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March 6, 2002

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
360 James Robertson Parkway
Nashville, TN 37201

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

Dear David:

Enclosed herewith are the original and thirteen copies of the UNE-P Coalition's *Opposition to BellSouth's Motion to Dismiss* filed in the above-captioned proceeding.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Henry Walker

HW/nl
c: Guy Hicks, Esq.
Enclosure

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

OPPOSITION TO BELLSOUTH MOTION TO DISMISS

The Tennessee UNE-P Coalition ("Coalition")[1] hereby opposes the "Motion of BellSouth Telecommunications to Dismiss Petition Pursuant to T.C.A. § 65-5-209(d) and to Strike Pre-filed Testimony" ("Motion"). In support, the Coalition shows as follows.

I. Introduction

The Coalition's Petition places before the Authority an issue central to the future of competition in the state: it asks the Authority to conduct a proceeding under Tennessee law to declare circuit switching an unrestricted unbundled network element ("UNE"). Currently, under the Federal Communications Commission's ("FCC") national list of UNEs (which sets a minimum list of UNEs, to which the states can add) switching is available only on a restricted basis in Tennessee. Under the FCC's rules, in Nashville—the largest market in Tennessee and the engine that drives competition throughout the state—circuit switching is available to serve

[1] The carriers comprising the Coalition are Access Integrated Network, Inc.; Birch Telecom of the South, Inc.; Ernest Communications, Inc.; MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. (collectively "WorldCom"); NewSouth Communications Corp.; and Z-Tel Communications, Inc. As the Coalition has explained previously, AT&T is not, at least at this time, a member of the Coalition but was erroneously listed as such in the original Petition.

only the smallest customers (those with three or fewer lines). Moreover, BellSouth and the other incumbent local exchange carriers ("ILECs") continue to challenge the FCC's national list of UNEs, calling upon the FCC to, among other things, further limit the availability of switching. By acting to declare switching an unrestricted UNE in the state, the Authority can help ensure that the number of competitive alternatives available to the mass market of residential and small business customers in Tennessee continues to grow.

In its Motion, BellSouth launches a fusillade of attacks against the Coalition's Petition, not only attacking, prematurely and inappropriately, the merits of Coalition's position, but also raising multiple challenges to the procedural vehicle. The vigor of BellSouth's opposition to the Petition should signal to the Authority how critical a proceeding this is for the future of competition in Tennessee.

As explained in more detail in Section II below, the TRA has clear authority to grant the requested relief, BellSouth's assertions to the contrary notwithstanding. BellSouth makes much of the fact that the FCC's national list creates an explicit exception to the availability of switching, as if that somehow precludes Tennessee from acting to declare switching an unrestricted UNE within the state. However, 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. Under the dual jurisdictional structure of Section 251 of the Communications Act of 1934, as amended ("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. Indeed, the FCC has explicitly laid out the guidelines the states must follow in order to do so.

As for BellSouth's substantive challenges to the Petition, they are premature—they raise exactly those issues that should be aired and decided in the proceeding that the Petition asked the Authority to initiate. As discussed in Section III below, rather than prejudge those issues without the benefit of a record, the Authority should proceed with the hearing sought by the Coalition and give the Petition a full, fair, and expeditious hearing.

In addition to its substantive attacks on the Petition, BellSouth launches no fewer than six challenges to the appropriateness of the procedural vehicle, T.C.A. § 65-5-209(d). The Coalition responds to the specifics of BellSouth's procedural arguments in Section IV below, but would note at the outset that underlying them all is BellSouth's desire to delay as long as possible any regulatory action which would promote competition from UNE-P providers – which are currently in the forefront of trying to bring competition to a mass market of small business and residential customers. BellSouth is all too aware that, despite the best efforts of many state and federal regulators, the current restrictions on switching and the uncertainty created by the ILECs' challenges at the FCC, have placed a drag on competitive entry. For BellSouth, the longer it can forestall pro-competitive developments, the better. Obviously, though, the only interests served by delay are BellSouth's. For Tennessee consumers, and the competitive carriers who seek to serve them, the status quo is not acceptable: there are too few competitive carriers serving too few customers. The Authority should see BellSouth's procedural attacks for what they are—nothing but an attempt to preserve that status quo as long as possible.

