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November 29, 2001

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

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

Dear Mr. Waddell:

Please find enclosed for filing the original and thirteen copies of Petitioners' Memorandum in Opposition to BellSouth Telecommunications, Inc.'s Motion to Deny AT&T's Request to Convene a Contested Case and Dismiss the Petition in the above-captioned proceeding.

Copies are being served on all known parties of record.

Yours very truly,

Jack W. Robinson, Jr.

JWRjr/ghc
Enclosures

cc: Parties of Record

BEFORE THE
TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re:

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

Docket No. 01-00405

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

Petitioners, AT&T Communications of the South Central States, Inc., the Competitive Telecommunications Association, and TCG MidSouth, Inc. (collectively, the "Petitioners"), hereby respond to BellSouth Telecommunications, Inc.'s ("BellSouth") Motion to Deny Request to Convene a Contested Case and Dismiss the Petition and respectfully state as follows:

INTRODUCTION

Petitioners' allegations, which must be taken as true on a motion to dismiss, establish: (1) an absence of meaningful competition in the local exchange market in Tennessee; (2) an inherent conflict of interest and potential for anticompetitive conduct created by the fact that BellSouth controls the lines and facilities upon which its competitors rely while also competing against those same companies in providing local exchange service; and (3) that structural relief would eliminate the opportunity and incentive for BellSouth to engage in such anticompetitive conduct, thereby allowing meaningful local competition to finally emerge in Tennessee. This proceeding is about exploring a way to remedy anticompetitive conduct and facilitate local competition. These matters fall squarely within the subject matter jurisdiction of the Tennessee Regulatory Authority (the "Authority").

BellSouth, however, does not want the Authority to explore regulatory measures that could increase competition for the citizens of Tennessee. On June 11, 2001, BellSouth filed a Motion to Deny AT&T's Request to Convene a contested Case and Dismiss the Petition (the "Motion to Dismiss"). BellSouth has not denied the allegations contained in the Petition. Instead, BellSouth argues that the Authority lacks the jurisdiction or power to even consider the matters raised in the Petition.[1] BellSouth is wrong.

The 1995 Telecommunications Act of Tennessee (the "Tennessee Act") gives the Authority broad jurisdiction to open up the local exchange market to competition and to provide remedies for anticompetitive conduct. This jurisdiction is confirmed in the federal Telecommunications Act of 1996 (the "Federal Act"). In the face of this extensive statutory support, BellSouth is left to argue that structural relief is not authorized because the remedy itself is not mentioned specifically by name in the appropriate sections of these statutes. This argument is undermined by a host of state-court decisions upholding the broad power of the Authority over telecommunications matters as well as federal-court decisions upholding the

[1] As a threshold matter, BellSouth's repeated contention that the Petitioners "seek[s] one and only one remedy in its Petition," is false. *E.g.,* Motion to Dismiss at p. 9. In fact, Petitioners also have requested that the Authority investigate BellSouth's anticompetitive conduct, and take "such other and further actions as deemed appropriate by the Authority." Petition at p. 16. Because BellSouth's Motion to Dismiss is actually directed to one particular remedy that might be imposed by the Authority, rather than the fundamental question of whether the Authority has subject matter jurisdiction to continue this proceeding, BellSouth's arguments are premature. For this reason alone, the Authority should deny BellSouth's Motion to Dismiss and open a docket to investigate the anticompetitive conduct of BellSouth and the advisability of employing a structural remedy to foster local competition.

FCC's jurisdiction to impose structural relief despite the absence of any reference to that remedy in the general jurisdiction provision upon which the FCC relied in those cases.

BellSouth also fails to cite the thorough and well-reasoned opinion of the Pennsylvania Commonwealth Court in *Bell Atlantic-Pennsylvania, Inc. v. Pennsylvania Pub. Util. Comm'n,* 763 A.d. 440 (Pa. Commw. Ct. 2000) ("*Bell Atlantic*"), which analyzes and rejects many of the same arguments advanced by BellSouth in support of its claim that the Authority has no jurisdiction to consider the Petition. In addition, the *Bell Atlantic* court rejected the argument that structural relief was inconsistent with the Commerce Clause of the U.S. Constitution and inconsistent with sections 253 or 272 of the Federal Act. BellSouth's Commerce Clause challenge is premature because this proceeding is only at the motion to dismiss stage. BellSouth's federal law arguments in this case are virtually indistinguishable from those rejected in *Bell Atlantic* and should be dismissed here as well.

For all of these reasons, the Authority should deny BellSouth's Motion to Dismiss and should schedule further proceedings in which all interested parties and the Authority will have an opportunity to develop a full record on the state of competition in the market for local exchange service in Tennessee and to address, on the merits, the question of whether structural relief is a necessary step in the Authority's ongoing efforts to provide Tennessee consumers with the benefits of fair and effective competition.

STANDARD OF REVIEW

When reviewing a motion to dismiss, the Authority is required to take all allegations of the non-moving party as true. *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994). The non-movant's pleadings must be construed most favorably to him, and all doubt must be resolved in his favor. *See id.* The Authority should not dismiss the petition "unless it appears that the plaintiff can prove no set of facts in support of its claim that would entitle it to relief." *Id.*

ARGUMENT

I. THE AUTHORITY SHOULD CONVENE A CONTESTED CASE TO REMEDY BELLSOUTH'S CONTINUED ANTICOMPETITIVE BEHAVIOR

Having effectively resisted all prior efforts to convince, induce and/or require compliance with the competitive mandates of the Federal Act and the Tennessee Act, BellSouth takes the extraordinary position that the Authority should dismiss the Petition and decline to convene a contested case because the Authority has previously addressed certain of the issues raised by the Petition. *See* Motion to Dismiss at pp. 2-8. BellSouth's arguments are flawed, however, because the Authority has a duty to investigate the matters raised in the Petition, and because the request for structural relief has never been addressed before.

