BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 15, 2004

IN RE:	)	
	)	**DOCKET NO.**
GENERIC DOCKET ADDRESSING	)	**00-00523**
RURAL UNIVERSAL SERVICE	)	

DISSENT OF DIRECTOR RON JONES TO *ORDER RECONSIDERING HEARING OFFICER'S INITIAL ORDER ADDRESSING LEGAL ISSUE 2 AND AMENDING THE HEARING OFFICER'S ORDER ISSUED MAY 6, 2004*

The above-styled docket came before a panel of the Tennessee Regulatory Authority ("TRA") on August 9, 2004. During the deliberations, Chairman Pat Miller and Director Sara Kyle voted to: (1) grant in part the *Substitute Version of BellSouth Telecommunications Inc.'s Motion for Reconsideration or, in the Alternative, Clarification of the Initial Order of Hearing Officer for the Purpose of Addressing Legal Issues 2 and 3 Identified in the Report and Recommendation of the Pre-Hearing Officer Filed on November 8, 2000* ("*First Reconsideration Motion*");[1] (2) grant in part *BellSouth Telecommunications Inc.'s Motion for Reconsideration of Hearing Officer's Order Dated May 6, 2004* ("*Second Reconsideration Motion*");[2] (3) amend the Hearing Officer's *Order Granting In Part the Petition for Emergency Relief and Request for Standstill Order by the Tennessee Rural Independent Coalition* ("*May 6th Order*");[3] and (4) relieve BellSouth Telecommunications, Inc. ("BellSouth") of the injunctive relief granted in the *Initial Order of Hearing Officer for the Purpose of Addressing the Authority's Jurisdiction Over*

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[1] *See Order Reconsidering Hearing Officer's Initial Order Addressing Legal Issue 2 and Amending the Hearing Officer's Order Issued May 6, 2004*, 1, 13 (Sept 1, 2004).
[2] *See id.* at 14.
[3] *See id*

Intralata Toll Settlement Agreements Between BellSouth Telecommunications Inc. and Independent Incumbent Local Exchange Carriers ("First Initial Order") issued on December 29, 2004.[4] For the reasons stated herein, I respectfully dissent.

After having shepherded this docket through the procedural process for more than two (2) years and after having educated myself with the regulatory and legal challenges and nuances that have so prominently served as master of this proceeding since July 2000,[5] I must confess, painfully, that upon leaving the hearing room on August 9, 2004, I remained exceedingly ignorant and bewildered of precisely what it was that the majority decided in Docket No. 00-00523. Even after more than a two year intimacy with this docket, I recognized that a total disconnect, although I would like to think improbable, was yet still possible. I soon discovered, however, that the elusiveness of the majority's decision did not evade me alone. Even after reading the transcript, I remained perplexed. I had hoped that the order memorializing the decision, the magnitude and gravity of which should not be underestimated, would provide me with sufficient insight into the bases for the decision and the decision itself. Having read the majority's order, I am disappointed. The order, unfortunately, is little more than a mere listing of decisions with scant justification or analysis. Moreover, the order as to traffic other than commercial mobile radio service ("CMRS") traffic is inexplicably internally inconsistent. I do not envy for one moment and offer my sympathies to those parties that must determine their rights and obligations from the language of the *Order Reconsidering Hearing Officer's Initial Order Addressing Legal Issue 2 and Amending the Hearing Officer's Order Issued May 6, 2004* ("*Majority Order*").

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[4] *See id* at 13

[5] *See supra* text accompanying notes 7- 9.

I. THE TRAVEL OF THE CASE SECTION OF THE *MAJORITY ORDER*

With one exception, I do not dispute the information contained in the Travel of the Case section of the order. The exception I take relates to the incomplete discussion of the *First Initial Order* issued on December 29, 2000. The *Majority Order* merely states: "On December 29, 2000, the Hearing Officer issued an Initial Order addressing Legal Issue No. 1 and ruling that BellSouth must keep the current toll settlement arrangements in place until they are terminated, replaced, or modified by the TRA."[6] While this statement is technically correct, it fails to convey adequately the significance of this ruling by excluding the Hearing Officer's reasoning underlying this conclusion and thus negating to a large degree the significance of the order. Such failure is of particular relevance given the majority's decision to overturn the injunctive relief contained in the order.

