

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

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

OPPOSITION OF MCI TO BELLSOUTH'S PETITION FOR WAIVER

Pursuant to the Public Notice released by the Federal Communications Commission (FCC) on February 18, 2004,¹ WorldCom, Inc., d/b/a MCI (MCI) submits this opposition to BellSouth's petition for waiver filed in the above-referenced proceedings.²

I. INTRODUCTION

BellSouth seeks a waiver of the FCC's rules requiring it "to process orders under the revised commingling and service eligibility requirements," including the duty to provide enhanced extended loops (EELs) to requesting carriers.³ BellSouth seeks this

¹ *Pleading Cycle Established for Comments on BellSouth's Petition for Waiver*, Public Notice, 19 FCC Rcd 2760 (2004) (DA 04-404).

² BellSouth Telecommunications, Inc., Petition for Waiver, CC Dkt. Nos. 01-338, 96-98 & 98-147 (Feb. 11, 2004) (BellSouth Petition)

³ BellSouth Petition at 1. BellSouth refers to these revised commingling and service eligibility requirements as the "EELs requirements." It is unclear from the petition whether BellSouth's waiver request is limited to requests for loop-transport combinations

waiver “because the contract negotiation process has proceeded much faster in its region than anticipated.”⁴ Thus BellSouth, a party that has repeatedly argued in favor of commercial negotiations over regulatory intervention, now asks the Commission to intervene and override such private dealings in an instance where BellSouth is unhappy with the rapid pace of the negotiations. Specifically, BellSouth asks that the FCC waive its EELs requirements and allow BellSouth to “hold” competitive carriers’ requests for EELs until each relevant state commission completes its granular review of unbundled high-capacity loops and transport,⁵ which the petition states will occur by July 2, 2004.⁶

As explained more fully below, BellSouth’s petition suffers from several flaws, and should be denied. BellSouth (1) fails to account for significant changes in the relevant facts; (2) improperly attempts to draw a connection between the transition period for the FCC’s new EELs rules and the timeframe for state impairment proceedings; (3) overstates the impact of the conversions being sought; and (4) seeks relief that is broader than necessary to meet its ostensible concerns. Accordingly, the Commission should reject BellSouth’s request and require the company to honor its obligations to provide EELs to requesting carriers and to process orders for commingled loops, as required by the FCC’s rules.⁷

(EELs), or also extends to BellSouth’s obligation to process orders for commingled loops (*i.e.*, unbundled loops commingled with special access multiplexing), which are not subject to the FCC’s service eligibility criteria. *See* 47 C.F.R. § 51.318(b). In either case, MCI opposes the waiver request in its entirety.

⁴ BellSouth Petition at 1.

⁵ *Id.* at 6.

⁶ *Id.* at 3.

⁷ *See* 47 C.F.R. §§ 51.315, 51.316, 51.318; *see also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, *as*

II. DISCUSSION

A. The FCC Should Dismiss BellSouth's Petition as Procedurally Defective

The FCC should dismiss BellSouth's petition because the factual premise upon which the petition relies has changed so significantly. BellSouth seeks to reassure the Commission that the requested waiver is "limited" because state commissions will decide the relevant impairment cases by July 2, 2004.⁸ However, since filing its petition with the FCC, BellSouth has asked the state commissions in its region to suspend these impairment proceedings⁹ in the aftermath of the D.C. Circuit's recent opinion in *USTA v. FCC*.¹⁰ Florida, Georgia, Kentucky, Louisiana, and Mississippi have suspended all or part of their *UNE Triennial Review Order* related proceedings.¹¹ BellSouth, however, has not sought to amend its petition, even though it is asking for relief based on facts that it knows are no longer accurate. The Commission therefore should dismiss BellSouth's petition.

modified by Errata, 18 FCC Rcd 19020, ¶¶ 575-589 (2003) (*UNE Triennial Review Order*).

⁸ BellSouth Petition at 3, 6-7.

