COMPETITIVE CARRIERS OF THE SOUTH, INC., **DOCKET 29393**

Petitioners

ORDER DISSOLVING TEMPORARY STANDSTILL AND GRANTING IN PART AND DENYING IN PART PETITIONS FOR EMERGENCY RELIEF

BY THE COMMISSION:

I. Introduction and Background

This Docket was originally established to address the May 27, 2004 Petition of the Competitive Carriers of the South, Inc. ("CompSouth")[1] wherein CompSouth requested that the Alabama Public Service Commission (the "Commission") issue a Declaratory Ruling pursuant to Rule 22 of the Commission's Rules of Practice holding that the obligations of parties to interconnection agreements filed with the Commission should remain in effect unless and until such agreements are modified by amendments filed with, and approved by, the Commission. CompSouth asserted that the relief requested in its May 27, 2004 Petition was necessary due to various actions and statements by BellSouth Telecommunications, Inc. ("BellSouth") following the issuance of the opinion of the United States Court of Appeals for the D.C. Circuit in *United States Telecom Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*" and sometimes "D.C. Circuit Decision").

CompSouth specifically asserted that certain statements made by BellSouth in various state commission proceedings and in carrier notification letters had created a question as to whether BellSouth intended to continue to honor its existing interconnection agreements with respect to the provision of certain Unbundled Network Elements ("UNEs").[2] CompSouth accordingly requested that the Commission issue an Emergency Declaratory Ruling specifying that: (1) BellSouth would continue to

[1] CompSouth represented that its members included Access Integrated Networks, Inc.; Access Point, Inc.; AT&T; Birch Telecom; Covad Communications Company; IDS Telecom, LLC; ITC DeltaCom; KMC Telecom; LecStar Telecom, Inc.; MCI; Momentum Business Solutions; Network Telephone Corp.; NewSouth Communications Corp.; NuVox Communications, Inc.; Talk America, Inc.; Xspedius Communications; and Z-Tel Communications. DSLnet Communications, LLC also joined the Petition of CompSouth.

honor the obligations contained in its interconnection agreements, including its obligation to seek amendments to such agreements through the procedures spelled out therein to effectuate changes in law, unless and until the Commission approved any modifications to those agreements; and (2) BellSouth would not undertake unilateral actions under color of *USTA II* to restrict the access of CLECs to UNEs or to change prices for UNEs unless and until the Commission approved such changes.

On May 28, 2004, BellSouth submitted its Initial Response to CompSouth's Petition for an Emergency Declaratory Ruling. BellSouth noted in its May 28, 2004 Response that it would file a formal response as directed by the Commission, but sought to initially advise the Commission that the CLEC industry had either misunderstood or was affirmatively misrepresenting BellSouth's position concerning the D.C. Circuit Court of Appeals decision in *USTA II*. BellSouth appended to its May 28, 2004 Initial Response a copy of a May 24, 2004 carrier notification letter in which BellSouth advised the CLEC industry that it would not "unilaterally disconnect services being provided to any CLEC under the CLEC's interconnection agreement" and would not "unilaterally breach its interconnection agreements."[3] BellSouth noted that the D.C. Circuit's issuance of a mandate in *USTA II* would not affect BellSouth's continued acceptance and processing of new orders for services including switched, high capacity transport and high capacity loops. BellSouth noted that it would bill for such services in accordance with the terms of existing interconnection agreements until such time as those agreements were amended, reformed and/or modified in a manner consistent with the D.C. Circuit's decision in *USTA II* and established legal processes.[4] BellSouth did, however, reserve all rights, arguments and remedies available to it under the law with respect to the rates, terms and conditions in existing interconnection agreements.

On June 22, 2004, BellSouth filed its formal Response in Opposition and Motion to Dismiss the Petition of CompSouth for an Emergency Declaratory Ruling. In said Response, BellSouth argued that there was no "emergency" with respect to the relief requested by CompSouth and no merit to CompSouth's Petition because BellSouth had clearly, consistently and without exception stated that it

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[2] CompSouth Petition for Emergency Delcaratory Ruling at pp. 1-7.
[3] BellSouth's Initial Response at p. 2.
[4] *Id.*

would honor its existing interconnection agreements. BellSouth reiterated its commitment to continue honoring its existing interconnection agreements until those agreements were conformed to be consistent with the D.C. Circuit's mandate in *USTA II*.[5]

BellSouth also committed that it would not unilaterally increase the prices that it charged for mass market switching, high capacity dedicated transport, dark fiber, or high capacity loops for those carriers with existing interconnection agreements. Furthermore, BellSouth noted that it intended to implement the D.C. Circuit's mandate in *USTA II* via the "change of law" provisions in each CLEC's interconnection agreement.[6] BellSouth accordingly urged the Commission to dismiss the Petition of CompSouth, or in the alternative, to hold the Petition in abeyance.[7]

Upon review of the foregoing pleadings, the Commission concluded that BellSouth had provided adequate assurances that it would not attempt to unilaterally modify existing interconnection agreements with respect to the provision of services including mass market switching, high-capacity dedicated transport, dark fiber and high-capacity loops. The Commission further noted that BellSouth had conceded that its existing interconnection agreements must be amended in accordance with the "change of law" provisions in those agreements. The Commission accordingly found that CompSouth's Petition for an Emergency Declaratory Ruling should be held in abeyance so long as BellSouth continued to act in accordance with the representations made in the pleadings submitted in Response to CompSouth's Petition for Emergency Relief. The Commission did, however, afford the parties leave to submit supplemental pleadings in response to definitive rulings from the FCC and/or courts of competent jurisdiction with respect to the matters under review in this cause.

