Jim Lamoureux
Senior Attorney
Law and Government Affairs
Southern Region
jlamoureux@att.com

Promenade 1
1200 Peachtree Street N.E.
Atlanta, GA 30309
404 810 4196
FAX: 404 810 5901

February 22, 1999

By Hand

David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: *Proceeding to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements*
Docket No. 97-01262

Dear Mr. Waddell:

Pursuant to the February 10, 1999, Notice, please find enclosed the revised filing of AT&T's Response to BellSouth's Petition for Reconsideration and Clarification. It has been discovered that some errors occurred in the preparation and printing of this document. I apologize for any inconvenience this might have caused.

Copies have been served upon counsel for all parties of record as indicated on the attached certificate of service.

Sincerely,

Jim Lamoureux

Encls.

cc: Counsel for all Parties of Record (w/encls.)

BEFORE THE
TENNESSEE REGULATORY AUTHORITY

In Re: Petition to Convene A Contested Case Proceeding to Establish Permanent Prices for Interconnection and Unbundled Elements	))))	Docket No. 97-01262

AT&T'S RESPONSE TO BELLSOUTH'S PETITION FOR RECONSIDERATION AND CLARIFICATION

Pursuant to the February 10, 1999, Notice issued by the TRA, AT&T hereby submits its Response to BellSouth's Petition for Reconsideration and Clarification of the TRA's January 25, 1999, Interim Order on Phase I ("Interim Order") in this proceeding. AT&T respectfully requests that the TRA generally deny BellSouth's Petition, which sets forth no legally or logically valid reason to rehear or reconsider the Interim Order. BellSouth's Petition rehashes arguments BellSouth presented at the hearing and in its post-hearing brief, but fails to identify a single issue on which the TRA's Interim Order is inconsistent with Tennessee or federal law, or the facts contained in the record of this proceeding.

On the contrary, the TRA's Order generally is well-reasoned and well-grounded in the voluminous record of this proceeding, is consistent with federal and Tennessee law, and implements sound public policy in the best interests of Tennessee consumers. AT&T does agree, however, that the TRA should reconsider any aspects of its Interim Order affected by the decision of the United States Supreme Court. When it issued its Interim Order, the TRA did not have the benefit of the Supreme Court's decision, which was issued the same day the TRA issued its Interim Order. Therefore, the TRA should reconsider its Interim Order in light of the

Supreme Court's decision.[1] In particular, as set forth in greater detail below, the TRA should reconsider its decision concerning integrated digital loop carrier in light of the decision of the Supreme Court. AT&T supports MCI's request that the TRA establish a schedule for the parties to submit comments on the effect of the Supreme Court decision on this case.

INTRODUCTION

In its Interim Order, issued January 25, 1999, the TRA resolved several policy issues, and issues relating to cost model inputs necessary to establish permanent prices for unbundled network elements purchased from BellSouth in Tennessee. BellSouth now protests several of the TRA's decisions in its Interim Order. In particular, BellSouth protests the TRA's decisions on: (1) fill factors and utilization rates, (2) depreciation, (3) network maintenance expenses, (4) switching model inputs and assumptions, (5) physical collocation, (6) operational support systems costs, (7) non-recurring prices, (8) disconnect costs, and (9) integrated digital loop carrier. In short, BellSouth now requests that the TRA reconsider one or more aspect of nearly half of all the issues resolved by the TRA in its Interim Order.

Not surprisingly, BellSouth's suggested resolution on each of the issues addressed in its Petition would raise the price of unbundled network elements. BellSouth's Petition is thus nothing more than a calculated effort to increase the price of unbundled network elements in Tennessee and continue to deny Tennessee consumers the benefit of local competition.

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1 AT&T also agrees that there are some minor aspects of the Interim Order which would benefit from clarification, as identified below.

BellSouth's Petition should be denied for at least two reasons. First, it raises legally insufficient grounds for rehearing or reconsideration under Tennessee law. Second, for the reasons set forth below, the TRA's Interim Order is fully consistent with federal and Tennessee law, the weight of the evidence in this case, and, most importantly, the interests of Tennessee consumers.

I. BELLSOUTH'S PETITION IS LEGALLY INSUFFICIENT UNDER TENNESEE LAW

T.C.A. § 65-2-114 provides for rehearing in contested cases before the Authority, and T.C.A. § 65-2-116 sets forth the permissible grounds upon which such a petition may lie.[2] The TRA may grant a petition for rehearing ***only*** upon a showing of: (1) a material error of law; (2) a material error of fact; or (3) the discovery of new evidence which could not have been previously discovered by due diligence. T.C.A § 65-2-116. BellSouth's Petition fails on each of these grounds.

First, BellSouth's Petition raises no allegation of new evidence, and, indeed, there is no such evidence. Second, BellSouth raises no allegation of any material errors of law; in fact, BellSouth's Petition contains no reference to any law whatsoever, other than the recent decision of the United States Supreme Court. Finally, BellSouth's Petition fails to demonstrate any material errors of fact. While BellSouth's Petition discusses some of the record evidence in this proceeding, it fails to demonstrate a single instance in which the TRA erred in its interpretation

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2 Within the Tennessee Uniform Administrative Procedures Act, T.C.A. § 4-5-317 also provides for petitions for reconsideration in contested cases before state agencies.

of the record evidence in this proceeding.

In short, BellSouth's Petition alleges merely that the TRA's decision does not comport with the testimony ***BellSouth presented*** at the hearing or with ***BellSouth's interpretation*** of the evidence in the record. However, the fact that the TRA heard and considered BellSouth's evidence, and, in light of all the other evidence adduced at the hearing, issued a decision with which BellSouth disagrees, is not error (let alone material error), and it certainly is no basis for a rehearing or reconsideration.

