

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 in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	

**OPPOSITION OF AT&T CORP.  
TO BELLSOUTH PETITION FOR WAIVER**

Pursuant to the Commission's Public Notice, DA 04-404, released February 18, 2004, AT&T Corp. ("AT&T") submits this opposition to the Petition for Waiver ("Petition") filed by BellSouth Telecommunications, Inc. ("BellSouth") on February 11, 2004.

**INTRODUCTION AND SUMMARY**

In the *Triennial Review Order*,<sup>1</sup> the Commission relaxed certain restrictions on the use of the UNE combinations known as "EELs," paving the way for competitive carriers to substitute cost-based UNE combinations for a small minority of the monopoly-priced special access circuits that they purchase from incumbent LECs. In *USTA II*, the D.C. Circuit rejected the incumbent LECs' legal challenges to the new EELs rules. Indeed, the court ruled that the Commission had failed to provide a valid legal justification for *any* EELs restrictions. But in a

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<sup>1</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-337 et al., Report and Order and Order on Remand, 18 FCC Rcd. 16978 (2003) ("*Triennial Review Order*"), *rev'd in part*, *USTA v. FCC*, Nos. 00-1012 et al. (D.C. Cir., March 2, 2004) ("*USTA II*").

great windfall to BellSouth and other incumbent LECs, the court left the new EELs rules in place while the Commission reconsiders them on remand.

In the guise of a “waiver” request, BellSouth now asks the Commission selectively to override the change of law provisions in its many interconnection agreements where the normal operation of those agreements would allow competitive local exchange carriers (“CLECs”) to take advantage of the EELs conversions that are plainly authorized under the *Triennial Review Order* rules that were issued *nearly seven months ago* and that the court of appeals left in place. In BellSouth’s view, it should not be required to make *any* EELs conversions until state commissions complete high capacity loop and transport impairment proceedings. The Petition is baseless and must be denied.

BellSouth’s claimed justification for its waiver request – that “the contract negotiation process has proceeded much faster in its region than anticipated by the” Commission in the *Triennial Review Order* – is a complete fabrication. Unlike other rules promulgated in the *Triennial Review Order*, the Commission made the new EELs rules effective immediately. And the Commission nowhere suggested that it expected the parties to delay in any manner complying with contractual provisions to reform existing interconnection agreements to reflect the new rules. To the contrary, in rejecting BellSouth’s earlier plea for “the extraordinary step of the Commission interfering with the contract process,” *Triennial Review Order* ¶ 701, the Commission set an *outside* limit of 9 months on contract renegotiations, expected negotiations to “commence immediately,” and expressly “admonish[ed] all parties to avoid gamesmanship” that might *delay* implementation of the new rules. *Id.* ¶¶ 703-06 (any delay “will have an adverse impact on investment and sustainable competition in the telecommunications industry”). BellSouth’s Petition is just such gamesmanship, and the only Commission action that it could

properly trigger is “a finding of bad faith” by BellSouth. *Id.* ¶ 706 (“Once the rules established herein are effective, and any applicable change of law process has been triggered, a party’s refusal to negotiate (or actions that would otherwise delay unnecessarily the resolution of) any single issue may be deemed a violation of section 251(c)(1)”). In this regard, the Petition is just one of many steps BellSouth is taking unreasonably to delay its obligations to comply with the Commission’s EELs rules – including, for example, refusing to agree to modify its interconnection agreement with AT&T to include the same EELs language that BellSouth volunteered in an SGAT and claims is compliant with the *Triennial Review Order*.<sup>2</sup>

There is no possible basis for the selective delays that BellSouth seeks here. Most of the *Triennial Review Order* rule changes, of course, favored BellSouth and other incumbents. BellSouth wasted no time in invoking interconnection agreement change of law provisions to take advantage of those changes. BellSouth cannot seriously expect to have it both ways – demanding prompt modification of agreements to reflect changes in law that it likes, but seeking the Commission’s blessing to refuse to comply with the changes in law that it does not like. This is particularly true given that BellSouth is now urging state commissions not to proceed with the state impairment proceedings that BellSouth contends here must be completed before BellSouth should incur any obligation to comply with the Commission’s new EELs rules. Although BellSouth purported to justify its waiver request on a need for “a nine month transition period” before converting EELs, Petition at 6, that period has now almost passed, and, if BellSouth’s views prevail, a waiver could have the effect of stopping all EELs conversions *indefinitely*. That would be an indefensible outcome. Indeed, as the Commission recognized in the *Triennial Review Order* the old EELs rules that the Commission replaced were not operating as the

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<sup>2</sup> See March 4, 2004 Letter from N. Bracy (BellSouth) to R. Stevens (AT&T) (attached).