II. BellSouth's February 15, 2005 Notice of Issuance of Triennial Review Remand Order and Posting of Carrier Letter

On February 15, 2005, BellSouth filed with the Commission a Notice of Issuance of Triennial Review Remand Order and Posting of Carrier Letter. BellSouth therein advised the Commission that the Federal Communications Commission (the "FCC") had on February 4, 2005 released its permanent

[5] *Id.* at p. 3.
[6] *Id.*
[7] *Id.*

unbundling rules in its *Triennial Review Remand Order.*[8] BellSouth further advised the Commission that it had on February 11, 2005, issued a carrier notification advising that the FCC had identified a number of former Unbundled Network Elements that would no longer be available as of March 11, 2005 except as provided in the *TRRO*. In particular, BellSouth stressed that the February 11, 2005 notification advised carriers that with regard to each of the former UNEs discussed in the *TRRO*, the FCC had provided that no "new adds" would be allowed as of March 11, 2005.[9] BellSouth further asserted that the *TRRO*'s provisions as to "new adds" were effective March 11, 2005 without the necessity of formal amendments to any existing interconnection agreements.[10]

In conclusion, BellSouth advised the Commission that in accordance with the terms of the *TRRO*, BellSouth had informed its carrier customers that effective March 11, 2005, BellSouth would no longer accept orders which treat the items affected by the *TRRO* as UNEs. In particular, BellSouth notified the Commission that it had informed its customers that as of March 11, 2005, BellSouth was no longer required to provide high capacity UNE loops in certain central offices, to provide UNE transport between certain central offices, or to provide new UNE dark fiber loops or UNE entrance facilities.[11]

III. The February 25, 2005 Petition of MCI for Emergency Relief

By filing of February 25, 2005, MCImetro Access Transmission Services, LLC ("MCI") sought permission to intervene in this cause and Petitioned the Commission to issue a Declaratory Ruling requiring BellSouth to: (1) Continue accepting and processing MCI's UNE-P orders under the rates, terms and conditions of MCI's current interconnection agreement with BellSouth (the "MCI/BellSouth interconnection agreement"), and (2) Comply with the "change of law" provisions of the MCI/BellSouth interconnection agreement with regard to the implementation of the FCC's *TRRO* issued on February 4, 2005. As discussed in more detail below, MCI surmised that there existed circumstances that should cause this Commission to allow MCI to intervene and reactivate this matter.[12]

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[8] *In the Matter of Unbundled Access to Network Elements; Review of the §251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313 and CC Docket No. 01-338, *Order on Remand,* FCC 04-290 (released February 4, 2005) (the *"TRRO"*).
[9] BellSouth Notice at pp. 1-2; *Citing TRRO* at ¶227.
[10] *Id.; Citing Attachment A,* p. 2.
[11] *Id.* at p. 2.
[12] MCI's Petition to Intervene was granted in the Commission's March 9, 2005 Temporary Standstill Order discussed

MCI noted that it entered into an interconnection agreement with BellSouth on June 17, 2002. According to MCI, that agreement required BellSouth to provide UNE combinations including "the combination of network element platform or UNE-P."[13] MCI asserted that said agreement further provided that "[t]he price for these combinations of network elements shall be based upon applicable FCC and Commission rules and shall be set forth in Attachment 1 of this agreement."[14] MCI maintained that those rates remained in effect.

MCI further asserted that the MCI/BellSouth agreement specified the steps be taken if a party wished to amend the MCI/BellSouth agreement due to a change in law. When the parties are unable to agree on how to implement a change in the law, MCI noted that the MCI/BellSouth interconnection agreement set forth a dispute resolution process that must be followed.[15]

MCI did not dispute that the FCC in its February 4, 2005 *TRRO* determined on a nationwide basis that ILECs are not obligated to provide unbundled local switching pursuant to §251(c)3 of the Telecommunications Act of 1996. MCI also did not dispute that the FCC adopted a transition plan that calls for CLECs to move to alternative service arrangements within 12 months of the effective date of the *TRRO* and determined that the price for §251(c)3 unbundled switching during the transition period would be the higher of (i) the CLEC's UNE-P rate as of June 15, 2004 plus one dollar, or (ii) the rate established by a state commission between June 16, 2004 and the effective date of the *TRRO* plus one dollar.[16]

With respect to new UNE-P orders after the effective date of the *TRRO*, MCI noted that the FCC stated that: "the transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to §251(c)3 except as otherwise specified in this order."[17] MCI argued, however, that the *TRRO* did not purport to abrogate the "change of law" provisions of carriers' interconnection agreements and in

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below.

