BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESEE

September 13, 2002

IN RE:		
PETITION OF TENNESSEE UNE-P COALITION TO OPEN A CONTESTED CASE PROCEEDING TO DECLARE SWITCHING AN UNRESTRICTED UNBUNDLED NETWORK ELEMENT	)))))))	**DOCKET NO. 02-00207**

ORDER DENYING MOTION TO HOLD PROCEEDING IN ABEYANCE AND GRANTING MOTION FOR RECONSIDERATION OR CLARIFICATION

This docket came before the Pre-Hearing Officer for consideration of *BellSouth Telecommunications, Inc.'s Motion to Hold Proceeding in Abeyance* filed on July 12, 2002, *Response to Motion to Hold Proceeding in Abeyance* filed on July 23, 2002, *Petition for Clarification or Reconsideration* filed on August 14, 2002, and *BellSouth Telecommunications, Inc.'s Response to UNE-P Coalition's Petition for Clarification or Reconsideration* filed on August 16, 2002.

I. RELEVANT PROCEDURAL HISTORY

On February 25, 2002, the UNE-P Coalition[1] filed its *Petition to Open Contested Case Proceeding* ("Petition") requesting that the Tennessee Regulatory Authority ("TRA") convene a contested case to establish "local switching as a 'new interconnection service'" and to "declare

[1] The UNE-P Coalition consists of NewSouth Communications, Corp; Birch Telecom of the South, Inc.; Ernest Communications, Inc.; Access Integrated Networks, Inc.; MCImetro Access Transmission Services, LLC; MCIWorldCom Communications, Inc.; and Z-Tel Communications, Inc.

switching an unrestricted [unbundled network element ("UNE")]."[2] The UNE-P Coalition cited Tenn. Code Ann. §§ 65-4-124(a) and 65-5-209(d) as providing the TRA with the authority to grant the requested relief.[3] When exercising that authority, the UNE-P Coalition asserted, the TRA should apply the federal impairment analysis set forth in Section 251(d)(2) of the Telecommunications Act of 1996 ("Act").[4]

The TRA addressed the filing of the Petition at the February 26, 2002 Authority Conference. BellSouth Telecommunications, Inc. ("BellSouth") and the UNE-P Coalition presented oral arguments as to the application of Tenn. Code Ann. § 65-5-209(d).[5] Thereafter, the TRA convened a contested case proceeding and appointed Director Melvin J. Malone as the Pre-Hearing Officer.[6] Next, the Pre-Hearing Officer directed BellSouth to file a response to the Petition by March 4, 2002 and the UNE-P Coalition to file a reply by March 7, 2002.[7]

On February 28, 2002, the UNE-P Coalition filed its *Motion to Set Pre-Hearing Conference* asking that a pre-hearing conference be scheduled for March 7, 2002 and proposing a procedural schedule incorporating the deadlines set forth in Tenn. Code Ann. § 65-5-209(d).[8] On March 1, 2002, BellSouth filed a letter expressing its opposition to the UNE-P Coalition's motion and intention to file a response.[9] Three days later, BellSouth filed the *Motion of*

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[2] *Petition to Open Contested Case Proceeding*, p. 1, 9 (Feb. 25, 2002).
[3] *Id.* at 1.
[4] *Id.* at 1-2.
[5] Transcript of Proceeding, Feb. 26, 2002, pp. 17-26 (Authority Conference).
[6] *Order Convening a Contested Case Proceeding and Appointing a Pre-Hearing Officer* (Apr. 8, 2002) (Chairman Kyle did not vote with the majority).
[7] *Id.*
[8] *Motion to Set Pre-Hearing Conference*, p. 1 (Feb. 28, 2002). Tenn. Code Ann. § 65-5-209(d) provides:

> If not resolved by agreement, the authority shall, on petition of the competing telecommunications services provider, hold a contested case proceeding within thirty (30) days to establish initial rates for new interconnection services provided by an incumbent local exchange telephone company subsequent to June 6, 1995, which rates shall be set in accordance with the provisions set forth in Acts 1995, ch. 408. The authority shall issue a final order within twenty (20) days of the proceeding.

Tenn. Code Ann. § 65-5-209(d) (Supp 2001).
[9] Letter from Joelle Phillips to David Waddell dated March 1, 2002 (Mar. 1, 2002).