A. BellSouth's Request That the Authority Decline To Convene a Contested Case Is Premature

BellSouth would have this Authority summarily reject the Petition, without conducting any investigation whatsoever. This course of conduct would be an abuse of discretion. The Authority's duty to investigate the issues raised in a complaint prior to deciding whether to convene a contested case is established by several statutes. The Authority is required to "[i]nvestigate, upon its own initiative or upon complaint in writing, any matter concerning any public utility as defined in § 65-4-101." Tenn. Code. Ann. § 65-4-117. Furthermore, Section 65-2-210 of the Tennessee Code Annotated provides that "[i]n addition to any other jurisdiction conferred, the authority shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408." The clear language of these statutes, under which Petitioners have filed their Petition, establishes that the Authority must investigate the allegations raised in the Petition prior to deciding whether to convene a contested case.

The Authority's duty to investigate under Section 65-4-117 prior to determining whether to convene a contested case was expressly recognized by the Tennessee Supreme Court in *Consumer Advocate Division v. Greer*, 967 S.W.2d 759, 763 (Tenn. 1998) – the primary case relied on by BellSouth. In that case, Tennessee's Attorney General's Office (the "Advocate") filed a petition to intervene, alleging that BellSouth's proposed rate changes "may prejudice Tennessee consumers." *Id.* at 760. The Authority denied the Advocate's petition to intervene, and the Advocate appealed, arguing that Section 65-5-203 requires the Authority to convene a contested case upon the filing of a written complaint. *Id.* at 761.[2]

The Tennessee Supreme Court rejected the Advocate's arguments, finding that the Advocate's petition did not constitute a written complaint under Rule 1220-1-1-.05(1) of the Rules of the Tennessee Regulatory Authority. Although this finding disposed of the case, the court also addressed whether the Authority was required to convene a contested case under Section 65-5-203. The court noted that the statutory language of Section 65-5-203 implied an intent on the part of the General Assembly to vest the Authority with a degree of discretion in deciding whether to convene a contested case hearing. *Id.* at 763. In reaching this conclusion, the court reviewed the language of other related statutes, including 65-4-117 -- the statute applicable to this case. With respect to Section 65-4-117, the court found that "the General

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[2]Significantly, *Consumer Advocate Division v. Greer*, 967 S.W.2d 759 (Tenn. 1998) concerns the statutory scheme dealing with rate regulation, and the Authority's duties upon a written complaint as set forth in Section 65-5-203. Here, of course, Petitioners have not filed a rate regulation complaint, and therefore, Section 65-5-203 is not implicated.

Assembly granted the Authority discretionary authority to determine, **after investigation**, whether a contested case hearing is warranted." *Id.* (emphasis supplied).

Thus, the Tennessee Supreme Court has unequivocally expressed that the decision to proceed with a contested case under Section 65-4-117 should not be made on an empty record. Rather, such a decision should only be made after a reasonable investigation of all relevant matters, through discovery and otherwise. To refuse to convene a contested case under Section 65-4-117 without any record support is simply inappropriate. *See In re Show Cause Proceeding to Amend the Billing and Collection Tariffs of South Central Bell*, 779 S.W.2d 375, 381 (Tenn. Ct. App. 1989) (noting that decision to establish rate regulation was arbitrary and capricious and a violation of Tenn. Code Ann. § 45-5-322(h) because the commission did not have sufficient evidence to evaluate rates).

Here, BellSouth has not yet answered Petitioners' allegations, there has been no discovery, the Authority has taken no evidence, no witnesses have submitted testimony, and no hearing has been held. The current state of the record cannot discharge the Authority's obligation to conduct an "investigation" before declining to convene a contested case. If the Authority were to grant BellSouth's Motion to Dismiss, it would be doing so on far less of a record than the Florida body had before it, and would be vulnerable to reversal due to a failure to conduct an adequate investigation as mandated by Tennessee Code Annotated Section 65-4-117. For example, while far from ideal, the Florida Public Service Commission conducted an extensive two-day "workshop" regarding structural separation before ruling on BellSouth's similar motion to dismiss.[3]

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[3]The Florida Public Service Commission's November 6, 2001 Order granting BellSouth's motion to dismiss a similar proceeding is inapplicable here. *See In re: Petition by AT&T Communications of the Southern States, Inc.*, Docket No. 010345 TP, Order No. PSC-01-2178-

B. BellSouth's Contention That the Authority Has Already Addressed the Issues Raised by the Petition Is Without Merit

Even assuming that the Authority has the discretion to decline to convene a contested case at this stage of the proceeding, BellSouth's entire premise as to as to why the Authority should exercise that discretion is logically flawed. Indeed, it is precisely because the allegations of the Petition raise matters that have been already complained of elsewhere that it is necessary for the Authority to consider the remedy of structural relief. *See* Motion to Dismiss at p. 2.

Since the inception of the Tennessee Act, in arbitrations, complaints, and other proceedings, the Authority has attempted, in piecemeal fashion, to force BellSouth to comply with the pro-competitive mandates of the Tennessee Act and Federal Act. Rather than facilitate the smooth transition to a competitive Local Exchange Carrier ("LEC") market, BellSouth has steadfastly refused to comply with the legislative mandates. As stated in the Petition, "[t]he sheer number and repetitiveness of arbitrations, complaints and other proceedings during the past five years in Tennessee . . . should alone attest to the ultimate futility of this approach." Petition at p. 11. BellSouth actually acknowledges this "sheer number" of proceedings. Motion to Dismiss at pp. 5-6.