In the *First Initial Order*, the Hearing Officer noted that on August 4, 2000, BellSouth informed the Authority that BellSouth had sent letters to members of the Rural Independent Coalition[7] ("Coalition") notifying the members with Toll Settlement Agreements[8] that BellSouth

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[6] *Order Reconsidering Hearing Officer's Initial Order Addressing Legal Issue 2 and Amending the Hearing Officer's Order Issued May 6, 2004*, 3 (Sept. 1, 2004)

[7] The Coalition is comprised of the following companies: Ardmore Telephone Company, Inc.; Ben Lomand Rural Telephone Cooperative, Inc , Beldsoe 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, Inc , Tennessee Telephone Company, Twin Lakes Telephone Cooperative Corporation; United Telephone Company; West Tennessee Telephone Company, Inc., and Yorkville Telephone Cooperative

[8] In the May 6th Order, I provided the following definitions

> First, this order uses the term "Toll Settlement Agreements" to refer to the written contracts between BellSouth and the Coalition that were terminated as of December 31, 2000. BellSouth generally refers to these agreements as the "Primary Carrier Plan," and the Authority has referred to these agreements in the past as "Settlement Contracts " Second, this order uses the term "Interconnection Arrangements" to refer to BellSouth's continuing obligation to provide certain compensation to the Coalition after the termination of the Toll Settlement Agreements The Coalition refers to this obligation in its brief as "Existing Terms and Conditions "

Order Granting In Part the Petition for Emergency Relief and Request for Standstill Order by the Tennessee Rural Independent Coalition, 2 (May 6, 2004) For consistency's sake, I will continue to use these same terms as described above

will terminate the agreements effective December 31, 2000.[9] The Hearing Officer further noted that the Tennessee Public Service Commission had used the payment mechanism contained in the Toll Settlement Agreements to maintain the Coalition member's compensation levels.[10] The Coalition objected to BellSouth's proposed action.[11]

After considering the parties' arguments and relevant law, the Hearing Officer divided the obligations contained in the Toll Settlement Agreements into two (2) categories. Toll Settlement Agreements, stated the Hearing Officer, are "comprised of provisions agreed to by and between the parties themselves, absent regulatory influence or mandate."[12] Conversely, the Hearing Officer concluded that the Interconnection Arrangements[13] are "comprised of provisions that exist pursuant to **regulatory edict and *must* be complied with until the TRA, consistent with state law, declares otherwise.**"[14]

Having defined the obligations, the Hearing Officer recognized BellSouth's action terminating the Toll Settlement Agreements on December 31, 2000 and held that this was an area where the Authority should not tread.[15] However, as to the Interconnection Arrangements, the Hearing Officer concluded that the Authority has jurisdiction and that no party may contract away regulatory obligations such as those contained in the Interconnection Arrangements through a termination clause.[16] The Hearing Officer based this conclusion on state law

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[9] *See Initial Order of Hearing Officer for the Purpose of Addressing the Authority's Jurisdiction Over Intralata Toll Settlement Agreements Between BellSouth Telecommunications Inc and Independent Incumbent Local Exchange Carriers*, 2-3 (Dec 29, 2000)
[10] *See id* at 5
[11] *See id* at 3
[12] *Id* at 10
[13] *See supra* note 8 (explaining the term "Interconnection Arrangement").
[14] *Initial Order of Hearing Officer for the Purpose of Addressing the Authority's Jurisdiction Over Intralata Toll Settlement Agreements Between BellSouth Telecommunications Inc and Independent Incumbent Local Exchange Carriers*, 10 (Dec. 29, 2000) (bold emphasis added).
[15] *See id* at 10, 12
[16] *See id* at 10-11

obligations rather than federal law requirements even though the 1996 Telecommunications Act had been in effect for over four years.[17] Based on these findings and conclusions, the Hearing Officer ordered that BellSouth be "enjoined from taking any measures to unilaterally terminate the existing [Interconnection Arrangements] currently in effect between BellSouth and the Rural Carriers."[18]