BellSouth Telecommunications, Inc. to Dismiss Petition Pursuant to T.C.A. § 65-5-209(d) and to Strike Filed Testimony arguing that Tenn. Code Ann. § 65-5-209(d) is not applicable to this docket[10] and that the TRA lacks authority to require the unrestricted unbundling of local switching.[11]

On March 6, 2002, BellSouth filed its opposition to the motion to set pre-hearing conference and the UNE-P Coalition filed its opposition to BellSouth's motion to dismiss. On that same day, the Pre-Hearing Officer issued a *Notice of Action* summarily denying the UNE-P Coalition's *Motion to Set Pre-Hearing Conference.* On March 8, 2002, BellSouth filed a motion to file a reply to the UNE-P Coalition's opposition to the motion to dismiss with its reply brief attached. The UNE-P Coalition filed a response to BellSouth's reply on March 14, 2002.

On March 25, 2002, the Pre-Hearing Officer entered an *Order Regarding the Applicability of Tenn. Code Ann. § 65-5-209(d)* concluding that Tenn. Code Ann. § 65-5-209(d) is not applicable to this proceeding.[12] On April 9, 2002, the Pre-Hearing Officer issued an *Initial Order Denying BellSouth's Motion to Dismiss and to Strike.* The Pre-Hearing Officer concluded that "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 circumstances, consistent with Section 251 of the Act and the national policy framework instituted in the *Third Report and Order.*"[13]

Having resolved the above preliminary issues, the Pre-Hearing Officer recognized a need to assess how this docket would proceed forward. Therefore, on May 13, 2002, the Pre-Hearing

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[10] *Motion of BellSouth Telecommunications, Inc. to Dismiss Petition Pursuant to T.C.A. § 65-5-209(d) and to Strike Pre-Filed Testimony*, pp. 6-10 (Mar. 4, 2002).
[11] *Id.* at 14-17.
[12] *Order Regarding the Applicability of Tenn. Code Ann. § 65-5-209(d)*, pp. 5-7 (Mar. 25, 2002).
[13] *Initial Order Denying BellSouth's Motion to Dismiss and to Strike*, p. 8 (Apr. 9, 2002) (referring to *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 15 F.C.C.R. 3696 (1999) (Third Report and Order)).

Officer issued the *First Report and Recommendation* addressing that issue. After discussing relevant statutory and case law authority and analyzing that authority in conjunction with the relief requested by the UNE-P Coalition, the Pre-Hearing Officer recommended that the TRA close the contested case proceeding and accept the Petition as a petition for rule filed pursuant to Tenn. Code Ann. § 4-5-201.[14] Further, the Pre-Hearing Officer recommended that the TRA adopt the procedural schedule set forth in the *First Report and Recommendation*. This schedule required that discovery requests and a proposed protective order be filed on May 24, 2002, objections to discovery be filed by May 31, 2002, responses to discovery be filed on June 7, 2002, pre-filed direct testimony or comments be filed on June 21, 2002, and pre-filed rebuttal testimony or comments be filed on June 28, 2002.

On May 20, 2002, the UNE-P Coalition filed a *Motion to Amend Petition and Motion to Reconsider the Hearing Officer's First Report and Recommendation*. The UNE-P Coalition explained that it was only asking the TRA to require unrestricted access to local switching as a UNE in BellSouth's service territory.[15] Given this amendment, the UNE-P Coalition requested that the Pre-Hearing Officer reconsider his decision to accept the Petition as a petition for rule.[16]

The TRA considered the *First Report and Recommendation* at the May 21, 2002 Authority Conference. In light of the filing of the *Motion to Amend Petition and Motion to Reconsider the Hearing Officer's First Report and Recommendation*, the TRA did not consider the report in its entirety. Instead, the TRA directed BellSouth to file responses to the motions to amend and reconsider by May 28, 2002, the UNE-P Coalition to file replies by May 30, 2002,

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[14] *Id.* at 3-7.
[15] *Motion to Amend Petition and Motion to Reconsider the Hearing Officer's First Report and Recommendation*, p. 2 (May 20, 2002).
[16] *Id.*

and the Pre-Hearing Officer to resolve the motions.[17] In addition, the TRA adopted those procedural dates listed in the *First Report and Recommendation* pertaining to discovery and the filing of a proposed protective order.

