AT&T



Suite 1200
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March 15,1999

David Waddell
Executive Director
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re: *BellSouth Telecommunications, Inc's Entry Into Long Distance (InterLata) Service in Tennessee Pursuant to 271 of the Telecommunications Act of 1996*

***Docket 97-00309***

Dear Mr. Waddell:

Pursuant to Authority's March 11, 1999, Notice, Enclosed are the original and thirteen copies of AT&T's Comments on BellSouth's Motion to Remove Item No. 1 From March 16, 1999 Final Conference Agenda. Due to time constraints, AT&T has not attached to its Comments copies of certain material referenced therein (i.e., articles from the *Birmingham News* and *USA Today* and from BellSouth's filing in Georgia). However, counsel for AT&T will have copies available at the Directors' Conference for the Authority or any party who desires a copy.

Copies of AT&T's Comments are being served on all parties of record as indicated on the attached certificate of service. Thank you for your assistance. If you have any questions, please do not hesitate to call.

Sincerely,

Jim Lamoureux

cc: all parties

**BEFORE THE**
**TENNESSEE REGULATORY AUTHORITY**
Nashville, Tennessee

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| In re: | ) | |
| BellSouth Telecommunications, Inc.'s | ) | |
| Entry Into Long Distance (InterLATA) | ) | Docket No.: 97-00309 |
| Service in Tennessee Pursuant to | ) | |
| Section 271 of the Telecommunications | ) | |
| Act of 1996 | ) | |

**AT&T'S COMMENTS ON BELLSOUTH'S MOTION TO REMOVE ITEM NO. 1 FROM MARCH 16, 1999 FINAL CONFERENCE AGENDA**

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Pursuant to the Authority's March 11, 1999, Notice in this proceeding, AT&T hereby submits its Comments on BellSouth's March 10, 1999, Motion to Remove Item No. 1 From March 16, 1999 Final Conference Agenda. BellSouth apparently believes that its status as petitioner in this proceeding confers the right to control the Authority's calendar, including final disposition of the proceeding. While BellSouth certainly is "the party seeking relief in this proceeding," *BellSouth Proposed Order* at 1, BellSouth should not be able to rely on its status as petitioner to hold the Authority and the other parties hostage to an endless, open-ended proceeding.

More importantly, BellSouth ignores the interests of Tennessee consumers in the outcome of this proceeding. BellSouth should not be able to continue to stonewall and delay the establishment of local competition in Tennessee, to the detriment of Tennessee consumers. This case is not just about BellSouth, and its desire to provide long distance services; at the heart of this case is a determination of whether BellSouth has opened its local monopoly to competition.

Thus, the mere fact that BellSouth is petitioner should not be enough to delay resolution of this case. The interests of Tennessee's consumers should be paramount, and those interests are not well served by delaying resolution of the issues in this proceeding. This case has consumed a substantial amount of the Authority's and the parties' time and resources, and if the Authority is prepared to render a decision on the merits in this case, it should do so, to the benefit of Tennessee consumers.

BellSouth initiated this proceeding December 12, 1997. It has thus been over fifteen months since BellSouth filed its SGAT and sought the TRA's endorsement of BellSouth's request to provide long distance services in Tennessee.[1] In those fifteen months, the parties have participated in status conferences, filed pre-hearing briefs, filed issues lists, conducted written discovery, engaged in workshops, submitted testimony, participated in hearings, filed post-hearings briefs, filed proposed findings of fact and conclusions of law, and filed reply proposed findings of fact and conclusions of law. Inconceivably, after fifteen months, and on the eve of the TRA's decision, BellSouth suggests that it is somehow premature for the TRA to act "on the merits of BellSouth's request for 271 relief." *BellSouth Proposed Order* at 1. Indeed, BellSouth now requests that the TRA ***indefinitely*** defer "any decision on the merits" of this case until an unspecified "later date to be determined." *Id.* at 2. BellSouth's Motion is squarely at odds with the procedural posture of this case.

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[1] The case itself has been open even longer than that. The TRA initiated this proceeding at a regularly scheduled Directors' Conference on March 4, 1997. *See Order Instituting Formal Inquiry and Adopting Procedure*, Docket No. 97-00309 (March 21, 1997). Thus, this case has been ongoing for over two years.