The inclusion of the above two paragraphs in the *Majority Order* would have improved the order by providing the reader a more complete understanding of the majority's decision to lift the injunction. All we know from the *Majority Order* is that the stay is lifted, but do not know the reasons for doing so. Inclusion of the Hearing Officer's analysis may have led the majority to explain in its Findings and Conclusions Section why it believed the stay should be lifted and the extent to which its decision to lift the stay affects the findings in the *First Initial Order* that the Authority has jurisdiction and that no party may contract away regulatory obligations such as those contained in the Interconnection Arrangements. For these reasons, I believe the Travel of the Case (or even the Findings and Conclusions) section of the *Majority Order* should have provided a summary of the Hearing Officer's analysis memorialized in the *First Initial Order.*

II. FINDINGS AND CONCLUSIONS SECTION OF THE *MAJORITY ORDER*

The Findings and Conclusions section of the *Majority Order* can be broken down into the following seven decisions, all of which, with the exception of No. 2, are deserving of comment:

1) "the 1.5 cent[s] interim rate is just and reasonable because it reflects negotiated rates existing in approved agreements in the BellSouth region for CMRS traffic transiting BellSouth's network";
2) "BellSouth should be required to pay the 1.5 cent[s] rate from June 2003 when BellSouth ceased payments to the Coalition members";
3) "BellSouth shall continue such payments at the 1.5 cent[s] rate through September 30, 2004";

[17] *See id*
[18] *Id* at 13.

4) "there should be a true-up of the 1.5 cent[s] interim rate for wireless transit traffic to the rate for wireless traffic determined in Docket No. 03-00585";
5) "bring to an end as of September 30, 2004, the injunctive relief granted in ordering paragraph number 1 of the *First Initial Order* issued on December 29, 2000";
6) "negotiations regarding the toll settlements agreements can take place outside of this docket provided that an interim compensation scheme exists"; and
7) "[t]he compensation currently in place must remain in place until replaced by an interim rate negotiated between BellSouth and the Coalition members."[19]

A. DECISION NO. 1: "THE 1.5 CENT[S] INTERIM RATE IS JUST AND REASONABLE BECAUSE IT REFLECTS NEGOTIATED RATES EXISTING IN APPROVED AGREEMENTS IN THE BELLSOUTH REGION FOR CMRS TRAFFIC TRANSITING BELLSOUTH'S NETWORK"

I take exception with this decision for two reasons. First, in rendering this decision the majority failed to either recognize or acknowledge other relevant points brought forth during the course of these proceedings. Second, the decision is unclear and depending on the meaning does not take into consideration the nature of the approved agreements.

It is my opinion that the majority failed to recognize or address other relevant considerations. Based on my reading of the deliberations and the *Majority Order*, the majority did not consider the fact that pursuant to the Interconnection Arrangements BellSouth had been paying approximately 6.0 cents a minute for wireless traffic.[20] Also, there is no mention by the majority of the fact that the parties previously agreed that BellSouth would pay 3.0 cents per minute for wireless traffic terminated in May 2003.[21] Of particular relevance, but not addressed by the majority, is the fact that BellSouth offered to pay the Coalition 2.5 cents per minute for wireless traffic terminated through May 2004, the time by which BellSouth asserted the

[19] *Order Reconsidering Hearing Officer's Initial Order Addressing Legal Issue 2 and Amending the Hearing Officer's Order Issued May 6, 2004*, 12-13 (Sept. 1, 2004)
[20] *See* Transcript of Proceedings, July 26, 2004, 42 (Authority Conference) (Oral Argument of BellSouth Counsel) In an earlier filing, BellSouth represented that the amount previously paid was approximately 7.0 cents per minute *See BellSouth Telecommunications Inc 's Motion for Reconsideration of Hearing Officer's Order Dated May 6, 2004*, 6 (May 17, 2004).
[21] *See Joint Agreed Motion for 60-Day Conditional Stay*, 1 (Apr. 25, 2003).

arbitration in Docket No. 03-00585 would be complete.[22] It is inexplicable why the majority would order a rate that is less than the rate contained in an offer by BellSouth covering approximately the same time period covered by the interim rate adopted by the majority. Further, BellSouth has suggested that it is inappropriate to hold them to the 3.0 cents rate they agreed to pay for only one month[23] and to reward the Coalition for refusing to accept an offer of 2.5 cents per minute.[24] In my opinion, if it is inappropriate to rely on the 3.0 cents offer and the 2.5 cents offer for the reasons stated by BellSouth, it is equally inappropriate to punish the Coalition for not accepting the 2.5 cents offer it apparently deemed unacceptable.