[13] MCI's Motion for Emergency Relief at p. 3; *Citing MCI/BellSouth agreement at Attachment 3, §2.4.*

[14] *Id.*

[15] *Id.* at p. 4; *Citing MCI/BellSouth agreement Part A, §§2.3 and 22.1.*

[16] *Id.* at pp. 5-6; C*iting TRRO at §§227 and 228.*

[17] *Id.* at p. 6; C*iting TRRO §227.*

fact directed carriers to implement the rulings set forth in the *TRRO* by negotiating changes to those interconnection agreements.[18]

MCI pointed out that BellSouth issued a carrier notification dated February 8, 2005, wherein BellSouth noted the FCC's release of the *TRRO* and claimed that the *TRRO* precluded CLECs from adding new UNE-P lines starting March 11, 2005.[19] In an attempt to clarify BellSouth's intent, MCI asserted that on February 11, 2005, it sent a letter to BellSouth asking whether BellSouth intended to reject its UNE-P orders or charge a higher rate for new UNE-P lines in the event that MCI did not sign a "commercial agreement" with BellSouth by March 11, 2005.[20]

MCI noted that BellSouth issued a second carrier notification dated February 11, 2005 in which BellSouth expanded its interpretation of the *TRRO*. According to MCI, BellSouth claimed therein that "the FCC's actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to 'new adds' for … former UNEs."[21] MCI further noted that BellSouth's February 11, 2005 carrier notification went on to state that "effective March 11, 2005 for 'new adds,' BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates for the Unbundled Network Element Platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs."[22] According to MCI, BellSouth also issued a change request along with the February 11 carrier notification that created a new edit in its Operations Support Systems to reject all new orders for UNE-P effective March 11, 2005.[23]

MCI represented that it notified BellSouth on February 18, 2005, that the actions BellSouth had proposed would constitute a breach of the MCI/BellSouth interconnection agreement. MCI accordingly requested that BellSouth provide adequate assurances that it would perform pursuant to its existing interconnection agreements.[24]

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[18] *Id.; Citing TRRO at §233.*
[19] *Id.*
[20] *Id.* at p. 7; *Citing Exhibit B.*
[21] *Id.* at p. 7.
[22] *Id.; Citing Exhibit C.*
[23] *Id.; Citing Exhibit D.*
[24] *Id.* at pp. 7-8.

In conclusion, MCI argued that the MCI/BellSouth interconnection agreement required BellSouth to provide UNE-P to MCI at the rates specified in the agreement unless and until that agreement is amended pursuant to the "change of law" process specified therein. MCI thus asserted that BellSouth must continue to accept and provision MCI's UNE-P orders at the rates specified in the existing MCI/BellSouth interconnection agreement. By stating that it would not accept UNE-P orders beginning March 11, 2005, MCI asserted that BellSouth had breached the aforesaid agreement.[25]

MCI further concluded that the *TRRO* did not excuse or justify BellSouth's stated intention of refusing to accept MCI's UNE-P orders beginning March 11, 2005. To the contrary, MCI asserted that the *TRRO* required that its rulings be implemented through changes to parties' interconnection agreements. According to MCI, implementing the change of law with respect to new UNE-P orders would not be an academic exercise because the parties would need to address, among other issues, BellSouth's duty to continue to provide UNE-P to MCI at current rates under state law and under §271 of the federal act.[26]

IV. The February 25, 2005 Joint Petition of NuVox, Xspedius and KMC for Emergency Relief[27]

On February 25, 2005, NuVox Communications, Inc. ("NuVox"); Xspedius Management Company Switched Services, LLC on behalf of its operating subsidiaries Xspedius Management Company of Birmingham, LLC, Xspedius Management Company of Mobile, LLC and Xspedius Management Company of Montgomery, LLC (collectively referred to as "Xspedius"); KMC Telecom III, LLC ("KMC III") and KMC Telecom V, Inc. ("KMC V"), (KMC III and KMC V are collectively referred to as "KMC") (collectively NuVox, Xspedius and KMC are referred to as the "Joint Petitioners") also jointly filed a Petition for Emergency Relief (the "Joint Petition for Emergency Relief") requesting that the Commission issue an Emergency Declaratory Ruling finding that BellSouth could not unilaterally amend or breach its existing interconnection agreements or the Ruling Granting Joint Motion to Hold Proceeding in Abeyance ("Abeyance Agreement") entered by the Commission in Docket 29242 on December 16,

[25] *Id.* at p. 8.
[26] *Id.*
[27] ITC-DeltaCom Communications, Inc. ("ITC-DeltaCom") filed a letter in support of the Joint Petition of NuVox, Xspedius and KMC for Emergency Relief on February 28, 2004. To the extent necessary, ITC-DeltaCom, NuVox, Xspedius and KMC were granted permission to intervene in Docket 29393 in their individual, company capacities in

2004.[28] The Joint Petitioners filed their request for relief in light of BellSouth's February 11, 2005 carrier notification wherein BellSouth stated that certain provisions of the FCC's *TRRO* regarding new orders for delisted UNEs ("new adds") were self-effectuating as of March 11, 2005.

The Joint Petitioners asserted that BellSouth's pronouncement of February 11, 2005 was incorrect and based on a fundamental misreading of the *TRRO*.[29] As with any change in law, the Joint Petitioners maintained that the *TRRO* constituted a change in law that must be incorporated into existing interconnection agreements prior to being effectuated.[30]

Contrary to BellSouth's position, the Joint Petitioners vehemently asserted that the *TRRO* was not self-effectuating with regard to "new adds" or in any other respects including any changes in rates or the availability of access to UNES. The Joint Petitioners in fact represented that the section of the *TRRO* entitled "Implementation of Unbundling Determinations" plainly stated that "incumbent LECs and competing carriers will implement the Commission's findings as directed by §252 of the act." The Joint Petitioners noted that §252 of the Telecommunications Act of 1996 requires negotiations and state commission arbitration of issues that cannot be resolved through negotiation.[31]

The Joint Petitioners further asserted that the FCC's decision to employ the traditional process by which changes of law are implemented was reflected in several other instances throughout the *TRRO*. By way of example, the Joint Petitioners noted that with regard to high capacity loops, the FCC held that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes."[32] The Joint Petitioners noted that the FCC reached similar conclusions with respect to modifications necessary to address high capacity transport and UNE-P arrangements.[33]

The Joint Petitioners also pointed out that in Alabama, the process for implementing the changes of law resulting from the *TRRO* were well underway in the Joint Petitioners' arbitration in Docket 29242

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the Temporary Standstill Order of March 9, 2005. (*See* footnote 27). .

