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July 22, 2005

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”) respectfully withdraws its Petition for Forbearance under 47 U.S.C. § 160(c) From Enforcement of Section 252 with Respect to Non-251 Agreements, which was filed on May 27, 2004. BellSouth’s reasons for doing so are twofold.

First, BellSouth filed its Petition for Forbearance concurrently with an Emergency Petition for Declaratory Ruling, which seeks a declaration that non-section 251 agreements are not subject to the filing and approval requirements of section 252. In its Petition for Forbearance, BellSouth did not agree or concede that section 252 applies to non-section 251 agreements; rather BellSouth requested forbearance as “an additional basis” for the Commission to exempt non-section 251 agreements from the section 252 filing and approval process in the event BellSouth’s declaratory ruling was denied or a decision granting such relief was vacated upon judicial review. Because it seeks forbearance from statutory requirements that, in BellSouth’s view, do not apply, BellSouth’s Petition for Forbearance raises similar “procedural defects” that recently resulted in the denial of a forbearance petition filed by SBC.¹ Although BellSouth does not agree with that decision, BellSouth recognizes that the Commission’s reasoning is presently binding.

¹ Memorandum Opinion and Order, *In re: Petition of SBC Communications, Inc. for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services*, WC Docket 04-29 (May 5, 2005).

Second, since the filing of this Petition, at least one federal court has expressly held that non-section 251 agreements are not subject to the filing and approval requirements of section 252. In *Qwest v. Schneider*, CV-04-053-H-CSO, slip op. (June 5, 2005), the United States District Court for the District of Montana held that the Montana Public Service Commission had no authority under section 252 to require Qwest to submit for approval a commercial agreement with Covad for line sharing, which the parties conceded was not required to be made available under section 251. According to the court, “section 252’s language limits the requirement that agreements be submitted to state commissions for approval to those agreements that contain section 251 obligations.” *Id.* at 14. In light of the court’s determination that section 252 does not apply to non-section 251 agreements, there is no “regulation or other provision” of the Communications Act that the Commission can or should forbear from applying under 47 U.S.C. § 160(a).

Despite the withdrawal of BellSouth’s Petition for Forbearance, it is essential that the Commission resolve the issues surrounding the commercial negotiation process. The Commission has long recognized the benefits of commercially negotiated arrangements between carriers, noting that “the Communications Act emphasizes the role of commercial negotiations as a tool in shaping a competitive communications marketplace.”² As XO has correctly observed, “uncertainty over the filing requirements for [commercial] agreements has been an impediment to true bargaining.”³

In order to allow the commercial negotiation process to function, the Commission must first make clear that state public service commissions cannot attempt to second-guess commercial negotiations by improperly extending the scope of the section 252 process to include non-section 251 agreements. Accordingly, consistent with the court’s reasoning in *Qwest v. Schneider*, the Commission should grant BellSouth’s Emergency Petition for Declaratory Ruling and declare that commercial agreements for network elements that are not required to be unbundled under section 251 need not be filed with, or approved by, state public service commissions under section 252.

The Commission also should clarify that section 271 does not provide a jurisdictional basis for state commissions to regulate the prices and terms of section 271 elements. In connection with generic proceedings in BellSouth’s region intended to implement the *Triennial Review Remand Order*, various CLECs are seeking to extend the regulatory reach of state public service commissions by urging them to use section 271 as a basis to regulate rates for network

² FCC Press Release, *Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein, On Triennial Review Next Steps* (released March 31, 2004); *see also* NARUC Applauds FCC Efforts To Find Consensus on Competition Rules (March 31, 2004).

³ Ex Parte Letter from Christopher McKee, XO, to Marlene H. Dortch, Secretary, FCC, Docket No. 04-313 (filed May 11, 2005).

Ms. Marlene H. Dortch

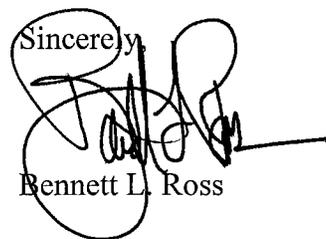
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elements that are not required to be unbundled under Section 251.⁴ The extension sought by these CLECs would essentially foreclose commercial agreements for anything that could be fit under the rubric of section 271. Under this scenario, there would be little left to negotiate because regulatory price-setting would extend so broadly. Accordingly, the Commission should grant BellSouth's Emergency Petition for Declaratory Ruling and Preemption of State Action by finding that state public service commissions have no jurisdiction to establish rates for network elements that are not required to be unbundled pursuant to section 251 and by preempting the decision of the Tennessee Regulatory Authority that sought to do so.

The Commission's resolution of the issues raised in BellSouth's Emergency Petitions for Declaratory Ruling would provide necessary guidance to the state public service commissions and would obviate any need for parties to litigate these issues in numerous federal courts.

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

Sincerely,

Bennett L. Ross

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cc: Michelle Carey
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⁴ See, e.g., Direct Testimony of Joseph P. Gillan, Georgia PSC Docket No. 19341-U, *In re: Generic Proceeding to Examine Issues Related to BellSouth's Obligation to Provide Unbundled Network Elements*, filed on behalf of the Competitive Carriers of the South, Inc. (July 19, 2005), at 4 ("BellSouth remains obligated to offer through approved interconnection agreements each of the network elements listed in the competitive checklist of S. 271, albeit at a (potentially) different price") & 13 ("the most likely alternative for a post-S. 251 offering is the parallel offering that BellSouth must make available to remain in compliance with S. 271. Because the prices for S. 271 offerings must remain just and reasonable - a standard that S. 251 prices must also satisfy -- there is every reason to expect that the S. 271 price will be "just and reasonably" close to the rates paid today").