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T.R.A. DOCKET ROOM

March 12, 2004

Hon. Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Pkwy.
Nashville, Tennessee 37243-0505

Re: *Implementation of the Federal Communications Commission's Triennial
Review Order--9 Month Proceeding--Switching*
Docket No 03-00491

*Implementation of the Federal Communications Commission's Triennial
Review Order--9 Month Proceeding--Hot Cuts*
Docket No 03-00526

*Implementation of the Federal Communications Commission's Triennial
Review Order--9 Month Proceeding--Loop and Transport*
Docket No 03-00527

Dear Chairman Tate.

Enclosed please find the original and fourteen (14) copies of the Order Regarding Hearings issued today, March 12, 2004, by the North Carolina Utilities Commission.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By:

Henry Walker

Attorney for CompSouth

cc Parties of record
HW/k

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. P-100, SUB 133q
DOCKET NO. P-100, SUB 133s

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

Docket No. P-100, Sub 133q

In the Matter of
Triennial Review Order—UNE-P

Docket No. P-100, Sub 133s

In the Matter of
Triennial Review Order—High Capacity
Loop and Transport

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ORDER REGARDING
HEARINGS

BY THE CHAIR: Having reviewed the comments filed by US LEC of North Carolina (US LEC), Competitive Carriers of the Southeast, Inc. (CompSouth), the Public Staff – North Carolina Utilities Commission (Public Staff) and BellSouth Telecommunications, Inc. (BellSouth), the Chair concludes that the Commission will proceed with hearings in these dockets on Tuesday, March 23, 2004 under the revised terms described below.

In light of the March 2, 2004 opinion of the United States Court of Appeals for the District of Columbia Circuit in *United State Telecom Assoc. v. FCC (USTA II)*, vacating and remanding portions of the Federal Communications Commission's (FCC) August 21, 2003 *Triennial Review Order* (TRO), the Commission sought advice from the parties as to the decision's effect on the scheduled hearings, which were set to begin just three weeks after the Court's opinion was issued. In *USTA II*, the Court vacated the FCC's delegation to the states of decision-making authority over impairment determinations necessary to find that Incumbent Local Exchange Carriers (ILECs) are obligated under § 251 of the federal Telecommunications Act of 1996 (the Act) to provide certain unbundled network elements to competing telecommunications carriers. The Court also vacated and remanded the FCC's nationwide impairment determinations with respect to mass market switching and certain dedicated transport elements (DS1, DS3, and dark fiber). In addition, the Court vacated the FCC's decision that the availability of tariffed special access services not be considered as part of the impairment analysis.

Predictably, the parties who responded to the Commission's request for comments had differing views. Though asserting that it is prepared to move forward with the hearings, BellSouth questions the wisdom of doing so as a matter of resource deployment for the Commission and the parties, given the current judicial uncertainty. Both the Public Staff and BellSouth urge the Commission to suspend and hold the

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Predictably, the parties who responded to the Commission's request for comments had differing views. Though asserting that it is prepared to move forward with the hearings, BellSouth questions the wisdom of doing so as a matter of resource deployment for the Commission and the parties, given the current judicial uncertainty. Both the Public Staff and BellSouth urge the Commission to suspend and hold the

proceedings in abeyance in light of the Court's decision. They generally agree that the stated holdings of the Court place the legal rationale and foundation of the TRO in question and create much doubt as to whether the parties' present preparation and testimony will actually address the issues to be resolved, even if the Commission is ultimately called upon for the type of fact-finding and advisory assistance endorsed in *USTA II*. The Public Staff points out that even if the hearings are held as scheduled, there is a real likelihood that the Commission will have to revisit controversial issues in subsequent hearings following final resolution of all petitions for rehearing and appeals in *USTA II*. According to the Public Staff, such subsequent hearings will represent an additional time and resource burden on the Commission and the parties.

On the other hand, both US LEC and CompSouth request that the Commission proceed with the hearings as scheduled. Their comments note that most of the discovery has been completed in both dockets and that three rounds of pre-filed testimony in the UNE-P switching case and two rounds in the Loop and Transport case have been completed. They argue that the remaining hearing and post-hearing tasks represent a smaller portion of the total TRO work than all the work already completed prior to hearing. US LEC and CompSouth agree that proceeding with the hearings is a more efficient and effective use of time and resources for both the parties and the Commission than delaying or continuing the hearings indefinitely. US LEC points out that continuing the hearings could lead to further rounds of discovery that would increase the TRO workload. While the *USTA II* court found the FCC's delegation of decision-making authority to be unlawful, US LEC and CompSouth note that the Court validated the FCC's use of state commissions for fact-gathering and advice-giving. Based on the Court's sanctioning of fact-gathering and advice-giving roles for state commissions, US LEC and CompSouth argue that it is highly likely the FCC will ultimately call on state commissions to assist with granular, market-specific fact-gathering and to provide expert advice as a part of the FCC's decision-making process. Going forward with the scheduled proceedings may reduce the workload associated with any future FCC-imposed deadlines for fact-gathering or advice-giving with regard to the state of telecommunications competition in North Carolina and could materially shorten the time it takes the FCC to complete the granular review necessary to make impairment determinations for markets in North Carolina. Both proponents of proceeding as scheduled emphasize that fact-gathering by the Commission as to the status of competition in North Carolina will be critical to any decision on access to unbundled network elements, regardless of whether the decision is made by the Commission or the FCC. Therefore, US LEC and CompSouth contend strongly that proceeding with the scheduled hearings will not be a waste of time even if the Commission should later need to re-open the hearings to gather additional facts in light of any post-*USTA II* changes in the TRO's impairment determinations.