Ironically, notwithstanding the many complaints lodged against BellSouth every year for its anticompetitive behavior, BellSouth boasts of a vibrant and competitive local exchange market in Tennessee. BellSouth's allegation of a competitive market is supported by its contention (disputed by Petitioners) that "7% of Tennessee's total lines [are] open to competition and 27% of the business lines [are] subject to competition." Motion to Dismiss at p. 4 (emphasis

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FOF-TP, dated November 6, 2001. First, the statutory scheme in Florida differs from the structure in Tennessee. Second, the Florida order is currently subject to a motion for reconsideration. Finally, the Florida Commission was fiercely divided.

omitted). Even assuming its statistics are correct, only in BellSouth's distorted view of the world is control of 93% of the market "competition." Certainly, this is not the "competitive marketplace" Congress and the General Assembly envisioned when passing the Federal Act and the Tennessee Act. And, as Petitioners allege, the attempted remedies employed thus far have wholly failed to eliminate BellSouth's continued anticompetitive behavior, because the proper incentives are not in place.

Finally, BellSouth accuses the Petitioners of "hackneyed allegations regarding BellSouth's Contract Services Arrangements," because "BellSouth has not filed any other 'winback' promotions [since October 2000] in Tennessee." Motion to Dismiss at p. 7, 8. Petitioners do not dispute that BellSouth has not "filed" any other winback promotions in recent months. But neglecting to "file" a tariff has not stopped BellSouth from continuing to use anticompetitive winback promotions in Tennessee. Within the last few months, BellSouth has apparently offered a winback promotion – without filing a tariff – that includes 3 months of free service to business customers that return to BellSouth. *See In re: Complaint of XO Tennessee, Inc. against BellSouth Telecommunications, Inc.*, Docket No. 01-00868 (alleging BellSouth offered a winback promotion, not on file, that includes 3 months of free service); *In re: Complaint of Access Integrated Network, Inc. Against BellSouth Telecommunications, Inc.*, Docket No. 01-00808 (same). Something is still fundamentally wrong, and something must be done.

As alleged in the Petition, and as discovery or an investigative hearing will show, BellSouth's recalcitrance to comply with the mandates of the Federal Act is caused by the inherent conflict of interest which is created by its structure: (1) the operator of the local telephone network that virtually all Competitive Local Exchange Carriers ("CLECs") rely upon to provide their own local telephone service; and (2) the principal competitor of those very same CLECs for the very same retail customers. To adequately deal with this fundamental conflict of interest, this Petition requests, for the first time, that the Authority consider a structural solution for what is fundamentally a structural problem. Only through this remedial measure will "the constant barrage of police actions required of the Authority now to maintain the piecemeal approach of getting BellSouth to comply with the federal Act and the Tennessee Act" be eliminated. Petition at p. 15.

II. The Authority Possesses Jurisdiction Over This Matter, and Is Authorized to Order the Relief Requested

A. The Tennessee Act's Broad Grant of Jurisdiction to the Authority Includes the Power to Order Structural Relief

BellSouth contends that the Authority lacks jurisdiction to fashion relief in this case because the structural separation remedy is not specifically enumerated: BellSouth is wrong.[4] Tennessee case law has continuously emphasized and reinforced the Authority's broad statutory powers. The court in *Tennessee Cable Tel. Assoc. v. Tenn. Pub. Svc. Comm'n*, 844 S.W.2d 151, 159 (Tenn. App. 1992), observed that the Legislature's intent to vest "practically plenary authority over the utilities" in the Authority was clear, and noted that the Authority's actions need only be "harmonious and consistent" with its statutory authority in order to satisfy the jurisdictional inquiry.

[4]In making this argument, BellSouth appears to have overlooked one very basic fact: structural separation is just one of several alternative remedies requested by the Petitioners in this case. *See* Petition, at p. 16 (requesting structural separation and/or "such other and further actions as deemed appropriate by the TRA"). Surely, BellSouth does not assert that the Authority lacks the jurisdiction to fashion *any* relief whatsoever in this matter. Therefore, BellSouth's jurisdictional protests are, at the very least, premature.

In fact, BellSouth concedes on page nine of its Motion to Dismiss that the Authority possesses implied powers. Therefore, the only issue in dispute in these proceedings is the extent of those implied powers. Contrary to BellSouth's contentions, Tennessee courts have repeatedly affirmed the decisions, actions and rules of administrative agencies, when they arose "by necessary implication" out of the authority granted to these agencies by statute. *See, e.g., Gate Pharmaceuticals v. Tenn. Bd. of Med. Examiners*, 1996 WL 648424 (Tenn. Ct. App. Nov. 8, 1996) (upholding agency rule requiring the Board's approval prior to prescribing, dispensing or selling weight-loss drugs containing Phentermine). *Cf. City of Chattanooga v. Tenn. Elec. Power Co.*, 112 S.W.2d 385 (Tenn. 1938) (upholding city's resolution granting franchise to electrical company to use city's streets to erect poles and wires).

Two elements are taken into account in determining if an agency's exercise of authority arises "by necessary implication" from its statutory grant of power. The first of these factors is the breadth of the statutory grant of power. If the terms of the statute in question indicate that the legislature intended to confer broad powers on the particular governmental entity, the more likely it is that the entity's action will be found to fall under the "necessary implication" umbrella. *See City of Chattanooga*, 112 S.W.2d at 388 (City had implied authority to enact ordinances in question, because powers granted to the City with respect to control over streets and alleys "were so numerous and sweeping as to be the equivalent of general control.").

The second factor is the nexus between the statutory grant of power to the agency, and the agency's action, decision or regulation. If the agency action "logically follows" from its statutory grant of authority, or the action is indispensable to the agency's performance of its statutory duties, the agency possesses implied authority to regulate accordingly. *See Gate Pharmaceuticals*, 1996 WL 648424 at *5 (medical board's power to discipline physicians for conduct not in the course of professional conduct necessarily implied the power to advise physicians, by rule, as to what conduct was proscribed).

Both elements of the "by necessary implication" inquiry have been satisfied here.

