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June 15, 2004

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245;

Unbundled Access to Network Elements, WC Docket No. 04-313;

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338

Dear Ms. Dortch:

BellSouth Corporation (“BellSouth”) submits this ex parte to address the Commission’s legal authority to find that: (i) state public service commissions have no jurisdiction to establish rates for network elements that are not required to be unbundled pursuant to Section 251 of the Telecommunications Act of 1996 (“1996 Act”); and (ii) commercial agreements need not be filed with, or approved by, state public service commissions under Sections 251 and 252 of the 1996 Act.¹ Granting such relief is compelled by the language of these statutory provisions as well as Commission precedent and is essential to ensuring that the ILECs’ unbundling obligations are determined by a single federal agency, not 50 separate state commissions.

¹ BellSouth uses the term “commercial agreements” to refer to contractual arrangements voluntarily entered into between incumbent local exchange carriers (“ILECs”) and competing local exchange carriers (“CLECs”) that are not the result of a request for interconnection, services, or network elements pursuant to 47 U.S.C. § 251. Such contractual arrangements typically involve the rates, terms, and conditions for services or facilities to which the Commission has found that CLECs are not impaired without unbundled access under Section 251(c)(3). In addition, “commercial agreements” also include contractual arrangements for any other services or facilities not requested under Section 251, including, but not limited to, requests for services or facilities under Section 271 or Section 211. See Ex Parte Letter from Christopher McKee, Executive Director of Legal and Regulatory Affairs for XO Communications, to Marlene Dortch, Secretary, FCC (May 11, 2005).

It is essential that the Commission resolve these issues sooner rather than later. In connection with generic proceedings intended to implement the *Triennial Review Remand Order*, various CLECs are requesting that state public service commissions in BellSouth's region establish rates for network elements that are not required to be unbundled under Section 251 and order expanded unbundling under the guise of Section 271.² The Commission's resolution of the issues referenced above would provide necessary guidance to the state public service commissions confronting such requests. It also would provide additional incentives for parties to enter into commercial arrangements, which both the Commission and the National Association of Regulatory Utility Commissioners ("NARUC") have encouraged and which are essential to ensuring a competitive marketplace.³

47 U.S.C. § 252

Under the 1996 Act, the state public service commissions' authority to review and approve interconnection agreements and to establish rates for inclusion in such agreements is set forth in Section 252. Importantly, that authority is limited to agreements that result from requests to implement the specific obligations established in Section 251.

In this regard, Section 252(a) is the key provision. By its terms, that provision makes plain that Section 252 applies only to interconnection agreements negotiated after an ILEC receives "a request for interconnection, services, or network elements pursuant to Section 251."⁴ This critical limitation governs all Section 252 obligations. Only agreements that seek "interconnection, services, or network elements" as required pursuant to Section 251" are covered by Section 252. Thus, Section 252(a) states explicitly that *only* these agreements that result from requests to negotiate terms implementing these section 251 requirements -- that is, requests for access "pursuant to section 251" -- "shall be submitted to the State commission" for review and approval under Section 252(e).⁵ Similarly, only those agreements filed pursuant to

² See Ex Parte Letter from Glenn Reynolds, Vice President – Regulatory, BellSouth, to Marlene Dortch, Secretary, FCC (June 10, 2005).

³ Press Statement of Chairman Michael Powell and Commissioners Kathleen Abernathy, Michael Copps, Kevin Martin and Jonathan Adelstein on Triennial Review Next Steps, March 31, 2004 (noting the importance "of commercial negotiations as a tool in shaping a competitive communications marketplace"); NARUC Applauds FCC Efforts to Find Consensus on Competition Rules, March 31, 2004.

⁴ 47 U.S.C. § 252(a)(1). The fact that Section 252(a)(1) provides that such agreements may be negotiated "without regard to the standards set forth in subsections (b) and (c) of Section 251" does not impact the necessary precondition: the request for interconnection must be for network elements and services required under Section 251 of the 1996 Act. If the contract is not requested pursuant to Section 251, Section 252(a)(1) does not apply.

⁵ 47 U.S.C. §§ 252(a)(1) & (e). In addition, a state may only reject an agreement "if it finds that the agreements do not meet the requirements of Section 251." 47 U.S.C. § 252(e)(2)(B).