II. The TRA Has the Clear Authority to Grant the Requested Relief

In the Petition, the Coalition asks the Authority to initiate a proceeding pursuant to T.C.A. §§ 65-5-209(d) and 65-4-124(a) to make circuit switching available as an "interconnection service" throughout BellSouth's service area. To do so, the Petition requests

that the Authority, as guided by the FCC, conduct an "impairment" analysis pursuant to Section 251(d)(2) of the federal Act, 47 U.S.C. § 251(d)(2).[2]

Pursuant to Tennessee law, Chapter 408 of the Public Acts of 1995, BellSouth is required to provide "non-discriminatory interconnection" to its public network and, "to the extent that it is technically and financially feasible," provide "desired features, functions and services" to competing local carriers. T.C.A. § 65-4-124(a). The TRA has been given explicit statutory authority to "promulgate rules and issue such orders" as necessary to enforce that requirement. T.C.A. § 65-4-124(b). There is no doubt, and BellSouth does not dispute, that the TRA has the power under state law to consider the Coalition's Petition. In fact, given the mandatory language of Section 124(b) (the agency "shall, at a minimum . . . . provide for unbundling of service elements and functions"), it appears the TRA not only has the power but the duty to address the Coalition's request.

BellSouth's Motion mentions Section 65-4-124 only once, in passing, and sidesteps altogether the carrier's unbundling obligations under that statute and the TRA's explicit statutory duties.(As discussed further below, BellSouth apparently does not dispute that the TRA has the power under Tennessee law to hear this case.) Instead, BellSouth contends that the FCC is in a better position than the Tennessee Regulatory Authority to evaluate the competitive needs of carriers in this state and that the FCC has prohibited the TRA from deciding whether or not switching should be made available as a UNE in Tennessee. BellSouth is simply wrong.

In its order adopting the national list of UNEs, the FCC explicitly found that

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[2] While BellSouth characterizes the Petition as making reference to Section 251 "[a]lmost in passing," Motion at 14, the Coalition was quite explicit in explaining why the TRA should conduct an impairment analysis. As the Coalition stated in the Petition: "[w]hile the TRA has sufficient authority under state law to provide the requested relief, by demonstrating compliance with the stricter federal impairment standard, the TRA will avoid any possible challenge to its authority." Petition at 2.

> section 251(d)(3) of the Communications Act grants state public utility 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.[3]

The FCC was even more explicit regarding the ability of states to add UNEs that the FCC declined to place on the national list in its discussion of packet switching. There, as with the circuit switching at issue here, the FCC found that it did not have a record before it that justified nationwide unbundling of the frame relay network element. The FCC went on to say, however, that CLECs

> are free to demonstrate to a state commission that lack of unbundled access to the incumbent's frame relay network element [a form of packet switching] impairs their ability to provide the services they seek to offer. A state commission is empowered to require incumbent LECs to unbundle specific network elements used to provide frame relay service, consistent with the principles set forth in this order.[4]

What is true with respect to packet switching is equally true with respect to circuit switching. It is hard to imagine how the FCC could have been clearer that the national list is a floor on which the states are free to build, and that the removal of an element from the national list in no way precludes a state from adding that element as a UNE within a particular state.

Faced with explicit, black letter law, BellSouth, creates out of whole cloth an exception that is not found in the FCC's language. According to BellSouth, a decision by the FCC not to place an element on the national list prevents a state from adding it as a UNE within the state. This interpretation, however, makes no sense. A decision by the FCC not to place an element on

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[3] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 13 FCC Rcd 3696, ¶ 154 (1999) ("*FCC UNE Order*").

the national minimum list is just that: a finding that, on a *national* basis, an element does not meet the impairment test for automatic inclusion as part of the national minimum set of obligations. Such a finding, however, says *nothing* about whether the impairment test can be met within a particular state, based on focused analysis specific to that state. BellSouth thus misses the point entirely when it states that "[s]ince the FCC has decided, on a national basis, that requiring an ILEC to provide unbundled switching in [certain circumstances] did not meet the federal standards, a state is not free to decide that it does." Motion at 17. 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 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.

Not only is BellSouth's reading nonsensical, it is also offered without even a single supporting authority. By contrast, in the Petition, the Coalition cited numerous state commission decisions upholding the authority of states to add UNEs to the national list, including in several instances elements that the FCC had previously declined to place on the national list.[5] *See* Petition at 8. In point of fact, so far as the Coalition is aware, no state that has addressed the

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[4] *Id.* ¶ 312.

