

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

June 6, 2006

IN RE:

PETITION OF BELL SOUTH TELECOMMUNICATIONS, INC.  
FOR EXEMPTION OF CERTAIN SERVICES.

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DOCKET NO.  
03-00391

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ORDER GRANTING EXEMPTION OF CERTAIN SERVICES

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This matter came before Chairman Pat Miller, Director Deborah Taylor Tate and Director Sara Kyle of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, on September 13, 2004 and on February 28, 2005 for consideration of the relief requested in the *Petition for Exemption of Certain Services* ("Petition") filed by BellSouth Telecommunications, Inc. ("BellSouth") and Citizens Communications, Inc. ("Citizens").

**BACKGROUND**

BellSouth and Citizens (the "Petitioners") filed the *Petition* on June 16, 2003, requesting exemption from regulation of intraLATA toll service and primary rate integrated services digital network ("PRI") service, pursuant to Tenn. Code Ann. § 65-5-208(b) (1993).<sup>1</sup> The *Petition* states that in Tennessee, "the price for these services is effectively regulated by substantial competitive activity" and therefore the TRA should order that these services be exempt from regulatory requirements.<sup>2</sup>

On June 27, 2003, AT&T Communications of the South Central States, LLC ("AT&T") filed a petition to intervene stating that, as a competing local exchange carrier ("CLEC") in Tennessee,

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<sup>1</sup> Title 65, Chapter 5, Part 2 was recodified in 2004 and Part 2 was moved to Part 1 however, the section numbers did not change. All references in this Order will reflect the code section as it was prior to recodification. In order to locate a statute please refer to Title 65, Section 5, Part 1. For example, if the cited code provision is Tenn. Code Ann. § 65-5-208 (1993), it is now located at Tenn. Code Ann. § 65-5-108 (2004).

<sup>2</sup> *Petition for Exemption of Certain Services*, pp. 1-3 (June 16, 2003).

AT&T's "legal rights, duties, privileges, immunities, or other legal interest or responsibilities may be affected or determined by the outcome of this proceeding."<sup>3</sup> During the August 4, 2003 Authority Conference, the panel voted unanimously to convene a contested case proceeding in this matter and appoint the Authority's General Counsel or his designee to act as the Hearing Officer in this proceeding to hear preliminary matters prior to the Hearing, to rule on any petition(s) for intervention, and to set a procedural schedule to completion.

The Southeastern Competitive Carriers Association ("SECCA") and Time Warner Telecom of the MidSouth, LLC ("Time Warner") filed petitions to intervene on September 5, 2003 and September 8, 2003, respectively. On December 11, 2003, the Hearing Officer issued an order granting the petitions to intervene of AT&T, SECCA and Time Warner and requesting that proposed procedural schedules be filed by December 18, 2003.<sup>4</sup>

BellSouth suggested a procedure by which the two areas in which exemption is requested, intraLATA toll service and PRI service, would be bifurcated and addressed separately by the Authority.<sup>5</sup> BellSouth stated that the first issue may be narrowed or eliminated by the parties and therefore, proposed that the parties provide comments on the scope of the dispute on the first issue and establish a procedural schedule for the first issue while deferring procedural issues related to the PRI issue.<sup>6</sup> On January 2, 2004, the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") filed a petition to intervene. Finding that no other party submitted a procedural schedule or objected to BellSouth's proposed procedures, the Hearing Officer issued an order on January 8, 2004 granting the Consumer Advocate's petition to intervene and adopting a modified version of BellSouth's proposed procedural schedule for the filing of comments by the parties.<sup>7</sup>

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<sup>3</sup> See AT&T's *Petition to Intervene*, p. 1 (June 27, 2003).

<sup>4</sup> See *Order Granting Petitions to Intervene and Requesting Proposed Procedural Schedules* (December 11, 2003).

<sup>5</sup> *BellSouth Telecommunications, Inc.'s Proposal Regarding Procedural Schedule* (December 18, 2004).

<sup>6</sup> *Id.* at 2.

<sup>7</sup> See *Order Granting Petition to Intervene and Adopting Procedural Schedule* (January 8, 2004).