Commission intended and were preventing CLECs from purchasing EELs even in circumstances in which the Commission had fully intended since 1996 that EELs be available. Thus, contrary to BellSouth's suggestions, there has already been far *too much* delay. Given that CLECs still do not have access to EELs that should have been available years ago, it is plainly the CLECs, not BellSouth and the other incumbents, that are the aggrieved parties here.

BellSouth's speculation that transport and high capacity loops may be de-listed on some routes in some parts of some states plainly cannot justify the blanket waiver it seeks here. All manner of future events *may* occur that could affect entitlements under interconnection agreements, including stays, higher court decisions, and state commission decisions applying federal or state law to require additional unbundling. But BellSouth and other parties to interconnection agreements were fully aware of such possibilities when they *agreed* to the orderly change of law processes that BellSouth now asks the Commission selectively to override.

In all events, BellSouth's Petition rests on a series of gross exaggerations. BellSouth claims that it has completed renegotiation of many contracts in its region. In fact, BellSouth is still in the process of renegotiating many of its largest agreements, including those with AT&T (and, as noted, BellSouth still refuses to agree to use its own SGAT EELs language that it concedes complies with the *Triennial Review Order* in its interconnection agreements with AT&T). BellSouth claims that it has sought de-listing of transport on hundreds of important routes. In fact, as detailed below, BellSouth has not even attempted the required showings on the vast majority of those routes, and the threat of substantial number of "reconversions" is thus nonexistent. BellSouth claims that it could incur massive "stranded costs" and other "inefficiencies" to the extent UNEs are de-listed on some routes and reconversions do become necessary. In fact, the Commission's new rules render EELs conversions a simple process; in

most cases only a billing change is required, and even in the small minority of cases in which UNE modifications may be required, they are expressly contemplated by the Commission rules upheld by the D.C. Circuit.

## DISCUSSION

BellSouth has not remotely met the stringent standards for a waiver of the Commission's rules. Indeed, BellSouth is not really requesting a "waiver" of any FCC rule at all. BellSouth's obligation to convert special access to UNEs arises from its *contracts* with competitive LECs. Thus, what BellSouth actually seeks is an order from the Commission authorizing BellSouth to *abrogate* those contracts. As BellSouth notes, the Commission decided in the *Triennial Review Order* (at ¶¶ 701-05) that the transition to the new regime would be accomplished solely through the negotiation of interconnection agreements, principally by operation of the change of law provisions in BellSouth's existing interconnection agreements. BellSouth's request for a "waiver" is actually a request to override the Commission's *Triennial Review Order* and BellSouth's own interconnection agreements.

BellSouth's existing interconnection agreements, including their change of law provisions, have been approved by the state commissions and have been found to be in the public interest as a matter of federal law. 47 U.S.C. § 252(c) & (e). Those contractual provisions are binding independent of any Commission rule, and can be abrogated only on direct appeal pursuant to § 252(e)(6). The Commission certainly cannot abrogate these contracts by "waiver"; the FCC's waiver rule (47 C.F.R. § 1.3) applies only to the "provisions of this chapter" (*i.e.*, the FCC's formal rules). A waiver would be ineffective because these contracts have independent legal force. There is thus no conceivable legitimate basis for a Commission order directing competitive LECs, in contravention of express contractual rights that have already been invoked

– and, in some cases, have already been reduced to new binding contractual commitments – to accede to BellSouth’s attempts to renege on its contractual commitments.<sup>3</sup>

In any event, BellSouth has not demonstrated any “special circumstances” that would render application of the Commission’s transitional policy here contrary to the public interest. See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969). The Commission stressed in the *Triennial Review Order* that it wanted its new rules implemented as quickly as possible, and it fully understood that there could be a mismatch between the timing of the renegotiation of interconnection agreements and the nine-month review of network elements to be conducted by the states.