[28] The proceedings in Docket 29242 concern the *Joint Petition of New South Communications Corp., et al. for Arbitration with BellSouth Telecommunications, Inc.*

[29] Joint Petition for Emergency Relief at pp. 1-2.

[30] *Id.*

[31] Joint Petition for Emergency Relief at pp. 9-10.

[32] *Id.* at p. 10; C*iting TRRO at ¶196.*

and the generic proceeding established by the Commission to address changes of law under Docket 29393. The Joint Petitioners asserted that until these proceedings have been concluded and/or the parties reach negotiated resolution, the interconnection agreements in existence today must be abided by.[34]

The Joint Petitioners further argued that regardless of the disputed provisions of the TRRO, the Abeyance Agreement which the Joint Petitioners entered into with BellSouth clearly required BellSouth to abide by the terms of the parties' existing interconnection agreements until those agreements are replaced with new agreements which are currently being arbitrated in Docket 29242. The Joint Petitioners asserted that the parties had clearly stated in their Abeyance Agreement that they agreed to the abatement period so that "they can consider how the post *USTA II* regulatory framework should be incorporated" into their existing interconnection agreements being arbitrated before the Commission.[35]

According to the Joint Petitioners, the parties agreed to "avoid a separate/second process of negotiating/arbitrating change of law amendments to the current interconnection agreements to address *USTA II* and its progeny."[36] To implement this shared objective, the Joint Petitioners represented that they and BellSouth had agreed to "continue operating under their current interconnection agreements until they are able to move into the new arbitrated/negotiated agreements that ensue from [the arbitration] proceeding period."[37]

The Joint Petitioners maintained that BellSouth should not, by virtue of a self-proclaimed fiat, be allowed to walk away from the commitments made in the Abeyance Agreements, make an end run around the Commission's interconnection arbitration process, and unilaterally amend existing interconnection agreements which BellSouth previously agreed would not be changed pending the outcome of the ongoing interconnection arbitration proceedings in Docket 29242.[38] The Joint Petitioners argued that BellSouth's failure to honor the commitments made to the Joint Petitioners in the Abeyance

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[33] *Id.; Citing TRRO at ¶143 and 227.*
[34] *Id.* at p. 3.
[35] *Id.* at p. 12. *See* Abeyance Agreement at p. 2.
[36] *Id.*
[37] *Id. See* Abeyance Agreement at p. 3.
[38] *Id.* at p. 13.

Agreement would constitute a breach of the duty to negotiate in "good faith" imposed on ILECs by §251(c)(1).[39]

In conclusion, the Joint Petitioners represented that the Commission should act to prevent BellSouth from taking unilateral action on March 11, 2005, that would effectively breach and/or unilaterally amend the Joint Petitioners' existing interconnection agreements and most, if not all, other BellSouth Alabama interconnection agreements. The Joint Petitioners pointed out that for their operations, and those of other facilities-based carriers, essential UNEs such as high capacity loops and high capacity transport were jeopardized by BellSouth's February 11, 2005 carrier notification. The Joint Petitioners maintained that they and the Alabama consumers they served would suffer imminent and irreparable harm if BellSouth were allowed to breach or unilaterally modify the terms of the parties' existing interconnection agreements. The Joint Petitioners accordingly sought expeditious consideration of the issues raised and an order declaring, among other things, that the Joint Petitioners should have full and unfettered access to BellSouth's UNEs provided for in their existing interconnection agreements on and after March 11, 2005 and/or until such time as those agreements are replaced by new interconnection agreements resulting from the arbitration proceedings in Docket 29242 or the final conclusions of the Commission in Docket 29393.[40]

V. The Commission's March 9, 2005 Temporary Standstill Order

After considering the foregoing pleadings, the findings and conclusions of the FCC in the *TRRO* and the conflicting language in the *TRRO* regarding implementation of the conclusions set forth therein, the Commission issued a Temporary Standstill Order Scheduling Oral Argument ("Temporary StandStill Order") on March 9, 2005. The Commission determined therein that the entire telecommunications industry in Alabama and the customers of that industry would be best served by further analysis of the issues set forth in the Petitions of MCI, NuVox, Xspedius and KMC. In order to facilitate that further analysis, the Commission found that the Emergency Relief requested by MCI, NuVox, Xspedius and KMC was due to be temporarily granted for all CLECs operating in Alabama pursuant to existing interconnection agreements that had been submitted to and approved by this Commission.

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[39] *Id.* at p. 13.

