BELLSOUTH

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

guy.hicks@bellsouth.com

Guy M. Hicks
General Counsel

615 214 6301
Fax 615 214 7406

June 11, 2001

VIA HAND DELIVERY

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

Re: *Petition of AT&T Communications of the South Central States, Inc. and TCG MidSouth, Inc. for Structural Separation of BellSouth Telecommunications, Inc.*
Docket No. 01-00405

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Motion to Deny AT&T's Request to Convene a Contested Case and Dismiss the Petition. Copies of the enclosed are being provided to parties of record.

Very truly yours,

Guy M. Hicks

GMH/jej

Enclosure

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

Re: *Petition for AT&T Communications of the South Central States, Inc. and TCG MidSouth, Inc. for Structural Separation of BellSouth Telecommunications, Inc.*

Docket No. 01-00405

MOTION OF BELLSOUTH TELECOMMUNICATIONS, INC. TO DENY AT&T'S REQUEST TO CONVENE A CONTESTED CASE AND DISMISS THE PETITION

On May 2, 2001, AT&T Communications of the South Central States, Inc. ("AT&T") filed a Petition for Structural Separation of BellSouth Telecommunications, Inc. ("BellSouth") on behalf of itself, TCG MidSouth, Inc., and the Competitive Telecommunications Association.[1] The Petition asks the Tennessee Regulatory Authority ("TRA") to: convene a contested case; grant the Petitioners leave to intervene in that contested case; and investigate and order the structural separation of BellSouth into distinct retail and wholesale units. *See* Petition at 16. In accordance with Rule 1220-1-2-.03, BellSouth respectfully files this motion in response to AT&T's Petition.

Tennessee law "does not impose a mandatory duty upon the TRA to convene a contested hearing in every case upon the filing of a written complaint." *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 764 (Tenn. 1998). Instead, the Supreme Court of Tennessee has held that "the TRA has the power to convene a contested case hearing if it chooses to exercise the authority . . . ." *Id.* at 763. Citing this decision, the Court of Appeals recently ruled that the TRA acted appropriately in declining to convene a contested case proceeding with regard to a Petition that asked the TRA to address matters that it had previously addressed and that failed to state a claim.

[1] Although AT&T filed its Petition on May 2, 2001, BellSouth was not served with a copy of the Petition until May 11, 2001.

See Consumer Advocate Division v. Tennessee Regulatory Authority, 2001 WL 575570 at *6 (Tenn. Ct. App. May 30, 2001). As explained below, the TRA has already addressed the matters AT&T raises in its Petition, and it is continuing to address many of those matters in active dockets. Moreover, AT&T's Petition fails to state a claim because the one and only remedy it seeks -- the structural separation of BellSouth -- is a remedy the TRA is not authorized to order. Finally, given that the TRA has no authority to order structural separation, the TRA also lacks subject matter jurisdiction over AT&T's Petition. The TRA, therefore, should deny AT&T's request to convene a contested case, and it should dismiss the Petition.

I. THE TRA HAS ALREADY ADDRESSED THE MATTERS AT&T RAISES IN ITS PETITION, AND IT IS CONTINUING TO ADDRESS MANY OF THOSE MATTERS IN ACTIVE DOCKETS.

The allegations in AT&T's Petition address the state of competition across the nation and in Tennessee, OSS, UNEs, and BellSouth's "retail practices." None of these allegations raise matters that have not been addressed already, and the TRA continues to address many of these matters in active dockets. The TRA, therefore, should decline AT&T's request to convene a contested case to address these same claims in yet another proceeding.

A. AT&T's claims regarding the state of competition have been addressed (and refuted) by the Local Competition Reports of both the FCC and the TRA.

According to AT&T's Petition, "CLECs have been unable to make *any meaningful inroads* into BellSouth's monopoly markets" since the passage of the federal Telecommunications Act of 1996 ("the federal Act") and the Tennessee Telecommunications Act of 1995 ("the Tennessee Act"). Petition at 2 (emphasis added). In fact, AT&T claims that "[t]he pro-competitive mandates of the Tennessee Act and the federal Act *remain as unfulfilled today as they where (sic) when passed in 1995 and 1996.*" *Id.* at 7 (emphasis added). Listening to

AT&T, one would have to wonder what the FCC and the TRA have been doing for the past five years.

The answer to that question, of course, resounds in the real world that exists beyond the Alice-in-Wonderland fiction of AT&T's Petition: the FCC and the TRA have been dutifully implementing the provisions of the federal Act and the Tennessee Act in a manner that has allowed numerous CLECs to compete any time and any place they choose to do so. As of December 31, 2000, for instance, CLECs had 16.4 million local telephone lines in service to end user customers nationwide -- a 93% increase over the previous twelve-month period. *See* FCC Press Release, May 21, 2001, "*Federal Communications Commission Releases Latest Data on Local Telephone Competition.* CLECs provided more than a third of these lines over their own local loop facilities, and they provided 5.3 million UNE loops as of the end of the year 2000 -- an increase of 62% in just six months. *Id.* As of the end of the year 2000, at least one CLEC was serving customers in the zip codes in which 88% of United States households reside. *Id.*

The benefits of this local exchange competition have not bypassed the State of Tennessee. As of October 31, 1999, for instance, the TRA had certified 60 CLECs, *see Tennessee Regulatory Authority Annual Report for the Period July 1, 1999 to June 30, 2000*, and according to the TRA's website, the number of certified CLECs has increased to more than 100 as of May 2, 2001. The TRA also had certified 97 local service resellers as of October 31, 1999, *see* TRA Local Competition Report, and although the TRA's website does not report the number of certified local service resellers, BellSouth estimates the number to remain at approximately 100 today. The number of facilities-based providers certified in Tennessee, therefore, is growing at a much quicker pace than the number of local service resellers certified in Tennessee.

Moreover, these competitors have not been sitting by idly since 1995 as AT&T's Petition implies. Instead, "these new market entrants have invested $450 million in equipment and facilities in Tennessee since 1995." TRA Local Competition Report at 35. As of June 30, 2000, facilities-based CLECs were "serving 217,000 lines in Tennessee, primarily business customers in the State's four (4) largest metropolitan areas."[2] *Id.* This represents "7% of Tennessee's *total* lines open to competition and *27% of the business lines subject to competition.*" *Id.* (emphasis added). In light of these facts of public record, it is difficult to imagine how AT&T can justify making the accusation that "[t]he pro-competitive mandates of the Tennessee Act and the federal Act *remain as unfulfilled today as they where (sic) when passed in 1995 and 1996.* Petition at 7 (emphasis added).

