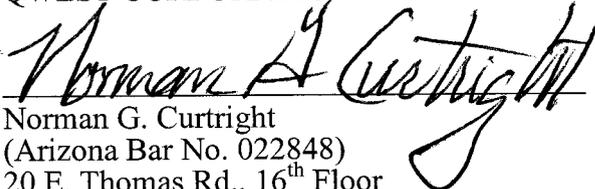


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RESPECTFULLY SUBMITTED this 5th day of May, 2008.

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BELLSOUTH TELECOMMUNICATIONS, INC., Plaintiff, v. MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, et al., Defendants.

No. 1:05-CV-0674-CC

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION

2005 U.S. Dist. LEXIS 9394

April 5, 2005, Decided

SUBSEQUENT HISTORY: Affirmed by Bellsouth Telcoms., Inc. v. McImetro Access Transmission Servs., LLC, 2005 U.S. App. LEXIS 19819 (11th Cir. Ga., Sept. 15, 2005)

COUNSEL: [*1] For BellSouth Telecommunications, Inc., Plaintiff: Matthew Henry Patton, Kilpatrick Stockton, Atlanta, GA; Michael E. Brooks, Kilpatrick Stockton, Atlanta, GA; Sean A. Lev, Kellogg Huber Hansen Todd Evans & Figel, Washington, DC.

For MCImetro Access Transmission Services, LLC, a Delaware Limited Liability Company, Defendant: Daniel S. Walsh, Office of State Attorney General, Atlanta, GA; Marc A. Goldman, Jenner & Block - Washington, Washington, DC; Dara L. Steele-Belkin, Sutherland Asbill & Brennan, Atlanta, GA; Teresa Wynn Roseborough, Sutherland Asbill & Brennan, Atlanta, GA.

For Nuvox Communications, Inc., a Delaware Corporation, KMC Telecom Holdings, Inc., a Delaware Corporation, KMC Telecom V, Inc., a Delaware Corporation, KMC Telecom III, LLC, a Delaware limited liability company, Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Atlanta, Defendants: Anne Ware Lewis, Strickland Brockington Lewis, Atlanta, GA; Frank B. Strickland, Strickland Brockington Lewis, Atlanta, GA.

For AT & T Communications of the Southern States, LLC., Defendant: Barry J. Armstrong, McKenna Long & Aldridge, Atlanta, GA; Suzanne W. Ockleberry, AT&T Communications [*2] of the Southern States, Inc., Atlanta, GA.

For Teleport Communications Atlanta, Inc., a Delaware Corporation, Defendant: Barry J. Armstrong, McKenna Long & Aldridge, Atlanta, GA.

For Talk America, Inc., a Pennsylvania Corporation, Lecstar Telecom, Inc., a Georgia Corporation, ITCDeltaCom Communications, Inc., an Alabama Corporation doing business as ITCDeltaCom, Broadriver Communications Corp., a Delaware Corporation, Cbeyond Communications, LLC, a Delaware Limited Liability Company, Dieca Communications, Inc., doing business as Covad Communications Corporation, Southern Digital Network, Inc., doing business as FDN Communications, USCarrier Telecom, a Georgia Limited Liability Co., Defendants: Teresa Wynn Roseborough, Sutherland Asbill & Brennan, Atlanta, GA; Dara L. Steele-Belkin, Sutherland Asbill & Brennan, Atlanta, GA.

For Business Telecom, Inc., a North Carolina Corporation, Defendant: Dara L. Steele-Belkin, Sutherland Asbill & Brennan, Atlanta, GA; Teresa Wynn Roseborough, Sutherland Asbill & Brennan, Atlanta, GA.

For Consumers' Utility Counsel Division of the Governor's Office of Consumer Affairs, Defendant: Christiane (Tiane) L. Sommer, Governor's Office [*3] of Consumer Affairs, Consumers' Utility Counsel Division, Atlanta, GA.

For US LEC of Georgia, Inc., a Delaware Corporation, Defendant: Newton M. Galloway, Smith Galloway Lyndall & Fuchs, Griffin, GA; Terri Mick Lyndall, Galloway & Lyndall, LLP, Griffin, GA.

For Georgia Public Service Commission, Angela E. Speir, Chairman of the PSC, Robert B. Baker, David L. Burgess, H. Doug Everett, Stan Wise, Defendants:

Daniel S. Walsh, Office of State Attorney General, Atlanta, GA.

JUDGES: CLARENCE COOPER, UNITED STATES DISTRICT JUDGE.

OPINION BY: CLARENCE COOPER

OPINION

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). [*4]

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.

¹ *Order on Remand, Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 2005 FCC LEXIS 912, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (FCC rel. Feb. 4, 2005).

First, BellSouth [*5] 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 support its conclusion)

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

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).

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 [*6] there would be a "nationwide bar" on switching (and thus UNE Platform) orders, *Order on Remand* 2005 FCC LEXIS 912 at *327-28. 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* 2005 FCC LEXIS 912 at *512 ("Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching"); 2005 FCC LEXIS 912 at *320 ("We 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. 2005 FCC LEXIS 912 at *230-315.

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 [*7] 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* 2005 FCC LEXIS 912 at *230-376. 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. 2005 FCC LEXIS 912 at *230-322. 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 Bell-

South 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* 2005 FCC LEXIS 912 at *390-91. In conflict [*8] 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* 2005 FCC LEXIS 912 at *320-22, 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* 2005 FCC LEXIS 912 at *375-76, 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." ³ *New York Order* 2005 N.Y. PUC LEXIS 130 at *44. 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.*

3 *Order Implementing TRRO Changes Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand*, 2005 N.Y. PUC LEXIS 130, Case No. 05-C-0203 (N.Y. PSC Mar. 16, 2005) ("*New York Order*").

[*9] 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, 2005 N.Y. PUC LEXIS 130 at *3. The Court concludes that 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, 15 L. Ed. 2d 284, 86 S. Ct. 360 (1965) ("An agency, like a court, can undo what is wrongfully done by virtue of its order."); *see also United States Telecom Ass'n v. FCC*, 360 U.S. App. D.C. 202, 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 [*10] 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 [*11] 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 [*12] 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 Communs. 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 (2004) (proposing a transition plan that "does not permit competitive LECs to add new customers").

[*13] *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 "frustrated sustainable, facilities-based competition," *Order on Remand* 19 FCCR at 16784, 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 industry disruption," *id.* at 16824. 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* 19 FCCR at 16797 (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 [*14] 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

UNITED STATES DISTRICT JUDGE

LEXSEE 425 F3D 964

BELLSOUTH TELECOMMUNICATIONS, INC., Plaintiff-Counter-Defendant-Appellee, versus MCIMETRO ACCESS TRANSMISSION SERVICES, LLC, a Delaware Limited Liability Company, Defendant-Counter-Claimant-Appellant, NUVOX COMMUNICATIONS, INC., a Delaware Corporation, KMC TELECOM HOLDINGS, INC., a Delaware Corporation, KMC TELECOM V, INC., a Delaware Corporation, KMC TELECOM III, LLC, a Delaware limited liability company, XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC, AT&T COMMUNICATIONS OF THE SOUTHERN STATES, LLC, XSPEDIUS MANAGEMENT CO. OF ATLANTA, TALK AMERICA, INC., a Pennsylvania Corporation, LECSTAR TELECOM, INC., a Georgia Corporation, ITC[caret]DELTA COM COMMUNICATIONS, INC., an Alabama Corporation d.b.a. ITC[caret]DeltaCom, BUSINESS TELECOM, INC., a North Carolina Corporation, BROADRIVER COMMUNICATIONS CORP., a Delaware Limited Liability Company, CBeyond COMMUNICATIONS, LLC, a Delaware Limited Liability Company, CONSUMERS' UTILITY COUNSEL DIVISION OF THE GOVERNOR'S OFFICE OF CONSUMER AFFAIRS, DIECA COMMUNICATIONS, INC., d.b.a. Covad Communications Corporation, SOUTHERN DIGITAL NETWORK, INC., d.b.a. FDN Communications, USCARRIER TELECOM, a Georgia Limited Liability Co., GEORGIA PUBLIC SERVICE COMMISSION, Defendants-Appellants, XO COMMUNICATIONS SERVICES, INC., et al., Defendants.

No. 05-11880

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

425 F.3d 964; 2005 U.S. App. LEXIS 19819; 62 Fed. R. Serv. 3d (Callaghan) 1374; 18 Fla. L. Weekly Fed. C 961; 36 Comm. Reg. (P & F) 912

September 15, 2005, Decided

September 15, 2005, Filed

PRIOR HISTORY: [**1] Appeals from the United States District Court for the Northern District of Georgia. D. C. Docket No. 05-00674-CV-CC-1.

BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., LLC, 2005 U.S. Dist. LEXIS 9394 (N.D. Ga., Apr. 5, 2005)

DISPOSITION: AFFIRMED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, competitive local exchange carriers (CLECs) and the Georgia Public Service Commission (PSC), appealed an order of the United States District Court for the Northern District of Georgia, which entered a preliminary injunction barring enforcement of an order of the PSC.

OVERVIEW: The key issue was whether the district court abused its discretion when it entered a preliminary injunction that barred enforcement of an order of the PSC, which required appellee company to negotiate the terms of providing its competitors unlimited access to its facilities. Because the Federal Communications Commission (FCC), in a regulatory order, ruled that unlimited access was no longer permitted, the district court did not abuse its discretion when it determined appellee showed a substantial likelihood of success on the merits and both the balance of harms and public interest supported a preliminary injunction. As to substantial likelihood of success on the merits, the CLECs were clinging to a former regulatory regime to cram in as many new customers as possible before they were forced to bow to the inevitable, but their argument contravened the clear intent of the FCC's Triennial Review Remand Order. Next, although the CLECs undoubtedly would lose customers, they would suffer that harm only as a result of conduct the

FCC concluded was anticompetitive and contrary to federal policy. Finally, the district court did not abuse its discretion when it declined to set a bond amount.

OUTCOME: The district court's order was affirmed.

LexisNexis(R) Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions
Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

[HN1] The court of appeals reviews for abuse of discretion the grant of a preliminary injunction. The court begins its review by noting how deferential it is. Appellate review of such a decision is very narrow. The district court's decision will not be reversed unless there is a clear abuse of discretion.

Civil Procedure > Judgments > General Overview
Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN2] The expedited nature of preliminary injunction proceedings often creates not only limits on the evidence available but also pressure to make difficult judgments without the luxury of abundant time for reflection. Those judgments, about the viability of a plaintiff's claims and the balancing of equities and the public interest, are the district court's to make and the appellate court will not set them aside unless the district court has abused its discretion in making them.

Civil Procedure > Remedies > Injunctions > Elements > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN3] A district court may issue a preliminary injunction when the moving party demonstrates (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction is issued; (3) the threatened injury to the moving party outweighs whatever damage the proposed injunction might cause the non-moving party; and (4) if issued, the injunction would not be adverse to the public interest.

Administrative Law > Agency Adjudication > Review of Initial Decisions

Administrative Law > Agency Rulemaking > Rule Application & Interpretation > Binding Effect

[HN4] An agency has the power to correct its earlier legal errors.

Administrative Law > Judicial Review > Reviewability > Preservation for Review

[HN5] An order of an agency can only be defended on the grounds cited by the agency during the administrative proceeding.

Civil Procedure > Remedies > Injunctions > Elements > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

[HN6] Although economic losses alone do not justify a preliminary injunction, the loss of customers and goodwill is an irreparable injury.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Prejudgment Remedies > General Overview

[HN7] Fed. R. Civ. P. 65(c) requires that an applicant for a preliminary injunction provide security against the potential effects of a wrongly-issued injunction.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Injunctions > Temporary Restraining Orders

Civil Procedure > Remedies > Prejudgment Remedies > General Overview

[HN8] See Fed. R. Civ. P. 65(c).

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Prejudgment Remedies > General Overview

[HN9] Before a court may issue a preliminary injunction, a bond must be posted, but it is well-established that the amount of security required by the rule is a matter within the discretion of the trial court, and the court may elect to require no security at all.

