in a regulatory process which, while formally conducted by state commissions (or by the FCC in default of state action), must examine in the first instance FCC orders and rules. *Accord., E.spire Communications, Inc. v. N.M. Pub. Regulation Comn.,* 392 F.3d. 1204 (10th Cir., 2004); *Verizon Md., Inc. v. Global Naps, Inc.,* 377 F.3d. 356 (4th Cir., 2004) (interconnection agreements are a "creation of federal law" and are the "vehicles chosen by Congress to implement the duties imposed by Sec. 251"). It is therefore entirely reasonable that the FCC can abrogate contract provisions found not to be in the public interest given the underlying legal structure.

Finally, there is the question of how far the ban on "new adds" should extend as applied to the embedded customer base. The Commission believes the better view is that ILECs like BellSouth should continue to process orders for the existing base of CLP customers pending completion of the transition process. Although this decision, like many others, is likely to be controverted, and colorable arguments can be adduced on either side, the Commission believes that the bright line that the FCC was drawing was between those *inside* the embedded customer base and those *outside* of it. After all, the TRRO focuses on the "embedded customer base," not on existing access lines. The Commission does not believe that it was the FCC's intent to impede or otherwise disrupt the ability of CLPs to adequately serve their existing base of customers in the near term. The Commission notes that the CLPs now serve thousands of customers, many of them business customers, with these de-listed UNE arrangements. Given the vital importance of fast telecommunications access in a highly dynamic economy, these customers would be baffled and impatient if they were to discover that adding a new line or even simply a new feature in the near term was impossible with their current provider. They may very well lose confidence in that provider. This is not good for competition, which is the overarching purpose of the Telecommunications Act.

Thus, we believe that, through a planned, orderly, and nondisruptive transition process under state commission supervision, the FCC intended that the CLPs should retain the ability to adequately serve their customers during the transition period. The Commission has already established a docket with respect to BellSouth in Docket No. P-55, Sub 1549 to deal with the transition.

2. Abeyance Agreement

The same analysis applicable to "new adds" also applies to the Abeyance Agreement between BellSouth and the Joint Petitioners. Under the Agreement's terms, the existing, underlying interconnection agreement is to be carried forward until the new interconnection agreement is reached. Although the Joint Petitioners have the better of the argument that the phrase "*USTA II* and its progeny" includes the TRRO, this is not determinative. What is determinative is that the FCC reached out and negated certain existing provisions of all interconnection agreements to the extent that they allow "new

adds" outside of the embedded customer base. This applies *pari passu* to the existing agreement between BellSouth and the Joint Petitioners.

3. Loop and Transport

BellSouth indicated at oral argument that it would continue to provision loop and transport in accordance with the self-certification/protest process outlined in the TRRO. BellSouth's announcement renders this issue moot.

4. State Law UNEs

In this docket there has been some discussion as to whether or not delisted UNEs could nevertheless be revived under state law. This is an interesting discussion, but this discussion is ultimately irrelevant to the issue before the Commission in this docket. Although G.S. 62-110(f1) allows the Commission to order the "reasonable unbundling of essential facilities, where technically and economically feasible," the Commission has not made the findings necessary to require the provision of delisted UNEs under state law.

5. Section 271 UNE-P

MCI argued that Section 271 independently supported its right to obtain UNE-P from BellSouth. BellSouth denied this, saying that while it is obligated to provide unbundled local switching under Section 271, such switching is not required to be combined with a loop, is subject to the exclusive jurisdiction of the FCC, and is not provided via interconnection agreements. The Commission does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 25th day of April, 2005.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

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