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January 23, 2006

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245

Dear Ms. Dortch:

Competitive Carriers of the South, Inc. ("CompSouth"), an association of competitive local exchange carriers ("CLECs") operating in the BellSouth region, submits this letter in opposition to the Emergency Petition for Declaratory Ruling and Preemption of State Action ("Petition") filed by BellSouth Telecommunications, Inc. ("BellSouth") in the above-captioned docket. The purpose of this letter is to bring to the Commission's attention recent developments regarding the subject of BellSouth's petition, to respond to several *ex parte* submissions from BellSouth, and to encourage the Commission to reject BellSouth's Petition.

I. State Authority Over Section 271 Network Elements

In the Petition, BellSouth asks the FCC to preempt a decision of the Tennessee Regulatory Authority ("TRA") which arose in the context of an arbitration proceeding between BellSouth and ITC^DeltaCom Communications, Inc. ("ITC^DeltaCom") conducted pursuant to Section 252 of the Act.[1] The TRA determined that BellSouth was obligated under the Section 271(c)(2)(B) Competitive Checklist[2] to offer local switching at a "just and reasonable" rate and that the rates and terms of BellSouth's offer should be included in the parties' interconnection agreement.[3] BellSouth contends that the TRA has no authority to arbitrate rates under Section

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1 47 U.S.C. §252.

2 47 U.S.C. §271(c)(2)(B).

3 After the TRA ruled that the agency had jurisdiction to resolve the 271 rate issue, the Authority asked each party to submit a "final best offer" with a proposed rate for local switching offered under Section 271. After considering offers from both sides, the agency adopted ITC^DeltaCom's proposal to set an interim switching rate of $5.08 per month, including usage, subject to a retroactive true-up following the establishment of a permanent rate. This interim rate is about 25% to 50% higher than the TRA TELRIC switching rate. The final best offer adopted by the Authority also requires BellSouth to "treat [Section 271 local switching] identically to the section 251 unbundled local switching element, except as to its monthly recurring price, with respect to the terms and conditions of service, connection with other elements,

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271, arguing that both the Act and the *Triennial Review Order* grants the FCC exclusive authority to regulate Section 271 rates.[4] Accordingly, BellSouth requests that the FCC issue an order declaring that states have no jurisdiction over network elements provided pursuant to section 271 and preempting the TRA's order. Contrary to BellSouth's request, as shown below, the TRA acted within its authority, and the processes it followed constitute the most efficient means by which to administer the Bell operating companies' ("BOCs") Section 271 network element obligations.

BellSouth's preemption request was filed on July 1, 2004, shortly after the TRA orally announced its decision in the BellSouth-ITC^DeltaCom arbitration proceeding. The agency's written order, dated October 20, 2005, has now been released. The order is available on the TRA website at www.state.tn.us/tra/orders/2003/0300119db.pdf.[5] The order includes a lengthy analysis and discussion of the TRA's jurisdiction to resolve disputes over Section 271 network elements. The order concludes that Congress explicitly charged state commissions with the responsibility to arbitrate rates, terms and conditions of Section 271 elements when it determined that BOCs must satisfy their Competitive Checklist obligations through interconnection agreements and required that those interconnection agreements be approved by state commissions under Section 252.

The Authority explained,

> [T]here is no language contained in the Federal Act that expressly prohibits state jurisdiction over Section 271 elements that are

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interoperability with other elements, and pricing with other elements. No changes to ordering, provisioning, maintenance or repair may be introduced that distinguish between the section 251 element and the section 271 element."

4 BellSouth Petition at 3-4.

5 Final Order of Arbitration Award, Docket No. 03-00119, Tennessee Regulatory Authority at 24-39 (rel. Oct. 20, 2005) ("TRA Order"). On November 4, 2005, BellSouth filed a petition requesting reconsideration. On December 12, 2005, the TRA orally rejected BellSouth's petition and re-affirmed its decision on the Section 271 issue. A written order on the petition to reconsider is expected shortly. Any party aggrieved by the Authority's decision may, of course, file an appeal in the United States District Court, Middle District of Tennessee, pursuant to Section 252(e)(6) of the Act. Such an appeal is the *exclusive* means by which an aggrieved party may seek review of state commission arbitration rulings. *See GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000); and *MCImetro Access Transmission Serv., Inc. v. BellSouth Telecomm., Inc.*, 352 F.3d 872, 875-76 (4th Cir. 2003).

After BellSouth filed its preemption petition with the FCC, ITC^DeltaCom filed a lawsuit against both BellSouth and the FCC, arguing that BellSouth cannot lawfully circumvent the appeals process provided in Section 252(e)(6) by filing an "appeal" of the TRA's decision with the FCC. ITC^DeltaCom asked the District Court, inter alia, to instruct the FCC to dismiss BellSouth's petition. The lower court held that only a United States Court of Appeals could grant the requested relief. The case is now pending before the United States Court of Appeals for the Sixth Circuit which presumably has the power, if it chooses, to grant the plaintiff's request. *ITC^DeltaCom v. BellSouth and Federal Communications Commission*, Case No. 05-5419.