Section 252(e) are required to be available for public inspection under Section 252(h),⁶ and only such agreements are available to other telecommunications carriers under Section 252(i).⁷

Likewise, a CLEC's initial "request" for an agreement "pursuant to Section 251" triggers the state arbitration period in Section 252,⁸ and only such agreements are available for arbitration by state commissions under Section 252.⁹ And, in arbitrating and approving agreements, the state commission's authority is again tied to implementing Section 251. For instance, state commissions may set rates for interconnection only "for purposes of subsection (c)(2) of section 251" and similarly may establish prices for network elements only "for purposes of subsection(c)(3) of such section [251]."¹⁰ And a state commission may reject arbitrated agreements "if it finds that the agreement does not meet the requirements of section 251 of this title, including the regulations prescribed by the Commission pursuant to section 251 of this title, or the standards set forth in subsection (d) of this section," which in turn establish rates only for facilities and services that must be offered under section 251.¹¹

In short, if the agreement is not requested for network elements and services required "pursuant to section 251," Section 252 by its express terms does not apply. A request "pursuant to section 251" must be for "interconnection, services, or network elements" required to be offered under Section 251. As a result, a CLEC requesting a network element for which the Commission has made a nonimpairment determination would not constitute a request "pursuant to Section 251," since the ILEC is not required to offer that element under Section 251.¹²

Section 252 sets forth the procedures for negotiation, arbitration, and approval of agreements for elements and services required under Section 251. Such agreements may be voluntarily negotiated or arbitrated, and the specific terms of access may differ from those required under the statute and Commission regulations, but in all cases the only agreements subject to Section 252 are, by definition, those that apply to Section 251 elements and services.

⁶ 47 U.S.C. § 252(h) ("A State commission shall make a copy of each agreement approved under subsection (e) ... available for public inspection and copying within 10 days after the agreement or statement is approved").

⁷ 47 U.S.C. § 252(i) ("A local exchange carrier shall make available any interconnection, service, or network elements provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement").

⁸ 47 U.S.C. § 252(b)(1).

⁹ 47 U.S.C. §§ 252(b) & (c).

¹⁰ 47 U.S.C. § 252(d)(1).

¹¹ 47 U.S.C. § 252(e)(2)(B).

¹² 47 U.S.C. § 251(d)(2)(B); *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, ¶ 656 (2003) ("Triennial Review Order"), *vacated in part and remanded*, *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.) ("*USTA IP*"), *cert. denied* 125 S. Ct. 313, 316 (2004).

Subsections (c), (d), (e), and (i) of 252 set forth procedures for handling “the agreements” defined in Section 252, i.e. either negotiated or arbitrated. Because “the agreements” by definition must relate to Section 251 elements and services, it necessarily follows that the subsections of 252 do not apply to agreements that cover non-Section 251 elements and services. Thus, commercial agreements do not need to be filed with or approved by the state commissions under 252(e). Moreover, if the parties are unable to agree on commercial terms, neither party is entitled to invoke the state commission’s authority under Section 252(b) to arbitrate the dispute or to establish rates pursuant to such arbitration.¹³

Any other reading of Section 252 would impermissibly negate the clause “pursuant to section 251.” This clause limits the applicability of the requirements of Section 252 to those agreements entered into pursuant to the requirements of Section 251. Interpreting Section 252 to require that parties to commercial agreements submit such agreements to state commissions for review and approval would impose obligations that Congress did not intend.

47 U.S.C. § 251

The plain language of Section 251 also demonstrates that commercial agreements need not be filed and approved under Section 252. Section 251(c)(1) explains that ILECs have an obligation to negotiate “in accordance with Section 252 the particular terms and conditions of the agreements to fulfill the duties described in paragraphs (1) through (5) of subsection [251] (b) and this subsection [251(c)].”¹⁴ Accordingly, if the agreement does not include the ILEC’s “duties” in Sections 251(b)(1-5) or Section 251(c), it falls outside the ILEC’s duty to negotiate under Section 252 and corresponding Section 252 filing and arbitration obligations.