Moreover, none of the reasons set forth by BellSouth are valid justifications to delay resolution of this proceeding. First, the fact that the TRA has not yet rendered a final decision in the UNE cost case should not postpone a decision by the TRA on the remaining issues in this case. Based on the substantial record in this case, the TRA certainly can render its judgment on the remaining issues and simply defer judgment on the issue of cost-based rates until it renders its final judgment in the UNE cost proceeding, or the TRA can do as AT&T suggested from the very beginning of this proceeding: it can reject BellSouth's SGAT, dismiss this proceeding until cost-based UNE rates are established in Tennessee, and instruct BellSouth not to file its SGAT or 271 case until it is truly prepared to file at the FCC and to demonstrate compliance with the Act.

Second, as to the issue of supplementing the record, BellSouth is incorrect both factually and logically. It is not AT&T or NEXTLINK who desire to supplement the record in this proceeding. Rather, BellSouth, after the hearing was concluded, and after post-hearing briefs had been filed, supplemented the record with a substantial volume of additional information and evidence. AT&T and NEXTLINK ***agreed*** to allow this information into the record if AT&T and NEXTLINK were provided an opportunity to respond.

Moreover, there is no disagreement about the scope of AT&T's filing; AT&T has agreed with BellSouth that, since BellSouth's filing is a Tennessee-specific version of the information BellSouth filed with the FCC in support of its 271 Louisiana II filing, AT&T will file its FCC material with the TRA. The only disagreement rests with BellSouth as to the scope of its ***response*** to AT&T's filing. BellSouth argues that it should be permitted to file ***any*** information it desires, including current information, new information, and additional information to that already in the record, in response to AT&T's filing. Thus, in essence, BellSouth once again hopes to "supplement" the record in this proceeding, without the benefit of discovery, a hearing,

or other due process protections. This is contrary to the agreement reached by the parties to allow BellSouth's supplemental filing into the record.[2]

Nor should this dispute postpone the TRA's decision. BellSouth's supplemental material is in the record. AT&T is prepared to file its material immediately. Moreover, all of the information is in the public record by virtue of the FCC Louisiana II proceeding. More importantly, all such information was considered by the FCC in rejecting BellSouth's Louisiana II application. If the TRA is prepared to issue its decision based on the record as it stands today, then it should do so.

Third, the transcript of the Denk deposition should in no way delay the TRA's decision. The Denk deposition only confirms that BellSouth's Tennessee PCS study suffers precisely the same flaws identified by the FCC in BellSouth's Louisiana PCS study. The Denk deposition will not further advance BellSouth's PCS arguments. Moreover, BellSouth has never even asserted that it would rely on the PCS study conducted by Mr. Denk in support of its case. Rather, the PCS study was filed at the direction of the TRA based on the testimony of Mr. Varner at the hearing. Once again, if the TRA is prepared to render a decision on the record as it stands today, it should do so.

Finally, the remaining issue with NEXTLINK should not postpone the TRA's decision. The record on this issue has been fully developed, and the TRA should be prepared to render a decision on the issue. That the parties continue to negotiate the issue should not delay the TRA's

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[2] BellSouth's position, however, demonstrates BellSouth's *modus operandi* in this proceeding: file prematurely, continue to file volumes of material in support of a premature filing, attempt to "supplement" the record without the benefit of a hearing, and seek a favorable decision through attrition.

decision on it. Moreover, any decision on this issue by the TRA can be modified if the parties reach agreement on it after the decision is issued. In short, all of the "reasons" identified by BellSouth in its Motion are insubstantial; none are sufficient to warrant further delay of this proceeding.

In addition to lacking viable reasons, BellSouth's Motion also is curious, given BellSouth's own repeated insistence that the TRA not delay resolution of this proceeding. As early as April 25, 1997—almost two years ago—BellSouth objected to the April 18, 1997, Hearing Officer's Report, which established certain procedures for the conduct of this proceeding. In particular, BellSouth objected to the requirement that it update its 271 filing with respect to all changes, revisions, or corrections, on the ground that such "a requirement could become a 'tool' that intervenors could use to delay the proceedings at either the TRA or the FCC." *BellSouth's Objections to Hearing Officer Report and Recommendation*, Docket No. 97-00309 at 5 (April 25, 1997). Further, BellSouth objected, ***on behalf of Tennessee consumers***, to the requirement that the 90 day notice period begin anew if BellSouth decides to proceed under a different 271 Track. Indeed, BellSouth objected, that, "***most importantly***, adoption of the Hearing Officer's recommendation could unduly delay BellSouth's entry into long distance to the detriment of Tennessee consumers." *Id.* at 2.

