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March 4, 2002

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

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

Dear Mr. Waddell:

Enclosed please find the original and thirteen copies of BellSouth's Motion to Dismiss Petition Pursuant to T.C.A. § 65-5-209(d) and to Strike Pre-Filed Testimony. Copies have been served on the parties of record.

Cordially,

Joelle Phillips

JP/jej

Enclosure

436602

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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

MOTION OF BELLSOUTH TELECOMMUNICATIONS, INC. TO DISMISS PETITION PURSUANT TO T.C.A. § 65-5-209(d) AND TO STRIKE PRE-FILED TESTIMONY

BellSouth Telecommunications, Inc. ("BellSouth") files this Motion to Dismiss Petition Pursuant to T.C.A. § 65-5-209(d) and to Strike Pre-Filed Testimony. BellSouth respectfully shows the Authority as follows.

I. INTRODUCTION

A. Procedural Overview

On the afternoon of February 25, 2002, BellSouth received notice that parties (collectively "Petitioners")[1] would be filing a Petition seeking certain relief

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[1] BellSouth was originally served with an incomplete copy of the Petition. BellSouth was notified, upon inquiry, to obtain the missing page of that Petition, that the Petition was being refiled to reflect that one of the parties represented to be a member of the "UNE-P Coalition" was in fact not a member. Accordingly, BellSouth did not receive service of the corrected copy until approximately 4:00 in the afternoon on the eve of the Tennessee Regulatory Authority's Agenda Conference scheduled for February 26, 2002.

In addition to the last minute filing, the reference in the style of the Petition to the Petitioners as the "Tennessee UNE-P Coalition" has created some confusion with respect to this Petition. As referenced above, AT&T was originally represented to be a member of the "UNE-P Coalition," but subsequently a substitute filing was submitted deleting AT&T from the footnote defining the members of the UNE-P Coalition. While AT&T was deleted from the footnote in

relating to the UNE for circuit switching. Counsel for the Petitioners further indicated the intent to rely on T.C.A. § 65-5-209(d) to argue that this claim should proceed on the dramatically truncated schedules established by that statute.[2] At the Agenda Conference on February 26, 2002, BellSouth commented on the Petition by noting that T.C.A. § 65-5-209(d) did not apply to the type of relief requested in this Petition. BellSouth indicated its intent to seek dismissal of the Petition on that basis. BellSouth was ordered to make such filing by Monday, March 4, 2002 at 2:00 p.m. in order to provide the Directors with sufficient time to consider the application of the statute and specifically the application of the 30-day time period.

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the subsequent filing, on Page 4 of the Corrected Petition under Section II, the Tennessee UNE-P Coalition is described as a group of companies that include AT&T. In fact, AT&T is specifically highlighted in the first paragraph of Section II of the Petition. BellSouth is unaware of any formal organization, corporation, or unincorporated association known as the "UNE-P Coalition." Accordingly, BellSouth construes the use of this term to be simply a device to collectively name a group of petitioning competitive local exchange carriers, each of whom is actually a separate party to this proceeding, subject to all obligations of a party to a proceeding and will be bound by rulings entered in this docket. BellSouth respectfully requests that Petitioner clarify the individual parties seeking relief in this matter. Even as of the date of the Directors' Conference on February 26, 2002, there was still some confusion with respect to whether AT&T intended to be a party to this action as noted by Director Kyle. (*See* Tr. at page 8, line 23, through page 9, line 3).

[2] T.C.A. § 65-5-209(d), which as discussed below is inapplicable, provides for a hearing to be held in 30 days from the petition and a decision to be rendered within 20 days of that hearing.

B. Background

The relevant facts that underlie the Petitioners' claim are fairly straightforward. Pursuant to §251(d)(2) of the Telecommunications Act, the FCC has established a national set of unbundled network elements (UNE) that must be provided by incumbent local exchange providers (ILECs) to competitive local exchange carriers (CLECs), upon request. Included in that list is unbundled local switching, precisely the same UNE that the Petitioners ask the Authority to "declare" in Tennessee.

