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

In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	))))	CC Docket No. 01-338
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)))	CC Docket No. 96-98
Deployment of Wireline Services Offering Advanced Telecommunications Capability	))	CC Docket No. 98-147

PETITION FOR WAIVER

BellSouth Telecommunications, Inc. ("BellSouth") hereby files this petition for waiver pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3. BellSouth seeks a limited and temporary waiver of the requirement to process orders under the revised commingling and service eligibility requirements ("EEL requirements") set forth in the Commission's *Triennial Review Order* ("*TRO*").[1] BellSouth seeks this waiver because the contract negotiation process has proceeded much faster in its region than anticipated by the *TRO*. BellSouth and competitive LECs have already executed many agreements containing the revised EELs requirements. This waiver would not affect the negotiation of interconnection agreements or preparations to process

[1] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-338, 96-98 & 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978, 17342-43, 17354, ¶¶ 579, 597 (2003) ("*TRO*").

orders. Rather, it would serve to ensure that the revised EEL requirements that allow UNEs to be substituted for special access services are implemented under the schedule anticipated in the *TRO* and in coordination with upcoming state decisions on where high-capacity UNE transport and loops will be available. Granting this temporary waiver will avoid wasting substantial resources likely from converting special access circuits to EELs before the states conclude their loop and transport impairment cases. Granting this waiver will also avoid substantial inefficiencies from unnecessarily accelerating the implementation of ordering and provisioning systems for the revised EEL requirements.

I. Introduction and Background

The Commission "recognize[d] that commenters have argued that a Commission-mandated transition period is needed so carriers have time to adjust their business practices, and to make arrangements to accommodate their customers."[2] Rather than explicitly defining this period by rule, the Commission relied on "the practical effect of [contract] negotiation[s]" to provide the "transition period."[3] The Commission believed that, in practice, this transition period would be nine months.

> [W]e believe that the statutory maximum transition period of nine months will ensure an orderly transition to the new rules. We further note that the nine-month period outlined by Congress is reasonably consistent with the transition periods sought by the parties.[4]

The Commission anticipated that the transition would apply whether contracts were revised through the arbitration process or voluntarily, noting explicitly that the nine-month

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2 *Id.* at 17404, ¶ 701.

3 *Id.*

4 *Id.* at 17405, ¶ 703.

period "provides good guidance even in instances where a change of law provision exists."[5] As discussed below, BellSouth has executed many revised agreements well before the nine-month transition.

This planned nine-month transition is particularly important in the situation raised by this waiver because the transition period coincides with the Commission's timetable for states to determine the routes or location at which UNEs will be available.[6] The UNEs that would be substituted for special access services, under the *TRO*'s revised requirements, are high-capacity transport and loops. However, whether high-capacity transport and loops will be available on a particular route or to a particular location is subject to state commission evaluation of impairment.[7] The Commission provided states nine months to complete this task.

All nine commissions in BellSouth's region have begun cases to determine where high-capacity transport and loops will be available as UNEs. Under the current schedules, each of the state commissions in BellSouth's region is scheduled to decide these cases by July 2, 2004. As might be expected, the cases are enthusiastically contested. While predicting the precise outcomes is impossible, BellSouth has provided factual information showing that the Commission's transport test will show that no impairment exists on a substantial number of routes. For example, in Florida, BellSouth submitted data showing that in several major metropolitan areas – Jacksonville, the Miami area, Pensacola, Orlando, and Tampa – 692 DS3 routes and 648 DS1 routes meet or exceed the transport triggers established in the *TRO*.[8] These

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5 *Id.* ¶ 704.

6 *Id.* at 17181, 17236, ¶¶ 339, 417.

7 47 C.F.R. § 51.319(a)(7) & (e)(4).

8 BellSouth expects that orders to substitute UNEs for special access-type services will be concentrated in precisely these metro areas, where demand in Florida for special access circuits is highly concentrated.

data also show that in these metro areas 98 customer locations meet the DS3 loop trigger and 106 locations meet the DS1 loop trigger.

In states where cases are being actively conducted to determine on which routes high-capacity UNEs will be available, allowing carriers to substitute UNEs for special access services before those cases are complete and the relevant state orders have taken effect makes little sense. This mistiming will inevitably result in special access circuits being converted to high-capacity UNE circuits, only to have a state determine shortly thereafter that those elements are no longer UNEs. The circuits will then have to be converted back. Similarly, orders placed for high-capacity transport and loops to create new special access-type circuits before the states have completed their UNE review, will, at least in some cases, result in provisioning of UNE circuits that subsequently have to be taken down or converted to special access circuits. Without the transition period the Commission anticipated, all parties are likely to waste resources swapping circuits back and forth between special access services and UNEs.