Similarly, in its April 25, 1997, Pre-Hearing Brief, BellSouth complained more than once about a potential delay in the proceedings. Thus, BellSouth complained that intervenors' "convoluted" interpretation of Track B "would only serve to delay full competition in the telecommunications market." *BellSouth's Pre-Hearing Brief*, Docket No. 97-00309 at 9 (April 25, 1997). In addition, BellSouth complained that delay of the 271 proceeding while the UNE cost case was concluded "could take months, if not longer." *Id.* at 17. Once again, BellSouth

complained not for itself, but on behalf of Tennessee "consumers, [who] would be denied the substantial benefits associated with BellSouth's competing for long distance customers." *Id.* Ironically, BellSouth railed that "Congress did not intend such a result or to put the timing of opening the Tennessee long distance market into the hands of BellSouth's competitors." *Id.*

BellSouth's Motion also is directly contrary to statements made by BellSouth at the January 22, 1998, Status Conference. There, counsel for BellSouth requested of the Hearing Officer precisely the opposite of what BellSouth now opposes—a speedy resolution of this proceeding. Indeed, contrary to BellSouth's suggestion in its *Proposed Order* that BellSouth should be entitled to seek delay because BellSouth is the "party seeking relief in this proceeding," at the Status Conference, counsel for BellSouth represented to the Hearing Officer that it was in the in the best interests of Tennessee consumers that this case be resolved quickly:

> ***I think it's in everybody's interest, particularly the consumers of Tennessee, to have any problems identified now*** rather than July. By going through the competitive checklist, the TRA can look at each of the 14 things that BellSouth must do to open -- to show that the market is open to competition and can satisfy itself that either BellSouth has done or has not done what is legally required. And if BellSouth has not done something, the TRA can say, you haven't done this, and here is what you need to do to fix it. Again, ***that should be done sooner rather than later.***

January 22, 1998, Status Conference, Tr. at 8-9. (Emphasis added.)[3] Moreover, again contrary to BellSouth's Motion, BellSouth represented that the TRA should render a decision, even

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[3] Similarly, in its January 20, 1998, Statement of Issues and Comments, BellSouth argued, "it is not in the interests of Tennessee consumers for this critical hearing to be delayed." *BellSouth's Proposed Statement of Issues and Comments*, Docket No. 97-00309 at 6 (January 20, 1998).

though certain matters, including a decision in the UNE cost case, remained outstanding.

Counsel for BellSouth was quite emphatic that:

> there's no reason why the TRA cannot continue to look at the case and look at the other issues that are crucial to competition other than cost-based rates. That's what's happened in almost every other state in our region.

*Id.* at 10.[4] Indeed, counsel for BellSouth stressed that it was "***imperative that the TRA press forward***, [and that] the TRA look at the other items in the checklist that have to be satisfied in order for BellSouth to show compliance." *Id.* Counsel for BellSouth even suggested that it would be in the best interests of the CLECs to press forward with the case:

> If all these competitors want to get in this marketplace and serve Tennessee consumers, if there's something that BellSouth is not doing that is -- or something it is doing that is preventing those competitors from getting in the marketplace, ***shouldn't the TRA know that now? And shouldn't the TRA deal with that now*** rather than sometime in August or sometime in September when the cost docket's -- and then we're right back here again with the same cast of characters, making the same arguments, and looking at the same issues. ***That ought to happen now.***

*Id.* at 16-17. (Emphasis added.)

BellSouth's Motion is similarly contrary to statements made by BellSouth to the Georgia Public Service Commission. On March 5, 1999, in a briefing to Georgia Commission on the

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[4] *See also id.* at 21-22 ("Why simply delay until the prices are set and then take up all the other issues that we're going to have to resolve at some point in time in the future? Why not do those now, knowing that prices are going to be set, we're going to have cost-based rates, and those are going to be folded in the SGAT, they're going to be put in the interconnection agreements, and we're going to move forward? That's what BellSouth – BellSouth believes that is the most efficient, expedient way to handle these proceedings.")

effect of the Supreme Court's January 25, 1999, decision, BellSouth urged the Georgia Commission not to delay resolution of the 271 proceeding pending before the Commission. Thus, even though BellSouth agreed that the Supreme Court's decision "represents a significant change in the applicable law," *BellSouth's Comments Addressing the Impacts of AT&T Corp. v. Iowa Utilities Board*, Docket Nos. 6863-U, 7253-U at 1 (March 5, 1999), and that BellSouth's obligations "may change in the future," *id.* at 2, BellSouth nonetheless urged the Georgia Commission to "promptly enter an order finding" that BellSouth's entry into the long distance market in Georgia is in the public interest. *Id.* BellSouth suggested that the Georgia Commission "need not and should not wait for the outcome of the lengthy administrative and judicial proceedings spawned by the Supreme Court's decision to enter such an order." *Id.* Directly contrary to BellSouth's Tennessee Motion, in Georgia, BellSouth opined that the Commission should not "delay this proceeding until all of these issues have been finally resolved, which could take months if not years." *Id.* at 16.