[5] Numerous states have interpreted Section 251(d)(3) as allowing them to add UNEs to the national list, including UNEs that the FCC previously declined to place on the list. *See, e.g. Joint Application of Sprint Communication Company, L.P., United Telephone Company of Kansas, United Telephone Company of Eastern Kansas, United Telephone Company of South Central Kansas, and United Telephone Company of Southeastern Kansas for the Commission to Open a Generic Proceeding on Southwestern Bell Telephone Company's Rates for Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Docket No. 97-SCCC-149-GIT, 14 (Kan. PUC 2000) (the Kansas Corporation Commission determined that it has the authority to conduct an impairment analysis to add OS/DA to the national list, although declined to do so on the merits); *Petition for Arbitration of the Interconnection Agreement between BellSouth Telecommunications, Inc., and Intermedia Communications, Inc., Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. 27385 (Al. PSC 2001) ("[T]his Commission has the ability to require the unbundling of packet switching and frame relay if it determines that a competitor is impaired without such requirement."); *ICG Telecom Group, Inc.'s Petition for Arbitration of Interconnection Rates, Terms, and Conditions, and Related Arrangements with Ameritech Ohio*, Case No. 99-1153-TP-ARB (Ohio. PUC 2000) (adding the EEL as a new UNE to the FCC's national list after conducting an impairment analysis).

issue has ever found that it lacked the authority to add as a UNE within the state an element that the FCC removed from its national list.

III. BellSouth's Substantive Challenges Are Premature and Without Merit

BellSouth goes on to advance several arguments as to why the TRA should not grant the relief requested by the Coalition. See Motion at 17-21. Those arguments are premature. They ask the TRA to, in effect, prejudge the issues presented by the Coalition's Petition, without the benefit of the parties' testimony, without the opportunity for discovery, and without the opportunity for the parties to examine each other's witnesses. Accordingly, the Authority should ignore BellSouth's arguments and should open the proceeding requested by the Petition in order to provide a forum for the full airing of both parties' evidence.

While the Coalition can and will address each of BellSouth's contentions during the hearing, BellSouth advances a couple of arguments that are so distorted as to warrant an immediate response. First, BellSouth, rather gratuitously, suggests says that if the Authority were to grant the relief requested by the Petition, it would all but sound the death-knell for facilities-based competition within the state. Motion at 19. This reflects a profound misunderstanding of the relationship between carriers which offer service over a UNE platform ("UNE-P") and switch-based competition. The reason why the unfettered availability of switching (which is a necessary element of the UNE-P) is so critical is that it is the one competitive entry vehicle that has generally proved effective in reaching the mass market of analog small business and residential customers – and the one group of competitors who are presently capable of threatening BellSouth's monopoly in that market.

As the Coalition will demonstrate in the hearing, it is simply not economical for a competitive provider to efficiently serve customers using its own switching unless the customer can be served using a digital, high-capacity loop. The cut-over costs, which occur on a per-loop

basis and for which there are generally no economies of scale, are simply too high for a carrier to offer service to customers over multiple analog loops. Thus, UNE-P poses no threat to facilities-based competition. For those customers whose needs are such that they warrant being served by a digital loop, in all or nearly all cases, it will be more efficient to do so than to provision multiple analog lines over UNE-P. For smaller business and residential customers without enough demand for capacity to warrant a digital facility, however, UNE-P is the service vehicle that has proven effective.

For the same reasons, BellSouth's contention that there is no need to provide access to unbundled switching in Nashville because CLECs have already deployed switches in the market (Motion at 19-21), also makes no sense. The fact that switches have been deployed to serve those customers that can be effectively served by a competitor using self-provisioned switching says absolutely nothing about whether those same switches can be used to serve mass market analog customers. Quite simply, both switch-based competition *and* UNE-P need to be available if all customers—and not just larger businesses—are going to receive the benefits of competitive choice.

Second, BellSouth suggests that the Coalition's members are cream-skinners who want "nothing to do with competition," Motion at 17, and who's real goal is "cheap access" to the rich Nashville market at the "artificially low price[s]," *id.* at 19, and "unfair advantage," *id.* at 17, that TELRIC affords. As the Coalition explained in the Petition, and will demonstrate during the hearing, competitive conditions in Nashville affect competition throughout the state. It is simply unreasonable to think that competitive providers are not handicapped if they are denied access to all but the smallest customers in the states' largest metropolitan area.

IV. T.C.A. § 65-5-209(d) Is the Proper Procedural Vehicle for Consideration of the Issues Raised by the Petitioner

BellSouth raises a number of challenges to the Petition's use of T.C.A. § 65-5-209(d) as a procedural vehicle. For the reasons shown below, all are without merit.

A. T.C.A. § 65-5-209(d) Is, by its Terms, Applicable to the Petition

BellSouth begins by arguing that T.C.A. § 65-5-209(d) is inapplicable because the Petition does not seek the establishment of "initial rates" for switching. BellSouth contends that the authority has already established the rate for switching in its February 23, 2001 order in Docket No. 97-01262, and there is, therefore, no rate to be established in this proceeding.

