

EXHIBIT 1
TO MOTION TO
INTERVENE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

BELLSOUTH TELECOMMUNICATIONS, INC.,)
)
Plaintiff)
) Civil Action File
v.) No. 1:06-cv-0162-CC
)
The GEORGIA PUBLIC SERVICE COMMISSION;)
STAN WISE, in his official capacity as Chairman)
of The Georgia PSC; DAVID L. BURGESS, in his)
official capacity as Vice Chairman of the Georgia)
PSC; H. DOUG EVERETT, in his official)
capacity as Commissioner of the Georgia PSC;)
ROBERT B. BAKER, JR., in his official capacity)
as Commissioner of the Georgia PSC; and)
Angela E. Speir, in her official capacity as)
Commissioner of the Georgia PSC,)
)
Defendants)

PROPOSED ANSWER AND DEFENSES OF COMPETITIVE CARRIERS
OF THE SOUTH, ACCESS POINT, INC., CINERGY COMMUNICATIONS
COMPANY, DIALOG TELECOMMUNICATIONS, DIECA
COMMUNICATIONS, INC. D/B/A COVAD COMMUNICATIONS
COMPANY, IDS TELECOM, LLC, INLINE, ITC^DELTACOM, LECSTAR
TELECOM, INC., MOMENTUM TELECOM, INC., NAVIGATOR
TELECOMMUNICATIONS, LLC, NETWORK TELEPHONE CORP. (A
TALK AMERICA COMPANY), NUVOX COMMUNICATIONS, INC.,
SUPRA TELECOM, TALK AMERICA, TRNISIC COMMUNICATIONS,
INC., and XSPEDIUS COMMUNICATIONS, LLC

COME NOW Competitive Carriers of the South, Inc. (“CompSouth”),¹

¹ CompSouth is a trade organization whose member companies include each of the Joint CLEC Defendants.

Access Point Inc., Cinergy Communications Company, Dialog Telecommunications, DIECA Communications, Inc., d/b/a Covad Communications Company, IDS Telcom, LLC, InLine, ITC^DeltaCom, LecStar Telecom, Inc., Momentum Telecom, Inc., Navigator Telecommunications, LLC, Network Telephone Corp. (a Talk America Company), NuVox Communications, Inc, Supra Telecom, Talk America, Trinsic Communications, Inc., and Xspedius Communications, LLC. (collectively, “Joint CLEC Defendants”) and file their Proposed Answer and Defenses to the Complaint for Declaratory and Injunctive Relief filed by Plaintiff BellSouth Telecommunications, Inc. (“Plaintiffs”), show the Court as follows:

FIRST DEFENSE

Plaintiff's Petition should be dismissed for failure to state a claim under the provisions of the federal Telecommunications Act of 1996, 47 U.S.C. § 251 et seq. ("the federal Telecommunications Act" or “the Act”). While Plaintiff BellSouth invokes the jurisdiction granted under Section 252(e)(6) of the Act, BellSouth fails to meet the jurisdictional prerequisite of that provision, namely, that it seeks relief from a final state commission determination in a proceeding initiated at the state commission pursuant to Section 252 of the Act. *See* 47 U.S.C. §

252(e)(6). Rather, BellSouth filed its Complaint prior to the GPSC's issuance of any final order affecting BellSouth's legal rights or obligations. Plaintiff BellSouth acknowledges in the Complaint that it is such future orders that could potentially prejudice BellSouth, not the order that is the subject of its Complaint. *See* Complaint ¶ 41. The Order that is the subject of BellSouth's Complaint merely establishes a procedural and hearing schedule for the GPSC's consideration of rates for certain unbundled elements; the GPSC's Order does not purport to set those rates, nor does it provide a final "determination," as that term is used in Section 252 of the Act, of the issues in the GPSC's underlying proceeding. BellSouth's Complaint is based purely on speculation about future GPSC Orders, not on any harm that could potentially befall BellSouth based on the GPSC Order now before the Court.

SECOND DEFENSE

Plaintiff's Complaint should be dismissed as it is not ripe. No case or controversy exists; rather, Plaintiff complains about what it perceives the intentions of the Georgia Public Service Commission ("GPSC") to be with respect to future orders. BellSouth's contentions are purely speculative and do not form the basis for any relief that could be granted by this Court. No action taken by the GPSC under the Order that is the subject of this

Complaint has caused Plaintiff any substantive harm. BellSouth's Complaint is plainly "pre-emptive" and should be dismissed as failing to present a controversy that is ripe for resolution by the Court at this time.