The Commission explained that “we find that delay in the implementation of the new rules we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry,” and it therefore established a default rule deeming the effective date of the Order as a request for renegotiation, “to ensure that there is no undue delay in commencing the renegotiation of interconnection provisions.” *Triennial Review Order* ¶ 703; see also *id.* ¶ 704 (negotiations under change of law provision should also begin

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<sup>3</sup> Indeed, BellSouth itself has conceded that if the Commission does have authority to abrogate interconnection agreements, it could only be done through formal action under the *Sierra-Mobile* doctrine. See Letter from Michael Kellogg (for BellSouth, SBC, and Qwest) to Marlene Dortch (FCC), dated January 21, 2003 (citing *FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956), and *United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956)). The *Sierra-Mobile* doctrine, however, applies only where a federal agency has plenary authority over the contracts, and it permits abrogation only where changed circumstances have rendered those contracts no longer in the public interest. *Sierra*, 350 U.S. at 355; *Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987). BellSouth can show neither: the state commissions, not the FCC, obviously have principal jurisdiction over approved interconnection agreements under § 252, and BellSouth can point to no changed circumstances since the *Triennial Review Order* that would render these change of law provisions contrary to the public interest. Indeed, the Commission itself has acknowledged that the *Sierra-Mobile* doctrine likely does not apply to § 252 interconnection agreements at all. See, e.g., *Triennial Review Order* ¶ 701 & n.2083.

“immediately”). With respect to EELs and commingling specifically, the Commission expressly concluded that “billing and operational issues . . . do not warrant a permanent commingling restriction, but instead can be addressed through the same process that applies for other changes in our unbundling rules adopted herein, *i.e.*, through change of law provisions in interconnection agreements.” *Triennial Review Order* ¶ 583. Recognizing that some new agreements would be submitted for arbitration under § 252, the Commission grudgingly accepted nine months only as a “statutory maximum transition period.” The Commission made clear its expectation that many (if not most) new agreements would be executed well before that nine-month maximum. Ironically, BellSouth itself (along with the other Bells) argued that the Commission should override the § 252 process altogether and order an *immediate* flashcut to the new rules; the Commission declined only because it believed such a flashcut might violate § 252. *Id.* ¶ 701 & n.2085.<sup>4</sup>

Moreover, the *Triennial Review Order* and *USTA II* make clear that the requested conversions are long overdue. In 2000, when the Commission first adopted restrictions on the use of EELs, it also adopted certain “safe harbors” that were meant to ensure that competitive LECs could obtain EELs when providing a significant amount of local service. As the Commission acknowledged in the *Triennial Review Order* (¶¶ 596, 614), the safe harbors were so cumbersome that they effectively precluded any access to EELs, even in circumstances in which the Commission had found such access to be appropriate and desirable. *See also USTA II*,

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<sup>4</sup> When the Commission wanted to avert a mismatch, it knew how to do so, as it did with enterprise switching. *See Triennial Review Order* ¶ 525 (preserving old four-line rule pending new determinations, to take place within 90 days). *See also* Letter from Michael Kellogg (BellSouth) to Marlene Dortch (FCC), dated January 21, 2003 (arguing that the Commission “should make clear that change-of-law (or other) provisions in an interconnection agreement cannot be used to impede or negate changes to the national UNE regime adopted by the Commission in this proceeding”).

slip op. at 55 (the Commission “abandoned the safe harbor approach, agreeing with the CLECs that this regime had proved intrusive, unworkable, and subject to abuse by the ILECs”). The Commission also expressly found that the availability of EELs is necessary to promote facilities-based competition and innovation. *Triennial Review Order* ¶ 576. Although the Commission attempted to maintain some use restrictions on EELs in the *Triennial Review Order*, the D.C. Circuit struck down the legal basis for those restrictions (*i.e.*, the “qualifying services” distinction), and the court explained that the Commission could maintain access to EELs on remand. *See USTA II*, slip op. at 32-33, 56-59. Competitive LECs have been waiting for over *four years* to be able to obtain access to EELs in appropriate circumstances, and the Commission should not prolong that wait any longer.