This conclusion also accords with Congress’s overriding intent in enacting Section 251. Section 251(b) and (c) set forth the provisions that Congress deemed essential to the development of local competition. It would make sense, therefore, that Congress would insist that the terms under which these requirements are met be reviewed by state commissions and provided on a nondiscriminatory basis. Conversely, there is no reason why Congress would subject arrangements for services and facilities that fall outside the scope of Section 251(b) and (c) to the same scrutiny. Since Congress did not deem such arrangements important enough to require negotiation regarding such items in the first place, it would be odd to construe the 1996 Act as requiring state approval of the terms on which such arrangements are provided. Rather,

¹³ Importantly, state public service commissions have no authority to determine whether a particular network element should be unbundled pursuant Section 251. In *USTA II*, the D.C. Circuit confirmed that the responsibility for determining 251 elements rests solely with the Commission. *USTA II*, 359 F.3d 554 at 18 (“[w]e therefore vacate, as an unlawful subdelegation of the Commission’s responsibilities, those portions of the Order that delegate to the state commissions the authority to determine whether CLECs are impaired without access to network elements ...”). Once the Commission has determined that CLECs are not impaired without unbundled access to a network element, the element is not a Section 251 element and, therefore, Section 252 does not apply when a CLEC requests access to that element.

¹⁴ 47 U.S.C. § 251(c)(1).

consistent with Congress's overriding intent to “reduce regulation,”¹⁵ parties must be allowed to contract freely as to those items without state regulatory interference.

47 U.S.C. § 271

Notwithstanding claims to the contrary, Section 271 does not authorize a state public service commission to impose obligations, including rates, for facilities that must be made available solely under Section 271. Section 271 grants no pricing authority to state commissions, and this Commission has never held that state commissions have any such authority for facilities that are not subject to unbundling under Section 251.

Section 271 is clear in authorizing this Commission, not state agencies, to determine whether the requirements of Section 271 have been met. As the statute plainly states, “the Commission shall ... approv[e] or den[y]” an application for in-region, interLATA authority and that the “Commission may” revoke such authority or take other action if it subsequently determines that the Bell Operating Company is no longer in compliance with Section 271’s requirements.¹⁶

Indeed, Congress expressly considered the proper role of the states in the Section 271 process, and it gave them only a limited, advisory role, not the power to impose obligations as a condition of compliance with that statutory section. Under the plain terms of Section 271, the Commission must merely “consult” with the relevant state public service commission before deciding whether to grant an application, and, in contrast to the views of the Attorney General, the Commission need not give the views of that state commission any particular weight.¹⁷ Thus, a straightforward reading of the statute demonstrates that state commissions have no authority to impose obligations under Section 271. In the words of the D.C. Circuit, Congress “has clearly charged the FCC, and *not the State commissions*,” with assessing compliance with Section 271.¹⁸

Although Section 271(c) refers to agreements “approved under section 252,” such language does not purport to grant states authority to set rates. On the contrary, by referring back to Section 252, such language merely confirms that state commissions do not have such authority. Section 252 could not be clearer in limiting state rate-setting authority to network elements that must be unbundled under Section 251(c)(3).¹⁹ This limitation on state rate-setting authority must be given effect. Had Congress wanted state commissions to set rates for network elements that must be unbundled under Section 251 and separately for purposes of ensuring compliance with Section 271, it could easily have said so. It said nothing of the kind. On the

¹⁵ Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56, 56.

¹⁶ 47 U.S.C. § 271(d)(3), (6)(A).

¹⁷ 47 U.S.C. § 271(d)(2)(B).

¹⁸ *SBC Communications, Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998) (emphasis added).

¹⁹ 47 U.S.C. § 252(d)(1) (empowering state commissions to set rates only for “purposes of subsection (c)(3) of such section [251]”).

contrary, Congress enacted a statute that does not mention any authority of a state commission to impose any obligations, much less to set rates, to ensure Section 271 compliance.

