BELLSOUTH

BellSouth Telecommunications, Inc
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

joelle phillips@bellsouth com

Joelle J Phillips
Attorney

615 214 6311
Fax 615 214 7406

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May 17, 2004

TN REGULATORY AUTHORITY
DOCKET ROOM

VIA HAND DELIVERY

Hon Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Generic Docket Addressing Rural Universal Service*
Docket No 00-00523

Dear Chairman Tate:

Enclosed are the original and fourteen copies of BellSouth's *Motion for Reconsideration of Hearing Officer's Order Dated May 6, 2004*. Copies of the enclosed are being provided to counsel of record

Cordially,

Joelle Phillips

JJP:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Generic Docket Addressing Rural Universal Service*

Docket No. 00-00523

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION FOR RECONSIDERATION OF HEARING OFFICER'S ORDER DATED MAY 6, 2004

BellSouth Telecommunications, Inc ("BellSouth") files this *Motion* seeking reconsideration by the Panel of the *Order Granting In Part The Petition For Emergency Relief And Request For Standstill Order By The Tennessee Rural Independent Coalition* ("Coalition" or "ICOs") issued by the Hearing Officer in this docket on May 6 (the "*Order*").

The *Order* is starkly inconsistent with the Hearing Officer's finding and analysis contained in the *Order* itself. Notwithstanding the Hearing Officer's explicit recognition that compensation between carriers should be recovered "from the cost causer", the *Order* requires a non-cost causer to pay Notwithstanding the Hearing Officer's finding that the existence of Tennessee Regulatory Authority ("TRA") approved interconnection agreements ranging in rate from 8 to 1.5 cents per minute were "particularly compelling", and notwithstanding the Hearing Officer's explicit recognition that 3 cents per minute is likely to exceed the rate established in the arbitration Docket No. 03-00585, the *Order* requires BellSouth, the non-cost causer, to pay the ICOs 3 0 cents per minute

Perhaps most importantly, the *Order* creates needless conflict and inconsistency with order already issued in the arbitration docket (Docket No 03-00585). For example, notwithstanding an existing final order issued by the Authority-appointed Prearbitration Officer in the arbitration docket – an order that has not been challenged by any party, that became final on April 27, 2004 – finding that BellSouth has no obligation to pay the terminating carrier for third-party transit traffic, the Hearing Officer in this Docket has ordered that BellSouth pay for precisely that same traffic. *See* April 12, 2004 *Order Denying Motion*, Docket No. 03-00585, p. 7 (stating "To this end, federal law imposes no compensation obligations on any third party, including BellSouth over whose network the traffic is being exchanged.") (Copy attached.)

As a practical matter, this *Order* will create additional issues and problems in the arbitration. The Hearing Officer's *Order* will provide an overwhelming incentive for the ICOs to delay the arbitration docket in order to continue receiving the 3 cents rather than the rate ultimately set in the docket. For these reasons and the following, BellSouth respectfully requests that the Panel reconsider and reject the *Order*.

I. OVERVIEW OF PROCEDURAL BACKGROUND.

This Docket, originally convened four years ago to consider issues relating to a state Rural Universal Service Fund, has for most of the Docket's recent history focused instead on an antiquated inter-carrier compensation system involving Tennessee ICOs. That system, which was the result of contracts known as the "Primary Carrier Plan", was the subject of a December 2000 Order the TRA (the "2000 Order"). The 2000 Order, which was challenged at the time by BellSouth, enjoined BellSouth from unilaterally

terminating something the 2000 Order referred to, but neither identified nor defined, as "toll settlement arrangements." ***The 2000 Order makes no reference to CMRS-originated transit traffic.***

Most recently, the Docket has begun to focus almost exclusively on issues relating to CMRS-originated transit traffic, that is, traffic that originates with a CMRS carrier, travels over the network of a middle carrier (BellSouth) and terminates to another carrier (in this instance, the ICO). Such traffic occurs when a Tennesse end user uses his or her wireless phone to call an ICO end user. Obviously, as a result of the continued development of competition, including intermodal competition, in Tennessee, such traffic is quite common and is growing.

Clearly, wireless communications are here to stay, and wireless services represent an important part of the way in which Tennesseans use communications service. Notwithstanding this obvious development in the Tennessee market, the ICOs continue to steadfastly refuse to do what is necessary to operate in this new world, specifically refusing or failing to enter into agreements with the wireless carriers relating to this ever-increasing traffic.

As wireless traffic has grown, the interconnection agreements relating to that traffic have developed. As a matter of parity and right, wireless carriers sought interconnection agreements providing for meet-point billing, just like the meet-point billing used with CLECs and interexchange carriers ("IXCs") in Tennessee. The use of meet-point billing is a sign of continued development in the Tennessee market It is the most logical way to deal with the addition of more and more players in the Tennessee

market because meet-point billing allows for the terminating carrier to receive call detail records to assist in billing the originating carrier. Notwithstanding the fact that ICOs have used these same call detail records to bill IXCs for years, the ICOs have steadfastly refused to bill the CMRS providers. Instead, they insist on continuing to operate as they did before CMRS carriers and CLECs existed. They pretend these carriers do not exist and demand to deal solely with BellSouth.

