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December 19, 2003

VIA HAND DELIVERY

Hon. Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Implementation of the Federal Communications Commission's Triennial Review Order (Nine-month Proceeding)(Switching)*
Docket No. 03-00491

Dear Chairman Tate:

Enclosed are the original and fourteen copies of BellSouth's *Response to MCI's Motion to Compel.* Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Implementation of the Federal Communications Commission's Triennial Review Order (Nine-month Proceeding)(Switching)*

Docket No. 03-00491

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO MCI'S MOTION TO COMPEL

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this response to the Motion to Compel filed by MCImetro Access Transmission Services, LLC and Brooks Fiber Communications of Tennessee, Inc. (collectively, "MCI"). MCI's motion should be denied if for no other reason than MCI has failed to discuss with BellSouth the vast majority of the discovery requests raised in its motion. MCI's failure to do so violates both the spirit and the letter of the Procedural Order entered by the Tennessee Regulatory Authority ("TRA") on October 27, 2003, and the TRA's own rules. Even if the TRA were inclined to condone MCI's refusal to attempt to work cooperatively with BellSouth with respect to discovery, which the TRA should not do, MCI is not entitled to the discovery it seeks. Accordingly, MCI's Motion to Compel should be denied.

II. STATEMENT OF THE FACTS

On October 27, 2003, MCI served its First Set of Interrogatories and First Requests for Production of Documents on BellSouth, which consisted of 195 discovery requests, not counting sub-parts. Taking the sub-parts into account, MCI's discovery to BellSouth consisted of more than 600 requests.

Consistent with the TRA's Procedural Order, BellSouth filed its responses to MCI's First Set of Interrogatories and Requests for Production of Documents on November 24, 2003. BellSouth subsequently filed supplemental responses to certain of MCI's discovery requests on December 4, 15, and 17, 2003.

On December 9, 2003, counsel for MCI sent counsel for BellSouth an e-mail raising concerns about certain of BellSouth's discovery responses. This e-mail requested that BellSouth "supplement its responses" with respect to the following Interrogatories: Item Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 12, 16, 18, 19(a), 20, 21, 28, 29, 97(k), 97(l), 98, 101, 104, 105, 106, 107, 112, 113, 118, and 125. Exhibit 1. These were the only Interrogatory response to which MCI expressed a specific concern, although MCI's e-mail made passing reference to other unidentified Interrogatories "to which BellSouth objects without providing a substantive response ...." *Id.*

Approximately 29 hours later, BellSouth's counsel responded by sending MCI a three-page e-mail on December 10, 2003, that addressed the Interrogatory responses expressly identified by MCI. BellSouth clarified certain of its answers, agreed to supplement other answers, and explained its reasons for refusing to provide additional information in response to certain of MCI's discovery requests. Exhibit 2.

On December 11, 2003, MCI's counsel sent an e-mail in which it "thanked" BellSouth "for the detailed responses," which, according to MCI, "addressed a number of concerns and helped narrow the issues." Exhibit 3. However, MCI indicated that it still intended to file a motion to compel seeking answers to previously unidentified requests to which BellSouth had "provided no response." For the first time, MCI provided a list of an additional 62 requests that the parties had never previously discussed, although MCI indicated that this list may not be comprehensive. *Id.*

On December 12, 2003, BellSouth's counsel exchanged several e-mails with counsel for MCI, complaining about MCI's intent "to file a motion to compel on interrogatory requests that we have never previously discussed." Exhibit 4. BellSouth's counsel invited MCI to "discuss whether the parties can resolve each and every one of our discovery disagreements" before involving the TRA. *Id.* MCI's counsel declined this invitation, claiming the parties were in a "standoff situation," even though MCI had made no prior effort to work with BellSouth to resolve all their differences. *Id.*

III. DISCUSSION

A. MCI Has Not Complied With The TRA's Order Or The TRA's Rules, Which Require That The Parties Confer In A Good-Faith Effort To Resolve Any Discovery Dispute Before Involving The TRA.

Before filing its Motion to Compel and embroiling the TRA in a discovery dispute between the parties, MCI was obligated to confer with BellSouth in a good-faith attempt to resolve such dispute. The TRA's October 27, 2003 Order explicitly provides that a party complaining about discovery "should be prepared to explain in detail why it has been unable to reach a satisfactory resolution and why it is prejudiced by the non-complaining party." Similarly, TRA Rule 1220-1-2-.11(8) states that if counsel for a party "has refused or delayed a discussion of any discovery problems," the TRA or the hearing officer "may take such action as appropriate to avoid delay."

In this case, MCI violated both the letter and the spirit of the TRA's Order and its rules. Rather than engaging in substantive discussions with BellSouth about the discovery responses to which MCI now takes exception, MCI unilaterally declared the existence of a "standoff." It is difficult to conceive how the parties could reach a "standoff" on issues that the parties had never previously discussed.

MCI cannot quite seem to make up its mind about how to characterize its attempts to resolve the present discovery dispute with BellSouth. On the one hand, MCI never really comes out and states explicitly that it conferred with BellSouth on those discovery requests "to which BellSouth has objected and has not filed a substantive response ...." MCI Motion at 2. This is understandable given that the parties never discussed those requests. While MCI apparently took the view that BellSouth would not be willing to rethink its objections under any circumstances, BellSouth expressly stated otherwise in e-mails to counsel for MCI. Exhibit 4. On the other hand, in its Motion MCI represents that the parties "may continue to confer concerning these Requests." It is not clear how the parties can continue what they never started. Furthermore, MCI has the process completely backwards; the parties are supposed to confer before a motion to compel is filed, not afterwards.

MCI has utterly failed to confer with BellSouth in a good-faith attempt to resolve this discovery dispute as required by the TRA's Order and the TRA's rules.