COUNSEL: For MCImetro Access Transmission Services, LLC, Appellant: Jeffrey A. Rackow, MCI, Inc., Washington, DC.

For Nuvox Communications, Inc., KMC Telecom Holdings, Inc., KMC Telecom V, Inc., KMC Telecom III, LLC, Xspedius Management Co. Switched Services,

LLC, Xspedius Management Co. of Atlanta, Talk America, Inc., Lecstar Telecom, Inc., ITC-Deltacom Communications, Inc., Business Telecom, Inc., Broadriver Communications, Inc., Cbeyond Communications, Inc., Dieca Communications, Inc., Souther Digital Network, Inc., USCarrier Telecom, Appellants: Teresa Wynn Roseborough, Sutherland, Asbill & Brennan, Atlanta, GA.

For Georgia Public Service Commission, Appellant: Daniel Stephen Walsh, Assistant Attorney General-Department of Law, Atlanta, GA.

For Consumers' Utility Counsel Div. of the Governor's, Appellant: Clare A. McGuire, Governor's Office of Consumer Affairs, Atlanta, GA.

For AT&T Communications of the Southern United States, LLC, Appellant: Barry J. Armstrong, McKenna, Long & Aldridge, LLP, Atlanta, GA.

For US LEC of Georgia, Inc., Appellant: Newton M. Galloway, Galloway & Lyndall, LLP, Griffin, GA; Dara Loren Steele-Belkin, Sutherland, Asbill & Brennan, Atlanta, GA.

For BellSouth Telecommunications, Inc., Jill, Warner, Matthew H. Patton, Michael E. Brooks, Kilpatrick, Stockton, L.L.P., Atlanta, GA; Sean A. Lev, Kellogg, Huber, Hansen, Todd & Evans & Figel, P.L.L.C., Washington, DC.

Amicus for Verizon: Joseph M. Ruggiero, Arlington, VA; Bruce David Cohen, Verizon, Newark, NJ.

JUDGES: Before TJOFLAT, PRYOR and ALARCON*, Circuit Judges.

* Honorable Arthur L. Alarcon, United States Circuit Judge for the United States Court of Appeals for the Ninth Circuit, sitting by designation.

OPINION BY: PRYOR

OPINION

[*966] PRYOR, Circuit Judge:

The key issue in this appeal is whether the district court abused its discretion when it entered a preliminary injunction that barred enforcement of an order of the Georgia Public Service Commission, which had required BellSouth Telecommunications, Inc., to negotiate the terms of providing its competitors unlimited access to its facilities. Because the Federal Communications Commission, in a regulatory order, had ruled that unlimited

access was no longer permitted, the district court did not abuse its discretion when it determined that BellSouth showed a substantial likelihood of success on the merits and both the balance of harms and the public interest supported the entry of a preliminary injunction.

I. BACKGROUND

In the Telecommunications Act of 1996, Congress sought to enhance competition in [**2] the local telephone service market to promote better quality and lower prices. Pub. L. No. 104-104, 110 Stat. 56. Congress delegated to the FCC the task of implementing this scheme of enforced competition. The FCC responded by requiring "Incumbent Local Exchange Carriers" (ILECs) to offer "Competitive Local Exchange Carriers" (CLECs) "unbundled" access to various components of the local telephone network known collectively as "unbundled network elements" (UNEs). In practical terms, unbundled access meant that ILECs provided CLECs access to UNEs at greatly reduced rates.

UNE components include "loops," "switches," and "transport facilities." Loops are copper wires that connect a home or business to the local phone company switch. A switch is a device, usually software, that routes a call from a home or office to the intended recipient. Transport facilities are devices such as copper wires or fiber-optic cables that transport calls between switches.

For eight years, the FCC tried and failed to implement a regulatory scheme that, after review by federal courts, satisfied the 1996 Act. For most of those eight years, the FCC required unbundling on the theory that it enhanced competition. [**3] The FCC required ILECs and CLECs to enter "voluntary" agreements to provide unbundled access to local telephone networks. If the parties could not agree, an agreement was provided either by the FCC or by state commerce commissions. States were given the authority to oversee voluntary agreements and arbitrate disputes arising from those agreements. 47 U.S.C. § 252(a), (b).

Under this regulatory scheme, BellSouth entered many agreements with CLECs. BellSouth agreed to provide network access at specified rates. Included in those agreements was a standard "change of law" provision, which required the parties, upon any change of law that materially altered the agreement, to "renegotiate in good faith such mutually acceptable new terms as may be required."

In 2004, in a challenge to the FCC scheme filed by ILECs, the D.C. Circuit vacated the second attempt of the FCC to implement the directive of Congress regarding local phone service. See *U.S. Telecom Ass'n v. F.C.C.*, 360 U.S. App. D.C. 202, 359 F.3d 554 (D.C. Cir. 2004). The D.C. Circuit concluded, in part, that the un-

bundling regime enacted by the FCC was not based on a rational analysis of whether "CLECs are impaired [**4] in the mass market without unbundled access to ILEC switches." *Id.* at 569. The D.C. Circuit also expressed some frustration regarding the "failure [of the FCC], after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial [*967] rulings." *Id.* at 595. In response to the ruling of the D.C. Circuit, the FCC issued interim rules that preserved the status quo ante while the FCC wrote new rules, and the FCC established a transition period, ending in early 2005, in which only existing customers could be served through UNEs.

In February 2005, the FCC released its Triennial Review Remand Order (TRRO), which stated that the unbundling of certain "UNE-Platform" (UNE-P) elements harmed competition by discouraging innovation. To redress that harm, the FCC stated that ILECs would no longer be obliged to provide CLECs "with unbundled access to mass market local switching," and the FCC provided more limited relief from unbundling for loops and transport. The FCC stated that existing, or "embedded," customers could continue to have access to UNE-Ps for up to twelve months, although at higher rates. The FCC also required [**5] CLECs to submit orders within one year to convert embedded UNE-P customers to "alternative arrangements." During the transition period, the FCC banned new orders for unbundled access to local mass market switching: "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching." The FCC required both ILECs and CLECs to negotiate, under the change-of-law provisions in their contracts, any "necessary" changes to the interconnection agreements: "We expect that [carriers] will implement [our] findings. . . . Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. . . . Thus, [carriers] must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes." Based on the "need for prompt action," the FCC stated that the TRRO was effective on March 11, 2005.

On February 11, 2005, BellSouth informed various CLECs that, as of the effective date of the TRRO, BellSouth would not accept new orders for unbundled local switching or UNE-P, nor would it accept loop and transport [**6] orders no longer required under the TRRO. In response to that decision by BellSouth, MCImetro Access Transmission Services, LLC, a CLEC, filed an emergency motion with the Georgia Public Service Commission and argued that BellSouth was required to continue serving the embedded base and accept new UNE-P orders so long as the change-of-law negotiating

process was ongoing. Other CLECs then filed similar motions with the Commission.

The Commission granted the motions. The Commission ruled that the FCC, in paragraph 233 of the TRRO, required carriers to implement through negotiations all changes mandated by the TRRO. Although the Commission stated that the FCC had the power, under the "proper circumstances," to alter carriers' rights under interconnection agreements, the Commission concluded that the FCC had not intended to abrogate the usual change-in-law process between carriers. The Commission, therefore, required BellSouth to negotiate with MCImetro and other CLECs regarding an amendment to their interconnection agreements.

BellSouth sued the CLECs and the Commission in federal court and moved for a preliminary injunction. The district court granted the injunction and held that BellSouth [**7] had established a substantial likelihood of success on the merits. The district court concluded that, because the TRRO was immediately effective, there was nothing to negotiate regarding the determination of the FCC that unbundling was no longer permitted for local switching [*968] and, in limited circumstances, for loops and transport facilities. The district court reasoned that to allow CLECs to add new UNE-P customers would be inconsistent with the plain language of the TRRO.

The district court also found that BellSouth was suffering irreparable harm due to the loss of customers and those customers' goodwill, and the harm to BellSouth outweighed the harm to CLECs. The district court found that the CLECs would suffer harm "only if they intended to compete by engaging in conduct that the FCC has concluded is anticompetitive and contrary to federal policy." The district court determined that a preliminary injunction was in the interest of the public, because the FCC "authoritatively determined" that the practice of unbundling under the old regime harmed competition and was contrary to the public interest. This Court granted the CLECs an expedited appeal, but denied their motion to stay the [**8] injunction pending appeal.

II. STANDARD OF REVIEW

[HN1] This Court reviews for abuse of discretion the grant of a preliminary injunction. *Cumulus Media, Inc. v. Clear Channel Commc'ns, Inc.*, 304 F.3d 1167, 1171 (11th Cir. 2002). "We begin our review by noting how deferential it is." *Id.* "Appellate review of such a decision is very narrow. The district court's decision will not be reversed unless there is a clear abuse of discretion." *Revette v. International Asso. of Bridge, etc.*, 740 F.2d 892, 893 (11th Cir. 1984) (per curiam). [HN2] "The expedited nature of preliminary injunction proceedings often cre-

ates not only limits on the evidence available but also pressure to make difficult judgments without the luxury of abundant time for reflection. Those judgments, about the viability of a plaintiff's claims and the balancing of equities and the public interest, are the district court's to make and we will not set them aside unless the district court has abused its discretion in making them." Cumulus, 304 F.3d at 1171.

III. DISCUSSION

The CLECs and the Commission advance three arguments that we address in [**9] turn. First, the CLECs and the Commission argue that the district court misread the TRRO when it held that BellSouth had established a high likelihood of success. Second, the CLECs and the Commission contend that the district court abused its discretion when it held that the equities and the public interest favored BellSouth. Third, the CLECs request that the injunction be vacated, because the district court failed to set a bond amount to protect their interests under Federal Rule of Civil Procedure 65(c). None of these arguments is persuasive.

A. The Preliminary Injunction Was Not An Abuse of Discretion.

[HN3] A district court may issue a preliminary injunction when the moving party demonstrates (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction is issued; (3) the threatened injury to the moving party outweighs whatever damage the proposed injunction might cause the non-moving party; and (4) if issued, the injunction would not be adverse to the public interest. *Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr, S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003). [**10] It is clear that the district court considered each of these factors. Our review of that decision reveals no abuse of discretion.

[*969] 1. BellSouth Will Likely Succeed on the Merits.

In the TRRO, the FCC reversed its position of nearly a decade that widespread unbundling was needed to implement the will of Congress. This policy reversal was prompted by the scathing rebuke from the D.C. Circuit in *U.S. Telecom Association v. FCC*. The heart of this controversy between BellSouth and the CLECs concerns the intent of the FCC in fashioning its new policy in the TRRO.

The FCC now contends that a "nationwide bar" on UNE-P orders will encourage innovation and will not impair CLECs. To effect this policy choice, and given the need for "prompt action," the FCC decreed that new UNE-P orders, among others, would not be permitted.

Under the transition plan, the FCC, obviously aware that the changes it ordered could not be carried out immediately without massive disruptions in service, allowed for current CLEC customers to have access to UNE-Ps for up to twelve months. After the transition period, even current CLEC customers must have alternative arrangements.

Despite this clear directive, the [**11] CLECs and the Commission contend that BellSouth must negotiate with the CLECs regarding this aspect of the TRRO. It is not clear, under their reasoning, what remains to be negotiated. After all, the TRRO "does not permit" new customers access to UNE-Ps after March 11, 2005, and BellSouth does not dispute that it still must offer access in some circumstances to loops and transport facilities.

The CLECs and the Commission argue that paragraph 233 of the TRRO requires carriers to implement, through negotiation, all changes mandated by the TRRO, but this argument fails. The plain language of paragraph 233 requires negotiations over only those items necessary to effect the changes mandated by the TRRO: "Carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. . . . Thus, [carriers] must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes." As BellSouth correctly argues, the TRRO is a massive document that addresses many issues besides unbundling, and those ancillary issues require the parties to cooperate. In contrast, the TRRO leaves nothing to be done regarding UNE-P orders [**12] for new customers, because they are no longer allowed. No negotiations are necessary to implement this aspect of the TRRO.

