BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 5, 2003

IN RE:	)	
	)	
WORKSHOP TO GATHER INFORMATION FROM THE TELECOMMUNICATIONS INDUSTRY RELATED TO PREVENTING VIOLATIONS OF TENN. CODE ANN. § 65-21-114	)	**DOCKET NO. 03-00502**

REPORT ON WORKSHOP MEETING HELD NOVEMBER 7, 2003 AND RECOMMENDATION OF MODERATOR

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I. PROCEDURAL HISTORY OF COUNTY-WIDE CALLING

On January 6, 1988, the Tennessee Public Service Commission ("Commission") issued an order in Docket No. U-88-7547 directing South Central Bell Telephone Company ("SCB") to reduce its annual intrastate revenues by 35.4 million dollars. The Commission explained that the revenue reductions would be used, in part, to "reduce toll rates and zone charges and generally to extend local calling areas across the state."[1]

In Docket No. U-88-7588, the Commission ordered Ardmore, Claiborne, Crockett, GTE South, Ooltewah-Collegedale, Peoples, and West Tennessee Telephone Companies to provide county seat calling[2] within their service areas on or before November 1, 1988.[3] In this order, the Commission found that county seat calling in the areas served by the carriers is in the public interest and noted that each of the providers had agreed to implement county seat calling without a hearing or an increase in rates at that time.[4]

On November 15, 1988, the Commission issued an order in Docket No. U-88-7596. The Commission found that SCB had filed tariffs pursuant to the January 6, 1988 Order in Docket

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[1] *In re: Commission Investigation of the Earnings Level of the South Central Bell Telephone Company*, Docket No. U-88-7547, *Order*, 2 (Jan. 6, 1988) (attached hereto under **Tab 1**).

[2] County-seat calling is a service that provides for toll free calls to county government offices from any number within the same county. Also during this same time period, the Commission entered orders establishing Metro Area Calling ("MAC"). MAC expanded the local calling areas around Memphis, Knoxville, Chattanooga, and Nashville to include the entire county where the city is located and all adjacent counties. *See In re: Investigation of Earnings of South Central Bell Telephone Company*, Docket No. U-88-7594, *Order* (Oct. 17, 1988) (requiring that SCB offer MAC to its customers); *In re: Tariff Filing by Alltel, Tennessee, Inc. to Increase Rates to Enable the Powell and Claxton Exchanges to Become Full Participants in the Knoxville Metropolitan Area Calling on March 31, 1990*, Docket No. 90-02094, *Order* (Mar. 30, 1990) (approving rate increase to allow ALLTEL Tennessee, Inc. to participate in the Knoxville MAC); *In re: Metro Area Calling for Millington Telephone Company, Inc.*, Docket No. 90-04321, *Order* (Jun. 20, 1990) (implementing MAC for Millington Telephone Company Inc.'s Shelby, Tipton, and Fayette County customers); *In re: Petition of Concord Telephone Exchange, Inc. to Change and Increase Certain Intrastate Rates and Charges so as to Permit It to Earn a Fair and Adequate Rate of Return on Its Property Used and Useful in Furnishing Telephone Service to Its Customers in Tennessee (Implementation of Metropolitan Area Calling Plan for the Knoxville Area)*, Docket No. 89-11700, *Order* (Jul. 17, 1990) (approving rate changes to facilitate MAC in Knoxville) (all orders attached hereto under **Tab 2**).

[3] *See In re: County Seat Calling for Ardmore, Claiborne, Crockett, GTE South, Ooltewah-Collegedale, Peoples, and West Tennessee Telephone Companies*, Docket No. U-88-7588, *Order*, 2 (Oct. 5, 1988) (attached hereto under **Tab 3**).

[4] *See id.* at 1-2.

No. U-88-7547 to effectuate county seat calling. The Commission next found that SCB could not implement the plan in all counties because of a prohibition in the AT&T consent decree preventing SCB from completing calls that crossed local access and transport area ("LATA") boundaries. According to the terms of the consent decree such calls must be completed by inter-exchange carriers ("IXCs"[5]).[6] In recognition of this finding, the Commission requested IXCs transmit interLATA county seat calls without charge and permitted the local exchange carriers ("LECs") to amend their tariffs to waive access service charges on interLATA, intracounty seat calls when an IXC that carries the calls does not bill the subscriber for the calls. In addition, the Commission noted that the Meigs County and Decatur cross-LATA county seat situation could be remedied by seeking a modification of the LATA boundaries such that Decatur, Tennessee would be part of the Chattanooga LATA.[7]

On October 20, 1989, the Commission entered another order in Docket No. U-88-7596, which the Commission described as "the final step in the implementation of the County Seat Calling Plan ordered in Docket No. U-88-7547."[8] In this order, the Commission mentioned that in its November 15, 1988 order it requested that SCB petition the federal district court to modify the LATA boundary established for Decatur, Tennessee. Finding that SCB petitioned the federal district court and received a favorable ruling, the Commission closed Docket No. U-88-7596.[9]

During the proceedings in Docket No. U-88-7596, the Commission also addressed Docket No. U-88-7592, In re: County Seat Calling for Alltel Telephone Company. In this

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[5] For the purposes of this respond, the terms "IXC" and "interLATA carrier" shall have the same meaning.
[6] *See United States v. Western Elec. Co.*, 569 F. Supp. 990, 993-94 (D.D.C. 1983); *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 141, 227 (D.D.C. 1982).
[7] *See In re: Implementation of County Seat Calling Plans for Calls Across LATA Boundaries*, Docket No. U-88-7596, *Order*, 1-2 (Nov. 15, 1988) (attached hereto under **Tab 4**). According to a footnote in the order, AT&T Communications of the South Central States, Inc. had agreed to the procedure outlined in the order. *Id.* at 1 n.*.
[8] *See In re: Implementation of the County Seat Calling Plans for Calls Across LATA Boundaries*, Docket No. U-88-7596, *Order*, 1 (Oct. 20, 1989) (attached hereto under **Tab 5**).
[9] *See Id.* at 1-2.

docket, the Commission approved an agreement between SCB and Alltel to provide toll-free calling in Grainger County effective January 30, 1989.[10]

As part of a SCB earnings investigation, the Commission issued an order on August 20, 1993 addressing county-wide calling. In the *Order*, the Commission stated:

> The Commission finds that it is in the public interest t[o] complete county wide calling in Tennessee. To the extent tha[t] there are any counties where county wide calling without toll charges is not available, the Company will file tariffs to accomplish such county wide calling, and the funding required to provide such county wide calling will be drawn from the deferred revenue account.[11]

On October 13, 1993, the Commission issued an *Order* in Docket No. 93-07799 finding that, based on the shared economic and social interests, subscribers "served by a local exchange telephone carrier regulated by the Commission should be able to make toll-free calls to other subscribers who live in the same county and are also served by a local company regulated by the Commission."[12] After rejecting the option of further shifting LATA boundaries, the Commission determined the better method for achieving the desired result was to require interLATA carriers to provide toll-free, county-wide calling and to direct LECs not to charge access fees on intracounty, interLATA calls.[13] Given this conclusion, the Commission directed certified, interLATA carriers providing intrastate service to customers in those counties dissected by

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[10] *See In re: County Seat Calling for Alltel Telephone Company*, Docket No. U-88-7592, *Order* (Nov. 17, 1988) (attached hereto under **Tab 6**).

[11] *In re: Earnings Investigation of South Central Bell Telephone Company, 1993-1995*, Docket No. 92-13527, and *In re: Petition of BellSouth Telecommunications, Inc. d/b/a South Central Bell Telephone Company for Conditional Election of Regulation Pursuant to Chapter 1220-4-2-.5 of the Tennessee Public Service Commission's Rules and Regulations*, Docket No. 93-00311, *Order*, 17 (Aug. 20, 1993) (attached hereto under **Tab 7**). In addition to county-wide calling, the Commission also ordered SCB to develop optional calling plans for calls within a 40-mile radius of the customer's serving wire center and to include Dickson County in the Metro Calling Area area for Nashville. *See id.* at 15, 18-19.

[12] *See In re: Show Cause Proceeding Against Certified IXCs to Provide Toll Free, County-Wide Calling*, Docket No. 93-07799, *Order*, 1 (Oct. 13, 1993) (attached hereto under **Tab 8**).

[13] *See id.* at 1-2.

LATA boundaries to show cause why they should not be required to provide toll-free, county-wide calling.[14]

At a pre-hearing conference on November 10, 1993, the Commission asked the Telecommunications Division to investigate which entities, IXCs or LECs, should be responsible for providing toll-free, county-wide calling. On December 10, 1993, Austin H. Lyons, Director Telecommunications Division, filed a report addressing the question of "[s]hould the local exchange companies carry all intra-county calls including those which under current rules, would be routed through inter-exchange carriers."[15] Mr. Lyons concluded that in order for interLATA county-wide calling to be provided by LECs the LECs must receive authority to provide service across LATA boundaries, routing of telephone calls must be changed, additional trunks are likely to be required, and billing changes must be made. If IXCs were to provide toll-free county-wide calling, Mr. Lyons concluded that billing changes would have to be made. Mr. Lyons further determined that the superior mechanism for offering toll-free county-wide calling is the mechanism which does not require changing the operations of the network. Based on these findings, Mr. Lyons concluded that IXCs should continue to carry interLATA county-wide traffic, but IXCs should be provided a period of time to effectuate billing changes.[16]

On March 2, 1994, Administrative Law Judge ("ALJ"), Mack H. Cherry convened the show cause hearing in Docket No. 93-07799. In his *Initial Order*, the Administrative Law Judge summarized the issue as follows:

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[14] *See Id.* at 2. The counties dissected by LATA boundaries listed in an appendix to the *Order* are Claiborne, Cumberland, Greene, Hawkins, Marion, Meigs, Montgomery, Polk, Roane, McNairy, Obion, and Weakly. *See In re: Show Cause Proceeding Against Certified IXCs to Provide Toll Free, County-Wide Calling*, Docket No. 93-07799, *Initial Order*, 4 (Mar. 31, 1994) (attached hereto under **Tab 9**). Henry County is also dissected by LATA boundaries. *See* Map of Tennessee LATA Boundaries (attached hereto under **Tap 10**).

[15] Memorandum from Austin J. Lyons, Director Telecommunications Division, to Parties of Record Regarding Inter-LATA Toll-Free County-Wide Calling (Docket No. 93-07799), 2 (Dec. 10, 1993) (attached hereto under **Tab 11**).

[16] *See id.* at 12-13.

> The focus of this decision should be clear. Indeed, L. G. Sather of AT&T acknowledged as much in his testimony. The Commission has directed that toll-free service to the areas in question will be provided. Whether it will be provided is not even an issue to be considered. The issue is how the toll-free service will be provided and which parties will provide it.[17]

The arguments of IXCs listed by the ALJ are summarized as follows:

- Toll-free calling is local in nature and LECs are better suited to provide this service.
- LECs are able to recover the costs associated with county-wide calling because LECs are rate-of-return regulated. Given the competitive interLATA environment, raising rates to recover costs is not an option for IXCs.
- SCB has obtained waivers of the LATA boundary requirements in the past.
- The cost of software to suppress the billing of intracounty- calls is too great.
- The call and credit method of billing creates customer dissatisfaction and complaints.
- The twice monthly updates of the Tax Authority Record ("TAR") Code Database promote complaints because customers move between counties during the two week period.
- Mileage bands are not appropriate for Tennessee because the counties are too large. Specifically, IXCs can not afford to give up the revenues generated from three bands of traffic.
- LECs' processes for crediting access charges are too slow.
- A rulemaking, not a show cause, is the appropriate proceeding through which to address this issue.[18]

The LECs' arguments were as follows:

- IXCs are already providing this service when providing toll-free county-seat calling.
- LECs contribute to the goal of providing county-wide calling by waiving access charges, the greatest expense of providing intracounty-, interLATA calls.
- There is uncertainty as to whether a waiver of the prohibition on providing interLATA calls could be obtained for all thirteen counties and the process of seeking such waivers would delay implementation of county-wide calling.
- The cost for LECs to provide county-wide calling would be too great because LECs would have to construct new facility routes and change software and telephone numbers.
- Use of new NXX codes for the new telephone numbers would accelerate the exhaust of the 615 area code.[19]

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[17] *See In re: Show Cause Proceeding Against Certified IXCs to Provide Toll Free, County-Wide Calling*, Docket No. 93-07799, *Initial Order*, 5 (Mar. 31, 1994) (attached hereto under **Tab 9**).
[18] *See id.* at 5-8.
[19] *See id.* at 8-9.

The ALJ described the Staff's position in this case as the same as the LECs. Some of the points highlighted by the ALJ were:

- IXCs execution of county-seat calling proved their ability to perform.
- The process of obtaining a waiver of the prohibition on providing interLATA calls would take too much time.
- Handling of the intracounty-, interLATA calls by IXCs would require fewer changes to current customer service arrangements.[20]

The ALJ concluded that IXCs had not shown cause why they should not be required to provide toll-free, intracounty, interLATA calls and ordered that "[a]ll IXCs providing intrastate service in Tennessee will provide interLATA intra-county calling toll-free to all Tennessee customers effective August 1, 1994."[21] The ALJ further determined that all IXCs providing intrastate service in Tennessee should by no later than two years from the date of the Final Order zero rate intracounty, interLATA calls. Those IXCs that did not have the ability to zero rate calls at the time of the issuance of the *Initial Order* were given six months to file a waiver request based on the IXC's market share in the thirteen counties.[22] Despite the zero rate requirement and the opportunity for a waiver, the ALJ required that all IXCs that did not have the ability to zero rate calls at the time of the issuance of the *Initial Order* comply with the Commission's directive through bill and credit calling.[23] To offset the cost to IXCs of providing county-wide calling, the ALJ directed the LECs to credit access charges associated with intracounty, interLATA calls. In reaching these conclusions, the ALJ made many important findings including:

- There was insufficient evidence in the record to determine whether South Central Bell Telephone Company could obtain a waiver of the prohibition on providing interLATA calls from the federal court.
- Although the cost to those IXCs that are not zero rating calls cannot be ignored the cost for LECs to provide the same service is greater.

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[20] *See id.* at 10.
[21] *Id.* at 22.
[22] *See id.* at 22.
[23] *See id.* at 12.

- Requiring IXCs to provide the service would better serve customer convenience by helping to conserve numbers in the 615 area code.
- This Commission's requirement to provide county-wide calling is merely an extension of county-seat calling to which IXCs have not objected.
- Regardless of the label given to the service at issue, LECs can provide the service and IXCs cannot.
- The provisioning of intracounty, interLATA calls is not local service.
- Toll-free county-wide calling is incidental to other profitable services provided by an IXC and is an entree to those other profitable services. There is a return on the investment for toll-free county-wide calling.
- Assuming IXCs lose revenue as a result of providing toll-free intracounty calls, IXCs can come before the Commission and ask for relief.
- Given the use of the TAR Code Database by all carriers, no matter whether LECs or IXCs provide the service, all will receive complaints and the complaints should be spread in a fairly uniform relationship to a carrier's customer base.
- It is anticipated that LECs could develop a more efficient means of crediting access charges.
- The second, third, fourth, and sixth criteria listed in *Tennessee Cable Television Association v. Tennessee Public Service Commission*, 844 S.W.2d 151 (Tenn. Ct. App. 1992), militate in favor of a rulemaking, but there is insufficient argument and information to assess the remaining factors or to reach a conclusion on whether the issues present in this docket should be resolved in a rulemaking rather than a show cause proceeding.[24]

The Commission adopted the ALJ's conclusion that IXCs should provide toll-free intracounty, interLATA calls to Tennessee consumers, the provision of a two year grace period, and the six-month waiver request period in its *Order* entered on July 15, 1994.[25] The Commission also agreed with many of the ALJ's findings. The Commission agreed that IXCs had failed to demonstrate through the presentation of material and substantial evidence that the Commission's directive is confiscatory and should not be imposed on IXCs. As did the ALJ, the Commission noted that IXCs are permitted to request rate relief from the Commission and cited a docket in which the Commission granted rate relief related to county-wide calling to AT&T.[26]

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[24] *See id.* at 11- 19.

[25] *See In re: Show Cause Proceeding Against Certified IXCs and LECs to Provide Toll-Free County-Wide Calling*, Docket No. 93-07799, *Order*, 3, 17 (Jul. 15, 1994) (attached hereto under **Tab 12**).

[26] *See id.* at 7 (citing *Tariff Filing by AT&T to Increase Rates for Private Line Services*, Docket No. 94-01035 (Jul. 7, 1994)).

The Commission also affirmed the finding of the ALJ that intracounty, interLATA service is not local and that IXCs can provide the service without a modification to their certificate of public convenience and necessity.[27] Echoing the concerns of the ALJ, the Commission found that requiring LECs to provide intracounty, interLATA calls was not in the best interests of Tennessee consumers because it would require SCB to apply for a waiver of the prohibition on providing interLATA calls, which would only inject delay and uncertainty into the docket, and because it would require the assignment of new NXXs thereby accelerating number exhaustion.[28] The Commission also found unpersuasive IXCs' argument that their ability to recover costs through rate changes is constrained by competition. The Commission concluded that IXCs' costs associated with changing their billing systems are ameliorated by the grace period provided for implementation, the waiver of access charges, and the existence of two billing methods for accomplishing toll-free, intracounty, interLATA call billing, that is, use of the TAR Code database and mileage bands.[29] Based on these findings and conclusion and others set forth in the order, the Commission ordered that "[a]ll IXCs providing intrastate service in Tennessee will provide interLATA intra-county calling toll-free to all Tennessee customers effective October 15, 1994."[30]

The only findings and conclusions of the ALJ that the Commission disagreed with were related to the determination of whether a rulemaking was the more appropriate procedural vehicle to determine who is responsible for providing intracounty, interLATA calls. The Commission explicitly disagreed with the ALJ's finding that the fourth and sixth criteria in

[27] *See id.* at 8.
[28] *See id.* at 11, 16.
[29] *See id.* at 13-14.
[30] *See id.* at 17.

Tennessee Cable militate in favor of a rulemaking. The Commission concluded that it was engaged in ratemaking and that such action is not required to be done in a rulemaking.[31]

AT&T Communications of the South Central States, Inc., MCI Telecommunications Corporation, and Sprint Communications Company, L.P. (collectively "Petitioners") appealed the Commission's July 15, 1994 order. The Court of Appeals, Middle Division, issued its opinion of April 26, 1995. In its opinion, the Court concluded that the "direction of petitioners to render free long distance service between exchanges serving customers in a single county is not authorized by statute."[32] The Court further concluded that the Commission's Final Order violated the Fifth Amendment of the Constitution of the United States and Article 1, Section 21 of the Constitution of the State of Tennessee and made the following findings:

> The order of the Commission "demands" or "takes" property, not for public use, but for private use of an individual at his demand. The utility is entitled to some compensation from the member of the public receiving the benefit of the demand . . . .
>
> . . . . Just compensation means compensation from the public treasury or, in the case of utilities, from the member of the public receiving the benefit.[33]

Based on these findings and conclusions the Court reversed and vacated the July 15, 1994 *Order* and remanded the docket for further proceedings as may be necessary and appropriate.

On September 1, 1995, Public Chapter 183 took effect. This legislation is codified at Section 65-21-114 of Tennessee Code Annotated and provides:

> (a) After January 1, 1996, any telephone call made between two (2) points in the same county in Tennessee shall be classified as toll free and shall not be billed to any customer.
>
> (b) This section shall apply to all companies or entities providing telephone service in this state as public utilities, including, but not limited to, telephone companies regulated by the Tennessee Public Service Commission. Provided,

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[31] *See id.* at 9-10.

[32] *AT&T Communications of the South Cent. States, Inc. v. Cochran*, No. 01A01-9409-BC-00427, 1995 WL 256662, *2 (Tenn. Ct. App. May 3, 1995) (The slip opinion is stamped filed on April 26, 1995) (attached hereto under **Tab 13**).

[33] *Id.* at *3.

> however, that this section shall not apply to any telephone company which is prohibited by federal law from providing countywide service in a particular county.
>
> (c) Nothing in this section is intended to modify or repeal the rate-making and telephone regulatory authority of the Tennessee Public Service Commission or the right of telephone companies to earn a fair rate of return.[34]

On January 23, 1996, the Commission entered an order on BellSouth Telecommunications, Inc.'s ("BellSouth") application for a price regulation plan. In the order, the Commission directed BellSouth to petition the United States District Court for the District of Columbia to permit BellSouth to provide local exchange service across LATA boundaries.[35] On February 8, 1996, Public Law 104-104, the Telecommunications Act of 1996, became effective.[36] In light of the Telecommunications Act of 1996, on April 11, 1996, Judge Harold H. Greene of the United States District Court for the District of Columbia entered an order dismissing all pending motions as moot.[37]

On May 17, 1996, the Commission issued an order in Docket No. 96-00918 directing all IXCs operating in Tennessee that "provide interstate service to customers located within the following twelve counties: Claiborne, Cumberland, Greene, Hawkins, Marion, Meigs, Montgomery, Polk, Roane, McNairy, Obion, Weakley, [to] appear and show cause why they should not be penalized pursuant to T.C.A. § 65-21-114."[38] In reaching this conclusion, the Commission found that the Consumer Services Division had received thirty-eight (38)

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[34] 1995 Tenn. Pub. Acts 183 (attached hereto under **Tab 14**).

[35] *See In re: Application of BellSouth Telecommunications, Inc. d/b/a South Central Bell Telephone Company for a Price Regulation Plan*, Docket No. 95-02614, *Order*, 5 (Jan. 23, 1996) (attached hereto under **Tab 15**).

[36] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[37] *See United States v. Western Elec. Co.*, 1996 U.S. Dist. LEXIS 9293, at *7 (D.D.C. Apr. 11, 1996) (attached hereto under **Tab 16**).

[38] *In re: Show Cause Proceeding Against Certified Inter-Exchange Carriers (AllNet Communications Service, Inc., AT&T Communications of the South Central States, Inc. LDDS WorldCom, MCI Telecommunications Corp., Sprint Communications Co., and Wiltel, Inc.) to Provide Toll Free County-Wide Calling*, Docket No. 96-00918, *Order*, 2 (May 17, 1996) (attached hereto under **Tab 17**).

complaints since the enactment of Section 65-21-114 in regard to charges for calls completed by IXCs.[39]

The Directors held a pre-hearing conference in Docket No. 96-00918 on November 26, 1996. Before the Directors were a motion in limine, in which Authority Staff acting as a party asserted that the Authority is without jurisdiction to determine whether Section 65-21-114 violates the United States or Tennessee constitutions, and a motion to dismiss, in which Petitioners asserted that the Authority lacked statutory authority to enforce Section 65-21-114 through a show cause proceeding.[40] Based on the motions and oral arguments, the Directors determined that they have express authority and jurisdiction to enforce Section 65-21-114, but are prevented by the Tennessee Supreme Court's decision in *Richardson v. Tennessee Board of Dentistry*, 913 S.W.2d 446 (Tenn. 1995), from ruling on the constitutionality of Section 65-21-114.[41]

Petitioners filed a renewed petition for review of interlocutory rulings and application for immediate stay in the Tennessee Court of Appeals on January 29, 1997. The Court entered an order on March 4, 1997 noting that the Authority filed a response conceding that the Authority does not have jurisdiction to impose penalties under Section 65-4-120 of Tennessee Code Annotated and remanding the docket to the Authority with instructions to dismiss the proceeding for lack of jurisdiction.[42] Based on this order, the Consumer Advocate filed a motion to dismiss

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[39] *See id.* at 1-2.

[40] *See In re: Show Cause Proceeding Against Certified Interexchange Carriers (AllNet Communications Service, Inc., AT&T Communications of the South Central States, Inc., LDDS WorldCom, MCI Telecommunications Corp., Sprint Communications Co., and Wiltel, Inc.) to Provide Toll Free County-Wide Calling*, Docket No. 96-00918, *Order*, 2 (January 28, 1997) (attached hereto under **Tab 18**).

[41] *See id.* at 3.

[42] *AT&T Communications of the S. Cent. States, Inc. v. Greer*, Appeal No. 01-A-01-9701-BC-00017, *Order* (Mar. 4, 1997) (attached hereto under **Tab 19**).

on March 31, 1997.[43] At an Authority Conference on April 15, 1997, the Directors voted to grant the Consumer Advocate's motion and close the docket.[44]

The Authority next addressed county-wide calling at the May 6, 1997 Authority Conference. Under miscellaneous business, the Directors unanimously voted to open a docket to investigate how to provide county-wide calling in the counties of Claiborne, Cumberland, Greene, Hawkins, Marion, Meigs, Montgomery, Polk, Roane, McNairy, Obion, and Weakly and to insure just compensation to the providers of such service. The Directors further voted to require staff to move as expeditiously as possible, but to report back to the Directors by no later than the first meeting in July.[45] On June 25, 1997, Eddie Roberson, Chief of the Utility Services Division, sent his report to the Directors. In the report, Mr. Roberson stated: "[A]ll certified interexchange carriers have informed us that they either have or plan to voluntarily provide toll-free county-wide calling in Tennessee by not billing for these calls. Interexchange carriers will modify their billing systems in order to suppress county-wide calling charges."[46] According to the report, the following companies agreed to provide toll-free county-wide calling by the following dates:

AT&T Communications of the South Central States	May 1, 1997
Sprint Communications	End of August, 1997

[43] The Consumer Advocate explained in its motion that the Authority conceded that it did not have jurisdiction because there was no violation of a rule or order. *See In re: Show Cause Proceeding Against Certified Interexchange Carriers (AllNet Communications Service, Inc., AT&T Communications of the South Central States, Inc., LDDS WorldCom, MCI Telecommunications Corp., Sprint Communications Co., and Wiltel, Inc.) to Provide Toll Free County-Wide Calling*, Docket No. 96-00918, *Motion to Dismiss*, 1 (Mar. 31, 1997).

[44] *See In re: Show Cause Proceeding Against Certified Interexchange Carriers (AllNet Communications Service, Inc., AT&T Communications of the South Central States, Inc., LDDS WorldCom, MCI Telecommunications Corp., Sprint Communications Co., and Wiltel, Inc.) to Provide Toll Free County-Wide Calling*, Docket No. 96-00918, *Order Granting Motion to Dismiss Nunc Pro Tunc* (Oct. 20, 1997) (attached hereto under **Tab 20**).

[45] Transcript of Proceedings, May 6, 1997, pp. 43-47 (Authority Conference). It appears that no docket number was ever assigned to this investigation.

[46] Memorandum from Eddie Roberson, Chief of Utility Services Division, to Chairman Lynn Greer, Director Sara Kyle, and Director Melvin Malone on Staff Report on the Status of County-Wide Calling in Tennessee, 1 (Jun. 25, 1997) (attached hereto under Tab 20). Per the memorandum, AT&T Communications of the South Central States will only offer free county-wide calling to business customers under one of its customized long distance calling plans. *See id.* at 2 n.2.

MCI Telecommunications	Within the next 12 months
Frontier Communications	Since 1996
WilTel Network Services	October, 1998[47]

Mr. Roberson recommended that the Authority keep the docket open so that staff could continue to monitor county-wide calling compliance and file a final report after the companies implement the billing changes. He also recommended that the Authority issue a press release regarding the availability of county-wide calling and otherwise educate consumers.[48] At the July 1, 1997 Authority Conference, Mr. Roberson presented his report to the Directors. The Directors complimented Mr. Roberson's efforts, but no vote was taken.[49]

The Attorney General issued an opinion on July 20, 2001 addressing the following question: "Is Tenn. Code Ann. § 65-21-114, in requiring all telephone calls placed between two points in the same county to be toll-free, constitutional as applied to interexchange or long distance carriers?"[50] The Attorney General provided the following qualified response: "While Tenn. Code Ann. § 65-21-114 is constitutional in most of its applications, it would be unconstitutional to apply this statute to a long distance telephone carrier under circumstances where the carrier does not receive reasonable remuneration for the service it is required to provide."[51] The Attorney General cited Article I, Section 21 of the Constitution of the State of Tennessee and the Fourteenth Amendment to the United States Constitution in the opinion and described the constitutional problem that arises in counties dissected by LATA boundaries as follows:

> As a result, in parts of these affected counties, a long distance carrier must be involved in completing a call to certain areas within the county. Since long

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[47] *Id.* at 2 (footnote omitted).
[48] *See id.* at 2.
[49] Transcript of Proceedings, July 1, 2003, pp. 18-23 (Authority Conference).
[50] *Constitutionality of Tenn. Code Ann. § 65-21-114 Concerning Countywide Telephone Calling*, Op. Tenn. Att'y Gen. 01-115, 1 (2001) (attached hereto under **Tab 22**).
[51] *Id.*

> distance calls are billed on a toll basis, the requirement of § 65-21-114 that such calls be toll free would mean that the long distance carrier would be required to complete these calls for no remuneration whatsoever. Many subscribers making calls within the county but across a LATA boundary would have no other long distance calls during a billing period, resulting in their long distance carrier's [sic] being required by this statute to render a service for free. This produces the constitutional problems with the statute.[52]

Despite this conclusion, the Attorney General noted that the General Assembly or the Tennessee Regulatory Authority could devise a mechanism to provide compensation to interexchange carriers for completing intracounty, interLATA calls.[53]

II. PROCEDURAL HISTORY OF THIS DOCKET

The Telecommunications Division received tariffs relating to county-wide calling from Citizens Telecommunications Company of the Volunteer State and Citizens Telecommunications Company of Tennessee (collectively "Citizens") on June 11, 2003. The tariffs provided:

> To the extent that an originating or terminating exchange is split between two or more counties, only those stations located within the same county may be called without incurring toll charges. Many exchanges can be called to some degree on a toll-free intracounty basis, but not completely on a toll-free basis, i.e., the exchange is split between counties.
>
> Countywide calls that terminate to a Local Exchange Carrier (LEC), CLEC, or Reseller that is not participating in County-Wide Calling (code not available in the TAR code database) will be rated at the appropriate toll charge.[54]

During the July 7, 2003 Authority Conference, the Directors raised concerns over whether the tariffs comply with Section 65-21-114 and voted to suspend the tariffs for thirty days.[55] Citizens filed tariff revisions on July 16 and 30, 2003. The July 30, 2003 revisions provide:

> County-wide calls originated by a [Citizens] customer which are carried by an IXC (Interexchange Carrier) via 1+ dialing and terminate to a customer of

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[52] *Id.* at 2.
[53] *See id.* at 3.
[54] *E.g., In re: Citizens Telecommunications Company of the Volunteer State Tariff to Clarify Language – Tariff Number 2003592*, Docket No. 03-00410, Tariff No. 2003-592, Revisions to T.R.A. No. 2, section 2, third revised page 1, 2.1 Availability of Facilities (rec'd Jun. 11, 2003, filed Jun. 30, 2003).
[55] Transcript of Proceeding, Jul. 7, 2003, pp. 21-22 (Authority Conference).

> another Local Exchange Company (LEC) or a Competitive Local Exchange Carrier (CLEC) that is not participating in County-wide Calling (code not available in the TAR code database) are rated and billed at the applicable toll charge. Any [Citizens] customer who is billed for an intra-county call of this type who notifies [Citizens] of the billing error will receive credit for the associated toll charges if [Citizens] is the billing agent for the IXC involved. At the time credit is issued [Citizens] will notify the TRA of the billing violation caused by noncompliance of the terminating LEC or CLEC so the TRA can take proper corrective action.[56]

The Directors considered the revised tariffs at the August 4, 2003 Authority Conference. The Directors were not fully convinced that the revisions complied with Section 65-21-114, yet recognized certain industry-wide technical limitations. Based on these concerns and findings, the Directors voted to open a workshop "to gather information and input from the telecommunications industry related to preventing violations of Tenn. Code Ann. § 65-21-144," appointed Director Ron Jones as the Moderator, and approved the tariffs conditioned on Citizens providing customers notice of their ability to receive a credit.[57] Pursuant to this order, Docket No. 03-00502 was opened.

