

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of

Unbundled Access to Network Elements)	CC Docket No. 04-313
)	
Review of the Section 251 Unbundling)	CC Docket No. 01-338
Obligations of Incumbent Local Exchange)	
Carriers)	

**OPPOSITION OF BELL SOUTH CORPORATION AND SBC COMMUNICATIONS
INC. TO PETITION FOR EMERGENCY CLARIFICATION AND/OR ERRATA**

BellSouth Corporation and SBC Communications Inc., for themselves and their wholly owned affiliated companies, oppose the “Petition for Emergency Clarification and/or Errata” filed in this docket on August 27, 2004.¹ Although couched as an attempt to correct “obvious oversight and error” in the *Order and Notice of Proposed Rulemaking* released by the Federal Communications Commission (“Commission”) on August 20, 2004,² the Petition does no such thing. Instead, the Petition seeks to alter the balance the Commission attempted to strike in the interim pending the development of lawful unbundling rules. Accordingly, and for the reasons explained below, the Commission should deny the Petition.

¹ The Association for Local Telecommunications Services, Alpheus Communications, LP, Cbeyond Communications, LLC, Conversent Communications, LLC, GlobalCom, Inc., Mpower Communications Corp., New Edge Networks, Inc., OneEighty Communications, Inc., and TDS, Metrocom, LLC (collectively referred to as “Petitioners”) Petition for Emergency Clarification and/or Errata (Aug. 27, 2004) (“Petition”).

² *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 & CC Docket No. 01-338, *Order and Notice of Proposed Rulemaking*, FCC 04-179 (rel. Aug. 20, 2004) (“*Interim Order*”).

I. ILECs MAY INVOKE CHANGE OF LAW PROCEEDINGS SO THAT NEW RULES MAY BE IMPLEMENTED IMMEDIATELY.

The Commission's *Interim Order* is clear with regards to change of law provisions and, as a practical matter, requires no further clarification of this issue. The Commission established a substantive "interim requirement" that, until six months after Federal Register publication of the *Interim Order* (with three exceptions), incumbent local exchange carriers ("LECs") must continue to provide unbundled access to mass market switching, enterprise market loops and dedicated transport under the rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. During this "interim period" the Commission provided a procedural safeguard to avoid unnecessary delay in implementing either lawful unbundling rules adopted by the Commission or the "default" requirements established for the six months following the "interim period" (the so-called "transition period"):

In order to allow a speedy transition in the event we ultimately decline to unbundle switching, enterprise market loops, or dedicated transport, we expressly preserve incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their governing interconnection agreements. To that end, we do not restrict such change-of-law proceedings from presuming an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements, but under any such presumption, the results of such proceedings must reflect the transitional structure set forth below.³

Petitioners complain about the language that immediately follows the foregoing quoted passage, in which the Commission indicated that "[i]n no instance, however, shall the rates, terms or conditions resulting from any such proceeding take effect before the earlier of (1) Federal Register publication of this Order or (2) the effective date of our forthcoming final unbundling rules." To the extent the Petition is simply arguing that new rates cannot be effective

³ *Id.* ¶ 22.

until six months after publication of the *Interim Order* in the Federal Register, this requirement is already made patently clear by the express language in paragraphs 1, 21 and 29 of the *Interim Order*⁴ and in the context of the language in an additional seven paragraphs in the *Interim Order* itself.⁵ Indeed, in both paragraphs 22 and 23, in which the Commission refers to both change of law provisions as well as publication in the Federal Register without a six-month qualifier, the Commission nevertheless makes clear in the language immediately following that for which Petitioners purport to seek correction or clarification that new rates cannot be effective until six months after publication of the *Interim Order* in the Federal Register.⁶

⁴ See ¶ 1 (“[O]n an interim basis, we require incumbent local exchange carriers (LECs) to continue providing unbundled access to switching, enterprise market loops, and dedicated transport under the same rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. These rates, terms and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or *six months after Federal Register publication of this Order . . .*”) (footnotes omitted, emphasis added); ¶ 21 (“These rates, terms and conditions shall remain in place until the earlier of the effective date of final unbundling rules promulgated by the Commission or *six months after Federal Register publication of this Order . . .*”) (emphasis added); ¶ 29 (“Until the earlier of (1) *six months after Federal Register publication of this Order* or (2) the effective date of the final unbundling rules adopted by the Commission in the proceeding opened by the appended Notice, the interim approach described above will govern.”) (emphasis added).