In addition to its shortsightedness, the decision is unclear in that it references existing, agreements approved throughout the BellSouth region containing a rate of 1.5 cents. The only references to agreements containing a rate of 1.5 cents or less that I could locate in the record discussed Tennessee only agreements.[25] Discussions of settlements entered into by Coalition members, BellSouth, and CMRS providers in other BellSouth states are also contained in the record, but those discussions reveal that the settlements contain a 2.5 cents rate, of which BellSouth pays between 1.0 and 1.5 cents and the CMRS providers pay the remainder.[26]

If it is the majority's intention to rely on the Tennessee agreements referenced in BellSouth's pleadings, I have the following complaints. Reliance on these agreements fails to

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[22] *See Brief of BellSouth Telecommunications, Inc Regarding Status of Outstanding Motions and Procedural Proposal*, 4-5 (Feb. 27, 2004)

[23] *See* Transcript of Proceedings, July 26, 2004, 46 (Authority Conference) (Oral Argument of BellSouth Counsel); *BellSouth Telecommunications Inc 's Motion for Reconsideration of Hearing Officer's Order Dated May 6, 2004*, 9 (May 17, 2004)

[24] *See BellSouth Telecommunications Inc 's Motion for Reconsideration of Hearing Officer's Order Dated May 6, 2004*, 9 (May 17, 2004)

[25] *See BellSouth Telecommunications Inc 's Brief Re Hearing Officer's May 6, 2004 Order*, 6-7, 13 (June 7, 2004), *BellSouth Telecommunications Inc 's Motion for Reconsideration of Hearing Officer's Order Dated May 6, 2004*, 8 (May 17, 2004)

[26] *See BellSouth Telecommunications Inc 's Brief Re Hearing Officer's May 6, 2004 Order*, 14 (June. 7, 2004), *BellSouth Telecommunications Inc 's Motion for Reconsideration of Hearing Officer's Order Dated May 6, 2004*, 8-9 (May 17, 2004), *Brief of BellSouth Telecommunications, Inc Regarding Status of Outstanding Motions and Procedural Proposal*, 4 (Feb 27, 2004)

address the fact that the agreements were considered by the Authority under federal law, not state law.[27] Additionally, the agreements were entered into by the Coalition and certain CMRS providers, not the Coalition and BellSouth.[28]

In conclusion, it appears from the deliberations and the *Majority Order* that the majority considered only one fact when rendering Decision No. 1 and failed to explain how that fact supports their decision in light of the other information in the record. Decision makers should consider the entire body of information before them and not rely on one fact in a vacuum. It is my opinion that consideration of the entire record supports an interim rate in excess of the 1.5 cents per minute ordered by the majority.

B. DECISION NO. 3: "BELLSOUTH SHALL CONTINUE SUCH PAYMENTS AT THE 1.5 CENT[S] RATE THROUGH SEPTEMBER 30, 2004"

Neither the deliberations nor the *Majority Order* provide any basis for the decision to modify the determination in the *May 6th Order* that payment of the interim rate should continue until "the earliest of the following dates: (1) a date established by the CMRS Carriers and the Coalition members; (2) 30 days following the panel's deliberations in Docket No. 03-00585; or (3) December 31, 2004."[29] The termination scheme in the *May 6th Order* was reasonable in that, unlike the *Majority Order*, it did not place the panel and parties in Docket No. 03-00585 in a

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[27] *See, e g , In re Interconnection and Reciprocal Compensation Agreement by and Between CenturyTel of Claiborne, Inc and Tennessee RSA No 3, L P d/b/a Eloqui Wireless*, Docket No. 02-00328, *Order Approving Interconnection And Reciprocal Compensation Agreement*, 1 (May 30, 2002); *In re Petition for the Approval of the Wireless Interconnect Agreement Between the TDS Telecom Tennessee Companies and Cellco Partnership, D/B/A Verizon Wireless*, Docket No. 02-00973, *Order Approving Interconnection Agreement*, 1 (Nov 13, 2002)