On September 16, 2003, Director Jones, acting as moderator, issued a *Notice of Filing* in Docket No. 03-00502. Director Jones invited all facilities-based providers and resellers of telecommunications services certificated in the State of Tennessee to:

- Describe the manner in which you are able to provide telecommunications service in compliance with Tenn. Code Ann. § 65-21-114(a). If you do not currently take steps to ensure compliance with § 65-21-114(a), explain your reason for not doing so.

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[56] *E.g., In re: Citizens Telecommunications Company of the Volunteer State Tariff to Clarify Language – Tariff Number 2003592*, Docket No. 03-00410, Tariff No. 2003-592, Revisions to T.R.A. No. 2, section 2, third revised page 1, 2.1 Availability of Facilities (filed Jul. 30, 2003).

[57] *In re: Citizens Telecommunications Company of the Volunteer State Tariff to Clarify Language – Tariff Number 2003592*, Docket No. 03-00410, *Order Conditionally Approving Tariff and Initiating "Workshop" on Preventing Violations of Tenn. Code Ann. § 65-21-114*, 2-3 (Sept. 5, 2003); *In re: Citizens Telecommunications Company of Tennessee Tariff to Clarify Language – Tariff Number 2003593*, Docket No. 03-00411, *Order Conditionally Approving Tariff and Initiating "Workshop" on Preventing Violations of Tenn. Code Ann. § 65-21-114*, 2-3 (Sept. 8, 2003) (both orders attached hereto under **Tab 23**).

- Identify any technical, operational, administrative or other difficulties encountered when attempting to comply with Tenn. Code Ann. § 65-21-114(a).
- Provide a suggestion for how this workshop should proceed.[58]

The following companies provided responses:

1-800-Reconex
Access America
Access Integrated Networks, Inc.
ACCXX Communications, LLC
ACN Communications Services, Inc.
Adelphia Business Solutions of Nashville, L.P. (TelCove)
Adelphia Business Solutions Operations Inc. (TelCove)
Advances Tel, Inc.
Advantage Cellular Systems, Inc.
Aeneas Communications, Inc.
Alltel Communications, Inc.
American Long Distance Lines, Inc.
American Long Lines, Inc.
American Telephone Systems, Inc.
AmeriMex Communications
Ardmore Telephone Company
AT&T of the South Central States, LLC
Bell Atlantic Communications, Inc. d/b/a Verizon Long Distance
Bellerud Communications, LLC
BellSouth BSE
BellSouth BSE, Inc.
BellSouth Long Distance, Inc.
BellSouth Telecommunications, Inc.
Ben Lomand Communications, Inc.
Ben Lomand Rural Telephone Cooperative, Inc.
Broadwing Communications, LLC
Brooks Fiber Communications of Tennessee, Inc.
BT Communications Sales LLC
Business Discount Plan, Inc.
Business Telecom, Inc.
CIMCO Communications, Inc.
Citizens Telecommunications Company of Tennessee, LLC
Citizens Telecommunications Company of the Volunteer State, LLC
Comcast Business Communications
CommuniGroup
Connect America Communications, Inc.
Consolidated Communications Operator Services, Inc.
Crockett Telephone Company
CTC Long Distance Services, Inc.
Custom Teleconnect, Inc.
DeKalb Telephone Cooperative
Dixie-Net
eMeritus Communications
Evercom Systems, Inc.
Express Connection Telephone Service
Express Paging, Inc.
GANCOC, INC d/b/a American Dial Tone
GE Business Productivity Solutions, Inc.
Globalcom, Inc.
Global Communication Inc. of America
Global NAPs Gulf, Inc.
Global Tel Link
Granite Telecommunications, LLC
GTC Telecom
Highland Communications, Inc.
IDS Telecom
Infone LLC
Infonet Services Corporation
Intellical Operator Services, Inc.
Intrado Communications, Inc
ITC^DeltaCom
JirehCom, Inc.
Knology
LDMI Telecommunications, Inc. d/b/a LDMI Telecommunications also d/b/a FoneTel
Level (3) Communications, LLC
LoadPoint, LLC
Long Distance Wholesale Club
Loretto Telephone Company
MCI WorldCom Communications, Inc.
MCI WorldCom Network Services, Inc.
MCImetro Access Transmission Services, LLC
McLeodUSA Telecommunications Services Inc.
Millennium Telecom
Millington Telephone Company
MountaiNet Long Distance

[58] *In re: Workshop to Gather Information from the Telecommunications Industry Related to Preventing Violations of Tenn. Code Ann. § 65-21-114*, Docket No. 03-00502, *Notice of Filing* (Sept. 16, 2003).

MountaiNet Telephone Company
National Telecom
NetOne International
NetSoultions, Inc.
Network Billing Systems
Network Communications International Corp.
Network Telephone
New Edge Networks, Inc.
NewSouth Communications
Norstan Network Services
North Central Telephone Cooperative
NOW Communications, Inc.
NuVox Communications, Inc.
NYNEX Long Distance Company d/b/a Verizon Enterprise Solutions
OneStar Long Distance, Inc.
PAETEC Communications, Inc.
Primus Telecommunications, Inc.
Qwest
Qwest Communications Corporation
Scott County Telephone Cooperative
Skyline Telephone Membership Corporation
SouthernNet, Inc. d/b/a Telecom*USA
Southwestern Bell Communications Services, Inc.
Sprint Communications Company L.P. (CLEC)
Sprint Communications Company L.P. (IXC)
Talk America, Inc.
TDS Long Distance Corporation
TDS Telecom
Teleglobe America, Inc.
Telescan Communications Solutions
Tennessee Telephone Service
The Other Phone Company Inc.
Time Warner Telecom of the MidSouth, LLC
TLX Communications, Inc.
T-Netix Telecommunications Services, Inc.
TON Services, Inc. (certificate cancelled 9/8/03 for nonpayment)
Total Telephone Concepts, Inc.
Touch 1
TTI National, Inc.
Twin Lakes Telephone Cooperative Corporation
U.S. South Communications, Inc.
U.S. Telecom Long Distance, Inc.
U.S. TelePacific Corp. d/b/a TelePacific Communications
U-Dial of Tennessee, Inc.
United Stated Advanced Network, Inc.
United Telephone Co.
United Telephone Southeast, Inc.
Universal Access, Inc.
Universal Telecom
US LEC of Tennessee
UTC Long Distance
Value-Added Communications, Inc.
VoiceCom Telecommunications LLC
West Kentucky Rural Telephone Cooperative
Working Assets Funding Service, Inc. d/b/a Working Assets Long Distance
XO Tennessee, Inc.
Z-Tel Communications

On October 13, 2003, Director Jones issued a *Notice of Workshop* scheduling a workshop meeting on November 7, 2003 from 1:00 p.m. until 5:00 p.m. Many providers participated in the workshop. At the conclusion of the meeting, Director Jones invited all interested providers to file written comments by November 17, 2003. Comments were filed by Time Warner Telecom of the MidSouth, L.P., BellSouth, United Telephone-Southeast, Inc., Sprint Communications Company, L.P., the Consumer Advocate and Protection Division, and ALLTEL Communications, Inc.

III. COMMENTS

A. COMMENTS FILED PURSUANT TO THE SEPTEMBER 26, 2003 *NOTICE OF FILING* AND PROVIDED DURING WORKSHOP

In the initial comments filed pursuant to the September 26, 2003 *Notice of Filing* and provided during the workshop meeting, the commenting entities provided a wide range of responses. Most carriers responded that they complied with Section 65-21-114 by using the TAR Code Database administered by BellSouth. According to the comments, carriers that participate in the TAR Code Database provide BellSouth updates of their customer information twice a month and BellSouth in turn provides the carriers updates of the entire database twice a month.[59] Carriers use the TAR Code Database when preparing customer bills. Specifically, carriers compare call records with the TAR Code Database and remove intracounty calls.[60] In those instances when a toll carrier carries an intracounty call that terminates outside the originator's local calling area, the toll carrier removes the call from the customer's bill using the TAR Code Database. Next, the LEC either provides the toll carrier a credit for access charges billed if requested to do so by the toll carrier or provides the toll carrier a bill for access charges that does not include charges for intracounty calls that terminate outside the originator's local calling area.[61] Other carriers provided the following explanation for how they comply with Section 65-21-114:

- Provides customer credits upon request
- Compares optional daily usage filed ("ODUF") information with call routing tables
- Relies on underlying carrier to filter call information

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[59] *See* Comments of BellSouth Telecommunications, Inc., Item 1, Page 2 of 2 (Sept. 30, 2003); Transcript of Proceeding, November 7, 2003, pp.48, 96 (Workshop Meeting) There were some comments indicating that some carriers may receive weekly updates from BellSouth, but BellSouth could not confirm whether this was true. BellSouth did explain that companies may receive the database via mailed tapes, a private line connection, or the Internet. *See* Transcript of Proceeding, November 7, 2003, pp. 96-99 (Workshop Meeting).

[60] *See* Transcript of Proceeding, November 7, 2003, p. 13 (Workshop Meeting); *Comments of BellSouth Telecommunications Related to Preventing Violations of T.C.A. § 65-21-114*, 2 (Nov. 17, 2003).

[61] *See* Transcript of Proceeding, November 7, 2003, pp. 13-15 (Workshop Meeting).

- Uses internally developed software that zero rates calls meeting certain mileage specifications
- Does not permit callers to complete intracounty calls that terminate outside the originator's local calling area
- Relies on LEC to not forward intracounty calls
- Manually inputs the originating NPA/NXX and the corresponding terminating NPA/NXX that are within the county-wide calling area into a billing system
- Relies on the "BellSouth Interconnection Unbundling and Resell Agreement" filed with TRA and defines the local calling area the same as BellSouth
- Compares county codes (GeoCodes)[62]
- Uses multi-county calling packages
- Charges a flat rate with no long distance charges
- Uses a third-party vendor that processes call records
- Uses two-way internal trunks
- Defines the local calling area as the county
- Uses county look-up table based on NPA, NXX and LERG information to match counties called

Many commenters provided an explanation for why they do not currently comply with Section 65-21-114. The reasons included the following:

- Telephone cooperatives are not obligated to offer intracounty calling toll-free pursuant to Section 65-21-114.
- Customer owned coin operated telephone ("COCOT") service providers that provide services to inmates are not subject to Section 65-21-114.
- Carrier provides only collect calls from inmates.
- Underlying carrier unable to provide reseller with a cost effective method for flagging intracounty records.
- Underlying carrier refused to filter calls for wholesale customers.
- Underlying carrier does not provide customer account record exchange ("CARE") records.
- Underlying carrier charges for all calls.
- Carrier's underlying carrier is a company that is prohibited by federal law from providing county-wide service in a particular county. As a reseller of that service, the responding carrier is also exempt pursuant to Tenn. Code Ann. § 65-21-114(b).
- Carrier is a long distance service provider that is not subject to county-wide calling because it would not receive remuneration for intracounty calls and; therefore, the statute would be unconstitutional.

[62] ITC^DeltaCom described the use of GeoCodes as follows: "The originating and terminating NPA/NXX is used to retrieve the GeoCode from the tax package (the GeoCode being a number in SS-CCC-LLLL format where SS=State, CCC=County, and LLLL=City/Location). County codes are then compared, and if they are the same, the call is dropped and not billed." Comments of ITC^DeltaCom (Oct. 1, 2003); *see* Transcript of Proceedings, November 7, 2003, pp. 22-23, 33, 57 (Workshop Meeting) (Time Warner Telecom of the MidSouth, LLC, KMC Telecom and ITC^DeltaCom discussing Geo Codes).

- Carrier does not have presubscribed customers and relies on customers following instructions on phone or tent cards.
- Carrier sells only pre-paid phone cards.
- Carrier does not charge a separate rate for call completion and does not base pricing on local/long distance classifications. This is a carrier that provides concierge-type services.
- Carrier does not have the facilities to distinguish calls.
- Carrier is not providing service at this time.

The commenting providers also provided insight into some of the technical, operational, and administrative difficulties faced by carriers trying to comply with Section 65-21-114. Some of the comments included the following:

- TAR Code Database difficulties:
  - Not all carriers submit numbers to the Administrator.
  - Virtual NXX numbers may not be in the Database and when associated with an Internet service provider may result in very large bills.
  - A number of ILECs do not follow a uniform, consistent practice in terms of when and how their TAR Code files are updated.
  - Data may be stale as a result of new NPA/NXXs.
  - The TAR Code Database is expensive to use.
  - Initial development may require file format changes and the purchase of proprietary software to allow transmission of data to the TAR Code Administrator.[63]
  - Internal system automation problems preclude the company from retrieving numbers from the TAR Code Database
- The burden is on IXCs rather than the LECs. The LEC bills the IXC which bills the reseller. The reseller then has to credit the customers' bills.
- Ported numbers cause problems.
- The expense of recognizing intracounty calls on an NPA/NXX basis would be a true impediment to small competitors.
- Neither the TRA nor BellSouth was able to assist with associating counties and rate centers, which is necessary when an address is not associated with a phone number.
- Customers do not understand who is responsible for complying with the law.

[63] During the workshop meeting and in its November 17, 2003 comments, BellSouth stated that it was not aware of any proprietary software that must be purchased to interface with the TAR Code Database. *See* Transcript of Proceeding, November 7, 2003, p. 100 (Workshop Meeting); Comments of BellSouth Telecommunications, Inc., 6 (Nov. 17, 2003).

B. Alternatives Discussed During the Workshop Meeting

During the workshop meeting participants discussed the alternatives for ensuring compliance with Section 65-21-114 mentioned in the pre-filed comments and offered some new ideas as well. The alternatives discussed were to use the Local Exchange Routing Guide ("LERG") or 911 databases to populate the TAR Code Database, require all carriers to populate the TAR Code Database, report complete NXX ranges to BellSouth rather than specific numbers, use GeoCodes or a similar service from a third-party vendor, use a competitively neutral party to administer the TAR Code Database, use mileage bands, provide LATA-wide extended area service ("EAS"), and encourage legislative action.

The option of using the LERG or 911 databases would not eliminate the TAR Code Database, but would provide a source for county information other than the LECs.[64] As to the LERG, carriers expressed concern over the integrity of the LERG data that would be fed into the TAR Code Database and the fact that the LERG data may be staler than current TAR Code Database data.[65] Further, companies noted that the LERG data is not sufficiently detailed in that it only provides the NXX,[66] although one carrier stated that LERG "6" may work because it contains a county field and a full ten digit NXX range.[67] As to the 911 database, there was some confusion on the detail of the data available in the 911 databases. One commenter suggested that the data only goes to the NXX level,[68] and another commented that the 911 databases contain all ten digits.[69]

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[64] *See* Transcript of Proceeding, November 7, 2003, pp. 36, 47 (Workshop Meeting)
[65] *See id.* at 36, 52.
[66] *See id.* at 38, 52.
[67] *See id.* at 50.
[68] *See id.* at 53.
[69] *See id.* at 67.

Carriers also suggested that rather than require all carriers to use the TAR Code Database to bill calls, the Authority could simply require that all carriers send updates to BellSouth for it to use in populating the database.[70] Using this alternative would permit carriers to bill using any source and would ensure that those carriers that choose to use the TAR Code Database are able to access all number information. Time Warner Telecom of the Mid-South, LLC noted that it would incur additional costs if it were to begin participating in the TAR Code Database.[71] KMC Telecom noted that it uses GeoCode data to bill its customers properly and to send updates to BellSouth, although it did mention that there is an internal cost associated with sorting the data for use in the TAR Code Database.[72]

Millington Telephone Cooperative offered a one-time entry solution at the workshop meeting. Specifically, Arthur Chin the representative from Millington Telephone Company stated:

> I'm from Millington Telephone. We're right beside Time-Warner in terms of our operation area. We're about ten miles north of them, and we serve Shelby County, Tipton County, and Mason. We have interexchanges in four counties, within the four counties, so we don't have the same type of problems that all of these other more foreign exchanges or the telephone company has.
>
> We basically put nine entries into the TAR database from 000 to 999, all 10,000 numbers goes into the same county. For Time-Warner to comply, all they have to do is actually put in one entry (901) 478-0000 to 999, and they don't have to update ever. If they are going to be operating only in the Memphis, Shelby County area. I mean, that is like permanent. We never update our database. I mean, we only do it one time from the inception of the 911because all of our customers are within -- I mean, certain exchanges are permanently in that particular county area.
>
> So I mean, I think you just submit one file, one time only if you're going to be in the Memphis area, I think from here till the end of never.[73]

[70] *See id.* at 58-59.
[71] *See id.* at 37.
[72] *See id.* at 57.
[73] *See id.* at 65.

One issue raised during the meeting in regard to this alternative that merits further consideration is how this solution would accommodate numbers that are ported into or outside of a county.[74]

Another alternative that came out of the workshop is to require carriers to use an alternative database, such as GeoCodes, provided by a third-party.[75] None of the companies that use GeoCodes expressed dissatisfaction with the codes or their vendors;[76] however, those carriers that currently use the TAR Code Database Code did express certain reservations in regard to converting to GeoCodes. Specifically, BellSouth noted that it and other carriers have substantial investments in the TAR Code Database and would incur additional costs to convert to GeoCodes.[77]

One carrier put forth the idea that a competitively neutral party should administer any common database or other solution and that party may not be BellSouth.[78] In support of its comments, the carrier noted that the use of the TAR Code Database administered by BellSouth began prior to the passage of the Telecommunications Act of 1996. The carrier suggests, that given the current competitive environment, an alternate administrator may be more appropriate.

Another alternative is to use mileage bands to rate calls. ITC^DeltaCom expressed a preference for mileage bands over other alternatives claiming that it is a "cleaner process."[79] Other carriers were not as supportive. Sprint Communications Company, L.P. commented that as toll carriers move to flat-rate service offerings they may no longer maintain mileage band information in their billing systems.[80] Sprint Communications Company, L.P. also noted that

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[74] *See id.* at 65-69.
[75] *See id.* at 37.
[76] The companies that mentioned that they used GeoCodes were Time Warner of the Mid-South, L.P., ITC^DeltaCom, and KMC Telecom. *See id.* at 22, 33, 57.
[77] *See id.* at 37-38.
[78] *See id.* at 32, 41-42.
[79] *See id.* at 73.
[80] *See id.* at 75.

using mileage bands can cause a company to credit more toll than is required because a mileage band may extend beyond the county boundaries.[81]

The participants also discussed LATA-wide EAS.[82] While this alternative sounds simple, it quickly became clear during the workshop meeting that there are certain issues related to this alternative that require further consideration. First, this alternative does not provide relief to those consumers that live in a county dissected by a LATA boundary.[83] Second, this alternative would still require that there be some centralized system with an independent, third-party administrator.[84] Third, there is not an EAS network in place to carry LATA-wide local calling.[85] Fourth, using this alternative would require price regulated companies to recover revenues currently generated for toll and access charges from another source.[86]

A final alternative expressed was for the carriers to agree on an alternative, perhaps LATA-wide EAS, and to take that agreement to the General Assembly.[87] One carrier commented that it would rather go before this agency.[88]

C. NOVEMBER 17, 2003 COMMENTS

Time Warner Telecom of the MidSouth, L.P. ("Time Warner") submitted that the TAR Code Database is not the only solution and mentioned the adoption of GeoCodes and the regulation of retail/wholesale prices as alternative solutions. Time Warner further noted that the burden to implement the solution should not be more onerous on one group of carriers than on another.[89]

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[81] *See id.* at 76-77.
[82] *See id.* at 78.
[83] *See id.* at 79.
[84] *See id.* at 78, 83.
[85] *See id.* at 85.
[86] *See id.* at 76.
[87] *See id.* at 82.
[88] *See id.*
[89] Comments of Time Warner Telecom of the MidSouth, L.P., 1 (Nov. 17, 2003).

Citizens Telecommunications Company of the Volunteer State and Citizens Telecommunications Company of Tennessee ("Citizens") asserted that in order to fully comply with Section 65-21-114 the LECs of the original and terminating number and the IXC must share a database. Changing from the TAR Code Database is neither rational nor feasible given that the majority of carriers use the TAR Code Database, which is tested, inexpensive, and an industry standard. Further, Citizens commented that it appears that if the TAR Code Database were mandated, BellSouth could develop an automated means to calculate access credits and thereby eliminate the frustration of calculating the amount of access credits due. Citizens also questioned the accuracy of the GeoCode databases used by some carriers. Lastly, Citizens noted that there appears to be a problem with calls that transit the Telecommunications Relay Service being billed despite the originating and terminating customers being in the same county and stated that it is currently discussing the problem with MCI.[90]

Sprint Communications Company, L.P. and United Telephone-Southeast, Inc. (collectively "Sprint") also commented that the TAR Code Database could meet the needs of carriers as long as all carriers participate. As to those carriers that use GeoCode databases and where the local calling area is equal to the county boundary, Sprint supports allowing one-time or as-needed updates to the TAR Code Database to minimize costs to those carriers.[91]

The Consumer Advocate and Protection Division ("CAPD") stated that the industry should recognize a standard database to ensure that calls are properly billed. Also, the CAPD stressed the importance of the Authority considering counties dissected by LATA boundaries and

[90] Comments of Citizens Telecommunications Company of the Volunteer State and Citizens Telecommunications Company of Tennessee (Nov. 17, 2003).
[91] Comments of Communications Company, L.P. and United Telephone-Southeast, Inc. (Nov. 17, 2003).

ensuring compensation to IXCs consistent with the Attorney Generals July 20, 2001 Opinion No. 01-115.[92]

According to ALLTEL Communications, Inc. ("ALLTEL"), the Authority cannot require IXCs to comply with Section 65-21-114 unless IXCs are compensated for completing such calls. Further, ALLTEL submits that even if the Authority could devise a compensation mechanism, compliance would be very expensive and likely outweigh any benefits of county-wide calling. Given these assertions, ALLTEL requests that the Authority exempt IXCs from the requirements of Section 65-21-114.[93]

BellSouth provided extensive comments in response to the Moderator's invitation. BellSouth supports the use of the TAR Code Database and asserts that, although carriers may use other methods for preparing their bills, industry-wide updating of the TAR Code Database is required to prevent gaps in the process. BellSouth expressly opposes abandonment of the TAR Code Database, but is willing to turn over the administration of the database to a third-party or the Authority.[94] BellSouth also recognizes that any solution will require companies to incur some costs, but asserts that "the fifty or so companies participating in the TAR Code solution should not have to incur additional expense to adopt another method of providing county-wide calling simply because a few service providers have elected not to participate in the [TAR Code Database]."[95] BellSouth finally concludes that there is no better alternative than the TAR Code Database for providing toll-free, county-wide calling.[96]

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[92] Comments of the Consumer Advocate and Protection Division (Nov. 17, 2003).
[93] Comments of ALLTEL Communications, Inc. (Nov. 18, 2003).
[94] Comments of BellSouth Telecommunications, Inc., 1-2, 5 (Nov. 17, 2003).
[95] *Id.* at 6.
[96] *Id.* at 7.

D. RECENT CONSUMER SERVICES CORRESPONDENCE

Recently the Consumer Services and External Affairs Division has received several responses from carriers in regard to county-wide calling complaints.[97] While county-wide calling complaints and responses thereto are not new to the Consumer Services and External Affairs Division, a brief summary of a few such responses may be helpful to this discussion.

On October 31, 2003, ACCXX Communications, LLC ("ACCXX") responded to a county-wide related complaint. In its response, ACCXX asserts that it has had to cease providing service in Obion County because of Section 65-21-114. ACCXX explains that Williams Communications bills ACCXX for intracounty calls, but ACCXX must credit the end user's account for such calls pursuant to Section 65-21-114.

On November 20, 2003, U.S. Telecom Long Distance, Inc. ("U.S. Telecom") responded to a county-wide calling complaint. In the response, U.S. Telecom stated that it explained to the complaining customer that it is charged by the underlying carrier for intracounty calls; per the Attorney General, Section 65-21-114 is unconstitutional as applied to toll-carriers; and if the consumer did not wish to incur charges for intracounty calls, the consumer should choose a different carrier. According to the response, the customer switched to BellSouth.

MountaiNet responded to a county-wide calling complaint on November 17, 2003. MountaiNet explained that it is a reseller of Qwest long distance services and that the LECs are passing intracounty calls to Qwest which is then passing the calls to MountaiNet. MountaiNet asserts that it will continue to credit consumers' bills upon requests even though Qwest has refused to credit MountaiNet's account claiming that it is not required to do so. The relief requested by MountaiNet is that the law be amended or enforced.

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[97] The three responses that will be summarized are attached hereto under **Tab 24**.

IV. CONCLUSIONS AND RECOMMENDATIONS

Over fifteen years has passed since the Commission first tried to obtain the benefits of an expanded local calling area for consumers and still we hear arguments for why carriers cannot or will not bring those benefits to consumers. The time has come to bring resolution to these issues and to provide consumers the benefits to which they are entitled by statute, yet the resolution is for the most part no clearer today than it was fifteen years ago. Absent further legislation on this subject, the Authority must do its duty and mandate the means through which carriers must comply with Section 65-21-114. Leaving the means to the industry, despite many good intentions, has not fully accomplished the goals of the Commission, the Authority, or the General Assembly.

Two issues have long been resolved and there has been no reason given to compel the Authority to reevaluate these issues. Specifically, the Commission long ago determined that in those instances where an intracounty call crosses LATA boundaries IXCs are better situated to complete the calls.[98] Many of the reasons given justifying these decisions still hold true today. Additionally, in Docket No. 93-07799, the ALJ concluded and the Commission affirmed that an intracounty call that terminates outside of the end users local calling area is not local.[99] No justification has been given for revisiting this issue. Moreover, this issue is somewhat of a red herring as the statute requires that intracounty calls be toll-free regardless of whether this agency or a provider labels that call as local or toll.

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[98] *See In re: Show Cause Proceeding Against Certified IXCs and LECs to Provide Toll-Free County-Wide Calling*, Docket No. 93-07799, *Order*, 3, 17 (Jul. 15, 1994) (attached hereto under **Tab 12**); *In re: Implementation of County Seat Calling Plans for Calls Across LATA Boundaries*, Docket No. U-88-7596, *Order*, 1-2 (Nov. 15, 1988) (attached hereto under **Tab 4**).

[99] *See In re: Show Cause Proceeding Against Certified IXCs and LECs to Provide Toll-Free County-Wide Calling*, Docket No. 93-07799, *Order*, 8 (Jul. 15, 1994) (attached hereto under **Tab 12**).

Despite decisions on these two issues, other issues related to the provision of toll-free county-wide calling for all consumers remain unresolved. As expressed earlier, all carriers have not been able to agree on a system that addresses these issues and accomplishes the goals of Section 65-21-114. Therefore, this task must be taken up by the Authority. In order to accomplish this task, it is my recommendation that the Authority convene two dockets, a rulemaking and a generic contested case.

As a starting point for the rulemaking, the Authority staff should be directed to draft a proposed rule for filing with the Secretary of State's Office.[100] The rule should establish a mechanism to be used by all carriers for the purpose of fulfilling the goals of Section 65-21-114. When deciding which mechanism the Authority should mandate, the Authority Staff should consider the movement in Tennessee toward a competitive environment and this agency's responsibility to permit such competition.[101] Further, Authority Staff should consider all alternatives raised by the workshop participants and the costs that carriers will incur to implement the mechanism. If it is determined that the best approach involves the TAR Code Database or some other central database, Authority Staff should address how the database will be populated, who will administer the database, the frequency of updates to the administrator, and the frequency of updates to carriers.

Authority Staff should also review the need to require LECs to waive access charges. If it is determined that such charges should be waived, the proposed rule should set forth the manner in which this will occur. For instance, at what point in the billing process will the access charges be identified? In addition, if it is determined that the bill and credit system currently used by several LECs to waive access charges should be adopted, the Authority Staff should

[100] *See* Tenn. Code Ann. § 4-5-203(b), (c) (1998).
[101] *See* Tenn. Code Ann. § 65-4-123 (Supp. 2003).

consider the need for establishing due dates for the submission of credit requests and the payment of credits.

The proposed rule should also identify the types of carriers that are responsible for ensuring that customers are not billed toll charges for intracounty calls. For instance, the Authority should provide a clear statement of who will be held responsible for complying with Section 65-21-114 so that carriers, such as those that provide inmate services, are fully aware of their obligations. Further, the proposed rule should address the relationship between underlying carriers and resellers.

It is also my recommendation that the Authority convene a generic contested case that will concurrently proceed with the rulemaking docket. The purpose of this generic docket is to address the constitutional application of Section 65-21-114. Toll carriers continue to assert that Section 65-21-114 as applied to them is unconstitutional because it requires that they provide a service without reasonable remuneration. Such assertions should come as no surprise given the 1995 opinion of the Court of Appeals and the 2001 opinion of the Tennessee Attorney General.[102] Despite these two opinions and the conclusory assertions of toll carriers, the issue of whether carriers actually receive reasonable remuneration has never been determined in an evidentiary proceeding.[103] Failure to address this issue in such a proceeding in the near future will only continue the current proclamation of unconstitutional application and the resulting perceived inability of the Authority to enforce Section 65-21-114.

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[102] *AT&T Communications of the South Cent. States, Inc. v. Cochran*, No. 01A01-9409-BC-00427, 1995 WL 256662, *3 (Tenn. Ct. App. May 3, 1995) (The slip opinion is stamped filed on April 26, 1995) (attached hereto under **Tab 13**); *Constitutionality of Tenn. Code Ann. § 65-21-114 Concerning Countywide Telephone Calling*, Op. Tenn. Att'y Gen. 01-115, 1 (2001) (attached hereto under **Tab 22**).

[103] The Attorney General seems to have relied on the assumptions that all long distance calls are billed as toll and there are no fees assessed in addition to toll charges. *Constitutionality of Tenn. Code Ann. § 65-21-114 Concerning Countywide Telephone Calling*, Op. Tenn. Att'y Gen. 01-115, 2 (2001) (attached hereto under **Tab 22**).

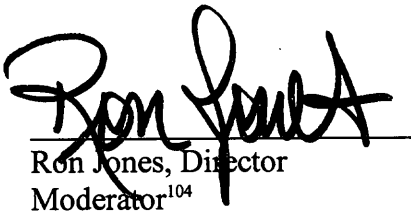
IT IS THEREFORE RECOMMENDED:

1) The Tennessee Regulatory Authority should open a rulemaking docket for the purpose of establishing a mechanism and related regulations to ensure compliance with Section 65-21-114 of Tennessee Code Annotated. Authority Staff should draft a proposed rule as described herein and publish such rule through the sending of a notice as described in Section 4-5-203(c) within sixty (60) days following the adoption of this recommendation at an Authority Conference.

2) The Tennessee Regulatory Authority should open a contested case docket for the purpose of determining whether toll carriers receive reasonable remuneration when terminating intracounty calls that terminate outside the originating caller's local calling area. In order to move this docket forward, any carrier that wishes to participate in this docket should file a petition to intervene and state, if applicable, whether the carrier receives reasonable remuneration for terminating calls that terminate outside the originating caller's local calling area within fourteen (14) days of the adoption of this recommendation at an Authority Conference. Any carrier that responds that it does not receive reasonable remuneration should provide a detailed explanation of its contention.

3) Any party that wishes to file comments on this *Report on Workshop Meeting Held November 7, 2003 and Recommendation of Moderator* shall do so by **Friday, December 19, 2003**.

4) The Moderator presents this *Report on Workshop Meeting Held November 7, 2003 and Recommendation of Moderator* to the panel for consideration at an Authority Conference to be scheduled by the publishing of a final conference agenda.



Ron Jones, Director
Moderator[104]

[104] *See In re: Citizens Telecommunications Company of the Volunteer State Tariff to Clarify Language – Tariff Number 2003592*, Docket No. 03-00410, *Order Conditionally Approving Tariff and Initiating "Workshop" on Preventing Violations of Tenn. Code Ann. § 65-21-114*, 3 (Sept. 5, 2003) (appointing Director Ron Jones as the moderator).

