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June 7, 2004

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 *Brief re Hearing Officer's May 6, 2004 Order*. Copies of the enclosed are being provided to counsel of record

Cordially,

Joelle Phillips

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Generic docket Addressing Rural Universal Service*

docket No. 00-00523

BELLSOUTH TELECOMMUNICATIONS, INC.'S BRIEF RE HEARING OFFICER'S MAY 6, 2004 ORDER

BellSouth Telecommunications, Inc. ("BellSouth") files this *Brief re Hearing Officer's May 6, 2004 Order* ("*Brief*") and respectfully shows the Tennessee Regulatory Authority ("Authority" or "TRA") as follows:

I. INTRODUCTION AND OVERVIEW

A. The Primary Carrier Plan and the December 2000 *Order*

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 inter-carrier compensation system (developed well before the passage of either the state or federal Telecommunications Act) involving Tennessee Rural Independent Carriers ("ICOs") That system is memorialized in contracts known as the "Primary Carrier Plan" ("PCP").

The Primary Carrier Plan explicitly provides that it can be terminated upon notice by any party. When BellSouth indicated that it planned to terminate that contract, the ICOs raised the issue in this docket, arguing that, until a Rural USF plan was in place to replace the PCP, BellSouth should not be allowed to terminate – even though the contract explicitly provided otherwise. This dispute was the subject of a December 2000

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TRA *Order* (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 specifically identified nor defined, as "toll settlement arrangements " ***The 2000 Order makes no reference to compensation for CMRS-originated transit traffic, which is the subject of the Hearing Officer's recent (May 6) Order.***

B. <u>The CMRS-Originated Transit Traffic Issue</u>

Most recently, this docket has focused almost exclusively on issues relating to CMRS-originated transit traffic, that is, traffic that originates with a CMRS carrier, travels over the network of an intermediate 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 (unheard of when the Primary Carrier Plans were originally developed) is now 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 interconnection agreements with the wireless carriers explicitly providing for proper inter-carrier compensation related to this ever-increasing traffic

As wireless traffic has grown, the interconnection agreements with BellSouth relating to that traffic have developed. When wireless traffic was far more limited, many CMRS providers used interconnection agreements in which they agreed to pay the transiting carrier whatever that carrier in turn was billed by the terminating carrier. Now that the wireless traffic has grown, and as a matter of parity and right, wireless carriers sought interconnection agreements providing for "meet-point billing"[1], just like the meet-point billing used with CLECs and interexchange carriers ("IXCs") in Tennessee. While it may have made sense in the infancy of wireless traffic to use other types of arrangements, it is not surprising that these carriers have now opted to use the same method used by CLECs and IXCs.

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 use this same method to bill the CMRS providers. Instead, they insist on continuing to operate as they did before CMRS carriers and CLECs existed. Rather than negotiate interconnection agreements with all the CMRS Providers, the ICOs have preferred to ignore them, to try to do business as if they were not there, and to demand to deal solely with BellSouth.

[1] "Meet-Point Billing" is simply the name of billing arrangements in which a carrier receives the identifying information necessary to bill the originating carrier . CLECs and IXCs all use meet-point billing arrangements with BellSouth ICOs also use meet-point billing arrangements with IXCs

C. The Arbitration of Interconnection Agreements Between the ICOs and the CMRS Providers.

Since the transit traffic issue arose in this docket, the ICOs have fought hard to remain as long as possible in a world where they dealt solely with BellSouth and with no other carrier. They have tried to force a three-way agreement on BellSouth and the wireless carriers. They have claimed that only a three-way contract would suffice – even though some members of the Coalition of ICOs have already entered into two-party interconnection agreements with some CMRS carriers. 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 when the matter was discussed in this docket, they later moved to dismiss the arbitration in the other docket.[2]

Interconnection agreements between the ICOs and CMRS carriers, explicitly addressing the intercarrier compensation for this traffic, 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 arrives at the place it is supposed to arrive (the network of the terminating carrier). It has been a

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[2] 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

long effort to get the right parties – the ICOs and the CMRS Providers – talking. Now that they are engaged in an arbitration, it is clear that this issue can and will be finally resolved when an interconnection agreement is finalized in that arbitration.