It has been clear at every turn since the transit traffic issue arose in this Docket that the ICOs would do whatever it took to remain as long as possible in a world where they dealt solely with BellSouth and with no other carrier. Ultimately, the wireless carriers, after attempting to negotiate with the ICOs, filed petitions to arbitrate interconnection agreements with the ICOs. That is the subject of Docket No. 03-0585. While the ICOs expressly recognized the CMRS carriers' right to arbitrate, in the arbitration docket, they later moved to dismiss the arbitration.[1] Interconnection agreements between the ICOs and CMRS carriers clearly will be the right way to resolve this ongoing dispute. It is the surest way that the cost causer (the originating carrier) can make arrangements to cover the costs of seeing that its customers' traffic

[1] The ICOs expressly told the Hearing Officer in April 2003, in this docket, that the CMRS carriers were entitled to arbitrate agreements with ICOs at the TRA, saying

> To the extent they can't agree, the process is very clear, they come to the Authority and ask for arbitration and ask you to help decide the terms and conditions where they are out of agreement And that process is absolutely open, always has been open, and continues to be open Not any independent I work for would suggest otherwise, nor would they try to stop that process (Transcript at 10)

Yet after pledging not to "try to stop that process", on March 4, 2004, the ICOs filed a motion to dismiss the very CMRS arbitration that is now pending

arrives at the place it is supposed to arrive. It has been a long effort, but it is clear that the only way this issue will be resolved is in the arbitration docket.

The ICOs have continually attempted to draw BellSouth into that arbitration or to otherwise find ways to continue making BellSouth participate as a banker or even as the sole payor related to this traffic. These attempts have ranged from (1) insisting that they were powerless to negotiate with the CMRS providers because the CMRS providers had never "come to them";[2] (2) agreeing that an arbitration was appropriate but then moving to dismiss that arbitration; and (3) consistently making compensation for the CMRS transit traffic an issue in this docket, instead of committing to the docket in which the CMRS providers are prepared to arbitrate regarding this traffic.

The reason for the ICOs' efforts is not complex. Under the ICOs' theory, BellSouth would be required to pay access charges (approximately 7 cents per minute) to the ICOs for this traffic. Notably, the ICOs concede that the CMRS providers should

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[2] The ICOs relied on this theme, arguing that BellSouth had to pay because the CMRS providers had not "requested" an agreement with the ICOs The Hearing Officer inquired about the logic of this argument in April 2003

> To the extent that you were aware of a particular CMRS carrier's traffic terminating in your area, do you feel any responsibility to approach them so that you can get paid?
>
> MR KRASKIN Well, it's interesting you raise that ***It sounds so terse of me to simply say no. I'd like to say no and explain why.*** We believe and I've advised that a wireless carrier has the right -- not only have I advised the rural independents, I've advised many rural wireless providers that they have a right to seek an agreement with an underlying toll carrier to transport and terminate their traffic And that is often a more efficient means for them to do so, both administratively and pricewise, to get a single composite rate from a carrier to transport and terminate their traffic
>
> Knowing that that exists and knowing that it is available, the fact that a wireless carrier may avail itself of such an arrangement and bring its traffic to us through BellSouth under the existing arrangement ***raises no reason on the part of the terminating carrier to contact the wireless carrier.*** (Transcript at 26, emphasis added)

not be required to pay access.[3] Thus, the ICOs are attempting to change the nature of this traffic – and collect almost ***seven times*** what it should collect for this traffic – simply by holding BellSouth accountable for payment.

As the Hearing Officer has recognized in the May 6 *Order*, currently interconnection agreements with ICOs and CMRS providers covering precisely this issue are on file at the TRA, and those interconnection agreements establish rates for terminating CMRS traffic that transits BellSouth's network at between .8 and 1.5 cents per minute for such traffic.[4] It is no mystery why the ICOs want to hold BellSouth in the midst of this dispute. They are hopeful that as long as BellSouth is footing the bill, they will receive more money (approximately 7 cents per minute of use in access charges) than they will ultimately be able to obtain in the arbitration from the CMRS providers (if the existing agreements are any guide – perhaps .8 to 1.5 cents for terminating the

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[3] Again, at the April, 2003 status conference, the ICOs made it clear that higher access charges were not applicable to the CMRS traffic, explaining

> I want to emphasize that point, though There is no independent with which I'm working who has directed me to insist on a resolution to this proceeding whereby we ask for access charges from any wireless carrier (Transcript at 20-21)

While the ICOs apparently agree the CMRS carriers should not pay access, they expect BellSouth to pay access for the CMRS providers' traffic.