TAB 1

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION

January 6, 1988 Nashville, Tennessee

IN RE: COMMISSION INVESTIGATION OF THE EARNINGS LEVEL OF THE SOUTH CENTRAL BELL TELEPHONE COMPANY

DOCKET NO. U-88-7547

O R D E R

This matter is before the Commission on its own motion pursuant to its statutory obligation to maintain continuing surveillance of the earnings of regulated utilities under our jurisdiction. See T.C.A. 65-3-104, 65-4-104, and 65-5-201; Commission Investigation of the Earnings Level of South Central Bell Telephone Company, Docket U-86-7443, August 27, 1986.

Based on the findings and recommendations of the agency Staff and discussions with representatives of South Central Bell, the Commission directs Bell immediately to file revised tariffs, effective upon the date of this Order, to reduce the Company's annual intrastate revenues by $35.4 million.1/ We conclude that such a reduction is necessary

1/ To the extent the Company and Staff cannot agree on the revenue impact of the tariff reductions, we direct the Staff to monitor that impact and to make appropriate adjustments, if necessary, to insure that the full amount of the reduction is accomplished within one year from the date of this Order.

to allow the Company an opportunity to earn a just and reasonable return in light of present economic circumstances.

These revenue reductions shall be used, in part, to reduce toll rates and zone charges and generally to extend local calling areas across the state. The Commission intends to continue to study these and other programs which will provide counties that are adjacent to the major metropolitan areas a uniform, comprehensive program which will permit the residents of those counties to call the metropolitan areas at no additional cost or at a reduced rate.2/

The revenue reduction is the result of negotiations between the Commission and the Company; this procedure should not be viewed as a rate hearing and does not change the rate-of-return of 12.18% prescribed in Bell's last rate case. Furthermore, the result reached here does not affect the right of the Company to seek rate relief or the right of the Commission to initiate further rate reductions in light of future circumstances.

2/ To the extent these tariff changes involve the offering of Optional Calling Plans, measured service, and other changes in the Company's service offerings, Bell is directed to take reasonable steps to advertise and promote these new offerings.

It is so Ordered.

CHAIRMAN

COMMISSIONER

COMMISSIONER

ATTEST:

EXECUTIVE DIRECTOR

TAB 2

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION
June 20, 1990 NASHVILLE, TENNESSEE

IN RE: METRO AREA CALLING PLAN FOR MILLINGTON TELEPHONE COMPANY, INC.

CASE NO. 90-04321

ORDER

This matter is before the Tennessee Public Service Commission on its own motion to implement a Metro Area Calling (MAC) Plan for Millington Telephone Company's Shelby, Tipton and Fayette County customers.

The Commission directed the Company and the Commission Staff to develop a proposal for such implementation.

The Company and the Staff have determined that the cost of implementing MAC for Millington Telephone Company is approximately $755,000. South Central Bell has agreed to flow $150,000 in additional extended area service (EAS) settlements to Millington Telephone Company effective July 1, 1990. This additional EAS amount is for one year only, expiring June 30, 1991. The proposal also indicated that additional revenues could be generated through service rate increases in the amount of $360,000, resulting in local rate increases for residential and business customers effective October 1, 1990 as set forth in Staff Exhibit 1.

Millington Telephone Company agreed to absorb the remaining costs of the MAC Plan through existing earnings.[1]

1/ Additional revenues of $207,000 could be potentially generated through increases in service connection and pay phone charges. The Company could file these changes and receive expedited approval if adequate support for the increases is provided.

The proposal indicated that the earliest date that MAC could be implemented is October 1, 1990, because South Central Bell will be unable to provide the trunking capability necessary to interface with Millington prior to that date.

The Commission considered this matter at its regularly scheduled Commission Conference held on May 23, 1990. It was concluded after careful consideration of the proposal presented by the Company and the Staff that it is fair and reasonable; and that Metro Area Calling is in the public interest and should be implemented for Millington Telephone Company's Shelby, Tipton and Fayette County customers. The Commission further concluded that the proposed rate increase should be approved effective October 1, 1990 and that if any affected person/entity is aggrieved by this decision, they shall have 30 days from the date of this Order to request a hearing before the Commission.

IT IS THEREFORE ORDERED:

1. That Millington Telephone Company shall provide Metro Area Calling to its Shelby, Tipton and Fayette County customers beginning October 1, 1990.

2. That the proposal presented by the Staff and the Company regarding the implementation of MAC is hereby approved.

3. That Millington Telephone Company, Inc. shall file tariffs effective October 1, 1990 to produce $360,000 in additional revenue pursuant to the rate design set forth in Staff Exhibit 1 which is attached to this Order.

4. That any person/entity aggrieved by the Commission's decision in this matter may file a petition in the office of the Executive Director within thirty (30) days from and after the date of this Order, requesting a hearing before the Commission.

CHAIRMAN

COMMISSIONER

COMMISSIONER

ATTEST

EXECUTIVE DIRECTOR

STAFF EXHIBIT I

EXCHANGE	CURRENT RATE	RATE INCREASE	NEW RATE
MILLINGTON			
R1	$ 13.15	$	$ 13.15
B1	35.00	4.70	39.70
PBX	61.25	8.25	69.50
SHELBY FOREST			
R1	13.15		13.15
B1	35.00	4.70	39.70
ROSEMARK			
R1	13.15		13.15
B1	35.00	4.70	39.70
STANTON			
R1	10.15		10.15
B1	22.80		22.80
MASON			
R1	10.15	3.00	13.15
B1	22.80	16.90	39.70
DRUMMONDS			
R1	10.15	3.00	13.15
B1	22.80	16.90	39.70
MUNFORD			
R1	10.15	3.00	13.15
B1	22.80	16.90	39.70

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION

July 17, 1990 Nashville, Tennessee

IN RE: PETITION OF CONCORD TELEPHONE EXCHANGE, INC. TO CHANGE AND INCREASE CERTAIN INTRASTATE RATES AND CHARGES SO AS TO PERMIT IT TO EARN A FAIR AND ADEQUATE RATE OF RETURN ON ITS PROPERTY USED AND USEFUL IN FURNISHING TELEPHONE SERVICE TO ITS CUSTOMERS IN TENNESSEE (IMPLEMENTATION OF METROPOLITAN AREA CALLING PLAN FOR THE KNOXVILLE AREA)

DOCKET NO. 89-11700

O R D E R

This matter is before the Tennessee Public Service Commission (Commission) upon the filing of tariffs by Concord Telephone Exchange, Inc. (Company) to establish increased rates that will enable it to participate in the Metropolitan Area Calling Plan (MAC) with South Central Bell (SCB) in Knoxville, Tennessee. MAC was originally scheduled to become effective on January 1, 1991 but the effective date has been changed to August 1, 1990.

The matter was heard on July 17, 1990 in Nashville, Tennessee, before the Commission, at which time the following appearances were entered:

APPEARANCES:

T. G. PAPPAS, BASS, BERRY & SIMS, 2700 First American Center, Nashville, Tennessee 37238, appearing on behalf of Concord Telephone Exchange, Inc.

D. BILLYE SANDERS, ASSISTANT GENERAL COUNSEL, Tennessee Public Service Commission, 460 James Robertson Parkway, Nashville, Tennessee 37243-0505, appearing on behalf of the Commission Staff.

PRELIMINARY MATTERS

1. Counsel for the Company presented a copy of his letter dated July 16, 1990 to Mr. Paul Allen, Executive Director, setting out the Company's compliance with Rule 1220-4-1-.05 of the Rules of the Commission pertaining to the publication and posting of notice as to the time, place and purpose of this hearing. The letter and attached proof of publication were filed on July 17, 1990 and a copy was received and identified as Exhibit 1.

2. The Company presented a copy of the tariffs filed by the Company with the Director of the Utility Rate Division on June 21, 1990 with an issue date of June 21, 1990 and an effective date of August 1, 1990. A letter from counsel for the Company to Mr. Archie Hickerson, Deputy Director of the Accounting Division identified the tariffs, their issue date, their effective date and the effect of said tariffs on both business and residential service. The letter also transmitted copies of the tariffs for the Halls Crossroads Exchange of Tennessee Telephone Company, which tariffs also implement MAC service for the customers of that exchange but do not involve an increase in rates. A copy of the letter of June 21, 1990 and the tariffs were received and identified as Exhibit 2.

3. The filing of the tariffs and the implementation of MAC are all pursuant to the Commission's Order of September 6, 1989 in the Consolidated Docket Nos. 89-11698, 89-11699 and 89-11700, in which among other items the Commission directed the Staff and the Company to review the costs pertaining to the implementation of MAC. This has now been done and the Company and Staff offered a memorandum dated May 24, 1990 from the Commission's Director of Accounting, Mr. Whitfield Burcham, to the Commissioners setting out the fact that an agreement had been reached as to the necessity to increase customer rates and the amount of the increase that had been agreed upon as being necessary in order for the Company to recover its cost of implementing MAC and to recover the lost toll revenues. A copy of the memorandum was made Exhibit 3.

4. The Commission was asked to and did judicially notice its order of September 6, 1989 in Consolidated Docket Nos. 89-11698, 89-11699 and 89-11700 which Order provided for the implementation of MAC at the Company's Concord exchange and Tennessee Telephone Company's Halls Crossroads exchange in the Knoxville area.

5. The Company offered Mr. Michael E. Hicks, Region Customer Service Manager of Telephone and Data Systems, Inc. (TDS) - Tennessee Region, as a witness at the hearing to answer any questions that the Commission or any public witnesses might desire to ask. The Staff had Mr. Dan McCormac present for the same purpose. There were no other witnesses present at the

hearing nor were there any intervenors or protestors to the implementation of the MAC plan at the hearing.

FINDINGS AND CONCLUSIONS

It is found and concluded from all the exhibits, the Order judicially noticed, and the representation of counsel of the Company and the Staff in this case that:

1. Proper notice has been given by publication and posting as provided by the Rules of this Commission;

2. The agreement reached by the Company and the Staff is fair and just and is in compliance with the Commission's directive in its order of September 6, 1989 in Docket No. 89-11700. Counsel for the Company and the Staff have represented that judicial review of the Commission's Order as provided in T.C.A. § 4-5-322 is waived in this matter;

3. There were no protestors or intervenors in this matter; and

4. The tariffs as filed setting out the the prices to be charged customers and the benefits to be received are: (a) in the best interests of the telephone customers of the Company; (b) fair and reasonable; (c) lower than the prices paid by the SCB Knoxville customers receiving the same or similar services; and, (d) therefore should be approved for the Concord exchange.

IT IS THEREFORE ORDERED:

1. That Concord Telephone Exchange, Inc.'s proposed tariffs as filed with the Accounting Division of the Commission on June 21, 1990 to be effective on August 1, 1990 be and the

same are hereby approved to become effective on August 1, 1990. Said Company tariffs are identified as follows:

CONCORD TELEPHONE EXCHANGE, INC.

PART III
SEVENTH REVISED SHEET NO. 5
CANCELS SIXTH REVISED SHEET NO. 5

2. That the rates and charges set out in the above identified filed tariffs for the provision of MAC service to the Concord Telephone Exchange, Inc. customers shall become effective for service provided on and after August 1, 1990. The classes of service, the current rate and the new rate are as follows:

Customers	Current Rate	New Rate
Business one-party	$20.20	$28.40
Residence one-party	7.55	10.90
Rotary Line - Business	27.00	42.60
Rotary Line - Residence	10.15	16.35
Semi-Public Coin Station	20.20	28.40
Business Trunk	35.90	49.70

3. The foregoing Order is final upon entry, the parties having waived all rights of appeal and review.

CHAIRMAN

COMMISSIONER

COMMISSIONER

EXECUTIVE DIRECTOR

APPROVED FOR ENTRY.

T. G. PAPPAS
BASS, BERRY & SIMS
2700 First American Center
Nashville, Tennessee 37238
Telephone: 615/742-6254

COUNSEL FOR CONCORD TELEPHONE EXCHANGE, INC.

D. BILLYE SANDERS
ASSISTANT GENERAL COUNSEL
Tennessee Public Service Commission
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

COUNSEL FOR THE COMMISSION STAFF.

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION
October 17, 1988 Nashville, Tennessee

IN RE: INVESTIGATION OF EARNINGS OF SOUTH CENTRAL BELL TELEPHONE COMPANY

DOCKET NO. U-88-7594

ORDER

This proceeding is brought by the Commission on its own motion, pursuant to T.C.A. § 65-2-106, to reduce the earnings of South Central Bell Telephone Company to a just and reasonable level. The Commission's authority to set just and reasonable rates is established by T.C.A. §§ 65-4-104 and 65-5-201. The agency maintains continual surveillance of the earnings of the utilities under its jurisdiction. See, e.g., U-88-7547, January 5, 1988 (Bell); U-86-7443, August 27, 1986 (Bell); U-88-7577, July 15, 1988 (United Inter-Mountain); U-87-7532, May 31, 1988 (Tellico Telephone); U-88-7568, May 31, 1988 (Tennessee Telephone).

Based on the findings and recommendations of the Commission Staff and its own investigation, the Commission directs South Central Bell Telephone Company to file revised tariffs to implement the following changes in rates and telephone service.

I. Metro Calling Plan:

The local calling areas around each of the State's four major cities shall be expanded to include the entire county where the city is located and all adjacent counties. 1/ (For example, all residential and business

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1/ If a person lives in a county affected by this plan but is served by a telephone central office in a county not affected by this plan, the person shall be included in the contiguous county calling area. For example, a Cheatham County resident who is served by a central office located in Dickson County shall be provided toll-free calling to Davidson County.

subscribers of South Central Bell located in Davidson County will be able to call toll-free to any Bell customer in Davidson, Williamson, Rutherford, Wilson, Sumner, Robertson, and Cheatham counties. All Bell customers in those adjacent counties will be able to call toll-free to Davidson County.) Toll calls from one adjacent county to another (i.e. Wilson to Sumner) will not be affected by this plan. The plan also does not affect customers of other telephone companies.

Metro Calling shall be implemented according to the following schedule:

Memphis - January 31, 1990

Chattanooga - February 28, 1990 [2/]

Knoxville - March 31, 1990

Nashville - July 31, 1990

When the plan is implemented, basic telephone rates in the adjacent counties shall be increased to equal the basic rates for business and residential service charged in the metropolitan area. At the same time, monthly charges for all customers affected by this plan shall be reduced by $1 per month. [3/]

2/ Because of engineering changes that must be completed prior to implementation of Metro Calling, Jasper, Whitwell, and South Pittsburgh will be included in the plan no later than October 14, 1990. Spring City and Decatur will be included no later than December 2, 1990. Rates in those communities will not change until the plan is implemented.

3/ The net result of those changes will be that residential rates in Memphis and Nashville and the adjacent counties will be $12.15. Rates in Knoxville and Chattanooga and the adjacent counties will be $11.85.

It is anticipated by the Commission that this plan will stimulate business and commerce in the affected areas, and consequently, will be in the public interest. However, the Company and the Commission recognize the uncertainty of the long term impact of the implementation of this calling plan. This uncertainty is magnified by the changing nature and structure of the industry, increasing competition, technological changes and new services to be offered in the future. It is recognized that these changes may require different pricing philosophies in the future. Therefore, this calling plan will be jointly monitored by the Commission and the Company and changes may be made.

II. Rural Rate Reduction

Effective January 1, 1989, monthly business and residential charges for customers of South Central Bell not affected by the Metro Calling Plan shall be reduced by $2.50 per month. [4/]

III. Long Distance Rates

Effective January 1, 1989, intrastate long distance rates for customers shall be reduced by approximately 12%. [5/] The reductions shall be proportionally larger for calls in the short mileage bands.

The net result of these changes in rates and service will be to reduce the Company's annual revenue requirement by $103.6 million.[6/] The Commission finds that such a reduction is necessary to reduce the Company's earnings and rate of return to a just and reasonable level. See Docket U-88-7547, January 6, 1988, "Investigation of the Earnings Level of the South Central Bell Telephone Company."

4/ Residential rates in these areas will range from $7.55 to $9.05 per month after these reductions are made.

5/ Bell will reduce its own toll rates by $20 million and reduce the common carrier line rate paid by intrastate toll carriers by $8 million. We anticipate that AT&T will file revised rates to pass through to its intrastate customers the savings generated by the reduction in access charges.

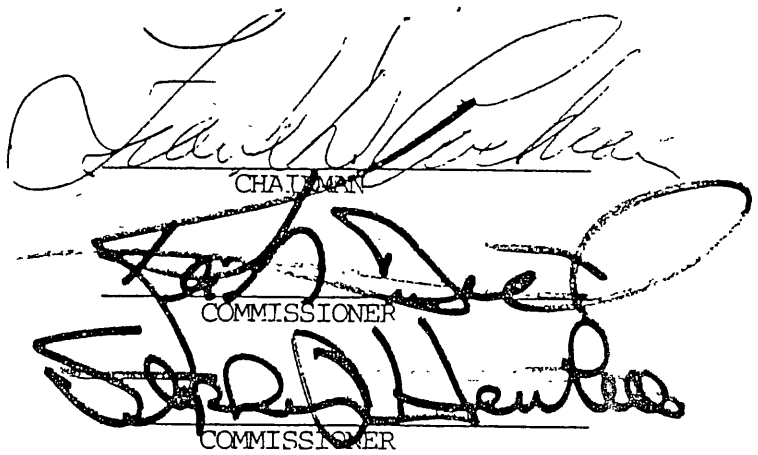
6/ The Commission estimates the cost of these rate and service changes to be (in millions):

Metro Calling Plan	$ 45.6
$1 reduction	$ 16.4
$2.50 reduction	$ 13.6
Bell toll reductions	$ 20.0
Access charge reduction	$ 8.0
Total	$103.6

The Company is directed to file tariffs by December 1, 1988, implementing these changes. The Staff and Company shall make appropriate accounting adjustments to insure that the Company has a reasonable opportunity to earn its targeted return in 1989. 7/

Finally, the Commission confirms its previous agreement with representatives of the telephone industry in Tennessee to convene a joint task force composed of industry and Commission representatives to explore alternative forms of regulation.

It is so ordered.



CHAIRMAN

COMMISSIONER

COMMISSIONER

ATTEST

EXECUTIVE DIRECTOR

7/ The Commission will issue another order, if necessary, describing these adjustments.

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION
March 30, 1990 NASHVILLE, TENNESSEE

IN RE: TARIFF FILING BY ALLTEL TENNESSEE, INC. TO INCREASE RATES TO ENABLE THE POWELL AND CLAXTON EXCHANGES TO BECOME FULL PARTICIPANTS IN THE KNOXVILLE METROPOLITAN AREA CALLING ON MARCH 31, 1990

DOCKET NO. 90-02094

ORDER

This matter is before the Tennessee Public Service Commission upon the filing of tariffs by ALLTEL Tennessee, Inc. to establish increased rates that will enable it to participate in the Metropolitan Area Calling Plan (MAC) of South Central Bell (SCB) at Knoxville, Tennessee. MAC is scheduled to become effective in Knoxville on April 1, 1990.

This matter was set for hearing and heard on March 26, 1990, before Ralph B. Christian, II, Administrative Judge. On March 28, 1990 the Administrative Judge issued his Initial Order recommending that the tariff filings as agreed upon between the Company and the Staff be approved to become effective on April 1, 1990.

Counsel for the Company and the Staff have represented and as indicated by their signatures at the end of this order they have agreed to waive their right of formal review of this Initial Order by the Commission at a regular scheduled conference as provided for in T.C.A. Section 4-5-315. They have further agreed that the Commission may adopt this Initial Order without a further hearing and that judicial review of the Commission's final order as provided in T.C.A. Section 4-5-322 is also waived in this matter.

IT IS THEREFORE ORDERED:

1. That ALLTEL Tennessee, Inc.'s proposed tariffs as filed with the Executive Director by letter dated March 20, 1990, Exhibit 2 in this matter and as agreed upon between the Company and the Staff be and the same are

hereby approved to become effective on April 1, 1990. Said Company tariffs are identified as follows:

PART II
7th Revised SHEET 10

PART III
7TH Revised SHEET 5A
5th Revised SHEET 5C
4th Revised SHEET 5D

Said tariffs were all issued as of February 28, 1990 to become effective April 1, 1990.

2. That the rates and charges set out in the above identified filed tariffs for the provision of MAC service to the Powell and Claxton Exchanges of ALLTEL Tennessee, Inc. shall become effective for service provided on and after April 1, 1990.

3. That the Company will provide the Extended Area Service between Oliver Springs and Claxton, as set out in the memorandum of agreement dated March 22, 1990, within ninety (90) days, if possible, if the cost does not exceed $50,000. If the cost is greater than $50,000 the feasibility of said service will be considered at the next earnings review of the Company.

4. The foregoing rates shall become effective upon entry of a final order in this matter by the Tennessee Public Service Commission, the parties having waived all rights of appeal and review.

CHAIRMAN

COMMISSIONER

COMMISSIONER

ATTEST

EXECUTIVE DIRECTOR

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION
January 16, 1990 Nashville, Tennessee

IN RE: INVESTIGATION OF THE EARNINGS LEVEL OF UNITED TELEPHONE COMPANY

UNITED MAC & CWC

DOCKET NO. 89-15200

ORDER

This matter is before the Commission on its ov its statutory obligation to maintain continuing surveillance of the earnings of regulated utilities under the agency's jurisdiction. See T.C.A. Sections 65-3-104, 65-4-104, and 65-5-210.

Based on findings and recommendations of the Commission Staff and discussions with representatives of United Telephone, the Company has agreed to implement Metro Area Calling and County Wide Calling. 1/ The Company and Staff have agreed to begin amortizing an extraordinary retirement of Central Office Assets - Digital Electronic Switching Equipment (Part 32 Account 2212) on January 1, 1990. The $158,000 of retired plant will be amortized over a ten year period.

The Staff and Company anticipate that the effect of these changes will reduce the Company's earnings over the next twenty-four months to a just and reasonable level based on the Company's current capital structure and the return approved by the Commission in Docket 89-15200.

The Commission considered this agreement between the Staff and the Company at a regularly scheduled Commission conference on January 9, 1990. In light of the joint recommendations of the parties, the Commission finds that the agreement will result in the Company's earning a just and reasonable return and that the implementation of Metro Area

1/ The Company will implement Metro Area Calling in the College Grove and Nolensville exchanges and will implement County Wide Calling in all exchanges effective January 1, 1991. See the Attachment for specific information relating to the implementation of Metro Area Calling and County Wide Calling.

Calling and County Wide Calling are in the best interests of the Company's customers.

IT IS THEREFORE ORDERED:

1. That the settlement agreement between the Staff and the Company is hereby approved;

2. That any party aggrieved with the Commission's decision in this matter may file a Petition for Reconsideration with the Commission within ten (10) days from and after the date of this Order.

3. That any party aggrieved with the Commission's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeal, Middle Section, within sixty (60) days from and after the date of this Order.

CHAIRMAN

COMMISSIONER

COMMISSIONER

ATTEST

EXECUTIVE DIRECTOR

ATTACHMENT

With the implementation of Metro Area Calling, customers served by the College Grove and Nolensville exhanges will be provided with toll free calling to Davidson County, and customers served by the Nolensville exchange that reside in Davidson County will be provided with toll free calling to all counties surrounding Davidson County.

The following table exhibits the exchanges and counties effected by the implementation of County Wide Calling.

EXCHANGE	TOLL FREE CALLING AREA
Belfast - 276	Marshall County
Chapel Hill - 364	Marshall County
College Grove - 368	Williamson County
Estill Springs - 649	Franklin County
Flat Creek - 695	Bedford County
Fosterville - 233/437	Bedford and Rutherford County
Nolensville - 776	Davidson and Williamson County
Unionville - 294	Bedford County

TAB 3

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION

October 5, 1988 Nashville, Tennessee

IN RE: COUNTY SEAT CALLING FOR ARDMORE, CLAIBORNE, CROCKETT, GTE SOUTH, OOLTEWAH-COLLEGEDALE, PEOPLES, AND WEST TENNESSEE TELEPHONE COMPANIES

DOCKET NO. U-88-7588

ORDER

This matter is before the Tennessee Public Service Commission upon its own motion to implement county seat calling for the following independent telephone companies: Ardmore, Claiborne, Crockett, GTE South, Ooltewah-Collegedale, Peoples, and West Tennessee.

The annual revenue requirements necessary to implement county seat calling have been quantified by the Commission Staff and each of the seven independent telephone companies identified above. Each of the companies has agreed to implement county seat calling without a hearing and without increasing rates to offset their additional revenue requirement. The Staff and the companies have agreed that the revenue requirement of county seat calling should be recognized in pending or future earning reviews before the Commission.

This matter was considered by the Commission at the Commission Conference held on September 20, 1988. The Commission concludes that county seat calling for the seven independent telephone companies identified herein as agreed

by each company and the Commission Staff is in the public interest and should be approved. Furthermore, each company shall file amended tariffs adopting county seat calling within their service areas to become effective November 1, 1988.

IT IS THEREFORE ORDERED:

1. That Ardmore, Claiborne, Crockett, GTE South, Ooltewah-Collegedale, Peoples, and West Tennessee Telephone Companies provide county seat calling within their respective service areas.

2. That each of these seven independent telephone companies file amended tariffs adopting county seat calling within their respective service area to become effective on or before November 1, 1988.

3. That any party aggrieved with the Commission's decision in this matter may file a Petition for Reconsideration with the Commission within ten (10) days from and after the date of this Order.

4. That any party aggrieved with the Commission's decision in this matter has the right of judicial review by filing a Petition for Review in the

Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.

CHAIRMAN

COMMISSIONER

ATTEST:

EXECUTIVE DIRECTOR

COMMISSIONER

TAB 4

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION

November 15, 1988 Nashville, Tennessee

IN RE: IMPLEMENTATION OF COUNTY SEAT CALLING PLANS FOR CALLS ACROSS LATA BOUNDARIES

DOCKET NO. U-88-7596

ORDER

This matter is before the Commission on its own Motion, pursuant to its previous Order of January 6, 1988, in Docket No. U-88-7547, involving South Central Bell Telephone Company.

In order to implement the January 6, 1988, Order in Docket No. U-88-7547, South Central Bell filed tariffs effective July 1, 1988, for its County Seat Calling Plan (General Subscriber Services Tariff, A20). This Plan cannot be implemented, as contemplated by the Commission, in all counties in Tennessee by South Central Bell, however, since calls from some exchanges must cross Local Access and Transport Area (LATA) boundaries to reach the county seat exchange. Such calls must be made over the facilities of Inter-Exchange Carriers under the requirements of the AT&T consent decree (552 F. Supp. 131 (D.C.C. 1982)). The Inter-Exchange Carriers of Tennessee are requested to transmit

*AT&T Communications of the South Central States, Inc., has agreed to this procedure.

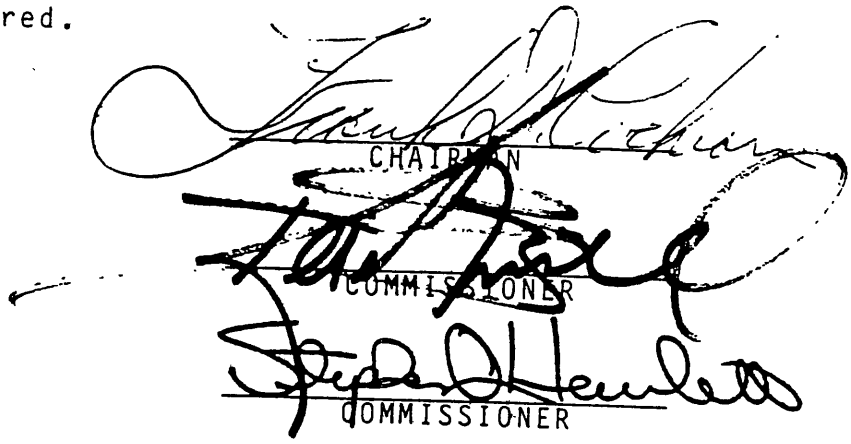
such calls without charge to assist in implementing the County Seat Calling Plan, provided that the local exchange carriers do not bill the Inter-Exchange Carriers for access charges.

South Central Bell and other local exchange carriers in Tennessee provide access to the local exchange network for Inter-Exchange Carriers pursuant to Access Services Tariffs for the State of Tennessee. In order to fully implement County Seat Calling in Tennessee, the Commission will permit any local exchange carrier to waive, or amend its tariffs to waive, its Tennessee Access Services Tariff charges on Inter-LATA calls carried by any Inter-Exchange Carrier within the State of Tennessee, when such carriers are not billing their customers for such calls as a part of a County Seat Calling Plan.

One cross-LATA county seat situation, involving Meigs County and Decatur, could best be remedied by a change in Decatur's LATA to conform to the exchange boundary. At divestiture, the toll traffic from Decatur was homed on Knoxville, and for this reason, the LATA boundary was established as it now exists. However, community of interest considerations and proximity of Decatur to the Chattanooga metropolitan area indicate that Decatur should in fact be part of the Chattanooga LATA. This would also enhance County Seat Calling for Meigs County since all of

the exchange area would be in the same LATA with Decatur, the county seat.

It is so Ordered.



ATTEST:

EXECUTIVE DIRECTOR

TAB 5

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION
Nasvhille, Tennessee
October 20, 1989

IN RE: IMPLEMENTATION OF COUNTY SEAT CALLING PLANS FOR CALLS ACROSS LATA BOUNDARIES
DOCKET NO. U-88-7596

ORDER

This matter is before the Commission upon its own Motion to close the above-mentioned docket.

This Order is the final step in the implementation of the County Seat Calling Plan ordered in Docket No. U-88-7547, effective July 1, 1988. South Central Bell was unable to completely implement this plan in all Tennessee counties because some exchanges must cross Local Access and Transport Area (LATA) boundaries to reach the county seat exchange.

The Commission in the instant docket issued an Order on November 15, 1988, providing for the transmission of these Inter-LATA calls by the Inter-Exchange Carriers and for adjustments in the compensation due both inter-exchange carriers and local exchange companies for this transmission in order to fully effectuate the Commission's County Seat Calling Plan.

In this Order, the Commission requested that South Central Bell petition the Federal District Court to change the LATA established for the town of Decatur, Tennessee. This community had originally been served out of Knoxville, but community of interest considerations as well as proximity to Chattanooga indicated that Decatur should be part of the Chattanooga LATA.

South Central Bell then petitioned the United States District Court to obtain the requested change in LATA. By

federal court order dated August 1, 1989, in Civil Action No. 82-0192-HHG, the Decatur, Tennessee exchange became associated with the Chattanooga LATA to be effective upon the completion of the necessary facility changes required.

This change in LATA having been accomplished as the Commission requested, this docket is herewith closed.

IT IS, THEREFORE, ORDERED:

1. That this docket shall be closed.

2. That any party aggrieved with the Commission's decision in this matter may file a Petition for Reconsideration with the Commission within ten (10) days from and after the date of this Order.

3. That any party aggrieved with the Commission's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within thirty (30) days from and after the date of this Order.

CHAIRMAN

COMMISSIONER

COMMISSIONER

ATTEST:

EXECUTIVE DIRECTOR

TAB 6

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION

November 17, 1988 Nashville, Tennessee

IN RE: COUNTY SEAT CALLING FOR ALLTEL TELEPHONE COMPANY

DOCKET NO. U-88-7592

ORDER

In an Order issued in this docket on October 13, 1988, the Commission directed Alltel Telephone Company to investigate and report the cost of implementing county-seat calling in parts of Grainger County, Tennessee.

Pursuant to the Commission's Order, Alltel and South Central Bell have reached the following agreement to provide toll free calling in Grainger County:

1. Effective January 30, 1989, Alltel will provide toll free calling between its three exchanges of Rutledge, Tate Springs, and Washburn and South Central Bell's Grainger County customers served out of the Mascot and Morristown exchanges.