What BellSouth conveniently ignores, however, is that the rate set by the Authority applies only where switching is currently available as a UNE. There is not, however, any TRA-set rate in place for switching where it is *not* available as a UNE, i.e. in downtown Nashville for serving customers with more than three lines The only "rate" in place there is the anticompetitive, "market" price unilaterally set by BellSouth. The relief sought by the Coalition is that the Authority require BellSouth to make switching available without restriction state-wide, and for service to all customers, at the same rate set by the Authority in Docket No. 97-01262. BellSouth's assertions to the contrary notwithstanding, this unquestionably entails the setting of an "initial rate" for switching where no rate is currently in place.

In any case, although the TRA has previously established rates for UNEs and has approved interconnection agreements continuing UNE rates, the TRA in those proceedings was acting, not under state law but pursuant to powers delegated to the agency under the Federal Telecommunications Act. To the Petitioners' knowledge, this proceeding is the first time that any carrier has invoked the unbundling requirements of T.C.A. 64-4-124 and the related procedural requirements set forth in 65-5-209(d).

Since this is the first TRA proceeding to designate a UNE under Section 124 and to establish a rate for that service pursuant to Section 209(d), this is, in fact and in law, a proceeding to set an "initial rate" for that service as the term in used in the statute.[6] It is clear, therefore, that the time limits set forth in Section 209(d) apply to the Petitioners' request. Indeed, if the Section were held *not* to apply to a case of this type, it is hard to imagine what kind of case the Section would apply to.

BellSouth next argues that T.C.A. § 65-5-209(d) does not apply because "the Petitioners doe 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." Motion at 9. This argument amounts to no more than a rehashing of BellSouth's argument about "initial rates," and the response is the same. By definition, if switching were universally available as a UNE, it would be universally available at the UNE rates set by the Authority in Docket No. 97-01262. This, unfortunately is not the case; switching has *not* been declared a universally-available UNE. Rather, the FCC has found that competitive carriers are entitled to access to switching as a UNE in some areas, in others (i.e. the top 50 metropolitan areas) the FCC has not included local switching on the national minimum list, thereby leaving the ultimate resolution to the states' discretion. The Coalition is requesting that the TRA act under that discretionary authority to declare switching a UNE in those areas where the FCC has not.

Finally, BellSouth argues that T.C.A. § 65-5-209(d) does not apply because it "is expressly limited to situations in which no agreement has been reached." Motion at 10. Since,

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[6] BST remarks that local switching "is not a form of 'interconnection' as that term is used in the Federal Act." Motion at 7. But the Tennessee statute was enacted a year before the Federal Act was passed. It is therefore not surprising that the terms of the state statute do not match precisely the terms of the federal Act.

BellSouth argues, BellSouth has an interconnection agreement with each of the members of the Coalition that includes rates for unbundled switching, there is no present disagreement as to the rate. *Id.* This is BellSouth at its most disingenuous. It is of course true that BellSouth has agreements in place with each member of the Coalition. None of those agreement, however, contains a TRA-set rate for switching applicable where switching is currently unavailable as a UNE. Instead, the agreements contain what BellSouth calls a "market-based" rate for switching, but is what is really a unilaterally determined markup of several hundred percent. BellSouth cannot be taken seriously then when it contends that there is no disagreement between the parties as to the appropriate rate.

B. The Petition Should Be Heard on a Schedule that Conforms to the Requirements of T.C.A. § 65-5-209

For the reasons shown above, all of BellSouth's arguments as to the applicability of T.C.A. § 65-5-209(d) fail. Accordingly, the matter should be set for hearing consistent with the timetable required by the statute, which requires a hearing within 30 days, and a TRA decision 20 days thereafter. The Coalition included a procedural schedule for hearing this matter that complies with that timetable in its February 28, 2002 Motion to Set Pre-Hearing Conference.

Apparently realizing that its arguments as to T.C.A. § 65-5-209(d)'s inapplicability are unavailing, BellSouth goes on to argue that the provision's 30/20 day schedule is directory, not mandatory because the statutes does not provide for any consequences if the agency fails to act within the applicable time limits. Motion at 13-14. The Coalition interprets the provision to mean what it says: that the "authority *shall* . . . hold a contested case proceeding within thirty (30) days" and that "[t]he authority *shall* issue a final order within twenty (20) days of the proceeding." T.C.A. § 65-5-209(d) (emphasis added). The Coalition, however, does not disagree with BellSouth's view that the statute is directory, not mandatory and, for that reason,

the Coalition has suggested a schedule which is flexible but consistent with the intent of the statute.[7]