And BellSouth’s own actions ensure that competitive LECs would continue to wait indefinitely, rather than the “limited and temporary” period that BellSouth suggests. Petition at 5. While BellSouth is asking this Commission to permit it to renege on its contracts only pending the outcome of the state commission unbundling determinations, BellSouth is now asking the state commissions in its region to hold those proceedings in abeyance indefinitely (and many have agreed to do so). A “waiver,” therefore, would be tantamount to an indefinite suspension of BellSouth’s obligations to provide EELs, which would be palpably contrary to the public interest. Indeed, if anything, the suspension of the state proceedings largely negates the premise of BellSouth’s request; with the proceedings held in abeyance, the possibility that the EELs converted pursuant to these agreements will “quickly cease to be EELs” has now largely vanished.

It is important to underscore that BellSouth’s obligations to provide unbundled access to enterprise loops and dedicated transport are likely to continue notwithstanding the D.C. Circuit’s

recent decision in *USTA v. FCC*, Nos. 01-1012 *et al.* (D.C. Cir., March 2, 2004) (“*USTA IP*”). The D.C. Circuit did not vacate the Commission’s rules requiring access to enterprise loops, nor did the court vacate the Commission’s rules requiring incumbents to convert special access circuits to UNEs and to permit commingling of UNEs with access services. *See USTA II*, slip op. at 54-59, 61-62. Accordingly, the court’s decision by its terms permits competitive LECs to convert special access channel terminations to unbundled loops where appropriate, and to commingle those UNEs with special access dedicated transport services. More fundamentally, however, the D.C. Circuit’s *USTA II* decision may be stayed (and, ultimately, overturned). And even in the absence of a stay, state commissions would likely continue to require access to enterprise loops and dedicated transport under their own authority given the impairment that plainly exists with respect to all but the highest capacity circuits. For these reasons, BellSouth’s unbundling obligations will likely continue.

BellSouth’s factual claims are also grossly overstated, in several respects. BellSouth complains that converting special access to UNEs will lead to “waste[d] resources” and “stranded costs” if those EELs must be “re-converted” back later. These claims are baseless. The Commission’s twin decisions to permit commingling but to prohibit ratcheting together have the effect of eliminating almost all of the costs of converting special access to UNEs. *See Triennial Review Order* ¶¶ 581 (ban on commingling necessitated enormous costs and parallel CLEC networks to accomplish conversions) & 582 (evidence suggested that ratcheting would have required “substantial changes to the incumbents’ billing systems and operational procedures”). BellSouth offers no evidence whatsoever of the costs of conversion in the typical case, and that is because the reality is that in most cases converting special access to UNEs requires only a simple billing change.

BellSouth's further claim that conversions will lead to "stranded costs" is limited to the situation where "current special access circuits consist of multiple legs at the same capacity, and a carrier converts fewer than all the legs to UNEs," by which BellSouth apparently means certain unusual configurations of commingling. *See* Petition at 4. BellSouth claims that, in order to "delineate the endpoints of the UNE circuit" (*id.* at 5 n.10), BellSouth would have to deploy certain equipment (such as DSX panels and frames, cross-connects, and cable racks and repeaters). These claims are baseless. There is no technological difference between the facilities used to provide special access and EELs. Converting the circuits, identifying the UNEs, and monitoring performance all require only database changes, not physical work, and BellSouth's claims to the contrary are false. In the rare instance in which physical work is required to perform the conversion, the necessary DSX panels and frames and other equipment usually are already deployed in the central offices where BellSouth is providing special access (because the relevant central office already contains collocations).

Finally, even if the state commissions continued the unbundling proceedings, it is unlikely that very many EELs would be de-listed. For example, in Florida (the largest state in BellSouth's region), BellSouth currently claims that 449 transport routes meet the Commission's triggers for de-listing. BellSouth has acknowledged in the Florida UNE proceeding, however, that there are a total of 4,800 transport routes in Florida.<sup>5</sup> Similarly, BellSouth has argued that 79 customer locations in Florida satisfy the triggers for de-listing enterprise loops – out of a total of 25,000 high capacity loop locations in Florida.<sup>6</sup>

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<sup>5</sup> Direct Testimony of Shelley W. Padgett, p. 3 (December 22, 2003).