Contrary to BellSouth's Petition, proffered errors of fact must present more than simply re-argument of a record fully developed and considered by the TRA. Memphis Fire Insurance Co. v. Tidwell, 495 S.W.2d 198 (Tenn. 1973) (allegations of "material error" were actually re-argument of matters considered and determined in original opinion and thus insufficient as a matter of law). Thus, any "petition to rehear which points out no matter of law or fact overlooked by the Court, and only seeks to reargue matters which counsel insists were improperly decided, presents no ground for a rehearing." Sparkman v. State, 469 S.W.2d 692, 699 (Ct. Crim. App. 1970); see also Abernathy v. Chambers, 482 S.W.2d 129, 132-33 (1972)("It is fundamental that the 'purpose of a petition to rehear is not to re-argue the case on points already considered by the Court; but rather, to call to the Court's attention some new and decisive authority which it overlooked"); City of Nashville v. State Board of Equalization, 360 S.W.2d 458 (1962) (petition for rehearing "should *never* be used merely for the purposes of re-

arguing the case on points already considered and determined") (emphasis added).[3]

Errors of fact and law are limited to "any decisive matter of law or fact" which is in the record before the TRA but overlooked in its opinion. Id. Moreover, "the mere fact that [the Court's] interpretation of a given fact differs from appellant's interpretation does not mean that [the Court] overlooked something." Mitchell v. Garrett, 510 S.W.2d 894, 898 (1974); see also Sparkman, 469 S.w.2d at 699 ("The office of a petition to rehear is to bring to the attention of the Court matters of fact or law improvidently overlooked, not matters which counsel supposes were decided incorrectly.")

There is nothing offered by BellSouth in its Petition that was overlooked by the TRA--only BellSouth's continuing disagreement with the TRA's judgment, reached after consideration of a full record. Moreover, while the Supreme Court decision certainly affects one of the issues in the Interim Order, BellSouth's assertion as to the effect of the Court's decision is inaccurate. Thus, as a matter of law, BellSouth's Petition should be denied.

II. FILL FACTORS AND UTILIZATION FACTORS

While BellSouth complains about the fill factors adopted by the TRA, it is clear that, when stripped of its rhetoric, BellSouth's Petition is actually based on nothing more than BellSouth's disagreement with the factors adopted by the TRA, and not on any factual error committed by the TRA or failure of the TRA to rely upon the record. Indeed, the TRA's

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3 Moreover, federal courts of appeal review denials by district courts of motions for new trials for an abuse of discretion only, and ordinarily find no abuse of discretion absent a definite and firm conviction that the trial court committed a clear error of judgment. See Anchor v. O'Toole, 94 F.3d 1014, 1021 (6th Cir. 1996).

decision on this issue is amply supported by the record in this proceeding. Under Memphis Fire, Sparkman, Abernathy, et. al., BellSouth's Petition raises no legitimate basis for the TRA to reconsider or rehear this issue and should, therefore, be denied.

BellSouth admitted that the unadjusted fill factors in its cost study were historic fill factors, and BellSouth provided no support to suggest that these were the same factors an efficient competitor will compute, going forward. (Caldwell, Tr. v. 2, 224-25.) Moreover, contrary to BellSouth's Petition, there is ample evidence in the record that BellSouth's actual historic fill factors and utilization rates are not forward looking and are inappropriate for determining TELRIC prices. (See Wells Reb. 22-26; Carter Reb. 39-45.) Thus, the TRA is correct in its Interim Order that "a reasonable projection is not necessarily the actual fill level in the network today as employed by BST's TELRIC Calculator model." Interim Order at 12. Also contrary to BellSouth's Petition, Mr. Wells' and Mr. Carter's testimony does indeed demonstrate that fill factors and utilization rates in the future will change and that the historic fill factors and utilization BellSouth proposed are imprudent for determining TELRIC prices. (Wells Reb. 22-23, 25-2627-30; Carter Reb. 40-45.)

In addition, BellSouth witness Gray admitted that 50% of the copper pairs in Tennessee were not currently being used. (Gray, Tr. v. 4, 292.) Such placement of excess cable, without regard for anticipated demand, clearly inflated BellSouth's fill factors, and amply supports the TRA's rejection of those fill factors. Moreover, as to BellSouth's reliance on Mr. Gray's endorsement of BellSouth's fill factors, the record demonstrates that Mr. Gray admitted that BellSouth's fill factors were nothing more than its "traditional, historical values." (Wells Reb. 26.) Moreover, Mr. Gray admitted that he never looked at those factors, had no idea what they were, and his endorsement of them was based entirely on testimony of other BellSouth

witnesses. Id. at 26-27.

Finally, it is clear that under the FCC's TELRIC pricing rules, BellSouth's historic fill factors reflect an impermissible embedded approach to UNE pricing. See, e.g., 61 Fed. Reg. 169 at 45543 ("Embedded costs are the costs that the incumbent LECs carry on their accounting books that reflect historical . . . operating procedures.") In short, there is ample legal and record support for the TRA's rejection of BellSouth's fill factors, and the TRA committed no error in rejecting BellSouth's proposed fill factors.

Moreover, BellSouth is absolutely incorrect that the TRA's fill factors are unrealistic and that there is no support in the record for the TRA's fill factors. Apparently, BellSouth has not reviewed the record in sufficient detail. The factors proposed by Dr. Kahn were supported in Dr. Kahn's own testimony. In addition, however, those factors are supported by Mr. Wells' and Mr. Carter's testimony. Indeed, both Mr. Wells and Mr. Carter proposed fill factors ***higher*** than those proposed by Dr. Kahn and adopted by the TRA. Mr. Wells proposed a distribution fill factor of 70% (Wells Reb. 22), and Mr. Carter proposed a feeder fill factor of 80% (Carter Reb. 45).

Both Mr. Wells' and Mr. Carter's proposed fill factors were supported by detailed analysis and supporting evidence. (See, e.g., Wells Reb. 24-30.) Contrary to BellSouth's Petition, Mr. Wells' and Mr. Carter's proposed fill factors did take into account such factors as demand for lines, availability of technology, serving area characteristics, and number of pairs per living unit. Id. at 27-29. AT&T and MCI's proposed fill factors, therefore, did not represent fill at relief levels or eliminate spare capacity, as blithely suggested in BellSouth's Petition. They simply represented more accurate, more reasonable, and more appropriate estimations of forward looking fill factors.

The TRA chose even more conservative fill factors, which were clearly supported not only by Dr. Kahn's testimony, but also by Mr. Wells' and Mr. Carter's. The TRA, therefore, committed no error in its selection of fill factors, and BellSouth's Petition for reconsideration of this issue should be denied.