[28] *Id*

[29] *Order Granting in Part the Petition for Emergency Relief and Request for Standstill Order by the Tennessee Rural Independent Coalition*, 18 (May 6, 2004)

difficult situation and provided the parties a sufficient opportunity to prepare for the possibility of not receiving compensation for certain wireless traffic.[30]

To explain, the truncated termination date adopted by the majority forces the panel in Docket No. 03-00585, which includes a Director that is not on this panel, to either conduct deliberations by September 30, 2004 or extend the time period for which the Coalition is providing service without receiving compensation. In the alternative, the termination date creates a situation where the Coalition has little flexibility in the preparation of their post-hearing case. To explain, if deliberations do not occur prior to September 30, 2004, the Coalition must accept an interim compensation arrangement offered by BellSouth or the CMRS Providers,[31] negotiate to receive compensation from September 30, 2004 in the agreement in Docket No. 03-00585, which could result in the Coalition foregoing other favorable terms, or continue to provide service with no compensation.

At the time of the majority's decision, the hearing in Docket No. 03-00585 had just begun and was scheduled to continue through August 13, 2004. Post-hearing briefing was scheduled to be completed by September 3, 2004. It is not unreasonable for briefing and deliberation preparations of 26 issues, many of which involve the interpretation of complex and interrelated federal statutes and regulations, to take more than 27 days. With the adoption of a multiple panel system at the start of the Directors' terms, an unfortunate consequence where this system sometimes causes one panel to issue a decision that affects another docket to which the

[30] The majority does not explain whether its references to wireless traffic include all wireless traffic or only wireless traffic terminated to an end user served by a member of the Coalition when that CMRS traffic is originated by a CMRS provider that has entered into a meet-point billing arrangement with BellSouth. For the purposes of this dissent, I assume that they meant the latter, although their intent should be clarified

[31] The CMRS Providers that are parties to this docket are Cellco Partnership d/b/a Verizon Wireless; BellSouth Mobility LLC, BellSouth Personal Communications, LLC, and Chattanooga MSA Limited Partnership collectively d/b/a Cingular Wireless, AT&T Wireless PCS, LLC d/b/a AT&T Wireless; PowerTel Kentucky, Inc , PowerTel Memphis, Inc , PowerTel Birmingham, Inc , and PowerTel Atlanta, Inc collectively d/b/a T-Mobile; and Sprint Spectrum L P. d/b/a Sprint PCS.

computer has assigned a different panel sometimes emerges. Because of this unfortunate side effect, there should exist, in my opinion, a heightened responsibility and awareness by a panel in considering the effects of its decisions on the work of other panels and parties before rendering a decision. In my opinion, the majority did not exercise such responsibility and awareness in this case.

C. DECISION NO. 4: "THERE SHOULD BE A TRUE-UP OF THE 1.5 CENT[S] INTERIM RATE FOR WIRELESS TRANSIT TRAFFIC TO THE RATE FOR WIRELESS TRAFFIC DETERMINED IN DOCKET NO. 03-00585"

I do not agree that a true-up is appropriate in this case. Consistent with my deliberations, I offer two reasons in support of my determination. First, the rule requiring a true-up referenced by the CMRS Providers is grossly and misleadingly misplaced as it is a federal rule; and, the determinations in this docket, notwithstanding the arguments of some of the parties, are decidedly state law decisions to resolve state law matters as is evidenced by even a cursory review of the dispute that initiated this proceeding. Second, the requirement of a true-up in this instance may have the untoward effect of prejudging issues in Docket No. 03-00585 and could result in the elimination of compensation for wireless traffic terminated during the true-up period.

The CMRS Providers assert in their petition for reconsideration that the *May 6th Order* "is in conflict with the regulations requiring ILECs to enter interim compensation arrangements during the negotiation/arbitration process, subject to retroactive adjustment of the interim (symmetrical) rates based on the final rates approved as a result of the arbitration."[32] In support of this assertion, the CMRS Providers cite 47 C.F.R. § 51.715, a federal regulation promulgated

[32] *CMRS Providers' Petition for Reconsideration*, 1-2 (May 17, 2004)

by the Federal Communications Commission.[33] This federal citation applies during the federal negotiation/arbitration process and to the parties to that negotiation/arbitration process.