⁵ See also ¶ 10 (“Thus, we set forth below a plan that (1) ensures continued availability over the next six months of elements provided under interconnection agreements as of June 15, 2004”); ¶ 16 (“[W]e find that the pressing need for market certainty until we issue final unbundling rules warrants the implementation of a plan that will preserve for six months certain obligations as they existed on June 15, 2004”); ¶ 20 (“Our interim requirements will, during the first six months of our year-long plan, maintain existing unbundling obligations”); ¶ 22 (“The fundamental thrust of the interim relief provided here is to maintain the *status quo* in certain respects without expanding unbundling beyond that which was in place on June 15, 2004. This aim would not be served by a requirement permitting new carriers to enter during the interim period.”); ¶ 23 (“Thus, whatever alterations are approved or deemed approved by the relevant state commission may take effect quickly if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order”); ¶ 26 (“[O]ur interim approach, which reserves legal obligations as of June 15, 2004, is superior to the imposition of entirely new interim requirements.”); ¶ 28 (“[T]he Commission . . . is thus limiting the applicability of these interim requirements to only six months.”)

⁶ See ¶ 22 (“We also hold that competitive LECs may not opt into the contract provisions “frozen” in place by this interim approach. The fundamental thrust of the interim relief provided here is to maintain the *status quo* in certain respects without expanding unbundling beyond that which was in place on June 15, 2004. This aim would not be served by a requirement permitting new carriers to enter during the interim period.”); ¶ 23 (“Thus, whatever alterations are approved or deemed approved by the relevant state commission may take effect quickly if our final rules in fact decline to require unbundling of the elements at issue, or if new unbundling rules are not in place by six months after Federal Register publication of this Order”).

To the extent, however, that Petitioners seek through their request to prevent incumbent LECs from initiating or completing change of law proceedings before the end of the six-month period following publication of the *Interim Order* in the Federal Register, their attempt should be rejected by the Commission. The Commission's clear intent was to preserve the *status quo* for a limited period to allow it time to promulgate lawful unbundling requirements, while, at the same time, enabling parties to amend their interconnection agreements immediately pursuant to relevant change of law provisions to remove prospectively any unbundling requirements that are eliminated once the Commission adopts final rules. These amendments may take effect at any time after publication of the *Interim Order* in the Federal Register, but they must, of course, preserve the *status quo* with respect to the "vacated" mass market switching, enterprise market loops and dedicated transport unbundled network elements ("UNEs") for the applicable period set forth in the *Interim Order*.⁷

That is precisely what BellSouth and SBC intend to do. Consistent with the Commission's *Interim Order*, BellSouth will propose that competing local exchange carriers ("CLECs") execute a contract amendment under the applicable change of law provision in their interconnection agreements. The amendment will, among other things: (1) implement the "interim requirement" preserving the *status quo* with respect to mass market switching, enterprise market loops and dedicated transport under the conditions set forth in the *Interim Order*; and (2) incorporate applicable requirements for the "transition period." As contemplated by the *Interim Order*, this amendment should take effect immediately after the *Interim Order* has

⁷ *Id.* ¶¶ 22, 23

been published in the Federal Register.⁸ Similarly, SBC will pursue amendment of its interconnection agreements to bring them into conformity with governing law, subject to the "transition period" set forth in the *Interim Order*, and to prepare them for implementation of the Commission's final unbundling rules, once they are adopted.

Insofar as three months have now elapsed since the Commission decided not to seek certiorari regarding *USTA II* decision and the *Interim Order* has not yet been published in the Federal Register, if anything, the Commission should modify the *Interim Order* to permit the transition period (i.e., the period commencing after the six month interim period) to take effect by a date certain (such as January 15, 2005). In any event, Petitioners should not be permitted to further delay this change of law process. They simply cannot be heard to argue that an existing interconnection agreement cannot be modified under a change of law provision until "six months after" publication of the *Interim Order* in the Federal Register. No correction or clarification that would permit such a result is warranted, as this would in turn create the very delay in initiating procedures necessary to effectuate any change of law that the Commission specifically sought to avoid in paragraphs 22 and 23 of the *Interim Order*.⁹ The Commission established quite clearly that change of law processes can move ahead and be implemented *immediately* so

⁸ The amendment also may include provisions for implementing lawful unbundling rules that either find impairment or fail to find impairment with regard to certain network elements and provisions that address the effect of the *Interim Order* in the event those rules are subsequently invalidated.