AT&T, however, does make this accusation. It also threatens that "[t]he time for the Authority to act is running short" and suggests that if the TRA does not order the structural separation of BellSouth soon, "it may be too late for competition ever to develop." *See* Petition at 3. If these allegations are true, where has AT&T's request for structural separation been for the last five years, and why has it been filed only after the FCC started granting section 271 relief to RBOCs? In reality, AT&T's Petition is simply another one of its many efforts to further delay BellSouth's ability to do what AT&T can already do -- bundle local and interLATA long distance services into attractive packages and provide Tennessee consumers with even more competitive choices. As such, it is reminiscent of AT&T's appeal of the PSC's Order granting United's price

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[2] According to end of year 2000 ARMIS data, there were 659,521 BellSouth business lines in Tennessee. The number decreases each month due to competition. For example, ARMIS data shows 680,618 business lines in 1999. BellSouth estimates that as of May 1, 2001, CLECs are currently serving more than 290,000 business lines in Tennessee. Using these figures as examples, the total number of business access lines in BellSouth's territory in Tennessee would be 949,521, and 290,000 CLEC lines would be approximately 30.54 percent of that total.

regulation plan -- an appeal the Court of Appeals characterized as "the most recent in a series of attempts by AT&T to derail the legislature's efforts to deregulate local telecommunications services and to open the local telecommunications industry to competition." *AT&T v. Greer*, 1996 WL 697945 at *2 (Tenn. Ct. App. 1996).

In any event, the real world facts once again refute AT&T's allegations. According to the FCC's press release dated May 21, 2000:

> CLEC market share in New York and Texas (the two states that had 271 approval during the reporting period ending in December 2000) *are over 135% and 45% higher than the national average, respectively.*

(Emphasis added). The RBOCs providing service in New York and Texas have not been structurally separated, yet competition in the local market clearly is thriving (and growing at an accelerated pace) in those two states. Once again, AT&T's allegations are founded in fantasy and not reality.

B. AT&T's allegations regarding OSS, UNEs, and BellSouth's retail programs simply rehash allegations the TRA has addressed or is in the process of addressing.

AT&T claims that a structural separation of BellSouth is necessary in order to address three alleged "critical barriers to local telephone competition." *See* Petition at 8. According to AT&T, these purported "barriers" are access to BellSouth's operations support systems ("OSS"); provisioning of unbundled network elements ("UNEs"); and retail programs. *See id.* As explained above, however, these three alleged "critical barriers" have not prevented facilities-based CLECs from obtaining at least 27% of the Tennessee market in which they have chosen to compete. Additionally, it is beyond dispute that the TRA has addressed, and continues to address, each of these three matters in other proceedings. In fact, AT&T's own Petition plainly

states that "in arbitrations, complaints, and other proceedings, the Authority has endeavored to address such issues." *See* Petition at 11.

On May 15, 2001, for instance, the TRA issued its "Order consolidating Docket Nos. 99-00347 and 00-00392 into Docket No. 01-00193 and Opening Docket No. 01-00362." In that Order, the TRA consolidated two existing dockets into a new performance measurements docket "for the purpose of establishing generic performance measurements, benchmarks and enforcement mechanisms for [BellSouth]." *Order* at 8. The TRA also established a second docket "to determine the areas of OSS testing in which reliance on existing data or the test results from other states is not possible and to conduct any required testing." *Id.* Finally, the Order provides that the TRA will retain an independent third party to analyze existing OSS data and test results and to determine whether any further testing is necessary. *Id.* The subject of OSS, therefore, clearly has been (and is continuing to be) addressed by the TRA.

Similarly, the TRA has considered and continues to consider issues regarding UNEs. In Docket No. 97-01262, for example, the TRA adopted final rates for UNEs, interconnection, and collocation. Additionally, in Docket No. 00-00544, the TRA adopted interim rates for line sharing, loop conditioning, loop makeup, unbundled copper loops, various forms of HDSL loops, network terminating wire, and riser cable. The parties have briefed the case and are anticipating a decision from the TRA with respect to permanent rates. Moreover, AT&T's allegations of "BellSouth's failure to provision UNE-P and UNE loops in the same manner in which it serves its own retail customers"[3] are squarely addressed by the "Notice of Available Terms and

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[3] *See* Petition at 10. AT&T's Petition fails to inform the TRA that both the Public Service Commission of South Carolina and the Florida Public Service Commission have entered orders in the past two months in favor of BellSouth's position on this issue. *See* Final Order on Arbitration, *In Re: Petition of Sprint Communications Company Limited Partnership for*

Conditions" the TRA issued in Docket No. 97-01262 on May 25, 2001. That Notice states, in pertinent part, that:

> During the proceedings in this docket, the Authority addressed an issue regarding the application of FCC Rule 51.315(b), which prevents [BellSouth] from separating elements it "currently combines." As to that issue, the Authority determined that BellSouth must provide combinations to [CLECs] as long as BellSouth provides the combinations to itself anywhere in its network.
>
> The purpose of this Notice is to notify CLECs that BellSouth has a duty to comply with FCC Rule 51.315(b) as construed by this agency. All CLECs are entitled to receive terms and conditions consistent with the Authority's orders in this docket.

The TRA, therefore, has addressed the subject of UNEs in at least two dockets and in one Notice of Available Terms and Conditions, and it is continuing to address UNEs in at least two active dockets. Clearly, there is no need to establish yet another docket to consider AT&T's UNE allegations.

Finally, AT&T's hackneyed allegations regarding BellSouth's Contract Service Arrangements ("CSAs") have been the subject of a contested case proceeding in the generic CSA docket, numerous Authority Conferences, and the "Regulations for the Provisioning of Tariff Term Plans and Special Contracts" the TRA recently adopted in Docket No. 00-00702.

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arbitration of certain unresolved terms and conditions of a proposed renewal of current interconnection agreement with BellSouth Telecommunications, Inc., Order No. PSC-01-1095-FOF-TP in Docket No. 000828-TP at 21-22 (Fla. PSC May 8, 2001)("We think that the Eighth Circuit Court has made clear the meaning of FCC Rule 51.315(b) in its July 8, 2000 ruling despite the fact that it did not specifically define 'currently combines.' By vacating Rules 51.315(c)-(f), which required ILECs to perform the functions necessary to combine UNEs in any technically feasible manner, the Eighth Circuit Court relieved BellSouth of the duty to combine UNEs at TELRIC rates for requesting carriers."); Order on Arbitration, *In re Petition of ITS Telecom, LLC for Arbitration of Proposed Interconnection Agreement with BellSouth Telecommunications, Inc.*, Order No. 2001-286 in Docket No. 2001-19-C at 18-19 (S.C. PSC April 3, 2001) ("Therefore, based upon the FCC *UNE Remand Order* and the Eighth Circuit's decision, this Commission finds that BellSouth is not required to combine network elements that are not in fact already combined in its network.").