The relevant negotiation/arbitration process here is in Docket No. 03-00585, the arbitration between the Coalition and the CMRS Providers. BellSouth is not a party to that docket and, in fact, fought to be excluded from that docket.[34] If a determination is to be made with regard to the application of 47 C.F.R. § 51.715, it should be made in Docket No. 03-00585. No such determination has been made; consequently, a conflict cannot exist between 47 C.F.R. § 51.715 and the state law determination in the instant docket.

The majority's decision to order a true-up may prejudge issues in Docket No. 03-00585 and eliminate any compensation for wireless traffic terminated during the true-up period. To explain, the majority has determined that the Coalition is entitled to compensation from BellSouth from June 2003 until September 30, 2004.[35] If the panel in Docket No. 03-00585 was to determine that bill and keep is the appropriate compensation mechanism, then the 1.5 cents rate becomes zero and the Coalition receives no compensation for traffic terminated during the true-up period. Therefore, it seems that by ordering a true-up along with the finding that the Coalition is entitled to compensation, the majority has prejudged the issue of whether to adopt bill-and-keep.

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[33] *See id* at 2 n.1, 4 - 6

[34] *See In re Petition for Arbitration of Cellco Partnership D/B/A Verizon Wireless*, Docket No. 003-00585, *BellSouth Telecommunications, Inc 's Response in Opposition to the Preliminary Motion of the Rural Coalition of Small LECs and Cooperatives to Dismiss or, in the Alternative, Add an Indispensable Party* (Mar 13, 2004).

[35] *See Order Reconsidering Hearing Officer's Initial Order Addressing Legal Issue 2 and Amending the Hearing Officer's Order Issued May 6, 2004*, 12 (Sept 1, 2004) (stating, "recognizing that the Coalition members have been providing services without compensation, the majority of the panel found that BellSouth should be required to pay the 1.5 cent[s] rate from June 2003").

DECISION NO. 5: "BRING TO AN END AS OF SEPTEMBER 30, 2004, THE INJUNCTIVE RELIEF GRANTED IN ORDERING PARAGRAPH NUMBER 1 OF THE *FIRST INITIAL ORDER* ISSUED ON DECEMBER 29, 2000"

AND

DECISION NO. 7: "[T]HE COMPENSATION CURRENTLY IN PLACE MUST REMAIN IN PLACE UNTIL REPLACED BY AN INTERIM RATE NEGOTIATED BETWEEN BELLSOUTH AND THE COALITION"

I will first address Decision Nos. 5 and 7 together and then No. 5 alone. These decisions are addressed together in order to note the internal inconsistency they create. I address Decision No. 5 further to explain why I cannot support it regardless of Decision No. 7.

1. DECISION NOS. 5 AND 7

Decision No. 5 is of particular concern and largely the basis for my earlier statement that the gravity of the *Majority Order* should not be underestimated. My understanding of this decision is that BellSouth may unilaterally terminate payments made pursuant to the Interconnection Arrangements for **all traffic exchanged between BellSouth and the Coalition as of October 1, 2004.**[36] Thus, depending on BellSouth's whim, the Coalition may lose an entire revenue stream as of October 1, 2004.

After reading Decision No. 5 and then moving on to read Conclusion No. 7, I was left asking myself "what could this possibly mean"? Other language in the *Majority Order* suggests that the phrase "compensation currently in place" refers to the rate due under the Interconnection Arrangements,[37] which according to BellSouth is 6.0 or 7.0 cents per minute.[38] But, as explained below, this interpretation is inconsistent with other sections of the order. Likewise, the phrase

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[36] Although the majority attempted to limit the effect of this decision to "all other traffic exchanged between BellSouth and the Coalition," because of the earlier decision to terminate interim compensation for wireless traffic on September 30, 2004, the effect of Decision No 7 goes to all traffic. *Order Reconsidering Hearing Officer's Initial Order Addressing Legal Issue 2 and Amending the Hearing Officer's Order Issued May 6, 2004*, 13 (Sept. 1, 2004)

[37] *See id* (stating "This decision . . requires BellSouth, in the interim, to continue payments to Coalition members for remaining traffic exchanged in accordance with the rates, terms and conditions contained in existing toll settlement arrangements ").

[38] *See supra* note 20 and accompanying text

"until replaced by an interim rate negotiated between BellSouth and the Coalition" is equally puzzling. What is the "interim" period and why would the parties engage in the negotiation of an interim rate at this time?