2. Effective January 30, 1989, South Central Bell will provide toll free calling for its Grainger County customers served out of the Mascot and Morristown exchanges to the Alltel customers in the Rutledge, Tate Springs and Washburn exchanges.

3. Calls between the South Central Bell exchanges of Mascot and Morristown within Grainger County will continue to be toll calls.

The Commission approves this agreement which will effectuate the Commission's goal of providing toll free, county-seat calling for all customers under the agency's jurisdiction.

The Commission also directs that the charge for making a local call on a coin-operated telephone in the Alltel service area be increased to $.25, the same rate charged by South Central Bell and most local telephone companies in Tennessee. The company shall file tariffs to implement this increase, effective January 1, 1989.

Any party aggrieved with the Commission's decision in this matter may file a Petition for Reconsideration with the Commission within ten (10) days from and after the date of this Order.

Any party aggrieved with the Commission's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.

It is so Ordered.

CHAIRMAN

COMMISSIONER

COMMISSIONER

ATTEST:

EXECUTIVE DIRECTOR

TAB 7

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION

Nashville, Tennessee
August 20, 1993

IN RE: EARNINGS INVESTIGATION OF SOUTH CENTRAL BELL TELEPHONE COMPANY, 1993-1995
DOCKET NO. 92-13527

PETITION OF BELLSOUTH TELECOMMUNICATIONS, INC., D/B/A SOUTH CENTRAL BELL TELEPHONE COMPANY FOR CONDITIONAL ELECTION OF REGULATION PURSUANT TO CHAPTER 1220-4-2-.5 OF THE TENNESSEE PUBLIC SERVICE COMMISSION'S RULES AND REGULATIONS
DOCKET NO. 93-00311

ORDER

This matter is before the Commission pursuant to the Staff investigation concluding that South Central Bell Telephone Company should reduce its earnings[1] during the 1993-1995 period. See T.C.A. § 65-2-106 and § 65-5-201.

The investigation began in early 1992 and over the succeeding months the Company submitted voluminous information concerning its operations in response to Staff Requests and on its own initiative. The parties in these cases have served data requests and received responses to those requests. This information, and all of the evidence presented at the hearings on April 6 and 7, 1993, comprise the record before this agency. Based on that record, the Commission adopts the Findings of Fact and Conclusions of Law set forth below:

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[1] See attached Appendix A itemizing the differences between the Staff's presentation and the Company's projections of earnings during the forecast period.

I. RATE OF RETURN/CAPITAL STRUCTURE

The Staff recommends 12 percent as a reasonable return on equity. The Staff further recommends an overall return on rate base of 10.26 percent. This return is based on the Staff's proposal for a double-leverage capital structure.

The Company asked for a continuation of its 11.6 percent overall return granted in 1990. This implies an approximate 14 percent return on equity. The Company recommends use of its actual capital structure.

a. Capital Structure

Until the first day of the hearing (April 6), capital structure was not a contested issue in this case. The Staff and the Company agreed that the Company's actual capital structure (33.41% long term debt, 5.11% short term debt, and 61.48% common equity) was appropriate for ratemaking purposes. This agreement was supported by Staff witness Klein in his direct and rebuttal testimony and by several facts: first, that the Company's actual capital structure remained very stable over the course of the initial regulatory reform plan; second, the actual capital structure reflects the realities of the Company's financial situation; and finally, the recent regulatory practice of this Commission has been to use the Company's actual capital structure.

Dr. Klein in his surrebuttal testimony on April 6 recommended the use of a "double leverage" capital structure. This recommendation changed the earlier Staff position that had accepted the Company's capital structure.

The source of the revised Staff recommendation is the guarantee by BellSouth (the parent of the Company) of debt which supports an Employee Stock Ownership Plan. The Staff recommends recognition of this debt in the Company's capital structure. The Company opposes this recommendation, citing Dr. Klein's original reasoning and additionally presenting evidence that the Staff recommendation would unnecessarily penalize the Company for the tax savings associated with the debt, which is already accounted for through the Company's compensation expense accounting.

The Commission has used double-leverage capital structures in setting rates for other utilities, and such findings will continue to be made where appropriate. In light of the specific evidence in this case relating to this Company's capital structure, however, we find that the Company's actual capital structure is appropriate for the 1993-95 plan for the Company.

b. Authorized Rate of Return Range

Testimony on the required return on equity was presented by a Staff witness, Dr. Klein, and a witness presented by the Company, Professor Vander Weide. These witnesses disagreed on at least three points: (1) Dr. Klein's use of the annual Discounted Cash Flow (DCF) model as opposed to the quarterly DCF model used by Professor Vander Weide; (2) Dr. Klein's use of short term U. S. Treasury bills for the risk premium analyses versus Professor Vander Weide's use of long term corporate bonds; and (3) the selection of firms for the analysis of required return on equity.

In addition to witnesses Klein and Vander Weide, the Staff and Company presented differing views of the competitive risk

that will be faced by the Company over the next three years. The Staff contends that Company financials indicate that the risk facing the Company from competition is minimal over the next three years, while the Company contends that the risk is clearly greater. The Company asserts that the threat of local competition from co-locators, cable television companies, and wireless companies has contributed to increase the Company's risk, and consequently its required return.

In considering all of the evidence, the Commission finds that a range of return on rate base of 10.65% to 11.85%, with a mid-point of 11.25%, is just and reasonable.

II. USE OF THE FORECAST

The regulatory reform rule requires that we project Bell's earnings over a forecast test period of two to four years. Both Bell and the Staff have provided us with forecasts of each of the next three years.

The Staff and Bell have different opinions as to how the forecast should be used. The Staff proposes that we use the forecast as we did in 1990, when we took each of the three years and ordered in advance three separate rate adjustments, after which we allowed the sharing matrix to make any other adjustments.

The only sharing which occurred was "negative" as Bell was unable to achieve the targeted rate of return in any of the three years of the plan, and fell below the authorized range of 11% to 12.2% in the latter two years.

Bell's proposal in this case is to make a different use of the forecast than that made in 1990. Bell proposes that only the first year of the forecast be used to set rates. If the first year forecasted rate of return is outside the rate of return range, rates will be adjusted to the nearest end of the range. If the forecasted rate of return does not fall outside of the range, no rate adjustment will be made. After the initial rate adjustment, the sharing matrix would be used to determine the funds available for future rate adjustments.

Both the Staff and Bell, as expected, criticize each other's positions. The Staff says Bell's plan causes earnings to accrue to the company which should be used for rate reductions or for the accelerated deployment of technology, and that Bell ignores the second and third years of the forecast. Bell criticizes the Staff plan as one which is more draconian than traditional regulation because it eliminates any possibility of the Company's sharing in efficiencies as spurred by an incentive regulation environment and limits the Company to sharing only 40-60% of any "extra" efficiencies; under traditional regulation the Company claims it would retain 100% of the extra efficiencies. In addition, Bell claims the Staff plan is flawed because it relies on speculative "out year" forecasts for some of its rate adjustments, rather than relying on actual results.

The contention over use of the forecast in the renewal of incentive plans requires resolution. Our regulatory reform rule requires us to make a multi-year forecast, but it does not require any particular use of the forecast. In fact, the rule

states clearly that "all or part" of projected earnings above the prescribed return may be placed in a deferred revenue account "in appropriate circumstances." Accordingly, we are free to tailor the incentive renewals in a way that will best serve the public interest.

The Staff has raised a legal issue regarding Bell's proposal. The Staff argues that a three year forecast must be utilized to set rates so that all "known and reasonably anticipated" changes are taken into account in setting rates.

We are satisfied that the law allows the Commission the discretion to use a forecast test period, a historical test period, or any other accepted method to determine a fair rate of return.

Both the Company and the Staff have proved that forecasting the results of the "out" years (i.e., the second and third years of the forecast) is a problematic exercise. Neither party predicted with any precision in 1990 what actually happened in 1991 and 1992. The causes of the misses cannot be, and probably could never be, identified with certainty. Changes in Tennessee's and the nation's economies, rapid technological change, increasing competition, and regulatory changes could have contributed to the inaccuracy of these predictions.

Whatever the cause may be, however, the potentially perverse results should be avoided. For example, Bell in 1991 earned below the range of 11-12.2% which was determined reasonable by this Commission. Yet the 1990 order mandated a rate

reduction/deferred revenue account (DRA) contribution of $74.0 million in 1992 despite the underearnings in 1991. Continuation of a policy similar to that which we started in 1990 could, if forecasts continue to be missed, result in rate decreases for companies that need rate increases, and rate increases for companies that are overearning. While our 1990 policies may have been correct in starting regulatory reform, we will not continue a policy that could have such contrary results. In the future, rate adjustments and Deferred Revenue Account contributions flowing from the Company's regulatory reform plan will be based only on actual results. Use of actual results will allow us to take into account all changes, known or unknown, reasonably anticipated or ignored by any forecast.

Basing future adjustments only on actual results is also consistent with our view of how regulatory reform ought to work. Companies that have been operating under a Regulatory Reform Plan have made decisions for which they should bear at least part of the potential consequences and reap at least part of the potential rewards. By focusing only on actual results, the Company will share in the consequences of earnings outside its authorized rate of return range, and will not be shielded or disincented from those consequences by a stale and speculative forecast adjustment.

In considering all of the evidence, the Commission finds that it is reasonable to adopt the Company's recommendations respecting use of the forecast.

III. FORECAST/ACCOUNTING/REGULATORY ISSUES

The Staff and the Company differed greatly in their respective predictions of the next three year's performance of the Company.

The difference in calculations of historical returns were not as great. Both the Staff and the Company presented evidence that the overall return was between 11.18% and 11.34% in 1990, and between 10.5% and 10.96% during 1991 and 1992.

The 1993 forecast filed by the Company predicts an 11.45% return on rate base. The Staff forecasts a return of 14.06%.

The trend shown above by actual results speaks for itself. We find the Company forecast to be more in line with the trend from previous actual results. Accordingly, we accept the use of the Company's forecast, by each component and in total, with the following exceptions and explanations:

(a) Inside Wire

The Staff proposed to treat the maintenance plan payment option for inside wire maintenance service as an above the line item, while recommending that maintenance paid for on a "time and materials" basis and installation should be below the line items. The Staff believes that the maintenance plan activity is unique and not subject to competition, but believes that installation is a competitive business.

In response to the Staff's position, the Company states that if part of the inside wire business is to be imputed, then the whole business should be imputed. The Company expresses a preference for accounting for all inside wire operations below the line, which will remove all inside wire revenues and expenses from ratemaking and would leave the Company free to set any price it wants for any of the services. Thus, the sum of the Company's position is that the entire inside wire business should be treated as a whole, either above or below the line. In particular, the Company contests the Staff position that maintenance is a separable activity; the Company contends that maintenance is a single activity with two payment options. Recognizing the Commission's history of imputing total inside wire operations in 1990-92, the Company filed tariffs for the installation and maintenance of inside wire. The Company states that if inside wire operations are to be imputed, then it favors formalizing the process through tariffing.

While there is disagreement over how the revenues and expenses should be treated, there is agreement that the total inside wire operations of the Company are losing money. Based upon records submitted by the Company, the Staff calculates that the maintenance plan service of Bell loses approximately $200,000 per year. The Staff also calculates much larger losses on the time and materials maintenance and installation segments of the inside wire business. The Commission finds that the inside wire operations of the Company are losing money as a whole, and that

each of the components of the inside wire line of business are losing money.

While inside wire has existed in a turbulent regulatory environment for many years, it is now clear that the FCC acquiesces in state decisions to account for inside wire operations either above or below the line in setting rates and regulating those operations. The FCC and many other states require that inside wire operations be accounted for below the line. Given our clear flexibility, and the evidence of competition in the inside wire business, we believe it is appropriate to end inclusion of the inside wire business in the calculation of the Company's revenue requirement.

Accordingly, we require the Company to account for all inside wire operations below the line and we deny the tariff filed by the Company. It is necessary, however, to continue the exercise of our jurisdiction with respect to the price and service rendered pursuant to the Company's monthly maintenance plan. In order to maintain reasonable rates for monthly inside wire maintenance services, we require the Company to maintain the current price of $1.25 per month through the end of 1993. In 1994, the Company may raise the price to and including $1.75 per month. In 1995, the Company may increase the price above $1.75 by no more than 10%, and the Company will be limited to an increase of 10% per year thereafter. In addition, we will continue to exercise jurisdiction over complaints regarding the maintenance service rendered by the Company.

(b) L.M. Berry Adjustment

In the 1990 case, the Staff recommended, and the Commission adopted, an adjustment to the Company's revenue requirement based on the difference between new and old contracts that BAPCO had with L.M. Berry.

BellSouth acquired L.M. Berry in 1986. Prior to the acquisition, L.M. Berry had performed yellow pages advertising sales services for South Central Bell. The contract negotiated with South Central Bell in the 1970s provided for the payment of certain commissions to L.M. Berry for its efforts. In 1989, L.M. Berry and BAPCO entered into an agreement which the Staff found resulted in a higher percentage of commission payments to L.M. Berry. The Staff recommended we disallow the difference in the two contracts, and the Commission adopted the Staff recommendation. Accordingly, the revenue requirement for the 1990 through 1992 period reflected this adjustment. The basis for the Commission's decision was a lack of evidence on the part of the Company justifying the change in the commission rate. The Commission was presented with no evidence that L.M. Berry had a similar rate with companies similar to South Central Bell.

In this case, however, the Company did present similar contracts to the Staff for review. The Staff continued to recommend that we disallow the difference. We find, however, that the evidence presented by the Company supports its contention that similar commission rates are paid to L.M. Berry by telephone companies of similar size and influence.

Accordingly, the Commission orders that the disallowance respecting the L.M. Berry contract be discontinued.

(c) BAPCO Rate Base/Yellow Page Revenue Growth[2]

1. Yellow Page Revenue Growth

The Staff forecasted yellow and white page directory advertising revenue to be $288.1 million using an average growth rate of 8.4%. The Company projected these same revenues to be $262.8 million using an average growth rate of 3.6%.

	Staff	Company	Difference
Yellow Page Publishing Fee	$189.0	$166.7	$22.3
BAPCO Yellow Page Rev.	63.5	59.4	4.1
White Pages	35.6	36.8	-1.2
Total Directory Rev.	$288.1	$262.9	$25.2

Company witness Cochran stated in his rebuttal testimony that only the $22.3 million difference in the Yellow Page publishing fee remains an issue. Therefore, the Company apparently accepts the Staff's numbers on White Pages and BAPCO revenue.

The Company's only argument on the publishing fee revenues is that the Staff used too high a growth rate. Staff witness Gaines explained that his forecast of revenues was made using an average growth rate which considered that the individual components making up the Directory Revenue account grow at

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[2] This is actually a "forecast" rather than an "accounting" issue but is included here because it relates to BAPCO and the proper amount of the Yellow Page imputation.

different rates. He pointed out that the Company only chose to take issue with the one area of this account where the Staff's forecast was higher than the actually achieved rates. As an example, he pointed out that BAPCO Tennessee Net Income had actually grown at an average annual rate of 16.3% -- not the 9.2% used in the Staff's forecast. Therefore, he stated that the growth of one component of the account should not be changed unless the growth in the other areas is also adjusted. To emphasize this, Staff witness Gaines indicated that he had arrived at virtually the same Directory Revenue forecast by pricing out the individual components at the individual growth rates.

Staff witness Gaines also pointed out that his methodology for forecasting the Yellow Pages revenues had been found reasonable by BAPCO and may well be conservative since BAPCO itself refused to tell the Staff what price increases BAPCO expected to make during the 1993-95 period. Finally, Staff witness Gaines stated, and Company witness Cochran confirmed on cross examination, that BAPCO itself failed to provide any workpapers to support the growth rate used in the Company's forecast.

Based on the lack of documentation supporting the Company's Yellow Page revenue and the Staff's ability to demonstrate that using individual growth rates produces approximately the same revenues as the average growth rate, the Commission adopts the Staff's projected Directory Revenues of $288.1 million for 1993-1995.

2. BAPCO Rate Base Addition

The Staff's rate base addition for BAPCO's Tennessee Yellow Page operations is $28.2 million less than the Company's rate base addition. The revenue requirement of this issue is $4.0 million for the three years.

Staff witness Gaines pointed out in surrebuttal testimony that the Staff's rate base addition is less than the Company's because Bell's figures reflect investment while the Staff's figures reflect equity. The Company presented no evidence to support its position which, in any event, is not consistent with prior Commission decisions on this issue. Therefore, the Commission adopts the Staff's BAPCO rate base addition of $75.2 million for 1993-1995.

(d) Other Disallowances

In addition to the BAPCO and L.M. Berry disallowances discussed above, the Commission has in previous cases ordered various disallowances that have been reflected in the Company's earnings. The Company's forecast was computed using the Commission's methods. The Staff proposed an increase in the percentages applied in computing the disallowance for certain lobbying and advertising expenses. The Commission finds that the other disallowances as computed by the Company are appropriate, and, accordingly, no change is required.

(e) Conclusion

Our rulings on the L.M. Berry issue discussed in (b) above and the BAPCO issues discussed in (c) above have only a slight impact (See Appendix A, page 1) on the Company's forecast

of an 11.45 percent return on rate base for 1993. After the change made for Inside Wire, the forecasted return for 1993 is approximately 11.75% and thus falls within the rate of return range approved in this Order. Accordingly, no rate adjustment based on the forecast is ordered.

IV. RATE DESIGN

a. Cap for Local Residential and Business Rates

The Commission finds that it is just and reasonable and in the public interest to cap the current rate levels for basic flat rate local residential and business services.

b. Optional Calling Plans

The Commission finds that it is in the public interest to create optional calling plans for calls within a 40-mile radius of the customer's serving wire center. South Central Bell is hereby ordered to develop and submit such plans to the Commission by March 31, 1994. The plan shall be submitted on a revenue neutral basis.

c. Rate Changes to Be Funded From the Deferred Revenue Account

The Commission established a deferred revenue account in the 1990 regulatory reform order adopted for South Central Bell. Although the legal status of that deferred revenue account has been in question because of the Tennessee Court of Appeals decision on appeal of that Order, the Company committed to

maintain a deferred revenue account whose balance would be based on the rate reductions/deferred revenue account contributions flowing from the 1990 Order. The new regulatory reform rule adopted in January, 1993, allows for creation and maintenance of a deferred revenue account. The Commission has adopted, in another docket, a motion that establishes the deferred revenue account and balance for that account based on the Company's commitment.

Accordingly, the Commission finds and orders that the Company maintain the deferred revenue account established by the Commission for the period January 1, 1993 through December 31, 1995. Based on the record before it, the Commission finds and orders that the deferred revenue account be used for the following rate adjustments:

(1) Access/Toll Reductions

The Commission finds that it is in public interest to reduce South Central Bell's access rates by an amount that will allow long distance companies to reduce their toll rates to interstate levels, and to reduce South Central Bell's toll rates consistent with the method used to reduce toll rates in Docket 89-11065. This action continues the Commission's consistent practice of reducing toll rates to all Tennessee customers and moving access rates closer to parity with interstate rates. The Commission intends to continue this practice as appropriate opportunities present themselves. Accordingly, effective September 1, 1993, the Company is hereby required to reduce switched access rates by an amount which will allow long distance companies to reduce

their intrastate toll rates to currently effective interstate levels, and to reduce South Central Bell's toll rates consistent with the method used in Docket No. 89-11065, and the funds for these reductions will be drawn annually from the deferred revenue account. AT&T, the state's dominant interlata carrier, shall flow through, on a dollar-for-dollar basis, these access reductions to their customers.[3]

(2) County Wide Calling

The Commission finds that it is in the public interest t complete county wide calling in Tennessee. To the extent tha there are any counties where county wide calling without toll charges is not available, the Company will file tariffs to accomplish such county wide calling, and the funding required to provide such county wide calling will be drawn from the deferred revenue account.

(3) Depreciation

The three-way meeting between the Staffs of the FCC and this Commission and the Company was held April 5, 6, 1993. Agreement has now been reached between the Company and the Staff respecting the capital recovery program for the Company. The Company is hereby ordered to implement the depreciation schedules attached as Appendix B effective September 1, 1993. The funding for 1993 shall be drawn from the deferred revenue account. The funding

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[3] AT&T shall reduce its intrastate rates so that they are no higher than the comparable interstate rates. Any intrastate rates which are currently below the comparable interstate rates are not affected by this Order.

for 1994 and 1995 will be drawn from the deferred revenue account and such deferred revenue account will include any applicable accruals for sharing associated with 1994 and 1995 results. If, at the end of 1995, the Company has recorded changed depreciation expense[4] for the combined years of 1994 and 1995 in excess of the sum of all sharing amounts attributed to customers during those two years, the Company shall contribute the amount of such excess, with appropriate interest, to the deferred revenue account.

(4) Dickson County

The Dickson County Chamber of Commerce was an intervenor in this proceeding. Its witness, Richard Bibb, requested that Dickson County be added to the Metro Area Calling (MAC) area. Dickson County was not included in the MAC plan for Nashville originally because Dickson County is not a county contiguous to Davidson County. Dickson County argues that it is in the Metropolitan Statistical Area (MSA) for Nashville, and that it ought therefore to be included in the MAC plan for Nashville.

After consideration of the evidence on this issue, the Commission finds that Dickson County should be included in the Metro Area Calling area for Nashville. The Company is hereby ordered to include Dickson County in the Nashville Metro Area

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[4] "Changed depreciation expense" is the difference between the actual revenue requirement calculated using the previous depreciation rates and the actual revenue requirement calculated using the depreciation rates adopted in this order.

Calling area effective January 15, 1994, and the funding shall be drawn from the Deferred Revenue Account.

V. PETITION FOR RECONSIDERATION

Any party aggrieved with the Commission's decision of this matter may file a Petition for Reconsideration with the Commission within ten (10) days from and after the date of this Order.

VI. JUDICIAL REVIEW

Any party aggrieved with the Commission's decision of this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.

IT IS SO ORDERED, this 20TH day of August, 1993.

CHAIRMAN

COMMISSIONER

COMMISSIONER

ATTEST:

EXECUTIVE DIRECTOR

TAB 8

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION
Nashville, Tennessee
OCTOBER 13, 1993

IN RE: SHOW CAUSE PROCEEDING AGAINST CERTIFIED IXCS TO PROVIDE TOLL FREE, COUNTY-WIDE CALLING
DOCKET NO. 93-07799

ORDER

This matter is before the Commission on its own motion pursuant to T.C.A. § 65-2-106.

Based on a preliminary investigation, the Commission makes the following findings.

The Commission has previously determined that telephone subscribers share economic and social interests with other subscribers in the same county and, therefore, that all subscribers served by a local exchange telephone carrier regulated by the Commission should be able to make toll-free calls to other subscribers who live in the same county and are also served by a local company regulated by the Commission.

In some counties, however, local exchange carriers are prohibited by federal law from offering county-wide calling. In those counties (listed in the appendix to this Order), some intra-county calls cross a LATA boundary and must be handled by an interLATA carriers such as AT&T, MCI, and Sprint./[1]

In order to complete implementation of the Commission's county-wide calling policy, the Commission could seek federal permission to shift LATA boundaries to conform to county boundaries. Even if permission were granted, however, this option would force some ratepayers to pay toll charges for inter-county calls which are now toll-free. The Commission finds that the better solution is to direct interLATA carriers to provide

[1] The Commission has also certified Contel ASC, Wiltel, and Metromedia Communications to offer interLATA, intrastate service.

toll-free, county-wide calling to eligible subscribers and to direct local exchange carriers under the Commission's jurisdiction not to charge access fees on those intra-county, interLATA calls. On behalf of regulated local exchange carriers, the Tennessee Telephone Association has informed the Commission that the Association supports this approach.

Therefore, the Commission directs that all certified, interLATA carriers providing intrastate service to customers located in one of the twelve counties listed in the appendix appear and show cause why the carriers should not be required to provide toll-free, county-wide calling under the conditions described herein.

The carriers are directed to respond to this Order within twenty (20) days of the date of this Order. If a carrier serves no customers affected by this Order, no response is necessary./[2]

This docket shall remain open for further proceedings as may be necessary.

It is so ordered.

CHAIRMAN

COMMISSIONER

ATTEST

EXECUTIVE DIRECTOR

COMMISSIONER

/[2] As previously discussed, this Order applies to a customer who is served by a local exchange carrier under the Commission's jurisdiction and who is calling another subscriber located in the same county who is also served by a Commission-regulated, local exchange carrier.

APPENDIX 1

INTERLATA COUNTY-WIDE CALLING FRINGE AREAS

County	Fringe	NXX	Access Lines
Claiborne	Middlesboro, KY	749	
Cumberland	Rockwood	354	545
	Spring City	365	45
Greene	Morristown	581,585, 586,587	126
Hawkins	Church Hil	357	NA
	Fall Branch	348	NA
	Kingsport	245,246 247,378	NA
	Sullivan Gardens	349	NA
Marion	Sewanee	598	80
	Monteagle	924	602
	Tracy City	592	138
Meigs	Cleveland	(NXX's)	408
Montgomery	Guthrie, Ky	485	151
Polk	Etowah	263	11
Roane	Spring City	365	2
McNairy	Corinth, MS	239	968
Obion	Fulton, Ky	469,479	2,280
Weakley	Fulton, Ky	469,479	

5,356

6-4-93

TAB 9

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION
Nashville, Tennessee
March 31, 1994

IN RE: SHOW CAUSE PROCEEDING AGAINST CERTIFIED IXCs AND LECs TO PROVIDE TOLL-FREE, COUNTY-WIDE CALLING

DOCKET NO. 93-07799

INITIAL ORDER

This matter is before the Tennessee Public Service Commission as a result of an Order dated October 13, 1993 which directed interexchange carriers (IXCs) to appear and show cause why they should not be required to provide toll-free, county-wide calling in certain areas of the state where such calls would cross local access and transport area (LATA) boundaries. A federal court order prohibits the carrying of traffic across LATA boundaries by Bell companies such as the South Central Bell Telephone Company (SCB).

In a Response to the Show Cause Order dated November 2, 1993, the IXCs maintained that local telephone companies (LECs) including SCB (LECs) should be required to furnish the service and ask that they be made parties to the show cause proceeding so that this option would be available. The IXCs maintain that the Commission can direct that SCB seek to obtain a waiver from the federal court which would then permit it to provide the service in question. The request was granted at a Pre-hearing Conference and both the IXCs and the LECs are subjects of the show cause order accordingly.

This matter was set for hearing and heard on March 2, 1994 in Nashville, Tennessee before Administrative Judge Mack H. Cherry at which time the following appearances were entered:

APPEARANCES:

JANET L. JORDAN, Attorney at Law, 27th Floor, 600 North 19th Street, Birmingham, Alabama 35203 and CHARLES L. HOWORTH, JR., Attorney at Law, Room 356, Green Hills Office Building, Nashville, Tennessee 37205, appearing on behalf of South Central Bell Telephone Company

T. G. PAPPAS, Attorney at Law, 2700 First American Center, Nashville, Tennessee 37238, appearing on behalf of United Telephone of the Southeast (United).

PAUL S. DAVIDSON, Attorney at Law, Third National Financial Center, Nashville, Tennessee 37238, appearing on behalf of Citizens Telecom.

BENJAMIN W. FINCHER, Attorney at Law, 3065 Cumberland Circle, Atlanta, Georgia 30339, appearing on behalf of Sprint Communications Company L.P. (Sprint).

MARTHA P. MCMILLIN, Attorney at Law, 3 Ravinia Drive, Atlanta, Georgia 30346 and SCOTT K. HAYNES, Attorney at Law, 414 Union Street, Suite 1600, Nashville, Tennessee 37219, appearing on behalf of MCI Telecommunications Corporation (MCI).

VAL SANFORD, Attorney at Law, P. O. Box 198888, Nashville, Tennessee 37219 and ROGER BRINEY, 1200 Peachtree Street, N.E., Atlanta, Georgia 30303, appearing on behalf of AT&T Communications of the South Central States (AT&T).

LADON BALTIMORE, Attorney at Law, 102 Woodmont Blvd., Nashville, Tennessee, appearing on behalf of Metromedia Communications.

DAVID W. YATES, Assistant General Counsel, Tennessee Public Service Commission, 460 James Robertson Parkway, Nashville, Tennessee 37243-0505, appearing on behalf of the Commission Staff.

Proposed initial orders were submitted by the parties March 24, 1994.

BACKGROUND

Since 1988 the Commission has set in place a policy by which telephone customers obtain greater capability to complete calls within their county without incurring toll charges. In that year the Commission established toll-free

county-seat calling throughout the state. In 1993 the Commission established toll-free county-wide calling except for the northeastern portion of the state.

The Commission's policy has been based upon telephone subscribers' commonly held economic and social interests where they reside in the same counties as noted in this Show Cause Order.

In both instances the primary vehicles for accomplishing Commission objectives were the LECs. However, in 13 counties SCB is prohibited by court order from offering either interLATA county-seat or county-wide toll-free calling because these counties are divided by LATA boundaries which are a product of the AT&T divestiture as reflected in the consent decree commonly known as the Modified Final Judgment (MFJ). See United States v. Western Electric, 569 F. Supp. 990, 996, 997 (D.C.C. 1983). The court divided the former AT&T/Bell System into various LECs and an IXC among other companies. The LATAs were developed as geographical areas of central office service territory "generally centering upon a city or other identifiable community of interest." See 569 F. Supp. 990 at 993, 994. Bell companies provide service within the LATAs while traffic between the LATAs is carried by the IXCs. The anti-trust implications are such that other LECs would have legal difficulty in making the county-wide interLATA connections as well where SCB territory is on the other side of the LATA boundary in a given county.

Smaller, less populated parts of counties divided from the rest of the county by these LATAs are frequently known as "fringe" areas. Indeed, parts of counties served by telephone central offices in other counties were known as fringe areas as well. As a result of the Commission's county-wide calling policy, the areas which are a product of LATA county divisions are the only fringe areas where a toll charge is assessed on calls within the same county. Approximately, 5500 customers are located in the fringe

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areas located within the 13 counties. The Show Cause Order specifically identified 5,356 lines in 12 counties. Hancock County was later identified as a county divided by a LATA. It should be appreciated that telephone customers throughout these counties would benefit in that they could call into the fringe areas toll-free.

To make available county-seat calling to all counties including the counties divided by LATA boundaries, the Commission requested that the IXCs provide toll-free calling provided the LECs waived customary access charges to the IXCs for said calls. See Implementation of County-Seat Calling Plans for Calls Across LATA Boundaries, Docket No. U-88-7596, Order dated November 15, 1988. The Show Cause Order in this proceeding reflects the thinking that toll-free county-wide calling in counties divided by LATA boundaries could be accomplished in the same way.

The IXCs maintain that the LECs have both the legal means and technical capability to provide county-wide calling to these areas. As a part of the pre-hearing process a request was made that Commission Telecommunications Division Director Austin J. Lyons, Phd., investigate the matter and provide a report. The Lyons Report was issued December 10, 1993.

Dr. Lyons concluded that the IXCs were correct in that the technical capability exists and the legal option is available. However, he found the expense of providing the service would be relatively greater for the LECs. He also found that obtaining the necessary waiver from the U. S. District Court required more preparation which would consume time. He said a favorable grant of the waiver was not certain.

Billing

The Commission Staff desires that no charges be reflected on the subscriber's bill. Only AT&T can suppress the toll charges since it has the necessary computer systems which can interface with the TAR Code Database developed by

SCB. Other IXC bills to customers reflect a charge and it is up to the customer to call the carrier and obtain a credit. Indeed, this is the manner in which toll-free county-seat calling is provided by the IXCs today. MCI and Sprint maintain that developing the capability to suppress billing will be both expensive and time consuming.