In any case, BellSouth offers no reason why the TRA should not adhere to the statutory 30/20 day schedule. BellSouth merely argues that because there is "no emergency situation," there is no reason to proceed on an expedited basis. Motion at 11. BellSouth, though, has the analysis backwards. The Petition presents the Authority with an important opportunity to act to advance the spread of competition in the state. The question should not be "why should the TRA act expeditiously" but rather why it should it not. Here, expedition inures to the benefit of Tennessee consumers, while delay inures only to the benefit only of BellSouth. Thus, regardless of whether the TRA *must* follow the schedule set out in T.C.A. § 65-5-209(d)—as the Coalition believes is the case—there is every reason why it *should*, and no reason why it should not.[8]

Nor can BellSouth be heard to argue that it is prejudiced by the 30/20 day schedule. Even though BellSouth has had the Coalition's Direct Testimony for over a week, the schedule does not require BellSouth to file its Direct Testimony until 18 days after the Hearing Officer decides BellSouth's Motion.[9] By contrast, the schedule gives the Coalition only seven days for

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[7] BellSouth's motion to strike the Coalition's Direct Testimony, Motion at 12-13, cannot be taken seriously. The filing of the Coalition's testimony contemporaneously with its Petition has provided BellSouth with more time than it otherwise would have had to digest the testimony. Moreover, BellSouth will have the advantage of being able to craft its Direct Testimony to respond to the Coalition's testimony. In any case, the decision that BellSouth cites in support of its motion to strike is wholly inapposite. There, the preceding was "at a preliminary stage," and the issues to be decided had yet to be framed. *Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulation*, Docket No. 01-00362, Order Granting Motion to Strike (T.R.A. Aug. 3, 2001), 1. Here, by contrast, the single, narrow issue presented by the Coalition's Petition is known to both the parties and the Authority.

[8] That the Coalition is asking the TRA to apply an existing rate is another reason why the Authority can and should conduct the proceeding on the expedited schedule set forth in T.C.A. § 65-5-209(d). Since the Coalition is seeking the application of an existing rate, there will be no need for the development and presentation of complicated cost cases.

[9] BellSouth's contention that the Coalition has somehow conceded that the timetable set out in T.C.A. § 65-5-209(d) does not apply because its proposed schedule begins to run on the date of the Hearing Officer's decision,
(footnote continued on next page)

its Rebuttal Testimony. The schedule also provides for simultaneous discovery, simultaneous briefs, and simultaneous reply briefs. If anything, it is the Coalition, the party who must present a case to justify a change in the current law, that is burdened by the expedited statutory schedule.

C. The Authority's Practice of Handling Carrier Complaints on an Expedited Basis Is Consistent with the Proposed Schedule

The Coalition's proposed schedule should be adopted even if the Authority finds that T.C.A. § 65-5-209(d) is inapplicable. As BellSouth recognizes, Motion at 11-12, the TRA's current practice is to handle carrier complaints involving competitive issues on an expedited basis. Given the importance of the issue presented by the Petition, there is no reason to depart from that practice here.

Respectfully submitted,

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Motion at 12, is sheer nonsense. Contrary to BellSouth's assertion that the statute requires that the 30-day period begin to run on the day a petition is filed, *id.*, T.C.A. § 65-5-209(d) says only that the Authority shall "hold a contested case proceeding within thirty (30) days," without specifying when that 30-day period begins. The Coalition was merely suggesting an option that allows the TRA to adhere to the directory nature of the statute, while providing BellSouth a more than ample opportunity to be heard. In no way, however, was the Coalition "backpedal[ing]" on its belief that the schedule set forth in T.C.A. § 65-5-209(d) is controlling. If BellSouth insists on the 30-day period beginning with the filing of the Coalition's Petition, the Coalition is willing to go forward on that basis.

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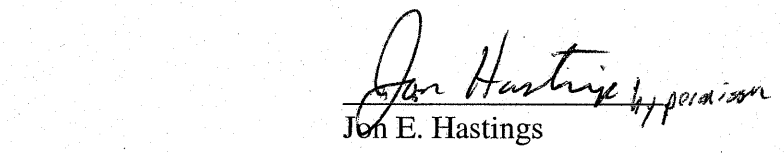

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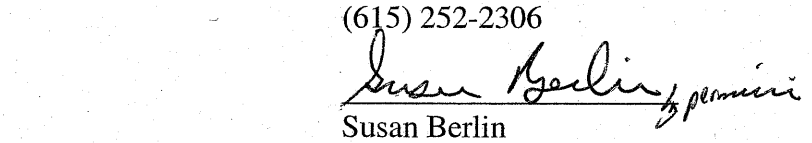

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March 6, 2002

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via fax or hand delivery and U.S. mail to the following on this the 6th day of March, 2002.

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