THIRD DEFENSE

Plaintiff's claims are barred by a failure to exhaust administrative remedies. Plaintiff BellSouth prays that this Court reverse a determination made by the GPSC. The GPSC has not yet issued a final determination in the proceeding that includes the Order that is the subject of BellSouth's Complaint. BellSouth has failed to pursue the remedies available to it at the GPSC before bringing this matter before this Court for judicial review.

FOURTH DEFENSE

Plaintiff has not met the requirements for the relief requested, including but not limited to, injunctive or declaratory relief. Plaintiff's Complaint itself acknowledges that the relief it seeks is pre-emptive. In Paragraph 41, Plaintiff admits that the GPSC has not yet set rates or taken other actions that prejudice it. Rather, Plaintiff announces that if the GPSC should "issue further orders setting specific rates, BellSouth intends to avail itself of all legal remedies." Complaint ¶ 41. Plaintiff does not even attempt to establish it has suffered irreparable harm, for it cannot: the GPSC has taken no action that has definitively affected Plaintiff's legal

rights or obligations.

FIFTH DEFENSE

To the extent that BellSouth's Complaint involves state law claims, Plaintiff's claims for declaratory and injunctive relief are barred by Plaintiff's failure to exhaust administrative remedies, including judicial review.

SIXTH DEFENSE

The actions of the GPSC of which Plaintiff complains are in accordance with the mandates of the federal Telecommunications Act, as well as state law, and were not arbitrary, capricious or unlawful.

SEVENTH DEFENSE

Plaintiff has failed to join indispensable parties.

EIGHTH DEFENSE

Subject to and without waiving the above defenses, the Joint CLEC Defendants respond to the individually numbered paragraphs of Plaintiff's Complaint as follows:

1.

The Joint CLEC Defendants admit that Plaintiff seeks declaratory and injunctive relief with respect to a decision of the GPSC. The Joint CLEC Defendants deny the remaining allegations set forth in Paragraph 1 of the Complaint.

2.

The Joint CLEC Defendants admit that the FCC issued an Order in 2005 that, in particular circumstances defined by the FCC's Order, restricted access to unbundled network elements ("UNEs") available under Section 251 of the Telecommunications Act of 1996 (the "Act"). The 2005 Order is known as the "Triennial Review Remand Order" ("*TRRO*"). CompSouth denies the remaining allegations set forth in Paragraph 2 of the Complaint.

3.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 3 of the Complaint. The FCC's decisions in the *TRRO* concerning availability of UNEs were limited to incumbent local exchange companies' ("incumbent LECs" or "ILECs") obligations to provide such UNEs under Section 251 of the Act. In an earlier order, the Triennial Review Order ("*TRO*"), the FCC affirmed that ILECs that also meet the statutory definition of "Bell Operating Companies," including Plaintiff BellSouth, must still make available to competitors access to unbundled local switching, loops, and transport, albeit under different pricing standards than those applicable to UNEs offered under Section 251. The FCC made clear, and BellSouth never denied in the proceeding before the

GPSC, that even when unbundling obligations under Section 251 are lifted, BellSouth still has an obligation to provide unbundled local switching, loops, and transport pursuant to Section 271.

4.

The Joint CLEC Defendants deny the allegations set forth in the first sentence of Paragraph 4. The Joint CLEC Defendants admit that the subject GPSC Order – an order unrelated to the GPSC Order now before the Court – was enjoined and that the GPSC has vacated certain portions of that prior order.

5.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 5 of the Complaint. The Joint CLEC Defendants note that it is not the GPSC, but Section 271 of the Act as interpreted by the FCC, that imposes unbundling obligations on BellSouth independent of those required by Section 251 of the Act. The FCC held in the *TRO* that rates for network elements unbundled under Section 271 must be set at “just and reasonable” rates. The FCC’s determination that Section 271 unbundled elements must be offered at “just and reasonable” rates even in the absence of Section 251 unbundling obligations was upheld by the United States Court of Appeals for the District of Columbia Circuit in *U.S. Telecom*

Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

6.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 6 of the Complaint. Section 271 of the Act demands that if BellSouth is permitted to provide interLATA long distance services, BellSouth must maintain compliance with the requirements of Section 271. One of those requirements is that BellSouth provide the items that must be unbundled pursuant to Section 271 under the terms of “interconnection agreements,” the terms and conditions of which must be approved by state regulatory commissions such as the GPSC. *See* 47 U.S.C. § 271(c)(1)(A). The GPSC’s decision to establish the rates applicable to unbundling under Section 271 implements the Act’s requirements applicable to Bell Operating Companies such as BellSouth.