## **PART I-INTRA LATA TOLL SERVICE**

### **Positions of the Parties**

In their *Petition* filed on June 16, 2003, the Petitioners sought exemption from regulation of intraLATA toll and PRI services pursuant to Tenn. Code Ann. § 65-5-208(b) (1993) which states:

The authority, after notice and opportunity for hearing, may find that the public interest and the policies set forth in this part are served by exempting a service or group of services from all or a portion of the requirements of this part. Upon making such a finding, the authority may exempt telecommunications service providers from such requirements as appropriate. The authority shall in any event exempt a telecommunications service for which existing and potential competition is an effective regulator of the price of those services.

The Petitioners state that intraLATA and PRI are sufficiently competitive through telecommunications, as well as, other providers such that Tennessee consumers have great leverage in the marketplace when shopping for these services.<sup>8</sup> Based on the current level of competition, the Petitioners seek exemption from regulation of intraLATA toll and PRI services.

On January 12, 2004, AT&T filed comments in response to the *Petition*.<sup>9</sup> In its comments, AT&T stated that it did not oppose Petitioners' request for limited deregulation of intraLATA toll rates as long as: (1) incumbent local exchange carriers ("ILECs") continued to file intraLATA toll tariffs under the applicable time limits and (2) ILECs' intraLATA toll service remains subject to all applicable Authority rules and statutes other than the price cap restrictions set forth in Tenn. Code Ann. § 65-5-209 (1993).<sup>10</sup>

On June 28, 2004, the Petitioners filed a *Proposal Regarding Relief Sought* ("Proposal") outlining the relief Petitioners were seeking as related to the intraLATA toll services. According to their *Proposal*, BellSouth and Citizens request a full exemption of intraLATA toll services with the following exceptions:

1. ILECs must file price lists with the TRA that are effective upon filing. Price lists are not considered to be tariffs;

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<sup>8</sup> See *Petition*, pp. 3-4.

<sup>9</sup> See *Comments of AT&T Communications of the South Central States, LLC* (January 12, 2004).

<sup>10</sup> *Id.* at 1.

2. The prohibition against pricing beneath the price floor will remain intact. The TRA could act upon price floor violations upon complaint or on its own motion. Violations of the price floor would constitute a violation of the order in this docket;
3. Price lists shall be referenced in an ILEC's approved tariff but not included in the tariff; and
4. Federal resale obligations relating to intraLATA toll service will not be affected and prices for resale shall be determined from the price lists.<sup>11</sup>

The Petitioners maintain that the relief they are seeking would better enable them to compete with others offering the same services by providing ILECs with pricing flexibility.<sup>12</sup>

On July 23, 2004, AT&T filed *Comments of AT&T Communications of the South Central States, LLC* asserting that the Petitioners are requesting much broader relief in their June 28, 2004 filing than they requested at the outset of the proceeding.<sup>13</sup> AT&T asserts that the Petitioners' "price list" proposal would eliminate the Authority's ability to suspend a proposed tariff, even if it appears to violate the price floor statute<sup>14</sup> and would allow Petitioners to raise rates without notice to their customers.<sup>15</sup> AT&T states that the appropriate deregulatory outcome of this proceeding is: (1) ILECs should continue to file intraLATA toll tariffs under the applicable time limits and (2) ILECs' intraLATA toll service should remain subject to all Authority rules and statutes, other than the price cap restrictions.<sup>16</sup>

In its *Brief of Consumer Advocate and Protection Division* ("Consumer Advocate's Brief") filed on July 23, 2004, the Consumer Advocate agrees with the Petitioners that intraLATA and interLATA toll markets are comparable.<sup>17</sup> Consequently, the Consumer Advocate proposes that intraLATA toll service be regulated in essentially the same manner as interLATA toll services. The

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<sup>11</sup> *Proposal*, pp. 2-3 (June 28, 2004).

<sup>12</sup> *Id.* at 3.

<sup>13</sup> *See Comments of AT&T Communications of the South Central States, LLC* (July 23, 2004).