⁹ *See, e.g.*, Louisiana PSC Dkt. Nos. U-27571 & U-27572, Comments of BellSouth in Response to March 9, 2004 Order (urging the PSC to suspend proceeding) (Mar. 11, 2004); Tenn. Reg. Auth. Dkt. No. 03-00491, BellSouth's Responsive Comments Regarding Suspension of Proceedings (Mar. 17, 2004); North Carolina Utils. Comm'n Dkt. P-100, Sub 133q and Sub 133s, Comments of BellSouth Regarding Suspension of Proceedings (Mar. 9, 2004); South Carolina PSC Dkts. 2003-326 and 2003-327, BellSouth's Motion to Hold Proceedings in Abeyance (Mar. 17, 2004).

¹⁰ *United States Telecom Ass'n v. FCC*, No. 00-1012 (D.C. Cir. Mar. 2, 2004).

¹¹ *See, e.g.*, Florida PSC Dkt. No. 030852-TP, Order Holding Docket in Abeyance (Order No. PSC-04-0252-PCO-TP) (Mar. 8, 2004); Georgia PSC Dkt. No. 17741-U, Order Suspending Hearings (Mar. 10, 2004); Louisiana PSC Dkt Nos. U-27571 & U-27572, Order Holding Docket in Abeyance (Mar. 15, 2004); Miss. PSC Dkt. No. 2003-AD-714, Order Holding Docket in Abeyance in Light of the March 2, 2004 Order by the United States Circuit Court of Appeals for the District of Columbia (Mar. 9, 2004).

It is unclear from the petition whether BellSouth is asking for a limited waiver until July 2, 2004, or asking that the FCC stay its rules indefinitely. If the former, then the relief requested no longer makes any sense in at least five BellSouth states – Florida, Georgia, Kentucky, Louisiana, and Mississippi – and therefore should not be granted. If the latter, then BellSouth is pursuing a strategy of asking the FCC to allow BellSouth to “hold” competing carriers’ requests for EELs (and possibly for commingled loops) until state commissions have completed their impairment proceedings,¹² while at the same time urging those same state commissions to postpone the very proceedings that BellSouth claims must be concluded before it should have to meet its obligations under the FCC’s rules.¹³ The FCC should not reward such tactics.

B. BellSouth’s Waiver Request Fails on the Merits

Even if the Commission reaches the merits of BellSouth’s petition, it should deny the requested relief. Grant of the requested relief would undermine the Commission’s rules and be inconsistent with the *UNE Triennial Review Order*. In addition, the petition overstates the potential harm to BellSouth and seeks relief that is overbroad.

1. Granting BellSouth’s Request Would Undermine the Commission’s Rules

Although the Commission has the discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest,¹⁴ the waiver sought by BellSouth would not serve the public interest. The Commission found in the *UNE*

¹² BellSouth Petition at 6.

¹³ See *supra* note 9; see also BellSouth Petition at 5 (claiming that the FCC should allow a nine-month transition period primarily because such a transition period “matches up with the nine months that states have to conclude their high-capacity transport and loop impairment cases.”)

¹⁴ *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

Triennial Review Order that “EELs facilitate the growth of facilities-based competition in the local market” and “promote[] innovation.”¹⁵ The Commission also specifically found that it would be contrary to public policy to postpone implementation of the new rules.¹⁶ Granting a waiver is appropriate only where the waiver would not undermine the rules to be waived.¹⁷ In this case, granting BellSouth’s petition would only serve to delay facilities-based competition, thereby depriving consumers of meaningful competitive alternatives and preserving BellSouth’s high-margin special access profits.

2. *BellSouth Improperly Relies on a Non-Existent Connection between the Effective Date of the EELs Requirements and the Completion of State Impairment Proceedings*

BellSouth’s argument that the FCC intended to have a nine-month transition period before the new EELs requirements took effect is simply inaccurate. By its terms, the FCC’s *Order*, including the EELs requirements, took effect 30 days after the *UNE Triennial Review Order* was published in the Federal Register,¹⁸ and have been in effect since October 2, 2003.¹⁹ Nonetheless, BellSouth attempts to import a “transition period” into the Commission’s *Order*, claiming that the FCC “believed” that carriers would have nine months to implement the new EELs-related rules. In support of its claim, BellSouth

¹⁵ *UNE Triennial Review Order*, ¶ 576.