Additionally, AT&T's complaints regarding "generous 'win-back' offers" do not apply in Tennessee. The only "winback" promotion BellSouth filed in Tennessee was the subject of a contested case proceeding in Docket No. 00-00391 in which SECCA (of which AT&T is a member), NEXTLINK, Time Warner, and NewSouth participated. That proceeding was resolved when the TRA granted a petition, *jointly filed by all parties to the docket*, to approve a revised tariff that embodied the settlement agreement reached by the parties. *See* Order Approving Initial Order of Hearing Officer Accepting Settlement Agreement and Approving Revised Tariff, Docket No. 00-00391 (October 2, 2000). By its own terms, that tariff is no longer in effect, and BellSouth has not filed any other "winback" promotions in Tennessee.

C. AT&T's Petition seeks the inefficient and unnecessary duplication of efforts the TRA is already undertaking.

Even if the TRA had the authority to order the structural separation of BellSouth (which, as explained below, it does not), it is difficult to understand exactly what AT&T anticipates will change if the TRA did, in fact, order such relief. According to AT&T's Petition, the TRA still would, among other things: conduct a "271 review" regarding BellSouth, *see* Petition at 12 n.6; preside over arbitration proceedings pursuant to sections 251 and 252 of the federal Act, *id.* at 15; and develop "performance measurements, benchmarks, and financial penalties for failure to meet the same." *Id.* Thus, even if the TRA had the authority to order the relief requested by AT&T, it would continue to consider the same matters it already is considering in various dockets. The TRA, therefore, should decline to convene a contested case because the relief sought by AT&T is duplicative, inefficient, and totally unnecessary. *See Consumer Advocate Division vs. Tennessee Regulatory Authority,* 2001 WL 575570 (Tenn. Ct. App. May 30, 2001).

II. THE TRA SHOULD DECLINE TO CONVENE A CONTESTED CASE AND DISMISS AT&T'S PETITION FOR FAILURE TO STATE A CLAIM AND FOR LACK OF SUBJECT MATTER JURISDICTION BECAUSE NO TENNESSEE STATUTE AUTHORIZES THE TRA TO BREAK UP A TELEPHONE COMPANY INTO SEPARATE PARTS THAT INDIVIDUALLY PROVIDE RETAIL TELEPHONE SERVICE AND WHOLESALE TELEPHONE SERVICE.

AT&T seeks one and only one remedy in its Petition: that the TRA "order the structural separation of BellSouth into distinct retail and wholesale units." *See* Petition at 16. As such, the Petition fails to state a claim because the remedy sought by AT&T is one that the Legislature has not authorized the TRA to provide. Additionally, because the TRA is not authorized to provide the sole remedy requested by AT&T, the TRA lacks subject matter jurisdiction over the Petition. The TRA, therefore, should decline to convene a contested case and it should dismiss AT&T's Petition.

A. The TRA powers are limited to those that are either granted to it by the express language of the controlling statutes or that arise by necessary implication from the express language of the statutes.

As noted by AT&T's Petition, section 65-4-104 grants the TRA "general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter." Section 65-4-106 provides that the provisions of that chapter "shall be given a liberal construction, and any doubt as to the existence or extent of a power conferred on the authority by this chapter or by chapters 1, 3 and 5 of this title shall be resolved in favor of the existence of the power, to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction by this chapter." Relying on these statutes, AT&T's Petition suggests that the TRA has unlimited authority to order any kind of relief AT&T can think to ask of it, including the dismantling of a telephone company like

BellSouth. A brief review of applicable Tennessee case law reveals that AT&T's suggestion is simply wrong.

The Supreme Court of Tennessee has long recognized that the government's control of "property and employments devoted to the public use" is "not absolute" and is "subject to certain limitations." *In re Cumberland Power Co.*, 147 Tenn. 504, 513 (1922). For example, although the TRA has "general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises," the TRA may exercise this general power only "*as far as may be necessary for the purpose of carrying out the provisions of [Chapter 4 of Title 65].*" T.C.A. §65-4-104 (emphasis added). The Supreme Court has referred to the emphasized language as "limiting language," and it has expressly noted that the "details of the regulatory powers conferred on the [TRA] are specified in succeeding sections [of the code] . . . ." *Franklin Light & Power Co. v. Southern Cities Power Co.*, 164 Tenn. 171, 189 (1931).

AT&T correctly notes that in the *Tennessee Cable Television Association* case, the Court of Appeals stated that the TRA has "practically plenary authority over the utilities within its jurisdiction." *See* Petition at 7. What AT&T does not discuss, however, is the very next paragraph of that same opinion, in which the Court recognizes that the TRA's authority is limited by the details set forth in succeeding statues:

> These statutes [§§65-4-104 and 65-4-106] undoubtedly require a liberal rather than a narrow interpretation of the existence of the [TRA's] authority. However, the [TRA's] powers remain rooted in its enabling legislation, and so its actions must be harmonious and consistent with its statutory authority.

Tennessee Cable Television Assoc. v. Tennessee Public Serv. Comm'n, 844 S.W.2d 151, 159 (Tenn. Ct. App. 1992)(emphasis added). A year later, the Court reiterated that "[t]he powers of

the [TRA] must be found in the statutes. If they are not there, they are non-existent." *Deaderick Paging v. Tennessee Public Serv. Comm'n*, 867 S.W.2d 729, 731 (Tenn. Ct. App. 1993). Thus, as summarized most recently by the Court of Appeals:

> The [TRA], like any other administrative agency, must conform its actions to its enabling legislation. It has no authority or power except that found in the statutes. While its statutes are remedial and should be interpreted liberally, they should not be construed so broadly as to permit the [TRA] to exercise authority not specifically granted by law.[4]
>
> The Supreme Court of Tennessee has held: Any authority exercised by the [TRA] must be as the result of an express grant of authority by statute or arise *by necessary implication* from the expressed statutory grant of power.[5] In either circumstance, the grant of power to the [TRA] is strictly construed.

BellSouth Advertising and Publishing Corp. v. Tennessee Regulatory Authority, 2001 WL 134603 at *10 (emphasis added and citations omitted).[6]

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[4] *See also, Nashville, C. & St. L. Ry. v. Railroad & Public Utilities Comm'n*, 15 S.W.2d 751, 752 (Tenn. 1929)("the courts cannot, by resort to a so-called liberal construction, give to an act a meaning beyond its terms").

[5] *See also, Madison Loan & Thrift Co. v. Neff*, 648 S.W.2d 655, 657 (Tenn. Ct. App. 1983)("It is a general rule that no intent may be imputed to the legislature in the enactment of a statute other than such as is supported by the face of the statute. The rule likewise applies in determining the power of an administrative agency.").