County-wide toll-free calling is not unique to Tennessee. The State of Georgia has mandated county-wide toll-free calling through legislation in 1990. See G.C.A. Section 46-2.25.1. Indeed, it was learned through testimony that similar legislation is pending before the Tennessee General Assembly. In Georgia, counties are bisected by LATA lines and the IXCs have been required by statute to provide similar toll-free service to its fringe areas.

Issue

The focus of this decision should be clear. Indeed, L. G. Sather of AT&T acknowledged as much in his testimony. The Commission has directed that toll-free service to the areas in question will be provided. Whether it will be provided is not even an issue to be considered. The issue is how the toll-free service will be provided and which parties will provide it.

REVIEW OF EVIDENCE

The evidence presented will be reviewed as the parties presented their proof. The IXC position is that the LECs should provide service to the fringe areas in question while the LECs contend that the IXCs should do so. The Commission Staff also contends that the IXCs should provide the service.

The IXCs

AT&T, MCI and Sprint each presented witnesses at the hearing. Indeed, Mr. Sather maintains that the LECs should also provide the interLATA portion of toll-free county-seat calling as well. The IXCs maintain that toll-free calling is local in nature and the LECs are better able to provide this kind of service since this is precisely the service

they routinely provide. The IXCs contend that their certificate to provide service would have to be modified in order to provide toll-free county-wide calling because it is local traffic. The IXCs have sought intraLATA authority for many years with only limited success. It is contended that the Commission is all too willing to force IXCs to provide "local calling" for free, but will not permit the IXCs that local service which would generate a profit.

Since the LECs are rate-of-return regulated the IXCs contend that the LECs are able to recover the costs of implementing toll-free county-wide calling. The witnesses explained that each IXC operates in a highly competitive environment which also includes resellers and other providers. The Commission implicitly recognizes the competitive nature of long distance telephone operations and permits intense price competition. While in theory an IXC can request an increase in rates to cover the additional cost, this is not likely from a practical standpoint since each IXC is apprehensive that a competitor will take advantage of each increase to gain a competitive advantage. While the Commission may cause an expense to the LEC it can also allow another means of revenue. Since a given LEC has a monopoly in an area it can pass the expense on to the consumer. The IXCs contend they do not have this option.

The IXCs also contend that BellSouth has a track record of obtaining waivers of the LATA boundary requirements of the MFJ for flat rate Extended Area Service (EAS). Therefore a waiver request for county-wide calling would likely be approved within a few months.

The Commission does have some experience in directing that a waiver of the MFJ be sought. As a part of the County-Seat Calling Order, the Commission directed that a waiver be obtained and the LATA changed regarding service to Meigs County and Decatur. The District Court did grant the waiver August 1, 1989. See Docket No. U-88-7596, Order issued October 20, 1989. Thus, the entire process from

Commission order to FCC order appears to have taken over eight months.

The IXCs also believe that their current handling of county-wide calling in Georgia and county-seat calling Tennessee generates an unacceptably high level of customer complaints and that this problem will be exacerbated if they are required to provide toll-free county-wide calling in Tennessee.

MCI and Sprint representatives maintain that they are not currently able to suppress toll charges for county-seat or county-wide toll-free calls on the customer's bill. Their witnesses maintain that the call and credit method of eliminating the charges engenders customer dissatisfaction and complaints. Mr. Key also acknowledged that complaints about the billing were likely underestimated in that many customers chose to "migrate" to competing carriers rather than complain in the competitive IXC environment.

AT&T contends that the twice monthly update of the TARS data promotes complaints in that customers are moving in and out of counties within that time frame.

MCI and Sprint witnesses maintain that the cost of developing the requisite software and computer systems which provide for call suppression would be too great. At least two years would be needed to develop this capability. In Georgia, MCI and Sprint have satisfied county-wide toll-free requirements by giving all customers throughout the state free calling within two mileage bands or about 21 miles. However, the witnesses said the same solution would not work in Tennessee because counties in question tend to be much larger than in Georgia. Three mileage zones would be required in Tennessee where the counties in question sometimes stretch for more than 30 miles. The witnesses said that their companies could not afford to give up three bands of traffic throughout the entire state as it does in Georgia where the affected population is so small. Mr. Key said it would be cheaper for his company just to write

customers in the fringe areas a check for their anticipated long distance calling than to comply with the mandate.

The IXCs also maintain that the LECs are entirely too slow about responding to crediting them with the access charge. The process takes months. Thus, the LECs have the use of their money in the meantime.

The IXCs maintain that the process is illegal in that they are forced to provide a free service with no practical means of covering the costs. As such the practice is confiscatory and in violation of T.C.A. Section 65-5-201. The IXCs further maintain that there has been no hearing into the justness and reasonableness of the rates in conformity with existing statutes.

The Commission has also directed SCB to provide the funding for county-wide calling from its deferred revenue account. See In Re: Earnings Investigation of South Central Bell Telephone Company 1993-1995, Docket No. 92-13527, dated August 20, 1993 at page 17. IXCs contend that compelling them to provide the service toll-free operates to compel them to shoulder the costs of county-wide calling in the areas in question.

AT&T contends in its proposed initial order that rulemaking, not a show cause proceeding, is the appropriate means of addressing this issue.

LECs

SCB and United provided witnesses in support of the LEC position. First, these witnesses observed that the IXCs are currently providing this same service in the form of toll-free county-seat calling across LATA boundaries so no changes in dialing patterns, telephone numbers or the network would be required.

Second, the witnesses said that LECs do their part in helping provide for toll-free calling to these county fringe areas when they waive the access charge to the IXCs. The access charge assessed by LECs to IXCs is logically the greatest expense of providing this service.

Third, there is substantial uncertainty as to whether SCB could obtain an MFJ waiver to carry this interLATA traffic, potentially delaying implementation of toll-free county-wide service to these fringe areas.

To obtain a waiver, the LEC must show that there exists a "community of interest" which justifies the change. In a sense the Commission is responding to a certain "community of interest" in that the State created these counties over 100 years ago and provided the citizens therein with a common government and common schools. However, the federal court envisions a community of interest centered around cities or based upon studies which show requisite calling patterns exist between people in various areas. Indeed, the IXCs themselves maintained there was no community of interest demonstrated in their Response to this Show Cause Order. For this reason it is not known whether such proof could be demonstrated to the federal court. Furthermore, SCB will be seeking 13 waivers, not just one. This may complicate and protract the process. Making a study to support a community of interest in 13 areas would likely mean the process of even preparing an application for court consideration would be time consuming.

Fourth, the cost would be far greater to the LECs. Billie Greenlief, an engineer for SCB, said construction of new facility routes would be required which would cost approximately $2.2 million. He said significant software changes as well as telephone number changes for each subscriber in the fringe area would be required. Mr. Greenlief testified that use of new NXX codes for these new telephone numbers would accelerate the exhaust of the 615 area code and probably could not be implemented until after an anticipated 615 area code split.

Commission Staff

Eddie Roberson, Director of the Consumer Services Division, and Dr. Austin Lyons, Director of

Telecommunications, testified in support of the Staff position which is the same as the LEC position.

Mr. Roberson recalled what happened last year when the Commission objective of toll-free calling for most counties was realized. It was a case study to the truth of the old, cynical maxim that "no good deed goes unpunished". His office received over 100 complaints from people who had not received toll-free county-wide calling because they live in the fringe areas in question. People could not understand why they were not receiving the same toll-free calling as their immediate neighbors in the same county. Since the IXCs had executed the county-seat calling with relatively few complaints, he reasoned the IXCs had the proven ability to perform. Mr. Roberson was also concerned that the process of obtaining an MFJ waiver would take too much time.

While Dr. Lyons found both the LECs and IXCs to have the technical capability, he found fewer changes to the current customer service arrangements would be required if the IXCs handled the calls. Whereas the LECs must obtain an MFJ waiver, change routing of telephone calls and construct additional facilities, the IXCs would be required only to make a billing change.

Dr. Lyons did agree that MCI, Sprint and similarly situated carriers should be permitted two years in which to develop call suppression capability. However, the Staff does envision that all IXCs will be able to offer this capability at some point in the future. In his report, Dr. Lyons found that the ability to develop this capability is possessed by MCI and Sprint just as they have developed "friends and family" and other billing arrangements. However, other programs are developed with the anticipation that income will be generated. He could understand where that incentive would be lacking in this case.

Cross Examination

While IXC witnesses maintained that they could not recover the cost because of their competitive environment

apparently they did find Georgia gave them the ability to recover the costs. When asked why the Georgia law and the Georgia Public Service Commission decision based on that law were not court tested by the IXCs, the witness from Sprint did say that Georgia made the proposition attractive. It seems Georgia agreed to provide much lower access charges than those which prevail in Tennessee. Mr. Key also acknowledged that the lowest toll mileage bands are the least profitable.

Apparently the basis for complaints is the TARS data collected by SCB. It can never be current or complete to the extent that it can detect new arrivals and departures among the residents of a county. However, SCB would have precisely the same problem in that it would have to use its own data to provide the service in any event. Furthermore, SCB would be in a position of passing data on to other LECs just as it passes it to the IXCs today.

FINDINGS AND CONCLUSIONS

The relative merits of the competing positions require a finding that the IXCs be required to provide service to the fringe areas in question.

First, there is no study or evidence submitted which would suggest that the federal court's "community of interest" standard could be satisfied so as to permit a waiver of the MFJ to permit SCB to carry traffic across LATA boundaries. As far as is known the nearest cities are indeed in the next county. The Commission's action in requiring county-wide toll-free calling is not necessarily based on the same community of interest consideration. It is not responsible to urge that SCB seek a waiver of the MFJ when the Commission has no basis to believe that such a waiver is legally justifiable. It is illegal today for SCB to carry these calls and the evidence is not available to show that a waiver can be obtained. It is well and fine to say the U. S. District Court freely grants these waivers. But it is impossible to make such a prediction where the

study needed on which to predicate such a decision does not exist.

Second, it cost the LECs more to provide the same service. In the final analysis, the cost of providing this service will be passed to telephone customer by the LECs and the IXCs. While the IXCs said their cost would be great, they did not itemize these costs and put them on the record. Providing this service would clearly cost SCB and other LECs more than the IXCs. It appears it would cost SCB alone over $2.2 million. On the other hand, the IXCs are already providing essentially the same service in the form of county-seat calling. The IXCs would be required to serve the same customers they already serve for county-seat toll-free calling.

AT&T already utilizes SCB data to provide toll suppression or zero billing to county-seat customers. It should continue to do so. However, the cost to MCI, Sprint and others in developing this capability for the benefit of a few thousand customers cannot be ignored. The cost relative to the benefit is also compelling when one takes into account that they have only a small share of the market. One would think AT&T is the major player today in that it alone can offer zero billing.

Accordingly, the IXCs without the ability to suppress charges or zero bill should be given two years in which to develop this capability. They should be compelled to provide bill and credit calling as they do today. However, IXCs such as MCI and Sprint should also be given six months in which to seek a waiver of the zero billing requirement if they can show the Commission that their share of both the market in the fringe areas and the 13 counties in question is so low that the cost of developing the requisite computer systems is not warranted. In this way the objectives of the Commission would be realized. At least one carrier would provide the service with call suppression or zero billing.

Other IXCs would do what they are doing today with regard to county-seat toll-free calling.

Third, customer convenience would be best served. If the LECs provide the service the Commission has to come up with a plan to minimize customer inconvenience. Customers must change their established telephone numbers or may have to give up present toll-free arrangements they have with neighbors in other counties. The utilization of new exchange numbers hastens the day when the 615 area code must be split giving far more people more inconvenience. The objective is to provide the telephone customers with a benefit, not burden the customers with inconvenience.

Fourth, the Commission is extending an existing policy to which the IXCs have not objected in the past. There is precedent for this decision. The Commission requested that the IXCs provide county-seat calling over LATA boundaries in 1988 if the LECs would waive access charges. The IXCs began providing the service. That means the IXCs are likely serving the same customers in the same way they serve them today. These customers and other customers in the county will simply have added capability. Furthermore, the IXCs have not objected to similar arrangements in Georgia.

IXC Objections

The IXCs argue that they would be compelled to provide local service. However, it is also interLATA traffic which is by definition not local service. A discussion of the semantic side of the question still does not eliminate the fact that SCB and the other LECs cannot now provide this service. As noted earlier, it is a dubious proposition at best as to whether they ever could. Call the service by whatever name one pleases, the LECs still cannot do it and the IXCs can.

It appears the IXCs are making precisely the same assumptions which Judge Harold H. Greene decried when he found:

"Thus, contrary to much popular and even industry understanding, the purpose of the establishment of the LATAs is only to delineate the areas in which the various telecommunications companies will operate; it is not to distinguish the area in which a telephone call will be "local" from that in which it becomes a "toll" or long distance calls." See 569 F. Supp 990 at 994, 995.

The Commission specifically finds that this is not local service.

The IXCs maintain that certificates must be changed to permit this service. Today, the IXCs provide service like this with no change in their certificates. Again, it is not found to be local service in any event.

The IXCs complain that they are providing a service without the means to pay for it. This is superficially an appealing argument. However, the reality is more complicated. It should be remembered that the same IXC which provides toll-free county-wide calling to the fringe area customer also provides other interLATA long distance service for that customer to any destination that customer desires. Each customer has only one long distance provider. Thus, this service is actually incidental to other service the IXC provides this customer. Of course this is one other reason that the service is not local as the IXCs argued. But it points to the fact that the county-wide service an IXC provides the fringe area customer will dictate whether that customer will stay with a given IXC or migrate to another.

Consider AT&T's position. It alone among the IXCs with which it competes can offer toll billing suppression or zero billing for these calls. It does it today with county-seat calling. This is more convenient for the customer who must otherwise call the carrier and have the toll charges credited. Perhaps others can offer better rates, but AT&T has a built-in advantage. It is only logical that customers in this area as well as customers in the 13 counties who frequently call into these fringe areas would tend to

migrate to AT&T which has a distinctive competitive advantage. One would think this competitive advantage is attracting customers to AT&T which give AT&T their total long distance calling, not just their fringe area calling. Of course other IXCs can eliminate the AT&T advantage by developing their own capability. That is what competition is all about. The point is that this toll-free county-wide calling service to the customers in question is an entree to other telephone service which is profitable. This is not a service where there is not a return on investment as the IXCs claim.

The argument that IXCs have no means in a competitive environment to recoup their costs through additional revenues in other areas was undermined by testimony concerning their experience in Georgia. The Sprint representative did say his company found access rate reduction an acceptable compensation. It should also be acknowledged that the major costs of long distance calling -- the LEC access charge -- is also eliminated through the arrangement.

Let it be assumed that the IXCs do indeed loose money which is not covered by increased revenue generated in other long distance calling, elimination of access charges or other means. Then the IXCs can come before the Commission and demonstrate their losses. The Commission can then fashion relief just as the Georgia Commission apparently satisfied IXC concerns when it come to access charge reductions. Naturally, the relief must match the costs. Indeed, the Georgia statute is instructive in this regard. See G.C.A. Section 46-2-25.1. Subsections (c), (d) and (e). In this way the Commission could pass any costs which exceed revenue on to the LECs if it so chooses.

Complaints will be received no matter who provides this service, whether it be provided by the LECs or the IXCs. This is because the billing is all based upon the same data, the TARS data provided by SCB. One would think any

complaints would be spread fairly uniformly among IXCs in relationship to the customers they possess so all are at a relative disadvantage in this regard. Complaints may be far greater should the Commission set into motion a wholesale change of phone numbers as might be the case if the LECs were required in some way to provide the service.

As noted earlier the concerns of MCI, Sprint and other similarly situated IXCs which do not now possess access to SCB data that is needed to suppress or zero bill these customers is best met by giving these IXCs two years to comply with the call suppression requirement and by giving these carriers access to a Commission waiver in this regard where they can demonstrate that their share of the market is too marginal to justify the costs.

The LECs can work together with the IXCs in responding to many IXC objections. It is anticipated that LECs could develop a means of crediting access charge relief to IXCs in a much more expeditious manner consistent with technology.

RULEMAKING QUESTION

The IXCs undeniably saved the best issue for last in this case. Not until the Proposed Initial Order did the IXCs contend that the Commission was wrong all along in its approach to resolving the issue of how to provide toll-free county-wide calling across LATA boundaries. At this time the IXCs made the argument that the Commission should have pursued a rulemaking as opposed to a contested case approach to the question.

In Tennessee Cable Television Association v. Tennessee Public Service Commission, 844 S.W.2d 151 (Tenn. App. 1992), the court adopted the following test to determine when an agency's determination should take the form of rulemaking:

> ". . . if it appears that the agency determination, in many or most of the following circumstances,
>
> (1) is intended to have wide coverage encompassing a large segment of the

regulated or general public, rather than an individual or a narrow select group;

(2) is intended to be applied generally; and uniformly to all similarly situated persons;

(3) is designed to operate only in future cases, that is prospectively;

(4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;

(5) reflects an administrative policy that

(i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or

(ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and

(6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy."

See 844 S.W.2d at 162-163.

Obviously the second, third, fourth and sixth consideration do militate in favor of rulemaking. The problem is that ascertaining whether the other considerations are applicable could have best been resolved by a review of the available evidence in relationship to the Cable Television criteria. Since the issue was not raised until the record was closed the proper evidence relevant to the considerations was not developed. Furthermore, the Commission is without the benefit of other argument on the matter. AT&T may be readily satisfied that all criteria are met, but I have insufficient information upon which to base such a conclusion. There are several considerations in doubt at this point.

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Wide Coverage

AT&T seems to take the position that since all IXCs and LECs are involved and these areas are located across the state that there is wide coverage so as to satisfy this consideration. That argument overlooks the real reason this matter came before the Commission at all. The Commission Order mandating county-wide coverage was implemented by the LECs last year covered the vast majority of the people in all fringe areas. It could be argued that the people living across LATA boundaries constitute "a narrow select group" within the meaning of the case. It should be remembered that there are only 5500 lines in these specific fringe areas from among more than two million lines in service across the state. The population within these 13 counties appears to only cover a small portion of the overall state. Furthermore, the fringe area population is often small within the context of specific counties such as Montgomery County which has more than 100,000 people while only 151 of the telephone lines are in the fringe area in question. Since the argument came after the evidence was presented it is impossible to say whether the coverage was wide or narrow.

Change in Policy

Even given the information available consideration five clearly militates against rulemaking. As noted earlier, county-wide calling is a logical extension of the Commission's earlier decision in the County-Seat Calling Case. The Commission is dealing with the people who live beyond the LATA boundaries precisely as it dealt with these same people in the County-Seat Calling Case. Had it been determined that the LECs should somehow provide the service that would have been a change in policy. To find that the IXCs should provide this service is entirely consistent with past Commission decisions in this regard.

It should be remembered that the IXCs already serve the same people in much the same way as a result of this

decision. The IXCs already facilitate calls from these fringe areas to and from the county-seat. Now calls to and from the rest of the county will be carried by the IXCs.

The IXCs take the position that the fact that they provided county-seat calling upon a Commission request somehow makes a difference. It not so important that the IXCs were requested to perform or ordered to do so. The relevant fact is that they did perform and the LECs responded by crediting the access charges. To the contrary, the voluntary compliance by the IXCs logically makes their position today all the more tenuous. Precedent has been set to which the IXCs willing complied and did not object. The IXCs are in a poor position to complain today.

It should also be taken into account that the Commission made a conscious decision to pursue the contested case approach to this question when it issued its show cause order. Without overwhelming and compelling evidence to the contrary, I am extremely reluctant to overturn the Commission's decision in this regard. In other words, I have been called upon by the Commission to make a decision in this matter and I am going to make it.

At the same time it is stressed that all who provide exceptions and replies should address this issue. This is not a frivolous issue. The issue should also be placed in its proper context. There are logically many ways to achieve the same objectives. As noted earlier, legislation is one way. The Georgia Legislature pursued this route. This could be done in Tennessee. The Commission may indeed want to change course and pursue the rulemaking route. That option does appear to have the advantage of being more unassailable.

I will not dismiss this Show Cause because I do not have the factual background upon which to make such a determination. I have not been satisfied that all Cable Television criteria have been met. I will not disturb the

Commission approach to this matter unless the evidence and the law is clear and compelling.

I also question whether the IXCs should not be estopped from raising this objection since it was not raised earlier. It should be remembered that the IXCs raised many objections to the Show Cause Order in their Response, but this issue was not raised. Furthermore, the issue was not raised either at the hearing or in pre-filed testimony.

CONCLUSION

The IXCs should be compelled to provide toll-free, county-wide calling across LATA boundaries as directed in the original Show Cause Order. The IXCs have not in fact shown cause why they should not be required to do so.

This decision is made after a thorough review of the evidence. Most compelling is the fact that the LECs cannot now perform these calls. Waiver must be granted by a federal court, not this Commission. There was no compelling reason presented to show why the Court should make such a waiver. This fact alone renders all other reasons secondary.

All other reasons for this decision and responses to IXC objections have been dealt with herein. The most compelling objection is naturally the ability to recoup the cost of any loss by the IXCs in providing this service. It is stressed that the IXCs have access to the Commission as a means of obtaining relief in this regard. IXCs such as MCI and Sprint will have two years to comply completely with the requirements of this order and they will be given a means by which a waiver can be obtained.

In this decision, there are no losers. Obviously, the LECs prevailed. The Commission Staff gets service to people in the fringe areas with one provider which can suppress call charges. IXCs such as MCI and Sprint are taken into consideration. They are given two years to fully comply and may seek a waiver as concerns call suppression.

Perhaps the big winner is AT&T. Perhaps the accounting people at AT&T should review this decision as well as the legal team. They may find the only money lost is the money spent to oppose this decision. The calls the people make within their county across those LATA boundaries will be made with precisely the same carrier that provides overall long distance calling. That gives AT&T a distinct competitive advantage over its competitors when it comes to all of their long distance calling. Customers in and around these areas will have a new reason to choose AT&T as their carrier of choice. It can readily be visualized that this competitive advantage could generate far more revenue than AT&T will lose in affording the service.

Lastly, the customers will be best served in county-wide toll-free calling which causes the least disruption to their lives. All telephone customers in the state will be served in the sense that this is the least expensive way to accomplish the objective at hand.

T.C.A. Section 4-5-315 provides that all parties shall have an opportunity to appeal initial orders to the Commission. However, the Commission reviews all initial orders, thereby assuring review. All parties may file exceptions or replies to exceptions in the form of a brief setting forth specific issues. The exceptions and any replies thereto will be considered by the Commission in its review. The Commission will determine the matter in a regularly scheduled Commission conference. Affected parties may then seek reconsideration of the Commission's final order or may appeal the final order to the Court of Appeals, Middle Division, within 60 days of the final order.

This Initial Order is prepared in conformity with the Tennessee Uniform Administrative Procedures Act, T.C.A. 4-5-101, et seq. Procedures whereby parties seek review, stay or reconsideration are found in T.C.A. Sections 4-5-315 through 4-5-318. Judicial review of Commission orders is described in T.C.A. 4-5-322.

IT IS THEREFORE ORDERED THAT:

1. All IXCs providing intrastate service in Tennessee will provide interLATA intra-county calling toll-free to all Tennessee customers effective August 1, 1994.

2. All IXCs providing intrastate service in Tennessee will begin, as soon as possible, but no later than two years from the date of the Final Order in this case, to zero rate interLATA intra-county calls on customer bills.

3. All IXCs without the present ability to zero rate interLATA intra-county calls on customer bills will be given six months from the date of the Final Order in this case to apply to the Commission for a waiver from the requirement to zero rate the calls in question and waiver will be granted providing they can show that their market share in the areas in question and the 13 counties is so low as not to justify the expense of developing the necessary computer system.

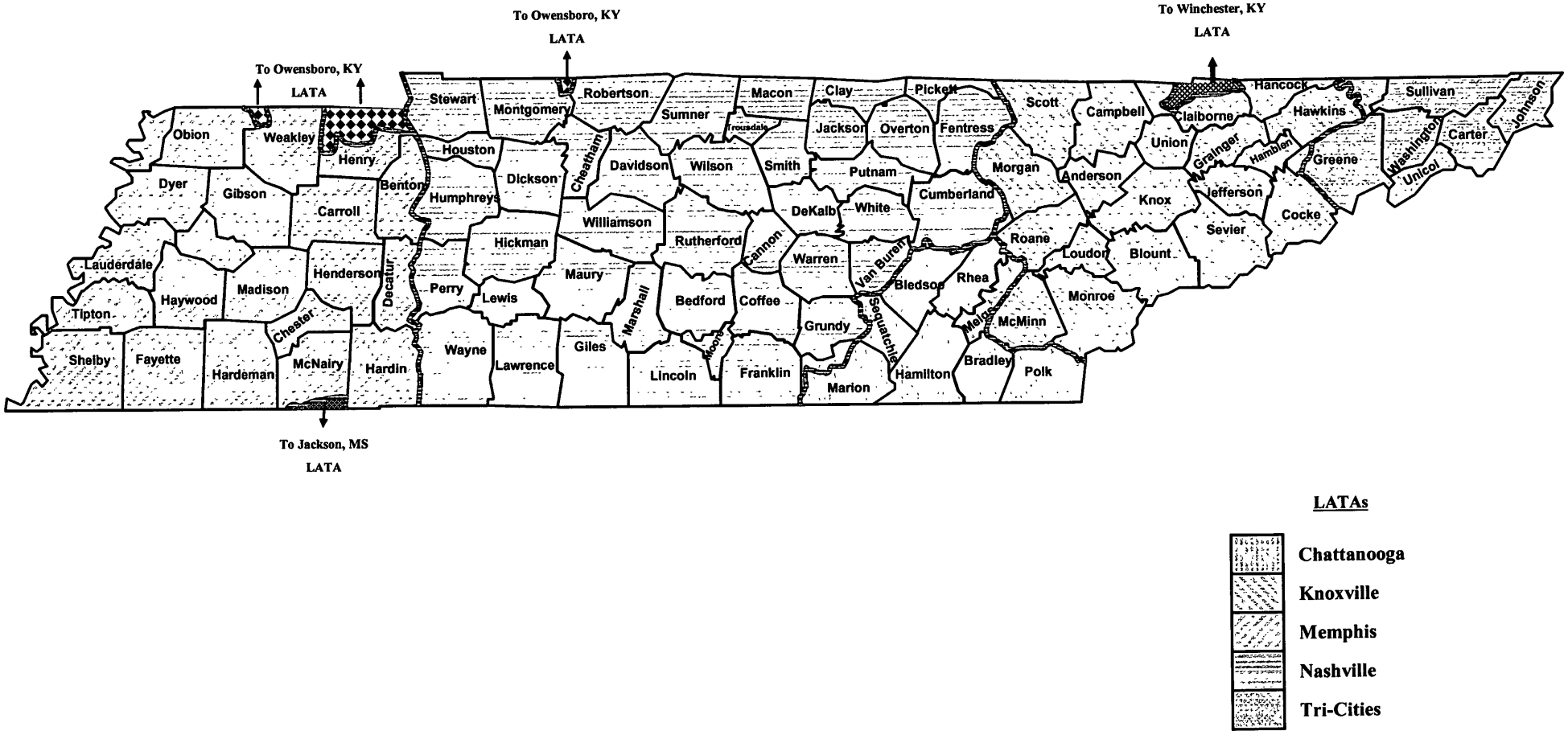
4. All LECs operating in Tennessee will credit access charges associated with interLATA intra-county calls.

5. The Motion to Dismiss the Show Cause Order by the IXCs is denied, however, all parties are requested to address the issue raised in any exceptions or replies submitted in this matter.

MACK H. CHERRY
ADMINISTRATIVE JUDGE

TAB 10

TENNESSEE LATA BOUNDARIES



TAB 11

Lata County Wide

TENNESSEE PUBLIC SERVICE COMMISSION

460 JAMES ROBERTSON PARKWAY
NASHVILLE, TENNESSEE 37243-0505

MEMORANDUM

TO: Parties of Record

FROM: Austin J. Lyons, Director
Telecommunications Division

DATE: December 10, 1993

RE: Inter-LATA Toll-Free County-Wide Calling
(Docket 93-07799)

At the November 10, 1993, Pre-Hearing Conference on the above subject, we agreed to investigate the issues associated with alternative ways of offering County-Wide Calling. Attached is a report on that work which will be considered at the December 16, 1993, meeting.

Attachment

c: Chairman Frank Cochran
Commissioner Keith Bissell
Commissioner Steve Hewlett

INTER-LATA TOLL-FREE COUNTY-WIDE CALLING

BACKGROUND

On October 13, 1993, the Tennessee Public Service Commission directed the inter-exchange carriers to show cause why they should not be required to provide toll-free, county-wide calling. Comments on this order were filed by the inter-exchange carriers on November 2, 1993. A pre-hearing conference was held on November 10, 1993.

In their comments and at the pre-hearing conference, the inter-exchange carriers argued that if toll free intra-county calling is required, it is best handled by the local exchange carriers, even when such calls cross LATA boundaries. It was recognized that in the case of South Central Bell, a waiver to the Modified Final Judgment established during the divestiture of the Bell operating companies from AT&T, would be required.

Different views on the complexity and expense of providing such service were offered by the local exchange carriers and the inter-exchange carriers. In light of this, the Telecommunications Division of the PSC was asked to investigate the issues and report back in time for these results to be considered at the December 16, 1993, hearing. This report provides the results of that investigation

OBJECTIVE

The Local Access and Transport Area (LATA) boundaries and the rules for carrying telephone calls across such boundaries, were established at the time of divestiture. They reflect extensive study of the calling patterns of telephone users, and an attempt to be fair to the business interests of both the local and long distance telephone companies.[1] Waivers to these rules can be requested. In their filed comments, the inter-exchange carriers suggest consideration of an Extended Area Service Waiver to cover this service, and identify the criteria to be met. The local exchange companies do not agree that such a waiver is warranted.

For purposes of this investigation, the objective was to see if a compelling argument could be found for changing the routing of intra-county calls when they happen to cross LATA boundaries. Should the local exchange companies carry all intra-county calls including those which under current rules, would be routed through inter-exchange carriers?

THE ISSUES EXAMINED

The key technical issues associated with providing the desired service are the following:

- Identification of Intra-County Calls
- Trunk Facilities and Traffic Volume

[1] United States v. Western Electric, 569 F. Supp. 990, 996, 997 (D.D.C., 1983)

- Call Routing
- Access Charge Handling
- Billing

Each of these areas was examined during this effort.

SOURCES OF INFORMATION

Attachment I identifies the individuals with whom the Commission interacted during the course of this investigation. In some cases these people consulted with product managers or subject matter experts on specific questions raised. The vendor contacts were provided by the local and inter-exchange carriers.

ASSESSMENT OF THE ISSUES

* Identification of Intra-County Calls

The matching of individual telephone numbers with the county in which the subscriber resides, is done by the local telephone companies through tax records. To provide intra-LATA County Wide Calling, each telephone company provides Bell with this information from their own area. Bell in turn develops a statewide data base which is provided to all local companies for use in billing. Information in the data base is updated twice per month.

Inter-exchange carriers would also require the use of this LEC generated data base for billing purposes. AT&T

currently uses this data base to provide County Seat Calling in Tennessee. Presumably a similar data base is being used by AT&T in Georgia where inter-LATA Toll-Free County Wide Calling traffic is carried by the inter-exchange carriers.

No one has suggested an alternative way of compiling such information. The LECs are the only ones with the appropriate records to generate such a data base. The issues raised in this area are:

> Customer Satisfaction: Updating the data base twice a month creates a lag in getting new telephone numbers into the data base. This leads to customer complaints when they are billed for intra-county calls before their number can be entered into the system.
>
> Billing: The inter-exchange carriers claim the cost of screening these calls against such a data base is unacceptably high.

The customer satisfaction issue resulting from infrequent data base updates is of concern no matter who provides the service. Since LECs use such a data base today for intra-LATA County Wide Service, they have the same concerns as an IXC with respect to customer satisfaction.

