**COMMONWEALTH OF KENTUCKY**

**BEFORE THE PUBLIC SERVICE COMMISSION**

**In the Matter of:**

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| **PETITION OF BELLSOUTH** | **)** | |
| **TELECOMMUNICATIONS, INC. TO ESTABLISH** | **)** | |
| **GENERIC DOCKET TO CONSIDER AMENDMENTS** | **)** | **CASE NO.** |
| **TO INTERCONNECTION AGREEMENTS** | **)** | **2004-00427** |
| **RESULTING FROM CHANGES OF LAW** | **)** | |
| | **)** | **(electronic filing)** |

## REPLY TO BELLSOUTH

The Competitive Carriers of the South, Inc. ("CompSouth")[1] submits this Reply to BellSouth's Response to the Joint CLECs' cross motion for summary judgment. The BellSouth Response focuses on two topics: (1) incorporation of Section 271 checklist items into interconnection agreements ("ICAs") (Issue 8); and (2) line sharing (Issue 17). CompSouth focuses its Reply on the Section 271 issue. Covad Communications has filed a separate response, supported by CompSouth, addressing BellSouth's arguments on line sharing issues.

On Section 271 issues, BellSouth's Response offers nothing new. Rather, BellSouth rehashes arguments made in its Motion for Summary Judgment and in its Response to Cinergy

[1] CompSouth's members participating in this filing include the following companies: Access Point Inc., AT&T Communications of the South Central States, LLC, Cinergy Communications Company, DIECA Communications, Inc., d/b/a Covad Communications Company, Dialog Telecommunications, Inc., IDS Telcom LLC, InLine, ITC^DeltaCom, LecStar Telecom, Inc., MCI, Momentum Telecom, Inc., Navigator Telecommunications, LLC, Network Telephone Corp., Nuvox Communications, Inc, Talk America, Trinsic Communications, Inc., and Xspedius Communications, LLC. CompSouth is presenting a collective position with regard to the issues in this proceeding; as to some issues, individual member carriers may have negotiated (or are in the process of negotiating or arbitrating) different language with BellSouth. The "Joint CLECs" who filed the cross motion for summary judgment are all CompSouth members and each is a respondent in this proceeding.

Communications' April 26, 2005 Emergency Motion for Declaratory Ruling. There is no justification for granting BellSouth's Motion for Summary Judgment on Issue 8.

## DISCUSSION

In responding to the Joint CLECs BellSouth presents a seriously distorted view of recent caselaw. BellSouth attempts to read holdings regarding Section 271 into court decisions that do not mention Section 271 obligations. At the same time, BellSouth asks the Commission to read holdings regarding Section 271 out of the decisions where Section 271 is explicitly discussed. BellSouth also misapplies Communications Act decisions rendered long before the Act was amended to add Sections 251, 252 and 271.

BellSouth criticizes the Joint CLECs for not "addressing the most recent federal court decision" related to Section 271 issues. Response at p. 10. The problem with BellSouth's argument, however, is that the recent decision it cites does not anywhere address Section 271 checklist obligations. The decision cited by BellSouth is actually a ruling on a motion issued by a United States Magistrate in Montana.[2] The issue in the Montana case involved whether an agreement between Qwest and Covad should be filed with the Montana Public Service Commission. While the decision does discuss the interplay between Sections 251 and 252, it does not in any way address the question of whether Section 271 Elements should be included in Section 252 ICAs. That issue simply was not before the court, and the Magistrate's decision sheds no light on the issues before the Commission here.

BellSouth attempts to distinguish a federal court decision that *does* discuss whether Section 271 Elements should be included in Section 252 ICAs, *Qwest Corp. v. Minnesota Public*

[2] BellSouth erroneously cites the decision as being from the federal district court for Massachusetts. *See* BellSouth Reply at 10 and n.14. The correct citation is: *Qwest Corp. v. Schneider*, CV-04-053-H-CSO (D. Mont. June 9, 2005).

*Service Commission*.[3] BellSouth claims that an FCC decision on a petition for declaratory ruling filed by Qwest "ruling on the same fact pattern, reached a different conclusion about Section 252." If one actually reads the FCC ruling and the federal court decision in *Qwest*, it is clear there is absolutely no basis for BellSouth's assertion that the decisions reach "different conclusions." As BellSouth notes, Qwest was sanctioned by the FCC for its failure to file ICAs that were required to be filed under Section 252. In the FCC proceeding on sanctions and in the declaratory order, the FCC set forth standards on what constituted compliance with the Section 252 requirement that Section 251 items must be reflected in filed ICAs. Neither of those FCC decisions addressed the status of Section 271 Elements in Section 252 ICAs.

The *Qwest* federal district court decision was an outgrowth of the FCC and state commission actions penalizing Qwest for its failure to file Section 252 ICAs. In the federal court case, Qwest sought review of the Minnesota Public Utilities Commission's decision to penalize Qwest. One of the claims Qwest made was it did not have "fair notice" that the ICAs should be filed because the Federal Act does not include a definition of the term "Interconnection Agreement."[4] The Court found Qwest's arguments unavailing. First, the Court found that the record showed Qwest failed to file ICAs even when it knew they must be filed. Then the Court held:

> Second, despite the absence of a definition in the Act, other sources outlined the scope of § 252 and provided notice. For example, § 271 includes a comprehensive checklist of items that must be included in ICAs before an ILEC may receive authority to provide regional long distance service. See 47 U.S.C. § 271(c)(2). This list reveals that any agreement containing a checklist term must be filed as an ICA under the Act. Id. While the checklist does not include every possible term

[3] 2004 WL 1920970 (D. Minn. 2004).

[4] *Qwest*, 2004 WL 1920970, at *6.

> that may arise in an agreement, its exhaustive recitation shows that Congress adopted a broad view of ICAs.[5]

The *Qwest* decision is in no way inconsistent with related FCC orders. Rather, the *Qwest* court directly addresses the interplay of the Section 271 checklist and Section 252 ICAs – and reaches a conclusion completely consistent with this Commission's position in the Preemption Opposition filing at the FCC.

BellSouth also cites to the Fifth Circuit's *Coserv*[6] decision, but urges that *Coserv* proves that BellSouth need not negotiate, and the Commission cannot arbitrate Section 271 issues. But BellSouth's Section 271 obligations simply do not give it the option of "opting out" of negotiating Section 271 checklist rates, terms and conditions. As the *Coserv* court held, ICAs may include terms on issues not covered by Section 251. The language of Section 271 makes clear that for BellSouth (since it invoked Section 271 to attain interLATA long distance authority), ICAs must include the items in the competitive checklist. Nothing in *Coserv* supports any other reading of Section 271.

Similarly, BellSouth references the Seventh Circuit's decision in *Indiana Bell*[7] to prove a point not made by the Court in that case. In *Indiana Bell*, the question presented before the Court was stated concisely by the Court itself:

> The issue is whether, during the long-distance application process, a state regulatory commission has the power to enter an order designed to ensure the applicant will continue to meet its obligations in the local service market.[8]

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5 *Id.* (emphasis supplied).