D. <u>The Business Realities Driving the Dispute.</u>

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";[3] (2) agreeing that an arbitration was appropriate but then moving to dismiss that same 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 ***and to establish an interim compensation system to compensate the ICOs while the arbitration is ongoing***

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[3] 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)

The reason for the ICOs' efforts is not complex. The ICOs hope to obtain more money, and they are urging a theory designed to result in higher compensation from BellSouth Under the ICOs' theory, BellSouth would be required to treat the CMRS traffic as if it were toll traffic covered by the Primary Carrier Plan and consequently pay access charges (approximately 7 cents per minute) to the ICOs for this traffic. Notably, the ICOs concede that, when this same traffic is addressed in an interconnection agreement with the CMRS providers, the CMRS providers should not be required to pay access when the ICOs terminate that same traffic.[4] Thus, the ICOs want to treat that same traffic differently –collecting almost ***seven times*** what it should collect for this traffic – and hold BellSouth accountable for payment as if the traffic were toll traffic covered by the PCP Arguing (wrongly) that the access rate applies, the ICOs cast their demand for 3 cents per minute as if it were a compromise – even though it drastically exceeds the rates for termination of CMRS-originated traffic in the ICO/CMRS interconnection agreements already on file at the TRA.

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. Those interconnection agreements establish rates for

[4] 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.

terminating CMRS traffic to ICO customers at between .8 and 1.5 cents per minute for such traffic [5]

Given the stark difference between the access rates in the Primary Carrier Plan and the lower compensation rates in the CMRS agreements, it is no mystery why the ICOs want to hold BellSouth in the midst of this dispute and argue that the traffic should be treated as if it were covered by the Primary Carrier Plan.[6] They are hopeful that as long as BellSouth is footing the bill, they will receive more money (even at their supposed 3 cent "compromise") than they will ultimately be able to obtain in the arbitration from the CMRS providers (if the existing agreements are any guide – .8 to 1.5 cents for terminating the traffic, compared to 3 cents). The ICOs quite simply are betting on the chance 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

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[5] 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

[6] There is no provision in the Tennessee Primary Carrier Plans addressing CMRS-originated traffic Rather than cite any contractual support for shoe-horning this traffic into those contracts, the ICOs use terms like the "interconnection arrangement" – meaning some obligation other than the text of the contract There is no such obligation in Tennessee, however Certainly, any argument that such an obligation could be teased out of state law must fail in the face of the compensation scheme under the federal act, which provides for originating carriers to pay the cost of terminating traffic

Officer issued an *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.[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 Prearbitration Officer has not yet ruled on that matter, the May 6 *Order* in this docket needlessly interferes with the progress of the arbitration – including the setting of interim compensation for both parties to that docket.

E. <u>This docket is Not the Place to Resolve the Issues Relating to CMRS Traffic, and Continuing to Allow the ICOs to Raise These issues in this docket Just Delays the TRA From Addressing Rural Universal Service.</u>

In short, while this docket was originally convened in 2000 for the purpose of establishing a state rural service fund, the docket has been diverted from that purpose. For almost four years now, this docket has been prevented from making any progress on its real purpose and has focused instead on the complaints of the ICOs who urge that, until a state RUSF is in place, other companies should be enjoined such that the ICOs feel no changes in their revenue until there is a new source to replace it.

That position is not reasonable in a competitive environment, and it has resulted in complex problems as the ICOs have tried to broaden the injunction-style relief they obtained in 2000 in order to reach additional items that were not at issue when the TRA issued that *2000 Order* requiring that BellSouth refrain from changing the way it

[7] April 12 *Order* at 7

compensated the ICOs on toll traffic – even though the contract governing that arrangement, the contract to which the ICOs agreed, explicitly allowed either party to terminate at any time on proper notice Having obtained this extraordinary (and wrong) relief in the context of wireline toll traffic, the ICOs have campaigned to extend that relief to a type of traffic that is not covered by that contract, that was not discussed at the time the *Order* was entered in 2000[8], and that was not even in existence when the contract covering the relationship between BellSouth and the ICOs was negotiated by these companies.

Stated simply – the ICOs obtained extraordinary and improper relief allowing them to continue enjoying the out-dated access charges in the PCP, and now they are demanding the same relief be expanded to encompass wireless traffic, as well. The problem is that requiring BellSouth to pay for wireless traffic it does not originate, at a rate some several times the market rate, is flatly inconsistent with federal law and creates an insurmountable obstacle for negotiation – why would the ICOs ever agree to negotiate new interconnection agreements with the wireless carriers as long as they could force BellSouth to pay many times the market rate?