The parties dispute whether the Mobile-Sierra doctrine allows the FCC to change unilaterally the terms of the interconnection agreements. Under this doctrine, an agency can abrogate or modify a utility contract "only if the public interest so requires." *Transmission Access Policy Study Group v. FERC*, 343 U.S. App. D.C. 151, 225 F.3d 667, 709 (D.C. Cir. 2000) (per curiam); see also *Fed. Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55, 76 S. Ct. 368, 371-72, 100 L. Ed. 388 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344-45, 76 S. Ct. 373, 380-81, 100 L. Ed. 373 (1956). The CLECs and the Commission argue that the FCC could not have invoked the Mobile-Sierra doctrine, because the FCC did not make an explicit finding regarding the public interest, but this argument fails.

The FCC plainly based its decisions on the public interest. In paragraph 218 of the TRRO, the FCC found that continued use of the UNE-P was contrary to the public interest, because it "hindered . . . genuine, facilities-

based [**13] competition." Paragraph 236 made the TRRO effective on March 11 also to serve the public interest.

[*970] The FCC has the undisputed power to issue binding rules under the 1996 Act. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380, 119 S. Ct. 721, 730, 142 L. Ed. 2d 834 (1999). [HN4] An agency also has the power to correct its earlier legal errors, *Gun South, Inc. v. Brady*, 877 F.2d 858, 862 (11th Cir. 1989), and the interconnection agreements were the product of an earlier regulatory scheme now repudiated by the FCC. The FCC had the power to impose unilaterally the ban on new unbundling, and it makes no sense to argue that BellSouth is required to negotiate over a practice the FCC has the power to and did prohibit.

In summary, the CLECs are clinging to the former regulatory regime in an attempt to cram in as many new customers as possible before they are forced to bow to the inevitable, but their argument contravenes the clear intent of the TRRO. Their remaining arguments as to why their interpretation of the TRRO is correct are not properly before this Court. [HN5] An order of an agency can only be defended on the grounds cited by the agency during the administrative [**14] proceeding. *Fla. Dep't of Labor & Employment Sec. v. United States Dep't of Labor*, 893 F.2d 1319, 1321-22 (11th Cir. 1990). The district court did not abuse its discretion in determining that BellSouth had established a substantial likelihood of success.

2. BellSouth Faced Irreparable Injury, the Balance of Harms Favored BellSouth, and the Injunction Was In the Interest of the Public.

The record also shows that the district court did not abuse its discretion when it determined that BellSouth established both irreparable harm and that the balance of harms was in its favor. BellSouth faced the loss of customers due to the order of the Commission. [HN6] Although economic losses alone do not justify a preliminary injunction, "the loss of customers and goodwill is an irreparable injury." *Ferrero v. Associated Materials Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (internal quotation marks omitted). The record supports the finding of the district court that BellSouth was losing about 3200 customers per week under the previous regime.

The alleged injuries of the CLECs do not outweigh those of BellSouth. Although the CLECs undoubtedly will lose customers, they [**15] will, as the district court reasoned, suffer that harm only as a result of "conduct that the FCC has concluded is anticompetitive and contrary to federal policy." The district court did not abuse its discretion when it found that the balance of these harms favored BellSouth.

For similar reasons, the injunction was in the public interest. As the FCC found, the earlier unbundling rules "frustrated sustainable, facilities-based competition," and a delay in implementing the new rules would be "contrary to the public interest." Based on these findings, the district court did not abuse its discretion when it found that compliance with the TRRO, not the contrary order of the Commission, was in the public interest.

B. The District Court Did Not Abuse Its Discretion When It Directed Counsel To Confer Regarding the Amount of Security Under Rule 65(c).

The CLECs finally contend that, because the district court failed to set a bond upon the issuance of the preliminary injunction, the injunction should be vacated. [HN7] Federal Rule of Civil Procedure 65(c) requires that an applicant for a preliminary injunction provide security against the potential effects [**16] of a wrongly-issued injunction:

[*971] [HN8] No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. . . .

Fed. R. Civ. P. 65(c). This Court has stated previously, in dicta, that [HN9] "before a court may issue a preliminary injunction, a bond must be posted," *Piambino v. Bailey*, 757 F.2d 1112, 1143 (11th Cir. 1985), but it is well-established that "the amount of security required by the rule is a matter within the discretion of the trial court . . . [and] the court may elect to require no security at all." *City of Atlanta v. Metro. Atlanta Rapid Transit Auth.*, 636 F.2d 1084, 1094 (5th Cir. Unit B 1981) (citation and quotation marks omitted).

Although the district court did not set a security amount, it stated that the parties were to confer regarding the "bond issue." That statement shows both the district court was aware of the bond requirement and there was some discussion [**17] of the issue at the hearing on the motion for a preliminary injunction. The district court did not abuse its discretion when it declined to set a bond amount at that time. Cf. *City of Atlanta*, 636 F.2d at 1094.

IV. CONCLUSION

The district court was "well within the bounds of its discretion" in entering a preliminary injunction to effec-

425 F.3d 964, *, 2005 U.S. App. LEXIS 19819, **;
62 Fed. R. Serv. 3d (Callaghan) 1374; 18 Fla. L. Weekly Fed. C 961

tuates the TRRO, "and we will not second guess its judgment." Cumulus, 304 F.3d at 1179.

AFFIRMED.

2 of 100 DOCUMENTS

BELLSOUTH TELECOMMUNICATIONS, INC., Plaintiff, v. CINERGY COMMUNICATIONS CO., a/k/a CINERGY COMMUNICATIONS, CORP., ET AL., Defendants.

Civil Action No. 3:05-CV-16-JMH

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

2006 U.S. Dist. LEXIS 11535

March 20, 2006, Decided

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For NewSouth Communications Corp., NuVox Communications Inc., KMC Telecom III, LLC, Xspedius Communications, LLC, Xspedius Management Co. Switched Services, LLC, Xspedius Management Co. of Louisville, LLC, Xspedius Management Co. of Lexington, LLC, KMC Telecom V, Inc., Defendant: Holly C. Wallace, Jeremy Stuart Rogers, Dinsmore & Shohl, LLP - Louisville KY, Louisville, KY; John J. Heitmann, Stephanie A. Joyce, Kelley Drye & Warren, LLP - Washington, Washington, DC; John E. Selent, Dinsmore & Shohl, Louisville, KY; John E. Selent, Dinsmore & Shohl, Louisville, [*2] KY.

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For Gregory D. Stumbo, By and Through his Office of Rate [*3] Intervention, in his official Capacity as Attorney General of the Commonwealth of Kentucky, Defendant: Dennis G. Howard, II, Attorney General's Office, Frankfort, KY.

JUDGES: Joseph M. Hood, United States District Judge.

OPINION BY: Joseph M. Hood

OPINION

MEMORANDUM OPINION AND ORDER

In this action, BellSouth Telecommunications, Inc. ("BellSouth") seeks review of the following two Kentucky Public Service Commission ("PSC") orders: (1) Order, *Petition of BellSouth Telecomms., Inc. to Establish Generic Docket to Consider Amendments to Inter-*

connection Agreements Resulting from Changes of Law, Case No. 2004-00427 (Ky. PSC Mar. 10, 2005) ("Cinergy Order"); and (2) Order, *Joint Petition for Arbitration of NewSouth Commc'ns Corp., et al.*, Case No. 2004-00044 (Ky. PSC Mar. 10, 2005) ("Joint CLEC Order"). The parties having fully briefed the issue, the matter is now ripe for review.

I. Factual and Procedural Background

With the passage of the 1996 Telecommunications Act ("the Act") Congress sought to promote competition among telecommunications providers in an effort to improve the price and quality of service to consumers. *BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC*, 425 F.3d 964, 966 (11th Cir. 2005). [*4] One provision of the Act places a duty on incumbent local exchange carriers ("ILECs or incumbent LECs"), like the plaintiff BellSouth, that have traditionally provided local telephone services to an area, to lease unbundled network elements ("UNEs") on a cost basis to new entrants into the market, called competitive local exchange carriers ("CLECs or competitive LECs"). 47 U.S.C. § 251(c)(3); *Id.* § 252(d)(1). The agency delegated to implement the regulatory scheme is the Federal Communications Commission ("FCC").

The Act authorizes the FCC determine the network elements and the proper candidates for this low rate of service. A "network element" is defined as "a facility or equipment used in the provision of a telecommunications services." *Id.* § 153(29). The unbundled network elements platform ("UNE-P") is composed of switching functions, shared transport, and loops. Plaintiff's complaint defines "switches" as "the facilities that route and connect calls." (Pl.'s Compl. P 3.) "Loops are the wire and fiber facilities strung on telephone poles or buried underground that connect the individual customer locations to the network. Transport refers to cables [*5] that connect the BellSouth facilities that house switches." (*Id.* n.2.)

When considering whether particular network elements ought to be unbundled, the Act provides that the FCC must consider "at a minimum, whether . . . access to such network elements as are proprietary in nature is necessary; and . . . [whether] the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." 47 U.S.C. § 251(d)(2).

The Act also mandates that ILECs and CLECs enter into interconnection agreements that are overseen by the FCC and state commissions. Because the nature of the industry is ever changing, the agreements most often contain "change of law" provisions that provide mecha-

nisms for the parties to renegotiate the effect particular changes of law have on the agreements. *Id.* § 252(a), (b).

In the late 1990s, the FCC interpreted the Act's impairment test broadly and imposed blanket unbundling requirements on ILECs. These requirements were stricken by the Supreme Court and lower federal courts as being contrary to the purposes of the Act.¹ Most recently, [*6] the D.C. Circuit vacated the FCC's rule that found CLECs were "nationally impaired" without unbundled access to switches and that more nuanced impairment determinations were delegated to state commissions. The D.C. Circuit held that the ultimate authority to determine impairment lies with the FCC, not state commissions. The court also held the FCC's finding of national impairment was improper because it was impermissibly broad. *United States Telecom Ass'n v. FCC*, 360 U.S. App. D.C. 202, 359 F.3d 554, 569-72. (D.C. Cir. 2004) ("*USTA II*").

1 For example, in *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 834 (1999), the Supreme Court held that the FCC had not properly considered whether unbundling was necessary or whether the CLECs were impaired. *Id.* at 388-92. In *United States Telecom Association v. FCC*, 351 U.S. App. D.C. 329, 290 F.3d 415, 419 (D.C. Cir. 2002) ("*USTA I*"), the D.C. Circuit held that the FCC's interpretation of impairment was too broad because it did not differentiate between cost disparities for entrants into any market and the telecommunications market. *Id.* at 426-27.

[*7] In response to that decision, the FCC issued the Interim Rules Order that provided for a period wherein unbundling requirements would remain in tact at the same rates and terms, but warned, "These interim requirements will only remain in place for six months after Federal Register publication of this Order, by which time we intend to issue permanent rules." 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 P 21 (2004) ("*Interim Order*"). The Interim Order also created a transition period that would take effect after the enactment of the permanent rules wherein ILECs would continue to provide UNE services at a rate moderately higher than the previous cost-based rate. *Id.* P 1. The Interim Order provided, however, that "this transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers at these rates." *Id.* P 29.

Subsequently, the FCC issued the Order on Remand, the Order at issue in this case, that attempted to effectuate the purposes of the Act; promotion of facilities-based

[*8] competition and increase in quality and pricing for consumers. Having found that previous broad interpretations of "impairment" actually decreased incentive for CLECs to build their own facilities, the Order on Remand found impairment "only where unbundling does not frustrate sustainable, facilities-based competition." Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 2005 WL 289015, 20 FCC Rcd. 2533, at PP 2-3 (FCC Feb. 4, 2005) ("Order on Remand"). In keeping with this purpose, the Order on Remand held that CLECs "are not impaired in the deployment of switches" and that "the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify a nationwide bar on such unbundling." *Id.* P 112.