6 *Coserv v. Southwestern Bell Telephone*, 350 F.3d 482 (5th Cir. 2003).

7 *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n,* 359 F.3d 493, (7th Cir. 2004).

8 *Id.* at 494.

The Seventh Circuit's complaint about the Indiana Commission's ruling was related to that commission's implementation of a "non-voluntary" performance measures plan as part of the Indiana § 271 long distance entry process. Neither the Seventh Circuit's holding nor its rationale is directed to the question of whether § 271 checklist items must be incorporated into the terms of § 252 interconnection agreements.

However, in its explanation of the workings of § 271, the Seventh Circuit references the nexus between the § 271 checklist and § 252 ICAs:

> Under section 271(d)(2)(B) the FCC consults with the state commission to verify that the BOC has (1) one or more state-approved interconnection agreements with a competitor, pursuant to sections 251 and 252, or a Statement of Generally Available Terms and Conditions (SGAT) under which it will offer local service, and (2) *that the interconnection agreements or the SGAT satisfies the 14-point competitive checklist set out in section 271(c)(2)(B).*[9]

The Seventh Circuit understood that "interconnection agreements" must satisfy the competitive checklist. The ICAs could not satisfy the checklist if the state commissions responsible for approving them refuse to arbitrate the rates, terms, and conditions of Section 271 checklist items. As discussed at length in the Joint CLEC's Response to BellSouth's Motion for Summary Judgment, leaving Section 271 checklist items out of Section 252 ICAs simply does not square with the specific language in Section 271 that requires checklist items be embodied in, as the Seventh Circuit described them, "state-approved interconnection agreements with a competitor."

BellSouth also erroneously relies on the Sixth Circuit's 1987 decision in *In Re: Long Distance Telecommunications Litigation*[10] and the D.C. Circuit's 1996 decision in *CompTel*[11] for propositions unsupported by either decision. BellSouth has leaned on both of these irrelevant

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9 *Id.* at 495.

10 *In Re: Long Distance Telecommunications Litigation,* 831 F.2d 627 (6th Cir. 1987).

11 *Competitive Telecommunications Association v. FCC,* 87 F.3d 522 (D.C. Cir. 1996).

decisions since filing[12] a fruitless attempt to preempt a decision of the Tennessee Regulatory Authority ("TRA") which correctly determined that Section 271 elements should be included in ICAs approved under Section 252. In responding to BellSouth's preemption petition, the TRA distinguished both cases, informing the FCC that:

> The facts giving rise to both of these cases predate both the Federal Act and the cooperative federalism giving both state and federal agencies a joint role in regulation. More importantly, there is nothing in the portions of these cases quoted by BellSouth or in the complete decisions of these cases that supports the argument that the TRA is precluded from setting rates for Section 271 elements, including switching.[13]

None of BellSouth's other citations to court precedent advance BellSouth's arguments any further than the ones discussed above. Simply put, BellSouth's Response offers nothing new regarding the inclusion of Section 271 Elements in Section 252 ICAs.

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[12] WC Docket No. 04-245, *BellSouth Emergency Petition for Declaratory Ruling and Preemption of State Action*

[13] Opposition of the Tennessee Regulatory Authority To BellSouth's Emergency Petition (July 30, 2004) at 15-16. A copy of the TRA's FCC filing is attached as Exhibit 1 to this Reply.

## CONCLUSION

**WHEREFORE**, for all the reasons stated herein and in the Joint CLEC's Response to BellSouth's Motion for Summary Judgment, BellSouth's Motion should be DENIED, and the Joint CLECs' Cross Motion and Cinergy Communications' Motion should be granted.

Douglas F. Brent

Signature Not Verified

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply has been filed electronically as permitted by the procedural order governing Case No. 2004-00427 this 18th day of August, 2005. The electronic copy is identical to the paper copy filed with the Commission.

Signature Not Verified

Douglas F. Brent

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# EXHIBIT 1

**BEFORE THE**
**FEDERAL COMMUNICATIONS COMMISSION**
**WASHINGTON, D. C. 20554**

| | | |
|---|---|---|
| **IN THE MATTER OF:** | ) | |
| | ) | |
| **BellSouth Emergency Petition for** | ) | **WC Docket No. 04-245** |
| **Declaratory Rule and Preemption** | ) | |
| **of State Action** | ) | |

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## OPPOSITION OF THE TENNESSEE REGULATORY AUTHORITY TO BELLSOUTH'S EMERGENCY PETITION

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This matter is before the Federal Communications Commission ("FCC") upon the *Emergency Petition for Declaratory Ruling and Preemption of State Action* ("Petition") filed by BellSouth Telecommunications, Inc. ("BellSouth") on July 1, 2004. The Petition seeks an Order from the FCC preempting the June 21, 2004 decision of the Tennessee Regulatory Authority ("Authority" or "TRA") in TRA Docket No. 03-00119, and preventing the TRA from proceeding with a generic docket to adopt a permanent rate for switching. In response to BellSouth's Petition, the TRA respectfully states that the TRA properly deliberated the switching issues as a part of its responsibilities under 47 U.S.C. § 252, the TRA's decision is consistent with 47 U.S.C. § 252, the TRA has authority under federal and state law to establish rates for switching and the proper forum to seek review of a TRA decision in an interconnection agreement arbitration proceeding is in the federal district court.

## BACKGROUND

### The Existing BellSouth/DeltaCom Agreement

TRA Docket No. 03-00119, the subject of BellSouth's Petition, was convened pursuant to 47 U.S.C. § 252 to arbitrate an interconnection agreement between ITC^DeltaCom Communications, Inc. ("DeltaCom") and BellSouth replacing an existing agreement approved by the TRA in Docket No. 99-00430 in 2001. TRA Docket No. 99-00430 was commenced on June 11, 1999, when DeltaCom filed its *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996.* An arbitration hearing was held on November 1, 1999 and the Arbitrators deliberated the unresolved issues on April 4, 2000. The Arbitrators issued the Final Order on the Arbitration in this Docket on February 23, 2001. As a result, the parties continued negotiations and BellSouth submitted the Negotiated Interconnection Agreement on April 25, 2001 to the TRA for approval. That Interconnection Agreement was approved by the Directors of the TRA on June 26, 2001.

The approved Interconnection Agreement contained rates, terms and conditions for local switching in Section 9 on page 26 of Attachment 2 of the Agreement. Specifically, Section 9.1.3.1.1 states:

> Notwithstanding BellSouth's general duty to unbundle local circuit switching, BellSouth shall not be required to unbundle local circuit switching for ITC^DeltaCom when ITC^DeltaCom serves end users with four (4) or more voice-grade (DS-0) equivalents or lines in locations served by BellSouth's local circuit switches , which are in the following MSAs: Atlanta, GA; Miami, FL; Orlando, FL; Ft. Lauderdale, FL; Charlotte-Gastonia-Rock Hill, NC; Greensboro-Winston Salem-High Point, NC; Nashville, TN; and New Orleans, LA, and BellSouth has provided non-discriminatory cost based access to the Enhanced Extended Link (EEL) throughout density zone 1 as determined by NECA Tariff No. 4 as in effect on January 1, 1999.