<sup>6</sup> *Id.*, p. 3.

And BellSouth has not demonstrated that even this small number of routes actually satisfy the triggers. For example, for dedicated transport, in the majority of cases BellSouth's evidence consists of point-to-point "routes" *assumed* to exist because CLECs have deployed collocations in the central offices on both ends of the route that happen to have fiber running into them. The Commission's rules make clear, however, that a transport route is defined as a "*connection* between [ILEC] wire center or switch 'A' and [ILEC] wire center or switch 'Z,'" and that for purposes of the triggers "the competitive providers *must offer service connecting wire centers 'A' and 'Z,'*" even if they do not use the exact network path that the incumbent uses. *Triennial Review Order* ¶ 401 (emphasis added). Most CLECs use SONET rings to collect traffic from various central offices and haul such traffic back to the CLEC's POP; they do *not* carry traffic *between* wire centers A and Z, nor do they offer such carriage to others. For these and numerous other reasons, BellSouth's submissions in the state proceedings only rarely demonstrate that the Commission's triggers for de-listing are satisfied.

### CONCLUSION

For the foregoing reasons, BellSouth's Petition for Waiver should be denied.

Respectfully submitted,

/s/ David L. Lawson

David L. Lawson  
James P. Young  
SIDLEY AUSTIN BROWN & WOOD LLP  
1501 K St., N.W.  
Washington, D.C. 20005  
(202) 736-8000

Leonard J. Cali  
Lawrence J. Lafaro  
Stephen C. Garavito  
AT&T CORP.  
One AT&T Way  
Room 3A214  
Bedminster, NJ 07921  
(908) 532-1850

March 19, 2004

**CERTIFICATE OF SERVICE**

I hereby certify that on this 19th day of March, 2004, I caused true and correct copies of the forgoing Opposition of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: March 19, 2004  
Washington, D.C.

/s/ Peter M. Andros

Peter M. Andros

**SERVICE LIST**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Room CY-B402  
Washington, D.C. 20554<sup>7</sup>

Qualex International  
Portals II  
445 12<sup>th</sup> Street, SW, Room CY-B402  
Washington, D.C. 20554

Janice Myles  
Wireline Competition Bureau  
445 12<sup>th</sup> Street, SW  
Room 5-C327  
Washington, D.C. 20554

Stephen L. Earnest  
BellSouth Telecommunications Inc.  
675 West Peachtree Street, NE  
Suite 4300  
Atlanta, GA 30375-0001

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<sup>7</sup> Filed electronically via ECFS

**Attachment**

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**BellSouth Interconnection Services**

675 W. Peachtree Street, NE  
34S91  
Atlanta, Georgia 30375

Nicole Bracy  
(404) 927-7596  
FAX (404) 529-7839

**Sent Via E-mail and U.S. Mail**

March 4, 2004

Ms. Roberta Stevens  
Local Services and Assess Management  
AT&T  
567 Cascade Dr  
Lilburn, GA 30047

Re: Amendment Requests

Dear Roberta:

This is in response to your e-mail dated February 23, 2004, regarding AT&T's and TCG's request to adopt Section 1.9, Commingling of Services, from the BellSouth Statement of Generally Acceptable Terms (SGAT) for the states of Florida and Georgia, pursuant to Section 5.1 of the General Terms and Conditions of the current Interconnection Agreements.

The SGATs for Florida and Georgia are pending approval from the Public Service Commissions (PSC). Once the SGATs have been approved or become effective, they will be available for adoption. However, your request to adopt only the commingling provisions from the SGAT is neither compatible with AT&T's and TCG's current provisions in the Interconnection Agreements, nor is it compatible with current law. Consistent with the Federal Communications Commission's (FCC) Triennial Review Order (TRO), all other TRO related provisions should accompany the commingling provisions. AT&T and TCG are also requesting to delete the safe harbors for special access conversions. Again, this is not consistent with the TRO.

Furthermore, the Parties are negotiating the exact provisions in their current negotiations that AT&T and TCG are requesting. BellSouth finds the requests duplicative in nature, and therefore, respectfully denies AT&T's and TCG's requests.

Sincerely,

Nicole Bracy  
Manager, Interconnection Services