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March 24, 2004

**BY HAND DELIVERY**

Ms. Blanca Bayó, Director  
Commission Clerk and Administrative Services  
Room 110, Easley Building  
Florida Public Service Commission  
2540 Shumard Oak Blvd.  
Tallahassee, Florida 32399-0850

Re: Docket No. 040130-TP

Dear Ms. Bayó:

On behalf of New South Communications, Corp., NuVox Communications, Inc., KMC Telecom, Inc. and Xspedius Communications, Inc., enclosed is an original and 15 copies of a Notice of Filing of an order of the North Carolina Utilities Commission to be filed in this docket.

Please mark the enclosed copy of this letter to indicate that the original was filed, and return to me.

Sincerely yours,



Norman H. Horton, Jr.

NHH:dle  
Enclosures

cc: Parties of Record

DOCUMENT NUMBER-DATE

03911 MAR 24 04


**BEFORE THE  
PUBLIC SERVICE COMMISSION**

In the Matter of	)	
	)	
Joint petition for Arbitration of	)	
	)	
NewSouth Communications Corp.,	)	
NuVox Communications, Inc.	)	Docket No. 040130-TP
KMS Telecom V, Inc., KMC Telecom III LLC, and	)	
Xspedius Communications, LLC on Behalf of its	)	
Operating Subsidiaries Xspedius Management Co.	)	
Switcher Services, LLC and Xspedius Management Co.	)	
of Jacksonville, LLC,	)	Filed: March 24, 2004
	)	
Of an Interconnection Agreement with	)	
BellSouth Telecommunications, Inc.	)	
Pursuant to Section 252(b) of the	)	
Communications Act of 1934, as Amended.	)	
_____	)	

**NOTICE OF FILING**

NewSouth Communications Corp., NuVox Communications, Inc., KMS Telecom V, Inc., KMC Telecom III LLC, and Xspedius Communications, LLC on Behalf of its Operating Subsidiaries Xspedius Management Co. Switcher Services, LLC and Xspedius Management Co. of Jacksonville, LLC, hereby provide Notice of the Filing of a copy of a recent Order Denying Motion to Sever and Imposing Procedural Restrictions issued by the Presiding Commissioner on behalf of the North Carolina Utilities Commission. The Joint Petition for Arbitration in North Carolina and subsequent motions and pleadings are similar to those in this docket and adopts the format for testimony and cross-examination proposed by the joint petitioners.

Respectfully submitted this 24<sup>th</sup> day of March, 2004.

  
NORMAN H. HORTON, JR., ESQ.  
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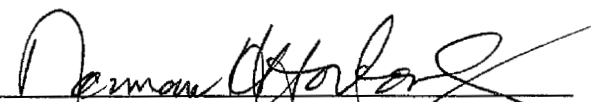
### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon the following parties by Hand Deliver (\*), and/or U.S. Mail this 24<sup>th</sup> day of March, 2004.

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Norman H. Horton, Jr.

STATE OF NORTH CAROLINA  
UTILITIES COMMISSION  
RALEIGH

DOCKET NO. P-772, SUB 8  
DOCKET NO. P-913, SUB 5  
DOCKET NO. P-989, SUB 3  
DOCKET NO. P-824, SUB 6  
DOCKET NO. P-1202, SUB 4

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of  
Joint Petition of NewSouth Communications )  
Corp. et al. for Arbitration with BellSouth ) ORDER DENYING MOTION TO  
Telecommunications, Inc. ) SEVER AND IMPOSING  
PROCEDURAL RESTRICTITONS

BY THE PRESIDING COMMISSIONER: On February 11, 2004, New South Communications Corp., NuVox Communications, Inc., KMC Telecom V, Inc., KMC Telecom III LLC, and Xspedius Management Co. Switched Services, LLC (collectively, Joint Petitioners) filed for arbitration with BellSouth Telecommunications, Inc. (BellSouth). On February 12, 2004, the Commission issued an Order Concerning Prefiled Testimony.