<sup>14</sup> Tenn. Code Ann. § 65-5-208(c) (1993).

<sup>15</sup> *See Comments of AT&T Communications of the South Central States, LLC*, p. 2 (July 23, 2004).

<sup>16</sup> *Id.* at 4.

<sup>17</sup> *Consumer Advocate's Brief*, p. 2 (July 23, 2004).

Consumer Advocate asserts that it does not object to granting Petitioners increased pricing flexibility, but this flexibility should be accomplished by mirroring the regulatory requirements for interLATA toll service, which would exempt intraLATA service only from rate regulation requirements.<sup>18</sup> Due to the possibility of unforeseen circumstances coupled with the dynamic nature of the telecommunications industry, the Consumer Advocate recommends the Authority take a cautious approach to granting the exemption and reserve the right to withdraw any exemption granted.<sup>19</sup> The Consumer Advocate argues that contrary to the Petitioners' proposal, it is not appropriate to consider developing new rules regarding anti-competitive pricing standards in this proceeding and urges the Authority to adhere to the current law regarding anti-competitive pricing requirements instead of developing new rules to accomplish the same end.<sup>20</sup> With respect to federal resale requirements, the Consumer Advocate maintains that any tariffing or price lists associated with intraLATA toll service must operate as current tariffs regarding federal resale obligations and clearly convey information to resellers, including a description of the services offered and a clear basis for calculating the wholesale rate.<sup>21</sup> Lastly, the Consumer Advocate urges the Authority to clarify whether intraLATA toll revenues would be classified as regulated or non-regulated for companies under rate-of-return regulation.<sup>22</sup>

On July 23, 2004, the Petitioners submitted *Brief of BellSouth Telecommunications, Inc. and Citizens Communications Company of Tennessee, LLC* ("Petitioners' Brief") in support of their *Proposal*. The Petitioners maintain that all parties agree that existing and future competition is sufficient to regulate the price of intraLATA toll services in Tennessee; therefore, the only issue for the Authority to decide is how the exemption should be fashioned.<sup>23</sup> BellSouth and Citizens request the Authority exempt intraLATA toll service with four exceptions to the exemption in order to

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<sup>18</sup> *Id.* at 3.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 5-6.

<sup>21</sup> *Id.* at 8.

<sup>22</sup> *Id.* at 9.

<sup>23</sup> See *Petitioners' Brief*, p. 1 (July 23, 2004).

address the concerns of the other parties.<sup>24</sup> The Petitioners propose replacing tariffs with price lists to allow a quicker response to competition and assert that price lists contain information to gauge compliance with the statutory price floor.<sup>25</sup> According to the Petitioners, predatory pricing is not a concern because they lack sufficient market power to conduct a successful predatory pricing strategy.<sup>26</sup> Under their proposal, the Petitioners assert that the relief they seek would not change or limit the application of federal resale provisions, which would be based on the price reflected on the price list and operate the way it did prior to the exemption.<sup>27</sup> Oral arguments addressing intraLATA toll exemption issues were heard by the voting panel on August 30, 2004. The panel deliberated the intraLATA exemption issue at a regularly scheduled Authority Conference held on September 13, 2004.

#### **SEPTEMBER 13, 2004 AUTHORITY CONFERENCE**

Based on the record and the unchallenged claim that intraLATA toll services are competitive, the panel voted unanimously that the tariffing requirements for intraLATA toll services for ILECs should be reduced. The panel made the following findings and conclusions:

- 1) All ILECs will be allowed to file price lists in lieu of tariffs that will be effective upon filing provided:
  - a) the ILECs' tariffs include terms and conditions relating to the intraLATA toll services;
  - b) specific reference to an effective price list is included in the tariff; and
  - c) existing customers are provided 30 days notice for any intraLATA toll price increase;
- 2) Any ILEC that files a price list that would affect the price change for intraLATA toll services must also file certification with the Authority that it has notified the

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<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.* at 2-3.

<sup>26</sup> *Id.* at 3-4.