> included in issues required to be arbitrated pursuant to Section 252. Rather, there is language that indicates that Congress gave states a role in determining Section 271 elements through state approval of both SGAT conditions and interconnection agreements. . . . Section 271 of the Federal Act requires an incumbent telephone company to satisfy its competitive checklist obligations through interconnection agreements. These interconnection agreements are required to be approved by a state commission under Section 252.

TRA Order, at 31 (footnotes omitted).

The order goes on to reject BellSouth's argument that because Section 271 elements are subject to the requirements of Sections 201 and 202 of the Act, state commissions are precluded from arbitrating rates for those elements. BellSouth cites to paragraph 664 of the *Triennial Review Order* as support for this proposition. In rejecting BellSouth's interpretation of paragraph 664, the TRA states: "Paragraph 664 offers two examples of situations where the FCC will make determinations of fact regarding whether a rate for a Section 271 element is just and reasonable. There is nothing, however, in the above-quoted language, to *preclude* a state commission from setting the rate for a Section 271 element." *Id.* at 32 (emphasis supplied).

II. Federal District Court Decisions

The conclusion reached by the TRA that state commissions have authority through the Section 252 arbitration process to oversee the rates and terms for Section 271 network elements also was reached by the Maine Public Utilities Commission. Verizon appealed that ruling and, in a recent order denying a request for a stay of the state commission's order, the U.S. District Court for the District of Maine upheld the Maine Commission's exercise of authority.[6]

To CompSouth's knowledge, this is the first and, thus far, only court in the country to review a state commission's decision to arbitrate 271 UNE rates. The court considered and rejected the same legal arguments made in BellSouth's petition.

As the District Court wrote, "This case focuses on the issue of whether the PUC is precluded by the provisions of the [Federal Telecommunications] Act and the applicable rulings of the FCC from fixing rates under §271 of the Act." Opinion at 5. The plaintiff, Verizon, argued that "Congress gave the Federal Communications Commission . . . exclusive jurisdiction to establish, interpret, price, and enforce these network access obligations under Section 271." *Id.* That is the identical argument made by BellSouth in its preemption petition.

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[6] *See Verizon New England, Inc. d/b/a/ Verizon Maine v. Maine Public Utilities Commission*, Order Denying Plaintiff's Motion for Preliminary Injunction, _____ F. Supp. 2d _____, 2005 WL 3220211 (D. Me., Nov. 30, 2005).

The Maine District Court disgreed:

> The central, vital predicate for this argument is that federal law preempts state regulation of § 271 obligations. It is clear that the statute is not intended to have any such effect. While § 271 states that the approval of an application submitted by a BOC to provide InterLATA services shall be by the FCC, *see* §§271(d)(1) and (b)(1), neither that provision nor any other provision in the Act confers exclusive jurisdiction on the FCC with respect to rate-making for §271 UNEs.

Id.

The court further noted that Verizon's (and BellSouth's) claims of exclusive FCC jurisdiction are not supported by any FCC decisions (*Id.*):

> Furthermore, Verizon has failed to direct the Court to any order of the FCC interpreting §271 to provide an exclusive grant of authority for rate-making under §271. The FCC order presented by Verizon that relates to rate-making under §271 provides "[w]hether a particular checklist element's rate satisfies the just and reasonable pricing standard of section[s] 201 and 202 is a fact-specific inquiry that the [FCC] will undertake." TRO ¶664. That language [which BellSouth also cites] says nothing, however, about the exclusivity of FCC jurisdiction or about PUC rate-making authority. Here again, Plaintiff overreaches. Verizon has failed to present, and this Court has been unable to find, any FCC order specifically interpreting the Act as providing the FCC with exclusive authority to set rates under §271.

In contrast to the *Verizon Maine* decision discussed above, which directly addresses the scope of state authority under Section 271, BellSouth claims that an unrelated discussion in another U.S. District Court opinion, *Qwest v. Schneider,*[7] "confirms BellSouth's legal position" that state commissions have no authority to set rates for services offered solely pursuant to Section 271.[8] This assertion is quite remarkable because Section 271 is nowhere mentioned in the court's decision.

As described by the court, the Montana Public Service Commission ordered Qwest and Covad to submit for the state commission's approval a line-sharing contract between the carriers. All parties conceded that Qwest was not required to offer line-sharing under Section 251. Nevertheless, the Montana PCS held that the line-sharing contract was an "interconnection

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7 *Qwest v. Schneider,* CV-04-053-H-CSO, (D. Montana, June 5, 2005).