The TRA should not condone such conduct and should summarily deny MCI's Motion to Compel.

B. MCI Has Not Stated Any Basis For The Discovery It Seeks, Even If The TRA Were Inclined To Overlook MCI's Failure To Comply With The TRA's Order And Rules.

Even assuming the TRA were inclined to overlook MCI's disregard of its Order and Rules, the TRA should nevertheless deny MCI's Motion to Compel because MCI has failed to establish any basis for the discovery it seeks. BellSouth's objections and responses to the discovery requests in question are appropriate, and MCI is not entitled to anything more from BellSouth.

Interrogatory No. 12

This Interrogatory requested that, for "the hot cuts identified in response to MCI-5, please provide a detailed description of each work effort your personnel had to perform, the costs you incurred, and the maximum number of hot cuts that you have accomplished per day per CLLI code since July 1, 2001." In its Supplemental Responses, BellSouth described the work involved in performing hot cuts and explained the "costs" incurred by BellSouth in connection with such work. With respect to the "maximum" number of hot cuts performed, BellSouth responded:

> There is no 'maximum' number of hot cuts that BellSouth has established for any central office in any state in the BellSouth region. BellSouth's hot cut process is based on load volumes and force. BellSouth uses plan size methods to monitor staffing levels to ensure that expected hot cut volumes will be met.

BellSouth's Supplemental Response, Item No. 12 (filed December 4, 2003).

Apparently dissatisfied with this response, MCI insists that BellSouth's response "does not answer the question," even though it plainly does. As BellSouth understood the request, MCI wanted the maximum number of hot cuts BellSouth could have performed in a single day in each of its central offices. However, there is no "maximum number" for the reasons plainly explained in BellSouth's response. To the extent MCI is seeking information concerning the most hot cuts BellSouth actually performed in a single day in each of its central offices (even if BellSouth could have completed more), BellSouth provided this information in its response to MCI Interrogatory No. 5. In this response, Bellsouth provided the actual number of hot cuts performed on a daily basis in each BellSouth central office across the nine-state region. It is unclear what additional information MCI needs or requires in response to Interrogatory No. 12.

Interrogatory No. 25

In this Interrogatory, MCI asked BellSouth to "state whether cross connect/jumper job performance has ever been the subject of litigation, arbitration, mediation, labor negotiations, formal labor disputes, informal labor disputes, or evaluation by any third party (e.g. federal or state agencies, etc.)," and, if so, to "provide supporting details and documentation." BellSouth objected to this request on relevancy grounds.

In seeking to overcome BellSouth's objection, MCI claims that the information it seeks is relevant because: (1) it would allow the TRA "to determine whether BellSouth has in place sufficient processes, or can modify and scale its current processes to handle the increased volume of UNE-P to UNE loop migrations that will occur if UNE switching/UNE-P is withdrawn; and (2) it "reflects the 'labor intensiveness' of BellSouth's current practices and related factors affecting BellSouth's ability and capacity to complete the manual hot cut process." Such claims are wholly misguided.

First, Interrogatory No. 25 is not limited to hot cuts, as MCI suggests, but rather seeks information concerning "cross connect/jumper job performance." BellSouth routinely performs cross connects and engages in jumper work in serving its retail customers, which has nothing to do with BellSouth's hot cut process for migrating a retail customer to a CLEC or visa versa. Second, even if Interrogatory No. 25 were limited to hot cut activity, which is not the case, the fact that such activity may have been "the subject of litigation, arbitration, mediation, labor negotiations," or various labor disputes is completely irrelevant to the FCC's impairment analysis. That BellSouth and the Communications Workers of America may have negotiated wages for technicians engaged in performing hot cuts has absolutely nothing to do with whether BellSouth's hot cut process is scalable or whether BellSouth has the "ability and capacity to complete the manual hot cut process." The TRA should see Interrogatory No. 25 for what it is – a fishing expedition that is irrelevant to the issues in this proceeding.

Interrogatory No. 28

This Interrogatory requested that BellSouth "provide the studies, analyses, and/or calculations of cross connect/jumper job work times and loaded labor costs *from the most recent non-recurring cost study submitted by BellSouth to the Tennessee Regulatory Authority*." BellSouth responded by referring MCI to the relevant files and supporting worksheets from the cost studies filed on December 12, 1997 in Docket No 97-01262, which is "the most recent nonrecurring cost study submitted by BellSouth" to the TRA.

Even though BellSouth answered the question it was asked, MCI is not satisfied with BellSouth's answer, claiming that the worksheets "would have been the subject of proprietary claims by BellSouth" in Docket No. 97-01262 and accordingly would have been destroyed or returned, or so says MCI. It is unclear whether MCI has made any attempt to actually locate the worksheets in its files, but putting aside this oversight, the work times associated with cross connect/jumper jobs are not and never have been proprietary. Thus, the information MCI seeks is publicly available and could be obtained from the TRA, even assuming MCI cannot find the information in its own files.[1]

Interrogatory Nos. 30-31

Interrogatories 30 and 31 both relate to performance data or measures in Tennessee. BellSouth's objections included a relevancy objection, which MCI acknowledges but fails to provide any indication of the precise performance measures that it contends are actually relevant to this proceeding. While the FCC's Triennial Review Order directs the state commissions to consider an incumbent's performance with respect to loop provisioning, collocation provisioning and availability, and cross-connect provisioning, ¶ 456, there are a host of performance metrics encompassed within MCI's discovery requests that have nothing to do with the FCC's impairment analysis. For example, BellSouth

[1] As to MCI's request for "loaded labor rates" used in BellSouth's 1997 nonrecurring cost study, it is unclear how labor rates that are more than six years old are in any way relevant to this proceeding. Not surprisingly, MCI does not address this issue in its Motion to Compel.

reports performance on various Billing, Trunking, and Change Management metrics, just to name a few. MCI does not and cannot explain how such metrics are relevant to this proceeding.