[4] See interconnection agreements of Highland Telephone and TDS (*Wireless Interconnection Agreement Between TDS Telecom and Verizon*, Docket No 02-00973, approved by TRA Panel, Kyle, Jones, Tate, order issued November 13, 2002, *Wireless Interconnection Agreement between Cingular Wireless and Highland Telephone Cooperative, Inc*, Docket No 01-00873, approved by TRA Panel, Kyle, Greer, Malone, order issued January 17, 2002) Specifically, the language in the Highland agreement, p 7, is illustrative,

> Sec VIII Billing, Para B Each Party acknowledges that it is the originating Party's responsibility to enter into compensation arrangements with the third-party carrier to which Transit Traffic is terminated Each Party acknowledges that the transited Party does not have any responsibility to pay any third-party Telecommunications Carrier charges owed by the originating party to the terminating carrier for termination of any identifiable Transit Traffic from the originating Party Both Parties reserve the right not to pay such charges on behalf of the originating Party

traffic). The ICOs quite simply have realized that as long as BellSouth has to pay, they will get more money than they will ultimately get at the end of the arbitration from the CMRS providers This realization has motivated them to delay the arbitration at every opportunity.

Now that the arbitration is proceeding, some of these ICO efforts are being stopped. On April 12, 2004, in the CMRS/ICO arbitration docket, the Prearbitration Officer issued the *Order* denying the motion of the ICOs to dismiss the arbitration or to join BellSouth as a party in the arbitration. In that *Order*, an *Order* which has not been challenged by any party, the Prearbitration Officer ***specifically*** found that BellSouth had no obligation to pay for transit traffic of this nature April 12 *Order* at 7.

In the arbitration docket, the Prearbitration Officer has also dealt with the issue of interim compensation for the ICOs. In that docket, she ordered the parties to submit briefs on interim compensation. The CMRS providers submitted a brief in response, but the ICOs submitted nothing. While the Hearing Officer has not yet ruled on that matter, the *Order* in this docket needlessly interferes with the progress of the arbitration – including the setting of interim compensation for both parties to that docket.

II. THE RATE ORDERED IS ARBITRARY AND EXCESSIVE.

A. The Rate is Twice the High End of the Current Market Range.

In the *Order* dated May 6, the Hearing Officer recognizes many things with respect to transit traffic. First the Hearing Officer notes the existence of approved interconnection agreements between some ICOs and some CMRS providers. *Wireless Interconnection Agreement Between TDS Telecom and Verizon*, Docket No. 02-00973,

approved by TRA Panel, Kyle, Jones, Tate, order issued November 13, 2002; *Wireless Interconnection Agreement between Cingular Wireless and Highland Telephone Cooperative, Inc.*, Docket No. 01-00873, approved by TRA Panel, Kyle, Greer, Malone, order issued January 17, 2002 These agreements, approved by the TRA and negotiated with no involvement from BellSouth, do, as the Hearing Officer recognized, provide "particularly compelling" evidence in this matter. Specifically, they demonstrate that the ICOs can negotiate, and, in fact, have negotiated successfully, interconnection agreements to deal with transit traffic.

Notably, the rate for compensating the ICOs for terminating such traffic in the agreements on file with the Authority range from .8 to 1 5 cents per minute. Notwithstanding this recognition of important precedent approved by the Authority, the Hearing Officer's *Order* imposes an obligation on BellSouth to pay ***twice the highest*** negotiated rate and more than three times the minimum negotiated rate in any existing interconnection agreement between a CMRS provider and an ICO relating to transit traffic. ***Further highlighting the problem, the Hearing Officer's Order notes BellSouth's argument, based on existing agreements, the likelihood that a 3 cent rate would likely exceed the rate adopted in the arbitration.***

B. <u>The Rate Exceeds Rates Being Paid Throughout the Region in Settlement.</u>

The rate is also far out of line with rates being paid elsewhere in BellSouth's region under settlement agreements. BellSouth, along with all the other parties in this docket, has entered into settlement agreements in other states addressing precisely the same issue in which BellSouth agreed, for a limited time, to bear a portion of the cost

associated with compensating the ICOs for this traffic while interconnection agreements were negotiated. BellSouth is paying, under most of those settlement agreements, 1.0 cent to 1.5 cents per minute through December 2004 in most such agreements. The ICOs receive a total of 2.5 cents per minute with an additional contribution from both the CMRS providers and BellSouth.

In Tennessee, however, by refusing to accept the same settlement arrangements acceptable in other states, the ICOs have now, under the Hearing Officer's *Order* won a .5 cent per minute premium above the amounts in those settlement agreements – a rate that already exceeds the maximum negotiated rate for this traffic as contained in failed and approved interconnection agreements. Delay tactics such as those engaged in in this Docket by the ICOs should not be rewarded in that fashion. Likewise, it is inconsistent with the TRA's support of the parties' efforts to do business by negotiated agreements to reward a party for refusing to do so.