III. DEPRECIATION

BellSouth's Petition on depreciation truly reflects nothing more that an effort by BellSouth to re-argue its original position in its testimony and in its post-hearing brief. There is no allegation in BellSouth's petition that the TRA ignored evidence, misrepresented evidence, or committed any other material error of fact. Rather, BellSouth simply believes the TRA did not give sufficient weight to ***BellSouth's evidence***, and, therefore, should have adopted BellSouth's position. That the TRA weighed all the evidence in the case, including BellSouth's, found BellSouth's evidence less persuasive, and thus adopted a position other than BellSouth's, is not material error and thus not proper grounds for rehearing or reconsideration. Memphis Fire, 495 S.W.2d 198 (Tenn. 1973).

BellSouth proposed in this proceeding depreciation lives significantly shorter than the FCC or TPSC adopted lives, which had the effect of increasing depreciation charges beyond what forward-looking depreciation lives permit. Moreover, the BellSouth proposed lives were not Tennessee-specific, unlike the FCC and TPSC lives. (Cunningham Reb. 5.) Rather, they were an average of depreciation lives--constructed by BellSouth for this case--throughout BellSouth's nine state region. Interim Order at 13. This is inconsistent with BellSouth's positions in the proceeding on other issues in which BellSouth demanded that the cost models and their inputs be Tennessee-specific. It is also inconsistent with the TRA's preference in its

Interim Order for "Tennessee specific [depreciation] factors." Interim Order at 13.

Finally, the TRA is absolutely correct that the depreciation lives proposed by BellSouth—and their accompanying multiple binders of supporting material in addition to the many volumes of material supporting the cost studies themselves—were never provided to the TRA for review before this proceeding. Interim Order at 13. For all of these reasons, the TRA's adoption of Tennessee-specific deprecation lives was entirely reasonable and consistent with the record.

The TRA's rejection of BellSouth's lives as too short is also well grounded in the record. BellSouth's lives are based on the "book lives" BellSouth uses for public reporting purposes. (Id. at 3-4, 8.) Such lives are governed by the Generally Accepted Accounting Principle ("GAAP") of "conservatism" that requires BellSouth to err on the side of shorter lives to eliminate any possibility that BellSouth could overstate the value of its assets to stockholders. By using shorter lives for unbundled network elements, BellSouth proposed to recover capital investment costs sooner than the elements' remaining revenue producing lives justify. This accelerated recovery would have provided BellSouth the discriminatory advantage of early capital recovery at the expense of the CLECs, and would have raised the CLECs' cost, placing them in a decidedly non-competitive position.

As noted by AT&T witness Lee, since the early 1980's, changes in technology have had a material impact on depreciation lives, *i.e.,* changes in technology have resulted in the need to shorten lives from what had been accepted historically. Comparison of the FCC-prescribed Tennessee lives to the historic lives that BellSouth proposed confirms this fact. For example, the FCC lives assume, going forward that efficient firms will replace digital switches 5.4 years earlier than historic lives; digital circuits, 4.0 years earlier; aerial cable, 11.4 years; underground-

metallic, 23.6 years; and buried metallic, 9.3 years. (Lee Dir. 13.)

Although the TRA's Interim Order refers to the TPSC lives, the TPSC approved lives and future net salvage values are the same as the FCC lives and future net salvage values. See BellSouth's Response to TCTA's First Data Requests, Item No. 9, Atts. 1 & 3. Thus, as noted by the TRA in its Interim Order, comparison of the rate at which the FCC has permitted BellSouth to recover its investment, to the rate at which BellSouth has been retiring this investment, indicates that BellSouth, *in spite of these technology changes,* is still recovering capital far faster than it has been retiring plant facilities. (Lee, Att. 4, at 4.) Thus, once again, the TRA's adoption of depreciation lives was reasonable and supported by the record, and the TRA should deny BellSouth's Petition.

Finally, BellSouth in its Petition refers to the FCC's October 14, 1998, Notice of Proposed Rulemaking addressing depreciation lives for digital switching. BellSouth's reference to a single fact which did not occur until many months after the hearing occurred (while perhaps par for the course for BellSouth) is not sufficient to compel the TRA to re-open the record in this case. Moreover, if such evidence is to be considered, then all such evidence which demonstrates that forward looking technology has advanced beyond the time of the hearing—e.g., the development and deployment of Next Generation Digital Loop Carrier and the most recent BellSouth switch vendor contracts and discounts—also should be considered in this proceeding.

IV. NETWORK MAINTENANCE EXPENSE

BellSouth requests that the TRA reconsider its decision to reduce BellSouth's plant specific expense by 22.5% below 1996 normalized expense. This would, in effect, lower BellSouth's proposed plant specific expenses by 29.1%, given that BellSouth grew its 1996

normalized expenses for inflation. The TRA's decision on this issue, however, is consistent with its determination that a TELRIC cost study should reflect the forward-looking costs to provide unbundled network elements. No adjustment is warranted, and the TRA should deny BellSouth's Petition.

AT&T recommended that the TRA adopt several adjustments to the level of expenses BellSouth proposed to recover in its cost studies, and resulting UNE prices. AT&T recommended that Network Operating Expense, when used to develop shared costs loadings, be reduced by 50%. (Lerma Reb. 13.) In addition, AT&T recommended that Plant Specific Expense be reduced by removing the inflation/growth factors BellSouth used in the development of its proposed plant specific factors and to recognize the force reductions BellSouth is incurring. (Lerma Reb. 41.) In the case of Network Operating Expense, BellSouth proposed to recover some of these costs through its shared cost loadings and some of these costs through Plant Specific Factors. In the case of Plant Specific Factors, BellSouth proposed to recover the cost to maintain its plant by applying the factors against investment levels.

The TRA appropriately determined that forward-looking costs should be reflective of what an efficient firm would incur, and thus appropriately determined to adjust BellSouth's costs. Moreover, the record fully supports adjusting the plant specific expenses proposed by BellSouth. (See Lerma Reb., Ex. ALR-6.) AT&T proposed that the four major categories of expense that contain plant specific expenses be reduced at a minimum to recognize productivity gains, the deployment of more advanced technology and the continuing improvements that an efficient firm would experience in operating its facilities. (Lerma Reb. 40-41.).