BellSouth also objected to MCI's requests on grounds that the information sought was available as a matter of public record. MCI does not bother to address this issue. However, whether MCI is willing to admit it or not, MCI can readily obtain information responsive to its requests from publicly available sources. For example, the measures themselves, which are contained in BellSouth's Service Quality Measurement ("SQM") Plan in Tennessee, are on file with the TRA (and have been previously provided to MCI as a party in Docket 01-00193 in Tennessee). Similarly, the monthly data that BellSouth reports pursuant to these measures as well as remedy payments paid pursuant to the Self-Effectuating Enforcement Mechanism ("SEEM") Plan in Tennessee are available on the BellSouth website (http://pmap.bellsouth.com). Thus, when MCI asks BellSouth for a "detailed description" for all UNE performance measures or metrics and a copy of "all UNE performance measure or metric reports applicable in Tennessee," such information is at MCI's fingertips if not already in its hands.

While BellSouth does not deny the relevancy of certain performance measurements to this proceeding, the TRA should not require BellSouth to respond to these interrogatories when MCI has been either unwilling or unable to narrow its requests or to explain why it cannot avail itself of information that is in the public record. In criticizing MCI for its failure to discuss all pertinent discovery disputes before filing its motion to compel, BellSouth cited to these interrogatories as a specific example:

> Let me take MCI Request No. 31 as an example. In this request, MCI asks BellSouth to identify every UNE performance measure or metric report in Florida, including reports of all penalties paid under these metrics. BellSouth objected on relevancy grounds and on grounds that information concerning BellSouth performance metrics and measures is a matter of public record. Obviously, there are numerous performance measures for which BellSouth is required to report data that have nothing to do with this case and MCI already is in possession of those measures and also has access to the monthly performance data BellSouth reports. So it is unclear what information MCI really needs or is seeking from BellSouth. Discussing these issues is the kind of process that the agreement with CompSouth contemplates before filing a motion to compel -- a process in which MCI apparently is unwilling to participate.

Exhibit 4. Despite BellSouth's efforts to address these issues, MCI has failed completely to cooperate, blithely insisting that BellSouth produce documents MCI does not need or that it already has.

Interrogatory Nos. 76-77, 80-81, 84-85 & 88-89

Interrogatories 76-77, 80-81, 84-85, and 88-89 seek a variety of OSS information specifically addressed to BellSouth's retail services and BellSouth's subsidiaries and affiliates. BellSouth primarily objected to providing this information on relevancy grounds. In seeking to overcome this objection, MCI insists that "information about OSS used by BellSouth for its retail services" is relevant to whether BellSouth is providing OSS "at parity." The TRA and the FCC have already held that BellSouth provides nondiscriminatory access to its OSS in connection with BellSouth's application for in-region interLATA authority in Tennessee. Furthermore, MCI points to nothing in the FCC's Triennial Review

Order which even remotely can be read to suggest that OSS "parity" is factor that the TRA must consider under the FCC's impairment analysis.

MCI makes much the same argument about the alleged relevancy of those requests that seek information about "OSS used by BellSouth's affiliates." However, this argument is absurd because BellSouth's "affiliates" have no parity obligation with respect to MCI or any other CLEC. That is to say, the fact that BellSouth International or Cingular may utilize operational support systems that are faster or better than the OSS made available to MCI is completely irrelevant to an incumbent's obligation to provide nondiscriminatory access (even assuming nondiscriminatory access was a factor in the FCC's impairment analysis, which is not the case). Furthermore, to the extent that information concerning the OSS used by BellSouth International and Cingular was relevant to this proceeding, which is not the case, MCI should get such information from those companies, not BellSouth.

BellSouth does not dispute the relevancy of "OSS process flows and business rules for UNE-P [and] UNE-L" to this proceeding. However, none of the requests at issue seeks information related to these topics. Although MCI erroneously asserts that Request No. 80 seeks information about "CLEC-UNE-P," this request nowhere includes any language relating to "CLEC-UNE-P." Furthermore, BellSouth provided MCI with detailed responses to Interrogatories 36 – 50, all of which addressed OSS, and which also specifically address particular types of UNE loops. MCI has failed to demonstrate any need for information concerning the OSS used by BellSouth's retail operations and its affiliates, and the Authority should reject MCI's vague and unsupported theories relating to parity.

Interrogatory Nos. 102-103

Interrogatories 102 and 103 seek detailed information concerning switches in use by cable operators and CMRS operators. For example, MCI asks BellSouth to identify "the number of units passed (reported separately by residential and business units) by the portion of the cable operator's network capable of supporting local exchange voice service"; "the number of customers of the CMRS operator who are subscribing to local exchange voice service"; the dates when the cable operator or CMRS operator first began providing local exchange voice service"; the "price of local exchange voice service provided" by the cable operator and CMRS operator; and geographical information concerning the serving territory of the cable and CMRS operators.

Without withdrawing any of requests for the detailed information described above, MCI erroneously suggests that it is merely seeking "basic information about Cable and CMRS switches." Motion at 12. The depth and breadth of information that MCI is seeking concerning Cable and CMRS providers is not limited to "switches," nor can such requested information be fairly characterized as merely "basic." As BellSouth correctly pointed out in both its objections and responses, MCI's desire for detailed information concerning cable or CMRS operations in Tennessee should be directed to the cable and CMRS providers themselves, not BellSouth. MCI has failed to address why it cannot avail itself of the available procedures to obtain information from non-parties rather than subject BellSouth to its overreaching discovery.