In fact, this issue has already resulted in years of delay. Notwithstanding a full year of formal negotiation, the ICOs have not reached agreement, and the ICOs have gone so far as to seek dismissal of the very arbitration that will provide an interconnection agreement to solve this problem.

II. WHAT DOES THE MAY 6 ORDER REQUIRE?

[8] BellSouth challenged the December *2000 Order* on jurisdictional grounds when it was issued Of course, the CMRS providers did not take any action to challenge that *Order* because it did not appear to apply to them in any way

The May 6 *Order* wrongly requires BellSouth – and BellSouth alone – to pay the ICOs three cents per minute for traffic originated by the wireless carriers – not by BellSouth. The May 6 *Order* requires BellSouth to make these payments retroactively for traffic terminated since May, 2003 and to continue such payments until December, 2004, ***some twenty-one months after the arbitration was initiated.***[9] It is important to note that, in this scenario, it is BellSouth that is providing a service to the CMRS carriers and the ICOs by carrying traffic between ***their*** end users. Under the May 6 *Order*, instead of receiving any compensation for providing this service, BellSouth is required to ***pay*** for providing this service.

The May 6 *Order* is also wrong in that it deals only with traffic flowing from wireless phones to ICO customers. It makes no provision for payment to the CMRS carriers when ICO customers call those wireless customers back. While the May 6 *Order* provides the ICOs an above-market rate when the traffic flows in one direction, it requires no such payment to the CMRS carriers when the traffic flows the other way, which it does every time an ICO end user calls one of the CMRS providers' end users.

III. HOW DOES THE MAY 6 ORDER COMPARE WITH ORDERS IN THE ARBITRATION?

The May 6 *Order* creates needless conflict and inconsistency with the April 12, 2004 *Order* issued in the arbitration docket (docket No. 03-00585). Notwithstanding that *Order* issued by the Authority-appointed Prearbitration Officer in the arbitration docket – an order that has not been challenged by any party, and that became final on April 27, 2004 – finding that BellSouth has no obligation to pay the terminating carrier

[9] There has never been any debate – even from the ICOs – that BellSouth should not be required to pay once the ICOs and CMRS carriers execute an interconnection agreement As noted in Section VI below, had those parties completed their arbitration in the statutory nine months, this controversy would have been over months ago

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.)

Not only is the May 6 *Order* inconsistent with the April 12 *Order* in the arbitration, the May 6 *Order* will cause disruption to the progress of the arbitration. As a practical matter, the Hearing Officer's May 6 *Order* will provide an overwhelming incentive for the ICOs to continue to attempt to delay the arbitration docket in order to continue receiving the 3 cents for the maximum amount of time, rather than resolving the arbitration and receiving the rate ultimately set in the docket.

IV. THE MAY 6 *ORDER* IS INCONSISTENT WITH THE FEDERAL ACT.

The May 6 *Order* is inconsistent with the Communications Act of 1934 as amended by the Telecommunications Act of 1996 (the "Act"), and the regulations implementing the provisions of Sections 251 and 252. The May 6 *Order* conflicts with the presumption under the Act that the originating carrier is responsible for compensation the terminating carrier As the Prearbitration Officer held in the April 12 *Order*, "federal law imposes no compensation obligations on any third party, including BellSouth over whose network the traffic is being exchange."[10]

The May 6 *Order* also conflicts with the regulations requiring the party with whom an arbitration is sought to enter interim compensation arrangements during the

[10] April 12 *Order* at 7

negotiation/arbitration process, subject to retroactive adjustment of the interim (symmetrical) rates based on the final rates approved as a result of the arbitration.[11]

The CMRS Providers have repeatedly stated that they agree that the ICOs are entitled to interim compensation from an originating CMRS provider for traffic terminated on its network, just as the CMRS Providers are entitled to interim compensation from an originating ICO for traffic terminated on the CMRS Provider's network.[12] The May 6 *Order*, however, contradicts federal law by compelling the payment of non-cost based, non-reciprocal compensation from a carrier, BellSouth, which did not originate the traffic in dispute, and which did not request negotiation with the ICOs.