As important as the customer satisfaction issue is, it is not relevant to the issue of whether an LEC or an IXC should carry the inter-LATA call. In either case, customer satisfaction will not change -- only the company receiving

the complaint will change.

The billing issue will be discussed later.

* Trunk Facilities and Traffic Volume

If a local exchange carrier is required to carry inter-LATA traffic, something which they are normally prohibited from doing, it is reasonable to expect that some new facilities will be needed. The magnitude of this issue depends on the traffic volume anticipated on such calls.

During the last Bell earnings review, Bell estimated a revenue impact of about $800,000 per year from the 300,000 customers impacted by intra-LATA County Wide Calling for the fringe areas. This would suggest a revenue impact of less than $200,000 per year for the 74,000 customers impacted in the 13 counties having more than one LATA.

It is difficult to identify a significant impact on the facilities of either the LECs or the IXCs from call volumes of this magnitude. Even the LECs who may not have direct trunks between the necessary locations, have significant inter-LATA capacity in their administrative networks which could be drawn on to meet some of the requirement.

The inter-LATA nature of this traffic presents more of a trunking issue to the LECs than to the IXCs. While no precise cost information is available, the costs for either are expected to be modest. Both the LECs and

IXCs should be able to handle the additional traffic volume easily.

* Call Routing

If local telephone companies are to complete calls across LATA boundaries, call routing changes will be required. Currently, six-digit screening by the local switch (the area code and the three digit office code) is adequate for routing a call. Inter-LATA calls are identified in this fashion and the calls are routed to the network (i.e. - Point-of-Presence) of the customer-selected long distance carrier. If however not all inter-LATA calls are to be handled this way, some additional routing information will be needed.

Consider a local office serving customers in more than one county. When an inter-LATA call must terminate at such an office, the call must be carried by an IXC network if the call is inter-county. If the inter-LATA call is intra-county however, it must travel over the local company networks. No longer is the terminating office code (i.e. NXX) sufficient to route the code.

One possible solution is to assign more than one code to an office. The codes could then reflect the county being served by those numbers. Proper routing would then be possible. The downside of this is that customer telephone numbers would be changed, and the already very limited set of office codes would be depleted even faster.

Another solution is possible if the local switch can screen all ten digits of the called number prior to routing the call. Since the pre-hearing conference, we have been in contact with the three switch vendors who provide the equipment to the telephone companies serving the Tennessee counties in question. AT&T, Northern Telecom, and Siemans Stromberg-Carlson all confirmed that their switching equipment can do ten digit screening. AT&T's 5ESS must be equipped with software generic 5E8 to do such screening. After describing the proposed use of such screening to each vendor, only AT&T Network Systems expressed any concern about the potential impact on network operations. After further checks by AT&T with Bell Laboratories in Indian Hill, Illinois, they reported to us that no operational problems were anticipated by such screening.

Since ten digit screening avoids the need to change customer telephone numbers, and the consumption of scarce "NXX" office codes, this appears to be the better solution if routing changes are to be made. There would of course be costs associated with making these switch routing changes, and maintaining the data base of county telephone numbers. An additional complexity will occur when the initiating office serves more than one county. Under this situation, both the calling and the called number would have to be examined to identify an intra-county call. No one was prepared to offer cost estimates for such changes, but given

the existing switch capabilities, the costs while not insignificant, would appear to be manageable.

Obviously, if the inter-exchange carriers continue to carry all inter-LATA calls, no routing changes or costs are involved.

* Access Charge Handling

The Commission does not want access charges imposed on inter-exchange carriers if and when they carry intra-county toll-free calls. How this is done is probably best worked out between the inter-exchange carriers and the local companies. At the pre-hearing conference, it was clear that no consensus existed on the best way to do this. The IXCs want the local companies to inhibit the billing of such charges. The local companies want the IXCs to track these charges and to issue an "after-the-call" credit to the IXC account.

From the arguments presented, it appears that each side is willing to take the word of the other on the amount of access charges associated with such calls. Implied in this is that the amount involved is not significant enough for either side to expend the resources to measure the charges precisely. (This reinforces the point made earlier that the call volume increase is expected to be modest).

Local companies currently identify intra-county calls to properly bill for intra-LATA service. Extending this screening to cover inter-LATA calls within a county for

access charge identification would be required to suppress such charges. No cost estimates have been supplied for doing this. The local companies have not claimed that they would be unable to do this. They have argued that it would be easier for the IXCs to track these charges and receive a credit.

A complication to access charge suppression occurs when an intra-county call is initiated by one telephone company, and completed by another. Since access charges are imposed on both ends of a call, a way must be found for the second company -- the one completing the call -- to suppress the access charges. The local companies are examining this issue.

On December 2, 1993, the Commission hosted a meeting of the local and inter-exchange companies on this subject. We reviewed the results of our assessment to that point. On the subject of access charges, the parties were asked if they really wanted the Commission to tell them "how" to implement the Commission policy. It is conceivable that an agreement in lieu of measurement could be acceptable to both sides. Asking the Commission to rule on an implementation process looks to be suboptimum. Since access charges are imposed by the local exchange companies, the responsibility for complying with Commission policy lies with these companies.

* Billing

The Commission desires that no charges be placed on a customer's bill for inter-LATA calls within a county. Doing this requires screening against a county data base that must be generated by the local companies. Currently, LECs are screening calls against such a data base to provide intra-LATA County-Wide Calling. Should the LECs be required to also carry inter-LATA calls within a county, the billing process should be similar to the one already being used.

The billing issue is the one raising the greatest concern with the inter-exchange carriers, if they continue to carry inter-LATA calls within a county. Georgia requires the IXCs to carry such calls at no charge to the customer. AT&T does this using the screening process described earlier. MCI and Sprint received PSC permission to implement such service by zeroing out charges on the first two long distance bands of their service. This effectively provides free calling over a 21 mile radius from the serving central office. This process resolves most, but not all of the problem. Some customers would still have to call the IXC to receive a credit. (It also provides some customers with unintended inter-county free calling, since the rate bands do not line up with county boundaries). Although Sprint raised this process as a possibility for Tennessee, MCI strongly objected. Evidently too much unintended revenue is being lost in Georgia.

AT&T can do the necessary screening for Tennessee, but doesn't want to because of the customer satisfaction issue described earlier. MCI and Sprint are looking at the costs of modifying their billing system, but both already claim it will be unacceptably high (e.g. - several million dollars and as much as 3 years time to develop).

Billing systems are heavily dependent on computer software. Software development resources are limited for any company. Typically new software features and changes must be prioritized because the demand for upgrades exceeds the available development resources. (The development of new software generics for network switching systems undergoes similar pressures). Lacking other pressures, a billing change aimed at reducing revenues is not likely to receive a very high priority.

The screening which the IXCs would have to do to offer the County-Wide service is not unlike the screening which they do for marketing purposes. MCI has had great success offering a service which screens the calling number against a list of "Friends and Family" telephone numbers for special billing. Sprint screens the calling number against a data base of current Sprint subscribes to offer its "Most" plan subscribers an additional discount. Screening the calling number against a list of friends and family living in the same county would not be a task with which the IXCs are unfamiliar. As we've pointed out, AT&T is already doing

this in Georgia. Again, the true issue appears to be one of priority. The IXCs would rather expend limited software development resources increasing rather than decreasing revenues.

Conclusions and Recommendations

If inter-LATA County Wide calling is to be offered by the LECs:

* An MFJ waiver must be approved
* The routing of telephone calls must be changed
* Additional trunks are likely to be required
* A billing change must be made

If Toll-Free County Wide calling is to be offered by the IXCs:

* A billing change must be made

County Wide Calling offers ratepayers a reduced rate for certain calls. It is not intended to add new features or change the quality of a telephone call. From an engineering perspective, offering such a service without changing the operations of the network is clearly superior to the alternative. (If it's not broke, don't fix it). The compelling reason for asking the LECs to provide this service was not found in this investigation. If Toll-Free, County-Wide Calling is provided in Tennessee, it is recommended that the IXCs continue to handle the inter-LATA traffic.

It is also recommended that adequate time be allowed for the IXCs to integrate this billing change into their upgrade process in an orderly fashion. A deadline should be established for removing such calls automatically from the bill (e.g. - January 1, 1996), but an interim process (e.g - Credits) should be tolerated until that time. At the same time, the Commission should give recognition to IXCs who resolve the billing issue early, and allow them to capitalize on this aspect of their service in promotions. Market forces will always have an impact on development priorities.

ATTACHMENT I

INTER-LATA TOLL-FREE COUNTY WIDE CALLING

Commission contacts (November 10, 1993-December 8, 1993)

VENDOR	SWITCH	CONTACTS
AT&T Network Systems	5ESS & Remotes	Ken Carr Atlanta, GA
Siemans Stromberg Carlson	DCO, RNS, RLS	Terry McCullough Birmingham, AL
		Don Albrecht Birmingham, AL
Northern Telecom	DMS-100, 10 & Remotes	Frasier Ritchie Richardson, TX
		Pat Barnes Atlanta, GA
		Bob Deninger Atlanta, GA
		Buddy Krajesky Atlanta, GA
		Chuck Evans Research Park, NC

INTER-EXCHANGE CARRIERS	CONTACTS
Sprint	Tony Key Atlanta, GA
	Ben Fincher Atlanta, GA

ATTACHMENT I

INTER-EXCHANGE CARRIERS	CONTACTS
MCI	Martha McMillin Atlanta, GA
	Ron Martinez Atlanta, GA
AT&T	Jim Jenkins Nashville, TN
	Gary Andraza Nashville, TN
	Les Sather Atlanta, GA

TELEPHONE COMPANIES	CONTACTS
BellSouth	Bob Ebinger Birmingham, AL
SCB	Paul Stinson Brentwood, TN
	Charles Odle Nashville, TN
	Phyllis Goff Atlanta, GA
United Telephone SE	Bob Wallace Nashville, TN
	Wilbur Joiner Wake Forest, NC
	Ted Pappas Nashville, TN
	Laura Sykora Wake Forest, NC

ATTACHMENT I

TELEPHONE COMPANIES	CONTACTS
GTE	Jim Hall Cookeville, TN
	Bill Senter Nashville, TN
TTA	Dick Blair Nashville, TN

TAB 12

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION
July 15, 1994 Nashville, Tennessee

IN RE: SHOW CAUSE PROCEEDING AGAINST CERTIFIED IXCS AND LECS TO PROVIDE TOLL-FREE COUNTY-WIDE CALLING

DOCKET NO. 93-07799

ORDER

This matter is before the Tennessee Public Service Commission ("Commission") following a Show Cause Order issued by the Commission pursuant to T.C.A. § 65-2-106. As set forth in that October 13, 1993 Order, the Commission has previously determined that telephone subscribers share economic and social interests with other subscribers in the same county and therefore that all subscribers should be able to make toll-free calls to other subscribers who live in the same county.[1]

The Commission noted in the show cause order issued in this docket that in some counties some Local Exchange Companies ("LEC") are prohibited by federal court order from carrying telephone traffic across the boundaries of artificially created calling areas known as Local Access and Transport Areas ("LATA").[2] In these

[1] Well before October 13, 1993, South Central Bell ("Bell") was ordered by the Commission to provide toll-free, intraLATA, county-wide calling for calls that did not cross LATA boundaries. See In Re: Earnings Investigation of South Central Bell Telephone Company, 1993-1995, Docket No. 92-13527, Order dated Aug. 30, 1993. Similarly, the interexchange carriers were previously ordered to provide toll-free, interLATA, county-seat calling. See Implementation of County-Seat Calling Plan for Calls Across LATA Boundaries, Docket No. U-88-7596, Order dated Nov. 15, 1988. The October 13, 1993 Order calling for toll-free, interLATA county-wide calling is designed to complete implementation of the Commission's county-wide calling policy.

[2] These LATA boundaries were established in the Modified Final

counties (listed in Appendix I to the Commission's October 13, 1993 Order), intra-county calls cross a LATA. The MFJ prohibits a Bell Company from carrying toll traffic across LATA boundaries without a specific waiver from the federal district court in charge of compliance under the MFJ. Only an interLATA carrier ("IXC") can carry traffic without legal restriction across LATA boundaries. The Commission made the preliminary determination that the IXCs should zero rate all intra-county calls carried across a LATA in this Show Cause Order in order to implement county-wide calling in the fringe areas of those counties traversed by LATAs. The affected carriers, the IXCs, were granted an opportunity by the Show Cause Order to appear and contest this preliminary determination in a contested case proceeding.

The hearing in this proceeding was convened on March 2, 1994, before Administrative Judge, Mack Cherry, at which time both IXCs and LECs appeared and presented evidence and/or argument in response to the Show Cause Order. On March 31, 1994, Judge Cherry issued an Initial Order recommending that the IXCs be ordered to provide intra-county interLATA service on a toll-free basis, and that the LECs be directed not to charge the IXCs any access fees for those intra-county interLATA calls.[3])

AT&T, MCI, and Sprint filed a joint "Exceptions to the Initial Order" and the Commission Staff, South Central Bell, United

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Judgment (MFJ) degree which was a result of the divestiture of the AT&T/Bell Telephone System. See United States vs. Western Electric, 569 F Supp 990, 996, 997 (D.C.D.C. 1983).

[3] Access charges are fees paid by IXCs for use of LEC facilities in initiating or terminating IXC calls and were found by the ALJ to constitute the major cost of the transport of an IXC call.

Telephone-Southeast, Inc. and Citizens Telecom filed a joint reply to the Exceptions in support of the Administrative Judge's Initial Order.

The Commission considered this matter at its regularly scheduled Commission Conference on June 7, 1994, and voted unanimously to affirm the Administrative Judge's Initial Order with certain exceptions which are noted in this Final Order. The Commission considered all of the evidence in the record; as well as the Initial Order, exceptions and replies thereto; all applicable statutes and rules; and hereby ratifies and adopts as its own all the conclusions and findings made in the Administrative Judge's Initial Order which are not in conflict with the findings and conclusions in this Final Order. In this Order, we will further address arguments raised before the Administrative Judge as well as those raised in the Exceptions filed to his Initial Order. In support of our decision and the Administrative Judge's recommended decision, we make the following findings of fact and conclusions of law.

FINDINGS AND CONCLUSIONS

I.

In their Exceptions to the Initial Order, the IXCs contend that the Commission lacks the statutory authority to order them to provide toll-free county-wide calling across interLATA boundaries. We disagree. The Tennessee Legislature specifically granted the Commission "general supervisory and regulatory power" over public utilities operating within the state of Tennessee in T.C.A. § 65-4-

104. In addition, the Commission is granted authority to certificate these carriers, to establish just and reasonable individual rates after hearing, and to generally supervise the services provided by public utilities pursuant to T.C.A. Title 65, Chapters 4 and 5. The IXCS and the LECs participating in this proceeding are public utilities certificated by this Commission in accordance with state statutes.

In addition, T.C.A. 65-4-106 provides that:

> "This chapter...shall be given a liberal construction and any doubt as to the existence or extent of a power conferred by this chapter or chapters 1, 3 and 5 of this title on the Commission shall be resolved in favor of the existence of that power, to the end that the Commission may effectively govern and control the public utilities placed under its control by this chapter."

This section is a legislative directive to construe the utility act in favor of the power of the Commission. Breeden vs. Southern Bell Tel. Co., 199 Tenn. 203 (1955). This statutory section is intended to grant considerable discretion to the Commission to order whatever action deemed appropriate to establish reasonable rates and utility services. This discretion is necessary in order for the Commission to utilize a flexible and responsive regulatory scheme that can react quickly to any changes in public need for utility services and to apply these charges to public utilities.

In furtherance of this broad and general power, the Commission is empowered and authorized to issue orders on its own motion citing persons and entities under its jurisdiction to appear before it and show cause as to why the Commission should not take such action as it deems necessary after preliminary investigation. T.C.A. 65-2-107.

The Commission's preliminary investigation into this matter was properly conducted by the Commission Staff. The Commission's preliminary investigation supported the determination that the IXCs were in the best position to offer this calling on an immediate basis, and thus should be given the responsibility to provide interLATA county-wide calling at a zero rate. Upon issuance of the Show Cause Order in compliance with T.C.A. 65-2-107, all affected IXCs and LECS were properly noticed and given ample opportunity to contest this preliminary determination by appearing and presenting their arguments and evidence in support of these arguments at hearing.

We reject the IXC's argument that the Commission does not have the statutory power to fix interLATA rates pursuant to a show cause proceeding. T.C.A. § 65-5-201 provides that "[t]he Commission has the power after hearing upon notice, by order in writing, to fix just and reasonable . . . rates for "public utilities," a term defined to include IXCs. The legislature did not restrict the Commission's power to fix rates only for LECs or only for public utilities subject to a certain type of regulation (such as rate of return), nor did it restrict this power to a specific type of hearing procedure. The IXCs are public utilities pursuant to

T.C.A. § 65-4-101 and may be rate regulated by the Commission for intrastate service as is any other public utility.

The primary purpose for the Show Cause Order was to put affected utilities on notice that the Commission had made an initial determination that IXCs should provide interLATA county-wide calling at a different rate -- a rate that the Commission determined was just and reasonable and in the public interest. The public interest to be protected in this order was to prevent a small subset of Tennessee customers from paying higher rates than other Tennessee customers were paying for similar calls. The failure to correct this could be deemed a violation of T.C.A. §65-4-114 which prohibits the establishment of any unjustly discriminatory or preferential rate for similarly situated customers. The Commission had previously established a toll-free rate for all customers within a county except for those customers located in the fringe areas that crossed a LATA. In order to eliminate the inconsistency in a rate or service currently provided for similarly situated telephone customers (i.e., intra-county intraLATA customers), the Commission determined that the just and reasonable rate for these interLATA intra-county calls was zero. In this Show Cause Order the Commission made a preliminary determination as to the type of carrier which would be in the best position to handle this type of call.

At the Show Cause Hearing, the IXCs had ample opportunity to contest this determination by placing material and substantial evidence in the record as to the reasonableness of requiring the

provision of this service at a zero rate and the detrimental impact this rate would have on company revenues. The IXCs refused to quantify, on the record, the estimated costs of providing this service and its specific impact. Instead, the IXCs chose to focus their case on why it was more appropriate for the Commission to require LECs to obtain federal court approval to provide this interLATA service.

At any time during this proceeding, the IXCs could have presented evidence to the Commission of current Tennessee investment, rates, and earnings which might support a determination that the rate reduction for intra-county, interLATA calling by IXCs is confiscatory and should not be imposed on them. But no such material and substantial evidence to support such a determination was forthcoming. In addition, it should be noted that the Commission can always provide rate relief for any IXC upon the proper showing for the approval of requested rate increases for other services or by the establishment of new services. In fact, in a Commission order dated July 7, 1994, Tariff Filing by AT&T TO Increase Rates for Private Line Services, Docket No. 94-01035, AT&T is permitted to offset any documented cost increase experienced by this carrier in providing county-wide calling as required in the instant docket up to $250,000 annually.[4] Other IXCs can presumably avail themselves of this same opportunity simply by filing revised tariffs for the same service. We believe ample

[4] This was done as part of a Commission Order for flow-through to customers of one-half of the additional revenue generated by the increases requested by AT&T for private line services.

opportunity was given to the IXCs to fully present their case as they chose.

In addition to the procedural and statutory authority issues raised by the IXCs, these parties also contend that the Commission is requiring them to provide "local" service, a monopoly service which they maintain is not permitted by the terms of their certificates. This argument is without merit. The IXCs hold fast to this contention regardless of the fact that they are currently providing county-seat calling on a toll-free or zero rate basis which is an almost identical service to the service at issue in this docket. If the provision of toll-free service is designated as "local" then why was this objection not raised over the provision of county-seat calling by IXCs. Unlike the LECS, it is not otherwise prohibited for the IXCs to provide this toll-free service. It is the Commission that sets the terms and conditions for IXC intrastate certificates and the Commission that knows the limitations of these certificates. We agree with the Administrative Judge's specific finding that this type of interLATA service is not local service. See the ALJ's Initial Order, p. 14. Likewise, we reject the IXCs' argument that they need new certificates in order to provide the intra-county, interLATA service. Their certificates, granted by this Commission, authorized interLATA service -- precisely the service at issue here.

After the hearing was concluded, the IXCs argued that the decision in this docket should be implemented by rulemaking rather than by Commission Order in a contested case proceeding. The IXCs

cite the test to determine when an agency decision requires a rulemaking which was established by the Tennessee Court of Appeals in a recent review of a Commission decision. Tennessee Cable Television Association v. Tennessee Public Service Commission, 844 S.W. 2d 151 (Tenn. App. 1992).

> "if it appears that the agency determination, in many or most of the following circumstances, (1) is intended to have wide coverage encompassing a large segment of the regulated or general public; rather than an individual or a narrow select group; (2) it is intended to be applied generally; and uniformly to all similarly situated persons; (3) is designed to operate only in future cases, that is, prospectively; (4) prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization; (5) reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and (6) reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy." 844, S.W.2d at pp. 162-163.

At this point we must take issue with the Administrative Judge in this matter that the fourth and sixth criteria in Tennessee Cable, cited above, suggests that rate making be done through rulemaking. In fact, we believe that the fourth and sixth criteria actually indicate that this action is not appropriate for rulemaking. The fourth criteria refers to the prescription of a legal standard or directive not provided by or clearly inferable from enabling statutory authorization. The power of the Commission to set just and reasonable rates and to determine the policy underlying those rates is specifically authorized by statute to be done "after hearing, by order in writing..." T.C.A. 65-4-116(3). Thus, the fourth criteria would not apply in a rate setting proceeding. The sixth criteria refers to the need for rulemaking

when the agency makes a decision on administrative regulatory policy which is like an interpretation of law or general policy. In this proceeding, the Commission is not interpreting a policy or law but is implementing a rate and service pursuant to T.C.A. 65-4-116. Many tariffed rates of telephone companies are based on general policies which apply to a broad class of customers but the Commission has never set such rates by rulemaking nor would it be appropriate to do so. If rate setting were required to be implemented through rulemaking then rates would be extremely resistant to change and inflexible which we believe is not in the public interest and not the responsive ratemaking system intended or described in our statutory framework.

It would not appear to be in the interest of the IXCs in this proceeding (assuming that they may want to continue to work toward eliminating their responsibility to carry these calls toll-free) for these carriers to have to propose a change in Commission rules in order to be relieved of the responsibility for interLATA county-wide calling. As discussed above, the Commission in this case is merely exercising its power to fix public utility rates -- a power that is granted to the Commission by statute in a specific fashion and which has been exercised in this fashion in all Commission ratemaking proceedings. No reading of the relevant statutes compels us to set rates through rulemaking nor do we believe that the Court of Appeals intended such a result.

Finally, we reject the IXC's general argument that there is not sufficient evidence in the record to support the Administrative

Judge's decision to require the IXCs to provide toll-free county-wide interLATA calls. Instead of relying on the facts in the record, the IXCs urge the Commission to base our decision on speculation about how the federal court supervising the Bell companies would rule on a hypothetical request to waive a federal legal restriction. We cannot presume the outcome of requesting a waiver from another court over which we have no control or jurisdiction and we do not believe that this speculation constitutes sufficient evidence on which to base a decision. We do, however believe that there is ample evidence to support the opposite conclusion.

II.

There are factual issues in this docket as to whether the LECs can legally carry the interLATA traffic; whether the IXCs or the LECs are better equipped to provide the service; and how Tennessee consumers would be best served.

All parties agreed that, from a technical standpoint, interLATA county-wide calling could be provided by either the IXCs or the LECs. Requiring South Central Bell to apply for MFJ waivers and to otherwise require the LECs to provide interLATA service creates delay and uncertainty and is not in the best interest of Tennessee consumers. IXCs are the only carriers currently authorized to transport interLATA calls. IXCs are already handling the interLATA, intra-county portion of the telephone traffic at issue and they have provided interLATA, intra-county-seat calling on a toll-free basis since at least 1988 without complaint.

Because the IXCs are transporting interLATA, intra-county

calls today (and interLATA county-seat calls on a toll-free basis), there would be no changes for customers or their dialing patterns if the IXCs were simply ordered to continue to provide interLATA county-wide calling and zero rate those calls. This is an important factor.[5] From testimony of the Commission Staff, it is clear that Tennessee telephone customers take seriously the disruption caused by changed phone numbers. A small business, for example, would encounter customer confusion and considerable expense as it would be required to change stationery, business cards, signage, etc.

If IXCs continue to provide interLATA county-wide calling, a billing change to zero rate calls is the only major change which would be required for provision of the service. IXCs would not be required to engineer and construct any new facilities to provide interLATA county-wide calling.

Although the IXCs provided very general testimony that changes in their respective billing systems would result in additional costs, they acknowledged that these cost estimates were very broad. The IXCs also did not dispute that LECs would incur substantial costs if ordered to provide this interLATA service. None of the IXCs provided persuasive evidence as to what the actual costs to change their billing system would be. AT&T's witness, for example, testified on cross-examination that AT&T had not made a study of

[5] LEC testimony indicated that new facilities would be required to provide interLATA calling at additional expense and that new numbers would have to be assigned to customers located in these fringe areas if they were required to provide interLATA county-wide calling. (See ALJ's Initial Order discussion, p. 9)

what the costs to change would be. He was also not prepared to present evidence as to what AT&T's current costs are for county-wide calling or what percentage of its intrastate revenue these calls represent. MCI's witness could testify only that costs to change might be "sizeable and significant."

Every witness at the hearing did seem to concur that there would be additional costs to whomever provided interLATA county-wide calling on a toll-free basis. On the record before us, we are unable to decide the issue simply by balancing those costs. The IXCs did not argue that their costs would be higher than the LECs. As noted earlier, they refused to quantify their costs in the record. Instead, they argued the LECs should provide interLATA county-wide calling because, whatever the costs, the LECs are rate-of-return regulated and can pass these costs along to their customers. IXCs, on the other hand argue that they are constrained by competition in what they can charge customers to recoup losses in other areas.

We find that argument unpersuasive. Both the IXCs and LECs have the ability to recover costs pursuant to state law. This is true regardless of the form of regulation under which they operate. Simply saying that LECs can pass along any increased costs to local ratepayers whereas IXCs cannot is a misleading and inaccurate argument. IXCs are actually freer than LECs to institute new services and rate changes because they are not rate-of-return regulated.

Further, we find as a matter of fact that any costs incurred by the IXCs to adapt their billing systems are substantially

ameliorated by three factors. The first is the grace period for billing system upgrades provided for in the ALJ's Initial Order. Second, LECs are required to waive switched access charges to the IXCs on the interLATA, county-wide calls in the affected counties which constitutes a large portion of the cost of an interLATA call. By waiver of the toll charges by the IXCs and waiver of the access charge by the LECs, the responsibility and financial support for this service is shared.

The third ameliorating factor is that there are already two known and readily available billing methods for the IXCs to provide toll-free, interLATA, county-wide calling. There may be others. The first available alternative is through the use of a data base that associated each telephone number within the state with its Tax Authority Record (TAR) code.

The second alternative (if MCI and Sprint do not want to use the TAR data base code) as indicated in testimony in the record is that the IXCs can strip off two or three short distance zones in their billing system to comply with the Commission's Order. No one disputed that this billing system, which is already in use in Georgia, would work in Tennessee.[16] (See general discussion of billing relief for IXCs, ALJ's Initial Order pp. 11-13.)

[16] The Georgia Public Service Commission instituted a county-wide calling system similar to the one at issue here in 1991. Since that time, the IXCs have provided interLATA county-wide calling on a toll-free basis in Georgia, with no material customer complaints.

III.

In conclusion, there are no legal impediments to the IXCs providing interLATA intra-county calls. The IXCs are already providing interLATA, county-seat calling on a toll-free basis now without a local service certificate. The IXCs would not be required to engineer or construct new facilities. Although changes in the IXCs' billing systems would be required, this Order provides for an appropriate grace period and a waiver or credit of access fees to help ameliorate those costs. Further, if IXCs provide interLATA county-wide calls, consumers would not experience the disruption that would inevitably follow from changes in dialing patterns. Georgia's interLATA, toll-free county-wide calling experience also demonstrates that customer complaints and/or confusion over billing will not be material if the IXCs are ordered to continue to carry this traffic.

If, on the other hand, LECs were ordered to handle interLATA, county-wide calls, it is clear many more difficult implementation issues arise. First, because South Central Bell is prohibited by federal court order from transporting interLATA telephone traffic, it would be required to apply to Judge Greene for MFJ waivers for the thirteen counties and LATA boundaries involved. Although the IXCs provided their opinion that South Central Bell could easily obtain waivers, there is no possible way for the Commission to determine how the federal court would rule. The Commission's Show Cause Order encompasses thirteen counties and thirteen LATA boundaries, involving a total of forty-four exchanges. A further complicating factor is that we are not dealing with entire

exchanges, but with a piece of the numerous exchanges involved. The evidence presented did not indicate that waiver requests even approaching this magnitude have ever been presented to Judge Greene. Without such a waiver, Bell cannot provide the interLATA service in question.

Even if waivers of the MFJ were readily available, new facility routes would be required to transport these interLATA calls across LATA boundaries if they were to be provided by the LECs. It is undisputed that the LECs would have the substantial additional cost of engineering and constructing new facilities, such as building lines across the LATA boundaries; increased switching costs; and the increased costs of continuing to maintain these new investments. The construction of these new facilities (and obtaining necessary easements and rights of way), in addition to applying for MFJ waivers, would both delay implementation of the Commission's county-wide calling policy and could increase local monopoly residential telephone service rates.

As the Administrative Judge noted, another factor of particular significance to Tennessee customers is the fact that LECs could carry traffic over LATA boundaries only by assigning new NXX codes. This would require a change in consumer telephone numbers. Both residences and businesses would require number changes. NXX codes are a scarce commodity. Tennessee has already begun implementation of ten digit dialing to gain additional NXX codes for new customers and services. Ordering the LECs to provide interLATA county-wide calling would add approximately 47 new NXX codes in Tennessee, which would help exhaust the available

telephone numbers in the 615 NPA. As noted earlier, changing customers' telephone numbers, be they residents or businesses, is complex and time consuming, not to mention disruptive. This factor alone weighs heavily against ordering the LECs to provide interLATA county-wide calling.

Taking all of these various factors into account, it is clear that there is ample evidence in the record to support the Commission's decision that IXCs should transport interLATA intra-county calls at a zero rate.

IT IS THEREFORE ORDERED THAT:

1. Except where inconsistent with this Order, the Administrative Judge's Initial Order is affirmed and adopted by reference;

2. All IXCs providing intrastate service in Tennessee will provide interLATA intra-county calling toll-free to all Tennessee customers effective October 15, 1994;

3. All IXCs providing intrastate service in Tennessee will begin, as soon as possible, but no later than two years from the date of the Final Order in this case, to zero rate interLATA intra-county calls on customer bills;

4. All IXCs without the present ability to zero rate interLATA intra-county calls on customer bills will be given six months from the date of the Final Order in this case to apply to the Commission for a waiver from the requirement to zero rate the calls in question and waiver will be granted providing they can show that their market share in the areas in question and the thirteen counties is so low as not to justify the expense of

developing the necessary computer system;

5. During any period after the implementation date of the county-wide calling service required by this order in which an IXC is unable to zero rate calls or otherwise adjust customer billing, refunds for interLATA county-wide calls shall be provided upon customer demand.

6. All LECs operating in Tennessee shall credit access charges associated with interLATA intra-county calls upon implementation of the county-wide service required by this Order;

7. Any party aggrieved with the Commission's decision in this matter may file a Petition for Reconsideration with the Commission within ten (10) days from and after the date of this Order;

8. Any party aggrieved with the Commission's decision in this matter has the right of judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.

