

**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

BELLSOUTH REPLY

BellSouth Telecommunications, Inc. (“BellSouth”) makes this reply to the oppositions submitted in response to BellSouth’s petition for waiver, filed February 11, 2004, in the above-captioned proceeding.¹ Most of the commenting parties have set forth two arguments: (1) that changes in circumstances, namely the release of the D.C. Circuit’s decision² regarding the *Triennial Review Order*,³ have negated the need for the waiver that BellSouth requested; and (2) the facts do not justify the waiver. As discussed below, however, the need for a waiver is even

¹ *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, BellSouth Telecommunications, Inc. Petition for Waiver (filed Feb. 11, 2004).

² *United States Telecom Ass’n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (“*USTA II*”).

³ *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 (2003) (“*Triennial Review Order*” or “*TRO*”).

more prevalent since the *USTA II* decision and BellSouth has identified particularized circumstances that amply support grant of the petition. Accordingly, BellSouth is deserving of favorable action on its waiver request.

I. THE TRO ONLY INCREASES THE NEED FOR THE WAIVER

As set forth in its Petition, BellSouth filed the request for waiver to address a potentially inconsistent set of timelines between the implementation of various sections of the *TRO*. Specifically, the *TRO*'s implementation process clearly anticipated a nine-month transition period to allow for state proceedings to be completed. The completion of the state proceedings was important because under the *TRO*, states were to determine the routes or locations at which network elements would no longer be available on an unbundled basis. As BellSouth pointed out, without the nine-month transition period it was highly probable that interconnection agreements entered into prior to the completion of those state proceedings would allow for the conversion of certain special access circuits to unbundled network elements ("UNEs") only to have state commissions ultimately determine that no impairment exists for some portion of those circuits and therefore require conversion back to special access. Subsequent to BellSouth filing its waiver, the D.C. Circuit issued *USTA II* vacating significant portions of the *TRO*.

Some commenters contend that the *USTA II* decision changed the circumstances regarding interconnection and the basis of the waiver.⁴ BellSouth does not disagree that *USTA II* changed the landscape surrounding the *TRO*. These changes, however, have created more uncertainty in the market than existed when BellSouth filed the waiver. Indeed, because the *USTA II* decision reversed the *TRO*'s delegation to state commissions to make impairment findings, many state proceedings have been stayed pending further direction from the courts or

⁴ Opposition of MCI to BellSouth's Petition for Waiver at 3 ("MCI Opposition").

the Commission, or both. Some commenters argue that these changes eliminate the need for the waiver that BellSouth requests. On the contrary, the *USTA II* decision has created substantial uncertainty in the market about the rules that govern interconnection, and rather than eliminating the need for a waiver on these matters, it has intensified them. Just as the state proceedings would have caused a seesaw effect with special access conversion, uncertainty regarding the interconnection rules will likely cause the same back and forth conversion process that BellSouth was seeking to avoid, and that the Commission should desire to avoid.

Indeed, until definitive rules are put in place to direct the interconnection process, the industry is operating in a controlled state of chaos. Many variables surround the *USTA II* decision. The court's mandate could issue; the Commission could appeal the court's decision and not seek a stay (or seek a stay and have it denied); or the Commission could appeal the court's decision and have a stay granted.⁵ The industry is greatly affected depending on which avenue the Commission takes. For example, if the court's mandate issues, many of the rules that impact interconnection services related to special access conversion for high capacity loops and transport will be vacated, and it is currently unclear what rules would govern. Moreover, if the Commission appeals the *USTA II* decision and a stay is sought and granted, the *TRO* rules will remain in effect during the appeal process, and presumably, state commission proceedings would begin again. Under either of these situations, a waiver of the commingling rules is warranted in order to avoid situations where circuits are converted from special access to UNEs only to then

⁵ The Commission issued a press release on March 31, 2004 stating that it sent a letter to telecommunications carriers and trade associations urging them to begin a period of commercial negotiations to arrive at commercially acceptable arrangements for the availability of UNEs. The Commission went on to state that it intended to petition the D.C. Circuit for a 45-day extension of the stay of the court's decision vacating the unbundling rules to provide additional time for these negotiations. Thus, even more variables are complicating this matter and contributing to further uncertainty that the Commission recognized has "unsettled the market."

be reconverted once new rules are established or the state proceedings are complete.

Accordingly, the waiver request provides the Commission a vehicle of opportunity to avoid wasted resources in this flip-flop conversion process until some certainty is in place.

II. SPECIFIC ISSUES RAISED IN COMMENTS DO NOT SUBSTANTIATE DENIAL OF THE WAIVER

Several commenters raised specific issues about why the waiver should be denied; however, these same commenters completely ignore the uncertainty created by the *USTA II* decision. As discussed above, it makes no sense to continue to press the implementation of rules that will require the conversion of numerous special access circuits to UNEs when the conversion of those circuits has little chance of being permanent. This is especially when the conversion of these circuits could require spending significant resources to provision on an interim basis. That fact alone justifies granting the waiver; however, BellSouth also responds to the commenters' specific issues.