The TRA, based on AT&T's recommendation that all Network Operating Expense should be reduced by 50% (a portion of which is assigned to Plant Specific Expense), apparently found

that the same expectation would be true for the other Plant Specific Expenses. That is, that the level of expenses should be reduced to recognize the forward-looking costs of an efficient firm offering unbundled network elements. The TRA's adjustment, therefore, is supported by the record, and does not warrant reconsideration.

V. SWITCHING ISSUES

With respect to switching, BellSouth's Petition clearly represents no more than a plea by BellSouth that the TRA should have given more weight to BellSouth's evidence than AT&T's. Because it fails to identify a single material error of fact committed by the TRA, BellSouth's Petition should be denied on this issue.

First, BellSouth complains that the TRA should have agreed with BellSouth to run SCIS in the average mode as proposed by Mr. Garfield, rather than in the marginal mode as proposed by Ms. Petzinger and adopted by the TRA.[4] This is nothing more than a criticism that the TRA found AT&T's evidence more credible than BellSouth's, and is not a proper grounds for rehearing or reconsideration. It also demonstrates a fundamental misunderstanding of the term "marginal" as it describes the mode for running SCIS that the TRA adopted.

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4 BellSouth's passing reference to Mr. Garfield as having "worked extensively with the SCIS model" demonstrates the shallowness of BellSouth's Petition. Of course, BellSouth fails to mention that Ms. Petzinger was one of the designers of SCIS, and as leader of the SCIS team, was responsible for the technical development, production, documentation, customer care and cost study consultation for the SCIS family of models. (See Petzinger Reb. 1-2.) BellSouth also fails to mention that Mr. Garfield worked for Ms. Petzinger.

Ms. Petzinger testified that it was improper to run SCIS in the average mode in this instance, not because of any theoretical economic distinction between average and marginal costs, but because of the manner in which SCIS assigns getting started costs when it is run in the two different modes. (See Petzinger Reb. 29-30.) Ms. Petzinger testified that it was clearly improper to run SCIS in the average mode precisely because of this difference. Id. BellSouth's Petition suggests a distinction between the average and marginal modes of SCIS which is simply incorrect.

BellSouth implies that the marginal run is a short run marginal cost identifying only the cost of the incremental unit of demand. This is simply incorrect. The SCIS model always uses a long-run perspective and always calculates costs assuming that the entire switch's demand is the basis of the increment. Thus, the average and marginal SCIS runs are essentially the same but for the treatment of the fixed, getting started cost of a switch. The marginal mode treats the getting started cost of a switch as a fixed investment, assuming the utilization inputs show that the switch is not expected to exhaust. Id. As Ms. Petzinger proposed, and the TRA agreed, the getting started investment should be treated as fixed cost, and added to the line port investments. Id. The marginal run of SCIS generates the more accurate result.

BellSouth's references, therefore, to the testimony of Drs. Kahn and Beard on this issue are inapplicable. BellSouth is either confused about the use of the terms "average" and "marginal" to describe the alternate modes of its own model, or is deliberately misinterpreting those terms to obfuscate this issue. In either case, BellSouth's Petition should be denied. There is ample basis in the record—and no inconsistencies—for the TRA's decision to run SCIS in the marginal mode.

The TRA's decision to adopt the switch discounts recommended by Ms. Petzinger is also

supported by the record. BellSouth does not dispute that the discounts recommended by Ms. Petzinger were derived from her review of BellSouth's own switch vendor contracts. Moreover, the TRA is absolutely correct that the discounts proposed by Ms. Petzinger more accurately reflect BellSouth's forward looking costs than the discounts proposed by BellSouth.

As BellSouth admits in its Petition, the switching costs to be calculated must reflect the total investment required to serve total current demand. BellSouth Petition at 8. TELRIC principles, reflected in the FCC's pricing rules, also require that only current wire centers may be assumed for purposes of the cost study, and an entirely new, cost efficient, network using forward-looking technology must be assumed for purposes of serving current demand from those wire centers. See 61 Fed. Reg. 169 at 45545-46. These principles dictate the use of switch placement costs rather than costs for add-ons to meet growth.

By assuming only the current location of wire centers, the cost study must necessarily forecast switch cost based on placement of new switches to serve demand, rather than current switch capacity plus growth to meet current demand. Focusing on BellSouth's current switch capacity or the historic manner in which BellSouth has purchased switch capacity to serve current demand--i.e., through initial placement plus add-ons for growth--embodies the FCC's definition of a prohibited embedded cost approach. Id. The proper TELRIC approach is to assume the purchase, on a forward looking basis, of switches to serve current demand.

Moreover, BellSouth's proposal to focus only on growth only costs is inconsistent with its approach in determining the cost of the other components of its network, such as outside plant. Indeed, if a growth only analysis were assumed for outside plant, overall costs would likely decrease. BellSouth can not, on the one hand, advocate a growth only analysis for switching, thus increasing switching costs, while simultaneously ignoring the cost-lowering

effects of growth in other network components. Finally, use of replacement discounts, and thus replacement costs, is consistent with the SCIS model's conception of a static analysis, capturing the cost of a new switch, given total current demand. On the whole, therefore, Ms. Petzinger's proposed switch discounts were entirely appropriate, and the TRA committed no error in adopting the switch discounts she proposed.

Finally, the TRA should not disturb its conclusion that the price of the port includes all features at no additional charge. Ms. Petzinger never denied that for a very small subset of features, such as Three-Way Calling, special equipment may be required in a switch. However, Ms. Petzinger also made clear that this equipment was already included in the general prices for switches in BellSouth's vendor contracts and in the costs that SCIS produced in BellSouth's cost studies. Thus, while in theory additional equipment may be necessary for some features, in actual practice, the cost of such equipment was included in BellSouth's contracts, and more importantly, those costs were already included in BellSouth's cost studies. To add such costs again in the form of separate additional feature costs would result only in a double count of costs and a windfall for BellSouth. In short, despite BellSouth's protestations to the contrary, there are no additional costs to be added for vertical features, precisely because the cost studies already capture all costs associated with such vertical features. BellSouth's Petition on this issue should be denied as well.