On May 23, 2002, BellSouth sent the TRA a letter stating that it did not intend to file a response to the *Motion to Amend Petition and Motion to Reconsider the Hearing Officer's First Report and Recommendation.*[18] On May 29, 2002, the Pre-Hearing Officer issued an *Initial Order Granting Motions to Amend Petition and to Reconsider the Hearing Officer's First Report and Recommendation.* The Pre-Hearing Officer first concluded that, because the motion to amend the Petition was unopposed, the request should be granted. Given this conclusion, the Pre-Hearing Officer next turned to the motion to reconsider the *First Report and Recommendation* and determined that is appropriate for this docket to proceed as a contested case. Lastly, the Pre-Hearing Officer restated the procedural schedule using the same dates set forth in the *First Report and Recommendation* and directed the parties to reserve July 22-26, 2002 for a hearing.[19]

In the meantime, discovery requests were filed and numerous disputes developed. On June 28, 2002, the Pre-Hearing Officer issued an *Initial Order Resolving Discovery Disputes.* As part of the ruling, the Pre-Hearing Officer directed the TRA to "promulgate data requests to issue to Network Telephone Corp., Business Telecom, Inc., XO Tennessee, Inc., Adelphia Business Solutions of Nashville, L.P. and any other [competing local exchange carrier] which the Authority determines should respond."[20] By this time, the Pre-Hearing Officer had granted

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[17] *Order Adopting First Report and Recommendation*, pp. 1-2 (Jun. 17, 2002).
[18] Letter from Guy M. Hicks to David Waddell dated May 23, 2002 (May 23, 2002).
[19] *Initial Order Granting Motions to Amend Petition and to Reconsider the Hearing Officer's First Report and Recommendation*, p. 4 (May 29, 2002).
[20] *Initial Order Resolving Discovery Disputes*, p. 23 (Jun. 28, 2002).

several extensions as a result of the need to resolve the discovery disputes; thus, the remaining due dates were as follows: responses to discovery filed by July 3, 2002, pre-filed direct testimony filed by July 12, 2002, pre-filed rebuttal testimony filed by July 26, 2002, and hearing dates reserved for August 26-30, 2002.

On July 8, 2002, the parties filed the *Agreed Motion Regarding Filing Deadlines During the Week of July 1st Through July 5th, 2002*. In the motion, the parties agreed to modify the previously set due dates such that the parties would file responses to discovery on July 10, 2002, pre-filed direct testimony on July 19, 2002, and pre-filed rebuttal testimony on August 2, 2002. In support of their motion, the parties cited the fact that they had been informed that the Authority would not accept filings from July 1 through July 5, 2002 due to the extensive closure of the government of the State of Tennessee.[21]

On July 12, 2002, BellSouth filed *BellSouth Telecommunications Inc.'s Motion to Hold Proceeding in Abeyance* ("Motion to Hold in Abeyance"). The UNE-P Coalition filed its response on July 23, 2002.

On July 29, 2002, the parties filed the *Joint Motion to Extend Filing Date*. The parties requested that the Pre-Hearing Officer extend the August 2, 2002 date for filing rebuttal testimony until after competing carriers responded to the data requests discussed in the *Initial Order Resolving Discovery Disputes*. The parties explained that by granting the extension, the Pre-Hearing Officer would avoid the need to supplement the rebuttal testimony.[22] The parties requested further that a status conference be scheduled following the deadline for the filing of

[21] *Agreed Motion Regarding Filing Deadlines During the Week of July 1st Through July 5th, 2002*, p. 1 (Jul. 8, 2002). Despite this contention, the TRA was open to receive filings on Friday, July 5, 2002.
[22] *Joint Motion to Extend Filing Date*, p. 2 (Jul. 29, 2002).

responses to the data requests for the purpose of discussing the filing dates for pre-filed rebuttal testimony and hearing dates.