Finally, the suggestion that the parties previously agreed to a 3 cent per minute compromise completely neglects recognition of the other provision of that compromise; that is, ***its limited 30-day duration*** BellSouth ***never*** agreed to 3 cents per minute for such an extended period of time. BellSouth should not be punished for its good faith attempt to settle this dispute by agreeing to pay 3 cents per minute for one month while trying to reach settlement

III. THE RATE WILL INCENT THE ICOS TO DELAY.

The Hearing Officer's *Order* establishes that this 3 cent per minute compensation shall be paid by BellSouth until the earlier of three potential end points: (1) a date

established by CMRS carriers and Coalition members; (2) thirty days following the panel's deliberations in the arbitration docket; or (3) December 31, 2004. In light of the history of this dispute and the ***years*** that it has been ongoing, it should be clear from a practical perspective that the ICOs are never going to agree with the CMRS carriers to obtain less than 3 cents per minute as long as they can get 3 cents per minute from BellSouth under the *Order*. Consequently, the *Order* boils down to a requirements that BellSouth pay until either December 31 or thirty days following the deliberation in the arbitration

Given the Hearing Officer's own reference to the likelihood that 3 cents per minute will exceed the rate established in that arbitration, this *Order* provides a powerful incentive to the ICOs to take every step possible to delay resolution of the arbitration. As the Authority is aware, there are numerous opportunities in an arbitration for parties to delay. This *Order* encourages such a delay strategy because it provides a stream of higher payments than the payments that are likely to result from the arbitration. It should be clear by this point to all concerned that arbitration and the execution of interconnection agreements between the CMRS providers and the ICOs is the way to resolve this dispute. This *Order* provides a strong incentive for the ICOs to delay precisely that resolution.

Had the CMRS providers and the ICOs not chosen to waive the statutory deadlines associated with their arbitration, this matter would already be resolved. As a non-party, BellSouth has no control over the timing of the arbitration or its conclusion. To the extent that the *Order* is intended to safeguard against the ICOs providing service

without compensation in the interim period before the arbitration is concluded, it must be remembered that ***by their own choice*** the ICOs have extended that interim period of time by waiving the statutory deadlines.

IV. THE *ORDER* CONFLICTS WITH A PRIOR, UNCHALLENGED, FINAL ORDER OF THE PREARBITRATION OFFICER.

This *Order* also conflicts with an earlier, final *Order* in the arbitration docket specifically recognizing that BellSouth is not responsible for payment of precisely what this *Order* requires BellSouth to pay. The Authority has long recognized the importance of consistent orders, and this is particularly important today given its multi-panel make-up. Moreover, it is particularly significant that no party objected to the April 12 *Order* in the arbitration before it became final. For all these reasons, an order inconsistent with that earlier *Order* should not be accepted by the Authority, especially when this inconsistent *Order* directly relates to the issues being addressed in the Arbitration Docket.

V. THE *ORDER* FAILS TO REQUIRE TRUE-UP.

BellSouth, of course, believes that the *Order* is flawed and BellSouth should not pay any amount related to this traffic. If, however, the Authority is inclined to require BellSouth to pay some amount as an interim measure, at the very least, BellSouth should be protected from paying more than what the cost causer is ultimately required to pay pursuant to the terms of the arbitrated agreement. Specifically, BellSouth should not be required to pay any amount without being permitted to "true-up" those amounts once the correct rate is set in the arbitration.

The Authority has frequently used the true-up concept to ensure fairness for interim payments.

VI. THE *ORDER* PURPORTS TO PROVIDE COMPROMISE – BUT INSTEAD IS UNFAIR AND ONE-SIDED.

The *Order* expressly couches the relief in terms of "compromise" intended for an interim period. A true compromise must be reasonable in rate, duration, and in who foots the bill. A clearly more reasonable compromise on rate would have been to select an amount representing the midpoint of the negotiated rates in existing interconnection agreements related to such traffic (1.15 cents per minute) To the extent that the Hearing Officer intended to simply reach a compromise rate for a limited period of time, a rate of 1 15 (representing an average of existing rates), collected from the cost causer, with a true-up in the event a lower rate is set in the arbitration, is a far more rational compromise.

Likewise, a true compromise would address all the parties, including the CMRS carriers and would also address the payment to the CMRS carriers, who are also not being paid currently when the traffic goes in the other direction (ICO end users to CMRS end users)

Importantly, the Hearing Officer recognizes in the *Order* that changed circumstances since an earlier December 2000 *Order* of the Authority require modification of the existing treatment of compensation relating to CMRS traffic. The Hearing Officer also recognized that the legal issue regarding responsibility under the Telecommunications Act of 1996 (the "Act") for paying terminating compensation to the ICOs for CMRS traffic will be decided in the arbitration docket. In fact, that issue has

already been decided in the arbitration docket with respect to BellSouth. *See* April 12, *Order* at 7.