With respect to the first prong, Tennessee Code Annotated Section 65-4-104, which outlines the Authority's jurisdiction, speaks in broad terms, stating that the Authority "has general supervisory and regulatory power, and control over all public utilities" and may make such rules and regulations as are "necessary to carry out and make effective the provisions of this chapter." In fact, the Authority's enabling statute, Tennessee Code Annotated Section 65-4-104, bears a striking resemblance to the statute pursuant to which the medical board's regulation was upheld in *Gate Pharmaceuticals*, in that it grants the agency the authority to make such rules and regulations as are "necessary to carry out and make effective the provisions of this chapter." *See Gate Pharmaceuticals*, 1996 WL 648424, *4; Tennessee Code Annotated Section 65-4-104.

Indeed, the Authority's jurisdiction under Title 65 is even broader than that which was upheld in *Gate Pharmaceuticals*, as Tennessee Code Annotated Section 65-4-106 (emphasis supplied) states that the chapter dealing with the Authority's jurisdiction over public utilities "shall be given a liberal construction, and any doubt as to the existence or extent of a power conferred on the authority by this chapter or chapters 1, 3 and 5 of this title shall be resolved in favor of the existence of the power . . . ." In addition, Tennessee Code Annotated Section 65-4-123, which articulates Tennessee's telecommunications policy, expressly permits the Authority to utilize "alternative forms of regulation for telecommunications and telecommunications providers." This language indicates that the Tennessee legislature intended to confer liberal authority on the Authority to enable it to use a flexible approach in formulating remedies to problems affecting telecommunications.

Furthermore, the statutes dealing with non-discrimination with respect to rates and interconnection grant the Authority even more, rather than less, flexibility in fashioning appropriate remedies. In particular, Tennessee Code Annotated Section 65-2-210 gives the Authority the "original jurisdiction to investigate, hear and enter appropriate orders to resolve all issues of fact or law" arising in connection with the non-discriminatory telecommunications interconnection provisions of the Tennessee Act. This language implies a broad grant of flexible jurisdiction, particularly with regard to remedies against anticompetitive practices.

With respect to the second prong, there is a direct nexus between the remedies requested by the Petitioners, and the Authority's statutorily-mandated goal of fostering competition among LECs and preventing anticompetitive behavior. Tennessee Code Annotated Sections 65-4-115, 65-4-117, and 65-4-124 all underscore the Authority's legitimate goal of encouraging competition among telecommunications providers and putting an end to anticompetitive practices. The remedies sought by the Petitioners are directly related to the Authority's statutory goal, and the Authority therefore has jurisdiction to grant the requested relief.

Accordingly, there is no question that the Authority has the power to consider the structural remedies requested this Petition.

B. This Authority's Enabling Authority Is Similar to the FCC's Enabling Authority, Which Has Consistently Been Interpreted to Give the FCC the Power to Order Structural Relief

In the analogous federal context, the general enabling authority conferred on the FCC by Congress to promote efficient and economical telephone service is no greater (or more specific) than the jurisdiction granted by the legislature to the Authority. This statutory grant is set out in the Communications Act of 1934, and provides:

> Duties and Powers: The Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions.

47 U.S.C. § 154(i). Pursuant to this section, courts have consistently and repeatedly upheld the FCC's implied authority to order various forms of structural relief. *See, e.g., GTE Midwest, Inc. v. FCC*, 233 F.3d 341, 346 (6th Cir. 2000) ("The Commission chose a permissible regulatory tool [structural separation] and set out plans for its implementation."); *Illinois Bell Tel. Co. v. FCC*, 740 F.2d 465, 465 (7th Cir. 1984) (Posner, J.) ("The Commission's power to adopt such a [structural separation] rule as an incident to its authority to regulate the interstate telecommunications industry . . . is not questioned."); *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 219 (D.C. Cir. 1982) ("The Commission, having chosen a permissible regulatory tool -- structural separation -- set out a detailed plan for implementing it."); *GTE Serv. Corp. v. FCC*, 474 F.2d. 724, 729-732 (2nd Cir. 1973) (holding that order of structural separation was within the FCC's general enabling authority to promote efficient and economical telephone service).

Of course, the implied authority to order structural relief is not exclusive to the FCC. As discussed in the next section, the Federal Act expressly affirms the primary role of state commissions in matters relating to local telephone competition. Therefore, the Authority has a broad regulatory mandate under both the Federal Act and the Tennessee Act to utilize the widely accepted regulatory tool of structural separation in furtherance of the goal of local telephone competition.

C. BellSouth Has Failed to Cite Any Statutory or Case Authority That Proscribes the Exercise of Jurisdiction by the Authority to Grant the Requested Relief

The cases cited by BellSouth in its bid to limit the Authority's jurisdiction are easily distinguished from the current case. As a preliminary matter, many of BellSouth's cases were decided in the first half of the twentieth century, and involve the Railroad Commission. They are therefore rooted in a vastly different time, statutory scheme, and judicial outlook on agency authority. *Franklin Light & Power Co. v. Southern Cities Power Co.*, 47 S.W.2d 86 (Tenn. 1932); *In re Cumberland*, 249 S.W. 818 (Tenn. 1923); *Pharr v. Nashville C. & St. L. Ry.*, 208 S.W.2d 1013 (Tenn. 1948); and *Nashville C. & St. L. Ry. v. Railroad and Public Utilities Comm'n*, 15 S.W.2d 751 (Tenn. 1929), the cases on which BellSouth heavily relies for its arguments on strict construction of the Authority's enabling statutes, were decided under a much less well-developed statutory scheme than that which exists today, and well before the 1995 Tennessee Act. The drafters of the laws of the 1920s, 1930s and 1940s could not have envisioned the exponential growth of the telecommunications sector which necessitated the statutes that currently govern the Authority's jurisdiction.

