BELLSOUTH

BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300

guy.hicks@bellsouth.com

Guy M. Hicks
General Counsel

615 214 6301
Fax 615 214 7406

April 1, 2002

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Generic Docket to Establish Generally Available Terms and Conditions for Interconnection*
Docket No. 01-00526

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Comments in response to the Report and Recommendation issued by the Hearing Officer on March 15, 2002. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Generic Docket to Establish Generally Available Terms and Conditions for Interconnection*

Docket No. 01-00526

COMMENTS OF BELLSOUTH TELECOMMUNICATIONS, INC.

BellSouth Telecommunications, Inc. ("BellSouth") submits the following comments in response to the Report and Recommendation issued by the Hearing Officer on March 15, 2002 (the "Report").

The Report makes recommendations that fall into three categories. First, the Hearing Officer recommends that BellSouth be required to file a second amended modified interconnection agreement that incorporates fifteen recommended modifications. Second, the Hearing Officer recommends that the Authority proceed with the preparation of this docket for hearing on sixteen separate issues. Third, the Hearing Officer recommends that the parties be permitted to participate in workshops only upon conclusion of the hearing and the filing and approval of any necessary modifications to the interim interconnection agreement. BellSouth's Comments will address each of these three recommendations.

1. **BellSouth will continue to cooperate with the Authority in developing a generally available set of Tennessee interconnection terms and conditions reflecting Authority orders.**

In the course of their deliberations regarding the approval of Tariff No. 01-00205 filed in the *Permanent Prices* docket[1], the Directors voted to open the above-referenced docket. The establishment of the new docket was based on the following:

> A generic docket to resolve issues frequently arbitrated and to produce generally available interconnection terms and conditions would benefit competition. The availability of such terms and conditions will streamline the interconnection process and mitigate difficulties that CLECs may have in obtaining cost-based interconnection rates in a timely fashion. These goals are consistent with federal and state law. *See* Order of June 21, 2001.[2]

On July 13, 2001, the Authority issued a Notice of Filing for the purpose of establishing a starting point in the docket. BellSouth was instructed to modify the interconnection agreement template on its website to reflect Authority decisions. Comments from the parties were solicited. Among other comments, DeltaCom and Time Warner urged the Authority to conduct workshops followed by a hearing to resolve any remaining issues. XO also supported use of the workshop process. (*See* Report at p. 3) Following submission of the modified interconnection agreement and comments, the Authority deliberated issues in the *Permanent Prices*

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[1] *See In Re: Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements*, Docket No. 97-01262 (hereinafter "*Permanent Prices* docket").

[2] The Authority's deliberations occurred at a time during which certain CLECs alleged they were having difficulty in getting access to TRA-ordered UNE rates. BellSouth has made the TRA-ordered rates available via public website notification through a simple contract amendment process

docket and in the *Line Sharing* docket[3]. BellSouth was then ordered to amend the modified interconnection agreement to be consistent with the Authority's deliberations in the *Permanent Prices* docket and the *Line Sharing* docket. Again, parties were given the opportunity to file comments.

As instructed, BellSouth filed its Amended Modified Interconnection Agreement on January 25, 2002. Time Warner, SECCA, XO and MCI filed pleadings on February 15, 2002, stating that they would not be filing comments "relevant to the substantive portions" of the Amended Modified Interconnection Agreement. Again, the CLECs proposed workshops, stating the "CLEC industry have committed their resources to a more cooperative approach in defining local interconnection issues ...."[4]

BellSouth has invested substantial time and effort in cooperating with the development of general terms and conditions for Tennessee interconnection agreements. BellSouth will continue to cooperate. BellSouth agrees to submit contract language reflecting Authority decisions from generic dockets for inclusion in the general interconnection terms and conditions for Tennessee. The situation with respect to decisions from arbitrations is more complicated, however.[5] As

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and CLEC agreements have been routinely amended to incorporate those rates. BellSouth is unaware of any pending or recent complaints by CLECs regarding the availability of those rates.

[3] See *In Re: Generic Docket to Establish UNE Prices for Line Sharing per FCC 99-355 and Riser Cable and Terminating Wire as Ordered in TRA Docket No. 98-00123*, Docket No. 00-00544, (hereinafter "Line Sharing docket").

[4] *See Comments filed on behalf of Time Warner Telecommunications of the Mid-south, LP, XO Communications, Inc., MCI WorldCom, Inc., and the Southeast Competitive Carriers Association,* p. 1-2 (February 15, 2002).