Petitioners' complaint is an attempt to avoid the FCC-created exception to its requirement that an ILEC provide CLECs with unbundled switching. That exception excuses ILECs from offering unbundled switching as a UNE at total element long run incremental costs ("TELRIC") in "density zone 1" central offices located in any of the fifty top "MSAs" in the country to any telecommunications carrier serving end users with four or more lines, provided that the ILEC is willing to provide a combination of loops and transport (enhanced extended links or "EELs") to the CLECs in those offices. 47 C.F.R. § 51.319(c)(2). The exception is based on the FCC's application of the necessary and impair standard required by the Federal Act and the United States Supreme Court. *AT&T v. Iowa Utilities Bd.,* 525 U.S. 366 (1999). The basis for the FCC's limitation on the provision of switching at TELRIC prices is that the FCC has determined that competitive alternatives to the ILECs' switches are available in those areas; thus, according to the FCC, it is not "necessary" for ILECs to provide unbundled local switching, and CLECS that do not

own switches are not "impaired" even though unable to purchase unbundled local switching from the ILEC in such circumstances.

The FCC's conclusions supporting this decision are set forth in Paragraph 253 of its *Third Report and Order and Fourth Further Notice of Proposed Rulemaking, In the Matter of Implementation of the local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, November 5, 1999* ("UNE Remand Order"), where the FCC said:

> We conclude that, as a general matter, unbundled local circuit switching meets the "impair" standard set forth in section 251(d)(2). Accordingly, we require incumbent LECs to provide local switching as an unbundled network element. Based on the record, we find that, in general, lack of access to unbundled local switching materially raises entry costs, delays broad-based entry, and limits the scope and quality of the new entrant's service offerings. As discussed in detail below, our unbundling analysis focuses upon the ability of a requesting carrier to self-supply switching because the record does not support a finding that requesting carriers, as a general matter, can obtain switching from carriers other than the incumbent LEC. We find, however, that an exception to this rule is required under certain market circumstances. We find that, where incumbent LECs have provided nondiscriminatory, cost-based access to combinations of loop and transport unbundled network elements, known as the enhanced extended link (EEL), requesting carriers are not impaired without access to unbundled switching for end users with four or more lines within density zone 1 in the top 50 metropolitan statistical areas (MSAs).

The logic of the FCC in creating this exception is reflected in Paragraph 285 of that same order, where the FCC said:

> We conclude that it is appropriate to create an exception to the local circuit switching unbundling obligation only in density zone 1, within the top 50 MSAs. The exception applies to density zone 1 as it was defined on January 1, 1999. Based on the limited evidence in the record, we believe that density zone 1 closely reflects the wire centers where competitive LEC switches are located. In particular, of the seven

> markets in the top 50 MSAs served by BellSouth, each MSA contains at least one density zone 1 where approximately 97 percent of all competitive LEC switches have been deployed. We recognize that only one commenter, BellSouth, provided detailed data to describe where requesting carriers have deployed switches in density zone 1. The record does not contain similar data for other incumbent LECs. Given the record before us and the need to provide a measure of certainty to the market, we believe that drawing a line at density zone 1 within the top 50 MSAs represents a reasonable approximation of where requesting carriers are not impaired without access to unbundled local circuit switching. (footnotes omitted).

There is only one "top 50" MSA in Tennessee, and that is the Nashville MSA. There are 41 central offices in the Nashville MSA, out of a total of 196 BellSouth central offices in Tennessee. Of the 41 central offices in the Nashville MSA, only 17 are density zone 1 central offices. Therefore, the exception carved out by the FCC affects only 17 of 196 BellSouth central offices.

The exception carved out by the FCC is not absolute. Even in those 17 central offices, and even where BellSouth agrees to provide EELs, CLECs serving customers with less than four lines can still purchase unbundled switching at TELRIC rates from BellSouth, just as they can in the other 179 BellSouth central offices in Tennessee. Furthermore, even for CLECs serving customers with four or more lines from those 17 central offices, CLECS can purchase unbundled local switching from BellSouth, although not at TELRIC rates. 47 U.S. § 271(c)(2)(B)(vi). Accordingly, the exception that the Petitioners are seeking to have the Authority overturn is all about money and affects only those customers who have four or more lines and who are served out of one or more of the 17 central offices in Tennessee described above.