MCI suggests that because BellSouth may have wholesale information, that BellSouth should use this information to respond to it. This suggestion is also meritless and contradicts MCI's request for "basic information." MCI does and cannot explain why it believes BellSouth, in its role as a wholesale provider, has access to: (1) the "number of customers" served by each cable and CMRS provider in Tennessee who subscribe to local voice service and broadband service; (2) the "throughput rate" for cable and CMRS providers' broadband service; (3) the prices charged by cable and CMRS providers; (4) the "quality" of service provided by cable and CMRS providers; and (5) the territory served by cable and CMRS providers.

To the extent that MCI is now modifying its request and seeks only "basic information about cable and CMRS switches," MCI can and should consult the Local Exchange Routing Guide ("LERG"), which presumably contains the "basic" information MCI seeks.

MCI's gratuitous claim that because BellSouth may have conducted an analysis of "whether and where to challenge UNE switching" that it cannot "maintain the litigation advantage" of keeping information to itself should also be disregarded. Motion at 12. First, the FCC has expressly held that state commission are not permitted "to consider CMRS providers in their application of the triggers" under the FCC's impairment analysis. TRO, ¶ 499, n.1549. Thus, any information that BellSouth has about CMRS-provided switching would have no bearing on the issues before the Authority. Second, even assuming that BellSouth has a secret stash of switch data that it obtained from cable providers in connection with this case (which is not the case), such information was gathered in anticipation of litigation and is shielded from disclosure under the attorney work product doctrine. To the extent BellSouth intends to rely upon switches owned by cable providers in establishing that CLECs in Tennessee are not impaired without access to unbundled switching from BellSouth, BellSouth will disclose such information at the appropriate time. However, this is not that time.

Interrogatory No. 125

Interrogatory No. 125 requested information concerning the past or future retirement of copper feeder plant. BellSouth responded to this request as follows:

> BellSouth objects to this Interrogatory to the extent that it is overly broad, unduly burdensome, and oppressive. Subject to this objection, and without waiving this objection, BellSouth retires copper feeder facilities due to public requirements (e.g. road work or road moves) and non-discretionary replacements (e.g. damage to plant caused by storms).
>
> BellSouth also has a website for disclosure of work associated with the above. The *Network Disclosures* will be found at: www.interconnection.bellsouth.com/notifications/network
>
> BellSouth cannot predict, particularly in the situation regarding public requirements, where or when copper plant will be retired because BellSouth does not know of the Tennessee Department of Transportation's plans except when advised.

In seeking an order compelling BellSouth to answer this Interrogatory, it is unclear that MCI has even reviewed the question that MCI asked or BellSouth's response. First, although MCI claims that its request seeks information concerning BellSouth's "copper loop plant," Interrogatory No. 125 refers only to "copper feeder plant"; no mention is made of loops or BellSouth's copper distribution plant (of which loops would be a part). Second, MCI phrased its request in the disjunctive, asking BellSouth to provide information concerning cooper feeder plant that had already been retired *or* future retirement plans. BellSouth answered this request as it relates to future retirement plans and at the same time provided MCI with a URL link with network disclosures concerning plant retirements and explained the circumstances when it makes plant retirements. No further response from BellSouth is required.[2]

<u>Interrogatory No. 130</u>

Interrogatory No. 130 seeks information about loops that MCI describes as "warm." MCI's actual request and BellSouth's response are repeated in their entirety below:

> NO. 130: On a statewide and CLLI-code-specific basis in Tennessee, please state the percentage of working loops used or available to support BellSouth retail services that are configured as "connect through"/"warm line" (i.e., loops that have electrical continuity between the customer premises and the BellSouth switch, and over which a person at the customer premises can call 911 and BellSouth repair service).
>
> RESPONSE: BellSouth objects to this Interrogatory on the grounds that information concerning BellSouth's retail services is not reasonably calculated to lead to the discovery of admissible evidence and it is not relevant to the subject matter of this action. BellSouth also objects to this

[2] Furthermore, as BellSouth has already explained to MCI, once facilities are retired, they are removed from BellSouth's facility databases. Thus, BellSouth has no mechanized means to reconstruct the amount of copper feeder that has been retired and when the retirement took place. To obtain this information, BellSouth would be required to contact each of its outside plant engineers so they could conduct a manual review of each and every work order since early 2000 to determine which involved the retirement or removal of copper feeder. Exhibit 2. This would be a burdensome and costly process, in which BellSouth should not be required to engage.

> Interrogatory on grounds that it is overly broad, unduly burdensome, and oppressive.

MCI suggests that it requires information concerning "warm" lines because that information relates in some unspecified manner to BellSouth's ability to provision UNE loops. MCI's unsupported and unsubstantiated claim should be denied, as MCI has failed to articulate how the Authority will be able to use the information requested in its impairment analysis. Although MCI contends that including such loops in provisioning performance "skews results because such loops require no wiring work on the frame in the wire center," the contention makes no sense.

First, in Docket 01-00193 the Authority has already established the requirements to which BellSouth must adhere in measuring and reporting its performance, including loop provisioning performance. While it may be necessary for the Authority to adopt additional performance measures to monitor BellSouth's batch hot cut process, this is not the proper forum to hear MCI's grievances about performance measures this Authority has already approved.

Second, MCI does not explain what results are allegedly being "skewed" by virtue of including "warm" loops in BellSouth's provisioning performance results. To the extent a "warm" loop is activated in the switch to serve a BellSouth retail customer, the time involved in provisioning service to that customer would be reflected in BellSouth's retail data. By the same token, to the extent a "warm" loop is activated in the switch to serve a customer of a CLEC that purchases UNE-P or resells BellSouth's voice service, the time involved in provisioning service to that customer would be reflected in the appropriate CLEC data.