The arguments on both sides are nearly equally compelling. These arguments, combined with the current regulatory, judicial, and market uncertainty, render this procedural decision extraordinarily difficult. The dilemma is exacerbated by the sharp split among members of the FCC, both as to the substantive merits of the TRO itself and as to the procedural path that should be followed in the wake of the Court's

decision. The highly-charged differences among these bright people of good will as to how the law should be interpreted in the public interest mirror the national clash of conflicting positions and signal the importance and difficulty of the underlying policy and legal issues. It is critical that regulatory commissions and markets not become further immobilized in the face of the confusion and it is incumbent on this Commission to exert all efforts to bring some clarity to the situation, even if that is measured only in incremental steps towards better understanding of the issues. Thus, the Chair is persuaded that good cause exists to proceed with the hearings under the terms announced herein. Holding such hearings will be an efficient use of time for both the Commission and the parties, who have already prepared their cases and put a great deal of time and effort in meeting the stringent deadlines imposed by the Commission's October 22, 2003 Procedural Order. The Chair also believes that:

- Regardless of whether *USTA II* stands or is modified or reversed, the FCC will need to call on the fact-gathering resources and capabilities of the Commission to determine the status of telecommunications competition in North Carolina;
- Factual evidence introduced at these hearings and at any subsequent hearings will have relevance to the decisions the FCC or this Commission will ultimately make regarding impairment and access to unbundled network elements; and
- There is benefit in maintaining forward movement in the fact-finding process and in having conversation about the current status of competition in North Carolina's geographic markets.

Accordingly, the sooner the Commission is more educated to the parties' views, the better the Commission can serve the interests of the parties, the Commission, and---most significantly---the public of North Carolina. This is true both in terms of efficiency and quality of effort in gathering facts and, if and when asked, in providing sound advice to the FCC. The views in which we are particularly interested include the parties' positions regarding the requirements and effects of the TRO, the practical results and ramifications of the *USTA II* opinion, future expectations related to resolution of any *USTA II* appeals, and other matters which involve TRO-related issues that may come before the Commission prior to final resolution of *USTA II* and the TRO. Finally, and of equal importance, the Chair believes that these hearings should help inform the Commission as to the current status of competition in North Carolina's geographic markets and that such information will be valuable to the Commission in exercising its authority regarding unbundling under N.C.G.S. § 62-110(f1) and § 271 of the Act.

Accordingly, the Chair concludes that:

1. The hearings in both Docket Nos. P-100, Sub 133q and P-100, Sub 133s will convene at 9:00 a.m., on Tuesday, March 23, 2004, in the Commission Hearing Room 2115, Dobbs Building, 430 North Salisbury Street, Raleigh, North Carolina;

2. The Commission will enter the pre-filed testimony submitted by the parties into the record and it shall be received subject to the right of cross-examination by any active party of record. Any and all cross-examination of witnesses shall occur at such later time and place as is ordered by the Commission. Witnesses need not be present at these hearings. The parties shall be responsible for identifying the pre-filed testimony to be received and for providing copies to the court reporter;

3. After the pre-filed testimony has been received, parties through their counsel will address the Commission regarding their positions as to such matters referenced hereinabove. The parties are urged to confer with a view toward determining whether those having common interests can present unified statements. The parties shall also be prepared to discuss procedural matters in these dockets, including but not limited to the need to continue or close the discovery period, the completion of outstanding discovery, and anticipated actions and motions regarding matters, proceedings and dockets believed to be affected by TRO and *USTA II*. In addition, the parties are requested to address the Public Staff's comment directed to maintaining the status quo regarding agreements that may be affected by issues subject to appeal in *USTA II*. The parties should be prepared to inform the Commission as to their views of the current status of competition in North Carolina's geographic markets and to respond to the Commission's questions;

4. Pending the hearings on March 23, 2004, the Commission suspends its procedure for hearing motions to compel and will not hear any such motions prior to the hearing. Also pending said hearings, the parties are relieved from the requirement imposed by Commission Procedural Order dated October 22, 2003 to provide a proposed order of witnesses and approximate cross-examination times; and

5. Pending further order from the Commission, the parties shall continue to remain available for hearings or other proceedings in these dockets from Monday, May 10, 2004, at 1:00 p.m. through Friday, May 14, 2004, at the Commission Hearing Room and as previously reserved for "overflow hearings."

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 12th day of March, 2004.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2004, a copy of the foregoing document was serviced on the parties of record, via US mail:

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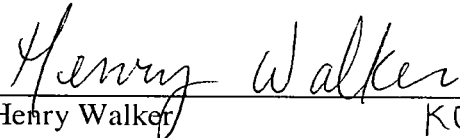
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