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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY 27 2004

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:)	
)	
Petition for Forbearance Under 47 U.S.C.)	WC Docket No. 04-__
§ 160(c) From Enforcement of Section 252)	
With Respect to Non-251 Agreements)	

PETITION FOR FORBEARANCE

BellSouth respectfully submits this Petition for Forbearance pursuant to Section 10(c) of the Act and Section 1.53 of the Commission’s Rules. Specifically, BellSouth seeks forbearance from Sections 252 with respect to commercially negotiated agreements for the provision of wholesale services that are not required under Section 251 (referred to herein as “Non-251 Agreements”).¹

I. INTRODUCTION

Concurrently herewith, BellSouth is filing an Emergency Petition for Declaratory Ruling, which asks the Commission to declare that Non-251 Agreements are not subject to the obligations set forth in Section 252.² As explained in the Emergency Petition, Section 252 by its terms relates only to agreements negotiated pursuant to Section 251. Consequently, agreements for wholesale services that are not provided under Section 251 are not subject to filing and approval under Section 252.

BellSouth further demonstrated that the competitive harms that would ensue from subjecting such Non-251 Agreements to filing and approval requirements compel the Commission promptly to issue the requested ruling in order to eliminate a serious impediment to

¹ BellSouth will continue to file its section 251 agreements with state commissions.

² See BellSouth Emergency Petition for Declaratory Ruling, WC Docket No. 04-__ (filed May 27, 2004).

the negotiation of commercially reasonable wholesale service arrangements. Finally, BellSouth stated that, because its commercial agreements are federal, it would comply with Section 211 of the Act and Section 43.51(c) of the Commission's Rules.

BellSouth is filing this Petition for Forbearance to provide an additional basis for the Commission to exempt Non-251 Agreements from the requirements of Section 252, in the event that (1) the Commission grants the Emergency Petition for Declaratory Ruling but that decision is vacated upon judicial review, or (2) the Commission does not agree with the legal analysis in the Emergency Petition but concurs with BellSouth that the underlying relief sought is vitally important. Granting this Petition for Forbearance also will ensure that state commissions cannot attempt to regulate Non-251 Agreements. In short, the limited forbearance sought herein is necessary in order to eliminate obstacles to the successful negotiation of commercially reasonable interconnection arrangements, bring certainty to an industry that has been beset by ceaseless litigation since passage of the 1996 Act, and advance the interest of consumers in sustainable, economically rational competition.

II. THE STANDARD FOR FORBEARANCE IS MET.

Forbearance from Section 252 for Non-251 Agreements easily satisfies the statutory standard. Section 10(a) of the Act states that the Commission:

shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service ... if the Commission determines that—

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation is not necessary for the protection of consumers;
and

(3) forbearance from applying such provision or regulation is consistent with the public interest.³

In making the determination called for under Section 10(a)(3), the Commission must “consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions” Such a conclusion “may be the basis for a Commission finding that forbearance is in the public interest.”⁴ Each of those elements is satisfied here. Importantly, if the Commission forbears from applying section 252, it will prevent the states from imposing such an obligation. *See* 47 U.S.C. § 160(e).

A. Enforcement of Sections 252 Is Not Necessary To Assure Just and Reasonable Rates and Charges.

The filing of Non-251 Agreements with state commissions is not necessary to assure just and reasonable rates and charges. Indeed, the Commission repeatedly has found that “competition is the most effective means of ensuring that the charges, practices, classifications, and regulations ... are just and reasonable, and not unjust and unreasonably discriminatory.”⁵ Once competitors are no longer impaired without access to a particular network element, there is no need to file voluntary agreements to provide an equivalent to that element with the state commissions to assure just and reasonable rates. The absence of impairment signifies that there are meaningful alternatives to the ILECs’ networks – including cable systems, wireless services, and alternative wireline networks. Given the existence of such alternatives, ILECs have every incentive to reach commercially reasonable wholesale arrangements in order to maintain traffic

³ 47 U.S.C. § 160(a) (emphasis added).

⁴ *Id.* § 160(b).

⁵ *Petition of US West Communications, Inc. for Declaratory Ruling Regarding the Provision of National Directory Assistance; Petition of US West Communications, Inc. for Forbearance; The Use of N11 Codes and Other Abbreviated Dialing Arrangements*, 14 FCC Rcd 16252, ¶ 31 (1999).

on their networks, and CLECs have other options if they cannot or do not wish to agree to terms with ILECs. Accordingly, the marketplace can be relied on to assure that the ILECs' wholesale rates remain just and reasonable.

As a backstop, BellSouth's compliance with Section 211 will enable the Commission to view the rates, terms, and conditions contained in the commercial agreements. The Commission, therefore, will be able to ensure compliance with sections 201-202 of the Act. Although this offer is not necessary in order to justify forbearance, it does provide further assurance that the Commission can monitor developments in the marketplace and address any questions about the terms on which BellSouth is providing wholesale services.

B. Enforcement of Section 252 Is Not Necessary To Protect Consumers.

Forbearing from enforcing Section 252 with respect to Non-251 Agreements will not harm consumers. To the contrary, consumers will be the ultimate beneficiaries of forbearance. Eliminating the uncertainty created by the filing requirement will promote the ability of ILECs and CLECs to reach commercially reasonable agreements, and such agreements will foster sustainable competition and innovation. They will give "America's telephone consumers the certainty they deserve,"⁶ preserve "the benefits of competition for consumers,"⁷ and, by allowing "companies [to] devote their resources to competing in the marketplace, rather than in the courtroom," they will assure that "consumers will be the winners."⁸ As the Commission recently

⁶ News Release, "FCC Chairman Michael Powell's Comments on SBC's Commercial Agreement with Sage Telecom Concerning Access to Unbundled Network Elements," April 5, 2004.