⁹ As demonstrated above, *supra* note 3, the Commission was seeking "to allow a speedy transition in the event we ultimately decline to unbundle switching, enterprise market loops, or dedicated transport" and thus "preserv[ing] incumbent LECs' contractual prerogatives to initiate change of law proceedings to the extent consistent with their own governing interconnection agreements." Moreover, elsewhere in paragraph 22, the Commission stated that it did "not restrict such change-of-law proceedings from presuming an ultimate Commission holding relieving incumbent LECs of section 251 unbundling obligations with respect to some or all of these elements," so long as the "results of such proceedings . . . reflect the transitional structure set forth below."

long as they are consistent with the transitional scheme. There is no ambiguity on this point nor is there any error that needs correcting.

Implementing change of law proceedings immediately is consistent with the *Interim Order* provided that any contract amendment made “effective” as of the date of publication of the *Interim Order* in the Federal Register reflects the interim requirements set forth in the *Interim Order* with respect to the availability and pricing of unbundled mass market switching, enterprise market loops and dedicated transport UNEs; the requirements during the Commission’s transition period; and the prompt adherence to whatever lawful new unbundling rules the Commission ultimately establishes. Indeed, the *Interim Order* itself constitutes an event that may trigger change of law provisions in interconnection agreements, depending, of course, on the precise wording of individual agreements. Accordingly, Petitioners’ request for clarification or correction of this issue should be denied.¹⁰

II. ABSENT A LAWFUL IMPAIRMENT FINDING BY THIS COMMISSION, STATE COMMISSIONS MAY NOT LOWER RATES FOR THE ELEMENTS THAT MUST BE PROVIDED PURSUANT TO THE INTERIM ORDER

Petitioners also seek to avail themselves of lower UNE rates for network elements that have never been lawfully determined to satisfy Congress’s impairment test and that ultimately may not have to be unbundled. The CLECs are not entitled to such a windfall while the *status quo* is ostensibly being preserved, and Petitioners’ request for “clarification” of this issue should be denied.

¹⁰ Alternatively, the Commission could clarify that nothing in paragraphs 22 or 23 of its *Interim Order* was intended to conflict with the six-month term of the interim period as established in paragraphs 1, 21 and 29. In so doing, however, the Commission should make clear that under paragraphs 22 and 23 of the *Interim Order* incumbent ILECs are not prevented from initiating or completing change of law proceedings immediately, and the resulting contract amendments may be made effective as of the date of publication of the *Interim Order* in the Federal Register, provided they reflect and comply with the interim requirements regarding new rates.

The FCC's rules requiring incumbent LECs to unbundle mass market switching, enterprise market loops and dedicated transport UNEs have been vacated. There has never been a lawful determination that such network elements must be unbundled, which is required in order for an incumbent LEC to be compelled to offer such elements at TELRIC rates.

Despite the lack of any such finding, in its *Interim Order* the Commission sought to preserve the *status quo* by requiring that incumbent LECs continue to provide during the Interim Period unbundled access to mass market switching, enterprise market loops and dedicated transport under the rates, terms and conditions that applied under their interconnection agreements as of June 15, 2004. The Commission adopted an exception in the event a "state public utility commission order raising the rates for network elements" subsequently takes effect, in which case the higher rates would apply.

Although Petitioners complain that the *Interim Order* will be interpreted to exempt incumbent LECs "from reducing UNE rates if they are mandated by a state Commission," that is the only plausible and defensible interpretation of the *Interim Order*. The Commission has made clear that its *Interim Order* was intended to preserve the *status quo* as of June 15, 2004 by obligating incumbent ILECs to continue providing at TELRIC rates network elements for which there has been no lawful finding of impairment. The result adopted by the *Interim Order* itself gives CLECs much more than that to which they are legally entitled: it imposes the same obligations that have been vacated three times and does so without any attempt to address the significant concerns raised in the D.C. Circuit's decisions. It would be even more inequitable (and unlawful) to allow a CLEC to obtain a network element at a lower TELRIC rate in the absence of any lawful findings of impairment.