BellSouth Motion to Sever or Impose Procedural Restrictions

On February 23, 2004, BellSouth filed a Motion to Sever or to Impose Procedural Restrictions. With respect to its Motion to Sever, BellSouth argued that the Telecommunications Act of 1996 does not contemplate the type of Joint Arbitration proposed by the Joint Petitioners, even though it does not expressly prohibit it. BellSouth argued that the Joint Petition suffers from significant procedural infirmities. The more proper procedure for seeking a joint proceeding would have been for each of the competing local providers (CLPs) to have filed a separate petition and then move for consolidation. Moreover, a proper Motion for Consolidation would contain sufficient facts to allow the Commission to determine whether the consolidation is in fact in the interest of judicial or administrative economy. The Joint Petitioners have not carried this burden.

BellSouth argued that the Commission could cure these problems by taking one of two actions. One would be for the Commission to immediately sever the proceeding into four separate arbitrations. The other would be to allow the Petitioners to continue jointly, but only if the proceeding is conducted subject to certain restrictions.

Specifically, the Commission should require that, if the Petitioners continue to proceed jointly, their positions must be the same on each issue. Bellsouth noted that the Joint Petitioners appear to state that they are in concert on 97 of 107 issues, but there is some variation on their positions on other issues. The Joint Petition also appears to suggest that there is no direct conflict on the remaining issues, but rather

there are particular issues that some, but not all, of the CLPs are advancing; but there is not enough information in the filing to tell. The Commission should order that the CLPs may only continue with this proceeding if their positions on each issue are not only "not adverse" but are, in fact, identical. In addition, the Commission should restrict the CLPs to cross examining each BellSouth witness only once. Finally, the Commission should order that the CLPs should be limited to one witness per issue or sub-issue in which a single issue may require testimony from two or more witnesses with different areas of expertise. Thus, the CLPs' "team" should be composed of only a single witness to address each substantive aspect of each issue.

### Joint Petitioners' Response

On March 3, 2004, the Joint Petitioners filed a Response to BellSouth's Motions, asking that they be denied. The Joint Petitioners argued that the procedural path they have undertaken is judicially efficient and is not contrary to law, while BellSouth has tended to elevate form over substance. The Joint Petitioners pointed out that, with respect to 97 issues, the CLPs have jointly submitted a position statement and issues matrix. Of the remaining 10 issues, there are 4 that are common to multiple CLPs and 6 that are common only to one CLP and BellSouth. The Joint Petitioners are hopeful that 8 of the 10 issues can be resolved before hearing. What distinguishes the 10 issues from the other 97 are that one or more of the Joint Petitioners opted not to arbitrate these 10 issues. Nevertheless, where more than one CLP is arbitrating the issue (whether it be 2 or 3 CLPs), those CLPs have jointly adopted a position statement, so that, at bottom, there is a single CLP position for each and every issue.

The Joint Petitioners acknowledged, however, that they are amenable to procedures that will streamline the proceeding. As indicated in the Joint Issues Matrix, the Joint Petitioners have offered a single "CLEC position" for each and every issue, and they have stated that they intend to use, to the fullest extent possible, a "team" witness approach. In subsequent discussions with BellSouth, the Joint Petitioners fleshed out their "team" proposal which would entail the use of panels containing witnesses from each CLP that joined in raising an issue being open to cross-examination by BellSouth, with BellSouth choosing whether to address the panel or individual witnesses on an issue-by-issue basis. BellSouth countered with a preference against multi-party panels and in favor of crossing CLP witnesses one CLP at time. The Joint Petitioners said they do not oppose this. In such a case, the use of panels would be limited to instances where a CLP has multiple witnesses to cover the various subparts or technical or policy concerns concerning an issue, but BellSouth was not satisfied with this.