The Hearing Officer's recognition that the time is right to act in order to establish a change with respect to the way the ICOs are compensated is absolutely correct. The compensation mechanism, however, that the Hearing Officer establishes that is not correct. The *Order* recognizes that its compensation decision is premised on the fact that (1) the Coalition is providing a service without receiving compensation; (2) that "the dispute is between BellSouth and the Coalition"; and (3) that the parties (BellSouth and the Coalition) previously agreed to a "reasonable compromise of 3 cents per minute." All three premises are flawed. While it may be true that the ICOs are receiving no compensation currently for terminating CMRS-originated traffic, it is not true that they are providing a service ***to BellSouth***. Rather, they are providing a service to the CMRS providers. If BellSouth has to pay for that, then it will be BellSouth who is footing the bill for service provided to the CMRS providers.

The idea that the dispute is "between BellSouth and the Coalition" is merely the acceptance of the ICOs' ***wrong*** view of this matter. The ICOs certainly wish to continue keeping BellSouth in the middle of this issue. However, the Prearbitration Officer in the arbitration docket has long since recognized that the real dispute is between the Coalition and the CMRS providers. They are the proper parties to the arbitration; they are the parties who will ultimately reach an interconnection agreement to address this issue; and BellSouth is merely, and literally, the middle-man, providing transit across its network without blocking traffic.

VII. CONCLUSION

The bottom line is that the Hearing Officer's *Order* requires the ***wrong*** party to pay the ***wrong*** amount for this traffic for the ***wrong*** period of time. As a result, the ICOs will have a powerful incentive to continue delaying the one thing that provides any hope of resolving this matter· that is, the arbitration For these reasons, BellSouth urges the panel to reconsider and reject the Hearing Officer's *Order* and find, consistent with the unchallenged *Order* in the Arbitration Docket, that BellSouth has no obligation to pay the terminating carrier for third-party transit traffic

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

Guy M. Hicks
Joelle J. Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

R. Douglas Lackey
J. Phillip Carver
675 W Peachtree St., NE, Suite 4300
Atlanta, GA 30375

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

April 12, 2004

IN RE:	)	
	)	
PETITION FOR ARBITRATION OF CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS	)	**DOCKET NO. 03-00585**
	)	
PETITION FOR ARBITRATION OF BELLSOUTH MOBILITY LLC; BELLSOUTH PERSONAL COMMUNICATIONS, LLC; CHATTANOOGA MSA LIMITED PARTNERSHIP; COLLECTIVELY D/B/A CINGULAR WIRELESS	)	
PETITION FOR ARBITRATION OF AT&T WIRELESS PCS, LLC D/B/A AT&T WIRELESS	)	
PETITION FOR ARBITRATION OF T-MOBILE USA, INC.	)	
PETITION FOR ARBITRATION OF SPRINT SPECTRUM L.P. D/B/A SPRINT PCS	)	

ORDER DENYING MOTION

This matter is before the Pre-Arbitration Officer pursuant to the *Preliminary Motion of the Rural Coalition of Small LECs and Cooperatives* ["Coalition"][1] *to Dismiss or, in the Alternative, Add an Indispensable Party* ("*Motion*") filed with the Tennessee Regulatory Authority ("TRA") on March 4, 2004. A response to the *Motion* was filed by the Commercial Mobile Radio Services ("CMRS") providers and by BellSouth Telecommunications, Inc. ("BellSouth") on March 12, 2004. For the reasons specified below, this *Motion* is hereby denied.

[1] Ardmore Telephone Company, Inc., Ben Lomand Rural Telephone Cooperative, Inc , Bledsoe Telephone Cooperative, CenturyTel of Adamsville, Inc.; CenturyTel of Claiborne, Inc , CenturyTel of Ooltewah-Collegedale, Inc , Concord Telephone Exchange, Inc.; Crockett Telephone Company, Inc , DeKalb Telephone Cooperative, Inc , Highland Telephone Cooperative, Inc.; Humphreys County Telephone Company, Loretto Telephone Company, Inc , Millington Telephone Company; North Central Telephone Cooperative, Inc ; Peoples Telephone Company, Tellico Telephone Company, Tennessee Telephone Company, Twin Lakes Telephone Cooperative Corporation; United Telephone Company, West Tennessee Telephone Company, Inc.; and Yorkville Telephone Cooperative

Background

For some time, BellSouth has been compensating the members of the Coalition for traffic exchanged via BellSouth facilities between Coalition members and the CMRS providers. In the context of renegotiating toll settlement payments between BellSouth and the members of the Coalition in TRA Docket No. 00-00523, BellSouth declared that it would no longer continue this compensation arrangement and suggested that some other reciprocal compensation mechanism be negotiated directly between the Coalition members and the CMRS providers. Pursuant to this declaration, the Pre-Hearing Officer in Docket No. 00-00523 ordered that the CMRS providers be notified of the opportunity to negotiate with the Coalition regarding this matter.[2] Each of the CMRS providers included in this arbitration filed a bona fide request to begin negotiations for interconnection and reciprocal compensation with the members of the Coalition on May 29, 2003.[3] On November 6, 2003, the CMRS providers filed with the TRA petitions for arbitration of these interconnection and reciprocal compensation agreements.[4]