<sup>27</sup> *Id.* at 5.

customers 30 days in advance of that filing;

- 3) For rate-of-return companies, the revenues generated from intraLATA toll services will continue to be recorded as regulated revenues;
- 4) This exemption does not relieve the ILECs from the price floor requirement or anticompetitive pricing provisions of Tenn. Code Ann. Section 65-5-208(c) (1993) or federal resale obligations;
- 5) The filing requirements for interexchange carriers shall be consistent with these provisions; and
- 6) Any rule changes needed to accomplish these provisions will be addressed in the rulemaking docket opened by the Authority, Docket No. 04-00284.

## **PART II- PRIMARY RATE ISDN**

### **Positions of the Parties**

#### **ILEC Position**

On November 22, 2004, BellSouth filed *BellSouth Telecommunications Inc. 's Post-Hearing Brief* (“*BellSouth's Post-Hearing Brief*”). According to BellSouth, there is a competitive market for PRI because there are many providers of PRI service and PRI substitute services.<sup>28</sup> BellSouth maintains that customers can obtain PRI from many different sources and PRI is subject to intermodal competition including wireless, broadband and VoIP<sup>29</sup> providers. According to BellSouth, it is impossible to determine the actual size of the market for PRI services and from that evaluate an ILEC's share of that market.<sup>30</sup> Nevertheless, BellSouth asserts that market dominance is not a necessary determination to grant relief under Tenn. Code Ann. § 65-5-208 (1993) but rather the Authority must determine if there is significant competition for the service.<sup>31</sup>

BellSouth maintains that its numerous contract service arrangements (“CSAs”) for PRI

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<sup>28</sup> *BellSouth's Post-Hearing Brief*, p. 2 (November 22, 2004).

<sup>29</sup> Voice over Internet Protocol (VoIP), is a technology that allows a person to make telephone calls using a broadband internet connection instead of a regular (or analog) phone line.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 3-7.

service also indicate there is significant competition for PRI services.<sup>32</sup> BellSouth notes that it has engaged in substantial promotional activity to respond to competition from at least twelve other companies currently providing PRI service.<sup>33</sup> BellSouth asserts that its PRI pricing power is constrained by the number of market competitors, the use of promotions and special contracts to meet competition, availability of substitutes, and homogeneity of PRI service. BellSouth argues that regardless of the size of the market, the activity in the market and actions of competitors, such as promotions and CSAs, indicates that there is robust competition for PRI service. According to BellSouth, determining that significant competition exists ends the TRA's inquiry under the statute.<sup>34</sup>

In its post-hearing brief filed on November 22, 2004<sup>35</sup>, United Telephone-Southeast, Inc. ("Sprint")<sup>36</sup> notes that it has several facilities-based carriers in its territory that advertise their services to the public. Sprint notes that it loses more than 50% of head-to-head bids to KMC Telecom, a CLEC, and asserts that the number of lost bids support the proposition that the price of PRI service is limited by competition.<sup>37</sup> Sprint also asserts that market share analysis is not useful because product markets are hard to define accurately and because determining market share thresholds is subjective and not useful for inferring market pricing power.

#### **CLEC and Consumer Advocate Position**

In its *Post-Hearing Brief of AT&T of the South Central States, LLC* ("AT&T Post-Hearing Brief"), AT&T claims that Petitioners have not conducted a study of PRI market share and that such analysis is necessary to make any inference as to the degree of potential or actual competition.<sup>38</sup> AT&T urges caution in deregulating PRI service, in which it contends BellSouth is the dominant provider, because PRI is essential to the development of VoIP services, which BellSouth perceives to

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<sup>32</sup> *Id.* at 4-5.

<sup>33</sup> *Id.* at 6.

<sup>34</sup> *Id.* at 4.

<sup>35</sup> *Post-Hearing Brief of United Telephone- Southeast, Inc.* (November 22, 2004) ("*Sprint's Post-Hearing Brief*").

<sup>36</sup> Sprint was granted an intervention in this docket to participate in the second phase of the proceedings by an Order issued by the Hearing Officer on August 4, 2004.

<sup>37</sup> *Sprint's Post-Hearing Brief*, pp. 3-4 (November 22, 2004).