Furthermore, the judicial view of agency authority in general was more restrictive during the time BellSouth's primary cases were decided. There has been a significant shift away from strict construction of Commission (now Authority) statutes, toward a more liberal reading of their jurisdictional terms. As previously stated, more recent cases involving the Authority's jurisdiction have repeatedly underscored the broad legislative grant of power to the Authority, and the deference accorded to its factual findings and expertise. *See, e.g., Tenn. Cable*, 844 S.W.2d 151.

Additionally, many of the decisions cited by BellSouth which deny jurisdiction hinge on concerns other than the Authority's statutory power to grant the relief requested. The majority of these cases involve: a) agencies other than the Authority or its predecessors, *see, e.g., General Portland, Inc. v. Chattanooga-Hamilton County Air Pollution Control Bd.*, 560 S.W.2d

910 (Tenn. App. 1976); *Wayne County v. Tenn. Solid Waste Disposal Control Bd.*, 756 S.W.2d 274 (Tenn. App. 1988); or b) nuisance actions or other actions involving uniquely judicial relief. For example, in *Cumberland*, 249 S.W. 818; *Pharr*, 208 S.W.2d 1013; and *Wayne County*, 756 S.W.2d 274, the courts hesitated to find that the Authority had jurisdiction because those actions were, in essence, nuisance lawsuits, which have long been recognized to be the province of the judiciary rather than administrative agencies. Therefore, separation of powers concerns, rather than the Authority's statutory power, dictated the courts' decisions in those cases.[5]

Likewise, in *General Portland*, the court held that the posting of a bond was an exclusively judicial function which the Authority could not mandate. *See General Portland*, 560 S.W.2d at 913. Courts may be better suited to providing remedies for nuisance actions sounding in tort and dealing with bond issues, than are state agencies. However, in the present case, the Authority is far better suited to devising and administering the measures to ensure competition in the local exchange market, including structural separation, than a court of law.

Other decisions cited by BellSouth turn on the fact that there was already another existing agency responsible for the matter over which the Authority had been requested to exercise jurisdiction. For instance, in *Tenn. Pub. Serv. Comm'n v. Southern Ry. Co.*, 554 S.W.2d 612, 613 (Tenn. 1977), the court noted that the building of railroad bridges (which the Authority had been asked to compel) was already the responsibility of the Department of Transportation, which was better suited to address the issue.

Moreover, in some of BellSouth's other cases, the courts held that the Authority lacked

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[5]In addition, the statute governing the agency at issue in *Wayne*, the Solid Waste Disposal Board, did not authorize the Board to grant remedies to private parties or provide a private right of action. *See Wayne*, 756 S.W.2d at 283. In contrast, the statutes governing the Authority's jurisdiction specifically give the Authority jurisdiction to hear disputes brought by private parties. *See* Tennessee Code Annotated Section 65-5-210(a).

jurisdiction, not because it lacked the authority to grant the requested relief, but because the entities sought to be regulated did not qualify as public utilities subject to regulation under the Tennessee statutes. In *BellSouth Ad. & Pub. Corp. (BAPCO) v. Tenn. Reg. Authority*, 2001 WL 134603, *11-12 (Tenn. App. 2001), the court's decision against the exercise of jurisdiction by the Authority was based mainly on the fact that BAPCO, the entity sought to be regulated, was engaging in a "non-utility endeavor." Because BAPCO's only function was publishing telephone directories, the court held that it would be over-stretching the language of the statutes to characterize BAPCO as a public utility subject to the Authority's jurisdiction. *See id.* at *12. Similarly, in *Deaderick Paging Co., Inc. v. Tenn. Pub. Serv. Comm'n*, 867 S.W.2d 729, the Authority's order approving the transfer of a telephone company's radio paging service was reversed, because the transferee company was not authorized by statute to provide the service.

Ironically, some of the cases cited by BellSouth serve to undermine its restrictive position on the Authority's jurisdiction, by emphasizing the broad scope of jurisdiction conferred on the Authority by the legislature. For example, in *Tenn. Cable*, 844 S.W.2d 151, the court did mention that the Authority's power must be based on statutory authority. However, the court went on to reject the cable company's contention that the Authority's jurisdiction was limited to setting rates and ordering refunds. *See id.* at 158. While conceding that rule-making is generally the preferred method for the Authority to exercise its regulatory power, the court stressed that it is not the only method available to the Authority, and proceeded to enumerate a number of factors which the Authority should consider in choosing between the remedies of rule-making, and case-by-case adjudication. *See id.* Significantly, the court notes that the Authority's enabling statutes do not specifically delineate the Authority's powers, and that Tennessee Code Annotated Sections 65-4-104 - 106 give the Authority broad powers to regulate telecommunications. *See id.* at 160.

Tennessee Code Annotated Section 7-52-603, cited by BellSouth, is also inapposite. Section 7-52-603 and the provisions of Chapters 4 and 5 of Title 65 arise out of two fundamentally different statutory schemes. Chapter 52 lays out in great detail each and every responsibility of municipal power plants, the exact services they must provide, what their business plans must contain, and how service is to be allocated among municipal and private electrical power companies--all details that are dealt with by the Authority in the telecommunications arena pursuant to a broad grant of authority.

In the instant case, there was no need for the Tennessee legislature to specifically provide for structural separation in Chapter 65, because the Authority is clothed with broad and flexible jurisdiction to order structural separation and other remedies, as appropriate to the circumstances before it.

Finally, BellSouth also cites (in a supplemental filing) the June 26, 2001 order in *Cavalier Telephone L.L.C., et al. For Structural Separation of Verizon Virginia, Inc., and Verizon South, Inc.*, Case No. PUC010096. The Authority should not be persuaded by the Virginia commission's decision any more than the Florida commission decision discussed above. Most important, the order in *Cavalier Telephone* contains almost no analysis. Moreover, most of the *Cavalier Telephone* order addresses statutes other than those relied on here.

