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March 17, 2004

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 *Responsive Comments Regarding Suspension of Proceedings* Copies of the enclosed are being provided to counsel of record.

Cordially,

Joelle Phillips

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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

Implementation of the Federal Communications Commission's Triennial Review Order (Nine-month Proceeding) (Hot Cuts)
Docket No. 03-00526

Implementation of the Federal Communications Commission's Triennial Review Order (Nine-month Proceeding) (Loop & Transport)
Docket No. 03-00527

RESPONSIVE COMMENTS OF BELLSOUTH
REGARDING SUSPENSION OF PROCEEDINGS

The March 11 Comments filed in the above-styled dockets by Competitive Carriers of the South, Inc. ("CompSouth") were fashioned as responsive comments to the BellSouth Telecommunications, Inc.'s ("BellSouth") March 10 filing, concerning the possible suspension of the referenced proceedings as a result of the March 2, 2004 Order of the United States Court of Appeals for the District of Columbia Circuit ("DC Circuit Court") in the appeal of the FCC's Triennial Review Order ("TRO"). CompSouth argues that BellSouth has raised concerns that were "either unfounded or are greatly outweighed by other matters." BellSouth files these responsive comments in an effort to provide the Authority with some additional information and relevant legal authority responsive to CompSouth's position.[1]

[1] Because of the timing of BellSouth's filing, CompSouth has had the opportunity to file responsive comments. In the interest of fairness, BellSouth should also be permitted to provide these responsive comments

As BellSouth stated in its earlier comments, it is prepared to move forward with the hearing in the referenced dockets, although it seems wasteful and potentially confusing to do so. In contrast, CompSouth urges the TRA to proceed without regard for the ***substance*** DC Circuit's decision on the ***procedural*** basis that the DC Circuit Court chose to "temporarily stay the *vacatur* (i e delay issue of the mandate)...". The timing of the issuance of the mandate is a procedural matter that does not change the fact that the DC Circuit Court order still reflects the law. BellSouth makes no argument that the order is "effective," but to turn a blind eye to what the court said makes no sense. Indeed, while there is no case specifically addressing this point by the United States Court of Appeals for the Sixth Circuit, other circuits have suggested that a circuit court opinion is binding on all inferior courts whether the mandate has issued, or whether an application for certiorari has been made to the Supreme Court.

For instance, the Ninth Circuit has held that once a published opinion is filed, it becomes the law of the circuit until withdrawn or reversed by the Supreme Court or an *en banc* court, and the Ninth Circuit expressly rejected the argument that appellate decisions are "not binding precedent until the mandate issues in th[e] case." *Chambers v. United States*, 22 F.3d 939, 942 n 3 (9th Cir. 1994), *vacated and remanded on other grounds*, 47 F.3d 1015 (9th Cir. 1995). *See also Yong v. INS*, 208 F.3d 1116, 1119 n.2 (9th Cir. 2000) ("once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority").

CompSouth's argument that the Authority move forward is not supported by either the tone or the specific language of the DC Circuit's Opinion. Even a cursory

reading of the opinion compels the conclusion that the TRO has been soundly rejected by the court and that any further proceedings the TRA may be called upon to hold will be quite different from those contemplated by the TRO. CompSouth seems to suggest that administrative economy could be achieved if the TRA were to get a jump on whatever future proceeding it may be called upon to hold if it simply proceeds with the hearing that it was planning – a hearing based on the now-rejected TRO. Far from promoting administrative economy, such a course will further scramble the egg, adding a needless layer of complexity (sorting action relevant to the TRO from actions pursuant to a future order).

CompSouth's reliance on statements from FCC commissioners who supported the very decisions found illegal by the Court cannot be given serious weight in resolving this issue. It is not surprising that members of the majority supporting the TRO would urge the states to go forward. State commissioners, however, should not be swayed by such rhetoric Instead, state commissions, in view of the very clear, pointed and, in some instances, even harsh language of the DC Circuit Court, must consider the real consequences of moving forward, including the potential for wasted resources, confusion of legal issues, and the potential for inconsistent decisions through the country. Urging the Authority to move forward, CompSouth argues that nothing in the DC Circuit Court's opinion "suggests that evidence of actual deployment of facilities is irrelevant." Even if that is correct, the testimony filed and the discovery taken in this proceeding is all based on the specific findings and pronouncements in the court-rejected TRO, including the premise that the state commission is authorized to determine what an appropriate geographic market would be and what the proper

definition of "mass market" customers should be. It is clear that the DC Circuit Court rejected the idea that the states have the unfettered discretion to make such decisions, yet those precise determinations underlie a great deal of the testimony filed in these proceedings.