<sup>38</sup> *AT&T Post-Hearing Brief* (November 22, 2005).



be a competitive threat. AT&T states that Digital Subscriber Line (“DSL”) service is not a good substitute for PRI, because DSL lacks the advanced call handling features of PRI. AT&T asserts that BellSouth is the price leader in the PRI market, and since BellSouth supplies facilities that competitors use to provide PRI, AT&T maintains that market conditions are ripe for BellSouth to engage in anti-competitive price squeeze tactics. AT&T requests that the TRA deny BellSouth’s premature and unjustified request for exemption from regulation for PRI services.

In its brief, Time Warner argues that the Petitioners have failed to satisfy the conditions for exemption from PRI pursuant to Tenn. Code Ann. § 65-5-208(b) (1993) because they have not shown that competition is an effective regulator of PRI service.<sup>39</sup> BellSouth’s attempt to show that the PRI market is competitive by listing other companies providing the service and potential substitutes for PRI service fails to offer any conclusive evidence that the price of PRI service is currently regulated by existing or potential competition.<sup>40</sup> In addition, Time Warner maintains that granting the Petitioners’ request for exemption would limit the growth of technology in Tennessee, specifically by limiting the spread of VoIP because ILECs could potentially price-discriminate among PRI customers based on whether the service is used to provide VoIP services.<sup>41</sup>

On November 22, 2004, the Consumer Advocate filed its brief in which it asserts that the Petitioners’ request for exemption should be denied because they have not demonstrated that competition would be an effective regulator of price.<sup>42</sup> The Consumer Advocate maintains that BellSouth is the dominant provider in the retail and wholesale markets for PRI and thus claims that effective price competition is unlikely.<sup>43</sup> According to the Consumer Advocate, BellSouth’s CSA pricing has muted existing and potential competition, and that without regulatory constraint, continued anti-competitive pricing will lead to price-squeezing and predatory pricing in the future.

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<sup>39</sup> *Post-Hearing Brief of Time Warner Telecom of the Midsouth, LLC* (November 22, 2004) (“*Time Warner’s Brief*”).

<sup>40</sup> *Time Warner’s Brief*, p. 8 (November 22, 2004).

<sup>41</sup> *Id.* at 7-8.

<sup>42</sup> *Brief of Consumer Advocate and Protection Division* (November 22, 2004) (“*Consumer Advocate’s Brief*”).

<sup>43</sup> *Id.*

By listing PRI competitors and identifying a few other services it claims may be a substitute for PRI, BellSouth attempts to prove that the PRI market is competitive.<sup>44</sup> The Consumer Advocate argues that until information on market strength and location is known, there is no way to know if the statutory requirements are being met.<sup>45</sup>

The Consumer Advocate also urges the Authority to deny the Petitioners' request for exemption from tariffing requirements.<sup>46</sup> Nevertheless, if the Authority allows the Petitioners to file price lists in lieu of tariffs, it should impose the following conditions: (1) the price lists should remain subject to the TRA's approval, suspension, and revocation in order to protect and advance the interests of consumers and competitive telecommunications policies; (2) all terms and conditions of PRI service, with the sole exception of price, should be reflected in the ILECs tariffs; (3) the price of PRI service, inclusive of all recurring and non-recurring rates and charges, should be set forth in publicly-filed price lists; (4) the price lists should represent binding instruments that, like tariffs, function in lieu of contracts between the ILECs and their customers; (5) the price lists should serve as the official published lists of all rates and charges for PRI services; and (6) the price list of a particular PRI service should be clearly cross-referenced to the service's matching tariff containing the terms and conditions of that service in order to prevent potential confusion and misunderstanding concerning each party's rights, privileges, duties, responsibilities, and obligations.<sup>47</sup> The Consumer Advocate also urged that Petitioners be required to provide consumers with advance notice of any proposed increase in the price of PRI service or any other change in the terms or conditions that might result in a costlier service arrangement or reduction in the value of service.<sup>48</sup>

#### **FEBRUARY 28, 2005 AUTHORITY CONFERENCE**

Oral arguments addressing the PRI exemption issue were heard on December 13, 2004. The panel deliberated the PRI exemption issue at a regularly scheduled Authority Conference on

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<sup>44</sup> *Id.* at 5-6.