During the July 23, 2002 Authority Conference, a panel of the TRA consisting of Chairman Sara Kyle and Directors Deborah Taylor Tate and Ron Jones unanimously voted to appoint Director Ron Jones as the Pre-Hearing Officer.[23] Thereafter, on August 1, 2002, Director Jones, acting as the Pre-Hearing Officer, issued an *Order Suspending Procedural Schedule*. The Pre-Hearing Officer found that good cause existed for the extension requested in the *Joint Motion to Extend Filing Date* and that the extension would not unreasonably delay the outcome of this docket. Based on this finding and the fact that the Motion to Hold in Abeyance was outstanding, the Pre-Hearing Officer granted the *Joint Motion to Extend Filing Date* such that all dates previously agreed to or reserved were suspended pending resolution of the Motion to Hold in Abeyance. Additionally, the Pre-Hearing Officer concluded that the ruling rendered the *Agreed Motion Regarding Filing Deadlines During the Week of July 1st Through July 5th, 2002* moot.[24]

On August 14, 2002, the UNE-P Coalition filed a *Petition for Clarification or Reconsideration* ("Petition for Clarification") requesting that the Pre-Hearing Officer grant the relief requested in the *Joint Motion to Extend Filing Date* and instruct the TRA to issue the data requests. BellSouth filed a response to the petition on August 16, 2002.

The Petition for Clarification and BellSouth's Motion to Hold in Abeyance are the subject of this order. Each filing is discussed in detail below.

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[23] Director Malone's term as a director of the Tennessee Regulatory Authority expired on June 30, 2002.
[24] *Order Suspending Procedural Schedule*, p. 3 (Aug. 1, 2002).

II. BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO HOLD IN ABEYANCE

In its Motion to Hold in Abeyance, BellSouth contends that the procedural schedule does not permit the Authority to develop a complete evidentiary record given that the ordered data requests have not yet issued.[25] Next, BellSouth asserts that the Authority should not expend its limited resources to resolve the issue presented in this docket because the D.C. Circuit Court of Appeals recently issued an opinion in *United States Telecom Association v. FCC* invalidating the standard of the Federal Communication Commission ("FCC") for determining whether an incumbent carrier must unbundle a network element thereby creating a "legal uncertainty" as to the applicable standard.[26]

In response, the UNE-P Coalition asserts that no hearing dates have been set and, therefore, there is sufficient time to develop the evidentiary record. Further, the UNE-P Coalition argues that the D.C. Circuit Court did not vacate the FCC's rules.[27] Lastly, the UNE-P Coalition contends that the TRA should not refrain from fulfilling its statutory duty because of a "legal uncertainty."[28]

A. Sufficient Opportunity to Develop the Evidentiary Record

BellSouth's first argument that the current schedule does not permit the development of a full and complete factual record does not justify an indefinite suspension of any further proceedings in this docket. BellSouth acknowledges this fact in its motion when it writes: "At a minimum, therefore, the TRA should hold this proceeding in abeyance while the TRA issues the data requests required by the Order to non-party CLECs, ensures that these non-party CLECs fully respond to these data requests, and allows BellSouth a reasonable amount of time to review

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[25] *BellSouth Telecommunications, Inc.'s Motion to Hold Proceeding in Abeyance*, pp. 2-4 (Jul. 12, 2002).
[26] *Id.* at 4-9 (referring to *United States Telecom Ass'n. v. FCC*, 419 F.3d 415 (D.C. Cir. 2002)).
[27] *Response to Motion to Hold Proceeding in Abeyance*, pp. 1-2 (Jul. 23, 2002).
[28] *Id.* at 2-3.

the responses to these data requests."[29] The Pre-Hearing Officer's *Order Suspending Procedural Schedule* addresses these concerns to the extent it allows the Pre-Hearing Officer to establish a new procedural schedule upon resolution of the Motion to Hold in Abeyance.

B. The "Legal Uncertainty" Created by the D.C. Circuit Court's Decision

In *United States Telecom Association v. FCC*, the D.C. Circuit Court reviewed the FCC's *UNE Remand Order*.[30] In the *UNE Remand Order*, the FCC modified Rule 51.317, which sets forth the standards for determining whether the failure to provide access to a network element will "impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer."[31] The FCC also modified in the *UNE Remand Order* Rule 51.319, which reflects the FCC's application of Section 251(d)(2) of the Act and Rule 51.317 by providing a list of those network elements incumbent carriers must provide.[32] The D.C. Circuit Court remanded the *UNE Remand Order* for further consideration by the FCC.

