BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

April 9, 2002

In Re: **Petition of Tennessee UNE-P Coalition to Open a Contested Case Proceeding to Declare Unbundled Switching an Unrestricted Unbundled Network Element.**

Docket No. 02-00207

INITIAL ORDER DENYING BELLSOUTH'S MOTION TO DISMISS AND TO STRIKE

This matter comes before the Hearing Officer, Director Melvin J. Malone, on the *Motion of BellSouth Telecommunications, Inc. to Dismiss Petition Pursuant to T.C.A. § 65-5-209(d) and to Strike Pre-Filed Testimony* ("*Motion to Dismiss*"). In response to the *Motion to Dismiss*, the Tennessee UNE-P Coalition (the "Coalition")[1] submitted its *Opposition to BellSouth Motion to Dismiss*. For the reasons set forth below, BellSouth's *Motion to Dismiss* is denied.

I. Travel of the Case

On February 25, 2002, the Coalition filed its *Petition to Open Contested Case Proceeding* ("*Petition*") with the Tennessee Regulatory Authority ("TRA" or "Authority"). The Coalition requests that the Authority convene a contested case to declare switching to be an unrestricted unbundled network element ("UNE"). The Coalition contends, among other things,

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[1] The Coalition includes: Access Integrated Networks, Inc.; Birch Telecom of the South, Inc.; Ernest Communications, Inc.; MCImetro Access Transmission Services, LLC; MCI WorldCom Communications, Inc.; NewSouth Communications Corp.; and Z-Tel Communications, Inc.

that it is entitled to the relief requested pursuant to Tenn. Code Ann. § 65-5-209(d) and Tenn. Code Ann. § 65-4-124.[2]

On February 26, 2002, at a regularly scheduled Authority Conference, the Directors appointed Director Melvin J. Malone to serve as the Hearing Officer to prepare this case for a hearing before the Directors.[3]

On March 4, 2002, BellSouth filed its *Motion to Dismiss* arguing, in part, that Tenn. Code Ann. § 65-5-209(d) is, given the relief requested in the *Petition*, inapplicable.[4] The Coalition filed its *Opposition to BellSouth Motion to Dismiss* addressing BellSouth's arguments against the applicability of Tenn. Code Ann. § 65-5-209(d) on March 6, 2002. On March 25, 2002, the Authority issued the *Order Regarding the Applicability of Tenn. Code Ann. § 65-5-209(d)*, in which the Hearing Officer ruled that Tenn. Code Ann. § 65-5-209(d) is not applicable to this proceeding.

II. Issue Presented for Decision

BellSouth's *Motion to Dismiss* is two-pronged. The first prong of the *Motion to Dismiss* was addressed in the *Order Regarding the Applicability of Tenn. Code Ann. § 65-5-209(d)*. In the second prong of its *Motion to Dismiss*, BellSouth contends that the Telecommunications Act of 1996 (the "Act") and the Federal Communications Commission's ("FCC") Third Report and

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[2] Tenn. Code Ann. § 65-4-124(a) provides as follows:

> All telecommunications services providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions; and all telecommunications services providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other telecommunications services providers.

[3] *TRA Transcript of Proceedings*, TRA Docket No. 02-00207, p. 14 (Feb. 26, 2002).

[4] *Motion of BellSouth Telecommunications, Inc. to Dismiss Petition Pursuant to T.C.A. § 65-5-209(d) and to Strike Pre-Filed Testimony*, TRA Docket No. 02-00207, p. 2 (Mar. 4, 2002).

Order[5] prohibit the Authority from granting the relief requested. This order addresses the second prong of the *Motion to Dismiss*.[6]

III. Arguments of the Parties

a. BellSouth

BellSouth contends in its *Motion to Dismiss* that "there is no authority for any state to add as a state-specific UNE, an element that was once declared by the FCC to be a UNE, but that was subsequently removed as a UNE because the UNE did not meet the federal statutory requirements."[7] According to BellSouth, after the FCC "determined that unbundled switching for customers having four or more lines in a density zone 1 central office located in the top 50 MSA was not a UNE because it was not necessary and its absence did not impair the ability of a CLEC to provide service, no state can simply reverse that decision by the FCC by declaring to the contrary."[8] Hence, BellSouth characterizes the *Petition* as "an attempt to avoid the FCC-created exception to its requirement that an ILEC provide CLECs with unbundled switching"[9] and an effort to "replow ground already covered by binding FCC precedent."[10]