Additionally, Section 9.1.3.2 states:

> In the event that ITC^DeltaCom orders local switching for a single end user account name at a single physical end user location with four (4) or more two (2) wire voice-grade loops from a BellSouth central office listed in Attachment 11, BellSouth's sole recourse shall be to charge ITC^DeltaCom the market based rate in Attachment 11 for use of the local switching functionality for the affected facilities.

The approved Interconnection Agreement also included market rates for unbundled switching.

Sections 9.1.3.1.1 and 9.1.3.2, as quoted above, were included after the FCC issued its *Third Report and Order and Fourth Further Notice of Proposed Rulemaking* in CC Docket No. 96-98 on November 5, 1999. The *Third Report and Order* was issued in response to the January 1999 decision of the United States Supreme Court in *Iowa Utilities*[1] that directed the FCC to reevaluate the unbundling obligations of Section 251 of the Federal Telecommunications Act of 1996 (the "Federal Act"). Specifically, the Court directed the FCC to revise the standards for determining unbundling obligations by providing criteria defining the "necessary" and "impair" requirements and considering the availability of alternative network elements outside the incumbent's network. As a result, the FCC concluded that circuit switching must be unbundled except for local circuit switching used to serve end users with four or more lines in access density zone 1 in the top 50 Metropolitan Statistical Areas (MSAs), provided the incumbent local exchange carrier ("ILEC") provides non-discriminatory, cost-based access to the enhanced extended link (EEL) throughout zone 1.[2] Additionally, the FCC stated that if a Section 271 checklist network element is unbundled, the applicable prices, terms and conditions are determined in accordance with Sections 251 and 252. However, if a checklist network element does not satisfy the unbundling standards in Section 251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with Sections 201(b) and 202(a) of the

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[1] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 119 S. Ct. 721, 142 L.Ed.2d 835 (1999).

[2] *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* FCC 99-238 (*Third Report and Order and Fourth Further Notice of Proposed Rulemaking*), p. 12 (November 5, 1999).

Federal Act.[3] The FCC also determined that in circumstances where a checklist network element is no longer unbundled, the market price should prevail as opposed to a regulated rate.[4]

On April 25, 2001, BellSouth submitted an Agreement containing such Section 271 checklist network elements in Docket No. 99-00430 to the TRA for approval. Therefore, the TRA approved the negotiated Agreement in Docket No. 99-00430 on August 10, 2001 pursuant to Sections 252 and 271. BellSouth's submission of the interconnection agreement included switching as a Section 271 element in Docket No. 99-00430. BellSouth did not raise any issue as to the TRA's jurisdiction over or its resolution of the switching issue in Docket No. 99-00430.

**The Current TRA Arbitration Docket No. 03-00119**

On February 7, 2003, ITC^DeltaCom Communications, Inc. ("DeltaCom") filed a petition in Docket No. 03-00119 requesting that the TRA arbitrate the interconnection agreement between DeltaCom and BellSouth which replaces the expiring agreement approved in Docket No. 99-00430 above. The petition contained seventy-one (71) issues. The parties could not reach agreement on local switching during negotiations in the new agreement in Docket No. 03-00119 and submitted this issue for arbitration. Following TRA-ordered mediation and continuing negotiations between the parties, thirty-one (31) issues remained for resolution by arbitration. The list of remaining issues included Issue No. 26: Local Switching- Line Cap and Other Restrictions. Specifically, sub-issues (a), (b), (c) and (d) stated:

> (a) Is the line cap on local switching in certain designated MSAs only for a particular customer at a particular location?
>
> (b) Should the Agreement include language that prevents Bellsouth from imposing restrictions on DeltaCom's use of local switching?

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[3] *Id.*, ¶ 470.

[4] *Id.*, ¶ 473.

(c) Is BellSouth required to provide local switching at market rates where BellSouth is not required to provide local switching as a UNE?

(d) What should be the market rate?

During the course of the proceedings the parties expressed different positions regarding Issue Nos. 26(a), 26(b), 26(c) and 26(d). DeltaCom asserted that these issues would be subject to the FCC's Triennial Review Order ("TRO") and the findings of the TRA regarding the impairment analysis. DeltaCom also asserted that, to the extent BellSouth is allowed to price a service at market rates, those rates must be approved by the TRA and supported by relevant market data and analysis. DeltaCom recommended that the Authority reject BellSouth's market-based switching rate of $14.00 for switching subject to the three line rule. DeltaCom maintained that the existing TELRIC UNE rate of $1.89 established by the Authority should remain in effect for all analog switch ports since those are the rates the Authority has found as just and reasonable.[5]

BellSouth asserted that it would provide local switching at market-based rates where BellSouth is not required to unbundle local switching. Further, BellSouth stated that the current FCC rules impose restrictions and set forth criteria under which BellSouth may avail itself of its switching obligations and that as such BellSouth will provide local switching in accordance with FCC and Authority rules. BellSouth offered to provide local switching that is not required to be unbundled at the market-based rate of $14.00.

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[5] *See In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, TRA Docket No. 03-00119, Joseph Gillan, Pre-Filed Direct Testimony, p. 4 (August 4, 2003). EXHIBIT 1

BellSouth contended that the rates for local switching, where it is not required to be implemented, are not governed by Sections 251 or 252 of the Act.[6] Therefore, BellSouth argues an arbitration under the federal 1996 Act is not the appropriate forum for the setting of market rates.[7] On July 2, 2003, BellSouth filed a *Motion to Remove Issues from ITC^DeltaCom Communications, Inc.'s Petition of Arbitration*. BellSouth's motion proposed to remove only four issues – Nos. 6, 9, 66 and 67 – from the arbitration. The Pre-Arbitration Officer ruled on BellSouth's Motion on August 20, 2003. In the *Initial Order Regarding BellSouth's Motion to Remove Issues and Other Pre-Hearing Procedural Issues*, the Pre-Arbitration Officer found that Issue No. 6 was moot due to resolution by the parties and that Issue Nos. 9, 66 and 67 would remain a part of the arbitration. Pursuant to the joint matrix filed on August 15, 2003, the Pre-Arbitration Officer included Issue Nos. 26(a), 26(b), 26(c) and 26(d) as unresolved issues to be litigated at the arbitration hearing on August 27, 2003.[8] BellSouth did not seek a review of the Pre-Arbitration Officer's order in advance of the Hearing.

BellSouth filed a pleading entitled *Emergency Petition for Declaratory Ruling and Preemption of State Action* on August 26, 2003. In that *Petition*, BellSouth asserted that any decision reached by the TRA may be rendered moot as the result of decisions reached in the TRO. BellSouth raised concerns regarding the effect of the TRO on testimony from the stand and how that might impact issues of notice and the opportunity to be heard normally afforded with the pre-filing of testimony. The Pre-Arbitration Officer issued a Report and

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[6] *See In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, TRA Docket No. 03-00119, Kathy Blake, Pre-Filed Direct Testimony, pp. 3-4 (August 4, 2003). EXHIBIT 2

[7] *See In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, TRA Docket No. 03-00119, Joint Matrix, p. 10 (August 15, 2003).