7.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 7 of the Complaint.

8.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 8 of the Complaint.

9.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 9 of the Complaint.

10.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 10 of the Complaint.

11.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 11 of the Complaint.

12.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 12 of the Complaint.

13.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 13 of the Complaint.

14.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 14 of the Complaint. The terms of the Act speak for themselves, but the broad purpose of the Act is to facilitate competitive entry into telecommunications markets, including entry that relies on the

use of unbundled network elements. *See Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 475 (2002) (“Under the Act, the new entrants are entitled, among other things, to lease elements of the local telephone networks from the incumbent monopolists.”)

15.

The Joint CLEC Defendants deny the allegation that unbundling obligations are statutorily tied to “a transition to facilities-based competition,” but otherwise admit the allegations set forth in Paragraph 15 of the Complaint.

16.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 16 of the Complaint.

17.

The Joint CLEC Defendants deny the allegation that all the referenced FCC orders established what BellSouth characterizes as “blanket” unbundling. The Joint CLEC Defendants admit that the referenced FCC orders required unbundling of loop, transport, and switching network elements, but otherwise deny the characterizations of such Orders set forth in Paragraph 17 of the Complaint.

18.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 18 of the Complaint.

19.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 19 of the Complaint regarding the characterizations of the referenced FCC Orders and court decisions. The referenced court decisions speak for themselves.

20.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 20 of the Complaint. The referenced court decision speaks for itself.

21.

The Joint CLEC Defendants admit that the FCC issued the referenced Order (the Order discussed above known as the *TRRO*) on February 4, 2005. The Joint CLEC Defendants deny the remaining allegations set forth in Paragraph 21 of the Complaint.

22.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 22 of the Complaint and state that the referenced Order speaks

for itself. The Joint CLEC Defendants deny that the *TRRO* in any way restricted the availability of unbundled switching that must be provided pursuant to Section 271 rather than Section 251 of the Act.

23.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 23 of the Complaint and state that the referenced Order speaks for itself.

24.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 24 of the Complaint and state that the referenced Order speaks for itself.

25.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 25 of the Complaint and state that the referenced Order speaks for itself.

26.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 26 of the Complaint, but deny that the characterization of Section 271 as being limited to facilitating BOC entry into long distance. *See TRO* ¶ 655 (“In fact, section 271 places specific requirements on

BOCs that were not listed in section 251. These additional requirements reflect Congress' concern, repeatedly recognized by the Commission and the courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market.”)

27.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 27 of the Complaint, but clarify that Section 271 requires that the local switching, loop, and transport network elements identified in the competitive checklist must be provided “unbundled” from other elements under the terms of Section 271(c)(2)(B)(iv)-(vi).

28.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 28 of the Complaint to the extent they attempt to characterize the views of any of the Joint CLEC Defendants. The Joint CLEC Defendants admit that local switching as defined in the Section 271 checklist is, from a technical and provisioning perspective, “the same as the switching element” previously offered under Section 251. The Joint CLEC Defendants deny that the Section 271 offering must be the same as the Section 251 element with regards to the price of the unbundled switching offered by BellSouth.

29.

The Joint CLEC Defendants admit the allegations set forth in Paragraph 29 of the Complaint, and state that the referenced FCC Order speaks for itself.

30.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 30 of the Complaint which mischaracterize and take out of context many parts of the referenced FCC Orders. The Joint CLEC Defendants state that the referenced FCC Orders speak for themselves.

31.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 31 of the Complaint, which are directly contrary to judicial interpretation of Section 271 of the Act. *See Verizon New England, Inc. d/b/a/ Verizon Maine v. Maine Public Utilities Commission*, Civil No. 05-53-B-C, Order Denying Plaintiff's Motion for Preliminary Injunction (D. Maine, Nov. 30, 2005) (“[T]he Court concludes that § 271 is not considered by the FCC and was not intended by the Congress to exclude the [state public service commission] in the circumstances of this case from all activity in setting rates under § 271.”). The Joint CLEC Defendants state that the referenced FCC Orders speak for themselves.

32.

