**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**
**ATLANTA DIVISION**

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| BELLSOUTH TELECOMMUNICATIONS, INC.,<br><br>Plaintiff,<br>v.<br><br>MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, et al.,<br><br>Defendants. | ) | No. 1:05-CV-0674-CC |

**ORDER**

Before the Court is the Emergency Motion for a Preliminary Injunction filed by plaintiff BellSouth Telecommunications, Inc. ("BellSouth"). Having reviewed the motion, the opposing memoranda, and the extensive record material that has been filed, and having heard argument on April 1, 2005, the Court finds that BellSouth has satisfied each aspect of the four-prong test for preliminary injunctive relief. *See*, *e.g.*, *Four Seasons Hotels and Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205 (11th Cir. 2003); *American Red Cross v. Palm Beach Blood Bank, Inc.*, 143 F.3d 1407, 1410 (11th Cir. 1998).

Accordingly, the Court grants BellSouth a preliminary injunction against the March 9, 2005 Order of the Georgia Public Service Commission ("PSC") in Docket

No. 19341-U to the extent that PSC Order requires BellSouth to continue to process new competitive LEC orders for switching as an unbundled network element ("UNE") as well as new orders for loops and transport as UNEs (in instances where the Federal Communications Commission ("FCC") has found that unbundling of loops and transport is not required). Consistent with the FCC's ruling in the *Order on Remand*[1] at issue here, to the extent that a competitor has a good faith belief that it is entitled to order loops or transport, BellSouth will provision that order and dispute it later through appropriate channels.

*First*, BellSouth has a high likelihood of success in showing that, contrary to the conclusion of the PSC, the FCC's *Order on Remand* does not permit new UNE orders of the facilities at issue.[2] BellSouth's position is consistent with the conclusions of a significant majority of state commissions that have decided this issue (BellSouth has provided the Court with decisions from 11 state commissions that

[1] Order on Remand, *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, FCC 04-290 (FCC rel. Feb. 4, 2005).

[2] In evaluating the merits of BellSouth's legal argument, this Court owes no deference to the PSC's understanding of federal law. *See, e.g., MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 112 F. Supp. 2d 1286, 1291 (N.D. Fla. 2000), *aff'd*, 298 F.3d 1269 (11th Cir. 2002).

support its conclusion) and with what the Court is likely to conclude is the most reasonable interpretation of the FCC's decision.

The language of the *Order on Remand* repeatedly indicates that the FCC did not allow new orders of facilities that it concluded should no longer be available as UNEs. The FCC held that there would be a "nationwide bar" on switching (and thus UNE Platform) orders, *Order on Remand* ¶ 204. The FCC's new rules thus state that competitors "may not obtain" switching as a UNE. 47 C.F.R. § 51.319(d)(2)(iii) (App. B. to *Order on Remand*); *see also* 47 C.F.R. § 51.319(d)(2)(i) ("An incumbent LEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops."); *Order on Remand* ¶ 5 ("Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching"); *id*. ¶ 199 ("[W]e impose no section 251 unbundling requirement for mass market local circuit switching nationwide"). The FCC likewise established that competitive LECs are no longer allowed to place new orders for loops and transport in circumstances where, under the FCC's decision, those facilities are not available as UNEs. *Id*. ¶¶ 142, 195.

The FCC also created strict transition periods for the "embedded base" of customers that were currently being served using these facilities. Under the FCC transition plan, competitive LECs may use facilities that have already been provided to serve their existing customers for only 12 more months and at higher rates than they were paying previously. *See id*. ¶¶ 142, 195, 199, 227. The FCC made plain that these transition plans applied only to the embedded base and that competitors were "not permit[ed]" to place new orders. *Id.* ¶¶ 142, 195, 199. The FCC's decision to create a limited transition that applied *only* to the embedded base and required higher payments even for those existing facilities cannot be squared with the PSC's conclusion that the FCC permitted an indefinite transition during which competitive LECs could order new facilities and did not specify a rate that competitors would pay to serve them.

In arguing for a different result, the PSC and the other defendants primarily rely on paragraph 233 of the *Order on Remand*, which they contend requires BellSouth to follow a contractual change-of-law process before it can cease providing these facilities. That provision, however, states that "carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order." *Order on Remand* ¶ 233. In conflict with that language, the PSC's reading of the FCC's

order would render paragraph 233 inconsistent with the rest of the FCC's decision. Instead of not being permitted to obtain new facilities, as the FCC indicated should be the rule, *see, e.g.*, *Order on Remand* ¶ 199, competitive LECs would be permitted to do so for as long as the change-of-law process lasts. Moreover, it is significant that the FCC expressly referred to the possible need to modify agreements to deal with the transition as to the embedded base, *see id.* ¶ 227, but did not mention a need to do so to effectuate its "no new orders" rule, *see id*. In sum, the Court believes that there is a significant likelihood that it will agree with the conclusion of the New York Public Service Commission that paragraph 233 "must be read together with the FCC directives that [UNE Platform] obligations for new customers are eliminated as of March 11, 2005." *New York Order*[3] at 13, 26. Any result other than precluding new UNE Platform customers on March 11 would "run contrary to the express directive . . . that no new [UNE Platform] customers be added" and thus result in a self-contradictory order. *Id.*

Finally, the Court notes that the PSC does not dispute that the FCC has the authority to make its order immediately effective regardless of the contents of particular interconnection agreements. *See* PSC Order at 3. The Court concludes that

[3] Order Implementing TRRO Changes *Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand*, Case No. 05-C-0203 (N.Y. PSC Mar. 16, 2005) ("*New York Order*").

it is likely to find that the FCC did that here. The Court further notes that it would be particularly appropriate for the FCC to take that action because it was undoing the effects of the agency's own prior decisions, which have repeatedly been vacated by the federal courts as providing overly broad access to UNEs. *See United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *see also USTA v. FCC*, 359 F.3d 554, 595 (D.C. Cir. 2004) (highlighting the FCC's "failure, after eight years, to develop lawful unbundling rules, and [its] apparent unwillingness to adhere to prior judicial rulings"). In any event, any challenge to the FCC's authority to bar new UNE- Platform orders must be pursued on direct review of the FCC's order, not before this Court.