BellSouth's request to indefinitely postpone this proceeding also is fundamentally inconsistent with recent public statements by BellSouth's Chairman and CEO, Duane Ackerman. In the last two weeks, Mr. Ackerman has twice asserted that BellSouth would enter the long distance market by the end of this year. *See Birmingham News,* March 11, 1999, ("Even so, Duane Ackerman believes BellSouth will be in the lucrative long-distance business by year's

end."); *USA Today*, March 1, 1999 ("We continue to press for long-distance relief. It could be in Georgia; it could be in Mississippi. I suspect it will be in the second quarter. I believe we will see this barrier broken in 1999.").[5] Mr. Ackerman's desire to "see this barrier broken" as early as the end of this year is squarely at odds with BellSouth's request in this proceeding to have the TRA delay indefinitely postpone its decision on the merits.

The fundamental inconsistency of BellSouth's Motion with its prior representations to the TRA, with its representations to the Georgia Commission, and with its prior public statements suggests an alternative, and more plausible, basis for BellSouth's Motion—to avoid a decision on the current record before the TRA, and to "supplement" the record with additional information, evidence, and testimony not subject to a hearing or other aspects of due process. The TRA should refuse to condone such efforts.[6] Moreover, to guard against such actions in the future, the TRA should admonish BellSouth not to initiate any Tennessee 271 proceedings until BellSouth is actually prepared to file a 271 request with the FCC and to demonstrate, based on a sufficient

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[5] Similarly, at a presentation to the Optimist Club in Mississippi on March 10, 1999, a BellSouth representative asserted that its network was open to competition and that it was eager to begin providing long distance services in Mississippi.

[6] As AT&T has learned in recent proceedings, only through a comprehensive procedural process—including discovery—is it possible to reveal some of the infirmities in BellSouth's case. Thus, given an opportunity to conduct depositions in North Carolina in December, AT&T uncovered substantial and material inaccuracies and contradictions in BellSouth's evidence, which otherwise would have gone undiscovered. Similarly, if this proceeding is resumed, or if BellSouth initiates another proceeding, AT&T intends to pursue discovery—including depositions—rather than allow BellSouth to put on its case through phantom evidence under the guise of "supplementing" the record.

evidentiary record, that BellSouth has complied with all of the provisions of the Act and that its local market in Tennessee is actually open to competition.[7]

For BellSouth to complain now, fifteen months after it began this proceeding, that it is "premature" for a decision on the merits is ludicrous. It also compels the conclusion that BellSouth had no intention whatsoever of applying to the FCC for 271 relief on December 12, 1997, when it began these proceedings. BellSouth can not have it both ways. If it is ***now*** premature for the TRA to issue a decision on the merits in this case, then it was premature for BellSouth to have filed its SGAT with the TRA more than fifteen months ago. On the other hand, if BellSouth stands by its original December 12, 1997, filing (which implied that BellSouth was prepared to file a Tennessee 271 application with the FCC), then there should be no reason to delay the TRA's resolution of this proceeding.

If BellSouth is correct in its Motion, then the proper course is ***not*** to delay the proceeding. Such action would only allow BellSouth to continue unimpeded in its efforts to introduce more and more evidence into this proceeding without the benefit of a hearing or other fundamental due process protections. Rather, the proper course is for the TRA to accept BellSouth at face value—to accept that BellSouth can not now sustain its burden of demonstrating that it has complied with the Act, to reject BellSouth's SGAT, and to decline to

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[7] BellSouth has suggested before that it must submit additional evidence in this proceeding because of the "fluid" nature of the 271 process. *See* Directors' Conference, Feb. 03, 1998, at 18-19. However, if the 271 process is "fluid," it is only because BellSouth has made it so, by initiating SGAT and 271 proceedings prematurely, and by initiating multiple proceedings, in multiple fora at multiple times.

issue a favorable recommendation as to BellSouth's compliance with the 14 point checklist. In short, the TRA should dismiss this proceeding without prejudice, and should admonish BellSouth to re-file only when it is prepared to demonstrate compliance with the Act and when it actually has some intention of filing a 271 application with the FCC.

Respectfully submitted,

**AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC.**

By: _____

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Dated: March 15, 1999

## CERTIFICATE OF SERVICE

I, James P. Lamoureux, hereby certify that on this 15th day of March 1999, a true and correct copy of the foregoing has been delivered via U. S. Mail, postage prepaid to the following counsel of record:

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