The ICOs face no risk of not being compensated because they have a willing provider of appropriate compensation for this traffic. The CMRS Providers have specifically sought revision of the May 6 *Order* to provide that the CMRS Providers and the ICOs compensate one another for all telecommunications traffic exchanged by the parties (including, but not limited to CMRS-originated transit traffic) delivered after May 31, 2004, at an *interim symmetrical rate* based on forward-looking costs and subject to true-up at the conclusion of docket No. 03-00585.

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[11] See C F R § 51 715

[12] The CMRS Providers have also noted that the issue of interim compensation is more appropriately addressed in the arbitration (docket No 03-00585) and that the ICOs' Petition for Emergency Relief in this docket should have accordingly been either denied without prejudice or stayed pending the resolution of the issue in docket 03-00585 Per the Prearbitration Officer's request, the CMRS Providers briefed that issue in the arbitration docket where it is pending *See* CMRS Providers' *Position on Interim Compensation* filed March 3, 2004, in docket 03-00585 The CMRS Providers have specifically noted that they have previously requested that the ICOs enter into an interim arrangement consistent with federal regulations, but the ICOs have refused all such requests, and chose not to file a brief in docket No 03-00585 regarding the interim compensation issue

V. THE RATE ORDERED IN THE MAY 6 *ORDER* 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, that a 3 cent rate would likely exceed the rate adopted in the arbitration.***

B. The Rate Exceeds Rates Being Paid Throughout the Region in Settlement.

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. Under these settlements, the ICOs receive a total of 2.5 cents per minute due to an additional contribution from the CMRS providers.[13]

In Tennessee, however, by refusing to accept similar settlement arrangements acceptable in other states, the ICOs have now, under the Hearing Officer's May 6 *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 filed 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

Importantly, the settlements in other states reflect an important distinction – in those states the PCP had been amended to add an annex specifically addressing

[13] Notably, the parties have been able to reach settlement in those states where BellSouth has not been enjoined from terminating the antiquated Primary Carrier Plan Far from encouraging settlement, that type of "freezing" of the status quo simply results in refusal to negotiate by the party who enjoys a benefit under that status quo Freezing the status quo eliminates all incentive to reach a new agreement and instead provides that party with a prize for refusing to negotiate Why would any party negotiate after they've already won?

CMRS traffic. Accordingly, the PCP in those states included some provision for CMRS traffic. In contrast, in Tennessee, there is no contractual obligation for BellSouth, as the transiting middle-carrier, to pay the ICOs anything.

Finally, the suggestion in the Hearing Officer's *Order* 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.

VI. 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 ICOs; (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 Hearing Officer's May 6 *Order*. Consequently, the May 6 *Order* boils down to a requirement 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 the 3 cent rate will exceed the rate established in that arbitration, the May 6 *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. The May 6 *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. The May 6 *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 May 6 *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. Notwithstanding the ICOs voluntary waiver of the 9-month deadline, the May 6 *Order* requires BellSouth to foot the bill for some twenty-one months after the arbitration clock began running.

VII. THE MAY 6 *ORDER* FAILS TO REQUIRE TRUE-UP.

BellSouth, of course, believes that the May 6 *Order* is flawed, and BellSouth should not pay any amount related to this traffic because it has no contractual obligation to do so. 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.

VIII. THE MAY 6 *ORDER* PURPORTS TO PROVIDE COMPROMISE – BUT INSTEAD IS UNFAIR AND ONE-SIDED.

The May 6 *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 recognized in the May 6 *Order* that changed circumstances since the 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 established is not correct. The May 6 *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***, and it is also not true that BellSouth is under any obligation to pay for that service. In fact, the ICOs are providing a service (termination) to the CMRS providers, not to BellSouth. If BellSouth has to pay for that, then it will be BellSouth who is footing the bill for service provided to the CMRS Providers. Moreover, BellSouth is providing a transit service to both the CMRS Providers and the ICOs.

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.

IX. 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. If left intact, the May 6 *Order* will result in BellSouth paying millions of dollars for termination of someone else's traffic. As a result of the May 6 *Order*, 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.

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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 Abevance, 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.

DK Beals

Kim Beals, Counsel
as Pre-Arbitration Officer

[10] 47 U.S C § 252(b)(4)(C)

CERTIFICATE OF SERVICE

I hereby certify that on June 7, 2004, a copy of the foregoing document was served on the parties of record, via the method indicated:

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