III. CONDUCTING PROCEEDINGS FOR STRUCTURAL RELIEF IS CONSISTENT WITH THE COMMERCE CLAUSE AND THE FEDERAL ACT

The U.S. Constitution's "Commerce Clause" does not bar the Authority from hearing the Petition. Because the Commerce Clause requires comparing benefits to burdens, it is inappropriate to resolve a Commerce Clause challenge on a motion to dismiss before any evidence is received. In addition, the Authority's consideration of the Petition is consistent with the Federal Act because the proposed remedy will be established in these proceedings to be necessary to (and not inconsistent with) achievement of the Federal Act's mandate and the state and national interest in developing local exchange competition.

A. Proceedings on Structural Separation Will Not Violate the Commerce Clause of the U.S. Constitution

BellSouth argues that the Commerce Clause prevents the Authority from hearing the Petition. First and foremost, BellSouth is wrong because it is impossible to address this type of Commerce Clause challenge on a motion to dismiss. That is because a Commerce Clause challenge involves weighing of facts, and comparison of benefits and burdens.

There have been no facts yet received in this proceeding. Therefore, it is premature for the Authority to address BellSouth's Commerce Clause arguments. *See, e.g., Camden County Bd. of Freeholders v. Beretta U.S.A. Corp.*, 123 F. Supp. 2d 245, 255 (D.N.J. 2000) ("At the motion to dismiss stage, the Court cannot assess the relative burdens and benefits of the County's claims without a more fully developed record. Accordingly, the County's claim will not be dismissed on dormant commerce clause or due process grounds.").

The United States Supreme Court has adopted a "two-tiered" approach to analyzing state regulation under the Commerce Clause. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986). When a state requirement directly regulates or discriminates against interstate commerce, or when its effect is to favor in-state economic interests over out-of-state interests, the state requirement may be invalid under the Commerce Clause. *See id.* at 579. This analysis is not implicated by the Petition because structural relief will regulate intrastate local telephone competition, consistent with the dual federal and state statutory scheme codified in 47 U.S.C. § 152. Where a state requirement (like structural relief) does not directly regulate interstate commerce, has arguable indirect or incidental effects on interstate commerce, and regulates evenhandedly, the state requirement is upheld, "unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." *See, e.g., Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

At this early stage, BellSouth has failed to provide any basis for its contention that structural relief would so unduly burden the flow of interstate commerce or discriminate against out-of-state interests that consumers should not enjoy the considerable benefits of increased local competition. Although BellSouth asserts that structural relief would place a transactional and administrative burden on BellSouth (a matter best left for an evidentiary hearing), BellSouth has failed to show how any such burdens constitute burdens on interstate commerce or obstruct any national interest, or any interest other than BellSouth's interest in maintaining its monopoly position in local telephone markets.

The "spectre" of BellSouth potentially facing varying requirements in different states is a curious argument for any public utility subject to the jurisdiction of each state's public utility commission to make. In exchange for the privilege of being able to provide telephone service, BellSouth, and indeed all carriers, are subject to the varying regulatory requirements imposed by the states in accordance with each state's determination of what is required in the public interest. As noted by the court in *Kentucky West Virginia Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 862 F.2d 69, 73 (3rd Cir. 1988),

> Such disparate results are a normal and predictable result of Congress' decision to retain more than one regulatory regime. Plaintiffs have presented no evidence that they cannot conform their business conduct in West Virginia to the West Virginia regulatory scheme and their Pennsylvania business conduct to the Pennsylvania regulatory scheme. Thus, . . . the plaintiffs have failed to show the actual conflict between regulatory requirements of different states sufficient to implicate the commerce clause.

If the potential for varying state requirements was a credible "undue burden," then under BellSouth's logic every state-specific requirement imposed by every public utility commission would potentially violate the Commerce Clause, as requirements vary from state to state.

Even if it were appropriate to address the Commerce Clause challenge now, BellSouth's argument would not prevail. In *Southern Pacific Co. v. State of Arizona,* 325 U.S. 761 (1945), the case on which BellSouth principally relies, the Supreme Court determined that Arizona's stated "safety" interest in limiting the length of interstate passenger and freight trains which passed through the state was outweighed by the strong competing national policy of promoting efficient railway service. *Southern Pacific,* 325 U.S. at 773. Accordingly, the state's requirement that Southern Pacific reconstitute its trains in the interest of local public "safety" when passing through the state imposed an undue burden on interstate commerce and the national interest of achieving efficient rail service, particularly where the state did not adequately present facts showing a correlation between train length and safety. *See id.*

As BellSouth itself pointed out in its Motion to Dismiss, the Court in *Southern Pacific* struck down the Arizona Train Limit Law because it "interposes a substantial obstruction to the national policy proclaimed by Congress, to promote adequate, economical and efficient railway transportation services." 325 U.S. at 773. Unlike *Southern Pacific*, where the putative state interest unduly burdened and obstructed the achievement of a competing national interest, here the state and the national interest are one and the same: local telephone competition. Further, unlike the situation in *Southern Pacific*, where no federal law authorized the state to impose regulations concerning the length of trains, here the Federal Act expressly preserves the states' historic role in regulating local telephone competition. Accordingly, structural relief designed to further Tennessee's interest in achieving local telephone competition cannot possibly impose an "undue burden" on, or in any way obstruct, interstate commerce, where the Congressionally declared national interest also seeks to promote the very same goal.

BellSouth's Commerce Clause arguments are without merit because the Commerce Clause only limits the states' authority in areas where Congress has not affirmatively acted to either authorize or forbid the challenged state regulation. *See Atlantic Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atlantic County*, 48 F.3d 701, 710 (3d Cir. 1995). Here, the proposed action involves regulation over local intrastate telephone competition. Because Congress has determined that competition in local intrastate telephone markets is in the national interest, this Authority's actions in furtherance of achieving that goal promote the national interest and could not possibly violate the Commerce Clause.