In summary, the Commission concluded in its Temporary Standstill Order that BellSouth should continue to honor the entirety of the rates, terms and conditions set forth in its existing interconnection agreements with CLECs in Alabama provided the agreements in question had been submitted to and approved by this Commission. BellSouth was accordingly instructed not to cease the provision of any UNE required to be provided pursuant to an existing interconnection agreement and to provide such UNEs according to the rates established or otherwise referenced in such agreements.[41]

In order to hasten a conclusion on the merits of the issues set forth in the pleadings of MCI, the Joint Petitioners and BellSouth,[42] BellSouth and the CLEC parties were ordered to participate in Oral Arguments to be held on March 29, 2005. The parties were further advised that the Commission would endeavor to render a decision on the merits of the issues raised in the aforementioned pleadings and the Oral Arguments on March 29, 2005 as soon as possible. To that end, the Commission instructed all parties to carefully track any and all UNEs/"new adds" provided by BellSouth on and after March 11, 2005 for purposes of truing up the UNEs/"new adds" so provided by BellSouth in accordance with the provisions of the *TRRO* or any superseding commercial agreements entered by and between BellSouth and the affected carriers.[43]

VI. The Oral Arguments of March 29, 2005

The Oral Arguments in this matter were held as scheduled on March 29, 2005. Counsel for BellSouth Telecommunications, Inc. ("BellSouth"), MCImetro Access Transmission Services, LLC ("MCI"), ITC^DeltaCom Communications, Inc. ("DeltaCom"), and Joint Petitioners NuVox Communications, Inc., Xspedius Management Company Switched Services, LLC and its operating subsidiaries, KMC Telecom III, LLC, and KMC Telecom V, Inc. (the "Joint Petitioners") participated in said arguments.

The arguments presented at the proceedings of March 29, 2005 were rather extensive with each of the parties submitting multiple authorities in support of their respective positions. The parties

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[40] *Id.* at pp. 3-4.
[41] *See* Temporary Standstill Order at pp. 9-10.
[42] The Commission notes that BellSouth has not yet filed a Pleading in response to the Petitions of MCI, NuVox, Xspedius and KMC. BellSouth shall do so on or before March 22, 2005.
[43] *Id.* at p. 10.

additionally presented arguments concerning the authority of the FCC to effectuate modifications to existing interconnection agreements by virtue of its rulings in the *TRRO*.

The Joint Petitioners cited the *Mobile-Sierra* doctrine as support for their position that the FCC cannot unilaterally abrogate the terms and conditions of existing interconnection agreements without engaging in extensive public interest considerations. The Joint Petitioners asserted that such public interest considerations were clearly absent in the *TRRO*.[44]

BellSouth asserted that the FCC's authority to implement self-effectuating changes to interconnection agreements as it did in the *TRRO* has been recognized by well established case law.[45] BellSouth further argued that the FCC had made the requisite public interest filings under the *Mobile-Sierra* doctrine inasmuch as the FCC and various places in the *TRRO* noted that certain unbundling proposals constituted the disincentive to CLEC infrastructure development. Even apart from the *Mobile-Sierra* doctrine, BellSouth argued that the FCC had 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.[46]

VII. The Commission's April 15, 2005 Order Extending Temporary Standstill

In light of the extensive nature of the evidence to be considered by the Commission following the March 29, 2005 Oral Arguments, the Commission issued an Order of April 15, 2005 extending the Temporary Standstill previously entered. The Commission determined in said Order that the public interest would best be served by deferring a decision on the merits of the issues presented until the public meeting of the Commission scheduled for May 3, 2005. In addition to allowing more time for a thorough review of the information already presented, the Commission determined that delaying its decision on the merits would also allow for consideration of rulings from various federal district courts in the BellSouth region which were expected to be issued prior to the May 3, 2005 meeting of the Commission.

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[44] *See* transcript of Oral Arguments at p. 72.
[45] *Cable & Wireless*, *PLC v. FCC*, 166 F3d. 1224, 1231-32 (D.C. Cir. 1999) *(quoting Western Union Tel. Co. v. FCC,* 815 F2d. 1495, 1501 (D.C. Cir. 1987). *See also United Gas Improvement Co. v. Callery Properties, Inc.* 382 U.S. 223, 229 (1965*)* (agencies can undo what is wrongfully done by virtue of their orders).
[46] *See* transcript of Oral Arguments at pp. 68-69, 87-88.

As previously directed in the March 9, 2005 Standstill Order, BellSouth was again instructed to continue honoring the entirety of the rates, terms and conditions set forth in its existing interconnection agreements with CLECs in Alabama provided the agreements in question had been submitted to and approved by the Commission. BellSouth was further instructed not to cease the provision of any UNE required to be provided pursuant to an existing interconnection agreement in accordance with the rates established therein until further notice from the Commission. As emphasized in the Commission's March 9, 2005 Temporary Standstill Order, the parties were again instructed to continue the tracking of UNEs and/or "new adds" provisioned on and after March 11, 2005 for purposes of a possible true up of the UNEs/"new adds" so provided by BellSouth in accordance with the provisions of the Federal Communications Commission's *Triennial Review Remand Order* or any superseding commercial agreements entered by and between BellSouth and affected carriers.

VIII. Findings and Conclusions

A. BellSouth is not, and was not, obligated to provision orders for UNEs delisted by the *TRRO,* and in particular UNE-P switching, as of March 11, 2005.

