Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
BellSouth Emergency Petition for	)	WC Docket No. 04-245
Declaratory Rule and Preemption of	)	
State Action	)	

COMMENTS OF
US LEC CORP. TO
BELLSOUTH TELECOMMUNICATIONS, INC.
EMERGENCY PETITION FOR DECLARATORY RULING
AND PREEMPTION OF STATE ACTIONS

US LEC Corp., on behalf of itself and its subsidiaries[1] (collectively, "US LEC"), respectfully submits its comments to the Emergency Petition for Declaratory Ruling and Preemption of State Actions filed by BellSouth ("Petition") pursuant to the request for comments issued by the Commission on July 6, 2004.[2] Contrary to BellSouth's position, US LEC believes that the Tennessee Regulatory Authority ("TRA") has the authority to regulate and establish pricing for unbundled elements that are required to be offered by BellSouth or other Regional Bell Operating Company ("RBOC") pursuant to Section 271 of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (the "Act"),[3] if the Commission has found that such element is not impaired pursuant to Section 251(c)(3) of the Act.[4]

US LEC provides local exchange services and access services in each of the BellSouth state as well as in the service territories of Verizon, Sprint, Alltel and other

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[1] US LEC of Alabama Inc.; US LEC of Florida Inc.; US LEC of Georgia Inc.; US LEC of Tennessee Inc.; US LEC Communications Inc.; US LEC of North Carolina Inc.; US LEC of Virginia L.L.C.; US LEC of Maryland Inc.; US LEC of Pennsylvania Inc.; and, US LEC of South Carolina Inc.
[2] Public Notice, *Pleading Cycle Established for Comments on BellSouth's Emergency Petition for Declaratory Ruling and Preemption of State Action,* DA 04-2028 (July 6, 2004).
[3] 47 U.S.C. § 271.
[4] 47 U.S.C. § 251(c)(3).

ILECs. US LEC is a facility-based provider and provisions unbundled network elements ("UNE") from BellSouth pursuant to an interconnection agreement with BellSouth for each applicable state.

In its Petition, BellSouth complains that the TRA has no authority to regulate unbundled network elements that a RBOC is required to provide access solely to comply with the checklist items in Section 271, and for which the Commission has made a "no impairment finding" pursuant to Section 251(c)(3) ("271 Elements"). In the context of an arbitration proceeding, the TRA concluded that BellSouth was required to provide access to local switching for customers with more than 4 lines (a 271 Element), set an interim rate for such service, and initiated a generic proceeding to determine a permanent rate. BellSouth asserts that the Commission has exclusive jurisdiction to regulate 271 Elements. It, therefore, petitions the Commission to declare that a state commission has no authority to regulate 271 Elements and seeks the preemption of the TRA's order by the Commission. US LEC disagrees with BellSouth's analysis and asks the Commission to dismiss BellSouth's Petition.

Section 252(a)(1) of the Act[5] provides that once an ILEC receives a request to negotiate for interconnection, services, or network elements pursuant to Section 251 of the Act, it

> may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement.[6]

[5] 47 U.S.C. § 252(a)(1)
[6] Id.

Thus, BellSouth had the discretion to negotiate terms, conditions and pricing for interconnection, services, or network elements even if such negotiations are not mandated by Section 251(b) and (c) and it may agree to terms, conditions and pricing that may be inconsistent with the provisions of 251(b)(c). The section also requires that once such services or elements are within the scope of the negotiations, specific charges for services and/or network elements (again not tying such element to access under Section 251) be included in the agreement.

Further, Section 252 of the Act provides the state commission jurisdiction to resolve any open issues that arise as a result of the negotiations initiated pursuant to Section 251 between the parties.

> A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning – (i) unresolved issues … (iii) any other issue discussed and resolved by the parties." 252(b)(2)(A) "The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).[7]

Thus, in the context of an arbitration proceeding initiated pursuant to Section 252 of the Act, the only restriction on the state commission's jurisdiction is that it may only resolve those issues that are raised in the petition for arbitration or in the response to such petition. Similarly, the Fifth Circuit has held that issues that are voluntarily negotiated by the parties pursuant to Section 252(a) are subject to the compulsory arbitration provision.[8]

BellSouth does not claim that it did not voluntarily engage in the negotiation of the access to the local switching element that it at the heart of its Petition. Nor does it

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[7] 47 U.S.C. § 252(b)(2)

[8] *Coserv v. Southwestern Bell Telephone*, 350 F.3d 482 (5th Cir. 2003)

assert that the issue was not raised as an open issue either in the petition for arbitration or in the response. Consequently, under the statutory language contained in Section 252, the TRA clearly has jurisdiction to resolve the issue and to set the pricing for 271 Elements.

Finally, the Commission has acknowledged that each state commission has an ongoing responsibility to ensure continued compliance by the RBOCs with the 271 checklist after approval of the RBOC's application for long distance authority. The Supreme Court in Iowa Utilities Board also confirmed the dual role of the Commission and the state commissions in pricing network elements:

> [Section] 252(c)(2) entrusts the task of establishing rates to the state commissions….The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.[9]

Thus, this dual role permits the continued jurisdiction of the TRA and other state commission's over 271 Elements that BellSouth and other RBOCs are mandated to provide access to maintain compliance with the conditions placed on them by 271 to enjoy the privilege of providing long distance services.

[9] Iowa II, 525 U.S. at 384

Accordingly, the Commission should dismiss the Petition and permit TRA to exercise its jurisdiction over the matter.

Respectfully submitted,

US LEC CORP.

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