BellSouth asserts that the D.C. Circuit Court invalidated and set aside the FCC's standard "for determining which network elements must be unbundled."[33] BellSouth fails, however, to provide compelling support for this conclusion. In its motion, BellSouth writes: "According to the Court of Appeals, network elements should not be unbundled when there is no reasonable basis to believe that competition is suffering from the type of impairment about which Congress was concerned."[34] This comment does not criticize the particular requirements of Rule 51.317,

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[29] *BellSouth Telecommunications, Inc.'s Motion to Hold Proceeding in Abeyance*, p. 4 (Jul. 12, 2002).
[30] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 15 F.C.C.R. 3696 (1999) (Third Report and Order) (hereinafter "*UNE Remand Order*"). The D.C. Circuit Court refers to this order as the "Local Competition Order." *United States Telecom Ass'n. v. FCC*, 419 F.3d 415, 418-19 (D.C. Cir. 2002).
[31] 47 U.S.C. § 251(d)(2) (2001); *see UNE Remand Order*, app. C, para. 155 & n.275.
[32] *UNE Remand Order*, app. C.
[33] *BellSouth Telecommunications, Inc.'s Motion to Hold Proceeding in Abeyance*, pp. 1, 5 (Jul. 12, 2002).
[34] *Id.*

but instead, addresses the FCC's decision to apply Section 251(d)(2) and Rule 51.317's requirements to the nation as a whole.[35]

BellSouth next refers to a portion of the D.C. Circuit Court's decision as follows: "According to the Court of Appeals, the FCC cannot adopt unbundling rules 'detached from any specific markets or market categories.'"[36] However, BellSouth fails to explain that the D.C. Circuit Court was not directly addressing the FCC's rules when writing this phrase. The complete statement of the D.C. Circuit Court is as follows:

> We certainly agree that the [United States Supreme] Court's brief passage reversing the Commission on the impairment issue contained little detail as to the "right" way for the Commission to go about its work. But the [United States Supreme] Court's point that if "Congress had wanted to give blanket access to incumbents' networks," it "would simply have said (as the Commission in effect has) that whatever requested element can be provided must be provided," *Iowa Utilities Board*, 525 U.S. at 390, 119 S.Ct. at 735, suggests that the Court read the statute as requiring a more nuanced concept of impairment than is reflected in findings such as the Commission's – **detached from any specific markets or market categories.**[37]

This quote expresses the Court's conclusion of its discussion of whether the FCC properly determined to require unbundling of almost every network element at the national level. This statement criticizes the finding of the FCC "to make its unbundling requirements (except for two elements) applicable uniformly to all elements in every geographic or customer market."[38] Neither this quote nor the discussion which precedes it specifically criticizes Rule 51.317, but

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[35] *United States Telecom Ass'n.*, 290 F.3d. at 422. The Court's language is as follows:

> As to almost every element, the Commission chose to adopt a uniform national rule, mandating the element's unbundling in every geographic market and customer class, without regard to the state of competitive impairment in any particular market. As a result, UNEs will be available to CLECs in many markets where there is no reasonable basis for thinking that competition is suffering from any impairment of a sort that might have the object of Congress's concern.

Id.

[36] *BellSouth Telecommunications, Inc.'s Motion to Hold Proceeding in Abeyance*, p. 5 (Jul. 12, 2002) (quoting *United States Telecom Ass'n.*, 290 F.3d at 426).

[37] *United States Telecom Ass'n.*, 290 F.3d at 425-26 (emphasis added).

[38] *Id.* at 419.

rather the FCC's findings in regard to that rule. In fact, Rule 51.317 does not mandate that the FCC apply the unbundling rules to the nation as a whole. Instead, the only geographic or market reference is that as to non-proprietary network elements the FCC shall consider the "extent to which alternatives in the market are available as a practical, economic, and operational matter."[39]

To further support its contention that the D.C. Circuit Court invalidated and set aside the applicable standard, BellSouth argues:

> As the Court of Appeals noted, "[t]o rely on cost disparities that are universal as between new entrants and incumbents in *any* industry is to invoke a concept too broad . . . to be reasonably linked to the purpose of the Act's unbundling provisions." Instead, according to the D.C. Circuit, the FCC's impairment analysis must focus on "cost differentials based on characteristics that would make genuinely competitive provision of an element's function wasteful."[40]

Once again, this argument focuses on the FCC's application of Rule 51.317, not the validity of that rule. The text of Rule 51.317 permits the decisionmaker to consider "[c]ost, including all cost that requesting carriers may incur when using the alternative element to provide the services it seeks to offer" when determining whether "lack of access to a network element materially diminishes a requesting carrier's ability to provide service."[41] However, the rule does not mandate the degree of cost disparity that must exist before a decisionmaker can order that a network element be unbundled. In applying the rule, the FCC chose, as characterized by the D.C. Circuit Court, to rely on universal cost disparities.[42] Such reliance is not required by Rule 51.317.