The primary issue before the Commission in this cause is whether the provisions in the FCC's *TRRO* precluding new orders for UNEs delisted by the *TRRO* were self-effectuating as of March 11, 2005 or whether ILECs were instead obligated to continue provisioning new orders for delisted UNEs until such time as the ILECs and interconnecting CLECs arrive at new contractual language through the change of law provisions in their existing interconnection agreements. The secondary issue presented herein is whether sufficient jurisdictional authority existed to render the *TRRO* self-effectuating with respect to new UNE orders on and after March 11, 2005 thereby overriding the change of law provisions in existing interconnection agreements.

We note that numerous other state commissions and at least four federal district courts have been faced with the exact issues presented to the Commission herein. While there have been some decisions finding in favor of the continued provisioning of new UNE orders pending compliance with contractual change of law provisions,[47] the vast majority of the decisions rendered have held that the

[47] *Illinois Bell Telephone Co. v. Hurley,* 2005 W.L. 735968, *6 (N.D. ILL. 2005); *In re: BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law,* Docket No.

FCC's *TRRO* was indeed intended to be self-effectuating with regard to the cessation of new UNE orders on and after March 11, 2005.[48]

It is apparent from our review of the record in this cause and the decisions cited herein that the FCC indeed intended for the provisions of the *TRRO* precluding new UNE orders on and after March 11, 2005 to be self-effectuating on that date. This conclusion was perhaps best stated by the court in *Mississippi PSC* wherein the court noted:

> " … [a] comprehensive review of all potentially relevant provisions of the *TRRO* demonstrates convincingly that the FCC envisioned that the bar on new – UNE-P switching orders would be immediately effective on the date established in the order, March 11, 2005, without regard to the existence of change of law provisions in parties' interconnection agreements. The *TRRO* makes clear in unequivocal terms that the transition period applies only to the embedded customer base, and 'does not permit competitive LECs to add new customers using unbundled access to local circuit switching.'"[49]
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> Given the clarity with which the FCC stated its position on this issue, it is not surprising that the majority of state utilities commissions and courts, by far, having considered this issue have held, on persuasive reasoning, that the FCC's intent in the *TRRO* is an

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04-00381 (Tennessee PSC April 11, 2005); *Staff's Recommendation Regarding MCI's Motion for Emergency Relief*, Docket No. 28131 (Louisiana PSC 2005); *Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U (Georgia PSC March 9, 2005); *In re: Order Establishing Generic Docket to Consider Change-of-Law to Existing Interconnection Agreements*, Docket No. 2005-AD-139 (Mississippi PSC March 9, 2005); *In the matter of: Joint Petition for Arbitration of New South Communications Corp., et al.,* Case No. 2004-00044 (Kentucky PSC March 10, 2005); *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. 2004-427 (Kentucky PSC March 10, 2005).

[48] *BellSouth Telecommunications, Inc. v. MCI Metro Access Transmission Services, LLC*, No. 1:05CV0674CC, 2005 WL 807062 (ND. GA. APR. 5, 2005). *BellSouth Telecommunications, Inc. v. Miss. Pub. Serv. Comm'n.,* No. 3:05-CV-173, at 6-11(S.D. Miss. April 13, 2005) ("*Mississippi PSC*"); *BellSouth Telecommunications, Inc. v. Cinergy Communications Company., aka Cinergy Communications Corp., et al.*, No. 3:05-CV-16 (E.D. KY. April 22, 2005) ("*BellSouth v. Cinergy*"); *Order and Complaint of Indiana Bell Tele. Co., Inc., d/b/a SBC Ind. for Expedited Review of Dispute with Certain CLECs Regarding an Adoption of an Amendment to Commission-Approved Interconnection Agreements*, Cause No. 4278 at 7, (Indiana Util. Reg. Comm'n. March 9, 2005); *Order on Emergency Petition for Declaratory Ruling Prohibiting SBC Ohio from Breaching its Existing Interconnection Agreements and Preserving Status Quo with Respect to Unbundled Network Orders*, Case No. 05-298-TP-UNC (Pub. Util. Comm'n. of Ohio, March 9, 2005); *Assigned Commissioner's Ruling Granting In Part Motion for Emergency Order Granting Status Quo for UNE-P Orders*, Application 04-03-014 (Pub. Util. Comm'n. of California March 10, 2005); *Proposed Order on Clarification*, Docket No. 28821 (Pub. Util. Comm'n. of Texas. March 8, 2005); *Implementation of the FCC's Triennial Review Order*, Docket No. TO03090705 (New Jersey Bureau Pub. Util. March 11, 2005 *adopting Verizon's proposed R.I. Tariff filing*) Docket 3662 *R.I. Pub. Util. Comm'n.* March 8, 2005; *Order Granting In Part and Denying In Part Formal Complaint and Motion for Expedited Order*, Docket No. 04-SWBT-763-GIT(State Corp. Comm'n of Kansas March 10, 2005); *Open Meeting on Complaint Against Verizon for Emergency Declaratory Relief Related to the Continued Provision of Unbundled Network Elements After the Effective Date of the Order on Remand*, Docket No. 334-05 (Massachusetts Dept. of Telecommunications & Energy March 22, 2005); *Order on Application of the Competitive Twelve Local Exchange Carriers*, Case No. U-14303 at 9 (Michigan Pub. Serv. Comm'n. March 29, 2005); *Order on Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection and Resold Services*, Docket No. 2002-682, at 4 (Maine Pub. Util. Comm'n. March 7, 2005.)