The Petitioners' claims are nothing more than an invitation for the Authority to turn the FCC's finding on its head. The Authority should not, and cannot, do that and is bound by the FCC's application of the "necessary and impair" standard to unbundled local circuit switching.

Essentially then, the Petition is flawed in two fundamental respects. First, it seeks the application of a schedule, which was designed for the inception of the already completed interconnection rate process under price regulation, while these claims seek not to establish initial rates but rather, in the Petitioners' words, to "expand" and "preserve" a UNE that has already been established and for which this Authority has already established rates. Second, the claims are designed to replow ground already covered by a binding FCC precedent. For these two legal reasons, if for no other, the Petition should be dismissed.

II. APPLICATION OF § 65-5-209(d) IN THIS CASE.

A. T.C.A. § 65-5-209(d) is inapplicable to the relief sought by the Petitioners.

As a threshold matter, the 30-day hearing schedule sought by the Petitioners is not applicable to these claims. Petitioners seek to impose a truncated schedule on these proceedings based solely on the application of § 65-5-209(d). T.C.A. § 65-5-209(d) provides as follows:

> "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."

This subsection is a provision of the Tennessee statute governing price regulation plans. The law is well-settled in Tennessee that the legislative intent and purpose of a statute is to be ascertained from the natural and ordinary meaning of the language used. *See, e.g., Wilson v. Johnson County*, 879 S.W.2d 807, 809 (Tenn. 1994); *Watts vs. Putnam County*, 525 S.W.2d 488, 494 (Tenn. 1975). As the Tennessee Supreme Court has observed "if the legislative intent is expressed in a manner devoid of contradiction and ambiguity, there is no room for interpretation or constructions and courts are not at liberty to depart from the words of the statute." *Schering-Plough Health Care Products v. State Board of Equalization*, 999 S.W.2d 773, 775-76 (Tenn. 1999).

Subsection (d) of this statute establishes a procedure by which a competing telecommunications service provider may obtain "initial rates for new interconnection services." As a preliminary matter, local switching is not a form of "interconnection," as that term is used in the Federal Act. Rather, it is an unbundled network element. However, even assuming that the Petitioners can overcome this legal hurdle, in order for T.C.A. § 65-5-209(d) to be applicable to this case, the Petitioners also must show that it is seeking the establishment of "initial rates" for switching. The Petitioners cannot make this showing because initial rates for switching were established by the TRA pursuant to Order dated February 23, 2001 in Docket No. 97-01262. Given that the "initial rate" has

already been set, the statute is simply inapplicable to claims relating to "preserving" (Petition at 2) or "expanding the availability of" (*id.*) the switching UNE. Accordingly, the truncated timetable established by the statute for setting of "initial" rates is inapplicable to this claim about "expansion" or "preservation" of an already-established rate for the switching UNE.

The term "initial" is not an ambiguous or novel term or a term of art. The term "initial" is defined in Webster's *Ninth New Collegiate Dictionary* as follows: "1: of or relating to the beginning: incipient; 2: placed at the beginning: first." There can be no legitimate argument as to what the term "initial" means. Its plain and ordinary meaning is simply "first." Accordingly, as used in the statute, the term "initial" means "first."

In the present case, it is clear that T.C.A. § 65-5-209(d) applies solely to the setting of the first rate for a particular interconnection service. In the present case, rates have already been set for switching (even assuming switching is an interconnection service, which BellSouth submits is not the case) and, accordingly, the 30-day procedure set forth in the statute does not apply to this case. If Petitioners seek to challenge the existing rate for switching, they cannot proceed under this statute.

B. <u>The circuit switching UNE already exists</u>.

As clarified during the Directors' Conference and as stated expressly in both the Petition and the letter to the Executive Secretary filed with the Petition, the relief sought by the Petition in this case is a declaration that "circuit switching" is

"an unbundled network element." In Tennessee, switching is already a UNE. T.C.A. § 65-5-209(d) addresses the establishment of rates for new interconnection services. There can be no argument that Tennessee does not already recognize switching as an unbundled network element. "Switching" is the process by which port and related software connect callers. Switching is currently available in Tennessee both as an individual unbundled network element and also as part of the UNE platform (UNE-P), which is the combination of the port and loop sold under a particular price as a group. The pricing of both unbundled local switching and the UNE-P in Tennessee is consistent with FCC rules.