[6] AT&T also cites *Breeden v. Southern Bell Tel. & Tel. Co.*, 285 S.W.2d 346 (Tenn. 1995) and *Briley v. Cumberland Water Co.*, 389 S.W.2d 278 (Tenn. 1965) in its Petition. *See* Petition at 7. In *Breeden*, the Court determined that the Public Service Commission had the exclusive original jurisdiction to consider the complainants' request that Southern Bell extend its lines in order to provide them with telephone service. This ruling is hardly surprising in light of the statute giving the PSC the *express* authority "to require every public utility . . . to establish, construct, maintain, and operate *any reasonable extension of its existing facilities* . . . ." *Breeden*, 285 S.W.2d at 349. In *Briley*, the Court simply held that obtaining permission of a local political subdivision for the use of its rights-of-way was not a condition precedent to the jurisdiction of the PSC to grant a water utility a certificate of convenience and necessity. *Briley*, 398 S.W.2d at 283. As such, both of these cases involve matters that were within the *express* statutory authority of the PSC. Neither case supports AT&T's contention that the TRA has the implied authority to order the structural separation of BellSouth.

As explained below, no Tennessee statute expressly or impliedly authorizes the TRA to splinter BellSouth into distinct operating units. The power of the TRA to order the remedy requested by AT&T, therefore, is non-existent. *Deaderick Paging*, 867 S.W.2d at 731.

B. No statute expressly grants the TRA the authority to order a structural separation.

Conspicuously absent from AT&T's Petition is a citation to any Tennessee statute that expressly authorizes the TRA to order the structural separation of a telephone company like BellSouth. The reason for this absence is obvious: there is no such statute in Tennessee. That fact, standing alone, is dispositive of AT&T's Petition.

In *Tennessee Public Serv. Comm'n v. Southern Ry. Co.*, 554 S.W.2d 612, 613 (Tenn. 1977), for example, the PSC ordered a railroad company to rebuild a bridge that had burned down, depriving a landowner "of any reasonable means of reaching her property . . . ." Relying on a statute authorizing it to inspect the conditions of a railroad's property and to order the abatement of any "dangerous or unhealthy conditions on trains or along the rights of way," the PSC ordered the railroad to rebuild the bridge. The Supreme Court of Tennessee ruled that the PSC had no authority to require the railroad to rebuild the bridge, explaining:

> Had the legislature intended to invest the Commission with the authority to insure the safety and convenience of the public in crossing a railroad right-of-way, it would have been a simple matter for it to have done so explicitly. It did not, and therefore we must presume that it did not intend such a result.

Id. at 613.

Similarly, it would have been a simple matter for the General Assembly to have expressly addressed the issue of structural separation in the statutes governing the TRA. After all, the General Assembly did just that in a recent statute. Section 7-52-601 allows municipalities to provide cable service, two-way video transmission, video programming, and

Internet services as long as they comply with various statutory requirements regarding pole attachments, cost allocation, and service rates. *See* T.C.A. §7-52-603(3). In addition to these requirements, the General Assembly also expressly stated that:

> A municipal electric system *shall establish a separate division to deliver any of the services authorized by this part.* The division shall maintain its own accounting and record-keeping system. A municipal electric system may not subsidize the operation of the division with revenues from its power or other utility operations.

T.C.A. §7-52-603(a)(1)(A)(emphasis added). Clearly, the General Assembly is familiar with the concept of structural separation, and it knows how to expressly address the issue of structural separation in legislation. The fact that it did not mention structural separation in any of the statutes governing the TRA shows that it did not grant the TRA authority to order the structural separation of BellSouth. *Cf. Southern Ry. Co.*, 554 S.W.2d 612, 613 (Tenn. 1977).

To the contrary, the language the General Assembly employed in the Tennessee Telecommunications Act of 1995 contemplates a single telecommunications service provider[7] offering both "retail" services and "wholesale" services. Section 65-4-124(a), for example, provides that

> all telecommunications service providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions, and services promptly, and on an *unbundled* and non-discriminatory basis from all other telecommunications services providers.

(Emphasis added). The statute also instructs the TRA to "promulgate rules and issue orders" to provide "*terms for resale*" and to provide for the "packaging of a basic local exchange telephone service or unbundled features or functions with services of other providers." *Id.*, §65-4-124(b).

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[7] Section 65-4-101(c) provides that "telecommunications service provider" includes "any incumbent local exchange telephone company" like BellSouth.

Far from suggesting that it is improper or even troublesome for a single company to provide both "retail" and "wholesale" services, the Legislature clearly contemplated and condoned exactly that scenario.

It is clear, therefore, that the TRA has no statutory authority to order the structural separation of BellSouth.

C. No statute impliedly grants the TRA the authority to order a structural separation.

As noted above, "[a]ny authority exercised by the [TRA] must be as the result of an express grant of authority by statute or arise *by necessary implication* from the expressed statutory grant of power." *See PSC v. Southern Railway Co.*, 554 S.W.2d 612, 613 (Tenn. 1977)(emphasis added). As the foregoing discussion makes clear, there is no express authority for the TRA to do what AT&T requests. Thus, the question devolves to whether the governing statutes grant by "necessary implication" the authority to do what is not expressly authorized.

1. An Agency has no implied authority to order a particular form of relief unless a statute plainly provides that it can do so.

Prior to addressing the statutes AT&T relies on in support of its claim of authority by necessary implication, it is instructive to consider a few of the numerous cases in which Tennessee Courts have found that an agency lacked the implied authority to order various forms of relief despite broad language in the statutes governing the agency. In *Nashville C. & St. L. Ry.*, 15 S.W.2d 751 (Tenn. 1929), for example, a railroad decided to man some of its depots only during peak hours rather than during all business hours. The Railroad Commission sought to require the railroad to man its depots during all business hours. A statute allowed the Commission to "require the location of such depots and the establishment of such freight and

passenger buildings as the conditions of the roads, safety of freight, and public comfort may require," and another statute provided that the railroad act "shall be liberally construed, and that any doubt as to the existence of the or nonexistence of a power conferred [by the act] shall be resolved in favor of the existence of the power, to the end that the commission may effectively govern and control the public utilities placed under its jurisdiction." *Id.* at 751-752. Notwithstanding the broad language of these statutes, the Court held:

> The act confers on the commission the power to require the location of such depots and the establishment of such freight and passenger buildings as the condition of the roads, safety of freight, and public comfort may require. This implies the power to forbid the abandonment of an existing depot or station required for public convenience, the safety of freight and the convenience and comfort of passengers. But the implication does not follow that the commission may direct and control the railway in the selection of its employees at such depots and stations or fix their hours of duty.