Petitioners are mistaken in complaining that “[t]he Commission gave no explanation as to why it did not include language clearly permitting rate reductions as well as rate increases” and that “the exclusion of rate reductions was apparently an oversight.”¹¹ The *Interim Order*’s intent (albeit improper) was to give the CLECs the benefit of the *status quo* before the Commission’s rules were vacated; it is inconsistent with that intent to give CLECs even further benefits in the absence of any lawful impairment finding. Indeed, the *Interim Order* is already inconsistent with established law; it would be even more unlawful if the Commission had prevented states from increasing rates for the elements incumbent LECs are compelled to provide under the terms of the *Interim Order*. For that reason, the Commission carefully preserved state commissions’ ability to impose price increases as well as carriers’ ability to enter into agreements contemplating other pricing arrangements.¹²

The Commission has insisted that the approach in the *Interim Order* is not simply a “mere reinstatement of [its] vacated rules”¹³ and is intended to impose “unbundling obligations that are no greater than the requirements under which incumbent LECs currently operate under – and, in many cases, have voluntarily agreed to continue.”¹⁴ Even assuming that were correct, to allow state commissions to compel a price reduction of vacated UNEs – when the *Interim Order* itself acknowledges that incumbent LECs are permitted to withdraw the affected UNE offerings under the D.C. Circuit’s holding – would constitute a further egregious example of imposing unbundling obligations that are greater than the requirements under which incumbent LECs currently operate.

¹¹ Petition at 3.

¹² *Interim Order*, ¶ 29 & n.69.

¹³ *Id.* ¶ 23.

¹⁴ *Id.* n.61.

If a state commission decides that the rate for a particular network element should be increased based upon a proper application of TELRIC, CLECs are in no position to complain. They still would be able to obtain a network element for which no lawful unbundling determination has been made and to do so at TELRIC rates. Under such circumstances, a CLEC would be no worse off by having to pay a higher TELRIC rate for a particular network element during the Interim Period, regardless of whether that network element is ultimately found to satisfy Congress's impairment standard.

The same cannot be said for the incumbent LECs. If Petitioners' request for clarification were granted, the CLECs would be permitted to pay reduced TELRIC rates during the Interim Period for a network element for which impairment has never been lawfully found and that the Commission may subsequently determine unbundling is not warranted. Under such circumstances, the CLECs would receive a windfall and the incumbent LECs would be further harmed by the continued perpetuation of an unlawful unbundling scheme that the courts have rejected three times. This is because the Commission expressly denied incumbent LECs the opportunity for any "true-up" for those vacated elements provided during the first six-month "interim period" in the event that the Commission determines that a particular network element need not be unbundled under its permanent rules.¹⁵ Thus, the Commission has already struck a balance by keeping current TELRIC UNE rates, but declining to allow incumbent LECs to raise rates above TELRIC levels through the true-up process even if it turns out that rates above TELRIC levels were appropriate in the first place. CLECs should not be permitted further discounts under rules that have been invalidated.

¹⁵ *Id.* ¶ 25.

III. CONCLUSION

The Commission's *Interim Order* requires no further correction or clarification on the issues raised in the Petition. Incumbent LECs may implement change of law provisions immediately, and any resulting contract amendments may become effective anytime after the *Interim Order's* publication in the Federal Register, provided that any post-interim period rates, terms and conditions encompassed by the amendments take effect in accordance with the schedule established by the *Interim Order*. CLECs are not entitled to lower UNE rates for network elements offered during the Interim Period, and any restrictions upon the ability of incumbent LECs to incorporate state-mandated rate increases of network elements would only add insult to injury. Accordingly, the Commission should deny the Petition.

Respectfully submitted,

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Date: September 7, 2004

CERTIFICATE OF SERVICE

I do hereby certify that I have this day of 7th day of September 2004 served the following parties to this action with a copy of the foregoing **OPPOSITION OF BELLSOUTH CORPORATION TO PETITION FOR EMERGENCY CLARIFICATION AND/OR ERRATA** by electronic filing and/or by placing a copy of the same in the United States Mail, addressed to the parties listed on the attached service list.

/s/ Anthony V. Jones
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