While BellSouth concedes that Section 251(d)(3) of the Act and the FCC's *Third Report and Order* provide state commissions with the authority to establish additional unbundling obligations,[11] it argues that the states are prohibited from requiring a network element to be

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[5] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 FCC Rcd. 3696 (1999), (Third Report and Order and Fourth Further Notice of Proposed Rulemaking) (hereinafter the "*Third Report and Order*").
[6] In its *Motion to Dismiss*, BellSouth does not dispute the Authority's jurisdiction to hear this matter pursuant to Tenn. Code Ann. § 65-4-124.
[7] *Motion to Dismiss,* p. 16.
[8] *Id.* at 16-17.
[9] *Id.* at 3.
[10] *Id.* at 6.
[11] *Id.* at 15-16.

unbundled when the FCC has previously removed such requirement.[12] BellSouth asserts that the remedy available under the circumstances must be sought in the FCC's triennial review.[13] Until the conclusion of the triennial review, BellSouth maintains that the Authority "is bound by the FCC's application of the 'necessary and impair' standard to unbundled local circuit switching."[14]

b. The Coalition

The Coalition acknowledges that the FCC has the authority to establish a minimum list of network elements that ILECs must unbundle on a nationwide basis and does not challenge the same. Notwithstanding the action taken by the FCC, however, the Coalition is requesting the authority to "declare switching an unrestricted UNE within the state."[15] According to the Coalition, "as the FCC itself made clear, and as every state to consider the issue has found, the FCC's national list is a floor upon which the states are free to build."[16] Contrary to BellSouth's position, the Coalition argues that "the dual jurisdictional structure of Section 251 of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. § 251, states are no less free to act where the FCC has considered an element and excluded it from the national list as they are in considering a new UNE on which the FCC has not passed."[17] The Coalition maintains that even if the FCC excludes an element from the national list, states are not prohibited from examining whether an FCC-excluded element meets the requirements of the necessary and impair standard on a state-specific basis, consistent with the Act.[18] "The Coalition is not asking the TRA to reverse the FCC's decision with respect to the national list. Rather, the Coalition is asking the

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[12] *Id.* at 16.
[13] *Id.* at 17.
[14] *Id.* at 6.
[15] *Opposition to BellSouth Motion to Dismiss*, TRA Docket No. 02-00207, p. 2 (Mar. 6, 2002).
[16] *Id.*
[17] *Id.*
[18] *Id.* at 6.

TRA to build on that national minimum list and declare that switching is an unrestricted UNE *in Tennessee*, a course explicitly sanctioned by the FCC."[19]

IV. Discussion and Analysis

This matter is before the Hearing Officer on a motion to dismiss. Under Tennessee law, a "motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint, not the strength of a plaintiff's proof."[20] A motion to dismiss "admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action as a matter of law."[21] Moreover, in ruling on a motion to dismiss, "courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true."[22] Finally, a motion to dismiss should be denied "unless it appears that the plaintiff can prove no set of facts in support of [its] claim that would entitle [it] to relief."[23] The foregoing legal principles provide the framework for resolving the *Motion to Dismiss*.

In its *Motion to Dismiss*, BellSouth contends that the Authority is without power to grant the relief requested as "there are simply no facts that will justify the Petitioners' claims."[24]

In its *Third Report and Order*, the FCC determined as follows:

> Incumbent LECs must offer unbundled access to local circuit switching, except for local circuit switching used to serve end users with four or more lines in access density zone 1 in the top 50 Metropolitan Statistical Areas (MSAs), provided that the incumbent LEC provides non-discriminatory, cost-based access to the enhanced extended link throughout zone 1.[25]

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[19] *Id.*
[20] *Bell v. Icard*, 986 S.W.2d 550, 554 (Tenn. 1999).
[21] *Id.*
[22] *Id.*
[23] *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 716 (Tenn. 1997).
[24] *Motion to Dismiss*, p. 17.
[25] *Third Report and Order*, p. 3707. *See also Third Report and Order* at para. 253.