[8] *See In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, TRA Docket No. 03-00119, *Initial Order Regarding BellSouth's Motion to Remove Issues and Other Pre-Hearing Procedural Issues*, p. 3 (August 20, 2003).

Recommendation on August 26, 2003 which separated Issue Nos. 26(b) and 26(c) from this arbitration, leaving Issue Nos. 26(a) and 26(d) for deliberations.[9] The Pre-Arbitration Officer agreed with BellSouth that leaving Issue Nos. 26(b) and 26(c) in the arbitration could pose practical and substantive problems due to both issues relying on the impairment analysis contained in the TRO that could ultimately be revised or removed. The Pre-Arbitration Officer found that the remaining Issue Nos. 26(a) and 26(d) should be resolved within the arbitration because the FCC's findings regarding these topics was in force and would not ultimately be affected by the FCC's TRO.

The FCC found in the Third Report and Order and Fourth Further Notice of Proposed Rulemaking in CC Docket No. 96-98, released November 5, 1999, that BellSouth was not required to provide unbundled local circuit switching as a Section 251 UNE when the ILEC serves end users with four (4) or more lines. Therefore, the issue properly before the TRA in this arbitration docket was application of the line cap (Issue 26(a)) and the applicable rate for unbundled local switching (Issue 26(d)) as a Section 271 UNE. Preliminary discussions prior to the hearing in this docket resulted in the parties concluding that Issue Nos. 26(a) and 26(d) would be heard at the hearing and, if necessary, evidence on the issue would be augmented at a later date. Based on this conclusion, BellSouth withdrew its motion.[10]

The Arbitration Hearing in this matter was held from August 27, 2003 through August 28, 2003 and on September 12, 2003. Following the hearing, the parties filed post

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[9] *See In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, TRA Docket No. 03-00119, *Report and Recommendation of Pre-Arbitration Officer Regarding Issues Impacted by Triennial Review Decision*, TRA Docket No. 03-00119, p. 4 (August 26, 2003).

[10] *See In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, TRA Docket No. 03-00119, Transcript of Proceedings, pp. 31-36 (August 27, 2003). Issue Nos. 26(b) and 26(c) would remain as an unresolved issue but would be carved out of the instant proceeding. EXHIBIT 3

hearing briefs on October 27, 2003. On January 12, 2004, the panel of Directors[11] assigned to this Docket sat as Arbitrators and ruled on some of the outstanding issues. The Arbitrators ordered the parties to file by January 26, 2004 Final and Best Offers ("FBOs") on the remaining issues, Issue Nos. 2, 26(d), 47, and 62. Issue 26(d) addressed the market rate for switching when BellSouth is not required to offer switching as an unbundled element pursuant to Section 251.[12] The parties requested, and were granted, two filing extensions and filed the FBOs on February 20, 2004.[13]

According to FCC rules, in situations where unbundled switching is not required under Section 251, the element must still be offered to competitors in order to comply with the requirements of Section 271; however, the rate does not have to comply with TELRIC pricing methodology. Instead, the FCC requires that rates for unbundled elements offered pursuant to Section 271 must be "just and reasonable".[14] The reason for requesting FBOs in this case was to determine a just and reasonable rate for unbundled switching.

In its FBO on Issue No. 26(d), DeltaCom proposed a rate of $5.08 (usage included) which was based on BellSouth's ARMIS 43-08 (row 6210) reported central office switching expenses for 2002 and an estimated share of its depreciation costs for switching plant in service.

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[11] Pursuant to Tenn. Code Ann. § 65-1-204(d) a panel of three Directors is randomly assigned to deliberate matters before the TRA.

[12] Issue 26(a) was deliberated January 12, 2004 with a finding that the four-line carve out per customer should continue until otherwise determined by the Authority in TRA Docket No. 03-00491 and reflect the previous ruling of this Authority in the AT&T arbitration, TRA Docket No. 00-00079. *See In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, TRA Docket No. 03-00119, Transcript of Proceedings, pp. 15-16 (January 12, 2004). EXHIBIT 4

[13] DeltaCom did not file its FBO for Issue 46 on February 20 because it was allowed ten additional days after BellSouth filed its FBO on this Issue in which to file. *See In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, TRA Docket No. 03-00119, Transcript of Proceedings, pp. 26-27 (January 12, 2004). EXHIBIT 5

[14] *Triennial Review Order*, CC Docket No. 01-338, paras 662-663 (August 21, 2003).

BellSouth's FBO was based on the price it charges for wholesale local platform DS0 service.[15] The proposed rates were $26.48 in Zone 1; $30.31 in Zone 2; and $35.32 in Zone 3. Inclusive in these rates are the port, features, and an analog SL1 loop. These rates did not include usage, which was an additional per-minute charge.

On March 22, 2004 the arbitration panel reconvened to deliberate on the FBOs. The panel deliberated on the remaining issues with the exception of Issue No. 26(d). With regard to this issue, BellSouth requested that the Authority defer ruling until the next conference, because BellSouth was soon to announce a proposal that could impact the issue.[16]

On April 12, 2004, the panel reconvened to rule on Issue 26(d). BellSouth again asked that the matter be deferred because, according to BellSouth, it was in the process of trying to negotiate an appropriate rate, pursuant to the FCC's encouragement to the industry to negotiate commercial agreements. BellSouth asserted that any action by the Arbitrators to set a rate for local switching would affect BellSouth's bargaining ability.[17] The Directors ruled that a decision on the FBO for Issue No. 26(d) would be deferred until June 15, 2004, forty-five (45) days after the 60-day stay of the D.C. Court's mandate, and that the panel could resume deliberations on June 21st.[18]

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[15] *See In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996,* TRA Docket No. 03-00119, BellSouth's Best and Final Offers, p. 5 (February 20, 2004)

[16] *See In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996,* TRA Docket No. 03-00119, Transcript of Proceedings, pp. 3-4 (March 22, 2004). EXHIBIT 6

[17] *See In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996,* TRA Docket No. 03-00119, Transcript of Proceedings, p. 4 (April 12, 2004). EXHIBIT 7

[18] *See In Re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996,* TRA Docket No. 03-00119, Transcript of Proceedings, pp. 27-28 (April 12, 2004). EXHIBIT 8 June 15, 2004 was the day the stay of the DC Court's mandate was to expire.

On June 21, 2004, the arbitrators reconvened to deliberate Issue No. 26(d). During deliberations the panel voted 2-1 to adopt DeltaCom's FBO. The panel further determined by unanimous vote that the TRA should open a generic docket to set rates for Section 271 switching and that the DeltaCom rate should be trued-up either to any rate negotiated by the parties or set through the generic docket. No written order has been issued memorializing the TRA's decision. During the deliberations it was determined that (1) market-based rates apply to Section 271 elements; (2) market-based rates must be just and reasonable; (3) just and reasonable rates cover the utility's operating expenses as well as a fair return on investments; (4) BellSouth did not produce a stand-alone switching rate in response to the request for FBOs; (5) BellSouth failed to establish the criteria set forth in paragraph 664 of the *Triennial Review Order*; and (6) a true-up and generic docket will continue to foster negotiations and allow all interested parties to provide input.