For the purposes of this discussion I will assume that the "compensation currently in place" is 6.0 or 7.0 cents and that the majority intended this compensation to be paid until the parties negotiate a different rate, regardless of whether it is considered permanent or interim. Based on these assumptions, the majority seems to have determined that BellSouth may discontinue payments for all traffic as of October 1, 2004, but must as a result of the *Majority Order* continue making payments for all traffic other than wireless traffic at the rates contained in the Interconnection Arrangements until BellSouth and the Coalition negotiate a rate. This interpretation along with Decision No. 3 renders Decision No. 5 a nullity. I have tried to read these decisions in harmony, but am unable to do so. I can only assume that if I have had difficulty understanding the coordination of these two decisions, then others may have as well. Thus, to avoid any future litigation, I believe the majority should issue a clarification of its order.

2. DECISION NO. 5

Despite the fact that the majority may have mitigated the ill effects of Decision No. 5 by their determination to continue some form of compensation after September 30, 2004, I still cannot vote in favor of this decision because BellSouth's attempt to attack collaterally the *First Initial Order* is procedurally flawed. Petitions to appeal or reconsider the *First Initial Order* were required to be filed on January 13, 2001.[39] The *First Reconsideration Motion* was filed on

[39] *See Initial Order of Hearing Officer for the Purpose of Addressing the Authority's Jurisdiction Over Intralata Toll Settlement Agreements Between BellSouth Telecommunications Inc and Independent Incumbent Local Exchange Carriers*, 13 (Dec 29, 2000)

July 15, 2002. Thus, BellSouth's attack on the *First Initial Order* in the *First Reconsideration Motion*, which by its title limits itself to the Hearing Officer's June 28, 2002 Order, should not have been permitted. Nevertheless, the *Majority's Order* states:

> With respect to all other traffic exchanged between BellSouth and the Coalition, the majority of the panel also granted, in part BellSouth's First Reconsideration Motion. The majority of the panel voted to bring to an end as of September 30, 2004, the injunctive relief granted in ordering paragraph number 1 of the *First Initial Order* issued on December 29, 2000.[40]

It is my understanding from this quote that Decision No. 5 is based on the majority's decision to grant the *First Reconsideration Motion.* I cannot agree with the majority's decision to grant a collateral attack that is levied a year and a half after the entry of the *First Initial Order* in a petition for reconsideration of the Hearing Officer's June 28, 2002 Order. The majority should have denied BellSouth's request in regard to the *First Initial Order* or required BellSouth to file a separate motion specifically requesting that the injunction be lifted.

If I have misinterpreted Decision No. 7 and it was not the majority's intention to provide compensation beyond September 30, 2004, I cannot agree with Decision No. 5 for two additional reasons. First, the decision was rendered absent consideration of its financial effects. Second, I believe the decision will place the Coalition at a disadvantage during future negotiations.

The majority rendered Decision No. 5 without regard to the financial impact that decision would have on Coalition members and their end users. This conclusion reached by the majority will likely affect the Coalition members' revenues in that it creates a scenario in which BellSouth will determine whether to eliminate a stream of revenue to Coalition members through its decision as to whether to terminate the Interconnection Arrangements. If BellSouth determines to terminate the Interconnection Arrangements, then the Coalition will no longer receive that

[40] *Order Reconsidering Hearing Officer's Initial Order Addressing Legal Issue 2 and Amending the Hearing Officer's Order Issued May 6, 2004*, 13 (Sept. 1, 2004).

revenue stream. Because the Coalition members are rate-of-return companies, possible consequences of the reduction to revenues are upward pressure on end user rates and failure to achieve the goals of universal service.

In the deliberations, Director Kyle stated that "[t]he December 2000 order has not resulted in a negotiated settlement in the four years since it was entered" and "it is now time for the Authority to exercise its statutory power and bring the parties to a workable solution."[41] I fail to see how the majority's solution creates a workable solution. The reality is that once BellSouth terminates payments, the Coalition members are left in a position of having to negotiate while at the same time realizing revenue losses. This is not conducive, in my opinion, to effectuating an optimal and equitable solution to the unique and sometimes debilitating circumstances to which many of Tennessee's rural incumbent local exchange providers now find themselves exposed.