Notwithstanding the action taken by the FCC, the Coalition is requesting that the Authority declare circuit switching to be an unrestricted UNE in Tennessee.

It is unnecessary here to embark upon an exhaustive recitation of the FCC's establishment of the national UNE list. The question at hand is whether the relief requested by the Coalition is, as BellSouth contends, prohibited as a matter of law by the Act and the *Third Report and Order*.

The *Third Report and Order* expressly provides that "Section 251(d)(3) [of the Act[26]] permits state commissions to require incumbent LECs to unbundle additional elements as long as the obligations are consistent with the requirements of section 251 and the national policy framework instituted in [the *Third Report and Order*]."[27] Hence, under the plain language of both the Act and the *Third Report and Order*, there can be no reasonable disagreement as to whether a state, consistent with the Act, can require additional unbundling obligations.[28] The issue, in sum, constituting the core of the *Motion to Dismiss* concerns the circumstances under which a state may require additional unbundling.

As noted earlier, BellSouth contends that "there is no authority for any state to add as a state-specific UNE, an element that was once declared by the FCC to be a UNE, but that was subsequently removed" from the national UNE list.[29] BellSouth cites no controlling, or even

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[26] Section 251(d)(3) of the Act, captioned *Preservation of State Access Regulations*, provides:

> 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 commmission that—
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> (A) establishes access and interconnection obligations of local exchange carriers;
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> (B) is consistent with the requirements of this section;
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> (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

[27] *Third Report and Order*, p. 3706.

[28] *See, e.g., Third Report and Order* at para. 139 (States have "the flexibility to add elements as technology and local market conditions change.").

[29] *Motion to Dismiss*, p. 16.

persuasive, language in the *Third Report and Order* for its interpretation.[30] If the FCC intended what BellSouth here advocates, then the FCC did not clearly make its intentions known.

It is true that the *Third Report and Order* does not explicitly and expressly provide that state commissions may obligate ILECs to make a UNE available after such time as the FCC has excluded the same UNE from the national UNE list. Still, since the FCC did not expressly prohibit such action by the states, and given the express latitude and flexibility provided the states to "identify additional unbundling obligations based on local market conditions,"[31] and the clear intent thereby, the lack of such explicit language is not dispositive.[32]

Commenting upon Section 251(d)(3) and the states ability to modify the national list, the FCC unequivocally stated as follows:

> This section of the statute allows state commissions to establish access obligations of local exchange carriers that are consistent with our rules implementing section 251. We believe that section 251(d)(3) grants state commissions the authority to impose additional obligations upon incumbent LECs beyond those imposed by the national list, as long as they meet the requirements of section 251 and the national policy framework instituted in this Order. As explained below however, we find that state-by-state removal of elements from the national list would substantially prevent implementation of the requirements and purposes of this section of the Act.[33]

Not only does this language demonstrate the ability of a state, consistent with the Act, to modify the list of UNEs available in that particular state, it also reveals that where the FCC intended to prohibit a specific type of modification by the states, such as the removal of elements from the national list, it expressly did so.[34] Therefore, it is not, under the circumstances presented,

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[30] *Opposition to BellSouth Motion to Dismiss*, p. 6.
[31] *Third Report and Order* at para. 122.
[32] The Authority cannot ignore the plain language of the *Third Report and Order*, which affirmatively grants states the ability to modify unbundling obligations based on local conditions, as long as such modifications are consistent with Section 251 of the Act and the national policy framework instituted in the *Third Report and Order*.
[33] *Id.* at para. 154.
[34] "We conclude that, at this time, removing network elements from the unbundling obligations established in this Order on a state-by-state basis would not be consistent with the goals of the 1996 Act." *Third Report and Order* at para. 157.

unreasonable to conclude that if the FCC sought to prohibit the action requested by the *Petition* it would have expressly done so. In fact, such a conclusion follows from the plain language of the *Third Report and Order*.[35] A different conclusion in support of the *Motion to Dismiss* would require a degree of speculation by this Authority, if not a superimposition. Simply put, BellSouth has not persuasively demonstrated that a state-imposed unbundling obligation with respect to a UNE previously removed from the national UNE list by the FCC cannot be accomplished, as a matter of law, under any circumstance, consistent with Section 251 of the Act and the national policy framework instituted in the *Third Report and Order*.