8 Letter to Marlene H. Dortch, Secretary, FCC, from Bennett L. Ross, General Counsel - D.C., BellSouth, WC Docket No. 04-245 (July 22, 2005) at 2.

agreement" as that term is used in sections 252(a)(1) and (c)(1) of the Act and that those sections require that such agreements be submitted for state approval. The court overturned the agency's decision, finding that the term "interconnection agreement" as used in sections 252(a)(1) and (c)(1) refers to an agreement which includes "interconnection, services or network elements provided pursuant to Section 251."[9] Since the Qwest-Covad contract "concerns only line-sharing"[10] and did not include any 251 services or elements, the Court found that the carriers were not required to submit the contract to the state commission for approval.

It is hard to see how this decision can be construed as supporting BellSouth's argument on the Section 271 issue. Since Qwest and Covad had voluntarily entered into a line-sharing contract, there was no discussion (or apparent need to discuss) whether line-sharing is a Section 271 obligation. Since the contract did not include any Section 251 services or elements, and because there was no issue as to whether the contract was entered into by the parties to fulfill Qwest's obligations under Section 271, the court's conclusion that the contract did not fall under the state's jurisdiction is plainly irrelevant to BellSouth's Section 271 argument.

III. Georgia Commission Decision

Most recently, the Georgia Public Service Commission has unanimously agreed that the agency has jurisdiction under the Act to determine 271 UNE rates and voted to conduct an expedited, evidentiary hearing to conclude in time for the state agency to determine just and reasonable Section 271 rates before March 11, 2006.[11]

This decision and pending proceeding in Georgia provide additional evidence that state regulatory commissions are fully able and prepared to apply the federal "just and reasonable" standard in arbitrating 271 UNE rates, thereby assuring that competitors will continue to have meaningful access to local facilities as envisioned by Congress and provided in the Competitive Checklist.

Congress granted concurrent jurisdiction to the FCC and the states to administer the ongoing obligations of the Section 271 Competitive Checklist and the most logical and efficient way to exercise that shared jurisdiction is for each regulatory body to do what it does best: the states arbitrate 271 rates and terms subject to standards established by the FCC while the FCC sets those national guidelines and reviews individual complaints pursuant to Section 271(d)(6).[12]

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9 Slip op. at 14, quoting Section 252(a)(1).

10 *Id.* at 16, n. 47.

11 The order released January 20, 2006, may be found at ftp://www.psc.state.ga.us/19341/89229.doc.

12 As noted above, BellSouth contends that the FCC has exclusive jurisdiction to ensure compliance with the section 271 Competitive Checklist and that rates and terms for section 271 elements do not belong in interconnection agreements administered by state commissions. BellSouth maintains that the availability of commercial agreements for the purchase of Competitive Checklist elements evidence its compliance with its section 271 obligations. Importantly, however, on October 5, 2005, BellSouth posted Carrier Notification SN91085205, which informed CLECs that its long-term commercial offering for section 271 local switching would expire on

State commissions are best suited to undertake the detailed, fact-specific inquiries necessary to apply the just and reasonable and nondiscrimination standards to specific Section 271 element rates and terms. If the states are barred from exercising any oversight of Section 271 element rates and terms, carriers will be forced in every instance to file FCC complaints to obtain review of BOC Section 271 element offerings. The FCC would likely be inundated with state-specific complaints which the agency would find it nearly impossible to resolve within the 90-day statutory deadline.

IV. **Conclusion**

BellSouth's preemption argument has no legal basis. Section 271 requires BellSouth to offer access to switching, loops, and transport "pursuant to one or more [Section 252 interconnection] agreements" which must be approved by state commissions.[13] The Act is clear; state arbitrators have express jurisdiction over disputes about 271 elements. The company cannot erase statutory requirements by ignoring them. Instead of addressing the language of Section 271, BellSouth relies on policy arguments which implicitly denigrate the competence of state arbitrators to determine "just and reasonable" rates and would likely result in an unmanageable flood of complaints to the FCC.

The recent decisions in Tennessee and Georgia and the Maine District Court decision rejecting the Bell carriers' preemption argument have further undermined BellSouth's preemption request. For these reasons, the Commission should deny BellSouth's Petition and instead confirm that the FCC and the state commissions have concurrent authority to oversee the BOCs' obligations to provide Section 271(c)(2)(B) network elements at rates, terms and conditions that are just, reasonable, and nondiscriminatory.

Very truly yours,
BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 
Henry Walker

HW/djc
Enclosures
cc: Chairman Kevin Martin
Commissioner Michael Copps
Commissioner Jonathan Adelstein
Commissioner Deborah Tate
Dan Gonzalez

October 10, 2005. Consequently, today BellSouth does not have a long-term section 271 local switching offering that is available to CLECs.

[13] 47 U.S.C. §271(c)(2)(A).

Michelle Carey
Jessica Rosenworcel
Scott Bergmann
Sam Feder
Tom Navin