The Joint CLEC Defendants deny BellSouth's characterization of the justification for its notification to CLECs in February 2005, but admit that such a notification process occurred.

33.

The Joint CLEC Defendants admit the existence of the petitions filed by MCI and other carriers, and state that the contents of such petitions and pleadings, as well as the FCC Order referenced in this Paragraph, speak for themselves.

34.

The Joint CLEC Defendants state that the referenced GPSC Order speaks for itself, and neither admit nor deny the allegations set forth in Paragraph 34 of the Complaint.

35.

The Joint CLEC Defendants state that the referenced BellSouth pleading speaks for itself, and neither admit nor deny the allegations set forth in Paragraph 34 of the Complaint.

36.

The Joint CLEC Defendants state that the referenced Orders of this Court and the United States Court of Appeals for the Eleventh Circuit

speak for themselves, and neither admit nor deny the allegations set forth in Paragraph 34 of the Complaint.

37.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 37 of the Complaint. The GPSC's January 17, 2006 Order (the "Section 271 Order") is baldly mischaracterized in Paragraph 37 as being related to the order that was the subject of this Court's prior decision. The Court's prior Order interpreted provisions of the FCC's *TRRO* that were raised in the complaint filed by MCI referenced by BellSouth in Paragraph 34 of the Complaint. The Section 271 Order was issued as part of a lengthy proceeding addressing issues raised by both the FCC's *TRRO* and *TRO* decisions, including the provisions of the *TRO* requiring BellSouth to make Section 271 unbundled elements available at "just and reasonable" rates. The issues before the Commission when it issued the Section 271 Order were the subject of an extensive evidentiary record and briefing. Other Orders approved by the GPSC in the proceeding that resulted in the Section 271 Order *explicitly* recognized and implemented the Orders of this Court and the Eleventh Circuit on the issues addressed in the case arising from the MCI complaint.

38.

The Joint CLEC Defendants state that the GPSC's Section 271 Order speaks for itself, and neither admit nor deny the allegations set forth in Paragraph 38 of the Complaint. The Joint CLEC Defendants deny that BellSouth's characterization of the GPSC's Section 271 Order in Paragraph 38 is accurate. The GPSC's Section 271 Order is authorized by Sections 271 and Section 252 of the Act.

39.

The Joint CLEC Defendants state that the GPSC's Section 271 Order speaks for itself. The Joint CLEC Defendants admit that the GPSC's Section 271 Order establishes a hearing schedule for a proceeding to establish "just and reasonable" rates for network elements that BellSouth must provide in Section 252 interconnection agreements that require approval by the GPSC.

40.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 40 of the Complaint, and note that BellSouth's allegations are directly contrary to judicial interpretation of Section 271 of the Act. *See Verizon New England, Inc. d/b/a/ Verizon Maine v. Maine Public Utilities Commission*, Civil No. 05-53-B-C, Order Denying Plaintiff's Motion for

Preliminary Injunction (D. Maine, Nov. 30, 2005) (“[T]he Court concludes that § 271 is not considered by the FCC and was not intended by the Congress to exclude the [state public service commission] in the circumstances of this case from all activity in setting rates under § 271.”). The Joint CLEC Defendants state that the Act and the referenced FCC Order speak for themselves.

41.

The Joint CLEC Defendants are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations set forth in Paragraph 41 of the Complaint and therefore can neither admit nor deny the same.

42.

The Joint CLEC Defendants re-allege and incorporate their response to Paragraphs 1-41 above as if fully set forth herein.

43.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 43 of the Complaint.

44.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 44 of the Complaint.

45.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 45 of the Complaint.

46.

The Joint CLEC Defendants deny the allegations set forth in Paragraph 46 of the Complaint.

The Joint CLEC Defendants specifically deny all allegations of Plaintiff's Complaint not specifically admitted.

In response to Plaintiff's Prayer for Relief and "WHEREFORE" Clause, the Joint CLEC Defendants specifically deny that Plaintiff is entitled to the relief sought.

WHEREFORE, having fully responded to Plaintiff's Petition, the Joint CLEC Defendants respectfully request that:

1. Plaintiff's claims for relief be denied;
2. Judgment be entered in favor of all Defendants;
3. all costs be taxed against Plaintiff; and
4. this Court enter and award such other and further relief to the Joint CLEC Defendants as it deems just and reasonable, including attorney's fees.

Local Rule 7.1D Certification

By signature below, counsel certifies that the foregoing was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.

/s/ Anne W. Lewis

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