The Order on Remand provided that "given the need for prompt action, the requirements . . . shall take effect on March 11, 2005." *Id.* at P 134. The Order on Remand created a transition plan for "embedded" or existing customers, wherein CLECs had to submit orders to convert to alternative service arrangements [*9] for switching in which time the parties would modify their interconnection agreements. The time period for the transition was extended to twelve months, as opposed to the six months forewarned in the Interim Order. *Id.* at PP 128-29.

Instead of a whole-scale ban on unbundling for loops and transport, the Order on Remand provided more limited relief. The Order set out specific circumstances where loops and transport were still impaired and, thus, unbundling was still required. The transition plans for loops and transport used almost identical language to that used for switching and provided that the plans only apply to the "embedded customer base" and "do not permit competitive LECs to add new dedicated transport UNEs [and new high-capacity loop UNEs]." *Id.* PP 199, 142.

As soon as the Order on Remand was issued, BellSouth notified CLECs that as of March 11, 2005, it would no longer accept *new* switching orders to those facilities that were not required by the FCC's order. Cinergy Communications Corp. ("Cinergy"), one of the defendants in this case, filed a motion for emergency relief to the PSC, requesting that the PSC order BellSouth to continue accepting and processing [*10] its orders, including *new* orders, pursuant to the change of law provisions in the parties' agreement. Various other CLECs also asked for the same relief.

On March 10, 2005, the PSC issued two almost identical orders granting the relief the CLECs requested. (Cinergy Order); (Joint CLEC Order). In the orders, the PSC rejected BellSouth's position that the Order on Remand was immediately effective on March 11, 2005 for

new orders and, instead, found that the ban on unbundling caused "a change in law within the meaning of the existing effective contract terms between BellSouth and these CLECs carriers. . . . Because these contracts are in effect, BellSouth must follow the contract language to change its interconnection agreements." (Cinergy Order at 3.) Based on this finding, the PSC ordered BellSouth to "follow its contractual obligation to negotiate the changes of law on its interconnection agreements regarding the discontinuation of unbundled network elements." (*Id.*)

Thereafter, BellSouth filed a complaint in this Court against the PSC and various CLECs seeking declaratory and injunctive relief from the two PSC orders for switching, loops, and transports. BellSouth simultaneously [*11] filed an emergency motion for a preliminary injunction seeking relief from the PSC orders only as the orders referred to switching.

On April 22, 2005, after a hearing and extensive briefing on the matter, the Court granted BellSouth's motion for a preliminary injunction enjoining enforcement of the two PSC orders as they related to switching. The Court found that based on the language of the Order on Remand, it was likely that BellSouth would succeed on the merits because the Order on Remand's ban on unbundling for new orders was effective March 11, 2005 and did not require the change to be effected through the change of law provisions in the interconnection agreements. The Court also found that the remaining factors for a preliminary injunction were present and weighed in favor of entry of a preliminary injunction.²

2 After the Court issued the April 22, 2005 Memorandum Opinion granting a preliminary injunction to BellSouth, one of the defendants, Cinergy, moved to clarify. Cinergy asked the Court to clarify that when the opinion used the terms "new orders" and "new customers" it only referred to new orders from new customers. In response, BellSouth argued that the Court meant new orders from existing customers as well as new orders from new customers. On June 3, 2005, the Court clarified its Opinion and held that "new customers" or "new orders" meant those customers or orders not included in the transition plan. The Court refused to decide whether new orders from existing customers was included in the transition plan because this issue had not been decided by the PSC.

Similarly here, the Court is merely deciding whether BellSouth was forced to effectuate the ban on unbundling through the change of law provisions in the interconnection agreements or whether BellSouth could immediately cease tak-

ing orders from those customers not included in the transition plan. For ease of understanding, the Court will refer to those customers not in the transition plan as "new orders."

[*12] Currently before the Court is BellSouth's motion for summary judgment. BellSouth seeks a permanent injunction against the PSC orders, declaratory relief, and damages. Although the preliminary injunction only involved switching, BellSouth's complaint and motion for summary judgment also assert that the two PSC orders conflict with the Order on Remand as the orders relate to loops and transport.

II. Standard of Review

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the initial burden to show the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). This burden is met simply by showing the Court that there is an absence of evidence on a material fact on which the nonmoving party has the ultimate burden of proof at trial. *Id.* at 325. The burden then shifts to the nonmoving party to "come [*13] forward with some probative evidence to support its claim." *Lansing Dairy, Inc. v. Espy*, 39 F.3d 1339, 1347 (6th Cir. 1994). The evidence is construed in the light most favorable to the nonmoving party when deciding whether there is enough evidence to overcome summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Summers v. Leis*, 368 F.3d 881, 885 (6th Cir. 2004).

Bell South contends that the two PSC orders are preempted by the Act. Accordingly, the Court reviews *de novo* the PSC orders' compliance with interpretation of the Act. *Verizon v. Strand*, 367 F.3d 577, 581 (6th Cir. 2004). "If no illegality is uncovered during such a review, the question of whether the state commission correctly interpreted the challenged interconnection agreement must then be analyzed, but under the more deferential arbitrary-and-capricious standard of review usually accorded state administrative bodies' assessments of state law principles." *Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 339 F.3d 428, 433 (6th Cir. 2003) ("*MFS Intelenet*").

III. Analysis

A. Preliminary [*14] Matters

Before the Court discusses the merits of the case, the Court must address two preliminary arguments of the defendants. The PSC argues that the case is moot and SouthEast argues that BellSouth is barred by res judicata from requesting the relief it seeks against SouthEast.

(1). Mootness

The PSC argues that the matter is moot because the CLECs were forced to make alternate agreements with BellSouth concerning new orders following entry of the preliminary injunction. The PSC asserts that if the Court were to deny permanent injunctive relief "and allow the PSC's orders to take effect, the result would be the same as if the orders were permanently enjoined - because the CLECs have already made alternative arrangements with BellSouth, an extended negotiation period would be pointless." (PSC's Resp. to Pl.'s Mot. for Summ. J. 4.)

Article III vests this Court with jurisdiction over "cases and controversies". "Under the 'case or controversy' requirement, this Court has no authority to issue a decision which would not affect the rights of the litigants." *Sw. Williamson County Cmty. Ass'n, Inc. v. Slater*, 243 F.3d 270, 276 (6th Cir. 2001). A matter is not [*15] moot if "the relief sought would, if granted, make a difference to the legal interests of the parties." *Id.* (quoting *McPherson v. Mich. High Sch. Athletic Ass'n*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc)). The burden rests with the party claiming mootness, in this case, the PSC. *Coal. for Gov't Procurement v. Fed. Prison Indus.*, 365 F.3d 435, 458 (6th Cir. 2004).

The Court finds that the matter is not moot because "the relief sought would, if granted, make a difference to the legal interests of the parties." *Id.* If the Court finds for BellSouth, the legal interest of the parties would change because the preliminary injunction entered by the Court only enjoined the PSC orders as they related to switching and did not enjoin the orders as they related to loops and transport and did not make any findings as to BellSouth's damages. Further, the PSC did not submit evidence that *all* of the CLECs have reached agreements with BellSouth regarding future pricing of new orders for switching, loops, and transport. Therefore, the PSC has not met its burden in proving the matter is moot.

(2). Res Judicata

SouthEast argues that BellSouth's [*16] attempt to obtain a permanent injunction enjoining the two PSC orders is precluded by the Court's previous decision in *Bellsouth Telecomms., Inc. v. Southeast Tel., Inc.*, 2005 U.S. Dist. LEXIS 20363, No. 3:04-CV-84-JMH (E.D. Ky. Sept. 16, 2005) ("*SouthEast Tel., Inc.*"), in violation of res judicata principles. SouthEast argues that the prior case "involved the issues that are presented here - specifically, whether BellSouth may unilaterally cease to

comply with the terms of its preexisting interconnection agreement, or whether it must continue complying with that agreement pending resolution of its disputes with SouthEast." (SouthEast's Resp. to Pl.'s Mot. for Summ. J. 10.) SouthEast maintains that the parties have already litigated this issue and, thus, BellSouth is foreclosed from seeking an injunction that would enable BellSouth to cease carrying on its obligations under their agreement.

Res judicata involves two principles of law more aptly called claim preclusion and issue preclusion. *Mitchell v. Chapman*, 343 F.3d 811, 819 n.5 (6th Cir. 2003). Claim preclusion "refers to [the] effect of a prior judgment in foreclosing a subsequent claim that has never been litigated, [*17] because of a determination that it should have been advanced in an earlier action[.]" whereas issue preclusion "refers to the foreclosure of an issue previously litigated." *Id.* Claim preclusion is present only:

- (1) where the prior decision was a final decision on the merits; (2) where the present action is between the same parties or their privies as those to the prior action; (3) where the claim in a present action should have been litigated in the prior action; and (4) where an identity exists between the prior and present actions.

Id. at 819; accord *Browning v. Levy*, 283 F.3d 761, 771 (6th Cir. 2002). The fourth element requires "identity of the facts creating the right of action and of the evidence necessary to sustain each action." *Mitchell*, 343 F.3d at 819 n.6.

Issue preclusion, on the other hand, is present if the following elements are met:

- (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted [*18] in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

Detroit Police Officers Ass'n v. Young, 824 F.2d 512, 515 (6th Cir. 1987); *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.*, 253 F.3d 900, 908 (6th Cir. 2001) (quoting *Young*).

Neither claim or issue preclusion precludes BellSouth's current suit against SouthEast because the two cases involve different sections of the Act, different orders from the PSC, and different mandates from the FCC concerning different factual situations.

For instance, in the prior suit, *SouthEast Tel., Inc.*, BellSouth appealed a PSC order holding that the FCC's new rule interpreting § 252(i)'s opt-in procedure was not applicable to determine whether SouthEast could adopt a portion of BellSouth's agreement with another CLEC. The former rule, called the pick-and-choose rule, permitted CLECs to adopt a portion of an ILEC's agreement with another CLEC, whereas the new rule, the all-or-nothing rule, provided that a CLEC wishing to adopt a provision of another agreement had to adopt the whole agreement [*19] or nothing at all.

SouthEast filed its notice of intent to adopt a portion of BellSouth's agreement with another CLEC prior to the enactment of the new rule, but the PSC's decision utilizing the former rule was after the rule change. BellSouth argued that the new rule should apply and, alternatively, that under the former rule the adoption of a dispute resolution provision was not permitted.

This Court affirmed the PSC's decision to apply the former rule because applying the new rule would have an impermissible retroactive effect and there was no congressional intent for the rule to be applied retroactively. The Court also found that under the former rule, a CLEC could adopt a dispute resolution provision because this provision was a "term" or "condition" under which ILECs made available interconnection, service, or network elements to CLECs.

In this case, on the other hand, the issue is whether the ban on § 251(c)(3) unbundling in the FCC's Order on Remand is effective immediately for new orders or whether the ban for new orders is to be effected through the change of law provisions of the parties' interconnection agreements. There is no "identity of the facts creating the right [*20] of action and of the evidence necessary to sustain each action" as is needed for claim preclusion. *Mitchell*, 343 F.3d at 819. On the contrary, the two cases involve different sections of the Act, different mandates from the PSC, and different action from the FCC.

Although SouthEast frames the issue of the former case much broader, the issue in the former case was only which rule to apply to SouthEast's attempt to adopt the dispute resolution provision and whether under the former rule that provision was adoptable. The issue was not "whether BellSouth may unilaterally cease to comply with the terms of its preexisting interconnection agreement, or whether it must continue complying with that agreement pending resolution of its disputes with South-

East[.]" as SouthEast maintains. Therefore, because there is a lack of identity of facts and the issue before the Court was not "raised and actually litigated in the prior proceeding[.]" *Young*, 824 F.2d at 515, the Court finds that neither claim preclusion or issue preclusion bars the present action.