**DISCUSSION**

**1. The TRA properly deliberated the switching issue as an open issue presented in a § 252 arbitration proceeding.**

The Act expressly provides for state commission jurisdiction to arbitrate all open issues presented pursuant to Section 252(b)(4)(C). In addition, the Federal Act makes it clear that state commissions must arbitrate all open issues in interconnection agreements. Section 252 (b)(4)(C) states:

> (C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.[19]

[19] 47 U.S.C. § 252(b)(4)(C).

In addition, Section 252 contains no exception for Section 271 elements presented as an open issue in an arbitration.

BellSouth admits that Section 252 affords state commissions jurisdiction to approve interconnection agreements reached either by voluntary negotiation or by compulsory arbitration.[20] The TRA has broad statutory authority to arbitrate any open issue submitted in a Section 252 arbitration. Section 252(b)(4)(C) provides that "the State commission shall resolve each issue set forth in the petition" for arbitration "and the response" thereto. The scope of open issues presented for arbitration under Section 252 includes "issues on which incumbents are mandated to negotiate."[21] Switching is an element of access and interconnection which Bell operating companies are mandated to negotiate pursuant to Section 271(c)(2)(B)(vi).

Beyond those issues that are mandated for negotiation, "the parties are free to include interconnection issues that are not listed in § 251(b) and (c) in their negotiations" and may "petition for compulsory arbitration of any open issue."[22] The Court of Appeals for the Fifth Circuit, in *Coserv Ltd. Liability Corp. v. Southwestern Bell*, 350 F.3d 482, 487-488 (5th Cir. 2003), stated as follows:

> There is nothing in § 252(b)(1) limiting open issues only to those listed in § 251(b) and (c). By including an open-ended voluntary negotiations provision in § 252(a)(1), Congress clearly contemplated that the sophisticated telecommunications carriers subject to the Act might choose to include other issues in their voluntary negotiations, and to link issues of reciprocal interconnection together under the § 252 framework. In combining these voluntary negotiations with a compulsory arbitration provision in § 252(b)(1), Congress knew that these non-251 issues might be subject to compulsory arbitration if negotiations fail. That is, Congress contemplated that voluntary negotiations might include issues other than those listed in § 251(b) and (c) and still provided that any issue left open after unsuccessful negotiation would be subject to arbitration by the PUC. We hold, therefore, that where parties have

[20] *Petition*, p. 7 (July 1, 2004).
[21] *MCI v. BellSouth*, 298 F.3d 1269, 1274 (11th Cir. 2002).
[22] *Coserv Ltd. Liability Corp. v. Southwestern Bell*, 350 F.3d 482, 487 (5th Cir. 2003).

> voluntarily included in negotiations issues other than those duties required of an ILEC by § 251(b) and (c), those issues are subject to compulsory arbitration under § 252(b)(1). The jurisdiction of the PUC as arbitrator is not limited by the terms of § 251(b) and (c); instead, it is limited by the actions of the parties in conducting voluntary negotiations. It may arbitrate only issues that were the subject of the voluntary negotiations. The party petitioning for arbitration may not use the compulsory arbitration provision to obtain arbitration of issues that were not the subject of negotiations . . . . An ILEC is clearly free to refuse to negotiate any issues *other than those it has a duty to negotiate* under the Act when a CLEC requests negotiation pursuant to § 251 and 252. [Emphasis added.]

BellSouth has a duty and cannot refuse to negotiate the price for the switching element pursuant to Section 271(c)(2)(B)(vi). BellSouth does not contest the fact that the price for switching was among the issues negotiated by the parties pursuant to DeltaCom's Section 252 request for interconnection. It is also undisputed that the price for the switching element was presented as an open issue in DeltaCom's petition for arbitration. Upon the failure of the parties to reach agreement of this non-251 issue, DeltaCom properly presented the price for switching as an open issue in the arbitration. As an open issue in the arbitration, the issue was properly before the TRA for resolution under Section 252 of the Federal Act. Further, BellSouth did not include this issue (Issue No. 26(d)) in its July 2, 2003 motion to remove certain issues from the arbitration.

**2. The Federal Act does not prohibit state commission jurisdiction over Section 271 elements that are issues required to be approved by state commissions under Section 252.**

There is no language contained in the Federal Act that expressly prohibits state jurisdiction over Section 271 elements that are included in issues required to be arbitrated pursuant to Section 252. Rather, there is language that indicates that Congress gave states a role in determining Section 271 elements through state approval of both SGAT conditions and interconnection agreements. Under Section 271(c)(1) of the Federal Act, an incumbent telephone company must offer network elements either through a statement of generally

available terms and conditions or an interconnection agreement. Each must be filed with and approved by the state commission.[23] Section 271 of the Federal Act requires an incumbent telephone company to satisfy its competitive checklist obligations through interconnection agreements.[24] These interconnection agreements are required to be approved by a state commission under Section 252.[25]

BellSouth must provide switching pursuant to the requirements of Section 271. In its *Petition*, BellSouth argues that the TRA does not have jurisdiction to establish the rate for switching. In support of this argument, BellSouth states that the Federal Act provides only for FCC enforcement of Section 271 requirements stating "once a BOC has obtained Section 271 authority (as BellSouth has in Tennessee), continuing enforcement of Section 271 obligations rests solely with the Commission."[26]

While BellSouth claims that the FCC's enforcement authority is evidence that state commissions are precluded from setting rates for Section 271 elements, it fails to point to a single provision in the Federal Act, to FCC orders, or to case law interpreting the requirements of the Federal Act, which would support its proposition that the FCC's power to enforce Section 271 provisions amounts to preemption of state authority to set rates for Section 271 elements. Put simply, BellSouth's argument mistakenly characterizes rate setting as an "enforcement action" or as an action to "ensure that an agreement satisfies Section 271."[27] In addition, BellSouth states that a "state commission's authority to set rates is specifically tied to the requirements of Section 251" and states further that "Section 252 grants state commissions

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[23] 47 U.S.C. § 252(e) and (f).
[24] 47 U.S.C. § 271(c)(2)(A).
[25] 47 U.S.C. § 271(c)(1)(A).
[26] *Petition*, p. 6 (July 1, 2004).
[27] *Petition*, p. 7 (July 1, 2004).

authority only over the implementation of Section 251 obligations, not Section 271 obligations."[28] While the TRA does not dispute the FCC's statutory power to enforce Section 271, the TRA respectfully submits that this fact does not abrogate the TRA's jurisdiction to set a rate for switching.

BellSouth also argues that, because Section 271 elements are regulated under Sections 201 and 202 of the Federal Act, state commissions are precluded from setting a rate for a Section 271 switching element. While the TRA does not dispute that Sections 201(b) and 202(a) set the applicable standards for the charges, practices, classifications and regulations related to switching, there is nothing in Sections 201(b) and 202(a) that preempts the TRA from applying these standards and setting a rate for switching.