It is clear from the Petition that the Petitioners do not seek to have a new aspect of the network declared as an unbundled network element but rather seek to address the circumstances under which the pricing for an existing UNE is applicable. A claim of that type bears no relationship to the issue for which § 65-5-209(d) establishes a procedure. Accordingly, if the Petitioners seek to assail the existing rule, which governs what pricing is available for the UNE platform in particular areas, then they must do so using the ordinary complaint procedures established by the TRA. In the present case, however, the Petitioners have relied upon T.C.A. § 65-5-209(d) in order to obtain the benefit of a dramatically truncated schedule. Because that statute is inapplicable to this claim, the Petitioners are not entitled to that truncated schedule.

C. **Even if the statute applied, the plain language of the statute clarifies that the procedure is available only when no agreement is reached. In the present case, the parties have reached agreement as to the rate.**

T.C.A. § 65-5-209(d) is expressly limited to situations in which no agreement has been reached. BellSouth has interconnection agreements with all of the Petitioners in this case. Accordingly, even if the statute were applicable to the type of claims being presented in the Petition, which it is not, the statute would be unavailable as a vehicle for these Petitioners who cannot satisfy the threshold element, namely, the lack of an agreement as to the rate.

D. **The Petitioners have conceded that the only basis for the application of the 30-day schedule is the statute and that no emergency exists.**

At the Directors' Conference on February 26, 2002, counsel for the Petitioners conceded in response to questioning by Director Kyle, as well as comments for BellSouth, that the sole basis on which an expedited schedule was sought was the application of § 65-5-209(d). (Tr. at p. 12, lines 6-17). It would be an unfair result if the Petitioners were allowed to obtain an expedited schedule as a fall-back or compromise position upon showing that the statutory basis for the expedited schedule was inapplicable or unwarranted. Petitioners' tactic of relying on an inapplicable statute, filing at the last possible minute before the TRA's Agenda Conference, simultaneously filing testimony, and seeking an expedited pre-hearing conference should not inure to the Petitioners' benefits. It is clear for the reasons discussed above, that the statute cited by the Petitioners does not apply to

this case. Accordingly, Petitioners should not be entitled to burden the Authority and other parties with a fast track schedule when neither cause nor statutory support cited warranting such treatment has been established.

Mere reference to an inapplicable statute should not result in application of the expedited schedule. Simply by alleging the application of the statute and the 30-day time period established by the statute, the Petitioners have already manipulated the procedural process in order to require BellSouth to respond to their Petition in three business days rather than the 30 days to which BellSouth is entitled to under the TRA's rules. Moreover, counsel for the Petitioners conceded during arguments at the Agenda Conference that no emergency situation merited special truncated scheduling for this claim. In short, Petitioners concede that, if this claim is not a claim governed by § 65-5-209, then there is no basis to depart from the TRA's ordinary procedural rules.

In its most recent filing, its Motion to Set Pre-Hearing Conference filed on February 28, 2002, Petitioners appear to concede the possibility that § 65-5-209(d) is inapplicable to this case. In that filing, Petitioners argue for the first time that an expedited schedule should be based not on the statute but rather on "the Authority's recent practice of handling carrier-to-carrier complaints on an expedited basis." While BellSouth recognizes that the Authority has indeed attempted to expedite the response times to carrier-to-carrier complaints, such expedited schedules have been set on a case-by-case basis with regard to the specific facts of each case. Moreover, the Authority has seen fit to commence a rulemaking

docket to formalize such process, further suggesting that there is no vested procedural right to expedited treatment of carrier-to-carrier complaints under the current procedure before the TRA. Similarly, in this filing, Petitioners argue for the first time that the 30-day schedule urged by the Petitioners to be applicable in this case could be deemed by the Hearing Officer to commence on a date other than the date of the filing of the Petition. This argument would be inconsistent with the plain language of the statute which requires, in those cases in which it applies, that the clock begins to run with the filing of the Petition. Petitioners' attempt to back pedal on this issue demonstrates their recognition that the statute does not apply. If it did apply, surely any construction of the statute that permitted the Hearing Officer to determine the date on which the 30-day schedule ran, would also provide that the Hearing Officer could disregard the 30 days when impracticable.