In concluding that BellSouth has a substantial likelihood of success on the merits, the Court does not reach the issue whether an "Abeyance Agreement" between BellSouth and a few of the defendants authorizes those defendants to continue placing new orders. That issue is pending before the PSC, and this Court's decision does not affect the PSC's authority to resolve it.

*Second*, BellSouth has demonstrated that it is currently suffering significant irreparable injury as a result of the PSC's decision. BellSouth has shown that as a

direct result of the PSC's decision, it is currently losing retail customers and accompanying goodwill. For instance, BellSouth has demonstrated that it is losing approximately 3200 customers per week to competitors that are using the UNE Platform. The defendants do not seriously dispute that BellSouth is losing these customers; on the contrary, MCI confirms that it is using the UNE Platform to sign up 1500 BellSouth customers per week. Under Eleventh Circuit precedent, losses of customers are irreparable injury. *See, e.g., Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (holding that loss of customers is irreparable injury and agreeing with district court that, if a party "lose[s] its long-time customers," the injury is "difficult, if not impossible, to determine monetarily") (internal quotation marks omitted); *see also Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996) (finding irreparable harm where FCC rules implementing this same statute "will force the incumbent LECs to offer their services to requesting carriers at prices that are below actual costs, causing the incumbent LECs to incur irreparable losses in customers, goodwill, and revenue"). BellSouth has therefore demonstrated the existence of very significant immediate and irreparable injury.

*Third,* the Court finds that BellSouth's injury outweighs the injury that will be suffered by the private defendants. The Court concludes that, although some

competitive LECs may suffer harm in the short-term as a result of this decision, they will do so only if they intended to compete by engaging in conduct that the FCC has concluded is anticompetitive and contrary to federal policy. In particular, paragraph 218 of the *Order on Remand* states that the UNE Platform "hinder[s] the development of genuine, facilities-based competition," contrary to the federal policy reflected in the Telecommunications Act of 1996. Thus, although defendants are free to compete in many other ways, their interest in continuing practices that the FCC has condemned as anticompetitive are entitled to little, if any, weight, and do not outweigh BellSouth's injury. *See, e.g.*, *Graphic Communications Union, Local No. 2 v. Chicago Tribune Co.*, 779 F.2d 13, 15 (7th Cir. 1985) (holding that private interest in avoiding arbitration could not count as evidence of "irreparable harm," because such a holding "would fly in the face of the strong federal policy in favor of arbitrating disputes"). Moreover, the Court notes that competitive LECs have been on notice at least since the FCC's August 2004 *Interim Order*[4] that soon they might well not be able to place new orders for these UNEs.

[4] Order and Notice of Proposed Rulemaking, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 FCC Rcd 16783, ¶ 29 (2004) (proposing a transition plan that "does not permit competitive LECs to add new customers").

*Fourth*, the Court concludes that BellSouth's motion is consistent with and will advance the public interest, as authoritatively determined by the FCC. As discussed, the FCC has determined that the UNE Platform harms competition and thus is contrary to the public interest. The FCC explained that its prior, overbroad unbundling rules had "frustrate[d] sustainable, facilities-based competition," *Order on Remand* ¶ 2, that its new rules would "best allow[] for innovation and sustainable competition," *id.*, and that it would be "contrary to the public interest" to delay the effectiveness of the *Order on Remand* for even a "short period of time," *id*. ¶ 236. The FCC further concluded that immediate implementation of the *Order on Remand* is necessary to avoid "industry disruption arising from the delayed applicability of newly adopted rules." *Order on Remand* ¶ 236 (emphasis added). Unless and until a federal court of appeals overturns the FCC *Order on Remand* on direct review, the FCC's judgment establishes the relevant public-interest policy here.

* * *

As BellSouth has satisfied the test for preliminary injunctive relief, it is hereby ORDERED AND ADJUDGED that Plaintiff's Emergency Motion for Preliminary Injunction is GRANTED. The Court hereby preliminarily enjoins the Georgia Public Service Commission and the other defendants from seeking

to enforce the PSC Order to the extent that order requires BellSouth to process new UNE orders for switching and, in the circumstances described above, for loops and transport.

For the same reasons as those set forth above with respect to this Court's grant of preliminary injunctive relief to BellSouth, the Joint Defendants' Motion for Stay is DENIED.

BellSouth's motion for preliminary injunction having now been considered and determined, all Defendants are DIRECTED to answer or otherwise respond to BellSouth's Complaint within seven (7) days of the date of this Order. Any answers or responses already submitted to the Court by Defendants shall be deemed filed as of the date of this Order for all purposes under the Federal Rules of Civil Procedure and the local rules of this Court.

ORDERED this 5th day of April 2005.

s/ *CLARENCE COOPER*

CLARENCE COOPER
UNITED STATES DISTRICT JUDGE