In certain circumstances, the absence of an appropriate transition is likely to also result in significant stranded capital. In particular, where current special access circuits consist of multiple legs at the same capacity level, and a carrier converts fewer than all the legs to UNEs, BellSouth anticipates that it would have to invest in equipment to delineate the UNE portion of the circuit from the special access portion. The capital investment required per circuit would range from $145 for a DSO 2-wire circuit to $668 for a DS3 circuit.[9] Where a state commission determines at the end of its nine-month review that the "UNEs" involved in a conversion of this type did not meet the impairment test, the capital investment already expended to provide the requested portion of the commingled circuit as a UNE will be entirely wasted. Equipment

[9] The particular equipment and expense involved, as well as relevant circuit diagrams are contained in a recent BLS *ex parte*. That *ex parte* is attached to this waiver request.

installed solely for the purpose of delineating the UNE portion of the commingled circuit will serve no purpose in an end-to-end special access circuit.[10]

II. Discussion

Section 1.3 of the Commission's rules, as well as settled case law, recognizes that the Commission has authority to grant a request for waiver of its rules for good cause shown.[11] There is good cause for a limited and temporary waiver to ensure that the revised EEL requirements are implemented in the time period the Commission contemplated.

The Commission specified that a "transition period of nine months will ensure an orderly transition" to the new rules established in the *TRO*.[12] Although the Commission arrived at the nine-month period in part based on the statutory timeline for the arbitration process, it noted that the nine-month period "provides good guidance" where voluntary agreements are arrived at under "change of law provision[s]."[13] Further, the Commission noted that this nine-month transition was appropriate because it was "reasonably consistent with the transition periods sought by the parties."[14] Perhaps most importantly, a nine-month transition matches up with the nine months that states have to conclude their high-capacity transport and loop impairment cases. Indeed, in its decision on switching impairment, the Commission applied this same logic, finding that "[b]y extending the four-line carve-out on an interim basis, pending such state commission

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10 Choosing not to install the equipment to delineate the end points of the UNE circuit while awaiting the results of the state nine-month review does not appear to be a workable solution. For example, the classification and treatment of such a hybrid circuit under interconnection agreements, tariffs and state performance measurement and performance assurance plans is far from clear.

11 47 C.F.R. § 1.3; *WAIT Radio v. FCC,* 418 F.2d 1153 (D.C. Cir. 1969).

12 *TRO*, 18 FCC Rcd at 17405, ¶ 703.

13 *Id.* ¶ 704.

14 *Id.* ¶ 703.

action, we seek to avoid service disruptions that may result from expanding and then possibly reducing the eligibility for local circuit switching in this manner."[15]

The orderly and efficient transition to the revised EEL requirements that the Commission anticipated occurring over a nine-month period is threatened in those circumstances where contract renegotiation proceeds significantly faster than the Commission contemplated. Indeed, negotiations over modifying interconnection agreements to incorporate the revised EEL requirements have proceeded very quickly in BellSouth's region. As of January 21, 2004, BellSouth and CLECs had signed 50 of these agreements.[16] Under these agreements, carriers may now place orders for EELs under the revised EEL requirements established in the *TRO*. These orders are likely to occur well before the nine-month transition period is over.[17] As noted above, the Commission anticipated that a nine-month transition period was appropriate for the transition to the revised *TRO* EEL requirements regardless of whether interconnection agreements are arbitrated or modified under change of law provisions.[18]

The waiver BellSouth seeks would allow it to hold requests from carriers under the new EEL requirements until the relevant state commission completes its determination of the routes and customer locations where high-capacity UNEs will continue to be available. This waiver would apply only where and to the extent that carriers execute interconnection agreements

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15 *Id.* at 17313, ¶ 525.

16 All but a few of BellSouth's interconnection agreements contain provisions for a 90-day interval for modification based on change of law.

17 A number of additional agreements are likely to be signed over the next several weeks. These agreements are also likely to result in orders well before the transition period the Commission contemplated.

18 The Commission's decision to treat both arbitrated and voluntarily negotiated agreements similarly makes sense. A different decision may have done little but create incentives to arbitrate.

incorporating the *TRO*'s revised EEL requirements before state commissions complete their UNE loop and transport reviews.

There is good cause for granting this limited waiver. Grant of this waiver request will result in substantial public benefits. Most importantly, it will ensure that the transition period the Commission and the parties anticipated for orderly and efficient implementation of the *TRO*'s revised requirements occurs in these circumstances that the Commission did not fully anticipate. The benefits of that are substantial. As discussed above, ensuring coordination between the completion of the state transport and loop UNE cases with the ordering and provisioning of EELs (which are high-capacity UNEs) under the revised EEL requirements of the *TRO* will avoid wasting carrier resources. Otherwise, carriers with revised interconnection agreements may order EELs that will quickly cease to be EELs as the underlying UNEs are removed at the conclusion of the state cases. This process of converting to EELs and then flipping back to special access services wastes resources and creates endless possibilities for finger-pointing, neither of which serves the public interest. In the particular situation described above involving multi-leg circuits, failure to grant the waiver is likely to strand substantial capital at a time when the industry cannot afford wasteful investments. Finally, granting the waiver will allow BellSouth the full amount of time that the Commission anticipated to develop the ordering and provisioning processes applicable to the revised EEL requirements.

III. Conclusion

For the foregoing reasons, BellSouth requests that the Commission expeditiously grant its request for a limited waiver of the revised EEL requirements rules established in the *TRO* for a limited time until state commission impairment proceedings within BellSouth's in-region states are completed, and to grant any other relief the Commission deems appropriate.

Respectfully submitted,

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Date: February 11, 2004

CERTIFICATE OF SERVICE

I do hereby certify that I have this 11th day of February 2004 served the parties of record to this action with a copy of the foregoing **PETITION FOR WAIVER** by electronic filing addressed to the parties listed below.

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