¹⁶ *Id.*, ¶¶ 705-706.

¹⁷ See *WAIT Radio v. FCC*, 418 F.2d 1153, 1157-59 (DC Cir. 1969); see also *AT&T, et al.; Petitions for Waiver of the International Settlements Policy to Change the Accounting Rate for Switched Voice Service With Mexico*, Order, File Nos. ISP-WAV-20020419-00014, *et al.*, DA 04-434, Order at 5 (Int’l Bur., rel. Feb. 20, 2004) (a waiver may be appropriate if “a grant of waiver would not undermine the underlying policy objectives of the rule in question.”).

¹⁸ *UNE Triennial Review Order*, ¶ 830.

¹⁹ 68 Fed. Reg. 52276 (Sept. 2, 2003); see also 68 Fed. Reg. 60993 (Oct. 24, 2003) (providing notice that the FCC had received the necessary approvals from Office of Management and Budget).

points to the FCC's statement that "the statutory maximum transition period of nine months [for resolving interconnection disputes] will ensure an orderly transition to the new rules."²⁰

Putting aside the fact that the quoted language plainly refers to a *maximum* transition period, not a minimum period, as BellSouth seems to suggest, BellSouth's argument completely ignores the context in which the quoted statement was made. The Commission's discussion of a transition period arose in the context of the incumbent local exchange carriers' (LECs') request that the FCC unilaterally change all interconnection agreements to incorporate immediately the changes in law brought about by the *UNE Triennial Review Order*.²¹ The FCC declined the incumbent LECs' request, but it also expressly declined to establish a Commission-mandated transition period.²² Instead, the Commission decided that any transition should be governed by the change-of-law provisions in existing interconnection agreements.²³ Thus, contrary to BellSouth's claims, the FCC did not intend to establish a nine-month transition period for complying with the new EELs requirements.²⁴ Moreover, nowhere in the *UNE Triennial Review*

²⁰ BellSouth Petition at 2, quoting *UNE Triennial Review Order*, ¶ 703.

²¹ *UNE Triennial Review Order*, ¶ 701 (citing letters from BellSouth and other incumbent LECs asking for immediate changes to all interconnection agreements).

²² *Id.*

²³ *Id.*, ¶ 583 ("We expect that change of law provisions will afford incumbent LECs sufficient time to complete all actions necessary to permit commingling."); *id.*, ¶ 701 ("we decline to establish such a transition period and find, instead, that contract arrangements should govern."); *id.* at ¶ 703 (finding that delay in implementation of the new rules would be harmful and providing that the effective date of the rules "shall be deemed the notification or request date for contract amendment negotiations"); *see also id.* at ¶ 705.

²⁴ Although the FCC referred to section 252(b) as a "default timetable for modification of interconnection agreements that are silent concerning change of law and/or transition timing," *UNE Triennial Review Order*, ¶ 703, it clearly envisioned that such

Order did the FCC draw any connection between the date on which the incumbent LECs must begin providing EELs to requesting carriers and the deadline for completion of state commission impairment proceedings. Thus, the very foundation of BellSouth's petition – *i.e.*, that the FCC intended to delay implementation of the revised EELs requirements until state proceedings on impairment had been completed – is faulty and without basis in the FCC's order.