<sup>45</sup> *Id.* at 6.

<sup>46</sup> *Id.* at 12.

<sup>47</sup> *Id.* at 15.

<sup>48</sup> *Id.*

February 28, 2005.

Based on the record regarding the existence of competition for PRI services in Tennessee, the panel voted unanimously to exempt PRI services from regulation pursuant to Tenn. Code Ann. § 65-5-208 (1993) for BellSouth, Citizens and Sprint. The panel made the following findings and conclusions:

- 1) Tennessee has many providers who are offering PRI services to Tennessee business customers;
- 2) Evidence shows various competitors are working diligently to compete with one another for PRI customers and are pricing their PRI service in recognition of competition;
- 3) The presence of CSAs is strong evidence that companies are negotiating prices as a result of competition;
- 4) There is credible evidence regarding the impact of intermodal competition in this docket;
- 5) The multitude of advertising materials from several companies in this record demonstrates that business customers in Tennessee have access to a significant amount of information regarding the choices that are available when purchasing PRI service;
- 6) The Authority's decision to exempt PRI services for Bellsouth, Citizens and Sprint in this docket shall not have a precedential effort as to any other service; and
- 7) This issue of exemption of PRI service should be revisited in one year.

**IT IS THEREFORE ORDERED THAT:**

1. The *Petition for Exemption of Certain Services* filed by BellSouth Telecommunications, Inc. and Citizens Communications, Inc. seeking an exemption from regulation of intraLATA toll service and primary rate integrated digital network ("PRI") service is granted

pursuant to Tenn. Code Ann. § 65-5-108(b) (2004).

2. All ILECs will be allowed to file price lists in lieu of tariffs that will be effective upon filing provided:

- a) the ILECs' tariffs include terms and conditions relating to the intraLATA toll services;
- b) specific reference to an effective price list is included in the tariff; and
- c) existing customers are provided 30 days' notice for any intraLATA toll price increase;

3. Any ILEC that files a price list that would affect the price change for intraLATA toll services must also file certification with the Authority that they have notified the customers 30 days in advance of that filing;

4. For rate-of-return companies, the revenues generated from intraLATA toll services will continue to be recorded as regulated revenues;

5. This exemption does not relieve the ILECs from the price floor requirement or anticompetitive pricing provisions of Tenn. Code Ann. Section 65-5-108(c) (2004) or federal resale obligations;

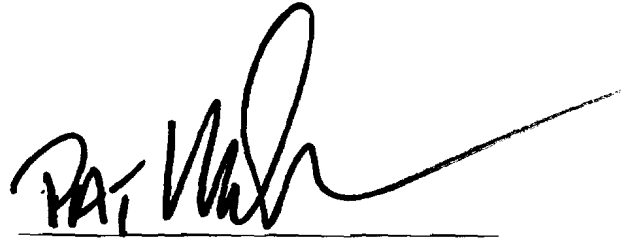
6. The filing requirements for interexchange carriers must be consistent with these provisions;

7. Any rule changes needed to accomplish these provisions will be addressed in a rulemaking docket that was opened by the Authority on August 30, 2004, Docket No. 04-00284.

8. PRI services for BellSouth Telecommunications, Inc., Citizens Communications, Inc. and United Telephone-Southeast, Inc. should be granted the same exemption ordered in this docket regarding intraLATA toll services.

9. The Authority will revisit the PRI exemption issue in one year from the date of the

Authority's decision in this docket.<sup>49</sup>

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Pat Miller, Chairman

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Deborah Taylor Tate, Director<sup>50</sup>

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Sara Kyle, Director

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<sup>49</sup> At a regularly scheduled Authority Conference held on February 6, 2006, Director Miller clarified that the Authority should revisit the state of PRI competition in rural areas six months following the issuance of a final order by the Authority in this docket.

<sup>50</sup> Director Tate voted in agreement with the other directors but resigned her position as director before the issuance of this order.