

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Petition of Mpower Communications Corp. for	)	
Establishment of New Flexible Contract	)	CC Docket No. 01-117
Mechanism Not Subject to "Pick and Choose"	)	

**BELLSOUTH COMMENTS TO MPOWER'S  
PETITION FOR FORBEARANCE AND RULEMAKING**

BellSouth Corporation, on behalf of its wholly owned affiliated companies<sup>1</sup> through undersigned counsel ("BellSouth"), files its Comments to the Petition for Forbearance and Rulemaking ("Petition") of Mpower Communications Corp. ("Mpower").

In its recently filed Petition, Mpower asks the Commission to establish a new contract mechanism that it has given the name "FLEX Contracts." Pursuant to Mpower's Petition, Mpower requests the Commission to forbear from application of enforcement of "pick and choose" provisions of section 252(i) and the applications and enforcement provisions of section 252(e) of the Telecommunications Act of 1996 ("1996 Act"). Additionally, the Petition asks the Commission to institute a rulemaking to establish a federal program for notification, opt-in, and enforcement of FLEX contracts. Mpower seeks this new mechanism because it believes that it will promote innovation in the contractual relationship between ILECs and CLECs. For

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<sup>1</sup> BellSouth Corporation is a publicly traded Georgia corporation that holds the stock of companies which offer local telephone service, provide advertising and publishing services, market and maintain stand-alone and fully integrated communications systems, and other network services world-wide. BellSouth participated in all aspects of the pleading cycle in this rulemaking proceeding.

example, Mpower envisions the FLEX contract to look very different from the interconnection agreements that CLECs and ILECs typically enter. Mpower describes interconnection agreements as standardized and therefore leave very little room for negotiation. Mpower points out that this standardization is caused largely by the “pick and choose” provision of the Telecommunications Act of 1996 (“1996 Act”). It asserts that this provision has inhibited innovative deal-making between the CLECs and ILECs. Mpower visualizes FLEX contracts, however, as freely negotiated agreements offering terms and conditions that will mutually benefit both parties.

BellSouth agrees that *freely* negotiated contracts could produce terms and conditions that could potentially benefit both the CLEC and ILEC. BellSouth agrees that the pick and choose provision undermines the full measure of the bargain that was negotiated between the parties. Negotiations are made up of give and take. A particular clause in a contract that may be beneficial to one party while taxing on the other party was probably included because the benefiting party was willing to give up something in return in order to receive the benefit. This is the simple art of negotiation. Allowing a carrier that was not a part of the negotiation to reap the benefit of a good clause without the balance of other clauses, however, disrupts the concept of negotiation. Faced with this outcome, ILECs have been put in a position of having to work toward standardization in their interconnection agreements.

In order to be a freely negotiated agreement, however, both parties must have the complete freedom to negotiate without the regulatory constraints placed on ILECs. Accordingly, BellSouth believes that if the Commission were going to entertain Mpower’s Petition it must do so with the following conditions. First, the FLEX contract mechanism must be completely voluntary between the parties. Second, it must be a mechanism that is separate and distinct from

interconnection agreements that ILECs enter with CLECs pursuant to sections 251 and 252 of the 1996 Act and must be completely free of all obligations of sections 251 and 252, not just sections 252(e) and (i).<sup>2</sup> Under these conditions, BellSouth is unaware of any harm that the FLEX contract concept could cause to either the CLECs or the ILECs.

In its Petition, Mpower describes the FLEX contract as being a voluntary negotiation between the ILEC and the CLEC. BellSouth stresses the importance of this concept. Any such agreement must be a voluntary undertaking that remains voluntary from the opening negotiations until both parties sign the contract. Not only must the decision to enter into a FLEX contract be voluntary, but also there must be no prescribed terms, conditions, prices, services, or elements. The parties, not outside regulatory entities, must establish all of these items through negotiation. Moreover, subject only to contract law, both parties must have the right to decide, at any time prior to signing the contract, to end negotiations and not enter into a agreement. The concept of voluntary negotiations is important because the ILECs obligations for entering into an interconnection agreement with the CLEC will remain in place.<sup>3</sup> If it chose not to seek a FLEX contract, the CLEC would have the protection afforded it under sections 251 and 252 of the 1996 Act to obtain interconnection or unbundled network elements from the ILEC through an interconnection agreement. The FLEX contract mechanism must therefore be free from any requirement being placed on it by a regulatory entity.