VI. OPERATIONAL SUPPORT SYSTEM COSTS

BellSouth is simply wrong that the TRA's decision on this issue is not supported by the record. In his rebuttal testimony, Mr. Ellison specifically addressed this issue head on. He testified:

> However, should the Authority decide to address these charges in the current proceeding, it should reject BellSouth's proposed method of recovering costs. Investments in electronic interfaces, just like one-time investments in loops or switches, provide long-term consumer benefits and reflect assets, systems, and capabilities that have extended useful lives, and thus, like one-time investments in loops or switches, should be recovered through recurring charges over those extended useful lives. In this way, each carrier is assessed charges in each period in a nondiscriminatory fashion that appropriately reflect its relative use of the network (and its relative share of the total customer base).

(Ellison Reb. 16-17.) He also testified:

> BellSouth's proposal would establish formidable barriers to entry that will suppress competition by making its competitors pay more of those costs per unit of demand. Contrary to BellSouth's position, as noted in a recent recommendation by an administrative law judge for the New York Public Service Commission, "[t]he telecommunications industry is being reorganized not for the benefit of CLECs but because the state and nation as a whole will benefit from the introduction of vigorous competition, and all participants in that market—ILECs and CLECs alike...should share in the costs of doing so." Recommended Decision by Administrative Law Judge Joel A. Linsider, New York Public Service Commission, Case No. 95-C-0657 at 39 (Oct. 2, 1997).

Id. at 17. Apparently, BellSouth has not reviewed the record.

AT&T also does not agree that the TRA should clarify its decision as suggested by BellSouth. The TRA was clear that all OSS costs should be capitalized and recovered over the life of the OSS using the appropriate depreciation lives. However, AT&T does agree that one aspect of the TRA's decision should be clarified. In its decision on Issue 16, the TRA required that OSS costs be capitalized, and recovered over the life of the OSS using the appropriate depreciation rate. However, in issue 17(b), the TRA required that costs for OSS should be included only in the recurring rate for the loop. Recovering OSS costs through the loop rate only is inconsistent with the purpose for which OSS is used—i.e., to electronically order all

unbundled elements—and is inconsistent with the concept of recovery of OSS costs from all users who benefit from OSS—i.e., including those CLECs who use OSS to order UNEs other than the loop. Moreover, AT&T has been unable to determine any manner by which OSS costs may be incorporated in the recurring rate for the loop only. Therefore, AT&T respectfully requests that the TRA clarify that recovery of OSS costs should be accomplished through an appropriate addition to the recurring rates for all UNEs.

VII. NONRECURRING PRICES

AT&T disagrees that the TRA's decision on this issue requires clarification. BellSouth's original non-recurring cost study assumed a fallout rate of 20%. The Interim Order requires BellSouth to reduce that fallout rate to 7%. This decision is based on evidence presented by ACSI as well as AT&T and MCI that the fallout rate should be much lower than the 20% proposed by BellSouth (AT&T and MCI proposed a 2% fallout rate). The TRA's decision on this issue is unambiguous and amply supported by the record. Accordingly, BellSouth should adjust all manual work activities to reflect a 7%, rather than 20% of occurrence.

In addition, the TRA required BellSouth to modify its cost study to reflect only 3 minutes of work activity at the LCSC. There is no ambiguity in the Interim Order's direction that BellSouth's cost studies should include only 3 minutes of work activity per order. This also is consistent with evidence presented by AT&T and MCI. BellSouth's cost model is designed to provide for cost on a "First" and "Additional" order basis. Thus, costs could vary for work activities that involved more than one request for the same UNE at the same location. AT&T and MCI argued that the LCSC (as well as other work groups associated with fallout) conducts its manual work on a per order basis, rather than a per UNE basis. The TRA's "3 minutes per

order" decision thus ensures that BellSouth will not double recover its non-recurring costs. The TRA's Interim Order on this issue is reasonable and supported by the record and, therefore, does not require reconsideration or clarification.

VIII. DISCONNECT COSTS

BellSouth apparently is not challenging the TRA's decision to remove disconnect costs from its nonrecurring rates and to separately charge for disconnection at the time of disconnection. Moreover, it is now clear as a result of the Supreme Court decision that BellSouth must provide UNE combinations to CLECs. Accordingly, AT&T now understands the TRA's decision on this issue as prohibiting BellSouth from assessing any disconnection costs when a CLEC has purchased a UNE combination to serve a customer and then subsequently loses that customer to another LEC—i.e., in those cases in which no physical disconnection actually occurs. The TRA's decision on this issue is thus consistent with, and indeed required by, the Supreme Court's decision.

IX. PHYSICAL COLLOCATION

BellSouth's Petition on this issue clearly reflects the essence of its Petition as nothing more than an effort to re-argue BellSouth's positions in this case. BellSouth identifies no instance in which the TRA's Interim Order on this issue is contrary to the record or contrary to law.[5] This is simply another instance in which BellSouth disagrees with the fact that the TRA

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5 Moreover, BellSouth is incorrect that the AT&T/MCI model has not been used by any commission. The model was used in Florida in Order No. PSC-98-0604-FOF-TP to set collocation prices.

found the evidence presented by AT&T and MCI more persuasive than the evidence presented by BellSouth.

The record demonstrates that the AT&T/MCI collocation model is designed to produce the forward-looking costs an efficient competitor, operating in Tennessee, would incur--in this case to collocate CLEC equipment in BellSouth's central office space. (Natelli Dir. 8-9.) The developers of the collocation model constructed a forward-looking model central office and a forward-looking collocation area layout based on efficient central office space planning practices and assuming both efficient suppliers and competitive processes. (Hobbs Dir. 2.) Using these models, the developers identified all necessary components of collocation investment, including engineering, furnish, and installation costs. (Natelli Dir. 11.) Using these investment inputs, the AT&T/MCI collocation model calculates recurring costs using the same techniques the Hatfield Model employs in the calculation of recurring costs of unbundled network elements. (Natelli Dir. 14.)

The AT&T/MCI collocation model is thus in no way "fanciful." It is based on real world evidence. Moreover, it stands in stark contrast with the rates BellSouth proposed for collocation, several of which were identified as "ICB" or individual case basis. Thus, the TRA is absolutely correct that BellSouth offered little evidence to support its rates, because, for the largest cost components of collocation (space construction and space preparation), BellSouth actually offered no rates.