[49] *Mississippi PSC* at pp. 6-7

> unqualified elimination of new UNE-P orders as of March 11, 2005, irrespective of change of law provisions in parties' interconnection agreements.[50]

While there is little doubt from the foregoing that the FCC intended the *TRRO* to be self-effectuating with respect to new UNE orders on March 11, 2005, it is less clear as to whether the FCC had the requisite authority to effectuate its intentions in that regard thereby overriding the change of law provisions in existing interconnection agreements throughout the country. MCI and the Joint Petitioners argue that the FCC lacked the requisite jurisdiction to abrogate the terms and conditions of existing interconnection agreements. MCI and the Joint Petitioners further argue that even if the FCC possessed such jurisdiction, the *TRRO* does not reflect that the FCC made the particularized public interest findings necessary to abrogate or modify the freely negotiated interconnection agreements in question as required by the *Mobile-Sierra* doctrine.

We note at the outset of our consideration of this secondary issue that the question regarding the jurisdictional authority of the FCC to override existing interconnection agreements can only be appropriately and conclusively addressed in a direct appeal of the FCC's *TRRO*.[51] That undisputed principle of appellate law did not, however, deter the federal district courts in *Mississippi PSC* and *BellSouth v. Cinergy* from considering the issue of the FCC's jurisdictional authority to override interconnection agreements and rendering opinions thereon. Those courts indeed held that if the question of the FCC's jurisdictional authority to override existing interconnection agreements is not considered a collateral attack on the *TRRO*, the FCC had the authority to mandate that the *TRRO* would be self-effectuating due to the fact that the interconnection agreements in question are not ordinary private contracts, but are instead instruments arising within the context of ongoing federal and state regulations.[52]

The court in *Mississippi PSC* rationalized that the disputed provisions in the various interconnection agreements permitting the UNE platform are there not because the parties involved freely

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[50] *Id.* at pp. 7-8.

[51] *See FCC v. ITT World Communications, Inc.,* 466 U.S. 463, 468 (1984); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n.,* 394 F.3d 568, 569 (8th Cir. 2004).

[52] *See Mississippi PSC* at p. 13 citing *E.spire Communications, Inc. v. N.M. Pub. Regulation Comm'n*., 392 F.3d 1204, 1207 (10th Cir. 2004). *See also Verizon Maryland, Inc. v. Global Naps, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004) (Interconnection agreements are a "creation of federal law" and are "the vehicles chosen by Congress to implement

and voluntarily negotiated those agreements, but because BellSouth was required to enter those agreements due to prior FCC orders.[53] The *Mississippi PSC* court thus concluded that it would be "substantively inaccurate to characterize the FCC's actions in the *TRRO* as an abrogation of private contracts and more accurate to characterize the FCC's conclusions as an elimination of legal requirements that had dictated the substance of the parties regulatory agreements."[54]

As recognized by the court in *Mississippi PSC*, the Telecommunications Act of 1996 vested direct jurisdiction over interconnection agreements with state utility commissions, but did not entirely divest the FCC of its authority with respect to such agreements. To the contrary, the Supreme Court has held that the FCC has the authority to issue rules and orders implementing all aspects of the Telecommunications Act of 1996.[55] To the extent that a state commission's judgment concerning the interpretation of an approved agreement conflicts with the FCC's interpretation of its own regulations, the FCC's interpretation controls under the supremacy clause.[56]

The *Mississippi PSC* court thus concluded that the FCC had appropriately determined that, as a matter of policy, the Telecommunications Act of 1996 did not require the provisioning of unbundled switching and that the bar on new UNE switching orders would be immediately effective without regard to the change of law provisions in specific interconnection agreements. The *Mississippi PSC* court held that the FCC's conclusion in that regard was in keeping with its plenary authority under the Telecommunication Act of 1996 and would prevail over counter state commission determinations.[57] We will defer to the logic and holding of the *Mississippi PSC* court in this regard where existing interconnection agreements other than those entered between BellSouth and the Joint Petitioners are concerned.

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the duties imposed in §251"); *BellSouth v. Cinergy* at pp. 11-12.

[53] *Id.* at p. 14 citing *BellSouth Telecommunications, Inc. v. MCImetro Access Transmission Services, Inc.,* 317 F.3d 1270, 1298 (11th Cir. 2003) (Interconnection agreements are "mandated by federal statute" and even voluntary agreements are "cabined by the obvious recognition that the parties to the agreement had to agree within the parameters fixed by federal statutes.")

[54] *Id.* at p.14.

[55] *Id.* at p. 15, *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 380, 119 S. Ct. 721 (1999).

[56] *Id.* citing *MCI Telecommunications Corp. v. Bell Atlantic Pennsylvania*, 271 F.3d 491, 516 (3rd Circuit 2001).

[57] *Id.* at pp. 15-16.

In summary, we hold that with regard to all CLECs other than the Joint Petitioners, BellSouth was not required to provide new UNE adds on or after March 11, 2005 and that the FCC's *TRRO* overrides the change of law provisions in existing interconnection agreements with such CLECs.[58] Thus, new UNEs provided by BellSouth to all CLECs other than the Joint Petitioners since March 11, 2005 should be trued up with respect to price in accordance with the provisions of the *TRRO* or any superseding commercial agreements reached between BellSouth and any affected CLEC.