The testimony already filed clearly brings this point home For instance, BellSouth witness Dr Pleatsikas testifies solely about the appropriateness of the "geographic market" definition proposed by BellSouth, and points out why proposed definitions of other parties are not appropriate Similarly, the application of the "potential deployment" test that is the substance of the testimony of several witnesses is also dependent in large measure on selecting an appropriate geographic market, and in being able to separate the "mass market" from the "enterprise" market. In other words, these are not simple fact-finding proceedings. Rather, much of the testimony provides fact and reasoning marshaled in response to the FCC's delegations to the states in the TRO. The DC Circuit Court has now said the FCC cannot delegate those decisions to state commissions to make. If this were a simple matter of identifying where switches capable of providing analog services were located on the ground in Tennessee, which is what CompSouth seems to be arguing when it speaks of "evidence of actual deployment of facilities," then the situation would be different. These cases, as they are presently structured, represent something else entirely. The testimony submitted and the discovery taken were based entirely on an order that has not survived court scrutiny.

CompSouth urges that Tennessee should proceed because New York, Indiana and Texas have decided to proceed in some fashion with their "TRO cases." It is BellSouth's understanding that the "hot cut" case in New York was briefed in February

and a decision is expected in April or May, but that the loop and switching cases have not been set for hearing. It is also BellSouth's understanding that while the Indiana commission has decided to proceed, it left the door open to making a different decision, and that comments from the parties addressing that issue are due this week. Notably, CompSouth did not reference what was happening in a majority of the other states that have taken up this issue. While BellSouth has not done a formal survey, informal contacts with the other regions indicate that approximately 25 of the states that actually had state TRO proceedings instituted, have suspended those proceedings in part or whole. In BellSouth's region, Florida had completed its switching hearings, and Georgia was one-half way through its switching hearing, and so elected to complete the hearing. Both states have now suspended the loop and transport cases, which had not begun. Mississippi has suspended its proceedings, as has Louisiana. The North Carolina Utilities Commission has issued an order directing that the prefiled evidence will be admitted to the record, and that comments from counsel will be received at the time it has scheduled for hearings, but has excused the attendance of any witnesses, so that there cannot, and will not, be a full hearing as was scheduled in North Carolina for TRO matters, at least not until later this year, if at all

What BellSouth has suggested is neither unique nor new. The question is whether the Authority should invest in a week-long hearing on these cases, knowing that this work may become completely irrelevant when the FCC takes its next steps and knowing that its work will undoubtedly require updating or further consideration in the future. Would it not be more efficient to conduct an evidentiary hearing after the law to be applied to the evidence has been announced? Should the parties to these

proceedings be called upon to expend significant human and capital resources to try these cases, when the end result may be that the effort is meaningless? BellSouth has not suggested that these matters should simply be dismissed. All that has been suggested is that the Authority defer or suspend the proceedings until everyone, the Authority and the parties, know what evidence will be relevant to a decision that the Authority can make. Whatever evidence has been collected to date, including prefiled testimony, to the extent it is relevant when such a decision is made, will be available whether the Authority hears it now, or then. What doesn't make sense is to take a week now to hear evidence, and then a week two months from now to hear different evidence.

In addition to being guided by federal law, the Authority also should consider the teachings of Tennessee courts. In *BellSouth v. Bissell*, 1996 Tenn App. LEXIS 623, the Tennessee Court of Appeals held that the Public Service Commission abused its discretion when it proceeded with an earnings investigation that was no longer meaningful due to a change in the law. The Court found that the PSC's non-specific suggestion that the investigation "might serve some purpose" was not sufficient to justify its continued progress after the law had changed. *Id.* At *4. The present situation is similar. At this point, it is unclear how much of what is before the TRA will still have meaning in light of the DC Circuit's opinion. The *Bissell* case suggests that the better course is to stay these proceedings and wait to proceed until there is some further guidance.

In light of all the foregoing, BellSouth has suggests that the best course is to suspend the current proceedings where they are now, and hold these proceedings in

abeyance until further direction is received from a court of proper jurisdiction, or from the FCC as a result of the DC Circuit Court's order The Consumer Advocate's recent filing reaches the same conclusion. BellSouth recommends that the Authority have the parties provide periodic informal updates, so that if it is ultimately determined that the state proceedings can go forward, that this can be done promptly.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 17, 2004, a copy of the foregoing document was served on the parties of record, via the method indicated:

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