Third, the FCC already has recognized "the significant differences between how the incumbent LEC provides service and how competitive LECs provide service using their own or third-party switches" in finding alleged "impairment" caused by the hot cut process. TRO ¶ 465. According to the FCC, connecting a customer "is generally merely a matter of a software change" by the incumbent, while a CLEC must engage in the manual hot cut process. *Id.* Thus, MCI is seeking discovery on an issue for which discovery is not necessary.

Fourth, to the extent the triggers have not been satisfied in a particular geographic market, the FCC's impairment analysis requires a state commission to consider, among other factors, whether an incumbent's "performance in provisioning loops" makes it "uneconomic" for a CLEC to self-provision switching. TRO ¶ 456. The work associated with provisioning a loop to a CLEC that uses its own switch or a third-party switch is the same whether the loop is "warm" or "cold" – that is, the loop must be physically transferred from BellSouth's switch to the CLEC or third-party switch. TRO ¶ 465. Accordingly, the "percentage of working loops used or available to support BellSouth retail services" that are "warm" is irrelevant to the impairment analysis the Authority is expected to conduct.

<u>**Interrogatory Nos. 138(c) and 140(a)**</u>

In these Interrogatories MCI seeks to compel BellSouth to provide the names of carriers occupying collocation space as well as the names of CLECs whose collocation arrangements are cross-connected to each other. BellSouth objected to these requests because providing the requested information would run afoul of

BellSouth's obligations to protect carrier information and Customer Proprietary Network Information ("CPNI"). 47 U.S.C. § 222(a) - (c). Section 222(a) imposes a duty upon every telecommunications carrier "to protect the confidentiality of proprietary information of, and relating to, other telecommunications carriers ...." Section 222(b) requires that a telecommunications carrier receiving or obtaining proprietary information "from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose ...." Finally, Section 222(c) sets forth specific requirements to which BellSouth must adhere before disclosing CPNI.

MCI suggests that BellSouth's objection is misplaced, apparently because it believes that the CPNI rules (47 C.F.R. § 64.2001 – 64.2009) relate only to marketing activities and not to competitive analysis by an administrative agency. Although BellSouth has no interest in debating the scope or breadth of its statutory obligations, BellSouth's concerns are twofold.

First, the discovery requests involved are from MCI, a competing carrier, not an administrative agency. Thus, MCI's suggestion that because competitive analysis is involved that BellSouth's statutory obligation to protect a carrier's proprietary information can be ignored is misplaced. Second, MCI disregards language in the Act relating to CPNI, which expressly prohibits disclosure of this information "except as required by law or with the approval of the customer." §222(c)(1). BellSouth's experience is that CLECs vigilantly protect information about their network arrangements, which would include the locations of their collocation arrangement as well as the specifics of any cross connection arrangements. BellSouth is unwilling to rely upon MCI's interpretation of BellSouth's statutory obligations as a legal basis to disclose such information.

In the event the Authority issues a subpoena that requires the disclosure of this information, such disclosure would be "required by law," and BellSouth would obviously comply. Whether this process is "cumbersome" to MCI is not the issue. MCI has a process that it can use to obtain the information it apparently believes is necessary, and it should not be permitted to short circuit this process and put BellSouth in legal jeopardy in the meantime.[3]

Interrogatory Nos. 142, 145, 146(b), 147(b), and 193

Interrogatories 142, 145, 146(b), 147(b), and 193 all seek basically the same information – average revenues that BellSouth receives from its customers. BellSouth objected to providing such information on relevancy grounds. Although MCI argues that such information is "expressly identified by the FCC as relevant for market definition," MCI misreads the reference in the FCC's Triennial Review Order upon which it relies. Specifically, in ¶ 496 of the TRO, the FCC stated that in defining the relevant market a state commission could consider "how the number of high-revenue customers varies geographically ...." (footnote omitted). However, MCI has not asked how many "high-revenue customers" BellSouth has or where these "high-revenue customers" are located, which, according to the FCC, may be a relevant inquiry. Rather, MCI has asked for detailed information about the amount of revenue BellSouth receives from all of its customers, including

[3] If the Authority were to grant MCI's motion and enter an order compelling BellSouth to disclose the names and locations of each carrier's collocation and cross-connection arrangement, such disclosure would be "required by law." Before ordering such relief, however, the Authority should require MCI to explain why it needs to know where each of its competitors has decided to compete – information that MCI's competitors are likely not anxious to be divulged.

low-revenue and mid-revenue customers. Such information is not relevant to any aspect of the FCC's impairment analysis.

Furthermore, MCI makes no serious attempt to address BellSouth's objections that some of its requests for BellSouth's revenues are overly broad and unduly burdensome. For example, Request No. 145 seeks average monthly revenue data for every month since July 2001 and requests that this information be divided by "wire center, local access and transport area and metropolitan serving area." Request Nos. 146(b) and 147(b) go two steps farther and ask for the same information, but this time broken down by non-circuit switches and by "service and/or feature type."