BellSouth cites a portion of ¶ 664 of the TRO as standing for the proposition that the FCC "retains exclusive jurisdiction to regulate Section 271 elements under Sections 201 and 202."[29] Paragraph No. 664 of the TRO, in its entirety, states:

> Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). We note, however, that for a given purchasing carrier, a BOC might satisfy this standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.

The TRA respectfully submits that ¶ 664 offers two examples of situations where the FCC will make determinations of fact regarding whether a rate for a Section 271 element is just

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[28] *Petition*, pp. 7-8 (July 1, 2004).
[29] *Petition*, p. 10 (July 1, 2004).

and reasonable. There is nothing, however, in the above-quoted language, to preclude a state commission from setting the rate for a Section 271 element.

BellSouth relies on ¶ 656 of the TRO in support of its contention that "a state commission's assertion of jurisdiction over elements provided pursuant to Section 271 would 'thwart or frustrate' the federal regime set forth in the TRO."[30] BellSouth quotes from ¶ 656,

> the appropriate inquiry for network elements required only under Section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis—the standards set forth in Sections 201 and 202.

Paragraph No. 656 first references ¶ 655 of the TRO noting that the question of what pricing standard applies to network elements that are unbundled by BOCs pursuant to Section 271 requirements (a question that the FCC answers in ¶ 656 of the TRO) is different from the question of what is the fundamental purpose of Section 271 (a question the FCC answers in ¶ 655). Neither paragraph offers a single word in support of BellSouth's contention that state commissions are precluded from setting a rate for a Section 271 element.

BellSouth cites *In Re: Long Distance Telecommunications Litigation et al. v. ITT-U.S. Transmission Systems, Inc. et al.*, 831 F.2d 627, 631 (6th Cir. 1987) (citations omitted) for the proposition that "just and reasonable" determinations made pursuant to Section 201(b) were placed by Congress "squarely in the hands of the Commission." BellSouth also cites the D.C. Circuit Court decision in *Competitive Telecommunications Association v. FCC*, 87 F.3d 522 (D.C. Cir. 1996) for the proposition that "Sections 201(b) and 202(a) 'authorized the Commission to establish just reasonable rates, provided that they are not unduly discriminatory.'"[31] The facts giving rise to both of these cases predate both the Federal Act and its cooperative federalism giving both state and federal agencies a joint role in regulation. More

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[30] *Petition*, p. 13 (July 1, 2004).
[31] *Petition*, p. 10 (July 1, 2004).

importantly, there is nothing in the portions of these cases quoted by BellSouth or in the complete decisions of these cases that supports the argument that the TRA is precluded from setting rates for Section 271 elements, including switching.

BellSouth offers the unsupported statement that "the Commission has held that as a matter of national policy, it retains exclusive jurisdiction to regulate elements provided pursuant to Section 271."[32] Even given this self-serving conclusion, there is nothing therein to support a contention that the TRA acts improperly or illegally in setting a rate for switching. To the contrary, Section 271 recognizes the authority of state commissions to review and approve the two methods of compliance established in that section: an approved interconnection agreement and an approved statement of generally accepted terms and conditions (SGAT).

The TRA maintains that Congress explicitly charged state commissions with the responsibility to arbitrate Section 252 disputes and that this charge includes arbitrating the rates, terms and conditions of Section 271 elements. Further, the TRA asserts that BellSouth incorrectly argues that because the FCC has the authority to enforce Section 271, that authority somehow diminishes or cuts off the obligations of the state commissions to arbitrate interconnection agreements required by Section 271, which also includes establishing rates for elements required by the competitive checklist.

Section 271(c)(2)(A) clearly links BellSouth's obligations under the competitive checklist to its providing that access through an interconnection agreement (or SGAT):

> (A) AGREEMENT REQUIRED - A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought--
>
> (i) (I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A) [Interconnection Agreement], or

[32] *Petition*, p. 13 (July 1, 2004).

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B) [an SGAT], and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph [the competitive checklist].[33]

The TRA maintains that by directly tying interconnection agreements to Section 271(c)(1)(A) and (B), the Act explicitly ties compliance with the competitive checklist to the review process described in Section 252. As Section 271(c)(1) states:

(1) AGREEMENT OR STATEMENT- A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) PRESENCE OF A FACILITIES-BASED COMPETITOR- A Bell operating company meets the requirements of this subparagraph if it has entered into one or more **binding agreements that have been approved under section 252** specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers.[34]

The TRA asserts that this language requires BellSouth to continue to be in compliance with Section 271 and supports the TRA's position that Section 271 network elements must be offered pursuant to the same, identical review process as Section 251 network elements.

[33] 47 U.S.C. § 271(c)(2)(A).

[34] 47 U.S.C. § 271(c)(1)(A) (Emphasis added).

**3. BellSouth must offer Section 271 elements on just, reasonable, and nondiscriminatory terms.**

The FCC's TRO determined that pricing of Section 271 elements must be more liberal than TELRIC prices but produce just and reasonable prices.[35] The TRO states:

> Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements.[36]

Thus, the FCC recognized that the pricing standards of Section 271 elements must be the same as the pricing standards used before the Federal Act such as those standards in Sections 201 and 202. Nevertheless, it is significant that the FCC did not change the division of pricing responsibility defined in the Federal Act. While the FCC will continue to set the pricing standards, it continues to be incumbent upon state commissions to apply those standards in the process of establishing rates.[37] The TRA also maintains that the FCC did not change the process utilized to resolve pricing disputes of Section 271 elements. Indeed, BellSouth fails to demonstrate that Section 271 precludes the TRA from arbitrating Section 271 elements, including their rates, terms, and conditions. BellSouth cannot show that the FCC intended to

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[35] This does not mean that TELRIC prices are not just and reasonable. On the contrary, TELRIC prices must first meet the just and reasonable definition of the Act.

[36] TRO, ¶ 663, footnotes omitted.

[37] The United States Supreme Court affirmed this division of responsibility in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, at 384 (1999), emphasis added:

> " ...252(c)(2) entrusts the task of establishing rates to the state commissions .... The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances. "

remove Section 271 elements from state arbitrations or from approval of interconnection agreements consistent with Section 252.

By accepting the terms of the social contract outlined in Section 271 of the Federal Act, BellSouth de facto accepted the authority of the TRA to take necessary actions to guarantee that the competitive gains that justified its recommendation of BellSouth's Section 271 approval are preserved by establishing just, reasonable rates and nondiscriminatory terms for those network elements that must be offered for BellSouth to continue to comply with Section 271 of the Act. The TRA interprets this ongoing obligation as deeply carved in the approval standards set by the FCC. Indeed, the FCC recognized:

> These additional requirements [the unbundling obligations in the competitive checklist] reflect Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market.... The protection of the interexchange market is reflected in the fact that section 271 primarily places in each BOC's hands the ability to determine if and when it will enter the long distance market. If the BOC is unwilling to open its local telecommunications markets to competition or apply for relief, the interexchange market remains protected because the BOC will not receive section 271 authorization.[38]

Based on this clear endorsement of competitive markets, it is no mystery to anyone that if the FCC and the TRA had any doubt whatsoever that BellSouth was committed and will act to maintain a healthy competitive local telecommunications market, they would have denied Section 271 approval. Therefore, it is clear that Congress fully understood that maintaining local competition would require continued compliance to Section 271 by RBOCs such as BellSouth.