Commission Precedent

Commission precedent confirms that commercial agreements entered into for services not required under Section 251 need not be filed with or approved by state public service commissions. For example, in the *Qwest ICA Order*, the Commission found that carriers must file with state commissions only those agreements that “create[] an ongoing obligation *pertaining to* resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation,” *i.e.*, the requirements of Section 251(b) and (c).²⁰ Thus, according to the Commission, the 1996 Act does not require the filing of “all agreements between an incumbent LEC and a requesting carrier.”²¹ Rather, “*only* those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under [section] 252(a)(1).”²² The Commission reiterated this interpretation, noting that while “a settlement agreement that contains an ongoing obligation relating to Section 251(b) or (c) must be filed under section 252(a)(1),” “settlement contracts that *do not affect an incumbent LEC’s ongoing obligations relating to section 251 need not be filed.*”²³

Likewise, the Commission’s interpretation of Section 271 is fatal to claims that state public service commissions have rate-setting authority under that statute. As this Commission has stated unequivocally, Congress intended a single federal authority – the Federal Communications Commission – to have “exclusive authority” over “the section 271 process.”²⁴

²⁰ *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19337 ¶ 8 (2002) (“*Qwest ICA Order*”) (emphasis added).

²¹ *Id.* n.26.

²² *Id.* This finding is consistent with the Commission’s Notice of Apparent Liability for Forfeiture against Qwest for failing to file interconnection agreements and provisions containing and relating to Section 251(b) and (c) obligations. See *Qwest Corporation, Apparent Liability for Forfeiture, Notice of Apparent Liability for Forfeiture*, File No. EB-03-IH-0263, FCC 04-57 (2004). While the Commission indicated that an “agreement that creates an ongoing obligation pertaining to resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, interconnection, unbundled network elements, or collocation” is subject to the filing and approval requirements of Section 252, the Commission did not address the type of agreement at issue here – namely, a commercial agreement entered into for services not offered pursuant to Section 251. Furthermore, such a commercial agreement would not be subject to the filing and approval requirements of Section 252 under the Commission’s analysis because the elements and services under such an agreement are being provided in lieu of those required under Section 251.

²³ *Qwest ICA Order* ¶ 12 (emphasis added); see also *id.* ¶ 9 (only those “agreements addressing dispute resolution and escalation provisions relating to the obligations set forth in sections 251(b) and (c)” must be filed under Section 252).

²⁴ Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions to Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392, 14401-02 ¶ 18 (1999).

Furthermore, in the *Triennial Review Order*, the Commission reaffirmed the conclusion that Section 252 applies only to Section 251 elements. Specifically, the Commission held that that the pricing standard set forth in Section 252(d) applies only to Section 251 elements. The Commission held that “[w]here there is no impairment under section 251 and a network element is no longer subject to unbundling, we look to *section 271* and elsewhere in the Act to determine the proper standard for evaluating the terms, conditions, and pricing under which a BOC must provide the checklist network elements.”²⁵ According to the Commission, “[s]ection 252(d)(1) provides the pricing standard ‘for network elements for purposes of [section 251(c)(3)]’, and does not, by its terms, apply to network elements that are required only under section 271.”²⁶

Other Legal Authorities

Other legal authorities confirm that state public service commission authority is limited to interconnection agreements entered into pursuant to Section 251.²⁷ The Fifth Circuit has held that an ILEC’s duty to negotiate under the 1996 Act is limited to discussing those duties necessary to implement Section 251(b) and (c). As the court of appeals explained, an “ILEC is clearly free to refuse to negotiate any issues other than those it has a duty to negotiate under the Act,” which are “those duties listed in § 251(b) and (c).”²⁸ Analogously, the Eleventh Circuit has held that state commissions’ arbitration authority is specifically limited to imposing the terms necessary to implement Section 251(b) and (c). In that court’s words, a rule mandating arbitration of items not covered by those parts of Section 251 would be “contrary to the scheme and text of th[e] statute, which lists only a limited number of issues on which incumbents are mandated to negotiate.”²⁹

Additionally, federal courts in both Mississippi and Kentucky recently rejected attempts by state public service commissions to impose unbundling obligations on BellSouth pursuant to their alleged enforcement authority under Section 271.³⁰ Likewise, various state public service

²⁵ *Triennial Review Order* ¶¶ 656-657 (emphasis added).

²⁶ *Id.* ¶ 657 (brackets in original).

²⁷ *Indiana Bell v. Indiana Utility Regulatory Comm’n et al.*, 359 F.3d 493, 497 (7th Cir. 2004) (preempting decision of the Indiana Commission that tried to “parlay its limited role in issuing a recommendation under section 271” into an opportunity to issue an order, ostensibly under state law, dictating conditions on the provision of local service).