3. *The Petition Vastly Overstates the Potential Harm to BellSouth*

In its petition, BellSouth overstates both the number of routes and locations that will be affected by state impairment cases, as well as the impact of requested EELs conversions. As BellSouth admits, it is impossible to predict the outcomes of the state impairment proceedings.²⁵ However, it is clear that BellSouth's characterization of those proceedings is wildly inaccurate. First, as noted above, it is now likely that many, if not all, states in BellSouth's region will not complete their impairment analysis by July 2, 2004, as BellSouth assumed in its petition.²⁶ Second, many routes and customer locations will not be subject to dispute. Third, BellSouth overestimates the number of routes likely to meet the transport triggers and the number of customer locations likely to meet the loop triggers. For example, in its petition BellSouth claims that 692 DS3 routes and 648 DS1 routes in Florida meet the transport triggers, 98 customer locations in

modifications would be guided by contractual change-of-law provisions wherever possible. *See id.*, ¶ 700. As BellSouth notes in its petition, “[a]ll but a few of BellSouth's interconnection agreements contain provisions for a 90-day interval for modification based on change of law.” BellSouth Petition at 6 n.16. Thus, the “transition period” for the vast majority of BellSouth's carrier customers should be no longer than 90 days.

²⁵ BellSouth Petition at 3.

²⁶ *Id.*

Florida meet the DS3 loop trigger, and 106 Florida locations meet the DS1 loop trigger.²⁷ Not only are these numbers based on aggressive interpretations of the FCC’s impairment triggers and faulty BellSouth data (assuming, for example, that OCn and DS3 facilities could be channelized to provide lower capacity service, and counting collocation arrangements as satisfying the transport trigger, even where the collocation space may not be connected to fiber facilities), but they are contradicted by BellSouth’s own filings in Florida – filings that predate BellSouth’s FCC petition.²⁸ Florida Competitive Carriers Association (FCCA) (the organization representing competitive carriers in BellSouth’s region) identified only 9 transport routes and 23 loop locations that potentially met the DS3 triggers for transport and loops.²⁹

In addition, BellSouth overstates the resources required to convert special access circuits to EELs. BellSouth bemoans the resources it claims are likely to be wasted if circuits are converted to EELs and then subsequently converted back to special access circuits.³⁰ As the Commission noted in the *UNE Triennial Review Order*, however, converting between special access and UNEs is “largely a billing function.”³¹ Accordingly, the conversion should be a “seamless process”³² and entail very little cost.

²⁷ *Id.* at 3-4.

²⁸ Florida PSC Docket No. 030852-TP, BellSouth Surrebuttal Testimony of Shelley W. Padgett at Exhibits 2, 4, 7 and 9 (Feb. 4, 2004) (claiming 508 DS1 routes and 389 DS3 self-provisioned routes meet the transport triggers, and claiming 68 DS1 locations and 74 DS3 self-provisioned locations meet the loop triggers).

²⁹ Florida PSC Docket No. 030852-TP, FCCA Surrebuttal Testimony of Gary J. Ball at 14 (Feb. 4, 2004).

³⁰ BellSouth Petition at 4, 7.

³¹ *UNE Triennial Review Order* ¶ 588.

³² *Id.*, ¶ 586.

BellSouth's concerns about "stranded capital"³³ are baseless. MCI does not expect to request conversions that require physical network changes. None of MCI's circuits resembles the circuits BellSouth described as requiring capital expenditures.³⁴ As shown in the attached diagrams, MCI's initial conversions will involve (1) commingled loops and (2) DS1 EELs.³⁵ Neither conversion requires physical changes to the network. Thus, BellSouth's claim that it will have to invest in "equipment to delineate the UNE portion of the circuit"³⁶ has no application to the vast majority of conversion requests.

4. The Requested Relief is Overbroad

Even if BellSouth's petition had merit, the relief it seeks is far too broad. BellSouth asks the Commission to freeze all requests for EELs, regardless of where the circuits are located or how they are configured. At a minimum, BellSouth should be required to complete orders for circuits that are located on routes that are not being challenged in a state proceeding, as there is no risk of "re-conversion." In addition, BellSouth should be required either to convert circuits that are provisioned in a manner that requires no physical changes to convert, or, if BellSouth chooses not to incur the minimal costs entailed in converting those circuits that require no physical changes, to issue bill credits for the difference between the special access rate and the UNE rate until the state proceedings are completed. There is absolutely no reason for BellSouth to delay processing requests that meet either of these criteria.

³³ BellSouth Petition at 4.