E. **Pre-filed testimony is premature and should be stricken.**

Simply by referencing a statute, the Petitioners attempt to usurp the authority of the TRA to establish schedules in accordance with its procedural rules for the orderly review of its claim. In this case, not only have the Petitioners sought to obtain a dramatically expedited schedule by the mere incantation of an inapplicable statute but have further attempted to set a scheduling order in place by filing testimony prior to the establishment of the schedule for such testimony. The filing of pre-filed testimony prior to a scheduling order requesting such testimony has previously been disallowed by TRA hearing officers on the basis that such evidentiary filings were premature. (Order Granting Motion to Strike, Docket

No. 01-00362). For the same reasons, the testimony filed in this docket should be stricken.

F. T.C.A. § 65-5-209 has been construed in the past by the TRA, and construction of subsection (d) must be consistent with that prior construction of the statute.

In 1995, the TRA addressed the meaning of various sections of T.C.A. § 65-5-209 in the context of BellSouth's Petition for Price Regulation. In that proceeding, the TRA took the position that the 90-day time period established by § 65-5-209(c) was not mandatory, but rather directory and left to the discretion of the TRA. This position was echoed by AT&T. As those parties argued in the Chancery Court in opposition to mandamus relief for the failure to meet the 90-day deadline, time limits established by statutes, when no consequence is established for the failure to meet such time limit, are merely directory and not mandatory.

In support of their position, the TRA and AT&T presented case law holding that statutory provisions relating to the mode or time of doing an act to which the statute applies are considered directory rather than mandatory. *Trapp v. McCormick*, 130 S.W.2d 122 (1939); *Garrett v. State Department of Safety*, 717 S.W.2d 290, 291 (Tenn. 1986); *Big Fork Mining Co. v. Tenn. Water Quality Control Board*, 620 S.W.2d 515, 520 (Tenn. App. 1981). As noted in *Trapp v. McCormick*, the distinction between directory and mandatory statutes is that the violation of directory statutes results in no statutory consequence, while the failure to comply with the requirements of a mandatory statute does result in consequences. The cited cases have explained that statutes setting forth time

periods with no consequence for the failure to meet such time periods are to be construed as directory only. In that earlier proceeding, the TRA and AT&T urged on the basis of this case law that, while it is clear that an agency should seek to comply with the statutory directive concerning the time period for accomplishing an action, the statute with a mere directory time requirement should be construed only to require the agency to act as reasonably practicable to meet the standard.

Having taken this position with respect to the 90-day period established in the one subsection of this same statute, it would be unfair and inconsistent for the TRA to construe the following subsection of the same statute, which establishes the 30-day time period, to be mandatory rather than directory. Such a construction would result in BellSouth being denied the benefit of the 90-day time period for ruling on its price regulation plan while being forced to bear the burden[3] of the 30-day schedule in this case.

III. THE SUBSTANCE OF THE CLAIMS.

A. The Authority is prohibited from re-instating a UNE that the FCC has excluded from the national list of UNEs.

The Petitioners assert that the Authority can create the UNE the Petitioners request pursuant to the authority given the Authority by T.C.A. §65-5-209(d) and T.C.A. §65-4-124(a). Almost in passing, the Petitioners also mention that the Authority "can and should also carry out the statutory analysis required by Section

[3] The Georgia petition filed seeking similar relief does not seek such a timetable. Instead, it seeks to have BellSouth provide cost studies, which obviously will require more than 30 days to complete.

251(c) (3) of the Communications Act of 1934 . . . to declare switching to be an unbundled network element . . . under federal law." It is an interesting theory, but it puts the cart before the horse. According to §251(d)(2), it is the FCC that first determines what network elements should be made available to the CLECs, and that the state may add UNEs to that list provided, among other things, that the state decision is consistent with the provisions of §251 and does not substantially prevent implementation of the requirements of §251 and the "purposes of this part." That is, the state, under the plain language of the federal statute, may add UNEs only under the same circumstances and conditions as are binding on the FCC when it adds UNEs to the national list. Any supposed state authority that conflicts with those requirements would obviously be preempted.