²⁸ *Coserv Limited Liability Corp. v. Southwestern Bell Telephone Co.*, 350 F.3d 482, 487-88 (5th Cir. 2003).

²⁹ *MCI Telecomms. Corp. v. BellSouth Telecomms. Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002).

³⁰ *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com’n et al.*, Civil Action No. 3:05CV173LN (S.C. Miss. Apr. 13, 2005), (“§ 271 explicitly places enforcement authority with the FCC . . . it is the prerogative of the FCC . . . to address any alleged failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long distance service); *BellSouth Telecommunications, Inc. v. Cinergy et al.*, Civil Action

commissions have correctly recognized that their authority to review and approve Section 251 interconnection agreements does not encompass elements and services not required under Section 251.³¹

Nor does the district court's decision in *Sage Telecom, LP v. Public Utility Commission of Texas*, No. A-04-CA-364-SS, 2004 WL 2428672 (W.D. Tx. Oct. 7, 2004), support a different result. There, the private parties "d[id] not dispute" that the agreement at issue "fulfill[ed] at least two of SBC's duties under § 251."³² The district court thus concluded that, regardless of how the parties characterized the agreement or the request leading to it, it had to be filed under Section 252 to avoid "allow[ing] the policy goals of the [statute] to be circumvented too easily."³³ The court further concluded that the notion that only the sections of a single agreement that implement Section 251 need be filed could not be squared was "not supported by the text of the Act itself," which refers to the filing of an "agreement" not a portion thereof.³⁴ Thus, the court's decision was expressly premised on the fact that the agreement concededly implemented Section 251 in part. It does not suggest that an agreement that does not implement Section 251 would similarly be subject to these requirements. On the contrary, it expressly held that SBC's concern that "any agreement between telecommunications carriers [would be subject] to commission approval" was "unjustified."³⁵ Rather, it is only when "an ILEC makes the decision to make such non-§ 251 terms not only part of the negotiations but also non-severable parts of the interconnection agreement" that also contains Section 251 terms that it must seek "approval by the State commission."³⁶

As the Commission repeatedly has found, "competition is the most effective means of ensuring that the charges, practices, classifications, and regulations ... are just and reasonable,

No. 3:05-CV-16-JMH (E.D. Ky. Apr. 22, 2005), ("[t]he enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first").

³¹ See, e.g., *In re: Petition for Arbitration of Covad with Qwest*, Docket No. UT-043045, Order No. 06 (Feb. 9, 2005) (Washington commission recognized that it had "no authority under Section 271 to require Qwest to include Section 271 elements, or pricing for such elements, in its interconnection agreement"); *In re: Petition for Arbitration of Covad with Qwest*, Docket No. 04-2277-02 (Feb. 8, 2005) (Utah commission holding that "[n]either Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the additional of new Section 251 obligations via incorporated by reference to access obligations under Section 271 or state law").

³² 2004 WL 2428672, at *4.

³³ *Id.*

³⁴ *Id.* at *5.

³⁵ *Id.* at * 9.

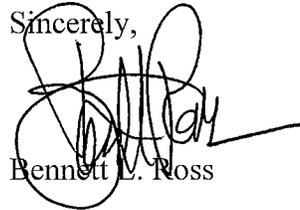
³⁶ *Id.*

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and not unjust and unreasonably discriminatory.”³⁷ For network elements to which CLECs are not impaired without unbundled access and for services not subject to the market-opening requirements of Section 251, meaningful competitive alternatives necessarily exist. As a result, parties seeking to negotiate a commercial agreement to govern access to such elements and services should be able to do so without the overhang of state public service commission involvement. Accordingly, the Commission should find state commissions have no authority to establish rates for facilities not required to be unbundled and that commercial agreements are not subject to state commission review and approval under the 1996 Act.

Please include this letter in the record in the above-referenced proceedings. Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Bennett L. Ross", written over a circular stamp or seal.

Bennett L. Ross

BLR:kjw
#587264.2

cc: Daniel Gonzalez
Michelle Carey
Jessica Rosenworcel
Scott Bergmann
Lauren "Pete" Belvin
Thomas Navin
Jeremy Miller
Ian Dillner

³⁷ *Petition of US West Communications, Inc. for Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of US West for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, 14 FCC Rcd 16252. ¶ 31 (1999).