³⁴ *See id.* at 4 n.9; *see also* "Coordination of Triennial Review Provisions on UNEs and Special Access" at 9-11, attached to letter from Jonathan Banks, BellSouth, to Marlene Dortch, FCC, CC Dkt. No. 01-338 (Jan. 13, 2004).

³⁵ *See* Attachment A.

³⁶ BellSouth Petition at 4.

III. CONCLUSION

For all of the reasons stated above, BellSouth's Petition for Waiver should be denied.

Respectfully submitted,



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Certificate of Service

I, Ruth E. Holder, hereby certify that on this 19th day of March, 2004, I caused true and correct copies of the foregoing Opposition of MCI to BellSouth's Petition for Waiver to be mailed by electronic mail or by first-class U.S. mail, postage prepaid, to:

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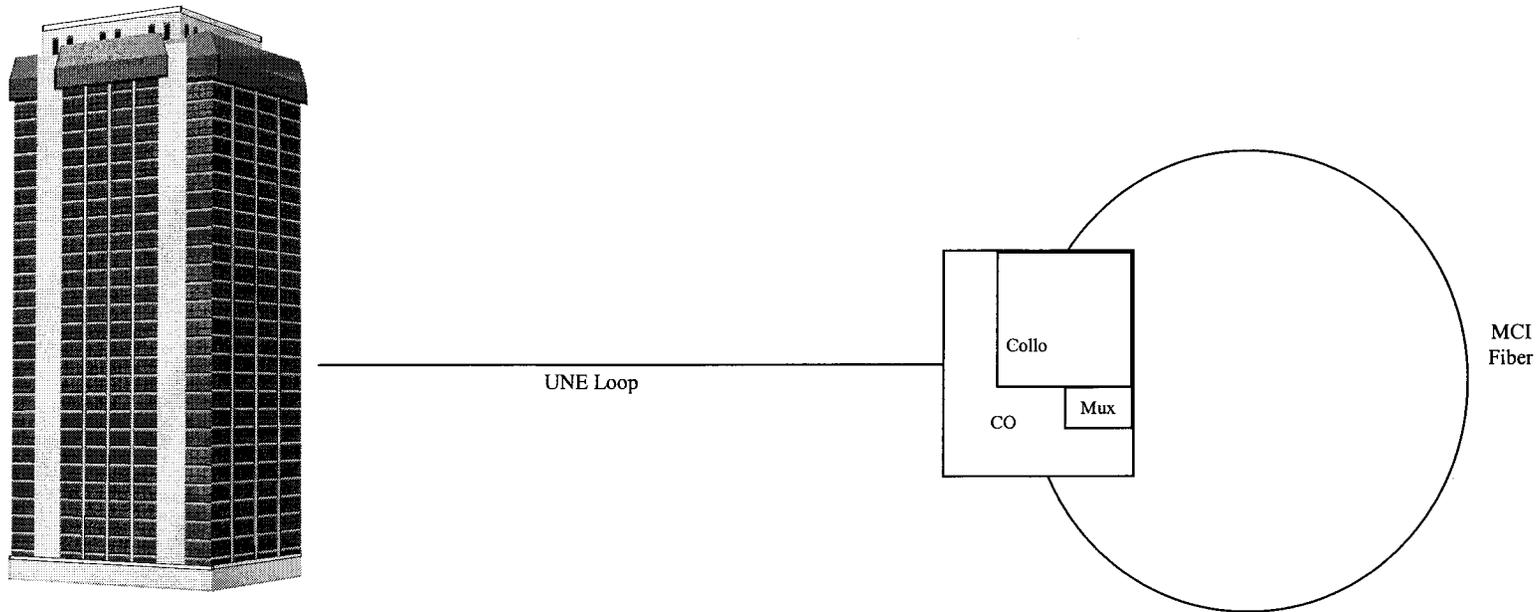


Ruth E. Holder

Attachment A

MCI's Initial Conversions will Involve Commingled Loops

Diagram of a commingled loop arrangement



The conversion from special access to UNEs will not involve any physical changes; only a billing change

MCI will then Convert DS-1 EELs

Diagram of DS-1 EELs