While the Petitioners obviously recognize that the Authority, if it wished to add a UNE in Tennessee, would have to do the same "necessary and impaired" analysis as is required of the FCC (Petition at page 2), Petitioners urge the Authority to rely on the grant of power supposedly given it by state law, suggesting that this somehow allows the Authority to ignore the federal law requirements. No explanation is offered, because none exists, that provides a basis for concluding that an Authority order that is inconsistent with the federal law is valid, even if based on a state law, particularly in view of the plain language in the federal statute to the contrary.

This then begs the question of whether the Authority, pursuant to the Petitioners' Petition, could conduct a review, which is consistent with federal law,

and conclude that unbundled switching should be made available without any limitations so that CLECs can serve all customers, regardless of the number of lines used by the customers, in all 196 BellSouth central offices in Tennessee. The simple answer is no, the Authority cannot do that.

The FCC, in the UNE Remand Order, has clearly delineated the circumstances under which a state can add a UNE on a state-specific basis to the national list of UNEs. In Paragraph 154 of that order, the FCC said:

> This section of the statute [§251(d)(3)] 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. [Text in brackets does not appear in order].

Moreover, in Paragraph 156 of the UNE Remand Order the FCC concluded that the states could remove state-added UNEs if they chose to do so. However, 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. That is, once the FCC determined that unbundled switching for customers having four or more lines in a density zone 1 central office located in a 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. Since the FCC has decided, on a national basis, that requiring an ILEC to provide unbundled switching in such a circumstance did not meet the federal standards, a state is not free to decide that it does.

The Petitioners attempt to entice the Authority to engage in an activity for which there is no valid justification or support. If the Petitioners want the FCC to change its position on the exception, they have the opportunity to do so in the FCC's triennial review of UNEs that is underway. However, the Petitioners must prevail upon the FCC to change its position, not attempt to make the Authority an appellate court for FCC decisions. The Petitioners' Petition should be dismissed.

B. <u>There is no factual basis upon which to grant the Petitioners' Petition</u>.

While it is clear to BellSouth that the Petitioners are simply casting about for a state commission that might be convinced to see this issue its way (a similar petition has been filed in Georgia, but nowhere else in the BellSouth region of which BellSouth is currently aware), there are simply no facts that will justify the Petitioners' claims, which are themselves internally inconsistent.[4]

The Petitioners claim that they are interested in providing competitive alternatives to the mass market of residential and business customers. (Petition, page 2). In reality, what the Petitioners obviously want has nothing to do with competition. What they want is the unfair advantage they receive under TELRIC pricing. The reason for the existence of the exemption that the FCC has created is

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[4] In Georgia, the petitioners did not request an expedited schedule.

that it has determined that CLECs are providing their own switching in Nashville and therefore CLECs are not impaired by the absence of unbundled switching from BellSouth. As cited above, in Paragraph 285 of the UNE Remand Order, the FCC specifically noted that:

> In particular, of the seven markets in the top 50 MSAs served by BellSouth, each MSA contains at least one density zone 1 where approximately 97 percent of all competitive LEC switches have been deployed.

This is, of course, fully consistent with the publicly available evidence regarding the existence of CLEC switches in Nashville. In the recently completed AT&T arbitration in Tennessee, AT&T indicated that AT&T and TCG each had a switch located in Nashville that were capable of providing switched local service anywhere in the Nashville area. (*See generally* Exhibits GRF 6a and 6c, Docket No. 99-00079). Given AT&T's testimony, it is obvious why AT&T is not a party to the Petition.[5] While BellSouth has not, because of the short time given to respond to the Petition, had an opportunity to conduct discovery or otherwise determine from publicly available information, just how many CLEC switches are located in Nashville, on information and belief there are more than just the AT&T and TCG switches.

So why don't the members of the Coalition simply buy switching from the CLECs that have switches in Nashville, if they don't like the market price BellSouth will charge in those instances where BellSouth doesn't have to provide switching at

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[5] As noted above, it is not completely clear whether the "UNE-P Coalition" purports to speak on AT&T's behalf.