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<sup>2</sup> Pursuant to § 252(a)(1), carriers may enter into voluntary agreements “without regard to the standards set forth in subsections (b) and (c) of section 251.” Thus, the Commission must recognize FLEX contracts would be voluntary agreements entered between carriers without regard to nor subject to any of the provisions of § 251, including § 251(c), and § 252.

<sup>3</sup> The Petition does not seek and BellSouth does not advocate that the FLEX contract would take the place of the interconnection agreement mechanisms established by sections 251 and 252 of the 1996 Act. Such obligations would remain in place.

The FLEX contract must be separate and distinct from the interconnection agreement obligations established by section 251 and 252 of the 1996 Act.<sup>4</sup> Consistent with a voluntary arrangement between the CLEC and the ILEC, the FLEX contract mechanism must not be subject to any of the obligations in section 251 or 252. While sections 251 and 252 would remain in place for all carriers to establish an interconnection agreement, in order to be effective, the FLEX contract must not have any of the obligations of those sections imposed upon it. Indeed, the FLEX contract would not be innovative or effective if it merely turned into another form of interconnection agreement that carried 251(c) obligations that could be arbitrated before a state commission pursuant to 252(b). Under those circumstances, the fact that another carrier could not pick and choose specific provisions from the agreement would have little relevance. Accordingly, in BellSouth's view, if the FLEX contract retains all of the standards set forth in sections 251 and 252, it will simply be a duplicate of the interconnection agreement mechanism that exists today.

Finally, BellSouth opposes Mpower's proposal to establish a federal program for notification, opt-in, and enforcement of FLEX contracts. The Commission has the authority to require the FLEX contracts to be filed with the Commission. This filing can act as public notification to other carriers and allow the Commission the ability to ensure compliance with 47 U.S.C. § 202. All disputes should be left to normal forms of dispute resolution, *e.g.*, the parties could include mediation and arbitration clauses in the FLEX contract or retain the ability to file suit if a dispute cannot be resolved between the parties. The creation of a federal program would

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<sup>4</sup> Because the FLEX contracts are voluntary agreements between the carriers, they will not be predicated on UNEs. Carriers would be free to negotiate the provision of services or network elements, or both, including all pricing, as agreed upon by the parties to the FLEX contract. The parties would be free to agree to more, or less, than the standards established by § 251. Accordingly, the FLEX contracts would not be subject to any obligations established by the Commission regarding UNEs or UNE pricing.

only add unnecessarily to the Commission's burden. Commercial disputes have long been settled internally, in arbitration, and when all else fails, in courts. Moreover, the Commission would retain jurisdiction for a carrier to file a complaint under 47 U.S.C. § 208. Accordingly, there is no particular reason why the Commission should establish a special program for oversight.

### **Conclusion**

As demonstrated above, BellSouth believes that freely negotiated, voluntary agreements between carriers could be beneficial to both CLECs and ILECs. BellSouth's belief, however, is predicated upon two caveats – the agreements must be truly voluntary and must not be subject to any of the provisions of §§ 251 and 252. Finally, BellSouth opposes any proceeding to establish a federal program for the enforcement of FLEX contracts. Any enforcement must be through the established forms of enforcement available through the Commission or other commercial disputes.

Respectfully submitted,

BELLSOUTH CORPORATION

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## **CERTIFICATE OF SERVICE**

I do hereby certify that I have this 3<sup>rd</sup> day of July 2001 served the following parties to this action with a copy of the foregoing **BELLSOUTH COMMENTS TO MPOWER'S PETITION FOR FORBEARANCE AND RULEMAKING** by electronic, hand delivery and/or by placing a true and correct copy of the same in the United States mail, postage prepaid, addressed to the parties listed on the attached service list.

/s/ Lynn Barclay  
Lynn Barclay

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