B. Permanent Injunction and Declaratory Relief

Having found that the matter is not moot or barred [*21] by res judicata, the Court proceeds to discuss the merits. BellSouth seeks a permanent injunction enjoining the two PSC orders, a declaration that the orders are pre-empted, and remand to the PSC to determine damages. In determining whether a permanent injunction will be granted, in addition to prevailing on the merits of the claim, the plaintiff must prove: "1) a continuing irreparable injury if the court fails to issue the injunction, and 2) the lack of an adequate remedy at law." *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1067 (6th Cir. 1998); *SKS Merch, LLC v. Barry*, 233 F. Supp. 2d 841, 852 (E.D. Ky. 2002). One court has noted,

This standard differs from the standard used to review motions for preliminary injunctions in only two respects. First, when a plaintiff seeks a permanent injunction, the plaintiff must show actual success on the merits, rather than a mere likelihood of success on the merits. *See Amoco Prod. Co. v. Village of Gambell, AK*, 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396, 94 L.E.2d 542 (1987). Second, a court facing a motion for a preliminary injunction must weigh the potential harm to the defendant resulting [*22] from an injunction, while a court deciding whether to grant permanent injunctive relief does not do so.

Eller Media Co. v. City of Cleveland, Ohio, 161 F. Supp. 2d 796, 807 n.12 (N.D. Ohio 2001).

BellSouth also seeks a declaration that the two PSC orders are pre-empted by the Order on Remand and, thus, are unlawful. Declaratory relief is appropriate if the Court finds that the PSC orders are pre-empted by the Act. *See WorldCom, Inc. v. Conn. Dep't of Pub. Util. Control*, 375 F. Supp. 2d 86, 99 (D. Conn. 2005) (affirming grant of declaratory and injunctive relief where state commission's order did not comply with the Act).

In granting BellSouth's motion for a preliminary injunction the Court found that BellSouth had a strong likelihood of success on the merits of its appeal as to switching. After reviewing the submissions of the parties, the Court finds that entry of a permanent injunction

is proper because the two PSC orders are inconsistent with and are pre-empted by the Order on Remand. The new arguments of the defendants do not persuade the Court to alter its analysis of the Order on Remand. Further, the Court extends the relief requested [*23] to certain loops and transport because the Order on Remand does not necessitate a different result for the specified network elements. Finally, the Court finds that the remaining elements support granting the permanent relief BellSouth seeks.

1). Prevailing on the Merits

First, the Court finds that the two PSC orders are pre-empted as they pertain to switching by the language of the Order on Remand. For example, the Executive Summary in the Order on Remand states that ILECs "have no obligation to provide competitive LECs with unbundling access to mass market local switching" and that the FCC "imposes no section 251 unbundling requirement" for switching. Order on Remand at PP 5, 199 (emphasis added). Concerning the effective date, the Order provides, "given the need for prompt action, the requirements set forth here shall take effect on March 11, 2005, rather than 30 days after publication in the Federal Register." *Id.* at P 235.

Regarding the transition plan, the Order states that the "transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundling access to local circuit switching [*24] pursuant to section 251(c) (3) except as otherwise specified in this Order." *Id.* at P 227 (emphasis added). The language is clear that the Order on Remand "does not permit . . . new UNE-P arrangements" and that only the "embedded customer base" is included in the transition plan.

As the Court found at the preliminary injunction stage, reading the Order on Remand to require ILECs to negotiate the ban on unbundling for orders not included in the transition plan leads to an illogical result because ILECs are paid at a higher rate for switching services for orders included in the "embedded base" than the cost-based amount formerly required and the transition plan only lasts twelve months. *Id.* at P 228. If the defendants' interpretation is accepted, then BellSouth would be paid less for servicing new orders than existing orders and may be processing new orders longer than it is required to accept existing orders at the lower prices mandated by the interconnection agreements.³ This result is illogical and wholly inconsistent with the Order on Remand's ban on unbundling.

³ Although the PSC argues in its response that "had the PSC's order not been enjoined, the defendants, while negotiating new agreements,

would have been placing orders for new UNE-P consistent with the prices of those for the embedded customer base", there is no authority or guaranty offered for this position.

[*25] The FCC's recent description of the Order on Remand in a declaratory ruling supports the Court finding. The FCC described the Order on Remand as attempting to avoid disruption by the ordering of "a 12-month transition period to allow competitors to move their *preexisting* UNE-P customers to alternative arrangements." Memorandum Opinion and Order and Notice of Inquiry, *BellSouth Telecomms., Inc. Request for Declaratory Ruling*, 20 FCC Rcd 6830, P 8 (2005) (emphasis added). The FCC's statement that the customers involved in the transition plan are "preexisting" supports the Court's finding that the ban on new orders is effected immediately.

The defendants cite paragraph 233 for support, which provides that "carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order." It also provides that "incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes." Order on Remand at P 233 (emphasis added). This paragraph, however, simply refers to effectuating the transition plan through the change of law processes in the interconnection [*26] agreements. The paragraph should be read together with the mandate that the transition plan shall only apply to existing orders and that the Order on Remand shall be effective March 11, 2005, "given the need for prompt action." *Id.* at P 235.

The defendants also argue that paragraph 227's statement that the transition plan does not permit "new UNE-P arrangements using unbundling access to local circuit switching pursuant to section 251(c)(3) *except as otherwise specified in this Order*" refers to paragraph 233's mandate that interconnection agreements be used to effectuate the change of law. The Court finds, however, that paragraph 227 refers to paragraph 228 that states "the transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period." *Id.* at P 228. Thus, paragraph 227 simply means that parties are free to negotiate a longer or shorter transition period.

The Court is not alone in its analysis of the Order on Remand. Three of the five district courts that have dealt with this issue have ruled similarly. ⁴ Further, a clear majority of state [*27] commissions have agreed that the Order on Remand is self-effectuating for new orders. ⁵

⁴ *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., LLC*, 2005 U.S. Dist. LEXIS 9394, No. 1:05-CV-0674, 2005 WL 807062, at *1-6 (N.D. Ga. April 5, 2005) (granting injunction to BellSouth) affirmed by *affirmed* by 425 F.3d 964, 969-71 (11th Cir. 2005); *BellSouth Telecomms., Inc. v. Miss. Pub. Serv. Comm'n*, 368 F. Supp. 2d 557, 560 - 66 (S.D. Miss. 2005) (granting injunction to BellSouth); *contra MCI Metro Access Transmission Servs., LLC v. Mich. Bell Tel. Co.*, No. 05-CV-709885 (E.D. Mich. Mar. 11, 2005) ("*Miss. PSC*") (order without opinion that grants an injunction to CLECs, but is later withdrawn due to parties' settlement); *Ill. Bell Tel. Co. v. Hurley*, 2005 U.S. Dist. LEXIS 6022, No. 05-C-1149, at 7-12 (E.D. Ill. Mar. 29, 2005) (denying injunction to BellSouth).

⁵ For instance, Indiana, New York, Ohio, California, New Jersey, Texas, Rhode Island, Kansas, Massachusetts, Michigan, and Maine all are in accord with BellSouth's interpretation of the Order on Remand. *See Miss. PSC*, 368 F. Supp. 2d at 561 n.6, for commission orders cited therein. Delaware, North Carolina, Florida, Louisiana, Alabama, Maryland, Virginia, Tennessee, and Pennsylvania have also held that the Order on Remand is self-effectuating for new orders. *See Open Meeting, Complaint of A.R.C. Networks, Inc., d/b/a/ InfoHighway Commc'ns, and XO Commc'ns, Inc., Against Verizon Del. Inc., for Emergency Declaratory Relief Related to the Continued Provision of Certain Unbundled Network Elements After the Effective Date of the Order on Remand (FCC 04-290 2005)*, Docket No. 334-05 (Del. PSC Mar. 22, 2005); Notice of Decision and Order, *In the Matter of Complaints Against BellSouth Telecomms., Inc. Regarding Implementation of the Triennial Review Remand Order*, Docket No. P-55, Sub-1550, at 4-5 (N.C. PSC Apr. 15, 2005); Vote Sheet, *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes in Law*, by *BellSouth Telecomms., Inc.*, Docket No. 041269-TP, at Issue 2 (Fla. PSC Apr. 5, 2005); Minutes of Open Session, Pursuant to Special Order 48, U-28131, at 3-4 (La. PSC Apr. 20, 2005); Order Dissolving Temporary Standstill and Granting in Part and Denying in Part Petitions for Emergency Relief, *Petition of Competitive Carriers of the South, Inc.*, Docket No. 29393, at 14 (Ala. PSC May 25, 2005); Letter, *Emergency Petition of MCI for a Comm'n Order Directing Verizon to Continue to Accept New Unbundled Network Element Platform Orders*, ML No. 96341 (Md. PSC March 10, 2005); Order

Dismissing and Denying, Petition of A.R.C. Networks Inc. d/b/a Infohighway Commc'ns, Inc. and XO Communications, Inc. for a Declaratory Ruling Directing Verizon to Continue to Provision Certain UNEs and UNE Combinations, Case No. PUC-2005-00042 (Va. SCC Mar. 24, 2005); Order Terminating Alternative Relief Granted During April 11, 2005 Deliberations, *BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 04-00381 (Tenn. Reg. Auth., July 25, 2005); Agenda, *Pa. PUC v. Verizon Pa. Inc.*, Docket No. R-00049525 (Pa. PUC Mar. 23, 2005).

Commissions that agree with the PSC are Illinois, Mississippi, Georgia, and South Carolina, two of which were found unlawful by the district courts reviewing the PSC orders and one of which only established a ninety day period that the ILEC must accept new orders. *See Ill. Bell Tel. Co. v. Hurley*, 2005 U.S. Dist. LEXIS 6022, Docket No. 05-C-1149, at 7-12 (N.D. Ill. Mar. 29, 2005); Order Establishing Generic Docket, Docket No. 2005-AD-139, (Miss. PSC Mar. 9, 2005), declared unlawful by *BellSouth Telecomms., Inc. v. Miss. Pub. Serv. Comm'n*, cited *supra*; Order on MCI's Motion for Emergency Relief Concerning UNE-P Orders, *Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U (Ga. PSC Mar. 9, 2005), declared unlawful by *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs.*, cited *supra*; *Commission Directive, Petition of BellSouth Telecomms., Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 2004-316-C (S.C. PSC Apr. 13, 2005) (establishing ninety day period within which ILECs must continue to accept new orders from CLECs).

[*28] The same logic applies to BellSouth's motion for relief against the two PSC orders as they refer to loops and transport. As opposed to a complete ban on unbundling for loops and transport, the FCC's Order on Remand creates a three-tier test to determine when unbundling is no longer required for certain wire centers for transport. Order on Remand, P 66. For loops, the Order on Remand also specifies the circumstances wherein unbundling is no longer required. *Id.* P 146. The ban on unbundling for loops and transport is not whole-scale but, instead, is limited to certain circumstances delineated in the Order on Remand. Similar to the ban on unbundling for switching, however, is the creation of tran-

sition plans for both loops and transport that only apply to the "embedded customer base" and "do not permit" CLECs "to add new dedicated transport UNEs". *Id.* PP 142, 195 (accord for loops).

Based on the similarity between the transition plans, the Court finds that the ban on unbundling for those situations where the FCC found no impairment for loops and transport is effective immediately for new orders. As BellSouth argues, the transition plans for loops, transport, and switching utilizes [*29] almost identical language and only apply to the "embedded base" of customers. The Court is persuaded that the same logical interpretation of the transition plans apply. *See BellSouth Telecomms, Inc.*, 2005 U.S. Dist. LEXIS 9394, 2005 WL 807062, at *4 (granting preliminary injunction for switching, loops and transport), *affirmed by* 425 F.3d 964 (11th Cir. 2005).

NuVox argues that the paragraphs following the transition plans for loops and transport indicate the FCC's intent to effectuate the limited ban on unbundling for loops and transport through the change of law provisions in the parties' agreements. For support, NuVox cites paragraph 143, which provides that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including any change of law processes." Paragraph 196 uses the same language for loops. These paragraphs, however, follow the transition plan paragraphs that clearly state that the transition plans apply only to the "embedded customer base" and that the transition plans "do not permit [CLECs] to add new [loops or transport]." ⁶ Order on Remand at PP 195, 142.