Frank D. Cochran
CHAIRMAN

COMMISSIONER

ATTEST

EXECUTIVE DIRECTOR

COMMISSIONER

TAB 13

H
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

A T & T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC., MCI Telecommunications Corporation and Sprint Communications Company, L. P., Petitioners/Appellants,
v.
Frank COCHRAN, Chairman, Keith Bissell, Commissioner, and Steve Hewlett, Commissioner Constituting the Tennessee Public Service Commission, Respondents/Appellees.

No. 01A01-9409-BC-00427.

May 3, 1995.
Rehearing Denied June 7, 1995.

Appeals of Tennessee Middle Section at Nashville.

Van Sanford and John Knox Walkup of Gullett, Sanford, Robinson and Martin, Nashville, TN.

Jeanne Moran, Nashville, TN.

Paul S. Davidson of Stokes & Bartholomew, Nashville, TN.

T.G. Pappas of Bass, Berry & Sims, Nashville, TN.

Charles L. Howorth, Nashville, TN.

OPINION

TODD.

***1** The captioned petitioners have petitioned this Court pursuant to T.R.A.P. Rule 12 for review of a final order of the Tennessee Public Service Commission (hereafter "Commission") requiring petitioners to render free service to a particular group of telephone users in respect to a particular class of telephone calls.

Petitioners do not operate local telephone exchanges which are designated by the acronym, "L.A.T.A." Petitioners are designated "inter LATA" or "IXC's" because they furnish long distance telephone connections between local exchanges. Petitioners compete for the patronage of local telephone subscribers who designate their choice among available long distance carriers. The long distance carriers are compensated by billing the local customer through the local exchange.

Not all Tennessee counties are served by county-wide local exchanges. In each of twelve counties of the State there are at least two local exchanges; so that, in these counties, some intra-county telephone calls require the service of inter LATA, or long distance connection between exchanges.

The Commission has adopted a policy of eliminating long distance charges on telephone calls within a single county. Pursuant to this policy, on October 13, 1993, the Commission served upon petitioners an order captioned:

> In Re: Show Cause Proceeding Against Certified ICX's to Provide Toll Free, County-Wide Calling

Following responses and hearing, the Commission entered its order providing:

> 2. All IXC's (long distance carriers) providing intrastate service in Tennessee will provide inter LATA intra-county calling toll free to all Tennessee customers effective October 15, 1994;....

In their petition to this Court for review, petitioners present the following issues:

1. Whether the Commission followed the proper standard or criteria in construing its statutory powers.
2. Whether the Commission's Final Order, requiring the petitioners to provide toll-free service to a particular category of customers on a geographic basis, is within the statutory powers of the Commission.
3. Whether the Commission's Final Order constitutes a taking of the particular services or property of the petitioners, without compensation, in violation of Article I, Section 21 of the Tennessee Constitution and the Fifth Amendment to the United States Constitution made applicable

to the States through the Fourteenth Amendment.
4. Whether the Commission's Final Order deprives the petitioners of due process of law in violation of Article I, Section 8 of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution.
5. Whether the Commission adopted the policies it seeks to implement in this proceeding in accordance with governing procedural law.

Petitioners summarize their argument:

1. The powers of the Commission are only those conferred by statute as limited by the Federal and State Constitutions.

2. The Commission has no power to compel petitioners to furnish free service under the circumstances of this case.

***2** 3. The action of the Commission is invalid because it is based upon incorrect "show cause" procedure rather than rule-making procedure.

T.C.A. Section 65-5-201 authorizes the Commission to fix "just and reasonable rates" for utility service, but no statutory provision is cited or found for requiring a utility to furnish its service to a particular customer without charge.

The Commission points out that its present tariffs require local telephone exchanges to furnish free directory service to its subscribers, but the relation of a local exchange with its subscribers is completely different from that of a long distance carrier and its intermittent customers. For a lump sum monthly charge, the exchange furnishes a package of services including directory service. Long distance telephone companies charge on a call by call basis, whereby they are paid for each call made. A more reasonable comparison would be with a public pay station telephone service.

The Commission asserts that it has the power to "distribute the load" of utility costs by lowering the rates charged one class of customers because of profits derived from another class of customers. Whatever the merits of this argument, the statute does not authorize the requirement of service without any charge to one class of customers even though the loss to the utility may be replaced by overcharging another class of customers.

The direction of petitioners to render free long distance service between exchanges serving customers in a single county is not authorized by statute.

Article I, Section 21 of the Constitution of Tennessee reads as follows:

> Sec. 21. No man's services or property taken without consent or compensation.--That no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.

The protection of this provision extends to corporations as well as to individuals. *Harbison v. Knoxville Iron Co.,* 103 Tenn. 421, 53 S.W. 955 (1899); 183 U.S. 13, 22 S.Ct. 1, 46 L.Ed. 55 (1901) ; *Home Tel. Co. v. People's Tel. & Tel. Co.,* 125 Tenn. 270, 141 S.W. 845 (1911).

The order of the Commission demands "particular service." In *Henley v. State,* 98 Tenn. 665, 41 S.W. 352 (1897), the Supreme Court said:

> Particular services must mean peculiar services; limited services; not ordinary or general services of an individual. It is not an easy matter to draw the distinction between particular and ordinary services in every instance, still some general rules may be given to mark the line. It seems clear that ordinary services, such as may be required of all citizens, or officials, by general or valid special laws, are not particular services. A single illustration may suffice: A physician cannot be required to give his time and services and skill and scientific knowledge in making an examination to qualify him to speak as an expert witness. If, however, the same physician may have already made an examination and come into the possession of facts material to be disclosed to attain justice and administer the law, he may be required to testify to them as any other witness may.

***3** *Henley,* Id. at 684.

The order of the Commission "demands" or "takes" property, not for public use, but for private use of an individual at his demand. The utility is entitled to some compensation from the member of the public receiving the benefit of the demand. The right to compensation is "property" which may not be taken without just compensation. *Southern Bell*

Tel. & Tel. Co. v. Tenn. Pub. Serv. Comm., 202 Tenn. 465, 304 S.W.2d 640 (1957).

The Constitution requires "just compensation" for services or property taken by public authority. Just compensation means compensation from the public treasury or, in the case of utilities, from the member of the public receiving the benefit. It does not mean forcing a person not benefitted to pay the compensation for the benefitted non-payer.

The action of the Commission also violates the Fifth Amendment of the Constitution of the United States which is made applicable to the states by the Fourteenth Amendment. *Dolan v. City of Tygard,* 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

Because of the statutory and constitutional infirmities of the order of the Commission, it is unnecessary to discuss or determine the procedural issue which is pretermitted.

There are other constitutional and authorized means of accomplishing the ends sought by the Commission, but it is not within the province of this Court to render advisory opinions.

The order of the Commission is reversed and vacated. Costs of this appeal are taxed against the Commission. The cause is remanded to the Commission for such further proceedings as may be necessary and appropriate.

Reversed, Vacated and Remanded.

END OF DOCUMENT

TAB 14

TENNESSEE 1995 SESSION LAWS
1995 SESSION OF THE 99TH GENERAL ASSEMBLY

Additions and deletions are not identified in this document.

Pub. Ch. 183
H.B. No. 971
PUBLIC UTILITIES--TELEPHONES--TOLL-FREE COUNTYWIDE TELEPHONE CALLS

AN ACT to provide for toll-free countywide telephone calling, and to amend Tennessee Code Annotated, Title 65, Chapter 21, Part 1.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

SECTION 1. Tennessee Code Annotated, Title 65, Chapter 21, Part 1, is amended by adding the following as a new section to be appropriately designated:

Section ___.

(a) After January 1, 1996, any telephone call made between two (2) points in the same county in Tennessee shall be classified as toll free and shall not be billed to any customer.

(b) This section shall apply to all companies or entities providing telephone service in this state as public utilities, including, but not limited to, telephone companies regulated by the Tennessee Public Service Commission. Provided, however, that this section shall not apply to any telephone company which is prohibited by federal law from providing countywide service in a particular county.

(c) Nothing in this section is intended to modify or repeal the rate-making and **telephone regulatory authority** of the Tennessee Public Service Commission or the right of telephone companies to earn a fair rate of return.

SECTION 2. This act shall take effect September 1, 1995, the public welfare requiring it.

Approved this 5th day of May, 1995

TN LEGIS 183 (1995)

END OF DOCUMENT

TAB 15

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION
NASHVILLE, TENNESSEE

January 23, 1996

IN RE: APPLICATION OF BELLSOUTH TELECOMMUNICATIONS, INC., d/b/a/ SOUTH CENTRAL BELL TELEPHONE COMPANY FOR A PRICE REGULATION PLAN

DOCKET NO. 95-02614

ORDER

This matter is before the Commission on the application of BellSouth Telecommunications, Inc. d/b/a South Central Bell Telephone Company (hereafter "Bell") for price regulation pursuant to T.C.A. 65-5-209. On September 20, 1995, this Commission entered an Order adopting the Staff audit of Bell's TPSC 3.01 Report for the twelve months ended March 31, 1995. The audit, conducted in accordance with T.C.A. 65-5-209(c) and (j), revealed Bell's rate of return to be 12.74%, well above the Authorized Rate of Return, set at 10.65-11.85%

Because Bell's earned rate of return exceeded the Authorized Rate of Return, the Commission initiated a contested, evidentiary proceeding to set initial rates. The Commission directed that the proceeding be conducted in two parts. In the first session, on November 1, testimony was admitted to determine a fair rate of return on Bell's rate base. This decision was deliberated and announced at the November 7 Commission Conference. In the second session, on November 20, the Commission heard rate-design proposals for the purpose of setting initial rates. On November 30, the Commission convened to deliberate and decide what initial rates were just, reasonable, and therefore, affordable.

The Commission previously adopted the Staff's audit in its Order of September 20, 1995. The Commission has further determined that the type of adjustments made by Commission Staff in conducting the audit are permitted by law. See Commission Order of November 9, 1995. The Commission takes notice of its prior Orders of September 20, 1995 and of November 9, 1995. Also, the Commission had before it the Audit Findings derived from the Staff's Audit of the 1995 TPSC 3.01 Report. See Exhibit 7.

Based on the record before the Commission, we make the following findings:

FINDINGS OF FACT

1. Bell's case consisted of testimony, which went to support what Bell's Rate of Return would have been but for the adjustments made in the Audit. Mr. Guy Cochran, Assistant Chief Accountant for Bell, urged the Commission to find that Bell's actual results were 10.20% for the twelve (12) months ended March 31, 1995. In rebuttal, the Consumer Advocate Division (hereafter CA) put on Mr. Archie Hickerson, Division Director, who disagreed with Mr. Cochran and opined that the Staff adjustments were properly made. He went further, however, to

propose that several adjustments, in addition to ones made by the staff, should be made to accurately reflect the company's earnings through March 1995 TPSC 3.01. Mr. Hickerson testified that an updated audit report would reveal that Bell's actual rate of return would be 14.50%. The Commission did not find that any party provided support in law to justify reconsideration of their adoption of the Staff Audit return of 12.74%.

Having found Bell to be earning above the range, the next step required by the statute is that the Commission make a finding of a fair rate of return. To do this, the Commission must determine an appropriate return to the common equity holder, which when incorporated into the appropriate capital structure of debt and equity, ultimately yields a fair rate of return. Bell put on their expert witness, Dr. James VanderWelde, Research Professor of Finance at Duke University. The CA put on their expert witness, Dr. Stephen Brown, Economist, Consumer Advocate Division.

2. Bell's witness, Dr. VanderWelde, testified that, using a discounted cash flow model and a risk premium model to estimate a fair rate of return, Bell should be permitted to earn in the range of 12.8-14% on equity. Dr. Brown, on behalf of the CA, using a discounted cash flow (DCF) model and a risk premium model, proposed a rate of return on common equity in the range of 9.74-11.01%. The distinction between the two lay in Dr. Vanderwelde's use of a quarterly DCF applied to comparable non-telecommunications firms while Dr. Brown used a continuous DCF applied to Bell and the Regional Bell Holding Companies(RBHC). The Commission has concerns about both methodologies based on their failure to adequately account for both the timing effect of quarterly dividend payments and a company's ability to continuously earn profits; and second, the testimony of the two experts regarding comparison of comparable firms, i.e. relative rates of return. Dr. Brown reviewed each company presented by Dr. VanderWelde. In doing so, he illustrated that there was no basis for comparison between Bell and the dissimilar companies. If there is no basis for comparison, Dr. VanderWelde's conclusions may have minimal relevance to a "fair rate of return on equity." As to Dr. Brown's own comparisons, he candidly admitted that, though his DCF analysis was correct, it might be given less weight because of the disparity in earnings and dividend growth rates for the RBHC's.

Each expert criticized the risk premium method proposed by the other. However, the Commission finds that both methods have merit. The risk premium method proposed by Dr. Brown indicated a fair return to equity of 11.01% while Dr. VanderWelde's method indicated 13.2%.

After considering the testimony of witnesses and the entire record in this portion of the price regulation proceeding, the Commission determined the fair return on equity to be 12.5%. By applying this equity return and the actual debt cost to the actual capital structure, taken from Bell's March 1995 TPSC 3.01 Report, the Commission finds that a cost of capital/fair rate of return of 10.35% is reasonable and is adopted.

3. The fair return on rate base of 10.35% applied to the rate base adopted in the Staff Audit results in an excess revenue requirement of $56.285 million. It was the decision of the Commission that the next portion of the proceeding would consider argument from the parties regarding how to design the Bell rates or, specifically, how to allocate the $56.285 million to reduce rates.

4. On November 20, the Commission convened to hear rate design proposals to reduce rates by $56.285 million from these parties: AT&T Communications of the South Central States (hereafter AT&T), Bell, and the CA.

AT&T proposed a reduction of switched access charges to cost: a proposal which AT&T admitted would cost $77 million, or more than $20 million over the actual reduction which was adopted.

Bell proposed four changes: 1) to make-up a $7.7 million deficit in the deferred revenue account to pay for rate reductions ordered in 1993; 2) to reduce the local switching component of intrastate switched access by $12.9 million; 3) to reduce intraLATA toll rates by $20.2 million; and 4) to utilize $15.5 million toward additional depreciation expense as part of the depreciation rate represcription process.

CA proposed four changes: 1) to reduce rates by $27.4 million by eliminating the Touchtone charge for residential customers; 2) to reduce rates by $21.1 million reflecting expansion of the local calling areas for Metro Area Calling; 3) to reduce rates by $7.4 million reflecting the elimination of zone charges; and 4) to pay a maximum of $0.4 million for a competitive impact study to be submitted to the Legislature as part of the two-year evaluation of local competition required by the Telecommunications Reform Act of 1995.

5. The Commission agreed that, as a matter of policy, the most appropriate rate design should benefit the greatest number of consumers and ratepayers in all counties served by Bell across the state.

Accordingly, the Commission adopts the following rate design:

a. The IntraLATA long distance message toll rates (MTS) shall be reduced by $21.5 million. The reduction shall be applied to:
   (1) provide free interLATA countywide calling;
   (2) reduce all MTS rate band per minute rates above $0.19 to $0.19;
   (3) provide subminute MTS pricing: and
   (4) use any remainder to further reduce MTS rates.

b. The $1.50 residential Touchtone charge shall be eliminated, a calculated reduction of rates by $27.4 million.
c. The $1.00 zone charge shall be eliminated, a calculated reduction of rates by $7.4 million.
d. Service connection charges for computer lines at schools and libraries shall be waived.
e. Bell should give customers "who have expressed a need to be included in Metro Area Calling" a flat-rate option in lieu of measured long-distance rates.

6. In order to enable Bell to apply part of the $21.5 million to provide free interLATA countywide calling as designated in subsection 5(a)(1), Bell must secure a waiver from the United States District Court for the District of Columbia in U.S. v. Western Electric Co., Inc. and AT&T. That waiver, when granted, shall modify the District Court's Order by permitting Bell to provide local exchange service across LATA boundaries solely for the purpose of providing countywide local telephone calling service.

7. AT&T put on witnesses whose testimony included statements reiterating their request that each rate Bell seeks to impose should be reviewed prior to the implementation of price regulation. In the United Telephone-Southeast, Inc. Price Regulation Order of October 13, 1995, the Commission denied AT&T's Motion to convene a hearing in order to construe certain provisions of Title 65, as amended by Chapter 408 of the Public Acts of 1995 and by Chapter 305 of the Public Acts of 1995. We did so based on the absence of authority, under the law, for the Commission, to make any further finding with regard to rates except as we set out in the provisions of the United Order. No testimony by these witnesses provides support for any basis to find differently here.

CONCLUSIONS OF LAW

Since the enactment of the Telecommunications Reform Act in June 1995, the Commission is guided by the provisions of T.C.A. 65-5-209 in establishing "just and reasonable rates" for an Incumbent Local Exchange Telephone Company (LEC). This law sets out that...

> Rates for telecommunications services are just and reasonable when they are determined to be affordable as set forth in this Section. Using the procedures established in this section, the Commission shall ensure that rates for all Basic Local Exchange Telephone Services and Non-Basic Services are affordable on the effective date of price regulation for each Incumbent LEC. T.C.A.65-5-209 (a).

Prior to the enactment of this law in June 1995, the Legislature had delegated to the Commission the power to fix rates that are "just and reasonable." T.C.A. 65-5-201 The Legislature has now determined that, for purposes of a price regulation plan, rates are just and reasonable when they are "affordable." T.C.A. 65-5-209(a)

The Commission is authorized to find these rates "affordable" by observing the entirety of T.C.A. 65-5-209. In the case of an Incumbent whose rate of return, as determined from an audit of its most recent TPSC 3.01, was greater than its Authorized Rate of Return, the Commission was under a mandate to initiate a contested, evidentiary hearing to establish initial rates. The proceeding is to be conducted in accordance with the Uniform Administrative Procedures Act. T.C.A. 4-5-101 et. seq.

Determination of a fair rate of return is an issue separate and apart from setting the rates. For that reason, the Commission bifurcated the proceeding and first set a hearing to determine a fair rate of return. Evidence was submitted as to cost, capital investment, relative rates of return and other factors. It is well established that the Commission is required to consider rate base, revenues, and expenses of the utility and a fair rate of return based on long-term debt, common equity and other underlying considerations when setting rates. CF Industries v. TPSC, 599 SW2d 536 (Tenn 1980).

Rate design, on the other hand, has been largely a decision left to the specialized knowledge and technical expertise of the Commission. The Commission may...

> consider all relevant circumstances shown by the record, all recognized technical and scientific facts pertinent to the issue under consideration and may superimpose upon the entire transaction its own expertise, technical competence and specialized knowledge. Thus, focusing upon the issues, the Commission decides that which is just and reasonable. This is the litmus test–nothing more, nothing less. Id. at 543.

Having considered the testimony of witnesses and the entire record compiled in the rate making and rate design proceedings,

IT IS THEREFORE ORDERED

1. that, in order that their rates be "affordable", Bell shall reduce rates by $56.285 million by the specifically designed distribution set forth in Section 5;

2. that, in order that their rates be "affordable", Bell shall file tariffs to accomplish the rate design set out in Section 5(a) through (d) within twenty (20) days from the entry of this order;

3. that Bell shall proceed within ten (10) days of entry of this order to properly petition the United States District Court for the District of Columbia in U.S. v. Western Electric Co., Inc. and AT&T to modify the Court's Final Judgment so that Bell is permitted to provide local exchange service across LATA boundaries for the purpose of providing countywide local telephone calling service and shall provide to this Commission a copy of this petition verifying same;

4. that the effective date of the tariffs set forth above and the effective date of price regulation for Bell occur on the same day but in no circumstance is the effective date of price regulation to occur until and unless Bell properly petitions the U.S. District Court for the waiver as set forth above;

5. that the allocation of the $56.285 million shall not be applied to administrative costs or legal fees associated with the implementation of the rate reduction outlined in this order;

6. that Bell shall charge and collect for Basic and Non-Basic Services only such rates less than or equal to the maximum permitted by T.C.A., Title 65, Chapter 5 (the Act);

7. that Bell shall adhere to a price floor for its competitive services subject to such determination as the Commission shall make pursuant to T.C.A. 65-5-207;

8. that Bell shall adhere to the safeguards set forth in T.C.A. 65-5-208(c) and (d) and all non-discrimination provisions of Title 65;

9. that Bell shall comply with all Competitive and Administrative Rules and such Orders as are issued by the Commission regarding support of universal service and such additional rules issued by the Commission under Title 65, Chapter 5, including interconnection, resale, intraLATA equal access, unbundling, number portability and packaging of Basic Services;

10. that, notwithstanding the annual adjustments permitted in T.C.A. 65-5-209(e), the initial Basic Service rates for Bell shall not increase for a period of four years from the date of entry of this Order. At the end of this four-year period, Bell shall only be permitted to adjust annually its rates for Basic Services in accordance with the method set forth in T.C.A. 65-5-209(e) provided that the limitations and safeguards set forth in the Act are followed with regard to any increase in rates;

11. that Bell's rates for Non-Basic Services shall be set as the company deems appropriate, subject to the limitations set forth in T.C.A. 65-5-209(e) and (g), the non-discrimination provisions of this Title, any rules or orders issued by the Commission pursuant to Section 65-5-208(c) and upon requisite prior notice to all affected customers;

12. that Bell shall maintain its commitment to the FYI Tennessee Master Plan to the completion of the funded requirements and any adjustments to the plan are to be approved by the Commission; and

13. that Bell shall comply with their business participation plan, filed with the Commission pursuant to Section 16, Chapter 408, Public Acts of 1995.

IT IS FURTHER ORDERED THAT

1. the request of AT&T that we review each rate prior to price regulation is hereby denied as being in excess of the authority with which we have been empowered;

2. all other motions filed or pending as of the date of this Order and not specifically ruled upon are hereby denied.

3. Any party aggrieved with the Commission's decisions of this matter may file a Petition for Reconsideration within ten (10) days from entry of this Order.

4. Any person aggrieved with the Commission's decisions of this matter has the right to judicial review by filing a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from entry of this Order.

CHAIRMAN

COMMISSIONER

COMMISSIONER

ATTEST:

EXECUTIVE DIRECTOR

TAB 16

LEXSEE 1996 U.S. DIST. LEXIS 9293

United States v. Western Elec. Co.

Civil Action No. 82-0192 (HHG)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1996 U.S. Dist. LEXIS 9293; 1996-1 Trade Cas. (CCH) P71,364; 2 Comm. Reg. (P & F) 1388

April 11, 1996, Decided
April 11, 1996, FILED

COUNSEL: [*1] For UNITED STATES OF AMERICA, plaintiff: John Philip Sauntry, Jr., U.S. ATTORNEY'S OFFICE, Washington, DC. Donald J. Russell, U.S. DEPARTMENT OF JUSTICE, Antitrust Division, Washington, DC.

For WESTERN ELECTRIC COMPANY, INC., defendant: Robert Joseph Butler, WILEY, REIN & FIELDING, Washington, DC. Roy Leslie Morris, ALLNET COMMUNICATION SERVICES, INC., Washington, DC. John Lawrence McGrew, WILKIE, FARR & GALLAGHER, Washington, DC. Albert H. Kramer, KECK, MAHIN & CATE, Washington, DC. Michael Heller Salisbury, JENNER & BLOCK, Washington, DC. For AMERICAN TELEPHONE AND TELEGRAPH COMPANY, defendant: Robert D. McLean, Marc E. Manly, SIDLEY & AUSTIN, Washington, DC. David William Carpenter, SIDLEY & AUSTIN, Chicago, IL. For TANDY CORPORATION, defendant: John Whitney Pettit, DRINKER, BIDDLE & REATH, Washington, DC.

For MCI COMMUNICATIONS CORPORATION, intervenor-deft.: Anthony Charles Epstein, JENNER & BLOCK, Washington, DC. For BELLSOUTH CORPORATION, invervenor-deft.: Richard William Beckler, FULBRIGHT & JAWORSKI, L.L.P, Washington, DC. For BELL OPERATING COMP, intervenor-deft.: Michael K. Kellogg, KELLOGG, HUBER, HANSEN, TODD & EVANS, P.L.L.C., Washington, DC. For BELL ATLANTIC, BELL ATLANTIC NETWORK SERVICES, intervenor-deft.: John Thorne, BELL ATLANTIC NETWORK SERVICES, INC., Arlington, VA. For SPRINT COMMUNICATIONS COMPANY, intervenor-deft.: Robert Jeffery Aamoth, REED, SMITH, SHAW & MCCLAY, Washington, DC. For NYNEX CORPORATION, intervenor-deft.: John C. Timm, White Plains, NY. John P. Walsh, John M. Clarke, White Plains, NY. For AMERITECH CORPORATION, intervenor-deft.: Evan Mark Tager, MAYER, BROWN & PLATT, Washington, DC. For PACIFIC TELESIS GROUP, intervenor-defendant: Richard W. Odgers, PACIFIC TELESIS LEGAL DEPARTMENT, Washington, DC. David A. Gross, AIRTOUCH COMMUNICATIONS, Washington, DC. James S. Blaszak, LEVINE, BLASZAK, BLOCK & BOOTHBY, Washington, DC. For SOUTHWESTERN BELL, intervenor-defendant: James D. Ellis, SOUTHWESTERN BELL CORPORATION, San Antonio, TX. Martin E. Grambow, SOUTHWESTERN BELL CORPORATION, Washington, DC.

For TELECOMMUNICATIONS RESELLERS ASSOCIATION, movant: Richard Liebeskind, U.S. DEPARTMENT OF JUSTICE, Washington, DC. For AIRTOUCH COMMUNICATIONS OF CALIFORNIA (AIRTOUCH), movant: David A. Gross, AIRTOUCH COMMUNICATIONS, Washington, DC. For TELECOMMUNICATIONS RESELLERS ASSOCIATION, movant: Kevin Scott DiLallo, HUNTER & MOW, Washington, DC. For ALARM INDUSTRY COMMUNICATIONS COMMITTEE, movant: Glenn A. Mitchell, STEIN, MITCHELL & MEZINES, Washington, DC. For LCI INTERNATIONAL, INCORPORATED ("LCI"), movant: Robert Jeffery Aamoth, REED, SMITH, SHAW & MCCLAY, Washington, DC.

JUDGES: HAROLD H. GREENE, United States District Judge

OPINIONBY: HAROLD H. GREENE

OPINION:

OPINION

On February 8, 1996, President Clinton signed the Telecommunications Act of 1996 into law. On that same date, the Court issued a Memorandum and Order permitting parties with pending motions in the above-captioned action to address the question of whether the motions were rendered moot by the Act's passage. That issue has now been fully briefed. All parties agree that this Court should terminate the decree, nunc pro tunc, as of February 8, 1996. With one exception, n1 all parties also agree that all pending motions should be dismissed as moot. Accordingly, the Court will enter an order terminating the decree, nunc pro tunc, as of February 8, 1996, and dismissing all pending motions as moot.

n1 See MCI's Supplemental Memorandum Regarding the Telecommunications Act of 1996 (Feb. 28, 1992). MCI and AT&T disagree on whether the relief requested in MCI's Motion for Declaratory Ruling Enforcing AT&T's Prior Representations Concerning Patents and Barriers to Entry (Dec. 21, 1992) may be granted by the Court in light of the passage of the Act. The Court finds it unnecessary to resolve that issue at this point because the issues raised by that motion and the related filings are essentially identical to those raised in MCI Telecommunications Corp. v. American Tel. & Tel. Co., Civil Action No. 92-2858, which is currently pending before the Court. Thus, the Court will address those issues in Civil Action No. 92-2858, rather than in the above-captioned case, a course of action to which MCI has expressed its agreement. See MCI's Supplemental Memorandum Regarding the Telecommunications Act of 1996 at 4 n.8 (Feb. 28, 1992).

[*2]

However, there is one lingering issue for the Court to address. Four of the Regional Companies, Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation, and SBC Communications, Inc., ("the Regional Companies") seek to have the Court order the return of documents obtained by the Department of Justice ("the Department") pursuant to Section VI of the decree in connection with the Regional Companies' Motion to Vacate the Decree, filed July 6, 1994. The Department seeks a declaration by the Court confirming its right to continue to use the documents in its possession and to transfer them to the Federal Communications Commission ("FCC").

The Court agrees with the Department that it should be allowed to retain the documents, n2 and, if appropriate, to share them with the FCC. Nothing in this Court's Order of August 18, 1994, allowing the Department to exercise its visitorial powers pursuant to Section VI of the decree in connection with the Regional Companies' Motion to Vacate, prohibits the Department from retaining the documents or sharing them with the FCC. The Regionals did not seek at that time to have the Court restrict the use of the documents or require their return [*3] to the companies. Moreover, Section VI(B) of the decree explicitly allowed the Department to share documents with the FCC. *United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 231 (D.D.C. 1982),* aff'd, *460 U.S. 1001 (1983).*

n2 The Regional Companies forcefully argue that the Department would be unable to obtain these documents under the new Act. The Department's ability to do so, however, is not the issue. The Department already has possession of the documents -- its ability to obtain them in the first instance under the Act is irrelevant. The Court must decide only whether the Department is required to return the documents and whether it may share them with the FCC.

Furthermore, it is clear from the structure of the Telecommunications Act of 1996 that Congress contemplated that the FCC would perform a role akin to that which the Court and the Department had previously performed under the decree. In fact, Congress required the FCC to call upon the expertise of the Department regarding the issue [*4] of the entry of the Regional Companies into the in-region inter-LATA service market. See *47 U.S.C. § 271.* It is implicit in the statute that Congress believed that the FCC would have full cooperation from the Department, including access to whatever information the Department has in its possession that may be relevant to the FCC's new responsibilities. There is absolutely no indication that Congress intended to strip the Department of possession of any documents it may have obtained while performing its obligations under the decree. n3

n3 This conclusion is buttressed by the fact that the FCC must resolve a Regional Company's application to provide in-region inter-LATA

> services within 90 days of receiving the application. *47 U.S.C. § 271*(d)(3). By requiring such decisions to be made in a relatively brief time period, it appears that Congress contemplated that the FCC would have ready access to information in the Department's possession.

However, the Regional Companies express concern that the Department [*5] seeks carte blanche to use the documents in any investigations or proceedings, not just those concerning the Regional Companies' entry into previously restricted markets. The Court agrees that the use of the documents by the Department should be related to the use for which they were originally obtained. Thus, the Department may use these documents in connection with the investigation of any activities that would have previously been prohibited by the decree, n4 as well as in connection with its role as an advisor to the FCC pursuant to *47 U.S.C. § 271*. The FCC may also use the documents as necessary to implement section 271 or any other section of the Act that requires the FCC to undertake a competitive analysis. But the documents may not be used to investigate wholly unrelated activity that might be in violation of other antitrust laws, unless otherwise authorized by law.

> n4 As all the parties recognize, the Court retains jurisdiction to entertain any proceedings alleging a violation of the decree based on conduct occurring before February 6, 1996.

[*6]

The current dispute over the documents in possession of the Department suggests that this litigation has come full circle. In one of this Court's earliest decisions after assuming control of this lawsuit, it directed that AT&T produce some 2.5 million documents to the Department of Justice that had previously been produced pursuant to judicial orders to two private plaintiffs in antitrust actions against AT&T. This Court reasoned that it would make no sense to curtail access by the Department to relevant documents when other parties had already secured access to the same documents. The Court explained:

> It would not advance but defeat the purpose of the Rules to require plaintiff in this case to proceed laboriously, and possibly at the cost of several years' delay, to duplicate the document selection process conducted by the plaintiffs in Litton and MCI when the fruits of that process are readily available and in the possession of a party to this very litigation, and when those who conducted the search do not object.

United States v. American Tel. & Tel. Co., 461 F. Supp. 1314, 1339 (D.D.C. 1978) (footnote omitted).

As in that instance, it would make no [*7] sense here and now to require the FCC to duplicate the effort expended by the Department in the collection of documents for purposes similar to those which the Congress has now entrusted to that Commission.

On the basis of all these considerations, the prohibition which the Regional Companies seek with respect to these documents will be denied. An Order consistent with the foregoing is being issued contemporaneously herewith.