BellSouth's only remaining argument is that structural separation would require the issuance of stock and that this relief violates the Commerce Clause to the extent applied to a company doing business in multiple states. Motion to Dismiss at p. 24. BellSouth makes a naked assertion, not yet tested by discovery or a hearing, that structural separation would involve the issuance of stock. There is no basis in the record for that assertion. Structural relief could take many forms.

However, even if the issuance of stock was required in this proceeding, such relief would not violate the Commerce Clause, as suggested by BellSouth. Indeed, the cases BellSouth offers in support do not apply to the circumstances of this case, and do not support the position that the Authority's action in this instance over a matter primarily involving intrastate local competition would violate the Commerce Clause.

For instance, in *United Air Lines, Inc. v. Illinois Commerce Commission,* 207 N.E.2d 433 (1965), the Illinois Supreme Court held that the requirement of prior approval by a state commission for every issuance of stock by an interstate carrier providing minimal intrastate service placed an undue burden on interstate commerce. *See id.* at 438. Similarly, in *United Air Lines, Inc. v. Nebraska State Railway Commission,* 112 N.W.2d 414 (1961), the Nebraska Supreme Court held that the issuance of stock by a corporation doing less than one percent of its business and holding less than one percent of its real property in Nebraska did not deal with the local aspects of the carrier's business and thus were beyond the commission's control. *See id.* at 417-18, 421. Surely, BellSouth will not suggest to this Authority that its presence in Tennessee is so minimal that the Authority action requested here, relating to local telephone competition, would violate the Commerce Clause.

Further, in *State v. Southern Bell Telephone & Telegraph Co.*, 217 S.E.2d 543 (N.C. 1975), the North Carolina Supreme Court determined that the requirement of prior approval for every issuance of securities by Southern Bell, whether or not such issuance involved a local North Carolina telephone matter, was held to violate the Commerce Clause. *See id.* at 551. Unlike the circumstances presented in that case, any structural separation order imposed in the instant proceeding (even if it did require the issuance of securities) would not involve the type of continuous supervision over the issuance of securities which was held in *State v. Southern Bell* to violate the Commerce Clause.

Finally, BellSouth's reliance on Attorney General Opinion No. 99-119, 1999 WL 322037 at *7 is misplaced. In that opinion, the Attorney General expressly noted the fact-intensive nature of a commerce-clause inquiry. *See id.* at *6. Indeed, the Attorney General qualifies its opinion by stating "[d]epending on the specific facts presented," regulation of stock issuance by a public utility may be proscribed. Of course, there is no suggestion, based on this early record, that any Commerce Clause concerns will be implicated.

None of the cases offered by BellSouth even comes close to suggesting that a state agency is prohibited in any and all circumstances from regulation within its jurisdiction which incidentally may require the issuance of stock, nor do any of these cases suggest that the structural separation requested in this case presents an undue burden on interstate commerce such that it obstructs any federal interest in violation of the Commerce Clause.

B. Congress Did Not Preempt The Authority's Jurisdiction

Congress did not evince any intent to prohibit the Authority's proceedings on structural relief because: (1) the Federal Act does not expressly preempt state regulation; rather it explicitly preserves the Authority's power over local telephone market competition; and (2) the federal statutes cited by BellSouth do not contravene the Authority's power to order structural relief. Instead, Congress expressly provided for the state commissions to continue to act in furtherance of the goal of opening local exchange markets to competition.

1. The Federal Act Expressly Preserves This Authority's Jurisdiction Over Local Telephone Competition

BellSouth can point to no language expressly preempting the Authority's jurisdiction. That is because the regulation of utilities is one of the most important functions traditionally associated with the police power of the states. *See, e.g., Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). In the Communications Act of 1934, Congress created a dual federal and state regulatory structure which granted the federal government jurisdiction over interstate communications, 47 U.S.C. § 152(a), while reserving to the states existing jurisdiction over intrastate communications. 47 U.S.C. § 152(b). In February 1996, Congress utilized that structure to further the cause of opening all local exchange markets to competition. *See* 47 U.S.C. § 151, *et. seq.* (1996).

Moreover, in Section 601(c) of the Federal Act, Congress included a "No implied effect" clause, which states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments." P.L. 104-104, § 601(c)(1). It is not surprising that BellSouth ignores Section 601(c), because that section is fatal to BellSouth's claim that Congress did not intend to allow states to order structural relief.

In fact, the Federal Act includes express provisions designed to preserve the role of the states in ensuring that local markets are competitive. For instance, in Section 251 of the Federal Act, Congress provided that:

> In prescribing and enforcing regulations to implement the requirements of this section, the [FCC] shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

47 U.S.C. §251(d)(3).[6]

Similarly, Section 253, which requires the removal of barriers to entry into interstate and intrastate telephone markets, also preserves the broad role of the states to foster competition:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254 of this section, requirements necessary to preserve and advance

[6]Section 252(e), which sets forth procedures for negotiation, arbitration (by state commissions) and approval of interconnection agreements between incumbent carriers and their competitors, specifically reserves to the states the responsibility to approve interconnection agreements in furtherance of the goal of achieving local competition. This section also contains a limited preemption provision, providing for federal preemption in the area of interconnection agreements only "if a State commission fails to carry out its responsibility under [Section 252])." 47 U.S.C. §252(e)(5). This limited preemption provision is not implicated here because the Authority has addressed Section 252 in other proceedings.

> universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

47 U.S.C. § 253(b). Section 253(d) further states that this broad grant of authority to the states may be preempted by the FCC only if the FCC, after notice and an opportunity for public comment, determines that a state's action violates Section 253. *See* 47 U.S.C. 253(d). By creating a process through which the preemption issue is to be addressed by the FCC after a notice and comment period, and after the Authority has acted in a manner challenged as being inconsistent with the Federal Act, it is clear that Congress did not intend, as BellSouth suggests, to preempt the ability of the states to act in the first place.