⁷ News Release, "FCC Commissioner Kevin J. Martin Praises Industry Efforts to Reach Agreement on Local Phone Competition," April 29, 2004.

⁸ News Release, "Commissioner Abernathy Applauds SBC Communications and Sage Telecom for Reaching a Commercial Agreement Governing Access to Unbundled Network Elements," April 5, 2004.

explained in forbearing from requiring the filing of inter-modal porting agreements under Section 252, “[r]equiring interconnection agreements for the purpose of intermodal porting could undermine the benefits of [local number portability] by preventing or delaying implementation of intermodal porting.”⁹ The same holds true here with respect to Non-251 Agreements.

C. Forbearance Is Consistent with the Public Interest.

Forbearance from Section 252 for Non-251 Agreements is consistent with the public interest. As explained in more detail in BellSouth’s Emergency Petition for Declaratory Ruling, requiring that such agreements be filed with state commissions injects an unacceptable level of uncertainty into the negotiating process. Carriers will be loath to negotiate when they risk exposure of agreements to pick-and-choose, potential revisions by state commissions on a state-by-state basis of commercially-determined provisions, and even just the prospect of delay in obtaining approval. Recently, all of the Commissioners jointly urged “all carriers to engage in a period of good faith negotiations to arrive at commercially acceptable arrangements for the availability of unbundled network elements” in order to “send a clear and unequivocal signal that the best interests of America’s telephone consumers are served by a concerted effort to reach a negotiated arrangement.”¹⁰ Of necessity, eliminating barriers to such agreements must be considered consistent with the public interest.

⁹ *Telephone Number Portability - CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd 23697, ¶ 36 (2003).

¹⁰ News Release, “Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adlestein on Triennial Review Next Steps,” March 31, 2004.

III. THE COMMISSION POSSESSES AUTHORITY TO FORBEAR FROM SECTION 252.

Section 10(d) limits the Commission's forbearance authority only with respect to the requirements of Sections 251(c) and 271, and even then only until such requirements have been "fully implemented." The Commission has unquestionable authority to forbear from Section 252, which is not referenced in Section 10(d). Nor would grant of the instant request somehow indirectly implicate Section 251(c), since BellSouth seeks forbearance only with respect to contractual obligations that do not arise under Section 251. Moreover, even if the commercially negotiated arrangements for providing elements (or combinations of elements) that are no longer subject to mandatory unbundling could somehow be related back to Section 251(c), which they cannot, Section 251(c) certainly has been "fully implemented" for elements that no longer meet the statutory impairment standard.

IV. THE GRANT OF FORBEARANCE WILL BE BINDING ON THE STATES.

Under Section 10(e) of the Act, once the Commission has forborne from Section 252 for Non-251 Agreements, a "state commission may not continue to apply or enforce" that requirement. 47 U.S.C. § 160(e). Nor may a state attempt to mandate filing of such agreements

under state law. Any such attempt would be expressly barred by Sections 251(d)(3),¹¹ 253(a),¹² and 261(c)¹³ of the Act.

V. CONCLUSION

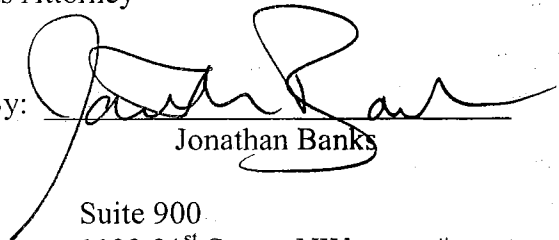
The Commission expeditiously should grant this Petition for Forbearance.

Respectfully Submitted,

BELLSOUTH CORPORATION

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May 27, 2004

¹¹ Section 251(d)(3) permits the states to impose “access and interconnection obligations” that are consistent with the requirements of Section 251 and “do not substantially prevent implementation of the requirements of this section and the purposes of this part.” A requirement to file non-251 portions of commercial agreements is not an “access and interconnection” obligation, and in any event such a requirements would be flatly inconsistent with Section 252.

¹² Section 253(a) prohibits state requirements that “may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.” Filing requirements may well chill the ability of CLECs and ILECs to reach commercial agreements that enable such carriers to provide services on mutually agreeable terms, thereby impairing competition.

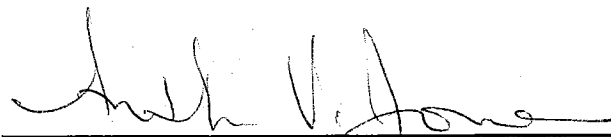
¹³ Section 261(c) permits additional state requirements with respect to intrastate services “that are necessary to further competition ... as long as the State’s requirements are not inconsistent with this part or the Commission’s regulations to implement this part.” Even assuming for the sake of argument that some of the wholesale services might be jurisdictionally intrastate, a State filing requirements would not be necessary to further competition once a non-impairment finding is made, and such a filing would be flatly inconsistent with Section 252 in any event.

CERTIFICATE OF SERVICE

I do hereby certify that I have this 27th day of May 2004 served the foregoing
PETITION FOR FORBEARANCE via hand-delivery or by electronic mail addressed to the
following parties:

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