Id. at 753.

Similarly, in *Pharr v. Nashville C. & St. L. Ry.*, 208 S.W.2d 1013, 1014 (Tenn. 1948), the Railroad and Public Utilities Commission attempted to address a complaint regarding "loud noises emanating from [a spur track]" by ordering the railroad to abandon the track and locate it elsewhere. In doing so, the Commission relied on a statute granting it "the power and authority to inspect the conditions existing on trains or along the rights-of-way, yards and terminals of all commercial railroads . . . to the end that safety, health and comfort of the general public and employees may be preserved and that dangerous or unhealthy conditions on trains or along the rights-of-way, yards, and terminals, if found to exist, may be abated and removed by the order of the Commission." *Id.* at 1015. The Court reversed the Commission, explaining that "[u]nder our statute there is no authority given the Commission to order the Railway to abandon its property and seek to locate its railroad facilities in some other place." *Id.* at 1016.

In *General Portland v. Chattanooga-Hamilton County Air Pollution Control Board*, 560 S.W.2d 910 (Tenn. Ct. App. 1976), an agency found that a company had failed to meet the agency's air pollution emission standards. In an attempt to discourage subsequent violations, the agency ordered the company to post a $10,000 bond, which the company would forfeit in the event of a future failure to meet the standard. The company subsequently failed to meet the standard, and the agency sued for forfeiture of the bond.

In considering the agency's claim that it had the statutory authority to require the company to post the bond, the Court stated that:

> an administrative agency such as this board has no inherent or common law powers. Being a creature of statute, it can exercise only those powers conferred expressly or impliedly upon it by statute. In this absence of statutory authority, administrative agencies may not enforce their own determinations. Administrative determinations are enforceable only by the method and manner conferred by statute and by no other means. The exercise of any authority outside the provisions of the statute is of no consequence.

Id., 560 S.W.2d at 914. In light of these principles, the Court held that the agency had no statutory authority to either require the company to post the bond or to seek forfeiture of the bond:

> A reading of the [Tennessee Air Quality Act] clearly shows the only enforcements for violations applicable to this case are: a fine, an action to abate a nuisance, or an action for an injunction. These methods being the only ones allowed by the Act, all others must be considered as being illegal. By no stretch of the imagination can these provisions of the Act be logically construed to authorize the exacting of bond as was done in this case or the forfeiture of the bond.

Id. at 913.

Agencies like the TRA, therefore, clearly are not vested with the implied authority to order any relief that may be requested by a party simply because the relief may be good "public policy" in the minds of some. In *Wayne County v. Tennessee Solid Waste Disposal Control*

Board, 756 S.W.2d 274, 278 (Tenn. Ct. App. 1988), for example, an agency found that a landfill had contaminated a family's well, causing the family to haul water from a nearby school for all their cooking, drinking, and bathing. The agency ordered the operator of the landfill to: (1) close the landfill in a satisfactory manner; and (2) to provide the family with a permanent, uncontaminated supply of water. In support of the second aspect of its order, the agency claimed that it had the authority "to fashion remedies for essentially private wrongs even though the Act does not give it explicit authority to do so" because such authority, according to the agency "is implicit in its authority to abate public nuisances and to issue orders of correction . . . ." *Id.* at 283.

While acknowledging the appeal of the agency's argument in light of the facts before it, the Court of Appeals held that the agency had no authority to order the operator of the landfill to provide the family with an uncontaminated supply of water. The Court explained that:

> notwithstanding the logic and appeal of the [agency's] position, it provides an insufficient basis for this Court to engraft remedies onto the Act that were not put there by the General Assembly. It is not our role to determine whether a party's suggested interpretation of a statute is reasonable or good public policy or whether it is consistent with the General Assembly's purpose. We must limit our consideration to whether the power exercised by the [agency] is authorized by the express words of the statute or by necessary implication therefrom.

Id. at 283.

Even if the relief requested by a party purportedly furthers an express policy of the State of Tennessee, an agency has no authority to order such relief if the statutes governing the agency do not grant such authority either expressly or by necessary implication. In the recent *BAPCO* decision, for example, the Court of Appeals considered and rejected an argument that the telecommunications policy of the State of Tennessee, as expressed in section 65-4-123, authorized the TRA to grant AT&T's request that its name and logo appear on the cover of

directories published by BAPCO. After examining section 65-4-123 and many of the other statutes relied upon by AT&T in this docket, the Court concluded that:

> However laudable the desire of the Tennessee Regulatory Authority to have produced 'one complete phone book containing the names and numbers of all customers,' the language of the controlling statutes and of TRA Rule 1220-4-2-.15 simply cannot be stretched to provide TRA with the authority to compel a non-utility publishing company to brand the cover of its White Pages directory, not just with the name, but also the commercial logo of a telephone utility in competition with BST.

BAPCO, 2001 WL 134603 at *12. Similarly, the language of the controlling statutes simply cannot be stretched to provide the TRA with the authority to order the dismantling of a telephone company like BellSouth.

2. None of the statutes cited in AT&T's Petition grant the TRA any authority to order structural separation.

Sections 65-4-104 and 65-4-106. These sections grant the TRA general supervisory authority over public utilities to the extent necessary to carry out the provisions of chapter 4 of Title 65, and they provide that doubts over the existence of a power must be resolved in favor of the existence of the power. As discussed above, Tennessee courts have found that the PSC, the TRA, and other agencies did not have the authority to order various remedies even in light of statutes with the same or similar language. Clearly, these statutes do not create the authority to order structural separation when no such authority is found in the "details of the regulatory powers conferred on the [TRA] . . . in succeeding sections . . . ." *See Franklin Light & Power Co. v. Southern Cities Power Co.*, 164 Tenn. 171, 189 (1931).

Section 65-4-117(1) & 65-5-210. As AT&T notes in its Petition, section 65-4-117(1) grants the TRA the power to "[i]nvestigate, upon its own initiative or upon complaint in writing, any matter concerning any public utility as defined in §65-4-101," and section 65-5-210 allows

the TRA to "investigate, hear, and enter appropriate orders to resolve all contested issues of fact or law arising out of the application of acts 1995, ch. 408." In *BellSouth Telecommunications, Inc. v. Bissell*, 1996 WL 557846 (Tenn. Ct. App. 1996), for example, the PSC "ordered the completion of a previously authorized investigation of the future earnings of BellSouth Telecommunications, despite legislative developments that stripped the Commission of its authority to use such an investigation to set telephone rates." *Id.* at *1. In reversing this Order, the Court of Appeals explained:

> We think the PSC's decision to continue the investigation is simply arbitrary, a decision "that is not based on any course of reasoning or exercise of judgment."
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> * * *
>
> We are aware that in adopting regulatory reform the legislature was careful to say that nothing in the act would "affect the authority and duty of the Commission to complete any investigation pending at the time" the act became effective. But we do not think the legislature intended to authorize the PSC to continue an investigation that no longer had any purpose.