TELRIC-based prices? The answer to that question is simple. The CLECs don't want to purchase unbundled switching on the open market. Evidently the market-based pricing for unbundled switching is more than the Petitioners want to pay, so they want the Authority to require BellSouth to furnish such switching at the artificially low price required by TELRIC.

This raises a point that the Authority should consider very carefully in deliberating how to treat the Petition. If facility-based competition in Tennessee is truly the goal, the Authority ought to be most concerned about the impact a ruling such as that sought by the Petitioners would have on the facility-based CLECs in Tennessee. Those are the CLECs who have invested their time and money in placing switches in Tennessee. Obviously these facility-based CLECs aren't going to be able to compete for the business of the members of the Petitioners who will, if successful in their petition, be able to purchase switching from BellSouth at a rate lower than any competitor could reasonably provide. So the question this begs is whether it is more important to allow the Petitioners to have unbundled network switching at TELRIC prices in Nashville, or is it more important to recognize the contribution, investment and risk that real facilities-based carriers have provided and incurred to bring real competition to Tennessee?

Can the Petitioners make a convincing argument that should compel the Authority to abandon the facility-based carriers like XO and Time-Warner in favor of the CLECs that haven't really invested in Tennessee, like Advanced Integrated Networks, Inc.? One of the theories that the Petition implicitly advances is that the

Petitioners serve the "mass" market throughout the state of Tennessee, primarily focusing on analog residential and business customers or focusing on smaller cities and rural areas (Petition at page 3), but that it has to have access to the larger (and therefore presumably profitable) customers in Nashville in order to support this charitable work in the rest of the state. Such logic seems tortured at best, particularly in light of the claims asserted here by the Petitioners. For instance, the Petition claims that one of the Petitioners, Access Integrated Networks, Inc., "serves 2-3 line business customers in over 115 communities in the state." (Petition, page 4). This is consistent with the testimony of Rodney Page, a frequent witness for Access Integrated Networks, Inc., that its market is the business customer having three or fewer lines. However, if Access Integrated Network, Inc. is serving the small business customer as it represents, it has no issue (and thus, no standing) here, since it can always buy unbundled switching from BellSouth anywhere in Tennessee, including Nashville, at TELRIC-based rates, to serve those customers that it identifies as its market. That is, if Access Integrated Networks, Inc. wants to serve one of its claimed group of customers, a business having two or three lines in Nashville, it can purchase unbundled switching from BellSouth, even in density zone 1 central offices, at TELRIC rates because the FCC's exception only applies to subscribers who have four or more lines.

The more likely reason that this Petition has been filed is that these CLECs, without regard to their ability to serve other parts of Tennessee profitably, want

cheap access to the downtown Nashville business market, without paying competitive prices for that access. Indeed, it will be interesting to note what positions the facilities-based CLECs in Tennessee take with regard to this Petition. These facility-based CLECs, who are active in the Nashville market (which of course is the premise upon which the FCC created this exemption, the availability of competitive switch providers) will surely question the competitive validity of allowing these Petitioners to compete for customers in Nashville using TELRIC-priced unbundled switching.

IV. CONCLUSION

As a threshold matter, the Petition should be dismissed because it has been brought under the wrong Tennessee statute in the first instance. Failing that, the Petition should be dismissed because the relief sought is not within the power of the Authority to grant. Finally, even if the first two obstacles could be overcome, this issue involves 17 central offices, which the Petitioners identify as primarily serving downtown Nashville. There are alternative competitive providers who have switches in Nashville. Certainly this includes AT&T and may well include XO and Time-Warner. There is absolutely no reason to reward the Petitioners for their failure to invest in Tennessee, while penalizing these other companies who have brought their money to this state.

For the foregoing reasons, BellSouth respectfully requests an Order:

1. Striking testimony filed by Petitioners;

2. Holding that T.C.A. § 65-5-209(d) is inapplicable to this proceeding;

3. Dismissing the Petition; and

4. Granting such other relief as the Authority deems necessary or proper.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on March 4, 2002, a copy of the foregoing document was served on counsel for known parties, via the method indicated, addressed as follows:

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