Having excluded the interconnection agreements of the Joint Petitioners from the above findings and conclusions as a result of the Abeyance Agreement between BellSouth and the Joint Petitioners, we now turn to an assessment of that Agreement. For the reasons set forth below, we conclude that the jurisdictional findings in the federal court rulings discussed and deferred to above do not provide sufficient justification for a determination that the self-effectuating provisions of the *TRRO* properly override the terms and conditions of the Abeyance Agreement entered between BellSouth and the Joint Petitioners.

We reach the conclusion discussed immediately above based upon our analysis of the logic relied upon by the courts in *BellSouth v. Cinergy* and *Mississippi PSC* to support their mutual conclusion that the FCC had the requisite jurisdiction to override existing interconnection agreements. In particular, the decisions of the *BellSouth v. Cinergy* and *Mississippi PSC* courts hinged on the finding that typical interconnection agreements executed and approved pursuant to the provisions of §§251 and 252 of the Telecommunications Act of 1996 were not private contracts, but were instead in the nature of governmentally mandated agreements which could be overridden by the self-effectuating provisions of the FCC's *TRRO.* We conclude that the Abeyance Agreement under review herein is not a governmentally mandated agreement, but is instead in the nature of a private contract which is not overridden by the FCC's decision to make the disputed provisions of the *TRRO* self-effectuating with respect to existing interconnection agreements. In particular, we find that, unlike the mandated interconnection agreements that the courts in *BellSouth v. Cinergy* and *Mississippi PSC* held that the FCC could override in its *TRRO*, the Abeyance Agreement was freely and voluntarily negotiated outside

[58] As discussed in more detail below, the interconnection agreements entered between BellSouth and the Joint Petitioners are not overridden by the self-effectuating provisions of the *TRRO* by virtue of the Abeyance Agreement entered between the parties.

of the established regulatory parameters for interconnection agreements. Indeed, the Abeyance Agreement does not have its genesis in §§251 and 252 of the Telecommunications Act of 1996 as standard interconnections do and was not submitted to the Commission for approval pursuant to the provisions of §252 of the Telecommunications Act of 1996. As a private contract, we conclude that the Abeyance Agreement insulated the interconnection agreements entered between BellSouth and the Joint Petitioner's from the otherwise self-effectuating provisions of the TRRO discussed at length herein.

We accordingly find that consistent with the terms and conditions of the Abeyance Agreement, BellSouth and the Joint Petitioners should endeavor to implement the changes of law resulting from the *TRRO* in their ongoing arbitration in Docket 29242 unless the parties reach an agreement to the contrary. Our conclusion in this regard necessarily means that new UNE adds provided by BellSouth to the Joint Petitioners will continue to be governed by the terms and conditions of the involved parties' current interconnection agreements due to the fact that the parties intended that course of action when they entered their Abeyance Agreement.

B. BellSouth does not have an independent obligation to provision UNE-P switching pursuant to §271 of the Telecommunications Act of 1996.

With regard to MCI's argument that BellSouth has an independent obligation to provision UNE-P switching pursuant to §271 of the Telecommunications Act of 1996, we conclude, as did the court in *Mississippi PSC,* that given the FCC's decision '"to not require BOCs to combine §271 elements no longer required to be unbundled under §251, it [is] clear that there is no federal right to §271 based UNE-P arrangements."'[59] This conclusion is further bolstered by the fact that the ultimate enforcement authority with respect to a regional Bell operating company's alleged failure to meet the continuing requirements of §271 of the Telecommunications Act of 1996 rests with the FCC and not this Commission. MCI's argument that there is an independent obligation under §271 to provide UNE-P is accordingly rejected.

C. The Commission will soon be precluded from implementing state law requirements mandating that incumbent local exchange carriers must unbundle network elements in any manner that differs from the unbundling requirements imposed by the FCC.

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[59] *Mississippi PSC* at pp. 16-17 *citing the* Order of the *New York Public Service Commission in Order Implementing TRRO Changes*, Case No. 05-C-02-03 (March 16, 2005). A "BOC" is a regional Bell operating company.

MCI also argued that the Commission has the statutory authority to establish an independent state law requirement that BellSouth provide UNE-P switching. Although it has been generally recognized that state commissions have the independent unbundling authority which MCI herein urges the Commission to exercise, this Commission will no longer have that latitude by virtue of the recently enacted provisions of the *Code of Alabama* 1975 §37-2A-4(b)(1). Said provisions preclude the Commission from imposing unbundling requirements that differ in degree or kind from those imposed by the FCC. Clearly, the Commission will not have sufficient opportunity to initiate and complete the proceedings that would be necessary to impose Alabama-specific unbundling requirements before the provisions of §37-2A-4(b)(1) become effective. MCI's arguments regarding the implementation of state law unbundling requirements are accordingly rejected.

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That the findings and conclusions set forth above are hereby adopted.

IT IS FURTHER ORDERED BY THE COMMISSION, That the Temporary Standstill Order entered in this cause on March 9, 2005 and extended by Order entered herein on April 15, 2005 is hereby dissolved.

IT IS FURTHER ORDERED BY THE COMMISSION, That based on the foregoing, MCI's Petition for Emergency Relief is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION, That consistent with the findings above, the Petition for Emergency Relief submitted by the Joint Petitioners is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION, That jurisdiction in this cause is hereby retained for the issuance of any further order or orders as may appear to be just and reasonable in the premises.

IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 25th day of May, 2005.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan, President

Jan Cook, Commissioner

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr., Secretary