Id. at *2. These statutes, however, do not authorize the TRA to "investigate" a requested remedy it is not authorized to grant.

Section 65-5-208(c), 65-4-115, and 65-4-122(c). Section 65-5-208(c) authorizes the TRA to "adopt other rules or issue orders to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices." Section 65-4-115 prohibits preferential or discriminatory practices, and section 65-4-122(c) prohibits unreasonable preferences, advantages, prejudices, or disadvantages. Clearly, these statutes do not, by *necessary implication*, authorize the TRA to order the split up of BellSouth. The FCC, the PSC, and the TRA have been implementing and enforcing similar statutes for years without suggesting

that they could not do so without splitting up BellSouth and other telephone companies that are subject to the same statutes. Additionally, as noted above, the General Assembly has expressly imposed structural separation requirements when it believed that nonstructural separation would be inadequate. *See* T.C.A. §7-52-603(a)(1)(A). Rather than imposing a similar requirement in the Tennessee Telecommunications Act of 1995, however, the General Assembly passed legislation that contemplates and condones a single entity providing both wholesale and retail telecommunications services. The authority to dismantle BellSouth, therefore, clearly does not "arise *by necessary implication* from the expressed statutory grant of power" in these statutes. *See PSC v. Southern Railway Co.*, 554 S.W.2d 612, 613 (Tenn. 1977).

Section 65-4-124. AT&T quotes the interconnection and unbundling provisions of subsection (a) of this statute in support of its Petition. As explained above, however, the language of subsection (b) of the same statute clearly contemplates a single telecommunications service provider offering both "retail" services and "wholesale" services. Because the structural separation requested by AT&T in its Petition is inconsistent with this plain statutory language, section 65-4-124(a) simply does not authorize the TRA to dismantle BellSouth.

Section 65-4-123. This section sets forth the State of Tennessee's policy of "permitting competition in all telecommunications services markets . . . without unreasonable prejudice or disadvantage to any telecommunications services provider . . . ." As such, it imparts no substantive powers upon the TRA, and it does not allow the TRA to grant AT&T's request to restrain competition by dismantling the operations of one of its competitors. *See, e.g., BAPCO*, 2001 WL 134603 at *12 ("However laudable the desire of the Tennessee Regulatory Authority to have produced 'one complete phone book containing the names and numbers of all customers,' the language of the controlling statutes and of TRA Rule 1220-4-2-.15 simply cannot be

stretched to provide TRA with the authority to compel a non-utility publishing company to brand the cover of its White Pages directory, not just with the name, but also the commercial logo of a telephone utility in competition with BST.").

III. THE TRA SHOULD DISMISS AT&T'S PETITION FOR FAILURE TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED BECAUSE THE RELIEF SOUGHT BY AT&T IS IMPERMISSIBLY IN CONFLICT WITH FEDERAL LAW.

Even if Tennessee statutes authorized the TRA to order the split up of BellSouth, the TRA still could not order the remedy requested by AT&T because doing so would violate the commerce clause of the Constitution of the United States. Such an action by the TRA would also be inconsistent with the provisions of the federal Act. *See* 47 U.S.C. § 261(c) ("Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, *as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.*)(emphasis added). Even if the TRA believes it may have jurisdiction to order the relief requested by AT&T, therefore, the TRA should still decline to convene a contested case proceeding because, as explained below, the relief AT&T has requested would be inconsistent with federal law.

A. Applying any of the statutes cited by AT&T in the manner suggested by AT&T would violate the Constitution of the United States.

Article I, Section 8 of the United States Constitution empowers Congress to "regulate Commerce . . . among the several states . . . ." The purpose of this provision is to insure the free and unimpeded flow of goods and services between the states. *See Waste Management Inc. v. Metropolitan Gov't of Nashville & Davidson County*, 130 F.3d 731, 735 (6th Cir. 1997). Over the years, this provision has been construed to mean that the states are precluded from imposing

any undue or unreasonable burden on interstate commerce. *Id.* Because this preclusion arises from the Constitution itself, it applies even if there is no federal statute or rule that preempts a particular state statute or regulation.[8] *See Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 35 (1980). The commerce clause, therefore, prohibits the TRA from applying any of the statutes cited in AT&T's Petition in a manner that would impermissibly burden interstate commerce.[9]

Yet that is exactly what AT&T is asking the TRA to do. If AT&T had its way, BellSouth would not be able to provide any retail service in Tennessee unless BellSouth created completely separate retail and wholesale entities.[10] *See* Petition at 14. Under AT&T's logic, each of the other eight state Commissions in BellSouth's region presumably could order BellSouth to implement a unique type of structural separation in order to provide retail services in that state: one Commission, for instance, could require a publicly owned corporate affiliate, another could

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[8] The specific relief requested by AT&T in this instance, however, presents the issue of whether the TRA is precluded from considering structural separation as a result of express preemption under §§253(a), 253(b) and 261 or some other type of preemption, such as conflict preemption under §§251, 252, 254, 271, 272 and 706, agency preemption by the FCC, or field preemption by Congress.

[9] BellSouth is not asking the TRA to invalidate any of the statutes upon which AT&T relies in its Petition. Rather, BellSouth is asking the TRA to recognize that applying these statutes in the manner suggested by AT&T would be unconstitutional. It is well settled that although an agency "has no authority to resolve facial challenges to the constitutionality of a statute," an agency does have the authority to "resolve questions of the unconstitutional application of a statute to the specific circumstances of the case or the constitutionality of a rule that the agency has adopted." *Richardson v. Tennessee Bd. of Dentistry*, 913 S.W.2d 446, 455 (Tenn. 1995).

[10] While AT&T and other CLECs have chosen to serve only the most lucrative accounts, BellSouth offers retail telephone service to every customer in its serving area. Granting the relief requested by AT&T, therefore, would hamper BellSouth's ability to serve Tennessee citizens that neither AT&T nor other CLECs are willing to serve.

require a single corporate entity with separate divisions, and others could require other forms of separation.[11]

The specter of a company having to implement nine separate forms of corporate organization in order to do business in its operating region clearly constitutes an impermissible burden on interstate commerce. In *Southern Pacific Co. v Arizona*, 325 U.S. 761 (1945), the Supreme Court struck down an Arizona statute prohibiting the operation within the state of trains of more than fourteen passenger or seventy freight cars. Even though there were no conflicting federal statues or regulations, the Court ruled that the statute violated the commerce clause:

> [T]he Arizona Train Limit Law imposes a serious burden on the interstate commerce conducted by appellant. It materially impedes the movement of appellant's interstate trains through that state and interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation service. Enforcement of the law in Arizona, while train lengths remain unregulated or are regulated by varying standards in other states, must inevitably result in an impairment of uniformity of efficient railroad operation because the railroads are subjected to regulation which is not uniform in its application. Compliance with a state statute limiting train lengths requires interstate trains of a length lawful in other states to be broken up and reconstituted as they enter each state according as it may impose varying limitations upon train lengths. The alternative is for the carrier to conform to the lowest train limit restriction of any of the states through which its trains pass, whose laws thus control the carrier's operations both within and without the regulating state.