Position of the Coalition

In reference to the request to dismiss the petitions for arbitration, the Coalition suggests that the interconnection terms and conditions sought by the CMRS providers are required by neither 47 U.S.C. § 251 nor the related regulations of the Federal Communications Commission ("FCC"). Although the TRA is authorized by 47 U.S.C. § 252 to arbitrate any open issues

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[2] *In re Universal Service for Rural Areas - The Generic Docket*, Docket No 00-00523, *Order Granting Conditional Stay, Continuing Abeyance, And Granting Interventions* (May 5, 2003)

[3] *See In re Petition for Arbitration of Cellco Partnership d/b/a Verizon Wireless*, Docket No 03-00585, p 5, *In re Petition for Arbitration of BellSouth Mobility LLC, BellSouth Personal Communications, LLC, Chattanooga MSA Limited Partnership, Collectively d/b/a Cingular Wireless*, Docket No 03-00586, p 5, *In re Petition for Arbitration of AT&T Wireless PCS, LLC d/b/a AT&T Wireless*, Docket No 03-00587, p 5; *In re Petition for Arbitration of T-Mobile USA, Inc* , Docket No. 03-00588, p 4; *In re Petition for Arbitration of Sprint Spectrum L P d/b/a Sprint PCS*, Docket No 03-00589, p 7.

[4] The petitions were filed in the five dockets specified in the footnote directly above and were ultimately consolidated into Docket No 03-00585 by order of the respective voting panel for each docket

according to the requirements of 47 U.S.C. § 251, the Coalition claims that the TRA has no authority to determine interconnection policies or standards not already expressly established by 47 U.S.C. § 251. Therefore, arbitration pursuant to 47 U.S.C. § 252 is not appropriate since there are no established standards governing the indirect interconnection being sought by the CMRS providers, *i.e.*, delivering traffic over a common truck group and alleviating BellSouth from all financial responsibility for the termination service. The Coalition also maintains that nothing in 47 U.S.C. § 251 permits the CMRS providers to mandate terms of an interconnection that are contrary to the wishes of the Coalition members, specifically the use of "meet point billing."

With respect to the request to join BellSouth as an indispensable party, the Coalition contends that, even though arbitration is not appropriate under these circumstances, the TRA may properly resolve the outstanding issues in this Docket, but not without BellSouth's involvement because the CMRS providers have chosen to interconnect indirectly with the members of the Coalition via the BellSouth network; without BellSouth, the Coalition members may not otherwise be able to determine the amount of traffic being terminated by each carrier; and BellSouth's involvement provides a measure of financial protection against defaulting providers. For these reasons, the Coalition maintains that BellSouth is a necessary and indispensable party to the negotiation of an interconnection agreement pursuant to the standards of Tenn. R. Civ. Proc. 19.01. In support of this contention, the Coalition argues that the resulting three-way interconnection agreements would be consistent with the existing agreements between BellSouth and the CMRS providers taken together with the separate agreements between BellSouth and the Coalition members.

Position of the CMRS Providers

According to the CMRS Providers, arbitration before the TRA of all outstanding issues in this Docket is consistent with federal law and TRA precedent as well as the prior agreement and/or understanding of the Parties. The CMRS providers assert that the TRA has previously represented arbitration as an appropriate mechanism under 47 U.S.C. §§ 251 and 252 to establish interconnection between the CMRS providers and the Coalition. The CMRS providers also assert that they have been diligently adhering to the procedures for arbitration outlined in Sections 251 and 252 and that the Coalition members have so far participated in this process and have explicitly agreed to arbitration should informal negotiations prove to be unproductive

Moreover, the CMRS providers disagree that federal law places any type of restriction on the types of issues that may and/or should be resolved by the TRA through arbitration and contend that the federal statutes were designed to address exactly the type of interconnection issues presented to the TRA for arbitration in this Docket. The CMRS providers claim that the issues to be resolved have arisen almost entirely out of the federal Telecommunications Act and its associated regulations and, even to the extent that any issues are based on state law, the TRA has the authority to address them all in the context of this arbitration. The CMRS providers specifically maintain the authority of the TRA to determine the obligation of the Parties to interconnect, whether directly or indirectly.

For purposes of establishing interconnection agreements with the Coalition members, the CMRS providers assert that the involvement of BellSouth is unnecessary. Although traffic is being exchanged over BellSouth facilities, the CMRS providers insist that appropriate compensation rates for this traffic can be determined without making BellSouth a party to the interconnection agreement. The CMRS providers contend that federal law does not allow for the

negotiation of a three-way interconnection agreement and that, to the extent input is needed from BellSouth, they have already agreed to cooperate.