[5] *See* also BellSouth's April 19, 2001 response to a question proposed by Director Malone in connection with the general tariff the Authority ordered BellSouth to file in Docket No. 97-01262.

noted in the Report at least five of the recommended modifications to the agreement set forth in the Report arise from arbitration, as opposed to generic rulings. *See* Attachment 1 to Report. BellSouth will carefully review these recommendations for inclusion in the general terms.

In arbitrations, carriers that did not participate in the arbitration may take the position that they are not bound by a ruling in such a proceeding because they were not afforded an opportunity to participate in the proceeding[6]. Carriers may take such a position, based not only on due process grounds, but on the basis that Authority arbitration orders by their terms only apply to the parties to the arbitration.

BellSouth cannot agree, as a general matter, that it will adopt a ruling from a two-party arbitration on a generic basis into the general Tennessee interconnection terms and conditions. While past TRA arbitration decisions are a major factor in BellSouth's analysis of its negotiation and arbitration positions and whether to bring an issue already arbitrated before the TRA again, BellSouth must also determine whether any new facts or legal or regulatory decisions have developed since the issue was last presented to the TRA and whether those facts or decisions may have an impact on the TRA. Any voluntary agreement to accept a ruling from a two party arbitration as binding in all instances for BellSouth will not allow

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[6] For example, Mr. Bradbury of AT&T testified that, if another company arbitrated with BellSouth on an issue which affected AT&T and the result were unsatisfactory to AT&T, he would not simply accept that result: "If we thought the position that was arrived at was so adverse to our interests, we would have to consider additional action." Transcript of Proceedings (4/10/01), Docket No. 00079, Vol. II(B) at p. 214.

BellSouth to present important new facts or legal or regulatory precedent in an effort to persuade the TRA to reach a different result. Further, the acceptance of such a ruling as generic would eliminate the ability of BellSouth and other telecommunications carriers from reaching compromises. Lastly, BellSouth's rights to seek judicial review of arbitration rulings could be impaired. It could be argued, for example, that BellSouth voluntarily agreed to arrangements with one carrier with respect to the same issue BellSouth was appealing in connection with the carrier that was a party to the arbitration. Arguably, such an agreement could be binding on BellSouth with respect to the requesting carrier even if BellSouth ultimately prevailed in its appeal with the carrier involved in the arbitration. Furthermore, in this scenario there is no binding order between the carrier requesting the terms and BellSouth from which an appeal can even be taken.

It should be noted that BellSouth has not appealed the vast majority of arbitration rulings in Tennessee nor has BellSouth brought forth a large number of identical arbitration issues in numerous arbitration proceedings. The Directors, acting as Arbitrators, have entered hundreds of rulings in arbitration proceedings in Tennessee and BellSouth has appealed only a very few of those rulings. However, BellSouth feels that it is critical that it not compromise its rights to bring new evidence before the Directors or seek judicial review as a result of implementation issues arising in connection with the general terms and conditions contemplated in this proceeding. BellSouth also believes that the general terms and conditions should not be used to eliminate the rights of parties to present issues to the

Authority in an arbitration simply because another party also raised the issue in an earlier arbitration.

While language in arbitration orders may directly address the arbitration issue posed by the parties seeking arbitration, the language in the arbitration order is typically not in the form or specificity of contract language.[7] This is not surprising and generally no different from the language a reviewing court typically includes in its orders with respect to arbitration appeals. The arbitrators, like the courts, are not asked to write the parties' contracts.

Consequently, negotiations are necessary to develop contract language. A number of factors enter into these negotiations. In the constantly evolving telecommunications industry, circumstances, policies, and regulatory rules may change between the time arbitrators deliberate and the time the parties ultimately submit an interconnection agreement for approval. Moreover, it is possible that the arbitrators' ruling itself may prompt the parties to settle an issue, or a number of issues, under terms different from those set forth in the arbitrators' ruling. For example, regional settlements of arbitrations may be prompted by varying rulings from public service commissions in several states on a given arbitration issue. It is also possible that neither party is happy with an arbitration ruling. In any event, the purpose of arbitrations is to facilitate the resolution of the parties' open issues. If

[7] In some cases, the arbitrators request best and final offers from the parties. In such cases, the arbitrators may adopt best and final language that is very close to final contract language.

the parties are able to reach a mutually acceptable resolution of an issue, it should not matter that the resolution differs from the arbitrators' ruling,

Moreover, while BellSouth will continue to cooperate in terms of modifying the Tennessee general interconnection terms and conditions to reflect Authority orders, the Authority should continue to approve agreements negotiated by parties pursuant to Section 251 of the Federal Act, including negotiated agreements that differ from the general Tennessee terms and conditions developed in this docket. The Authority has recognized that parties are free to voluntarily execute, and has approved, agreements that are inconsistent with the standards set forth in Section 251 of the Act and with previous Authority orders.[8] General terms and conditions developed in this proceeding should not replace or interfere with the negotiation and arbitration process established by the Federal Act.