Id., at 773. If requiring a carrier to "break down and reconstitute" its trains in order to operate them in a state is an impermissible burden on interstate commerce (*See id.*), then certainly requiring a carrier to break up and reconstitute its entire corporate structure in order to provide

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[11] The prospect of nine different rulings on structural separation is fundamentally different than the prospect of nine different rulings on rates for services. Charging one rate for a business line in Tennessee and a different rate for a business line in Georgia, for example, may involve various programming and systems changes. Unlike the relief requested by AT&T, however, it does not require the establishment of independent sets of systems owned by separate companies and operated and maintained by separate sets of employees.

service in a state is an even more impermissible burden on interstate commerce. *See* Petition at 14.

Corporate reorganization involves much more than simply filing a form or two with the appropriate state agencies. In addition to the tax implications, there are transactional burdens associated with transferring the various real estate and personal property involved in the reorganization from one entity to the other. There are administrative burdens associated with managing the associated payroll, benefits, and pension changes. There are also costs and burdens involved in duplicating the various assets that currently are shared by BellSouth's "wholesale" and "retail" organizations (such as office buildings, payroll systems, and billing systems).

These burdens on interstate commerce are further exacerbated by AT&T's request that the TRA "consider innovative rules concerning capital structure that would ensure that BellSouth's retail management has fiduciary obligations to shareholders other than those that also own the wholesale company." Petition at 15. Unless AT&T is suggesting that the TRA can re-write the statutes and caselaw governing corporate law (which it clearly cannot), granting such relief necessarily would involve an order requiring the issuance of new or additional stock. The Commerce Clause, however, prevents the TRA from entering such an order.

By way of example, the Supreme Court of North Carolina considered a regulation requiring state Commission approval of the issuance of stock. The Court ruled that applying the regulation to BellSouth's predecessor, Southern Bell, would violate the commerce clause, explaining that:

> If the North Carolina Commission disapproves a proposed securities issue and the Georgia Commission approves it, Southern Bell is stymied, for it is put in an impossible position. In our view, the mere possibility of such a conflict, as applied to Southern Bell under the facts of this case, makes Rule R1—16, and the

> statutes which authorize the rule, a direct regulation and an impermissible burden on interstate commerce.

State v. Southern Bell Tel. & Tel. Co., 217 S.E.2d 543, 551 (N.C. 1975). Several other state courts have employed similar reasoning in ruling that statutes or rules requiring a state Commission to approve the issuance of securities violate the commerce clause to the extent that they are applied to a company doing business in multiple states. *See, e.g., Panhandle Eastern Pipe Line Co. v. Public Utilities Comm'n*, 383 N.E.2d 1163 (Ohio 1978); *United Air Lines v. Illinois Commerce Comm'n*, 207 N.E.2d 433 (Ill. 1965); *United Air Lines, Inc. v. Nebraska State Ry. Comm'n*, 112 N.W.2d 414 (Neb. 1961).

Additionally, in response to a TRA inquiry regarding its authority to approve or disapprove the issuance of stock by various public utilities, the Office of the Attorney General of the State of Tennessee explained that "courts have expressed concern of the potential chaos and disruption that would ensue if every state in which an interstate utility operated could require that the utility obtain the prior approval of the state before issuing securities." Tennessee Attorney General Opinion No. 99-119, 1999 WL 322037 at *7 (May 14, 1999). Addressing the TRA's inquiry as it related specifically to telecommunications companies, the Opinion states that "[d]epending on the specific facts presented, state regulation appears to be proscribed, *especially if the facts are such that the application of state regulation may create a cumulative burden for the utility based on its having similar operations in many states.*"). Opinion at *8 (emphasis added). If the commerce clause prohibits a state Commission from approving or disapproving a multi-state company's decision to issue new shares of stock, how can AT&T seriously contend that the same commerce clause would allow the same state Commission to require the same company to issue the same stock?

AT&T seeks relief that is not authorized by state statute. Even if any state statute did authorize the TRA to order structural separation, applying that statute in the manner suggested by AT&T would violate the commerce clause. Given that the TRA is precluded from granting the only relief AT&T seeks in its Petition, the TRA should decline to convene a contested case proceeding, and it should dismiss the Petition.

B. Requiring BellSouth to split into two separate entities prior to providing retail service would be inconsistent with Section 253 of the federal Act because it would create an impermissible barrier to entry and it would not be competitively neutral.

Section 253(a) of the Act provides that "[n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 U.S.C. § 253(a) (emphasis added). The Act is groundbreaking legislation that expressly addresses the relationship between incumbents and new entrants -- including the manner in which an incumbent providing retail services to its end users must also provide wholesale services to its competitors. AT&T, therefore, cannot seriously contend that when it used the term "any entity" in Section 253(a), Congress really intended to say "any entity except an incumbent" or "any entity except an incumbent as it is currently organized." Section 253(a), therefore, prohibits a State from imposing requirements that prohibit any entity -- including BellSouth as it is currently organized -- from providing any retail telecommunications services in the State of Tennessee.

If the TRA were to order BellSouth to split into a "wholesale" entity and a "retail" entity, however, the "wholesale" entity would be prohibited from providing any telecommunications services to any end users. It is difficult to imagine a more direct violation of the federal statute that unequivocally states that a State may not prohibit "the ability of any entity to provide any

interstate or intrastate telecommunications service." The remedy requested by AT&T, therefore, clearly is inconsistent with Section 253(a) of the Act.

AT&T's requested remedy also is inconsistent with Section 253(b) of the Act, which provides:

> Nothing in this section shall affect the ability of a state to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.[12]

47 U.S.C. § 253(b) (emphasis added). The relief requested by AT&T clearly is not competitively neutral because the other ILECS and the CLECs in Tennessee would not be required to undergo a structural separation and would not be required to incur the costs associated with such a separation. If AT&T had its way, these other ILECS and the CLECs would enjoy a distinct competitive advantage over BellSouth, which violates the plain language of Section 253(b) of the 1996 Act.