First, many commenters dispute the amount of resources that will be necessary to convert special access circuits to UNEs. They claim that the conversion is nothing more than a billing change and that no additional resources are necessary. This is simply not true. As BellSouth discussed in an *ex parte* filed on January 7, 2004, capital expenditures will be required in order to implement and complete conversion of many of the special access circuits to UNEs. It is not a single billing change as has been suggested. Moreover, these expenditures are only necessary to complete the conversion process. As BellSouth has discussed, once definitive rules are put in place, such rules will show that no impairment exists on many of these types of circuits. Thus, the circuits will be converted back to special access services and any capital expenditures made for their conversion will be lost.

Second, some commenters claim that this issue is one of BellSouth's own making.⁶ They claim that it was BellSouth who pushed for an amendment of the interconnection agreements to implement the TRO provisions. They go on to argue that if a problem exists it is, therefore, because of BellSouth's own actions. BellSouth, however, was merely following the change of law provisions in its interconnection agreements. There is little doubt that if BellSouth had not moved forward with the amendments, these same CLECs would have accused BellSouth of not negotiating in good faith. BellSouth was, therefore, placed in the untenable position of having to comply with the change of law provisions of the agreements, yet knowing that in many situations circuits might be converted from special access to UNEs prior to the required impairment cases completing in the states.

Third, some commenters claim that BellSouth has overstated the issue in two ways. The first claim is that the routes in question make up a small part of the overall circuits and therefore no waiver is necessary on such a small percentage of total routes.⁷ Their second claim is that BellSouth has over-inflated the number of routes for transport and locations for loops that are subject to the non-impairment triggers.⁸ Their arguments completely miss the point. First, it

⁶ MCI Opposition at 1-2; Opposition of Cbeyond Communications, LLC, *et al.* at 4-5; Opposition of AT&T Corp. to BellSouth Petition for Waiver at 3 ("AT&T Opposition").

⁷ AT&T Opposition at 10.

⁸ NewSouth Communications Corp. and the Competitive Carriers of the South, Inc. Opposition to BellSouth Telecommunications, Inc. Petition for Waiver at 5-6; MCI Opposition at 7. In addition, MCI points out that the number of circuits that BellSouth claims will meet the trigger for non-impairment in Florida does not agree with the testimony BellSouth filed in Florida. In the Petition, BellSouth stated that 106 DS-1 and 98 DS-3 customer locations meet the triggers for loops and that 648 DS-1 and 692 DS-3 routes meet the triggers for transport, and these numbers comport with the direct testimony of Shelley Padgett filed on behalf of BellSouth in Florida Docket No. 030851-TP. Subsequently, in that same proceeding, on February 4, 2004, Ms. Padgett filed surrebuttal testimony that adjusted her previous numbers due to additional information she had obtained through discovery. Ms Padgett's surrebuttal testimony stated that 68 DS-1 and 74 DS-3 customer locations meet the *TRO* triggers for loops, while 508 DS-1 and 550 (MCI incorrectly alleges that the testimony states 389) DS-3 routes meet the transport *TRO*

does not matter what percentage of circuits will be subject to conversion. The fact that resources will be wasted at all on some circuits – a significant number as BellSouth has demonstrated in its *ex parte* and state testimony – justifies the waiver until the industry has certainty around the unbundling and commingling requirements. Second, BellSouth disagrees with commenters who claim that the number of customer locations and routes that meet the loops and transport triggers are less than the numbers BellSouth supplied in testimony in various state proceedings.

BellSouth is confident that its figures are an accurate reflection of the number of loops and transport routes that meet the triggers established by the *TRO*. The mere fact that there is disagreement over the volume of loops and transport routes actually supports granting the waiver. The uncertainty about the quantity of special access circuits that will or will not be eligible for conversion to UNEs or to commingled circuits only intensifies the need for certainty before conversions are required.

triggers. These differences were merely an oversight by BellSouth in using Ms. Padgett's testimony instead of her surrebuttal testimony in drafting the Petition. Regardless, these differences are irrelevant to the fact that the waiver is needed to avoid the flip-flop conversion of special access circuits to UNEs and then back to special access because of the uncertainty surrounding the UNE rules.

CONCLUSION

For the reasons stated in the Petition, and those discussed above, the commission should grant BellSouth's Waiver.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that I have this 5th day of April 2004 served a copy of the foregoing **BELLSOUTH REPLY** by electronic mail and/or by placing a true and correct copy of the same in the United States Mail, postage prepaid, addressed to the parties on the attached service list.

/s/ Lynn Barclay _____

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