Position of BellSouth

BellSouth objects to the efforts of the Coalition to force BellSouth to participate in this arbitration as a party. BellSouth disagrees that the subject of the arbitration is "three way indirect interconnection agreements" and asserts that federal law limits arbitrations to two parties and that the TRA has previously found that arbitration is limited to the two parties seeking to interconnect, in this case, the CMRS providers with the Coalition members. Moreover, BellSouth states that it and the CMRS providers have both refused to negotiate a three-way interconnection agreement and that there is no legal precedent supporting such an agreement or the Coalition's efforts to compel BellSouth's participation. BellSouth also denies that it is a necessary party to this arbitration. In support of its position, BellSouth contends that incumbent local exchange companies (ILECs) serving rural areas via BellSouth facilities have previously entered into interconnection agreements with CMRS providers without any involvement from BellSouth.

On a different but related note, BellSouth maintains that traffic which is the subject of the instant arbitration is not governed by the existing Primary Carrier Plan ("PCP") agreements between BellSouth and the Coalition members. BellSouth also claims that the dispute regarding these PCP agreements need not be resolved in the context of this arbitration but should be resolved in the Docket in which the issue was initially raised and is currently pending.

BellSouth also asserts that the petitions for arbitration are proper and should not be dismissed. BellSouth suggests that the present protests of the Coalition are inconsistent with its prior commitment to negotiate interconnection agreements and its prior representations that it

would be willing to engage in arbitration with the CMRS providers if necessary. Because of these representations and the reliance thereon of the CMRS providers, BellSouth contends that the Coalition should no longer be permitted to object to or further delay the arbitration.

Findings and Conclusions

Pursuant to 47 U.S.C. § 251(a)(1), the members of the Coalition, as well as the CMRS providers, are required to interconnect, either directly or indirectly, with all other telecommunications carriers. As local exchange carriers, the Coalition members are also obligated to establish reciprocal compensation arrangements for both the transport and termination of telecommunications traffic.[5] To accomplish these goals, the Coalition members must, as ILECs, negotiate in good faith in accordance with the requirements of 47 U.S.C. § 252.[6]

In addition to the ILEC, the duty to negotiate in good faith is also imposed upon the telecommunications carrier requesting the arrangement for transport and/or termination of traffic.[7] Voluntary negotiations between an ILEC and a requesting carrier or carriers is also provided for in 47 U.S.C. § 252(a)(1). As represented by both the CMRS providers and BellSouth, there is no provision in federal law for including any additional parties in the negotiation process. Because arbitration is simply an extension of voluntary negotiations, there is, likewise, no allowance made in federal law for participation in arbitration of any party other than the ILEC and requesting carrier(s).

Pursuant to these standards and requirements, the request of the Coalition for joinder of BellSouth and/or dismissal of the petitions for arbitration must be denied.

[5] 47 U S C § 251(b)(5)
[6] 47 U S C § 251(c)(1)
[7] 47 U S C § 251(c)(1)

Joinder

TRA Rule 1220-1-2-.22(2) does allow for the joinder of parties as requested in the Coalition's *Motion*. The standard for joinder is articulated in Tenn. R. Civ. Proc. 19.01 which reads as follows:

> A person who is subject to the jurisdiction of the court shall be joined as a party if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party.

Essentially, joinder requires a finding that the party is necessary or indispensable to a resolution of the matter at hand.[8] Based on this standard, the Coalition has not adequately supported its request to join BellSouth as a party to this arbitration.

Based upon the bona fide requests to negotiate interconnection and reciprocal compensation agreements, the members of the Coalition are obligated to interconnect with each CMRS provider, whether directly or indirectly, and to establish with each CMRS provider an arrangement for reciprocal compensation for the exchange of telecommunications traffic between a Coalition member and a CMRS provider. Whether the exchange of traffic between two such carriers is direct or indirect via the BellSouth network, explicit in federal law is the duty of each Coalition member to each CMRS provider, as the requesting carrier, to arrange for reciprocal compensation. To this end, federal law imposes no compensation obligations on any third party, including BellSouth over whose network the traffic is being exchanged. Notwithstanding any agreement between BellSouth and the other carriers for the use of the

[8] *See Horton v Tennessee Dept of Correction*, 2002 WL 31126656, at *4, n 4 (Tenn Ct App 2002)

BellSouth network, each Coalition member must still provide for the exchange of traffic with each CMRS provider. For this specific purpose, BellSouth is an unnecessary third party and need not be joined in this particular arbitration.

While it is clear that the Coalition would prefer that BellSouth be a party to the arbitration and the resulting interconnection agreements, this preference does not make BellSouth necessary and indispensable. As discussed above, complete relief is still available among the Parties in the absence of BellSouth. Not only is the necessary relief available, it is also mandated by federal law.