⁶ Nuvox also argues that paragraph 233, which applies to loops, transport, and switching supports its argument. The Court has already discussed this paragraph in the context of switching. For the same reasons discussed *supra*, Nuvox's argument is ill-fated.

[*30] The rules promulgated in support of the Order on Remand also clearly state that ILECs may no longer obtain unbundling for those loops and transport that the Order on Remand specifies as being no longer impaired. 47 C.F.R. § 51.319(a)(4)(iii) ("Where incumbent LECs are not required to provide unbundled DS1 loops . . . requesting carriers may not obtain new DS1 loops as unbundled network elements"); *Id.* § 51.319(a)(5)(iii) (same for DS3 loops); *Id.* § 51.319(e)(2)(ii)(C) (same for DS1 transport); *Id.* § 51.319(e)(2)(iii)(C) (same for DS3 transport). Therefore, the PSC orders mandating that BellSouth continue to provide switching, loops, and transport services for new orders to CLECs are preempted because they are inconsistent with the Order on Remand.⁷

7 In holding that the two PSC orders are pre-empted by the Order on Remand, the Court is not making a finding as to whether BellSouth has additional unbundling requirements pursuant to § 271. In the Court's Opinion granting preliminary relief, the Court noted that this Court was not the appropriate forum to address this issue because the FCC was the appropriate forum. This statement was *dictum* and was only addressed because the defendants argued that § 271 prevented the Court's entry of a preliminary injunction. As the Court is merely concluding that the PSC orders are pre-empted by the Order on Remand, the Court makes no finding as to § 271 requirements.

[*31] In finding the PSC orders are pre-empted, the Court rejects Nuvox's argument that the Act preserves the PSC's right to enact unbundling obligations pursuant to § 251(d)(3)(C) because the same section also provides that the Act preempts state regulations, orders, or policies that are *inconsistent*. 47 U.S.C. § 251(d)(3)(B) ("In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that . . . (B) is consistent with the requirements of this section."); *Id.* § 261(b) (permitting states to enforce existing rules so long as the rules are not inconsistent with the Act); *Id.* § 261(c) (permitting states to enact additional requirements on carriers so long as the additional requirements are not inconsistent with the Act); *Verizon v. Strand*, 309 F.3d 935, 940 (6th Cir. 2002) (analyzing § 261 of the Act and holding that "Congress has clearly stated its intent to supersede state laws that are inconsistent with the provisions of [the Act].").

2). Irreparable Injury and Absence of Remedy at Law

[*32] Next, the Court finds that the remaining factors support entry of a permanent injunction in favor of BellSouth. In particular, the Court finds that BellSouth would suffer irreparable harm in the absence of a permanent injunction because it is impossible to quantify potential lost customers. Although the CLEC defendants argue that BellSouth has quantified the loss by asking for the difference in price between what the defendants paid, it is impossible to quantify the amount of loss BellSouth would suffer from *customers* who chose the CLEC defendants over BellSouth due to the ability of the CLECs to receive switching, loops, and transport services at a cost basis from BellSouth. Sixth Circuit precedent supports this Court's finding. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 512 (6th Cir. 1992) (holding that "loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are diffi-

cult to compute"); *Mich. Bell Tel. Co. v. Engler*, 257 F.3d 587, 599 (6th Cir. 2001) (noting that "loss of established goodwill may irreparably harm a company"); *Lexington-Fayette Urban County Gov't v. Bellsouth Telcoms., Inc.*, 14 Fed. Appx. 636, 2001 WL 873629, [*33] at *3 (6th Cir. 2001) (holding that the lower court did not abuse its discretion in finding that BellSouth suffered irreparable harm through loss of customers because of a delayed entry into the marketplace) (unpub.); *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (finding that the movant established irreparable injury through loss of customers and good will).

Finally, an adequate remedy does not exist at law because the PSC Orders are contrary to the express intent of the FCC's Order on Remand's ban on unbundling. Without an injunction, BellSouth is unprotected against the PSC's unlawful interpretation of federal law. Therefore, the Court grants BellSouth's motion for a permanent injunction and declaratory relief.

C. Damages

BellSouth's proposed order also asks the Court to enjoin the PSC to "mandate that all [CLECS] in Kentucky that order [UNE] switching, loops, and/or transport from BellSouth in circumstances not permitted under the . . . Order on Remand" to pay "the difference between the UNE rates for access to such facilities and the lawful rate for access to such facilities (as established by the statutory resale [*34] rate)." (Pl.'s Mot. for Summ. J., Proposed Order 1-2.) Southeast objects to the Court determining the rates that the CLECs must pay retroactively because the PSC has recently addressed or has been asked to address this issue. (SouthEast's Resp. to Mot. for Summ. J. 6.)

The Court finds that district courts have the authority to remand matters to the PSC to determine damages, if any, are due to the party aggrieved by the PSC's unlawful orders. *Bellsouth Telcoms., Inc. v. Ga. PSC*, 400 F.3d 1268, 1271-72 (11th Cir. 2005) (holding that the district court was not in error in remanding the case to the PSC to determine the plaintiff's damages flowing from the PSC's unlawful rate determination because a district court has the authority to grant this remedy upon concluding that the state commission's substantive determination was unlawful). Therefore, the Court remands the matter to the PSC to determine the amount of damages, if any, and to whom the damages are due, consistent with this findings of fact and conclusions of law in this Opinion. In remanding to the PSC to determine if BellSouth should be awarded damages, the Court is not ruling on any issues presently [*35] before the PSC, for example whether BellSouth has additional unbundling requirements pursuant to § 271 or whether new orders from existing customers are included in the transition

plan because the PSC must first rule on these issues before determining the amount of damages.

IV. Conclusion

The clear language of the Order on Remand mandates that the ban on unbundling for new orders is effective immediately for switching and certain loops and transport. The PSC orders are inconsistent with the Order on Remand because they require BellSouth to continue processing new orders and to effect the change through the parties' interconnection agreements. Because the Order on Remand preempts the PSC orders, the Court grants the relief BellSouth requests.

Accordingly, **IT IS ORDERED:**

(1) Plaintiff's motion for summary judgment [Record No. 155] be, and the same hereby is, **GRANTED**.

(2) That the defendants be, and the same hereby are, **PERMANENTLY ENJOINED** from enforcing the two

PSC orders as the PSC orders pertain to accepting new orders.

(3) That the 2 PSC orders be, and the same hereby are, **DECLARED PRE-EMPTED** by the FCC's Order on Remand and, thus, are unlawful.

[*36] (4) That the matter be, and the same hereby is, **REMANDED** to the PSC to determine damages, if any.

(5) That the matter be, and the same hereby is, **STRICKEN FROM THE ACTIVE DOCKET**.

This the 20th day of March, 2006.

Signed By:

Joseph M. Hood

United States District Judge

LEXSEE 368 FSUPP 2D 557

BELLSOUTH TELECOMMUNICATIONS, INC., PLAINTIFF vs. MISSISSIPPI PUBLIC SERVICE COMMISSION, DORLOS "BO" ROBINSON, IN HIS OFFICIAL CAPACITY AS THE CHAIRMAN OF THE PSC, NIELSON COCHRAN, IN HIS OFFICIAL CAPACITY AS THE VICE CHAIRMAN OF THE PSC, AND MICHAEL CALLAHAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF THE PSC, DEFENDANTS NUVOX COMMUNICATIONS, INC., KMC TELECOM III, LLC, AND KMC TELECOM V, INC., XSPEDIUS COMMUNICATIONS LLC ON BEHALF OF ITS OPERATING SUBSIDIARIES XSPEDIUS MANAGEMENT CO. SWITCHED SERVICES, LLC AND XSPEDIUS MANAGEMENT CO. OF JACKSON, AND COMMUNIGROUP OF JACKSON, INC. D/B/A COMMUNIGROUP AND MCIMETRO ACCESS TRANSMISSION SERVICES LLC, DEFENDANT-INTERVENORS

CIVIL ACTION NO. 3:05CV173LN

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION

368 F. Supp. 2d 557; 2005 U.S. Dist. LEXIS 8498

April 13, 2005, Decided

April 13, 2005, Filed

SUBSEQUENT HISTORY: Summary judgment granted by Bellsouth Telcoms. v. Miss. PSC Comm., 2006 U.S. Dist. LEXIS 40812 (S.D. Miss., Apr. 27, 2006)

COUNSEL: **[**1]** For Plaintiff(s) or Petitioner(s): John C. Henegan, Butler, Snow, O'Mara, Stevens & Cannada, Jackson, MS.; Sean A. Lev - PHV, Kellogg, Huger, Hansen, Todd, Evans & Figiel, PLLC, Washington, DC.; Thomas B. Alexander, BellSouth Telecommunications, Inc., Jackson, MS.

For Defendant(s) Or Respondent(s): George M. Fleming, Mississippi Public Service Commission, Jackson, MS.; Steven J. Allen, Brunini, Grantham, Grower & Hewes, Jackson, MS.; Kathryn H. Hester, Watkins Ludlam Winter & Stennis, P.A., Jackson, MS.; Robert P. Wise, Wise, Carter, Child & Caraway, Jackson, MS.; James U. Troup - PHV, McGuirewoods, LLP - Washington, Washington, DC.

JUDGES: Tom S. Lee, UNITED STATES DISTRICT JUDGE.

OPINION BY: Tom S. Lee

OPINION

[*558] MEMORANDUM OPINION AND ORDER

This cause is before the court on the motion of plaintiff BellSouth Telecommunications **[*559]** (BellSouth) for preliminary injunction asking that the court enjoin the March 9, 2005 order entered by the Mississippi Public Service Commission to the extent that such order allows competitors to place new UNE-Platform orders. Defendant Mississippi Public Service Commission (PSC) and the various intervenors filed responses in opposition to the motion. Based on its **[**2]** review of the parties' submissions and their arguments to the court at the April 8th hearing on the motion, the court concludes that BellSouth's motion should be granted.

On February 4, 2005, the Federal Communications Commission (FCC) released its Triennial Order on Remand (TRRO) in CC Docket No. 01-338 following remand in *United States Telecom Association v. Federal Communications Commission*, 360 U.S. App. D.C. 202, 359 F.3d 554 (D.C. Cir. 2004).¹ In the TRRO, among other things, the FCC established new unbundling rules regarding mass market local circuit switching, high-capacity loops and dedicated interoffice transport. All that is relevant to the present motion is its ruling as to mass market switching.² Prior to the TRRO, the FCC,

pursuant to its authority under the Telecommunications Act of 1996, had consistently held that incumbent local exchange carriers (incumbent LECs), such as BellSouth, were required to provide access to the individual parts of their network systems - switches, loops and transport - on an unbundled basis and at prescribed prices, in order that the competitive LECs would be in a position to effectively compete in the marketplace. These individual parts of [**3] the system are known as "unbundled network elements" or UNEs, and as BellSouth explains, access to unbundled switching is important because it makes it possible for competitive LECs to obtain the UNE Platform (or UNE-P), which consists of all the individual or piece-parts of the BellSouth network combined.

1 See Order on Remand, *In re Unbundled Access to Network Elements*, 2005 FCC LEXIS 912, WC Docket No. 04-313, CC Docket, No. 01-338, 2005 WL 289015 (FCC Feb. 4, 2005).

2 BellSouth's complaint in this cause also seeks relief based-on-provisions of the TRRO concerning the unbundling of loops and transport, but the present motion concerns only the FCC's ruling pertaining to access to switching.

In its TRRO, the FCC ruled that the ability of competitive LECs to compete would not be impaired without access to unbundled switching, and concluded, therefore, that incumbent LECs would no longer be required to provide competitive LECs with access to unbundled switching. It specifically recognized that immediate [**4] implementation of its new rules posed a potential for disruption in service, and therefore established a twelve-month transition period, with accompanying transition pricing, for migration of competitive LECs' "embedded customer base" from UNE-P to alternate arrangements for service. The FCC determined that this twelvemonth transition period would provide "adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition," and hence gave carriers twelve months from the date of the TRRO to "modify their interconnection agreements, including completing any change of law processes," to implement the changes directed by the TRRO.³ The FCC stated in [*560] the TRRO, however, that the transition period it adopted applied "only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3). . . ."