2. **The Report should be modified to allow the parties the opportunity to participate in private negotiations and/or workshops before any hearings are ordered by the Authority.**

The Hearing Officer's recommendation that the Authority schedule hearings on sixteen issues should be modified. No party has even requested that formal hearings be scheduled to resolve the issues listed in the Report. To the contrary, the Report itself makes clear that the CLECs have consistently requested

[8] *See In Re: Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of The Telecommunications Act of 1996, Order,* TRA Docket No. 99-00948 (February 11, 2002), and *Order Regarding the Applicability of Tenn. Code Ann. §65-5-209(d),* TRA Docket No. 02-00207 (March 25, 2002), p. 6.

workshops as a means of addressing the question of whether additional modifications should be made to the general terms and conditions.

BellSouth respectfully submits that the rationale set forth in the Report for requiring formal hearings prior to workshops is flawed. The rationale is as follows.

> Before the parties may effectively engage in workshops, the Authority must render rulings on any issues that involve legal and/or public policy determinations. Only after the Authority has conclusively resolved such issues would it be reasonable for the parties to participate in workshops to resolve any remaining disputes.
>
> To explain, it is inconsistent with the goals of this Docket to allow the parties to resolve issues involving legal and/or public policy disputes by agreement. If such were permitted, there would be no streamlining of the interconnection process because in the future a CLEC or ILEC that disagrees with a workshop decision may insist on bringing the issue to the Authority for arbitration. Were the Authority to have stated its position on a particular issue after a hearing, the CLEC or ILEC would be less likely to bring the issue before the Authority for arbitration, absent a change in law or policy, because the Authority had already ruled on that issue. The latter will streamline the process; the former will not.[9]

Contrary to the assertion that "it is inconsistent with the goals of this Docket to allow the parties to resolve issues involving legal and/or public policy disputes by agreement," the Federal Act encourages negotiations as the first and best means of resolving disputes among the parties to interconnection agreements. Arbitrations pursuant to Section 252 of the Act can take place only after a negotiation period has elapsed and has failed to produce agreement on all issues:

> During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier

[9] *See* Section III of Report at p. 6.

> receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues. (See Section 252(b)(1) of Act.)

The Report turns on its head the Act's requirement that negotiations precede hearings by suggesting that workshop negotiations should only take place after rulings are made.

The Authority's rules provide for alternative dispute resolution through a mediation process. (*See* Rule 1220-1-3) The mediation process has been employed by the parties and Authority-appointed mediators on numerous occasions. All of the mediations were properly conducted before formal arbitration hearings, not after the hearings. Most of the mediations served to eliminate or at least narrow some open issues and thereby streamline the arbitration process. Workshops, like mediations, should be employed prior to hearings.

As the Authority has properly recognized on numerous occasions by approving negotiated interconnection agreements, the parties are free to negotiate the resolution of issues, including "legal and/or public policy disputes", by mutual agreement. There has never been any requirement by the Authority for the parties to forebear from negotiating "issues involving legal and/or public policy disputes" in order that the Authority rule before the parties could reach an agreement. Any such requirement would be inconsistent with the Federal Act's negotiation and arbitration process. The Federal Act draws no distinction between interconnection issues in general and "issues involving legal and/or public policy disputes." (See

§252 of Act.) Nor do the Authority's rules draw any such distinction. Approval of Section III of the Report, which recommends that formal hearings take place prior to any workshops, would not serve to streamline the process. Rather, this aspect of the Report would hamper or complicate negotiations and delay the submission of interconnection agreements.

The assertions in the Report also appear to reflect a misunderstanding of the nature of workshops. The Report refers to workshop "decisions".[10] Workshops are designed to promote the exchange of information, narrow the issues, and resolve such issues as can be resolved by agreement. No decision would result from the workshops other than decisions by the parties to resolve issues by agreement.

In terms of administrative economy the Authority should continue its present course of approving interconnection agreements negotiated by the parties and resolving issues brought to the Authority under the arbitration process provided for under the Federal Act rather than to proceed to hearing on the sixteen issues referenced in the Report. Given the CLECs' statements in this proceeding favoring workshops and cooperation and the fact that arbitration petitions have not been filed with respect to these sixteen issues, it may be presumed that at least some of the issues may be resolved by agreement, either through private negotiations or workshops. For example, the first issue identified on Attachment 2 to the Report is "What should be the standard length of an interconnection agreement?"