Moreover, the AT&T/MCI model is in no way inconsistent with the Act. Indeed, it is now clear that the sort of model presented by AT&T/MCI is required under the Act, as implemented by the FCC's regulations. The FCC's pricing regulations are absolutely clear that "collocation should be subject to the same pricing rules [as other unbundled elements]." 61 Fed.

Reg. 169 at 45542. Those FCC pricing rules require that prices be set at forward looking long run economic cost. Id. at 45543. The FCC has made clear that this standard is "intended to consider the costs that a carrier would incur in the future." Id. at 45545. Further, the FCC has clarified that this standard presumes the current ***location*** of wire centers, but requires a "reconstructed" local network to connect those wire centers to serve demand. Id. The FCC also has clarified that the standard requires what BellSouth complains is improper—the use of a "hypothetical" network to connect current wire center locations to serve demand. Id.

Therefore, just as it would have been improper for BellSouth to cost out loops using only the historical configurations of loops in BellSouth's network without any modifications to reflect forward looking costs, it is improper to cost collocation based on the historical configuration of space in BellSouth's central offices. Thus, not only is the TRA's Interim Order on this subject amply supported by the record, it is absolutely required by the FCC's pricing regulations.

X. INTEGRATED DIGITAL LOOP CARRIER

AT&T agrees that the TRA should reconsider its decision on integrated digital loop carrier ("IDLC") as a result of the January 25, 1999, decision of the United States Supreme Court in AT&T Corp., et. al. v. Iowa Utilities, et. al., __ U.S. __ (January 25, 1999). In particular, the TRA should reconsider its decision, based on the decision of the United States Court of Appeals for the Eighth Circuit, that BellSouth is not required to offer CLECs combinations of elements, including IDLC. Because the Supreme Court reversed the Eighth Circuit on this issue on the same day the TRA issued its Interim Order, it is appropriate for the TRA to reconsider its decision. However, AT&T disagrees with: (1) BellSouth's patently false assertion that it has not refused to provide IDLC to CLECs, (2) BellSouth's assertion that the TRA's decision is unclear,

and (3) BellSouth's interpretation of the impact of the Supreme Court decision on this issue.

First, BellSouth's suggestion in its Petition that it has not refused to provide CLECs with IDLC is absolutely and patently false. The record is clear that BellSouth's cost study is based entirely on the assumption that BellSouth will provide ***only*** universal digital loop carrier, rather than IDLC. (Carter, Tr. v. 9, 242-43; Caldwell, Tr. v.3, 110). BellSouth conceded that its cost study assumes that BellSouth would only provision unbundled elements physically separated from one another. (Varner, Tr. v. 1, 117-19.) BellSouth offered this as the only option available for CLECs to purchase unbundled loops and ports. (Id. at 41.) Since IDLC, as its name implies, is comprised of a loop physically integrated with the switch, by definition, BellSouth's insistence on physically separated elements proves that BellSouth refuses to provide IDLC to CLECs. Thus, Ms. Caldwell was very clear that BellSouth refuses to make IDLC be available to new entrants using unbundled network elements. (Id. at v. 2, 234-35; v. 3, 127.)

Indeed, at the hearing, BellSouth maintained that it could not provision an unbundled loop that uses IDLC because such loops are integrated with the switch. (Varner, Tr. v. 1, 275-76 (v. 1D, 49-50).) Thus, because of BellSouth's stubborn insistence, now repudiated by the Supreme Court, that it would only provide elements physically separated from one another, BellSouth chose not include IDLC in its UNE cost assumptions. (Id. at v. 2, 211.) BellSouth freely admitted that its failure to develop costs for IDCL was based entirely on its faulty premise that "unbundled" means physically separated. (Gray, Tr. v. 4, 264.)

BellSouth's own Petition even demonstrates this. BellSouth's Petition concedes that Mr. Gray testified that BellSouth's position was that "you cannot have unbundled elements and provide those unbundled elements with [IDLC] technology that's designed to bundle them back together." (Gray, Tr. v. 4, 261.) Moreover, BellSouth's suggestion that a CLEC with its own

switch and enough demand could "request that BellSouth integrate the system directly into the CLEC's switch" demonstrates that BellSouth refuses to provide IDLC to CLECs as an unbundled element, subject to the Act's pricing requirements for unbundled elements. BellSouth Petition at 16. Finally, BellSouth's suggestion that ***"a CLEC always has the option to resell the service of a BellSouth customer being served by integrated DLC technology"*** clearly demonstrates BellSouth's own admission that it refuses to offer IDLC as an unbundled element. Id.

Second, the TRA's decision on this issue is not in any way unclear. The TRA heard uncontroverted evidence that IDLC is the more efficient technology, and that denial of IDLC would force CLECs purchasing unbundled elements to offer inferior service to their Tennessee customers that the service offered by BellSouth. (Varner, Tr. v. 2, 277, v. 1D, 51; Carter, Tr. v. 9, 243-53; Caldwell, v. 3, 126-27, 132-39, 202, v. 3, 105; Gray, Tr. v. 4, 282, 375-77.) The TRA correctly held, however, that BellSouth is required to provide CLECs with non-discriminatory access to unbundled network elements, such as loops. Interim Order at 23.

Therefore, the TRA ordered BellSouth to provide to CLECs loops that are equivalent to loops used by BellSouth to serve its own customers. Id. Further, the TRA ordered BellSouth to offer loops which will allow end users to obtain the same level of performance as that offered by BellSouth. Id. The TRA also ordered that the price of such a loop should be computed by calculating the combined cost of a loop connected to a port with access to all features using IDLC technology, and the loop price would be the difference between this combined cost and the cost of an unbundled port with access to all software features. Id. There is no ambiguity in the TRA's decision on this issue.

The fact that the TRA did not dictate "the technically feasible manner" in which

BellSouth must make such equivalent loops available is simply irrelevant. The TRA properly left it up to BellSouth to determine a method of providing such loops to CLECs in a manner which complies with the TRA's Interim Order. The TRA told BellSouth what it must do, and it is up to BellSouth to figure out how it can accomplish what the TRA has ordered.