3 As dictated by the Telecommunications Act of 1996, 47 U.S.C. §§ 251 and 252, incumbent LECs and competitive LECs operate pursuant to "interconnection agreements" which must conform the legal requirements established by the

FCC and which are approved, interpreted and enforced by state public utilities commissions. These interconnection agreements typically specify a change of law process by which the parties are required to engage in notice, negotiation and, if necessary, dispute resolution, to account for changes in the law that apparently occur with relative frequency in this area.

[**5] Accordingly, on February 11, 2005, BellSouth sent out a "Carrier Notification" to all of its competitive LECs advising that as of March 11, 2005, the effective date of the TRRO, BellSouth would no longer accept orders for switching as a UNE item. A number of the competitive LECs responded by filing a Joint Petition for Emergency Relief with the PSC, asking that BellSouth be directed to continue to provide unbundled switching in accordance with its undertaking in its interconnection agreements until such time as the parties had completed the change of law process. In response, the PSC entered the order that is the subject of BellSouth's present motion, ruling that the parties were required to adhere to the change of law process in their interconnection agreements and that until such time as the process, including arbitration, was completed, BellSouth would be required to continue accepting and provision competitive LECs' orders as provided for in their interconnection agreements.

BellSouth brought this action seeking declaratory relief and a preliminary injunction pending the court's expedited review of the PSC's order. BellSouth takes the position that the PSC's order is contrary [**6] to, and preempted by the FCC's TRRO, and it thus seeks an order enjoining all defendants from seeking to enforce the PSC's order.⁴

4 Reacting to BellSouth's motion, several of the competitive LECs moved to intervene and orders have been entered granting these motions. One purpose for which one of the intervenors, CommuniGroup of Jackson d/b/a Communigroup, sought to intervene was to file a motion to compel arbitration contending that this dispute is subject to arbitration under its interconnection agreement with BellSouth. Although there has been a significant amount of briefing on this arbitration issue by the parties, the court finds it unnecessary to dwell on this motion for it is manifest that CommuniGroup's position with respect to arbitration is misplaced. BellSouth claims, quite simply, that the PSC's order requiring it to continue to process new orders for UNE-P switching violates federal law and should be enjoined. There is no sense in which this dispute falls within the "arbitration" provision of any in-

terconnection agreement. Accordingly, the motion to compel arbitration will be denied.

[**7] To prevail on its request for injunctive relief, the burden is on BellSouth to show "(1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that irreparable injury will result if the injunction is not granted, (3) that the threatened injury outweighs the threatened harm to defendant, and (4) that granting the preliminary injunction will not disserve the public interest." *Mississippi Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir. 1985) (citing *Canal Authority of State of Florida v. Callaway*, 489 F.2d 567 (5th Cir. 1974)).

The question of BellSouth's likelihood of success on the merits raises two issues: First, while the FCC's February 4, 2005 Order on Remand unequivocally provides for a "nationwide bar on [unbundled switching]," did the FCC intend that this aspect of its Order would be self-effectuating, and if so, was it within the FCC's jurisdiction to make the bar self-effectuating.

As to the first issue, a comprehensive review of all potentially relevant provisions of the TRRO demonstrates convincingly that the FCC envisioned that the bar on new-UNE-P switching orders would [**8] be immediately effective on the date [*561] established in the order, March 11, 2005, without regard to the existence of change of law provisions in parties' Interconnection Agreements. The TRRO makes clear in unequivocal terms that the transition period applies only to the embedded customer base, and "does not permit competitive LECs to add new customers using unbundled access to local circuit switching." ⁵ At P 227, the Order recites,

We require competitive LECs to submit the necessary orders to convert their mass market customers to alternative service arrangement within twelve months of the effective date of this Order. *This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local switching pursuant to section 251(c)(3) except as otherwise specified in this order.* . . . We believe that the twelve-month period provides adequate time for both competitive LECs and incumbent LECs to perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cut overs or [**9] other conversions. Consequently, carriers have twelve months from the effective

date of this Order to modify their interconnection agreements, including completing any change of law processes. By the end of the twelve month period, requesting carriers must transition the affected mass market local circuit switching UNEs to alternative facilities or arrangements. (Emphasis added).

⁵ See TRRO P 199; see also P 5 ("This transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs.") (emphasis added); P 127 (quoted in text).

Given the clarity with which the FCC stated its position on this issue, it is not surprising that the majority of state utilities commissions and courts, by far, having considered this issue have held, on persuasive reasoning, that the FCC's intent in the TRRO is an unqualified elimination of new UNE-P orders as of March 11, 2005, irrespective of change of law provisions in parties' interconnection agreements. [**10] ⁶

⁶ See *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., LLC*, 2005 U.S. Dist. LEXIS 9394, No. 1:05CV0674CC, 2005 WL 807062 (N.D. Ga. Apr. 5, 2005) (granting BellSouth's emergency motion for preliminary injunction against order of Georgia PSC to the extent the order required BellSouth to continue to process new orders for switching as an unbundled network element); Ind. Util. Reg. Comm'n, *Order on Complaint of Indiana Bell Tele. Co., Inc. d/b/a SBC Ind. For Expedited Review of a Dispute with Certain CLECs Regarding Adopting of an Amendment to Commission Approved Interconnection Agreements*, Cause No. 4278, at 7, (March 9, 2005) ("We find the more reasonable interpretation of the language of the TRRO is the intent to not allow the addition of new UNE-P customers after March 10, 2005," irrespective of change of law processes provided by parties' interconnection agreements); Pub. Utilities Comm'n of Ohio, *Order on Emergency Petition for Declaratory Ruling Prohibiting SBC Ohio from Breaching its Existing Interconnection Agreements and Preserving Status Quo With Respect to Unbundled Network Element Orders*, 2005 Ohio PUC LEXIS 108, Case No. 05-298-TP-UNC (March 9, 2005) (concluding that while SBC Ohio was required to negotiate and executed interconnection agreements as to embedded cus-

tomers base, "the FCC very clearly determined that, effective March 11, 2005, the ILECs unbundling obligations with regard to mass market local circuit switching . . . would no longer apply to serve new customers"); New York Pub. Serv. Comm'n, *Order Implementing TRRO Changes*, 2005 N.Y. PUC LEXIS 130, Case No. 05-C-0203 (March 16, 2005) ("Based on our careful review of the TRRO, we conclude that the FCC does not intend that new UNE-P customers can be added during the transition period. . . ."); Pub. Util. Comm'n of Ca., *Assigned Commissioner's Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders*, 2005 Cal. PUC LEXIS 128, Application 04-03-014 (March 17, 2005) (concluding that pursuant to the TRRO, "Verizon has no obligation to process CLEC orders for UNE-P to serve new customers"); Pub. Util. Comm'n of Tex., *Proposed Order on Clarification*, Dkt. No. 28821 (March 8, 2005); New Jersey Bureau Pub. Util., *Open Hearing, Implementation of the FCC's Triennial Review Order*, Dkt. No. TO03090705 (March 11, 2005) (refusing to require Verizon to continue providing unbundled access to New discontinued UNE orders as of March 11th); Rhode Island Pub. Util. Comm'n, *Open Meeting, Adopting Verizon's Proposed RI Tariff Filing*, Dkt. 3662 (March 8, 2005) (adopting tariff filing of Verizon which provide that Verizon would no longer accept orders for the subject elements (i.e., switching) as of March 11, 2005); State Corp. Commission of Kansas, *Order Granting in Part and Denying in Part Formal Complaint and Motion for Expedited Order*, 2005 Kan PUC LEXIS 275, Dkt. No. 04-SWBT-763-GIT (March 10, 2005) (agreeing with incumbent LEC regarding the self-effectuating nature of the TRRO as to serving new customers," and observing that "it does not make sense to delay implementation of these provisions by permitting an interconnection scheme contrary to the FCC's rulings to persist"); Mass. Dept. Of Telecommunications and Energy, *Open Meeting on Complaint Against Verizon for Emergency Declaratory Relief Related to the Continued Provision of Unbundled Network Elements After the Effective Date of the Order on Remand*, Dkt. No. 334-05 (March 22, 2005) (denying request for order requiring Verizon to continue to accept and process orders for unbundled network elements pursuant to their interconnection agreements and to require Verizon to comply with change of law provision); Mich. Pub. Serv. Comm'n, *Order on Application of the Competitive 12 Local Exchange Carriers*, 2005 Mich.

PSC LEXIS 93, *14, Case No. U-14303 (March 29, 2005) (concluding that competitors "no longer have a right under Section 251(c)(3) to order [the UNE Platform] and other UNEs that have been removed from the [FCC's] list"); Me. Pub. Util. Comm'n, *Order on Verizon-Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection and Resold Servs.*, 2005 Me. PUC LEXIS 74, *8, Dkt. No. 2002-682 (March 17, 2005) ("We find that the FCC intended that its new rules de-listing certain UNEs be implemented immediately rather than be the subject of interconnection agreement amendment negotiations before becoming effective.").

Contrary holdings have been issued only by the Kentucky and Louisiana Public Utilities Commissions, and the United States District Court for the Northern District of Illinois, *Illinois Bell Telephone Co. v. Hurley*, 2005 U.S. Dist. LEXIS 6022, 2005 WL 735968, *6 (N.D. Ill. 2005).

[**11] [*562] Despite this, the PSC and defendant intervenors, relying primarily on § 233 of the TRRO, included in a section entitled "Implementation of Unbundling Determination," argue that the FCC's ruling as to new orders for unbundled switching is not self-effectuating but rather is subject to the negotiation process dictated by the parties' interconnection agreements. Paragraph 233 states:

We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. . . . Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.

In its March 16, 2005 *Order Implementing TRRO Changes*, the New York Public Service Commission considered and rejected an argument that P 233 of the Order requires incumbent LECs to follow change of law provisions in interconnection agreements with respect to implementation of the bar on new orders for UNE-P switching, stating:

Although TRRO P 233 refers to interconnection [**12] agreements as the ve-

hicle for implementing the TRRO, had the FCC intended to use this process for new customers, we believe it would have done so more clearly. Paragraph 233 must be read together with the FCC directives that UNE-P obligations for new customers are eliminated as of March 11, 2005. Providing a true-up for [*563] new UNE-P customers would run contrary to the express directive in TRRO § 227 that no new UNE-P customers be added.

The court in *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., LLC*, 2005 U.S. Dist. LEXIS 9394, No. 1:05CV0674CC, 2005 WL 807062 (N.D. Ga. Apr. 5, 2005), found the New York Commission's reasoning persuasive:

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 P 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 [**13] embedded base, *see id.* P 227, but did not mention a need to do so to effectuate its "no new orders" rule, *see id.* In sum, the Court believes 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-P obligations for new customers are eliminated as of March 11, 2005.." *New York Order* at 13, 26. Any result other than precluding new UNE Platform customers on March 11, would "run contrary to the express directive . . . that no [UNE Platform] customers be added" and thus result in a self-contradictory order." *Id.*

The court similarly finds this reasoning persuasive.⁷ Moreover, the notion that BellSouth should be made to negotiate over something which the FCC has determined it has no obligation to offer on an unbundled basis and which BellSouth has no intention of offering simply makes no sense. As was cogently observed by the Rhode Island Public Utilities Commission,

As a practical matter, it is not obvious to us what issues would remain to be negotiated concerning the section 251 UNEs delisted by the FCC; the FCC has been [**14] clear that these UNEs are no longer required to be unbundled under section 251. The end result after going through the step of amending the interconnection agreements will be the same as enforcing the March 11th deadline immediately, albeit with some delay.

7 It does so, as well, recognizing that there is authority to the contrary. *See Illinois Bell Telephone Co. v. Hurley*, 2005 U.S. Dist. LEXIS 6022, 2005 WL 735968, *6 (N.D. Ill. 2005) ("Unlike P 227, P 233 of the TRO Remand Order does not address only existing customers. Rather, it falls under the general heading of 'Implementation of Unbundling Decisions' and mandates that the parties 'negotiate in good faith regarding any rates, terms, and conditions necessary to implement' the rule changes. This requirement presumably would include the substantially increased rate SBC now wishes to charge the CLECs seeking access to SBC's switches."),

Adopting Verizon's Proposed RI Tariff Filing, Dkt. 3662 (R.I.PUC March 8, 2005).