[10] *See* Report at p. 6.

BellSouth's position is that the standard length of an interconnection agreement should be three years. BellSouth is unaware of any current arbitration requests in Tennessee with respect to that position. Even assuming different CLECs desire different term lengths for their interconnection agreement, it is unclear how a TRA hearing and ruling would resolve the issue without imposing an arbitrary contract term length that some parties would find objectionable.[11]

In addition, BellSouth does not understand the inclusion or specific nature of some of the issues summarized in the Report. For example, the proposed issue in the Report relating to Section 5.6.4 of the Standard Terms & Conditions states, "Should BellSouth be allowed to aggregate lines provided to multiple locations of a single customer to restrict AT&T's ability to purchase local switching at UNE rates to serve any of the lines of that customer?" There is nothing in the Report explaining why the issue should be heard again in this Docket. Footnote 35 in the Report notes merely that the Authority stated that it "may address this issue again in Docket 01-00526." (emphasis added.) The Authority has not decided to address the issue again in Docket No. 01-00526. The Authority, acting as arbitrators, only recently entered an order addressing that issue in Docket No. 00-00079. Moreover, the Authority has not yet entered an order incorporating the slight modifications made to its initial arbitration order at the request of Director Malone on March 12, 2002.

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[11] To BellSouth's knowledge, DeltaCom is the only party that raised this issue. See *Comments* of DeltaCom dated August 23, 2001, at p. 1. At the time DeltaCom raised the issue, BellSouth was proposing two year agreements. BellSouth is now proposing three year agreements.

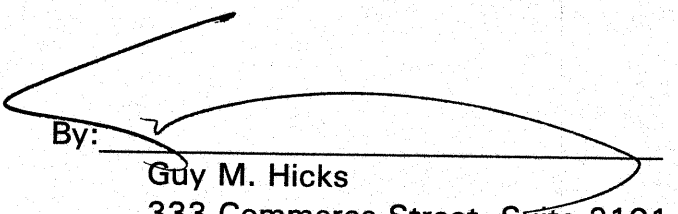
If the issues are not resolved and are of importance to the CLECs or BellSouth, a party can seek arbitration or the Authority may then conduct a generic proceeding. Indeed, the Authority has just completed a cycle of significant arbitration cases involving BellSouth, AT&T, MCI, and Sprint. In any event, it is unnecessary at this time to schedule hearings on the sixteen issues referenced in the Report. Moreover, negotiations and workshops should precede any such hearings. Negotiations or workshops would, at a minimum, serve to allow the parties to develop a mutual and clear understanding of issues. Issues may be resolved, thereby avoiding the need for or streamlining any hearings.

3. Conclusion

Based on the foregoing, BellSouth submits that the Authority should modify the Report consistent with these Comments.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



By: _____

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

T. Michael Twomey
675 W. Peachtree St., NE, Suite 4300
Atlanta, GA 30375

CERTIFICATE OF SERVICE

I hereby certify that on April 1, 2002, a copy of the foregoing document was served on the parties of record as indicated:

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

Henry Walker, Esquire
Boult, Cummings, et al.
414 Union Ave., #1600
P. O. Box 198062
Nashville, TN 39219-8062

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

Erick Soriano, Esquire
Kelley, Drye & Warren
1200 19th St., NW, #500
Washington, DC 20036

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

James Wright, Esq.
United Telephone - Southeast
14111 Capitol Blvd.
Wake Forest, NC 27587

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

Jon Hastings, Esquire
Boult, Cummings, et al.
414 Union St., #1600
Nashville, TN 37219

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

Don Baltimore, Esquire
Farrar & Bates
211 Seventh Ave., N., #320
Nashville, TN 37219-1823

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

Charles B. Welch, Esquire
Farris, Mathews, et al.
205 Capitol Blvd, #303
Nashville, TN 37219

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

Kenneth Bryant, Esquire
Trabue, Sturdivant & DeWitt
150 4th Ave, N., #1200
Nashville, TN 37219-12433

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

William C. Carriger, Esquire
Strang, Fletcher, et al.
One Union Square, #400
Chattanooga, TN 37402

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

James P. Lamoureux, Esquire
AT&T
1200 Peachtree St., NE, #4068
Atlanta, GA 30367

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

Timothy Phillips, Esquire
Office of Tennessee Attorney General
P. O. Box 20207
Nashville, TN 37202

[ ] Hand
[X] Mail
[ ] Facsimile
[ ] Overnight

J. Barclay Phillips, Esquire
Miller, Martin, et al.
150 4th Avenue, N, #1200
Nashville, TN 37219-2433