Finally, Section 261(c) provides that:

> 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 [FCC's] regulations to implement this part.

47 U.S.C. § 261(c).

2. The Federal Statutes Cited by BellSouth Do Not Contravene the Authority's Jurisdiction To Order Structural Relief

BellSouth has advanced several arguments in an effort to convince the Authority that it should rule -- even before BellSouth has admitted or denied the allegations of the Petition -- that structural relief is inconsistent with various provisions of the Federal Act. These identical arguments were recently addressed by the court in the *Bell Atlantic* case, which soundly rejected each and every argument. That court held that structural separation was consistent with the Federal Act and its goal of achieving local telephone competition. *See Bell Atlantic*, 763 A.2d. at 463-65.

BellSouth first argues that structural separation would be inconsistent with Section 253 of the Federal Act because it would allegedly create an "impermissible barrier to entry" and would not be "competitively neutral," because structural separation would prohibit BellSouth's retail entity from providing wholesale services, and vice-versa. *See* Motion to Dismiss at pp. 26-27. This very same argument was considered and rejected by the court in *Bell Atlantic*, which held that where "the state agency mandate is that Bell provide retail services through a structurally separate affiliate, albeit operating independently, it cannot be said that Bell as a business organization is being precluded on the whole from providing retail services." 763 A.2d at 463. BellSouth also argues that structural separation would not be competitively neutral because the proposed structural separation only involves BellSouth, and not other LECs which may currently enjoy unfair advantages over CLECs. BellSouth misunderstands the true meaning of the competitively neutral requirement. As the *Bell Atlantic* court stated:

> [E]xamination of the [competitively neutral] requirement shows that the wholesale-retail separation is just that -- competitively neutral in the practical sense that its intent is to insure neutrality in competition and thereby protect consumers' rights to choice of suppliers without encountering the higher costs which ensue from lack of competition.

Id. at 463.

Next, BellSouth contends that the Federal Act contemplates structural separation being required only as to equipment manufacturing and certain long-distance and information services, and electronic publishing services, 47 U.S.C. §§ 272(a)(2) and 274, and that by omission, the Federal Act negates structural separation in any other context or circumstances. BellSouth has previously attempted this argument; it was squarely rejected. In another case BellSouth fails to bring to the Authority's attention, the Sixth Circuit held:

> Although the Act specifies separate subsidiary requirements for certain Bell company activities . . ., the Act does not otherwise limit the Commission's authority to adopt separate affiliate requirements.
>
> * * *
>
> If Congress had sought to preclude the Commission's ability to impose separate subsidiary requirements, it could have done so explicitly.

GTE Midwest, 233 F.3d at 347 (6th Cir. 2000).

BellSouth's argument was also rejected by the *Bell Atlantic* court, which stated:

> However, the straightforward terms of those sections only describe those services for which the federal law mandates separate affiliates; in no way do those sections constrain a state regulatory body from requiring separated affiliates for other functions.

Bell Atlantic, 763 A.2d at 463.

Similarly, BellSouth cannot prevail on the argument that because Section 251 of the Federal Act contemplates the unbundling of "certain network elements," Section 251 must by negative implication prohibit structural separation, which BellSouth compares to the unbundling of "an entire network." This argument is yet another variation of BellSouth's argument that any state action not explicitly described in the Federal Act is inconsistent with the Federal Act, an argument which is completely undermined by Section 601(c) of the Federal Act, which shows the intent of Congress to be exactly the opposite. *GTE Midwest, Inc.*, 233 F.3d at 347. Moreover, structural relief requiring BellSouth to modify its corporate structure is not in any sense the equivalent of the unbundling of BellSouth's network elements. Accordingly, BellSouth's reliance on *AT&T v. Iowa Utils. Bd.,* 525 U.S. 366 (1999) is misplaced, as structural relief simply has nothing to do with the unbundling requirements contained in Section 251.

BellSouth next argues that the Federal Act's requirement that Incumbent Local Exchange Carriers ("ILECs") must "offer for resale at wholesale rates any telecommunications service that the carrier provides at retail" constitutes a recognition that a single carrier might provide both wholesale and retail services and that the Federal Act therefore prohibits by implication the structural separation of an ILEC's wholesale and resale operations. However, as noted in *Bell Atlantic*, nothing in the federal law requires the states "to share a Congressional expectation (which may be overly optimistic) that an integrated wholesale/retail business will sell to competing suppliers at a reasonable wholesale discount, particularly in the telecommunications field where access is often limited by technological factors." *See Bell Atlantic*, 763 A.2d at 464. On the contrary, the Federal Act expressly reserves to the states the authority to impose additional requirements designed to further local competition. *See* P.L. 104-104, § 601(c)(1). The purpose of this proceeding is to explore whether, after a five-year period during which BellSouth's monopoly over local telephone service has remained fully intact, "additional requirements" designed to further local competition are necessary. That role has been expressly reserved for the Authority pursuant to Section 261(c) and the other provisions cited above. In the face of Congress' clear intent to protect the role of the states in this area, there can be no serious argument that federal law preempts the entire field.

CONCLUSION

The Petition establishes that BellSouth's current structure creates an inherent conflict of interest (and incentives to undermine competitors) which causes BellSouth to violate the Tennessee Act and the federal Telecommunications Act of 1996. This Authority has jurisdiction to protect the public in this regard, and is the best equipped to make the determinations as to whether structural relief is necessary and appropriate. Petitioners therefore request that the Authority convene a contested case to investigate the Authority's power to order structural relief, and the other issues raised in the Petition.

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CERTIFICATE OF SERVICE

Docket Number 01-00405

I hereby certify that a true and correct copy of the Memorandum in Opposition to BellSouth Telecommunications, Inc.'s Motion to Dismiss has been forwarded via U.S. Mail, postage prepaid, to the following parties of record on this 29th day of November, 2001.

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