One might argue the fact that Rule 51.317 remains intact is insufficient to justify continuance of this docket because the FCC's interpretation of that rule derived through the

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[39] 47 C.F.R. § 51.317(b)(2).
[40] *BellSouth Telecommunications, Inc.'s Motion to Hold Proceeding in Abeyance*, p. 5 (Jul. 12, 2002) (quoting *United States Telecom Ass'n.*, 290 F.3d at 427).
[41] 47 C.F.R. § 51.317(b)(2).
[42] *United States Telecom Ass'n.*, 290 F.3d at 427.

application of the rule, which was criticized by the Court, is also applicable to a state commission's analysis. While this argument might generally have merit, in this case, it must fail given that the D.C. Circuit Court neither vacated the rule nor the *UNE Remand Order*. BellSouth failed to address this fact in its motion. Although the D.C. Circuit Court explicitly remanded and vacated another FCC order reviewed in its opinion,[43] the Court did not vacate the *UNE Remand Order*. Had the Court desired to do so, it could have.[44] Instead, the Court merely remanded the *UNE Remand Order* for further consideration in accordance with the principles outlined in the opinion.[45]

Based on the foregoing discussion, it is the conclusion of the Pre-Hearing Officer that BellSouth has failed to establish that the decision of the D.C. Circuit Court resulted in the invalidation of Rule 51.317, the rule which establishes the standard applicable to the determination of whether an incumbent carrier should unbundle a network element. Moreover, as to the D.C. Circuit Court's criticism of the FCC's application of the rule, this agency is prepared and capable of taking the D.C. Circuit Court's comments into consideration when rendering a decision. Lastly, it is worth noting that the "legal uncertainty" described by BellSouth is not new to telecommunications regulation. Since the issuance of the FCC's *First Report and Order* in the local competition docket, numerous appeals have been taken to the

[43] The D.C. Circuit Court also reviewed the FCC's *Line Sharing Order* in this opinion and explicitly vacated and remanded that order. *See id.* at 429.
[44] In other cases, the D.C. Circuit has explained that vacation is not always necessary and has chosen to remand a decision to an administrative agency without vacating the order or rule that was the subject of the review. *See, e.g., WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002).
[45] *United States Telecom Ass'n.*, 290 F.3d at 430.

Circuit Courts of Appeals and the United States Supreme Court.[46] One thing is certain, had the TRA awaited the final resolution of each of these "legal uncertainties," this agency would be significantly further from achieving the goals of the federal and state acts than it is today. In this instance where neither the rule nor the related order have been vacated, this agency should not refrain from attempting to achieve its goals while parties make their way through the federal court system. Based on the foregoing findings and conclusions, it is the determination of the Pre-Hearing Officer that the Motion to Hold in Abeyance should be denied.

III. PETITION FOR CLARIFICATION

In the Petition for Clarification, the UNE-P Coalition asserts that the Pre-Hearing Officer should clarify or reconsider the *Order Suspending Procedural Schedule* issued on August 1, 2002. Petitioners argue that the relief granted went beyond that requested in the petition in that the Pre-Hearing Officer ordered the suspension of the procedural schedule pending the resolution of the Motion to Hold in Abeyance.[47] The UNE-P Coalition contends that the Pre-Hearing Officer's decision may cause too long a delay in the docket and does not indicate whether the TRA should issue the data requests discussed in the *Initial Order Resolving Discovery Disputes*.[48] The UNE-P Coalition also contends that the Pre-Hearing Officer should clarify the order because BellSouth has interpreted the order in a Louisiana Public Service Commission proceeding and that interpretation is inconsistent with the UNE-P Coalition's understanding of the order.[49]

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[46] One such appeal has been ongoing since 1996. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15,499 (1996) (First Report and Order), *vacated in part sub nom. Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *rev'd in part aff'd in part sub nom. AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999), *remanded to* 219 F.3d 744 (8th Cir. 2000), *rev'd in part aff'd in part sub nom. Verizon Communications, Inc. v. FCC*, __ U.S. __, 122 S.Ct. 1646, 152 L.Ed.2d 701 (2002), *judgment entered sub nom. Iowa Utils. Bd. v. FCC* (8th Cir. Aug. 21, 2002).