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[38] *In the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, "Report and Order and Order on Remand and Further Notice of Proposed Rulemaking," FCC 03-36, released August 21, 2003 ("TRO"), ¶ 655.

**4. The Federal Act establishes a system of "cooperative federalism" that encompasses both state and federal regulation over telephone service.**

BellSouth concludes its Petition by asking the FCC to act on the Petition, "...because the action of the TRA frustrates the mechanism Congress implemented to govern the regulation and development of local service competition."[39] This statement and others by BellSouth regarding the authority of the TRA to set rates ignore both the TRA's basic authority to regulate public utilities and manner in which that authority has been woven into the theme of the federal Act to insure the development and continuity of local service competition.

The Federal Act has been called one of the most ambitious regulatory programs operating under "cooperative federalism," and creates a regulatory framework that gives authority to state and federal entities in fostering competition in local telephone markets.[40] Under cooperative federalism, "federal and state agencies should endeavor to harmonize their efforts with one another, while federal courts oversee this partnership by insisting on articulations of regulatory policy that respect the values embodied in the underlying legislation."[41] In this regulatory regime state commissions are directed by provisions of the Federal Act and FCC regulations in making decisions, which are subject to federal court review.[42] Thus, cooperative federalism is a statutory framework in which there is both state and federal regulation of telecommunications services. To determine the parameters of both federal and state regulation within this statutory framework, one needs to examine the language of the federal Act and the state statutes establishing regulatory authority.

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[39] *Petition*, p. 14 (July 1, 2004).
[40] *Mich. Bell Tel. Co. v. MCImetro Access Transmission Servs.*, 323 F.3d 348, 351 (6th Cir. 2003) (citations omitted).
[41] *Id.* at 352, quoting Philip J. Weiser, *Federal Common Law, Cooperative Federalism, and the Enforcement of the Telecom Act*, 76 N.Y.U. L.Rev. 1692, 1732 (2001).
[42] *Id.* at 352.

In construing the reach of the TRA's authority, the Tennessee Supreme Court has held:

> Any authority exercised by the Public Service Commission must be as the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power. *Pharr v. Nashville, Chattanooga and St. Louis Railway,* 186 Tenn. 154, 208 S.W.2d 1013 (1948); *Nashville, Chattanooga and St. Louis Railway v. Railroad and Public Utilities Commission et al,* 159 Tenn. 43, 15 S.W.2d 751 (1929). In either circumstance, the grant of power to the Commission is strictly construed.[43]

The Tennessee Court of Appeals has echoed this interpretation of the TRA's authority:

> The Commission, like any other administrative agency, must conform its actions to its enabling legislation. It has no authority or power except that found in the statutes. While its statutes are remedial and should be interpreted liberally, they should not be construed so broadly as to permit the Commission to exercise authority not specifically granted by law.[44]

The TRA must exercise its authority in accordance with legislative limitations, directives and policy. In other words, "its actions must be harmonious and consistent with its statutory authority."[45] Chapter 4 of Title 65 sets forth the statutory framework for the TRA's authority to regulate public utilities. Pursuant to Tenn. Code Ann. § 65-4-104, the statutory grant of authority over public utilities given to the TRA is extensive:

> The authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter [Chapter 4].

Tenn. Code Ann. § 65-4-106 provides:

> This chapter [Chapter 4] shall not be construed as being in derogation of the common law, but shall be given a liberal construction, and any doubt as to the existence or extent of a power conferred on the authority by this chapter or chapters 1, 3, and 5 of this title shall be resolved in favor of the existence of the power, to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction by this chapter.

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[43] *Tennessee Pub. Serv. Comm'n v. Southern Ry. Co.,* 554 S.W.2d 612, 613 (Tenn. 1977).

[44] *BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663, 680 (Tenn. Ct. App. 1997) (internal citations omitted).

[45] *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 159 (Tenn. Ct. App. 1992).

In commenting on Tenn. Code Ann. § 65-4-106, the Tennessee Supreme Court has stated the following:

> ...the Legislature has explicitly directed that statutory provisions relating to the authority of the TRA shall be given "a liberal construction" and has mandated that "any doubts as to the existence or extent of a power conferred on the [TRA]...shall be resolved in favor of the existence of the power, to the end that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction...." Tenn. Code Ann. § 65-4-106 (1997 Supp.). The General Assembly, therefore, has "signaled its clear intent to vest in the [TRA] practically plenary authority over the utilities within its jurisdiction." Tennessee Cable Television Ass'n v. Tennessee Public Service Comm'n, 844 S.W.2d 151, 159 (Tenn. App. 1992).[46]

In addition to the general powers described in the above referenced statutes, the TRA has been given specific authority or power "to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof" Tenn. Code Ann. § 65-5-201(a), "to fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility," Tenn. Code Ann. § 65-4-117(3), and to require every public utility to "furnish safe, adequate, and proper service." Tenn. Code Ann. § 65-4-114(1).

With the passage of the Tennessee telecommunications act in 1995 (the "Tennessee Act"), the Tennessee General Assembly changed regulation of telecommunications companies in Tennessee and established a new direction for the State and a new mandate to the TRA. The expressed goal of the Tennessee Act is articulated at Tenn. Code Ann. § 65-4-123:

> The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications

[46] *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 761-762 (Tenn. 1998).

> services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

The Tennessee Act also recognizes and imposes certain requirements on providers of telephone services:

> All telecommunications services providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions; and all telecommunications services providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other telecommunications services providers.[47]

Further, the Tennessee statutes that establish the authority of the TRA do not conflict with the Federal Act such that preemption of state law is an issue. As the Tennessee Court of Appeals recognized in *BellSouth v. Greer*, 972 S.W.2d 663, 670 (Tenn. Ct. App. 1997),

> Our federal system of government recognizes the dual sovereignty of the federal government and the various state governments....Preemption occurs when there is an outright or actual conflict between federal and state law. It can also occur by implication when compliance with both federal and state law is impossible or when state law obstructs the accomplishment of Congress's objectives. Preemption may also arise when Congress's legislation is so pervasive that it leaves no room for state legislative action. (Citations omitted.)

Nevertheless, the Court of Appeals recognized the similarity of the goals of the Federal Act and the Tennessee Act in contrast to any conflict that might raise a presumption of preemption.