Assuming for the sake of argument that the Authority finds MCI's requests relevant (which it should not), MCI brushes aside BellSouth's concerns as to the burden in providing the requested information as "misplaced." It is a mystery to BellSouth how MCI can overlook the burden to BellSouth of gathering over two years worth of revenue data, for 28 separate months, further segmented by "wire center, LATA and MSA," and then broken down by "service and/or feature type." Of course, because MCI failed to discuss this request with BellSouth and opted instead to file its motion to compel, BellSouth can only surmise that MCI is maintaining its overreaching request, without withdrawing, limiting, or modifying it so as to even create the appearance of reasonableness. Even assuming the amount of BellSouth's retail revenues were relevant (which is not the case), BellSouth should not be required to devote the time and energy to gathering such information for the lengthy period of time and to the granular levels requested by MCI.[4]

Interrogatory Nos. 143 and 144

These requests seek information concerning "universal service fund subsidies" that BellSouth receives and "implicit and/or explicit" subsidies BellSouth contends are contained in "retail rates for any service." Although BellSouth objected to these requests on relevancy grounds, MCI has brought to BellSouth's attention paragraph 518 of the FCC's Triennial Review Order, which suggests that such information may be relevant to the FCC's impairment analysis. As a result, BellSouth will supplement its responses to Interrogatory Nos. 143 and 144. However, had MCI bothered to discuss these requests with BellSouth before filing its Motion to Compel, the parties could have resolved this matter without the Authority's involvement.

Interrogatory No. 146

This Interrogatory requests cost and revenue information concerning "each switch identified in your response to MCI-97 above *other than circuit switches* .... As BellSouth has previously explained to MCI in the context of another interrogatory, BellSouth's response to Interrogatory No. 97 provided information concerning the switches it uses to provide local exchange service, *all of which are circuit switches.* Exhibit 2. Since BellSouth did not identify any non-circuit switches in response to Interrogatory No. 97, there is nothing for BellSouth to provide in response to Interrogatory No. 146, which only addresses non-circuit

[4] Even though not relevant to the issues in this proceeding, BellSouth has available retail revenue information by wire center based on April 2003 data, which BellSouth is willing to provide MCI. However, such information is not disaggregated to the level of detail MCI has requested.

switches. This is yet another example of a discovery dispute that could have been resolved without involving the Authority, had MCI merely taken the time to confer with BellSouth before filing its Motion to Compel.

<u>Interrogatories No. 147(a), 175 & 177-184</u>

Interrogatory No. 147(a) seeks information concerning "all categories and amounts of costs" that BellSouth incurs in providing local exchange service to "mass market" and "enterprise" customers. The remaining requests seek information concerning BellSouth's variable costs for providing local exchange service (No. 175); variable costs for providing long distance service (No. 177); marginal costs for providing long distance service (No. 178); variable costs for providing broadband service; (No. 179); marginal costs for providing broadband service (No. 180); variable costs for providing bundled local exchange and long distance service (No. 181); marginal costs for providing bundled local exchange and long distance service; (No. 182); variable costs for providing bundled local exchange, long distance and broadband service (No. 183); marginal costs for providing bundled local exchange, long distance and broadband service (No. 184)

BellSouth objected to all these request on relevancy grounds. In response MCI cites to paragraph 520 of the TRO, although this reference supports BellSouth's position, not MCI's. In paragraph 520, the FCC directed the state commissions to consider "the costs faced by a competitor providing local exchange service to the mass market." Here, MCI is seeking information about BellSouth's costs (and the costs of BellSouth's affiliates), which is not a factor the FCC directed the state commissions to consider. Obviously, there is a significant difference between, on the one hand, BellSouth's costs of providing local exchange service on a ubiquitous basis across the State of Tennessee using a legacy network, and, the costs a CLEC would incur in providing local service to select customers using its own switches and leasing facilities from BellSouth, on the other.

For example, the loop represents one of BellSouth's largest categories of cost in providing service to its end user customers. Under the FCC's impairment analysis, the Authority determines "the costs faced by a competitor providing local exchange service to the mass market." TRO ¶ 520. In so doing the Authority will not consider the cost to the CLEC of building and maintaining a loop, since it presumed that the CLEC will lease the loop from BellSouth. TRO, ¶ 520 (state commission should consider the cost to a competitor including "the recurring and non-recurring charges paid to the incumbent LEC for loops, collocations, transport, hot cuts, OSS, signaling, and other services and equipment necessary to access the loop"). Thus, there is no justification for compelling BellSouth to provide information concerning the cost BellSouth incurs in providing service.[5]

BellSouth also objected to these interrogatories to the extent they seek information concerning the costs incurred by BellSouth's affiliate – BellSouth Long Distance, Inc. ("BSLD") -- even assuming such information were relevant (which is not the case). Obviously, BellSouth Telecommunications, which is the party on

[5] MCI makes much of paragraph 87 of the TRO in which the FCC discusses "scale economies" as a potential entry barrier, particularly when "retail prices are close to the incumbent's average costs." However, this discussion is in the context of the FCC's interpretation of the general "impair" standard, and not in the context of the analysis the Authority must conduct in determining those markets where an efficient entrant is not impaired without access to unbundled switching. There is nothing in the FCC's discussion of the economic barriers that the Authority must examine that relates to an incumbent's marginal or variable cost of providing local exchange service.

whom MCI served its discovery, does not provide long distance service and, in fact, is presently prohibited by law from doing so. 47 U.S.C. § 272(a). Thus, BellSouth has no "costs for providing long distance service," whether stated on a total, marginal, or variable basis. To the extent it were relevant, MCI should obtain such information from BSLD.

Interrogatory Nos. 149-150

Unlike other interrogatories that seek information concerning BellSouth's cost of providing service, Interrogatory Nos. 149 and 150 seek information concerning the costs BellSouth incurs in deploying DLC equipment in Tennessee. Based upon MCI's acknowledgement that the amount BellSouth pays to purchase and install equipment such as DLC is an appropriate proxy for the "claimed costs of a competitor" for purposes of the FCC's impairment analysis, BellSouth will supplement its responses to these Interrogatories. This is yet another example of a discovery dispute that could have been resolved without involving the Authority, had MCI merely taken the time to confer with BellSouth before filing its Motion to Compel.

