BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: In the Matter of Petition Of Tennessee UNE-P Coalition To Open Contested Case Proceeding To Declare Unbundled Switching An Unrestricted Unbundled Network Element) Docket No. 02-00207

RESPONSE TO MOTION TO HOLD PROCEEDING IN ABEYANCE

The Tennessee UNE-P Coalition ("the Coalition") files the following response to the Motion filed by BellSouth Telecommunications, Inc. ("BellSouth") to hold this proceeding in abeyance.

Direct testimony has been filed in this case. Rebuttal is due on August 2, 2002. No hearing date has been set.

BellSouth contends these proceedings should be indefinitely delayed for two reasons: (1) because the TRA staff has not yet issued data requests to obtain information from various, competing local carriers who are not parties to this case, and (2) because the U.S. Court of Appeals for the D. C. Circuit has reversed and remanded for further consideration the rules of the Federal Communications Commission ("FCC") concerning the definition of "impair" as that term is used in Section 251(d)(2)(B) of the federal Telecommunications Act.

The Coalition recognizes that both the witnesses for BellSouth and the witnesses for the Coalition may need to file revised testimony based on the information which the TRA Staff collects from the non-party CLECs. Since no hearing date has been set, the filing of such supplemental testimony should not prejudice anyone. There is certainly no reason, however, to hold in abeyance the filing of rebuttal testimony on August 2, 2002.

BellSouth's second argument is also misplaced. As BellSouth is surely aware, but did not mention in its Motion, FCC Chairman Michael Powell issued a brief statement on the very day that the U.S. Court of Appeals issued its decision in *United States Telecom Association v. FCC*, 290 F. 3d 415 (D.C. Cir., 2002). In that statement (copy attached), the Chairman stated that "the current state of affairs for access to network elements [*i.e.*, the "impair" standard as interpreted by the FCC] remains intact." Emphasis added. The Court did not vacate the FCC's definition of "impair" but only remanded the matter to the FCC for further consideration. The FCC's rules and orders addressing this issue therefore remain in effect today and are likely to stay in effect for a substantial period of time.[1]

The U.S. Supreme Court has already addressed the "impair" standard once and it has also recently addressed the appropriate method of pricing unbundled network elements. Both of those cases literally took year to resolve, but no one has ever suggested – until now – that the TRA should suspend its regulatory responsibilities while contested issues wind their way through the judicial system.

This agency has been given a statutory mandate to promote competition by, among other things insuring that BellSouth provides competitors "non-discriminatory" access to all "features, functions, and services." T.C.A. § 65-4-124(a). The TRA is specifically directed to "issue such orders as necessary to implement" that mandate. T.C.A.§ 65-4-124(b). That is precisely what this case is about. The TRA cannot and should not avoid that statutory duty simply because of

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1 The FCC has requested that the Court reconsider its decision and may also elect to ask the United States Supreme Court to overturn the Court of Appeals. If the Supreme Court agrees to hear the case, it will not likely be resolved for at least a year. Even in the absence of Supreme Court review, the FCC's reconsideration will presumably take several months and will not begin until after the Court of Appeals acts on the petition to reconsider.

"legal uncertainty." If "legal uncertainty" were grounds from the indefinite postponement of decisions, the TRA would have accomplished very little in the past six years.

For these reasons, BellSouth's Motion should be denied

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the following on this the 22 day of July, 2002.

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STATEMENT OF FCC CHAIRMAN MICHAEL POWELL ON THE DECISION BY THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA REGARDING THE COMMISSION'S UNBUNDLING RULES

Washington, D.C. – The Court's decision today directs the Commission to undertake a more focused examination of the Act's unbundling obligations. The Commission is currently examining its unbundling framework, including line sharing rules, in its Triennial Review notice, which is presently open for public comment. We will be exploring many of the issues that the Court raised in its opinion in the coming months as we evaluate the record in this proceeding. While we continue to evaluate the Court's opinion and consider all the Commission's options, in the meantime, the current state of affairs for access to network elements remains intact.