Moreover, even if joinder were warranted under state law, there is still no provision in federal law to allow for the three-way arbitration and interconnection agreements proposed by the Coalition, especially when the other two intended parties object to such an arrangement, and when such an arrangement has, in fact, been previously prohibited by the TRA.[9] Further, there is no provision in federal law whereby the participation of these unwilling parties could be compelled. It is also counterintuitive that the Coalition would seek to impose upon these two unwilling parties a three-way agreement that is without support in federal law while objecting to the two-way agreement that is actually required.

Dismissal

TRA Rule 1220-1-2-.03(2)(f) allows for dismissal of a complaint or petition for "failure to join an indispensable party." Because BellSouth is not a necessary and indispensable party to this arbitration as contemplated by Tenn. R. Civ. Proc. 19.01, the Coalition's request to dismiss the arbitration petitions on this basis must be denied as a matter of course.

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[9] *See In re The Matter of the Interconnection Agreement Negotiations Between AT&T Communications of the South Central States, Inc and BellSouth Telecommunications, Inc Pursuant to 47 U S C Section 252*, Docket No 96-01152, *Order Denying the Petition of the Consumer Advocate Division to Intervene* (September 11, 1996)

Furthermore, the arbitration must continue pursuant to the requirements of federal law. As discussed above, the Coalition members are required to interconnect with the CMRS providers, directly or indirectly, and to make arrangements for reciprocal compensation. It is precisely this relief that the CMRS providers are seeking. To this end, the Parties are required to negotiate in good faith and, should these efforts be unproductive, to file for arbitration with the TRA. Upon receipt of a proper petition for arbitration, the TRA is required to resolve all issues presented to it for consideration in the petition.[10] Because the CMRS providers have followed exactly the procedure for negotiation and arbitration as outlined in 47 U.S.C. §§ 251 and 252, and the Coalition had, prior to the filing of this Motion, agreed to participate in this process, there is no basis on which to dismiss these petitions. This conclusion does not change by recharacterizing the request of the CMRS providers for interconnection as a three-way arrangement that does not fit the relief contemplated by federal law.

IT IS THEREFORE ORDERED THAT:

The *Preliminary Motion of the Rural Coalition of Small LECs and Cooperatives to Dismiss or, in the Alternative, Add an Indispensable Party* is hereby denied.

Kim Beals, Counsel
as Pre-Arbitration Officer

[10] 47 U.S C § 252(b)(4)(C)

CERTIFICATE OF SERVICE

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

[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight [X] Electronic	Russ Mitten, Esquire Citizens Communications 3 High Ridge Park Stamford, CT 06905 Rmitten@czn.com
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight [X] Electronic	Charles B. Welch, Esquire Farris, Mathews, et al. 618 Church St., #300 Nashville, TN 37219 cwelch@farrismathews.com
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight [X] Electronic	Mr. David Espinoza Millington Telephone Company 4880 Navy Road Millington, TN 38053 dce@bigriver.net
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight [X] Electronic	Jon E. Hastings, Esquire Boult, Cummings, et al. P. O. Box 198062 Nashville, TN 37219-8062 jhastings@boultcummings.com
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight [X] Electronic	Henry Walker, Esquire Boult, Cummings, et al. P. O. Box 198062 Nashville, TN 37219-8062 hwalker@boultcummings.com
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight [X] Electronic	James Wright, Esq United Telephone - Southeast 14111 Capitol Blvd. Wake Forest, NC 27587 james b.wright@mail.sprint com
[ ] Hand [ ] Mail [ ] Facsimile [ ] Overnight [X] Electronic	Clay Phillips, Esquire Miller & Martin 150 4th Avenue, #1200 Nashville, TN 37219 cphillips@millermartin.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Martha Ross-Bain, Esquire
AT&T
1200 Peachtree St , NE
Atlanta, GA 30309
Ross-bain@att.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Donald L. Scholes, Esquire
Branstetter, Kilgore, et al.
227 Second Ave., N
Nashville, TN 37219
dscholes@branstetterlaw.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Timothy Phillips, Esquire
Office of Tennessee Attorney General
P. O. Box 20207
Nashville, TN 37202
Timothy phillips@state tn.us

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Bill Ramsey, Esquire
Neal & Harwell, PLC
150 Fourth Avenue North, #2000
Nashville, Tennessee 37219-2498
ramseywt@nealharwell.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Stephen G. Kraskin, Esquire
Kraskin, Lesse & Cosson, LLP
2120 L Street NW, Suite 520
Washington, D.C. 20037
skraskin@klctele com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

J. Gray Sasser, Esquire
Miller & Martin LLP
150 Fourth Ave., N., #1200
Nashville, TN 37219-2433
gsasser@millermartin.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Julie Corsig, Esquire
Davis Wright Tremaine LLP
One Embarcadero Center, #600
San Francisco, CA 39111-3611
Julie.corsig@dwt.com

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Beth K. Fujimoto, Esquire
AT&T Wireless Services, Inc.
7277 164th Ave., NE
Redmond, WA 90852
Beth fujimoto@attws.com