The PSC and defendant intervenors [**15] next argue that even if the court were to conclude that the TRRO was intended to be self-effectuating, it still may not be given effect inasmuch as the FCC lacks jurisdiction to abrogate the terms and conditions of existing interconnection agreements regarding unbundled switching. In this vein, they argue that the parties' respective rights and obligations vis-a-vis BellSouth's provision of unbundled switching are governed exclusively by the parties' voluntarily negotiated interconnection agreements, over which the FCC has no jurisdiction. They further submit that even if the FCC did have jurisdiction to modify or abrogate the interconnection agreements, the TRRO does not reflect [*564] that the FCC made the requisite findings under the *Mobile Sierra* doctrine.

These arguments raise the question, highlighted by the parties' arguments, of whether the TRRO was intended to directly abrogate or modify the interconnection agreements, or whether, instead, enforcement of the TRRO would indirectly result in the modification of or abrogation of portions of the interconnection agreements. In either case, however, and despite the defendant and defendant-intervenors' protestations to the contrary,

[**16] the FCC had authority to act in the manner it did.

8 In the numerous rulings by state utilities commissions and courts addressing the FCC's Order, none to date has directly addressed whether the FCC had jurisdiction to impose its immediate bar to new orders for unbundled switching. Perhaps that is because no party has challenged the FCC's jurisdiction in this regard. Indeed, the recent opinion by the Georgia District Court specifically noted that "the [Georgia] PSC does not dispute that the FCC has the authority to make its order immediately effective regardless of the contents of particular interconnection agreements." *BellSouth v. MCI Metro Access*, 2005 U.S. Dist. LEXIS 9394, 2005 WL 807062 at 2.

If the FCC's Order is viewed not merely as a general regulation which bears on the proper interpretation of the interconnection agreements but as an outright abrogation of provisions of parties' interconnection agreements, consideration of its jurisdiction to act in the premises must take into account that interconnection [**17] agreements are "not . . . ordinary private contract[s]," and are "not to be construed as . . . traditional contract[s] but as . . . instrument[s] arising within the context of ongoing federal and state regulation." *Espire Communications, Inc., v. N.M. Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004); see also *Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004) (interconnection agreements are a "creation of federal law" and are "the vehicles chosen by Congress to implement the duties imposed in § 251"). It cannot reasonably be disputed that the provisions in the various interconnection agreements permitting the UNE Platform are there not because this was something the parties freely and voluntarily negotiated, but rather because this is what BellSouth was required to provide by law, and specifically by the FCC's earlier unbundling decisions. As BellSouth aptly notes, these provisions are vestiges of the now-repudiated FCC regime. See *BellSouth Telecomms., Inc. v. MCI Metro Access Transmission Servs., LLC*, 2005 U.S. Dist. LEXIS 9394, No. 1:05CV0674CC (N.D. Ga. Apr. 5, 2005) ("It would be particularly appropriate for the FCC to take that action because it was undoing the effects [**18] of the agency's own prior decisions, which have been repeatedly vacated by the federal courts as providing overly broad access to UNEs, . . . and 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."); see also *AT&T Communications of the Southern States, Inc. v. BellSouth Telecomms Inc.*, 229 F.3d 457, 465 (4th Cir. 2000) (observing that "many so-called 'negotiated' provi-

sions (in interconnection agreements) represent nothing more than an attempt to comply with the requirements of the 1996 Act."); see also *BellSouth Telecoms., Inc. v. MCI Metro Access Transmission Servs., Inc.*, 317 F.3d 1270, 1298 (11th Cir. 2003) (Anderson, J., concurring) (interconnection agreements are "mandated by federal statute" and even voluntary agreements are "cabined by the obvious recognition that the parties to the agreement had to agree within the parameters fixed by the federal standards). Thus, it is substantively inaccurate to characterize the FCC's action as an abrogation of private contracts, and more accurate to characterize it as the elimination of the legal requirements that had dictated the substance of the parties' [*565] regulatory [**19] agreements. 9 And while the 1996 Telecommunications Act vested direct jurisdiction over interconnection agreements with the state utilities commissions, it did not divest the FCC of all authority with respect to such agreements. On the contrary, the Supreme Court has clearly held that the FCC has authority to issue rules and orders implementing all aspects of the 1996 Telecommunications Act. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 380, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999) (the Act "explicitly gives the FCC jurisdiction to make rules governing matters to which the 1996 Act applies"). And thus, "while it is true that the 1996 Act entrusts state commissions with the job of approving interconnection agreements. . . these assignments . . . do not logically preclude the Commission's issuance of rules to guide the state-commission judgments," *id.* at 385. To the extent a state commission's judgment concerning the interpretation of an approved agreement conflicts with the FCC's interpretation of the FCC regulations, the FCC's interpretation controls under the Supremacy Clause. *MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania Serv.*, 271 F.3d 491, 516 (3rd Cir. 2001) (stating that "if the PUC's [**20] interpretation conflicts with that of the FCC, the PUC's determination must be struck down"). Here, this court perceives that the FCC has determined as a matter of policy that the Telecommunications Act does not require the provision of unbundled switching and that the bar on new UNE switching orders is to be immediately effective without regard to change of law provisions in specific interconnection agreements. From its conclusion in this regard, in keeping with its plenary authority under the 1996 Act, it follows that the FCC's conclusion prevails over the PSC's contrary conclusion.

9 The *Mobile-Sierra* doctrine, invoked by defendant and defendant intervenors, holds that the FCC may abrogate or modify freely negotiated private contracts only if required by the public interest, and requires that the agency make a particularized finding that the public interest requires a modification to or an abrogation of an existing

contract. The court is not persuaded that the *Mobile Sierra* doctrine in this context is relevant, particularly given the court's conclusion that the interconnection agreements are not ordinary private contracts that were freely negotiated between the parties. However, even if the doctrine applied, the FCC's order reflects the Agency's finding that the bar on new UNE-P switching orders should take effect immediately since the continued use of the UNE-Platform "hinder[ed] . . . genuine facilities based competition and was thus contrary to public policy. See TRRO P 218, 236.

[**21] Certain of the intervenors, namely CommuniGroup and MCI, argue that BellSouth "still has to provide [UNE-Platform] under Section 271, regardless of the elimination of [the UNE-Platform] under Section 251." ¹⁰ The New York Public Utilities Commission considered a similar argument by competitive LECs that even if the incumbent LEC no longer was obliged to provide access to UNE-P under the TRRO determination, it still had an obligation to continue providing such access pursuant to 47 U.S.C. § 271. The Commission rejected the argument, noting that in light of the FCC's decision "to not require BOCs to combine section 271 elements no longer required to be unbundled under section 251, it [was] clear that there is no federal right to 271-based UNE-P arrangements." This court would tend to agree. It would further observe, though, [*566] that even if § 271 imposed an obligation to provide unbundled switching independent of § 251 with which BellSouth had failed to comply, § 271 explicitly places enforcement authority with the FCC, which may "(i) issue an order to such company to correct the deficiency; (ii) impose a penalty on such company pursuant to subchapter V [**22] of this chapter; or (iii) suspend or revoke such [company's] approval" to provide long distance service if it finds that the company has ceased to meet any of the conditions required for approval to provide long distance service. Thus, it is the prerogative of the FCC, and not this court, to address any alleged failure by BellSouth to satisfy any statutorily imposed conditions to its continued provision of long distance service.

¹⁰ Section 271 of the Telecommunications Act appears in a section entitled "Special Provisions Concerning Bell Operating Companies," 47 U.S.C. §§ 271 to -276, which applies only to Bell Operating Companies (BOCs), all of which were formerly part of AT&T. Section 271 concerns the authority of BOCs to provide long distance services and provides, in general, that a BOC can only provide long distance services if it first meets certain requirements relating primarily to interconnection. 47 U.S.C. § 271(c).

Based on the foregoing, the court concludes [**23] that BellSouth has established a substantial likelihood that it will succeed on the merits of its claim. ¹¹ The court also concludes that BellSouth has shown that it will suffer irreparable harm if injunctive relief is not granted. BellSouth has offered proof, unrefuted by the PSC or defendant intervenors, that it is losing more than 5,000 customers a month to UNE-Platform competitors. The opponents of BellSouth's motion argue that this loss can be adequately redressed by an award of monetary relief; yet as BellSouth points out, at the end of the case, this court cannot simply give BellSouth back the customers it has lost, and the monetary loss attending the loss of customers can be difficult, if not impossible to quantify. See *Ferrero v. Associated Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991) (recognizing that the "Fifth Circuit has held that the loss of customers and goodwill is an 'irreparable injury,'" and agreeing that where there has been a loss of a party's long-time customers, the injury is "difficult, if not impossible, to determine monetarily") (citations omitted). See also *BellSouth v. MCIMetro Access*, 2005 U.S. Dist. LEXIS 9394, 2005 WL 807062 at 3 (finding [**24] that BellSouth had demonstrated the existence of "very significant immediate and irreparable injury"); *Illinois Bell Telephone Co. v. Hurley*, 2005 U.S. Dist. LEXIS 6022, 2005 WL 735968 at 7 (agreeing with SBC that "it will suffer irreparable harm because, even if its losses are quantifiable, there is no entity against which SBC could recover money damages").

¹¹ As did the Georgia court in *BellSouth v. MCIMetro Access*, 2005 U.S. Dist. LEXIS 9394, 2005 WL 807062, in concluding that BellSouth has sustained its burden as to the first requisite for injunctive relief, the court "does not reach the issue whether an 'Abeyance Agreement' between BellSouth and [Nuvox, KMC and Xpedius] 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."

As for the issue of whether the threatened injury to BellSouth outweighs the threatened harm to the defendant intervenors, the court is persuaded that the competitors have alternative [**25] means of competing with BellSouth and that while "some competitive LECs may suffer harm in the short-term [if the requested injunction is granted], 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." *BellSouth v. MCIMetro Access*, 2005 U.S. Dist. LEXIS 9394, 2005 WL 807062 (observing that "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 Tele-

communications Act of 1996."); *see also* State Corp. Commission of Kansas, *Order Granting in Part and Denying in Part Formal Complaint and Motion for Expedited Order*, 2005 Kan. PUC LEXIS 275, Dkt. No. 04-SWBT-763-GIT (March 10, 2005) (stating that "any harm claimed by the CLECs to be irreparable [*567] today is no different from the harm that they must inevitably face in the relatively short term as a result of implementing the FCC's new rules. On the other hand, the sooner the FCC's new rules can be implemented, the sooner rules held to be illegal can be abrogated.").¹²

12 The court would further note that the competitive LECs have been on notice since at least August 2004 of the possibility that a time would soon come when they would be precluded from placing new orders for switching UNEs. *See Order and Notice of Proposed Rulemaking, Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 19 F.C.C.R. 16783, P 29 (2004) (proposing a transition plan that "does not permit competitive LECs to add new customers").

[**26] The fourth and final requisite for injunctive relief requires that BellSouth demonstrate that granting the preliminary injunction will not disserve the public interest. The FCC determined in its Order that there is a strong public interest in "providing . . . consumers with the technical innovation and competition which the FCC has predicted will result from the elimination of mandated unbundled switching," and indeed, it specifically declared that it would be "contrary to the public interest" to delay the effectiveness of its order. TRRO P 236. The court is unpersuaded that there is a sufficient countervailing public interest to warrant denial of BellSouth's motion.

Conclusion

Based on the foregoing, it is ordered that BellSouth's motion for preliminary injunction is granted and the PSC is precluded from enforcing that part of its order requiring BellSouth to continue to process new orders for UNE-P switching.

SO ORDERED this 13th day of April, 2005.

Tom S. Lee

UNITED STATES DISTRICT JUDGE