C. Requiring BellSouth to split into two separate entities prior to providing retail service would be inconsistent with Section 272 of the Act and with the resale and unbundling obligations imposed by the Act.

Congress is no stranger to structural separation requirements, and when it intended to impose such requirements in the 1996 Act, it did so in clear and unequivocal language.[13] In

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[12] By its own terms, this statute does not create any new rights for the states, and it does not expand any existing rights of the states. This statute, therefore, does not alter the fact that the TRA has no authority under existing Tennessee law to order the structural separation of BellSouth.

[13] *See, Powell Says He's No Fan Of Company-Specific Merger Conditions*, Communications Daily (April 6, 2001) ("*Powell also indicated opposition to structural separation* for Bell companies because Congress specifically opted not to take that route. He said he was adherent of separation as means of promoting local competition when Congress was

Section 272(a)(1), for instance, Congress expressly stated that certain local exchange carriers may provide certain services only "through one or more affiliates that are separate from any operating company entity that is subject to the requirements of Section 251(c)." 47 U.S.C. § 272(a)(1). The services that are subject to this separate affiliate requirement are manufacturing activities, origination of certain interLATA telecommunications services, and certain interLATA information services. *See* 47 U.S.C. §272(a)(2). Additionally, Section 274 of the 1996 Act imposes a structural separation requirement on the provision of certain electronic publishing services. Significantly, none of these express structural separation requirements applies to the provision of any intraLATA telecommunications service.

To the contrary, Congress clearly envisioned an incumbent providing both wholesale and retail intraLATA services through the same corporate entity. In Section 251(c)(2)(D), for example, Congress required incumbents "to provide, for the facilities and equipment of any requesting telecommunications carriers, interconnection with the [incumbent's] network" on rates, terms, and conditions that comply with the requirements of Section 252. In Section 251(c)(4)(A), Congress required these same incumbents "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." 47 U.S.C. 251(c)(4)(A) (emphasis added). Congress, therefore, clearly envisioned the same corporate entity would be providing both retail services to end users at retail prices as well as wholesale services to other telecommunications carriers at either resale rates or UNE rates. AT&T's requested remedy is inconsistent with this clear Congressional intent.

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writing the Telecom Act. However, Congress chose interconnection regime instead and that's what should be followed now, he said . . . .) (emphasis in original).

To further demonstrate the extent to which the relief requested by AT&T is inconsistent with the Act, consider just a few of the results of granting such relief. Because the "wholesale" entity would provide no services to end users, there would be no "retail" rate for the services provided by the "wholesale" entity. Presumably, the wholesale entity would simply provide services to both the "retail" entity as well as to other telecommunications service providers at the TELRIC-based rates established pursuant to Section 252 of the Act. After purchasing these services from the "wholesale" entity, the "retail" entity presumably would resell those services to end users at rates that would cover its marketing, billing, collection, and similar costs.

The question then becomes, which entity has the resale obligation? If it is the "wholesale" entity, does that mean the wholesale entity must resell services for something less than the TELRIC-based rates for which it is already offering the service? Nothing in the Act suggests that anything lower than a TELRIC-based rate is permissible, and in fact, anything less than such a rate would be confiscatory. If it is the "retail" entity that has the resale obligation, will that entity resell its services after stripping its marketing, billing, collection, and other avoided costs as provided in Section 252(d)(3)? If so, how is that different than the TELRIC price the wholesale company is already charging for the elements that make up the services? Further, that would impose a resale obligation on the BellSouth "retail" company that would not be required of the CLECs against whom the BellSouth "retail" company is to compete. Such discriminatory treatment runs contrary to both state and federal law.

Likewise, AT&T's requested relief is inconsistent with the general premises surrounding the unbundling requirements of §251(c)(3) of the 1996 Act. When enacting §§251 and 252 of the 1996 Act, Congress recognized that the ILECs were providing retail telecommunications services over existing networks. Recognizing that providing new entrants with access to the

elements of these existing networks would accelerate the development of local exchange competition, Congress imposed various obligations on the ILECs, including a duty to make available at wholesale prices elements of the ILECs' networks. Congress, however, did not require the ILECs to separate their network from their retail offerings.

The powers granted to the FCC and the state commissions through the 1996 Act were not so unlimited as to permit the extraordinarily extreme level of intrusion on the management decisions of the ILECs as AT&T is proposing here. Under the Act, the FCC and a state commission can compel an ILEC to unbundle a particular network element from its tariffed retail services if, *inter alia*, the FCC finds: (1) that access to such network elements is necessary; and (2) that the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer. In other words, Congress contemplated a program under which an ILEC would be allowed to continue to offer an integrated network of retail services but would have to unbundle access to elements of that network to give the ILECs' competitors an opportunity to compete.

As the Supreme Court found in *AT&T Corp. v. Iowa Utilities Board*, 119 S. Ct. 721, 525 U.S. 366, 142 L.Ed.2d 835, however, there are limitations on the ILECs' obligations to unbundle network elements. The Court noted that, "the FCC did not adequately consider the "necessary and impair" standards when it gave blanket access to these network elements and others in Rule 319." *Id.*, 142 L.Ed.2d at 854. In other words, the FCC required too much unbundling of the network and was ordered to take another look at the question of what elements must be unbundled. If the "necessary and impair" standard is not met, the FCC and the TRA cannot order an ILEC to unbundle network elements.

Now AT&T comes before the TRA and asks for a far more draconian intrusion on BellSouth's rights. In addition to asking the TRA to order BellSouth to unbundle *elements* of the network BellSouth uses to provide retail services, AT&T asks the TRA to order BellSouth to unbundle *its entire network* from its retail offerings. AT&T's requested relief not only exceeds what the Supreme Court found acceptable in *AT&T Corp.*, the requested relief is inconsistent with the rights of the ILECs -- preserved in the Telecommunications Act -- to choose how to operate their businesses.

Clearly, the remedy AT&T seeks in its Petition creates a Pandora's box of legal and policy issues that would take years to sort out. More importantly, the remedy AT&T seeks is inconsistent with the Act. The TRA, therefore, should dismiss AT&T's Petition because it seeks a remedy that the TRA is prohibited from granting.

CONCLUSION

For the foregoing reasons, the TRA should dismiss AT&T's Petition requesting the break up of BellSouth into separate wholesale and retail corporate subsidiaries.

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301

R. Douglas Lackey
Patrick W. Turner
675 W. Peachtree Street NE, Suite 4300
Atlanta, Georgia 30375

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2001, a copy of the foregoing document was served on the parties of record, via the method indicated:

[ ] Hand
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[ ] Facsimile
[ ] Overnight

James Lamoureux, Esquire
AT&T
1200 Peachtree St., NE
Atlanta, GA 30309