[47] *Petition for Clarification or Reconsideration*, p. 1 (Aug. 14, 2002).

[48] *Id.* at 2.

[49] *Id.* at 3.

BellSouth responds by asserting that the action of the Pre-Hearing Officer was appropriate given that the Motion to Hold in Abeyance was outstanding.[50] BellSouth also contends that the Pre-Hearing Officer's decision prevents any waste of resources.[51] BellSouth argues that the order clearly indicates that the procedural schedule is suspended pending resolution of the Motion to Hold in Abeyance and that BellSouth did not misrepresent this fact to the Louisiana commission.[52]

The Pre-Hearing Officer finds that clarification may aid in the understanding of the *Order Suspending Procedural Schedule* and, therefore, the motion should be granted. Having so concluded, the requisite clarification is as follows. First, the order suspended all activity, including the issuance of data requests. Second, the suspension was intended to be lifted, if appropriate, upon the entry of an order disposing of the Motion to Hold in Abeyance, not the resolution of any resulting appeals or federal litigation.

IV. REMAINING MATTERS

Having determined that the Motion to Hold in Abeyance should be denied and having clarified the *Order Suspending Procedural Schedule*, the Pre-Hearing Officer finds that the data requests described in the *Initial Order Resolving Discovery Disputes* filed on June 28, 2002 should issue by September 11, 2002. All entities receiving such requests shall file responses with the Authority by September 25, 2002. Those entities receiving data requests that are not parties to this docket shall file all responses in accordance with the provisions of the *Initial Order Resolving Discovery Disputes*.[53]

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[50] *BellSouth Telecommunications Inc.'s Response to UNE-P Coalition's Petition for Clarification or Reconsideration*, p. 1 (Aug. 16, 2002).
[51] *Id.* at 2.
[52] *Id.*
[53] The *Initial Order Resolving Discovery Disputes* may be obtained through the TRA's electronic file room located at http://www.state.tn.us/tra/fileroom.htm.

The Pre-Hearing Officer will convene a status conference on October 2, 2002 at 9:00 a.m. for the purposes of determining: 1) whether further discovery is necessary; 2) a filing date for supplemental direct testimony; 3) a filing date for rebuttal testimony; and 4) hearing dates. The parties shall file agreed dates for the filing of rebuttal testimony and the hearing by September 30, 2002. Any request to change the date of the status conference shall be made in writing and filed with the TRA no later than September 30, 2002.

IT IS THEREFORE ORDERED THAT:

1. *BellSouth Telecommunications, Inc.'s Motion to Hold Proceeding in Abeyance* filed on July 12, 2002 is denied.

2. The *Petition for Clarification or Reconsideration* filed on August 14, 2002 by the UNE-P Coalition is granted, and the *Order Suspending Procedural Schedule* is clarified as explained herein.

3. The data requests described in the *Initial Order Resolving Discovery Disputes* filed on June 28, 2002 shall issue by **Wednesday, September 11, 2002**. All entities receiving such requests shall file responses with the Authority by **Wednesday, September 25, 2002**. Those entities receiving data requests that are not parties to this docket shall file all responses in accordance with the provisions of the *Initial Order Resolving Discovery Disputes*.

4. A status conference will be held on **Wednesday, October 2, 2002 at 9:00** a.m. in the hearing room of the Tennessee Regulatory Authority for the purposes set forth herein. The parties shall file agreed dates for the filing of rebuttal testimony and the hearing by **Monday, September 30, 2002**. Any request to change the date of the status conference shall be made in writing and filed with the TRA no later than **Monday, September 30, 2002**.

5. Any party aggrieved by the decision of the Pre-Hearing Officer in this docket may file a petition for reconsideration with the Pre-Hearing Officer within fifteen (15) days from the date of this Order.

Ron Jones, Director
as Pre-Hearing Officer