Finally, AT&T agrees with BellSouth that the decision of the Supreme Court effects this aspect of the TRA's Interim Order. However, BellSouth is incorrect as to the impact of the Supreme Court decision on this issue. In its landmark decision, the Court reinstated most of the FCC rules that the Eighth Circuit vacated in Iowa Utils Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) ("Iowa Utils. Bd. II"). In so doing, the Court held that the FCC had jurisdiction to issue regulations concerning the rates that incumbent local exchange carriers ("LECs") may charge for interconnection and unbundled network elements, and that the FCC acted properly in prohibiting incumbent LECs from separating network elements that already are combined in their networks. The Court also vacated 47 C.F.R. § 51.319 -- which established a list of seven network elements that incumbent LECs must make available to new entrants -- and affirmed the validity of certain other rules that the Eighth Circuit upheld. The net effect of these determinations was to reinstate nearly all of the FCC's nationally uniform, pro-competitive rules and regulations implementing the Act.

The impact of the Supreme Court's decision on the TRA's Interim Order is straightforward. The reinstated provisions and implementing regulations of the FCC's Local Competition Order have the force and effect of law, and are immediately applicable. Indeed, the Supreme Court's reinstatement of the erroneously-vacated rules means that virtually *all* of the provisions and implementing regulations of the FCC's Local Competition Order are now controlling.

Of import to the TRA's Interim Order, the Supreme Court reversed the Eighth Circuit and upheld the validity of Rule 315(b), which forbids incumbents from separating already-combined network elements before leasing them to new entrants. AT&T Corp., slip op. at 27-28; see also 47 C.F.R. § 51.315(b). The Court reasoned that in the absence of Rule 315(b) "incumbents could impose wasteful costs" on carriers who requested network elements, even if entrants did not seek access to the incumbents' entire preassembled networks, and that the FCC therefore had acted reasonably in preventing this "anticompetitive practice." Id. In addition, the Court agreed with the Eighth Circuit that the FCC's "refusal to impose a facilities-ownership requirement [on new entrants] was proper" and that CLECs, therefore, may provide telecommunications services "relying solely on the elements in an incumbent's network." Id. at 25. Thus, the reinstated FCC rules conclusively establish that BellSouth's recalcitrant insistence on separating network elements that are currently combined in its network is unlawful.[6]

The Supreme Court's decision thus unequivocally and conclusively eliminates the legal basis for BellSouth's obstreporesnous on this issue. The Court expressly rejected the arguments, repeated *ad nauseum* by BellSouth, that this requirement unlawfully "eviscerates the distinction between resale and unbundled access," and instead made clear that there is nothing unlawful

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6 The Supreme Court also reversed the Eighth Circuit on the core issue of the FCC's jurisdiction to promulgate rules concerning rates for interconnection and network elements. The Court held that "§ 201(b)[of the Act] means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996." AT&T Corp., slip op. at 10-11 Accordingly, the Court concluded that "the [FCC] has jurisdiction to design a pricing methodology." Id. at 17. Thus, all of the FCC's pricing rules vacated by the Eighth Circuit are now in effect. Several of these rules impact the ultimate decision in this proceeding, such as the requirement of de-averaged loop rates. Therefore, AT&T supports MCI's request that the TRA permit the parties to file comments on the effect of the Supreme Court's decision on the outcome of this proceeding.

about a requirement that "could allow entrants access to an entire preassembled network." *Id.* at 27. As set forth in AT&T's testimony and brief in this proceeding, the Court characterized the practice of ripping apart UNE combinations before leasing them, which is of course the *modus operandi* that BellSouth has long sought to follow, as "wasteful" and "anticompetitive." *Id.* at 28.

Thus, the TRA's decision on the IDLC issue has been superceded as a result of the Supreme Court's decision. BellSouth is now required as a matter of law to provide AT&T with combinations of elements at the sum of unbundled element prices, and the underlying basis for BellSouth's refusal to provide IDLC is now legally untenable. Therefore, consistent with the Supreme Court's recent decision, the TRA should withdraw the portion of its Interim Order addressing IDLC, and should order: (1) that BellSouth must provide any and all combinations of UNEs, including but not limited the combination of the loop and switching elements (known as the "UNE-Platform"), including loop/port combinations configured as IDLC, to all CLECs upon request; (2) that BellSouth must combine network elements for CLECs in the same manner that it normally combines them for itself, or in any other technically feasible manner requested by a CLEC; (3) that BellSouth may not *require* any CLEC to collocate, in any manner, as a precondition to obtaining access to any UNE or UNE combination; (4) that BellSouth may not take apart or disconnect any existing combinations of UNEs unless requested to do so by a CLEC; and (5) that UNE cost studies must not reflect any assumptions that elements must be physically separated or any assumptions that combined elements can not or will not be provided.

The only provision vacated by the Supreme Court is Rule 51.319. The Supreme Court's decision to vacate Rule 51.319, however, has no impact on the TRA's Interim Order. It has no impact because the TRA's arbitration decision, independent of Rule 51.319, requires BellSouth

to provide the same seven elements required under Rule 51.319, and BellSouth has ***never*** challenged the decision of the TRA on this issue.[7] Moreover, § 271 of the Act also enumerates several of the very same elements set forth in FCC Rule 51.319, including loops, ports, and transport. 47 U.S.C. § 271(c)(2)(B). Thus, if BellSouth intends to provide originating interLATA service in Tennessee, it will necessarily have to provide such elements.

Finally, the TRA's enumeration of unbundled elements is permissible under Tennessee law. The Act expressly permits states to adopt and impose state-law duties that may go beyond what the Act specifically mandates. Although the Act adopts a series of minimum requirements with which all incumbent LECs must comply, it is explicit that those federal requirements are *not* exclusive. For example, section 261(c), entitled "Additional State Requirements," provides that nothing precludes the TRA from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the TRA's requirements are not inconsistent

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7 Moreover, BellSouth should not be allowed to raise such claims at this late date. As the District Court for the District of Colorado held in denying an incumbent LEC's request to constructively amend its complaint, "requiring the Defendants to litigate claims on which they had no notice until this very late stage of the litigation places both the Defendants and the Court at a tremendous disadvantage." U.S. WEST Communications, Inc. v. Hix, No. 97-D-152, slip op. at 2 (D. Colo. Sept. 16, 1998). As in Colorado, "[BellSouth] should have identified all issues in the record that it wanted to challenge in its Complaint, or at the latest, before the first round of briefs on the merits." Id. at 4; see also Southwestern Bell Telephone Co. v. AT&T Communications, Inc., No. A-97-CA-132-SS, slip op. at 15 n.9 (W.D. Tex. Aug. 31, 1998) (denying an incumbent LEC's request to amend its complaint).

with the Act or the Commission's regulations to implement the Act. 47 U.S.C. § 261(c). Further, the Act reiterates this principle in the specific context of state review of interconnection agreements, stating in a provision entitled "Preservation of Authority" that a state commission may "establish[] or enforc[e] other requirements of State law in its review of an agreement." 47 U.S.C. § 252(e)(3). Section 601(c) likewise states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede . . . State, or local law unless *expressly* so provided in such Act or amendments." 47 U.S.C. § 152 (emphasis added). And section 251(d)(3) of the Act, entitled "Preservation of State Access Regulations," states that the FCC "may not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part."