To avoid four separate sets of substantially similar and redundant testimony, the Joint Petitioners told BellSouth they are willing to file consolidated and integrated Joint Testimony encompassing all testimony on all issues. Such Joint Testimony would list all CLP witnesses on the cover (likely 2-3 per CLP) and inside would set out by company which witnesses are sponsoring what. Some answers would be sponsored by a witness from all companies, some by fewer. The Joint Testimony at its beginning would include a section introducing each witness by company, with appropriate biographical information and qualifications, and a paragraph listing the answers he or

she sponsors. To facilitate identification, answers to questions would be numbered. For further ease of reference, CLPs would include at the end of each numbered answer an indication of which company witnesses are sponsoring the answer. Unfortunately, BellSouth also rejected this proposal.

In a separate matter, the Joint Petitioners noted that BellSouth appears to be amenable, or at least does not express opposition to, a waiver of the nine-month statutory deadline.

#### BellSouth's Reply

On March 11, 2004, BellSouth filed a Reply to Joint Petitioners' Response. BellSouth admitted that whether these proceedings should be severed or remain in a single proceeding was in the sound discretion of the Commission. However, BellSouth believes that the CLPs' Petition provides an insufficient factual basis to determine whether the joinder they are seeking is appropriate. The Commission should determine the effect of going forward jointly on the "expedition and economy" of the proceeding and whether the conduct of a joint proceeding will prejudice any party. BellSouth is fearful that the single hearing and attendant briefs and proposed order will end up being unduly complex and duplicative, where four smaller, simpler and less complex hearings may well be preferable; and BellSouth was concerned that it may be prejudiced by a joint proceeding. BellSouth indicated that the negotiation process seemed to show that some CLPs expressed more interest in some issues, while other expressed more interest in others. In sum, BellSouth asked that the proceedings either be severed into four separate proceedings or, alternatively, that the procedural restrictions proposed by BellSouth be adopted.

WHEREUPON, the Presiding Commissioner reaches the following

#### CONCLUSIONS

After careful consideration, the Presiding Commissioner concludes that BellSouth's Motion to Sever should be denied but that procedural safeguards should be put in place to minimize any possible confusion or redundancy in the presentation of evidence and testimony and subsequent briefs and proposed orders.

The Presiding Commissioner believes that judicial efficiency would be served and BellSouth would not be unduly prejudiced by this approach. The gains to judicial efficiency would seem obvious. The parties have in fact engaged in joint negotiations prior to the filing of the Petition, and it is generally better to have one hearing, instead of four, especially when approximately 100 issues are involved. Moreover, the Joint Petitioners have represented that they have jointly submitted a position statement on 97 issues. Of the remaining ten issues, there are four that are common to multiple CLPs and six common to only one CLP and BellSouth. This appears manageable.

Accordingly, the Presiding Commissioner concludes that the following procedures should be implemented in this proceeding:

1. The Joint Petitioners will be allowed to present CLP-by-CLP panels of their witnesses. The Presiding Commissioner believes this to be preferable to a witness-by-witness approach when so many issues are in common among the CLPs. However, the Joint Petitioners shall notify BellSouth regarding the constitution and order of these panels and confer with BellSouth with a view toward simplifying and expediting the procedure for their use. When this has been worked out, the parties shall advise the Commission of concerning same prior to the hearing.

2. (a) The Joint Petitioners will file consolidated and integrated testimony encompassing all testimony on all issues. The joint testimony will list all CLP witnesses on the cover and will inside the testimony set out by company which witnesses are sponsoring what. The joint testimony at its beginning will include a section introducing each witness by company, with appropriate biographical information and qualifications and a paragraph listing the answers the witness sponsors. Answers to questions will be numbered to facilitate identification. CLPs will include at the end of each numbered answer an indication of which company witnesses are sponsoring the answer.

(b) The Joint Petitioners will provide a cover sheet with their testimony which will cross-reference the witness with his or her issues and testimony page and line numbers.

3. The Joint Petitioners are limited to one cross-examination of each BellSouth witness.

4. The parties are urged to continue negotiations to reduce the number of issues and to present other joint proposals to streamline the hearing.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 22<sup>nd</sup> day of March, 2004.

NORTH CAROLINA UTILITIES COMMISSION

*Gail L. Mount*

Gail L. Mount, Deputy Clerk

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