Additionally, BellSouth asserts that the FCC considered "the same evidence and arguments" in formulating the current national UNE list as will be presented by the Coalition in this proceeding.[36] The gravamen of the *Motion to Dismiss* is that the Authority does not, as a matter of law, have the power to declare circuit switching an unrestricted UNE in Tennessee, not that the *Petition* improperly asks the Authority to merely reconsider Tennessee-specific evidence already evaluated by the FCC. Nonetheless, even if the FCC considered relevant and material Tennessee-specific evidence in determining whether to include circuit switching on the national UNE list, this alone is not sufficient, under Tennessee law, to carry the weight of the *Motion to Dismiss*. To accept this argument, the Authority would be compelled, at a minimum, either to assume or to find that no material factual circumstances in Tennessee have changed,[37] that no new arguments have been or will be presented in this proceeding, and that the *Third Report and Order* precludes an attempt at the state level to make additional arguments concerning the local

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[35] *See supra* text accompanying note 32.
[36] *Reply to Opposition to BellSouth's Motion to Dismiss*, TRA Docket No. 02-00207, p. 4 (Mar. 8, 2002).
[37] "[T]he Coalition observes that the data that the FCC had before it is nearly three years old. As the TRA is all too aware, since May of 1999, when BellSouth submitted its data, there have been sweeping changes in the competitive industry. . . . Many of the assumptions that the FCC made regarding whether the existence of a switch demonstrated an absence of impairment are not true today." *Tennessee UNE-P Coalition Response to BellSouth's Reply*, TRA Docket No. 02-00207, pp. 6-7 (Mar. 14, 2002).

market in Tennessee not originally considered or resolved by the FCC. Given the standards governing the consideration of a motion to dismiss, and the Coalition's assertions in opposition to BellSouth's position,[38] BellSouth's contention must fail.

To be sure, the Coalition may face significant hurdles in meeting the requirements of Section 251(d)(3) and the *Third Report and Order*. But, determining whether the Coalition can successfully negotiate those hurdles in ruling upon a motion to dismiss would be premature and inconsistent with Tennessee law.

V. Conclusion

For the foregoing reasons, the Hearing Officer denies the *Motion to Dismiss*.[39]

IT IS THEREFORE ORDERED THAT:

1. The *Motion of BellSouth Telecommunications, Inc. to Dismiss Petition Pursuant to T.C.A. § 65-5-209(d) and to Strike Pre-Filed Testimony* is denied.

2. Any party aggrieved by the decision of the Hearing Officer in this matter may file a Petition for Reconsideration with the Hearing Officer within fifteen (15) days from the date of this Order.

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[38] The Coalition disagrees with BellSouth's attempt to limit its *Petition* in this manner. According to the Coalition, "It is irrelevant that the FCC had before it data that included Nashville. That data—including the data submitted by BellSouth to which it refers—primarily related to where CLECs have deployed switches; *not* to what customers are or can be served using those switches. It is precisely that latter type of data that the Coalition intends to place before the Authority in this proceeding." *Tennessee UNE-P Coalition Response to BellSouth's Reply*, p. 6. Further, contrary to BellSouth's assertion, the Coalition argues that "The FCC did not conduct a particularized analysis of the Nashville market to make a specific impairment finding with respect to Tennessee." *Id.*

[39] As concerning BellSouth's request for the Authority to strike the Pre-filed Direct Testimony of Mr. Joseph Gillan, the Hearing Officer concludes that BellSouth has failed to articulate sound grounds for this request. Moreover, the case cited in support of the request is easily distinguished. Finding no harm by the submission of the pre-filed testimony with the *Petition*, the request to strike is hereby denied.

3. Any party aggrieved by the decision of the Hearing Officer in this matter may file a Petition for Appeal with the Tennessee Regulatory Authority within fifteen (15) days from the date of this Order.

MELVIN J. MALONE, DIRECTOR
AS HEARING OFFICER

ATTEST:

K. David Waddell, Executive Secretary