Tennessee law requires all telecommunications services providers to provide non-discriminatory interconnection to their public networks under reasonable terms and conditions. T.C.A. § 65-4-124(a). It also requires all telecommunications services providers, including BellSouth, to provide ***all desired features, functions, and services*** promptly, provided only that it is technically and financially feasible to do so. Id. Thus, Tennessee law provides the TRA additional authority to determine unbundled elements BellSouth must provide to CLECs, and confirms the validity of the TRA's prior arbitration decision in which it determined the minimum

set of elements BellSouth must provide.[8]

This is perfectly "consistent with the requirements of [section 251]." 47 U.S.C. § 251(d)(3)(B). Nothing in Tennessee law forbids BellSouth from doing anything the federal Act requires, or requires BellSouth to do anything the federal Act prohibits. Nor does the TRA's arbitration decision "substantially prevent implementation of the requirements" of the Act. 47 U.S.C. § 251(d)(3)(C). To the contrary, this is an instance in which federal and state law share a common goal. Enforcement of such requirements will hasten, rather than frustrate, the accomplishment of the Act's central objective, which is to introduce competition into local exchange markets and "erode the monopolistic nature of the local telephone service industry." Iowa Utils. Bd. II, 120 F.3d at 791.

BellSouth's assertion that it is "impossible" to determine which elements it will have to leave connected until the FCC determines which elements BellSouth must unbundle is simply false as a matter of law. It is also another obvious and shameless effort by BellSouth to delay the onset of competition in Tennessee. Moreover, BellSouth is incorrect that reinstatement of Rule 51.315(b) does not require the TRA to establish prices assuming the use of IDLC. IDLC consists of loops and ports; loops and ports clearly are now and will continue to be elements BellSouth must provide to CLECs; therefore it would be improper for the TRA to adopt cost studies which

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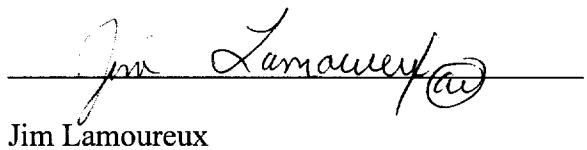
8 Indeed, in an ex parte presentation to the FCC on February 11, 1999, BellSouth agreed that "It is imperative that state commissions play an important part in defining network elements due to their knowledge of local market conditions and their extensive experience in making factual determinations about local competition issues."

do not assume the use and provision of IDLC, or any other combination of unbundled elements. BellSouth's Petition merely continues BellSouth's steadfast refusal to provide UNE combinations and to prepare cost studies which allow for the provision of UNE combinations. It is time for the TRA to finally put an end to such endless BellSouth efforts to impede the development of competition in Tennessee.

CONCLUSION

BellSouth's Petition sets forth no legally valid reason to rehear or reconsider the TRA's Interim Order. Therefore, for the foregoing reasons, AT&T respectfully requests that the TRA deny BellSouth's Petition.

Respectfully submitted,



Jim Lamoureux
AT&T Communications of the South Central States, Inc.
1200 Peachtree Street, N.E.
Atlanta, Georgia 30309
(404) 810-4196

Attorney for AT&T Communications of the South Central States, Inc.

February 22, 1999

NASHVILLE, TENNESSEE

In Re: Contested Case Proceeding to Establish Final Cost Based Rates for Interconnection and Unbundled Network Elements

Docket No: 97-01262

CERTIFICATE OF SERVICE

I, James P. Lamoureux, hereby certify that I have served a copy of the foregoing to the following counsel of record via U. S. First Class Mail, postage paid, this 22nd day of February, 1999.

James P. Lamoureux

Guy M. Hicks, Esq.
BellSouth Telecommunications, Inc.
Suite 2101
333 Commerce Street
Nashville, TN 37201-3300

Jon E. Hastings, Esq.
Boult, Cummings, Conners, & Berry PLC
Suite 1600, 414 Union Street
Nashville, TN 37219

Henry Walker, Esq.
Boult, Cummings, Conners & Berry, PLC
Suite 1600, 414 Union Street
Nashville, TN 37219

Charles B. Welch, Jr., Esq.
Farris, Mathews, Gilman, Branan
& Hellen, P.L.C.
511 Union Street, Suite 2400
Nashville, TN 37219

L. Vincent Williams, Esq.
Consumer Advocate Division
Cordell Hull Building, Second Floor
426 Fifth Avenue North
Nashville, TN 37243-0500

Jonathan E. CAnis
Enrico C. Soriano
Intermedia Communications
Kelley Drye & Warren LLP
1200 19th Street, N.W. Ste. 500
Washington, D.C. 20036

Benjamin W. Fincher, Esq.
Sprint Communications Co., L.P.
3100 Cumberland Circle
Atlanta, GA 30339

Dana Shaffer, Esq.
105 Molloy Street, Suite 300
Nashville, TN 37201

Dan H. Elrod, Esq. and
Kenneth M. Bryant, Esq.
Trabue, Sturdivant & DeWitt
2500 Nashville City Center
511 Union Street
Nashville, TN 37219-1738

H. LaDon Baltimore, Esq.
Farrar & Bates, L.L.P.
211 Seventh Avenue North, Suite 320
Nashville, TN 37219-1823

James Wright, Esq.
United Telephone-Southeast
14111 Capitol Blvd.
Wake Forest, NC 27587

William C. Carriger, Esq.
Strang, Fletcher, Carriger, Walker,
Hodge & Smith
One Union Square, Suite #400
Chattanooga, TN 37402