D. DECISION NO. 6: "NEGOTIATIONS REGARDING THE TOLL SETTLEMENTS AGREEMENTS CAN TAKE PLACE OUTSIDE OF THIS DOCKET PROVIDED THAT AN INTERIM COMPENSATION SCHEME EXISTS"

Once again, I am somewhat perplexed by this conclusion as it is unclear to this reader of the *Majority Order* why there is a limitation on negotiations. For the purposes of further discussion, I will assume that it was the intention of the majority in this decision to grant the following BellSouth request: "BellSouth seeks to clarify that nothing in the Order [issued June 28, 2002], however, alters the Hearing Officer's prior instruction to the parties to continue negotiating and the presumption that such negotiations would continue."[42] I agree that negotiations should continue outside this docket and encourage such actions. In fact, in my deliberations, I stated: "The Authority should clarify that negotiations with regard to non-CMRS

[41] Transcript of Proceedings, August 9, 2004, 25-26 (Authority Conference) (Motion of Director Sara Kyle).
[42] *Substitute Version of BellSouth Telecommunications, Inc 's Motion for Reconsideration or, in the Alternative, Clarification of the Initial Order of the Hearing Officer for the Purpose of Addressing Legal Issues 2 and 3 Identified in the Report and Recommendation of Pre-Hearing Officer Filed on November 8, 2000*, 3 (Jul 25, 2002)

traffic shall continue as contemplated by the hearing officer in the December 29th Order."[43] What I cannot agree with is the limitation placed on the decision that negotiations may occur outside this docket "provided that an interim compensation scheme exists." I cannot vote in this instance in favor of limiting the parties' ability to negotiate. Even if there were no rate in place and the compensation issue was before the TRA, I can find no reason to limit the parties' ability to negotiate on their own outside the TRA docket.

III. THE *CMRS PROVIDERS' PETITION FOR RECONSIDERATION*

Although the Authority noticed that it would also consider the *CMRS Providers' Petition for Reconsideration* filed on May 17, 2004,[44] the majority's order does not address this motion except to mention it in the procedural history and position of the parties.[45] During the deliberations, I moved that the petition be denied. My motion did not receive a second. Given that the motion appears to be unresolved, the TRA should place this item on an Authority Conference for resolution or the majority should clarify its decision on this motion in the *Majority Order.*

IV. CONCLUSION

In drafting the *May 6th Order*, I not only attempted to recognize pre-existing circumstances, as identified in past TRA orders, but also tried to provide a transitional pathway to recognize changing circumstances while maintaining the separation of federal and state actions. Clearly, the majority found that an alternative pathway was better.

As I have expressed throughout this dissent, the *Majority Order* is confusing and poorly crafted. It fails to provide sufficient notice to the parties of their rights and obligations to the

[43] Transcript of Proceedings, August 9, 2004, 20 (Authority Conference) (Motion of Director Ron Jones).
[44] Final Conference Agenda for August 9, 2004 Authority Conference, 3 (Issued June 30, 2004).
[45] *See Order Reconsidering Hearing Officer's Initial Order Addressing Legal Issue 2 and Amending the Hearing Officer's Order Issued May 6, 2004*, 8, 10 (Sept 1, 2004)

extent that future litigation based solely on the meaning of the order will come as no surprise. The order also fails to provide any analysis justifying the decisions rendered. The simple recitation of decisions is insufficient. I cannot imagine how a judge would review the *Majority's Order* if called upon to do so.

It is my opinion that despite the bevy of objections launched by BellSouth and the CMRS Providers, the *May 6th Order* should have been permitted to stand and the petitions for reconsideration of that order denied. Further, the panel should have voted to grant in part and deny in part the *First Reconsideration Motion.* The TRA should have clarified as requested by BellSouth that negotiations should continue as contemplated by the Hearing Officer in the *First Initial Order.* Conversely, the panel should have neither clarified nor reconsidered the statement and conclusion of the Hearing Officer with regard to the Tennessee Public Service Commission requiring BellSouth to enter into the Toll Settlement Agreements. That statement, while supported by the history of BellSouth's rate-of-return revenue reductions, was not necessary to the decision of the Hearing Officer that the Toll Settlement Agreements should be considered in this docket.

Ron Jones, Director