Interrogatory Nos. 162-164

These interrogatories ask BellSouth to provide information on a CLLI code specific basis concerning the number of retail lines, standalone DSL lines, line sharing arrangements, and line splitting arrangements. MCI seeks this information for each of the last three years (No. 162), for the current year (No. 163), and projected for the next three years (No. 164). BellSouth objected to these requests on relevancy grounds, and MCI has no real response.

Although MCI claims that BellSouth's retail and DSL lines as well as CLEC line sharing and line splitting arrangements from 2000 through 2006 is "relevant to revenues possibly achieved by an efficient potential entrant," MCI never explains how this is so. In paragraph 519 of the TRO, upon which MCI relies, the FCC merely indicates that the state commission "must consider all revenues" that a competing carrier is likely to obtain from serving the mass market. Paragraph 520, also relied upon MCI, requires a state commission to "consider all factors affecting the costs faced by a competitor providing local exchange service to the mass market." MCI never explains how the number of retail and DSL lines BellSouth served three years ago or even last year or the number of such lines BellSouth expects to serve three years from now is relevant to the revenues or costs of an efficient entrant.

MCI also insists that such information is relevant to "market definition questions," citing paragraph 496 of the TRO. However, paragraph 496 does not support MCI's relevancy claim. It merely provides examples that a state commission may consider in defining the market, including: (1) "how UNE loop rates vary across the state"; (2) "how retail rates vary geographically"; (3) "how the number of high-revenue customers varies geographically"; (4) "how the cost of serving customers varies according to the size of the wire center and location of the wire center"; and (5) "variations in the capabilities of wire centers to provide adequate collocation space and handle large numbers of hot cuts." TRO, ¶ 496. None of the information MCI seeks in Interrogatory Nos. 162, 163 and 164 is relevant to any of these factors.

Even assuming MCI could establish the relevancy of the information it has requested, which MCI has not done, BellSouth has already provided MCI with some of the information MCI seeks, as MCI begrudgingly acknowledges. In particular, BellSouth provided the number of retail voice lines served by BellSouth on a monthly basis since June 2001 in its response to Interrogatory No. 118. In response to Interrogatory No. 119, BellSouth provided data concerning the number of DSL lines served by BellSouth on a monthly basis since June 2001. BellSouth provided similar data for line sharing and line splitting arrangements in response to Interrogatory Nos. 120 and 121, respectively. Thus, it is unclear what additional information MCI needs or wants from BellSouth.

<u>Interrogatory Nos. 169-173</u>

In these interrogatories, MCI seeks "calculations and/or estimates" of the "market demand elasticity" for local exchange service (No. 169); long distance service (No. 170); broadband service (No. 171); bundled local and long distance service (No. 172); and bundled local, long distance, and broadband service (No. 173). BellSouth objected on relevancy grounds and also objected to the extent these requests sought information from BellSouth's affiliates.

In its Motion to Compel, MCI offers two reasons why the requested information is relevant. First, according to MCI, information relating to "market demand elasticity" is "extremely relevant to any analysis of potential deployment," although MCI never explains how this is so. Second, MCI argues that the "FCC specifically directed that any potential deployment case should consider "revenues" from all sources. Of course, the revenues that must be considered are those of the efficient entrant, not BellSouth or its affiliates. Furthermore, these interrogatories do not ask for revenues but rather seek information concerning the extent to which demand for certain telecommunications services may be sensitive to price.

Interrogatory No. 185

This Interrogatory asks BellSouth to state whether it has "any affiliates or subsidiaries that provide local exchange voice services, long distance voice services and/or DSL services," and, if so, to provide their full name and list of services they provide. BellSouth objected to this request on relevancy grounds and on grounds that it was overly broad, unduly burdensome, and inconsistent with the rules of discovery to the extent it sought "to impose an obligation on BellSouth to respond on behalf of its affiliates ...."

MCI makes no substantive response, except to repeat its usual refrain that the FCC's impairment analysis requires consideration of "revenue from all sources." Of course, the revenues that must be considered are those of the efficient entrant, not BellSouth or its affiliates. Furthermore, Interrogatory No. 185 does not ask for revenue information; it merely seeks the identity of certain BellSouth's affiliates and the services these affiliates provide. BellSouth has provided and will continue to provide relevant information concerning the services that it provides. To the extent MCI seeks similar information about services provided by BellSouth's affiliates, it should obtain that information from BellSouth's affiliates, not BellSouth.

Interrogatory Nos. 186-187

Interrogatory No. 186 asks BellSouth to "provide a copy of each executed contract (including attachments and/or amendments) between BellSouth and a long distance carrier for inter-LATA services and/or facilities." BellSouth objected on relevancy grounds and also objected because such information is "is in the public record is otherwise publicly available."

MCI never explains why contracts between BellSouth and BSLD are relevant to the FCC's impairment analysis, except to say that in a potential deployment case the Authority "should consider revenue from all sources." Of course, the revenues the Authority must consider are those of the efficient entrant, not BellSouth or BSLD. In any event, even assuming the requested contracts are relevant, Section 272(b)(5) requires BSLD to make available for "public inspection" all contracts with BellSouth. Thus, the contracts that MCI seeks are available via the following website: http://bellsouthcorp.policy.net/policy/transactions/

For each contract that is the subject of Interrogatory No. 186, Interrogatory No. 187 requests BellSouth to "provide the total minutes of use, and/or total transport capacity purchased, as well as the total dollar amount paid for such minutes of use and/or transport capacity, stated on a quarterly basis for the past three years." BellSouth objected to providing such information on grounds that it is not relevant to any issue in this proceeding.