> In fact, the (federal) Act specifically states that "this Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly provided in such Act or amendments." Telecommunications Act of 1996, § 601(c)(1), 47 U.S.C.A. § 152 note (West Supp. 1997). Congress included this provision to prevent "affected parties from asserting that the bill impliedly pre-empts other laws." House Conference Report No. 104-458, 104th Cong., 2d Sess., 201, reprinted in 1996 U.S.C.C.A.N. 124, 215. With specific reference to the interconnection issue, the Act also states that it should not be construed to prohibit state commissions from enforcing or promulgating regulations or from imposing additional requirements that "are

[47] Tenn. Code Ann. § 65-4-124(a).

> necessary to further competition in the provision of telephone exchange service or exchange access" as long as they are "not inconsistent" with the Act. See 47 U.S.C.A. § 261(b), (c) (West Supp. 1997).
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> . . . .
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> The Act itself makes it clear that state commissions play a pivotal role in implementing telecommunications policy. They provide a forum for resolving disputes between existing local telephone companies and their competitors seeking access to an existing telephone network. See 47 U.S.C.A. § 252.
>
> . . . .
>
> One of the principal ways it accomplishes its goal is to impose a general duty of interconnection on all telecommunications carriers thereby requiring local telephone companies to offer competitors access to part of their networks. 47 U.S.C.A. § 251 (West Supp. 1997); House Rpt. No. 104-204, 104th Cong., 2d Sess. 48, reprinted in 1996 U.S.C.C.A.N. 10, 11. Tenn. Code Ann. § 65-4-123 states a similar purpose, and Tenn. Code Ann. § 65-4-124(a) (Supp. 1996) imposes a similar duty of interconnection on local telephone companies.[48]

In *Mich. Bell Tel. Co. v. MCImetro Access Transmission Servs*, the Sixth Circuit Court of Appeals stated:

> When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. In fact, it expressly *preserved* existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition, stating that the Act does not prohibit state commission regulations "if such regulations are not inconsistent with the provisions of [the FTA]." 47 U.S.C. § 261. Additionally, Section 251(d)(3) of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. 47 U.S.C. § 251(d)(3).[49]

The Tennessee statutes and the relevant provisions of the Federal Act together form the basis for the authority of the TRA to set an interim rate for switching in the context of an arbitration proceeding and to convene a generic proceeding for the purpose of determining a permanent rate for switching. While Section 271 establishes the enforcement authority of the FCC regarding Section 271 issues, it does not strip the TRA of its authority to set rates for

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[48] *BellSouth v. Greer*, 972 S.W. 2d 663, 671-672 (Tenn. Ct. App. 1997).

[49] *Mich. Bell Tel. Co. v. MCImetro Access Transmission Servs.*, 323 F.3d 348, 358 (6th Cir. 2003).

Section 251 or Section 271 elements. The TRA is exercising its authority provided by the General Assembly prior to the enactment of the federal act as the legal foundation for its actions. Additionally, the TRA's decision is consistent with the requirement that its actions not conflict with any current federal requirements.

**5. The Federal Act requires appeals of arbitrations to be filed in federal district court.**

Section 251(d)(3) of the Act provides that a state regulation, order or policy of a state commission that establishes access and interconnection obligations of incumbent carriers will be upheld, as long is it meets federal requirements. The prerequisite for preserving state commission regulations, policies and orders is that these decisions must be consistent with Section 251, and not substantially prevent implementation of the purposes of the Act. With no clear error in interpretation of federal law or unsupported, arbitrary and capricious findings by a state commission, the decisions of such commissions generally stand.[50]

The Federal Act requires an aggrieved party to bring an action in federal district court, rather than the FCC, in an arbitration proceeding in which a state commission makes a determination. Congress intended an aggrieved party in an arbitration proceeding to bring an action against a state commission in federal district court. Pursuant to Section 252(e)(6) of the Act,

> In any case in which a State Commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.[51]

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[50] *Mich. Bell Tel. Co. v. MCImetro Access Transmission Servs.*, 323 F.3d 348, 353 (6th Cir. 2003).

[51] 47 U.S.C. § 252(e)(6).

Courts have construed such federal court action to be the *exclusive* means by which an aggrieved party may seek review of a final state commission arbitration determination.[52]

Conversely, aggrieved parties in an arbitration proceeding may seek relief from the FCC *only* if the state commission "fails to act" on an arbitration petition.[53] The TRA made a determination and did not fail to act on DeltaCom's arbitration petition. Therefore, the federal district court is the appropriate forum for a review of the TRA's decision in this arbitration proceeding.

The federal statutes, as well as the TRA rules of procedure, set forth the proper procedure for an aggrieved party to seek review of an arbitration decision by the TRA. In this docket, the proper procedure includes the entry of a final order of which BellSouth could seek reconsideration and ask the Authority for a stay. The Federal Act expressly provides that where a state commission acts on an interconnection agreement the proper forum for review is in the federal district court.

Only where a state commission fails to take action on an interconnection agreement should the matter be brought before the FCC. Such is not the case here. The TRA accepted the issues presented by DeltaCom and BellSouth for arbitration and proceeded to hear evidence on those issues that remained unresolved at the time of the arbitration hearing. After the conclusion of the deliberations on June 21, 2004, BellSouth short-circuited the appropriate review of the TRA's decision by filing this Petition with the FCC. BellSouth's Petition is an attempt at an end

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[52] *See, e.g., GTE North, Inc. v. Strand,* 209 F.3d 909 (6th Cir. 2000); *MCImetro Access Transmission Serv., Inc. v. BellSouth Telecomm., Inc.,* 352 F.3d 872, 875-76 (4th Cir. 2003) ("A party aggrieved by the state utility commission's resolution of disputed issues may seek review of that decision in federal district court, which has exclusive jurisdiction over such matters."); *MCI Telecomm. Corp. v. Bell-Atlantic Pennsylvania,* 271 F.3d 491, 512 (3d Cir. 2001) ("[A] state commission that decides to participate in that statutory scheme is on notice from the outset that it will be subject to suit, brought only in federal court, by any party aggrieved by its decision."); *MCI Telecomm. Corp. v. Illinois Bell Tel. Co.*, 222 F.3d 323, 337 (7th Cir. 2000) ("Congress envisioned suits reviewing 'actions' by state commissions, as opposed to suits reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in federal court").

[53] 47 U.S.C. § 252(e)(5).

run around the established procedures for review set forth in TRA rules and the Federal Act available to a party that does not agree with a finding of the TRA in an arbitration proceeding.

The TRA is certain that had BellSouth prevailed in its FBO on the switching issue this arbitration docket would have received no different treatment than that afforded by BellSouth in the first arbitration proceeding between BellSouth and DeltaCom (TRA Docket No. 99-00430). The Petition before the FCC in this case boils down to BellSouth's disagreement with the TRA's switching rate. There is no valid jurisdictional argument, and there is no justification for this issue being before the FCC.

**WHEREFORE,** for the foregoing reasons, the Tennessee Regulatory Authority requests that the Federal Communications Commission deny BellSouth's Emergency Petition.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 2004, a true and exact copy of the foregoing was filed electronically with the Federal Communications Commission. The original document has been delivered via U.S. Mail, postage pre-paid, to:

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
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