In its response, MCI argues that information concerning total minutes of use, total transport capacity purchased and total dollar amount paid for such minutes of use and capacity is "highly relevant because it seeks to gather revenue data necessary to determine whether operation is profitable." This argument is nonsensical because Interrogatory No. 187 seeks information about costs, not revenues. Furthermore, to the extent MCI is seeking to discover the costs associated with providing "interLATA long distance," such discovery is misguided because BellSouth does provide interLATA long distance service and is currently prohibited by law from doing so. Thus, the information Interrogatory No. 187 seeks is irrelevant to the issues in this proceeding, notwithstanding MCI's claims to the contrary.

Interrogatory Nos. 188-189

In these Interrogatories, MCI asks BellSouth to provide information concerning BellSouth's cost of capital, including its component parts (No. 188), and broken down for residential local exchange service, business local exchange service, long distance service, DSL service, and unbundled network elements (No. 189). BellSouth objected on relevancy grounds.

MCI's attempt to establish the relevancy of information concerning BellSouth's cost of capital is unpersuasive. First, MCI claims that the Authority "must consider whether inherent difficulties with competitive switching facilities exist," citing paragraph 515 of the TRO. In paragraph 515, however, the FCC directed state commissions to consider the two primary costs competing carriers face: (1) the costs of migrating loops to the CLEC's switch; and (2) the costs of backhauling voice circuits to the CLEC's switch. MCI does not and cannot explain how BellSouth's cost of capital is relevant to the Authority's assessment of a competing carrier's costs associated with loop migration and backhauling.[6]

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[6] In determining a competing carrier's cost, the rates the CLEC pays for network elements and services from BellSouth is relevant, but those rates were determined by the Authority using a

Second, MCI argues that the Authority must "determine whether entry is economic and must consider the cost of capital in that analysis," specifically whether the incumbent enjoys a "lower cost of capital." MCI misreads the portions of the TRO cited by MCI in support of this argument. Footnote 247 refers to a "lower cost of capital" that an incumbent may enjoy. However, this reference appears in the FCC's general discussion of "legal doctrines and economic theories" that resemble the FCC's "impair" standard but which the FCC declined to adopt. Paragraph 88, also cited by MCC, addresses "sunk costs" as a possible "barrier to entry," but it nowhere identifies an incumbent's cost of capital as a factor the Authority should consider in its impairment analysis for switching purposes. On the contrary, in paragraph 88, the FCC discusses the possibility that sunk costs would "increase" an entrant's cost of capital and thereby "discourage entry." An incumbent's cost of capital has no bearing on this issue.

Interrogatory Nos. 190-192.

Interrogatory Nos. 190 and 191 ask BellSouth to "describe in detail any legal, regulatory or other constraints" on BellSouth's ability to reduce prices for certain services based on specific geographic areas and for types of customers, respectively. Interrogatory No. 192 asks BellSouth to "describe in detail any price floors imposed by any law, regulation, Tennessee Regulatory Authority orders or rulings that constrain BellSouth's ability to reduce prices" for specified services.

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cost of capital that the Authority established for BellSouth. This cost of capital, including the component parts and assumptions upon which it was based, is set forth in the Authority's orders in Docket 97-01262. MCI already has copies of these orders and does not require any additional information from BellSouth.

BellSouth objected on relevancy grounds and because the information MCI seeks is "in the public record is otherwise publicly available."

Although MCI uses a shotgun approach by citing a string of paragraphs in the TRO that it says require the Authority to obtain the information MCI seeks, these references say no such thing. For purposes of the FCC's impairment analysis, the Authority must address all the revenues expected to be earned and costs likely to be borne by an efficient competitor utilizing a UNE-L strategy. TRO, ¶¶ 519-520. Obviously, a CLEC in Tennessee does not operate under the same "legal, regulatory, or other constraints" that have been imposed upon BellSouth, and the regulatory scheme under which BellSouth operates as a price regulated company is irrelevant to determining an efficient competitor's potential revenues and costs.

MCI also claims the information that it seeks is relevant "because it determines BellSouth's ability to target competitive pricing responses following entry by competitors," citing paragraphs 80, 83, 88 and 539 of the TRO. Unfortunately for MCI, BellSouth's ability to engage in price competition is not a factor the Authority has been directed to consider under the FCC's impairment analysis. Two of the paragraphs from the TRO cited by MCI – 80 and 83 – discuss "legal doctrines and economic theories" that resemble the FCC's "impair" standard but which the FCC declined to adopt. Paragraph 88 discusses "sunk costs" as a possible "barrier to entry," but this discussion is not in the context of the impairment analysis that the FCC directed the state commissions to consider for purposes of switching. Finally, paragraph 539 cited by MCI summarizes the

FCC's conclusion that CLECs are not impaired without unbundled access to packet switching, which is irrelevant to this proceeding and to the information MCI seeks.[7]

Even assuming that information concerning the legal and regulatory constraints on BellSouth's pricing were relevant to this proceeding, which is not the case, such information is readily available to MCI. Such constraints are contained in the statutes of the State of Tennessee and orders of this Authority, which MCI probably already has or could readily find if it were so inclined. BellSouth has no obligation to provide legal research for MCI, which is what Interrogatory Nos. 190, 191, and 192 essentially involve.

Respectfully submitted,

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[7] For reasons not readily apparent, MCI also cites footnote 298 in support of its argument concerning the alleged relevancy of information about the legal and regulatory constraints on BellSouth's pricing. However, footnote 298 offers no such support because it simply contains the FCC's observation that an incumbent LEC may enjoy an advantage "in advertising or brand name preference," which could affect an entrant's ability to compete.

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2003, a copy of the foregoing document was served on the parties of record, via the method indicated:

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