April 11, 1996

HAROLD H. GREENE

United States District Judge

ORDER

For the reasons set forth in the Opinion accompanying this Order, it is this 11th day of April, 1996,

ORDERED that the decree entered on August 24, 1982, is hereby terminated, nunc pro tunc, as of February 8, 1996; and it is

FURTHER ORDERED that any issues regarding the Weber patent raised in MCI's Motion for Declaratory Ruling Enforcing AT&T's Prior Representations Concerning Patents and Barriers to Entry (Dec. 21, 1992) and subsequent pleadings regarding that motion, shall be resolved in Civil Action No. 92-2858 rather than in the above-captioned action; and it is

FURTHER ORDERED that all other pending motions in the instant case are hereby DISMISSED moot; and it is [*8]

FURTHER ORDERED that this Court will retain jurisdiction in the above-captioned case for the limited purpose of dealing with conduct or activities occurring prior to February 8, 1996; and it is

FURTHER ORDERED that the Department of Justice ("the Department") may retain documents, deposition testimony, interrogatory responses and other materials (hereinafter "documents") obtained pursuant to Section VI of the decree entered on August 24, 1982, including documents obtained in connection with the

Motion of Bell Atlantic Corporation, BellSouth Corporation, NYNEX Corporation and Southwestern Bell Corporation to Vacate the Decree (July 6, 1994), provided that the documents may be used by the Department and the Federal Communications Commission ("the FCC") only in connection with investigations of any activities that would have been previously prohibited by the decree or in connection with the performance of their duties under the Telecommunications Act of 1996. No documents shall be divulged by the Department to any person other than employees, consultants, or experts retained by the Department, or duly authorized representatives of the Executive Branch of the United States or the [*9] FCC (including submission of such document for the record in a FCC proceeding), except in the course of legal proceedings in which the United States is a party, or for the purpose of enforcing the decree with respect to conduct or activities prior to the date of the enactment of the Telecommunications Act of 1996, P.L. 104-104, or as otherwise required by law; and it is

FURTHER ORDERED that if a party which submitted a document ("the submitter") has asserted a claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure as to such document, the Department shall use its best efforts to provide ten calendar days' notice to the party which submitted the document prior to publicly disclosing the document, quoting from the document in any public pleading, or disclosing the document in interviews or depositions of any person not employed by the submitter; and it is

FURTHER ORDERED that the Department may divulge or provide a copy of the document to the FCC (including submission of such document for the record in a FCC proceeding) if the Department deems such document to be relevant to authorized activities of the FCC under the Telecommunications Act of 1996. The confidentiality [*10] protections afforded to such document by the FCC shall be governed by applicable FCC rules and practices. If the submitter has asserted a claim of protection under Rule 26(c)(7) for such document, the Department shall advise the FCC of such claim, and shall, consistent with FCC rules and practices, request the FCC to provide confidential treatment for such document (including a request that if the FCC makes such document available to other parties, it require such other parties to comply with an appropriate protective order); and it is

FURTHER ORDERED that the Department, in its discretion, may return documents to the submitter without further order of the Court; and it is

FURTHER ORDERED that nothing in this Order shall be read to limit or alter the applicable provisions and protections of the Freedom of Information Act, *5 U.S.C. § § 552* et seq., or the authority of the Department to obtain and use documents under the Antitrust Civil Process Act, *15 U.S.C. § § 1311* et seq., the Hart-Scott-Rodino Antitrust Improvements Act of 1974, *15 U.S.C. § 18a,* or by any other means.

HAROLD M. GREENE

United States District Judge

TAB 17

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION
NASHVILLE, TENNESSEE
May 17, 1996

IN RE: **Show Cause Proceeding Against Certified Inter- Exchange Carriers (Allnet Communications Service, Inc., AT&T Communications of the South Central States, Inc., LDDS WorldCom, MCI Telecommunications Corp., Sprint Communications Co., and Wiltel, Inc.) To Provide Toll Free, County-Wide Calling.**

DOCKET NO. 96-00918

ORDER

This matter is before the Commission on its own motion pursuant to T.C.A § 65-2-106 and T.C.A § 65-21-114.

T.C.A. § 65-21-114 became effective on September 1, 1995, and provided for toll-free telephone service within counties. The exact terms of the statute read as follows:

> (a) After January 1, 1996, any telephone call made between two (2) points in the same county in Tennessee shall be classified as toll-free and shall not be billed to any customer.
>
> (b) This section shall apply to all companies or entities providing telephone service in this state as public utilities, including, but not limited to, telephone companies regulated by the Tennessee public service commission. However, this section does not apply to any telephone company which is prohibited by federal law from providing countywide service in a particular county.
>
> (c) Nothing in this section is intended to modify or repeal the rate-making and telephone regulatory authority of the Tennessee public service commission or the right of telephone companies to earn a fair rate of return.

There are twelve Tennessee counties whose residents do not have access to toll-free countywide calling. The Consumer Services Division of the Tennessee Public Service Commission, has received thirty-eight (38) consumer complaints since September 1, 1995. The Division has determined that these complaints were made by consumers who

complained that they were charged for interLATA, intracounty calls completed by the consumer's individual Interexchange Carrier ("IXC's").

Moreover, the Commission recognizes that these complaining consumers share economic and social interests with other consumers in the same county and, therefore, that all consumers served by an IXC regulated by the Commission, should be able to make toll-free calls to other consumers who live in the same county.

Therefore, the Commission directs that all Interexchange Carriers operating in the state of Tennessee who provide interstate service to customers located within the following twelve counties: Claiborne, Cumberland, Greene, Hawkins, Marion, Meigs, Montgomery, Polk, Roane, McNairy, Obion, and Weakley, appear and show cause why they should not be penalized pursuant to T.C.A. § 65-4-120, for failure to comply with the provisions of T.C.A. § 65-21-114.

The Carriers are directed to respond within thirty (30) days of the date of this Order. This docket shall remain open for further proceedings as may be necessary.

It is so ordered.

Chairman

Commissioner

Commissioner

Attest

Executive Director

TAB 18

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

January 28, 1997

IN RE: SHOW CAUSE PROCEEDING AGAINST CERTIFIED INTEREXCHANGE CARRIERS (ALLNET COMMUNICATIONS SERVICE, INC., AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC., LDDS WORLDCOM, MCI TELECOMMUNICATIONS CORP., SPRINT COMMUNICATIONS CO., AND WILTEL, INC.) TO PROVIDE TOLL FREE, COUNTY-WIDE CALLING

DOCKET NO. 96-00918

INITIAL ORDER

A prehearing conference in the above-captioned proceeding was conducted by the Directors of the Tennessee Regulatory Authority (hereafter "TRA") on Tuesday, November 26, 1996 at ten o'clock a.m., in the hearing room of the TRA at 460 James Robertson Parkway, Nashville, Tennessee. The following appearances were entered:

Penelope W. Register, Esq., Senior Staff Attorney, **TRA**, 460 James Robertson Parkway, Nashville, TN 37243;

L. Vincent Williams, Esq., **Office of the Consumer Advocate**, Cordell Hull Building, 2nd Floor, 426-Fifth Avenue N., Nashville, TN 37243;

H. LaDon Baltimore, Esq., Farrar & Bates, Attorney for **LDDS WorldCom** and **WilTel,** 211 Seventh Ave. N., Suite 320, Nashville, TN 37219-1823;

Val Sanford, Esq., Gullett, Sanford & Robinson, Attorney for **AT&T, MCI,** and **Sprint,** 230 Fourth Avenue N., 3rd Floor, Nashville, TN 37219-8888.

Several issues having been addressed by the parties in motions and memoranda of law by the parties, these issues were ready for disposition.

I. STIPULATION OF PARTIES

All parties to this proceeding, begun as Public Service Commission Docket No. 96-00918, agreed to stipulate to the record compiled prior to June 30, 1996 and agreed that the record should be forwarded to the TRA. AllNet Communications Services, Inc., (now Frontier Communications Services, Inc.) an original party which had submitted a response but otherwise failed to appear, further responded by letter its agreement to the stipulation.

II. STAFF MOTION IN LIMINE

Staff Counsel filed a motion in limine requesting that Respondents be precluded from raising certain constitutional issues at the hearing. At the conference, Counsel moved to alternatively consider the motion in limine as a motion to strike. Counsel argued that the TRA is without jurisdiction to review a federal or state constitutional challenge to T.C.A. § 65-21-114.

Respondents argued that because the TRA has the authority to enforce T.C.A. § 65-21-114, the TRA has jurisdiction to review the constitutionality of the statute as applied to interexchange carriers where calls cross interLATA boundaries, as is the case of the Respondents. As an example, they asserted that the statute is "probably constitutional as applied to the local exchange carriers."

Intervenor, the Office of the Consumer Advocate (hereafter "CAD"), concurred in substance with the Staff Counsel's motion in limine. The CAD argued that the statute was constitutional and that the TRA had made no application of the statute to subject to constitutional scrutiny. In response to the Respondents' constitutionality argument, the CAD maintained that the PSC Order, which was reversed by the Court of Appeals, was not based on the enforcement of T.C.A. § 65-21-114 and was therefore not relevant. The CAD further argued that T.C.A. § 65-21-114 permits the TRA to assign a fair rate of return which should permit the IXC's a return on their investment which, in turn, would avoid the unconstitutional "taking" as construed by the Court of Appeals in the case of *AT&T Communications of the South Central States, Inc., et. al., v. Cochran, et. al.,* Appeal No. 01-A-01-9409-BC-00427. Based on this reasoning, the CAD contended that the Staff motion in limine should be granted as to facial validity and that the TRA should reserve the constitutional question until a rate of return has been determined.

III. MOTION TO DISMISS

The motion, argued by Respondents AT&T, MCI, and Sprint, was based on the absence of statutory authority of the TRA to enforce T.C.A. § 65-21-114 through a T.C.A. § 65-2-106 proceeding. Respondents WorldCom, Inc., and Wiltel, Inc., concurred with and supported the motion.

The CAD contended that the motion should be denied because the general supervisory powers of the TRA over public utilities empower the agency to order any public utility to provide service to any customer. Staff Counsel contended that the motion should be denied because T.C.A. § 65-1-213 expressly confers on the TRA the duty to ensure that all laws within its jurisdiction were enforced, that Section 65-4-104 authorized the TRA to supervise and regulate all public utilities, that Section 65-21-114 was a law within the agency's jurisdiction and that Section 65-2-106 was an appropriate means of enforcing this law.

IV. HEARING SCHEDULE

The parties agreed to the following schedule:

Data requests due	January 3, 1997 at 12:00 noon
Direct testimony filed	January 17, 1997
Discovery completed	January 24, 1997
Rebuttal testimony filed	January 31, 1997
Hearing	March 4 and 5, 1997

V. ISSUES AT HEARING

Staff Counsel set out the issues as follows:

1. Whether Respondents failed to obey state law;
2. Whether the complaint against the Respondents was ascertained through a properly conducted investigation; and
3. What, if any, penalty should be assessed.

All Respondents offered to stipulate to facts not in dispute. The parties agreed that Staff Counsel should prepare proposed stipulations. No date for the submission of proposed stipulations was set.

VI. WHETHER THE IXC'S RATE OF RETURN IS AN ISSUE REQUIRING PROOF IN THIS PROCEEDING?

The CAD argued that the statute in question states that the companies providing county-wide toll-free calling should be permitted to earn a fair rate of return. He further argued that, if the Respondents would agree to waive the argument that T.C.A. § 65-21-114 is confiscatory, he would agree to drop the rate issue.

Respondents argued that rate-based rate of return regulation was not an appropriate issue in this proceeding. Therefore, the issues, according to the Respondents should be twofold: whether the Respondents failed to obey state law and what, if any, penalty should be assessed.

Staff Counsel requested that the Directors defer ruling on the issue of whether rate of return is an appropriate issue in this proceeding until a more developed record is made.

VII. SEPARATION OF FUNCTIONS

There being no objection, the Directors announced that David Waddell, Executive Secretary and a lawyer, as well as the General Counsel, may also act as legal advisor to them in this proceeding and that the Order Assuring Separation of Functions should so reflect.

VIII. DECISION

After reviewing the motions and hearing argument, the Directors decided that their authority and jurisdiction expressly permitted the enforcement of T.C.A. § 65-21-114 and that the Tennessee Supreme Court's decision in the case of *Richardson v. Tennessee Board of Dentistry,* 913 S.W.2d 446 (1995) barred them from ruling on the constitutionality of T.C.A. § 65-21-114.

IT IS THEREFORE ORDERED:

1. That the stipulation of the parties to the record compiled before the PSC is approved and that record is transferred to this proceeding;

2. That the motion in limine is granted as a motion to strike any affirmative defense which requires the TRA to review the constitutionality of T.C.A. § 65-21-114;

3. That the Respondents' motion to dismiss is denied;

4. That the schedule agreed to by the parties is approved;

5. That Staff Counsel shall prepare a stipulation of the facts in the case in chief and submit same to Respondents;

6. That a decision on the rate of return issue be deferred pending further development of the proof in the case; and

7. That the Order Assuring Separation of Functions in this proceeding be amended to provide that David Waddell may also serve as a legal advisor to the Directors.

8. That any party aggrieved with the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within ten (10) days from and after entry of this Order.

9. That any party aggrieved with the Authority's decision in this matter has the right of judicial review by filing a Petition for review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after entry of this Order.

Lynn Greer by C Phillips
CHAIRMAN

Sara Kyle
DIRECTOR

DIRECTOR

ATTEST:

K D Waddell
EXECUTIVE SECRETARY

TAB 19

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC., MCI TELECOMMUNICATIONS CORP., AND SPRINT COMMUNICATIONS CO., L.P.,

Plaintiffs/Appellants,

VS.

H. LYNN GREER, CHAIRMAN, SARA KYLE, DIRECTOR, AND MELVIN J. MALONE, DIRECTOR, CONSTITUTING THE TENNESSEE REGULATORY AUTHORITY,

Defendants/Appellees.

Tennessee Regulatory Authority
No. 96-00918

Appeal No.
01-A-01-9701-BC-00017

ORDER

On January 29, 1997, the captioned petitioners filed a renewed petition for review of interlocutory rulings and application for immediate stay. On February 4, 1997, this court temporarily stayed all further proceedings with respect to the subject matter of Tennessee Regulatory Authority's May 17, 1996 show cause order. The respondents have now filed a response to the petition which concedes that the TRA does not have jurisdiction to impose penalties under Tenn. Code Ann § 65-4-120. The respondents request that the case be remanded to the TRA with instructions to dismiss the proceeding for lack of jurisdiction.

It is, therefore, ordered that this case be remanded to the Tennessee Regulatory Authority for the purpose of entering an order dismissing the proceeding for lack of jurisdiction.

ENTER MAR 0 4 1997

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

SAMUEL L. LEWIS, JUDGE

BEN H. CANTRELL, JUDGE

TAB 20

file- Cnty-Wide

BEFORE THE TENNESSEE REGULATORY AUTHORITY

October 20, 1997 NASHVILLE, TENNESSEE

In Re:	)	
	)	
Show Cause Proceeding Against Certified Interexchange Carriers (AllNet Communications Services, Inc., AT&T Communications of the South Central States, Inc. LDDS WorldCom, MCI Telecommunications Corporation, Sprint Communications Company, L.P., and Wiltel, Inc.) to Provide Toll-Free County-Wide Calling	)	**Docket No. 96-00918**

ORDER GRANTING MOTION TO DISMISS NUNC PRO TUNC

This matter comes before the Tennessee Regulatory Authority ("Authority") upon a Motion to Dismiss filed by the Consumer Advocate Division, Office of the Attorney General ("CAD").[1] By its Motion, the CAD asserts that the Authority must dismiss the proceeding because of the March 4, 1997, Order of the Middle Section Court of Appeals of Tennessee.

The Court's Order reflects action taken on appeal from an intermediary Order issued by the Authority on January 28, 1997, herein. The Court remanded the proceeding to the Authority for the purpose of dismissing the proceeding for lack of jurisdiction. Therefore, in light of the March 4, 1997, Order of the Court of Appeals, the Directors of the Authority unanimously voted to grant the CAD's Motion at a regularly scheduled Authority Conference on April 15, 1997.

[1] The Motion to Dismiss was filed by the CAD on March 31, 1997.

IT IS THEREFORE ORDERED:

That the Motion to Dismiss filed by the Consumer Advocate Division, Office of the Attorney General, is hereby granted, and that this docket is hereby closed.

CHAIRMAN

DIRECTOR

DIRECTOR

ATTEST:

EXECUTIVE SECRETARY

TAB 21

TENNESSEE REGULATORY AUTHORITY

460 James Robertson Parkway
Nashville, Tennessee 37243-0505

MEMORANDUM

TO: Chairman Lynn Greer
Director Sara Kyle
Director Melvin Malone

FROM: Eddie Roberson, Chief
Utility Services Division

DATE: June 25, 1997

SUBJECT: Staff Report on the Status of County-Wide Calling in Tennessee

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At the May 6 Authority Conference, the staff was directed to conduct an investigation on the status of county-wide calling in Tennessee and submit a report of our findings on or before July 1, 1997.

We are pleased to report that all certified interexhange carriers have informed us that they either have or plan to voluntarily provide toll-free county-wide calling in Tennessee by not billing for these calls. Interexchange carriers will modify their billing systems in order to suppress county-wide calling charges. For the past several years interexchange carriers have post-credited county-wide calls in Tennessee. This practice required consumers to call their long distance carrier each month to get the charges for interLATA county-wide calls removed from their telephone bill. Needless to say, this practice led to consumer frustration and sometime confusion, especially, if the long distance customer representative was not aware of the post-crediting policy of their company. The voluntarily action of the interexchange carriers will remove the need of consumers to call their long distance company each month for credits for county-wide calling charges.

Because of the complexity of modifying billing systems to not bill for county-wide calls, each company has a different implementation date to provide the service. In way of summary, below is a list of the companies and the dates they have agreed to provide toll-free county-wide calling.

AT&T Communications of the South Central States	May 1, 1997[1]
Sprint Communications	End of August, 1997
MCI Telecommunications	Within the next 12 months
Frontier Communications	Since 1996
WilTel Network Services	October, 1998

Until the service is fully implemented, each company has agreed to continue to post-credit charges for county-wide calls when notified by the consumer. At the present time, AT&T and Frontier are providing toll-free county-wide calling in Tennessee.[2] Any consumer not satisfied with their long distance company over county-wide calls can switch to one of these companies.

Recommendation

I recommend that the Authority not close the docket in this case but instruct the staff to continue to monitor the status of county-wide calling in Tennessee and file a final report when all companies have implemented the service. I also recommend that the Authority issue press releases in the affected counties for the purpose of informing the public on the dates when companies are planning to provide county-wide calling within their county. This information will properly inform the public what companies are presently providing toll-free county-wide calling in Tennessee and allow them the opportunity to make a more informed choice concerning their long distance provider. This approach may also encourage the other companies to speed up their implementation schedule due to market pressure.

This matter is on the July 1, 1997, Authority Conference for your consideration.

c: David Waddell
Austin Lyons
Dennis McNamee
Ed Phillips
Chris Klein
Bert Meece
AT&T, MCI, Sprint, WilTel, and Frontier

---

[1] AT&T has informed me that they are experiencing some problems implementing toll-free county-wide calling in United Telephone Southeast's territory. This problem has caused residents of Hawkins County to be billed for county-wide calls. I am working with AT&T, United Telephone Southeast and BellSouth to resolve this problem.

[2] AT&T has stated that they have many of customized long distance calling plans especially designed for businesses, and that it would be too difficult and expensive to modify all of its billing systems to provide toll-free county-wide calling. However, if a business with one of these customized plans desires toll-free county-wide calling they will have the option of switching to AT&T's DDD long distance plan. AT&T's DDD long distance plan provides toll-free county-wide calling.

TAB 22

STATE OF TENNESSEE

Office of the Attorney General

PAUL G. SUMMERS
ATTORNEY GENERAL AND REPORTER

ANDY D. BENNETT
CHIEF DEPUTY ATTORNEY GENERAL

LUCY HONEY HAYNES
ASSOCIATE CHIEF DEPUTY
ATTORNEY GENERAL

MICHAEL E. MOORE
SOLICITOR GENERAL

425 FIFTH AVENUE NORTH
NASHVILLE, TN 37243-0485

TELEPHONE (615) 741-3491
FACSIMILE (615) 741-2009

July 20, 2001

The Honorable Jerry Cooper
State Senator
Room 309, War Memorial Building
Nashville, Tennessee 37243-0214

Dear Senator Cooper:

Pursuant to your request, enclosed is Opinion No. 01-115.

If you have further questions or comments, please contact this Office.

Sincerely,

PAUL G. SUMMERS
Attorney General

PGS/CLL:kc
Enclosure

cc: The Honorable K. David Waddell
Executive Director
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

STATE OF TENNESSEE
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

July 20, 2001

Opinion No. 01-115

Constitutionality of Tenn. Code Ann. § 65-21-114 Concerning Countywide Telephone Calling

QUESTION

Is Tenn. Code Ann. § 65-21-114, in requiring all telephone calls placed between two points in the same county to be toll-free, constitutional as applied to interexchange or long distance carriers?

OPINION

While Tenn. Code Ann. § 65-21-114 is constitutional in most of its applications, it would be unconstitutional to apply this statute to a long distance telephone carrier under circumstances where the carrier does not receive reasonable remuneration for the service it is required to provide.

ANALYSIS

The instant request concerns the constitutionality of Tenn. Code Ann. § 65-21-114, which provides that

> (a) Any telephone call made between two (2) points in the same county in Tennessee shall be classified as toll-free and shall not be billed to any customer.
>
> (b) This section shall apply to all companies or entities providing telephone service in this state as public utilities, including, but not limited to, telephone companies regulated by the Tennessee regulatory authority. However, this section does not apply to any telephone company which is prohibited by federal law from providing countywide service in a particular county.
>
> (c) Nothing in this section is intended to modify or repeal the rate-making and telephone regulatory authority of the authority or the right of telephone companies to earn a fair rate of return.

The thrust of this statute is to require that all telephone calls made between two points within the same county in Tennessee "shall be classified as toll-free and shall not be billed to any customer." The statute goes on to recognize in subsections (b) and (c) that federal law may prohibit countywide service by some carriers in some areas, and that telephone providers have the right to earn a fair rate of return. The focus of the statute is to make all intracounty calls a part of the local telephone service that is included in subscribers' basic billing and not charged on a toll basis. The latter parts of the statute seem to recognize that this may present certain problems, but the statute fails to address those problems in such a way as to render it fully enforceable.

The underlying principle in analyzing your question is that the State cannot require a telephone company, or any other business for that matter, to render its services for free. That would constitute a "taking" in violation of Article I, §21 of the Tennessee Constitution, as well as the fifth and fourteenth amendments of the United States Constitution. *See Southern Bell Telephone and Telegraph Co. v. Tennessee Public Service Commission*, 202 Tenn. 465, 304 S.W.2d 640 (1957); *Henley v. State*, 98 Tenn. 665, 41 S.W. 352 (1897); *Dolan v. City of Tygard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

There is no problem in enforcing this statute in areas where a subscriber's local exchange carrier can complete a call to all areas of the county. In such instances, the cost of providing countywide service can be included in the basic billing rate as a required service. This is the sort of regulation commonly required by the Tennessee Regulatory Authority. Thus in most areas of the State, Tenn. Code Ann. § 65-21-114 is effective.

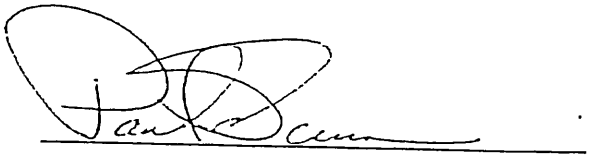
Complications arise, however, because approximately a dozen Tennessee counties are divided by LATA (Local Access and Transport Area) boundaries, across which the local exchange carriers that were part of the Bell system generally are not authorized to carry calls. Federal law, as part of the break-up of the telephone monopoly in the 1980's, has prohibited the Bell companies (such as BellSouth in Tennessee) from carrying calls across these LATA boundaries. *See generally MCI Telecommunications Corp. v. Taylor*, 914 S.W.2d 519 (Tenn. Ct. App. 1995). Thus in some counties in Tennessee, the local exchange carrier cannot complete calls to certain other parts of the county. This is a peculiarity caused by the fact that LATA boundaries do not necessarily follow county lines.

As a result, in parts of these affected counties, a long distance carrier must be involved in completing a call to certain areas within the county. Since long distance calls are billed on a toll basis, the requirement of § 65-21-114 that such calls be toll free would mean that the long distance carrier would be required to complete these calls for no remuneration whatsoever. Many subscribers making calls within the county but across a LATA boundary would have no other long distance calls during a billing period, resulting in their long distance carrier's being required by this statute to render a service for free This produces the constitutional problems with the statute.

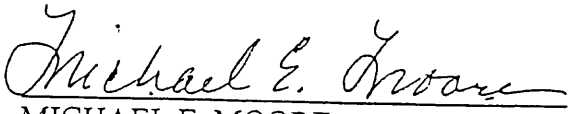
The Court of Appeals reached exactly this conclusion in *AT&T Communications of the South Central States, Inc. v. Cochran*, Tenn. Ct. of Apps., Middle Section, Apr. 26, 1995, a copy of which was enclosed with this request. This decision addressed a requirement imposed by the Public Service Commission before the statute in question was passed, but the enactment of Tenn. Code Ann. § 65-21-114 does not alter the constitutional analysis, for the substance of the statutory requirement is the same as that of the old P.S.C. order. The Court's opinion does note that there are permissible means of accomplishing countywide calling, but the statute in question does not provide for those mechanisms.

The bottom line is that to implement toll-free countywide calling for all customers in the counties divided by LATA boundaries, some mechanism would have to be devised to provide compensation for the long distance telephone carriers for completing such calls. The General Assembly could establish such a mechanism, or the Tennessee Regulatory Authority could do so. It is conceivable that the T.R.A. might identify the necessary compensation as a part of some remuneration that such companies already receive. The more plausible course, however, is to impose a charge to reimburse such carriers for providing toll-free service across LATA boundaries.

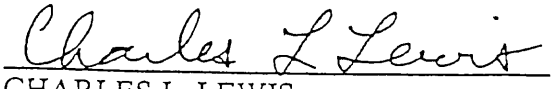
In conclusion, Tenn. Code Ann. § 65-21-114 is effective in requiring toll-free countywide calling in most instances, but it cannot be fully enforced in counties divided by LATA boundaries until compensation is provided from some source through some mechanism for the long distance carriers that complete such calls. This, of course, runs the risk of imposing an entirely new regulatory scheme and accompanying fees to support countywide calling. As the Court of Appeals has observed, until a compensating mechanism is provided or identified, it would violate the takings provisions of the Tennessee and federal constitutions to require long distance telephone companies to provide such a toll-free service.



PAUL G. SUMMERS
Attorney General



MICHAEL E. MOORE
Solicitor General



CHARLES L. LEWIS
Deputy Attorney General

Requested by:

Honorable Jerry Cooper
State Senator
309 War Memorial Building
Nashville, TN 37243

Court of Appeals of Tennessee.

A T & T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC., MCI Telecommunications Corporation and Sprint Communications Company, L. P.,
Petitioners/Appellants,
v.
Frank COCHRAN, Chairman, Keith Bissell, Commissioner, and Steve Hewlett, Commissioner Constituting the Tennessee Public Service Commission,
Respondents/Appellees.

No. 01A01-9409-BC-00427.

May 3, 1995.
Rehearing Denied June 7, 1995.

Appeals of Tennessee Middle Section at Nashville.

Van Sanford and John Knox Walkup of Gullett, Sanford, Robinson and Martin, Nashville, TN.

Jeanne Moran, Nashville, TN.

Paul S. Davidson of Stokes & Bartholomew, Nashville, TN.

T.G. Pappas of Bass, Berry & Sims, Nashville, TN.

Charles L. Howorth, Nashville, TN.

OPINION

TODD.

*1 The captioned petitioners have petitioned this Court pursuant to T.R.A.P. Rule 12 for review of a final order of the Tennessee Public Service Commission (hereafter "Commission") requiring petitioners to render free service to a particular group of telephone users in respect to a particular class of telephone calls.

Petitioners do not operate local telephone exchanges which are designated by the acronym, "L.A.T.A." Petitioners are designated "inter LATA" or "IXC's" because they furnish long distance telephone connections between local exchanges. Petitioners compete for the patronage of local telephone subscribers who designate their choice among available long distance carriers. The long distance carriers are compensated by billing the local customer through the local exchange.

Not all Tennessee counties are served by county-wide local exchanges. In each of twelve counties of the State there are at least two local exchanges; so that, in these counties, some intra-county telephone calls require the service of inter LATA, or long distance connection between exchanges.

The Commission has adopted a policy of eliminating long distance charges on telephone calls within a single county. Pursuant to this policy, on October 13, 1993, the Commission served upon petitioners an order captioned:

> In Re: Show Cause Proceeding Against Certified ICX's to Provide Toll Free, County-Wide Calling

Following responses and hearing, the Commission entered its order providing:

> 2. All IXC's (long distance carriers) providing intrastate service in Tennessee will provide inter LATA intra-county calling toll free to all Tennessee customers effective October 15, 1994;....

In their petition to this Court for review, petitioners present the following issues:

1. Whether the Commission followed the proper standard or criteria in construing its statutory powers.
2. Whether the Commission's Final Order, requiring the petitioners to provide toll-free service to a particular category of customers on a geographic basis, is within the statutory powers of the Commission.
3. Whether the Commission's Final Order constitutes a taking of the particular services or property of the petitioners, without compensation, in violation of Article I, Section 21 of the Tennessee Constitution and the Fifth Amendment to the United States Constitution made applicable to the States through the Fourteenth Amendment.
4. Whether the Commission's Final Order deprives the petitioners of due process of law in violation of Article I, Section 8 of the Tennessee Constitution and the Fourteenth Amendment to the United States Constitution.
5. Whether the Commission adopted the policies it seeks to implement in this proceeding in

accordance with governing procedural law.

Petitioners summarize their argument:

1. The powers of the Commission are only those conferred by statute as limited by the Federal and State Constitutions.

2. The Commission has no power to compel petitioners to furnish free service under the circumstances of this case.

*2 3. The action of the Commission is invalid because it is based upon incorrect "show cause" procedure rather than rule-making procedure.

T.C.A. Section 65-5-201 authorizes the Commission to fix "just and reasonable rates" for utility service, but no statutory provision is cited or found for requiring a utility to furnish its service to a particular customer without charge.

The Commission points out that its present tariffs require local telephone exchanges to furnish free directory service to its subscribers, but the relation of a local exchange with its subscribers is completely different from that of a long distance carrier and its intermittent customers. For a lump sum monthly charge, the exchange furnishes a package of services including directory service. Long distance telephone companies charge on a call by call basis, whereby they are paid for each call made. A more reasonable comparison would be with a public pay station telephone service.

The Commission asserts that it has the power to "distribute the load" of utility costs by lowering the rates charged one class of customers because of profits derived from another class of customers. Whatever the merits of this argument, the statute does not authorize the requirement of service without any charge to one class of customers even though the loss to the utility may be replaced by overcharging another class of customers.

The direction of petitioners to render free long distance service between exchanges serving customers in a single county is not authorized by statute.

Article I, Section 21 of the Constitution of Tennessee reads as follows:

> Sec. 21. No man's services or property taken without consent or compensation.--That no man's particular services shall be demanded, or property taken, or applied to public use, without the consent of his representatives, or without just compensation being made therefor.

The protection of this provision extends to corporations as well as to individuals. *Harbison v. Knoxville Iron Co.,* 103 Tenn. 421, 53 S.W. 955 (1899); 183 U.S. 13, 22 S.Ct. 1, 46 L.Ed. 55 (1901); *Home Tel. Co. v. People's Tel. & Tel. Co.,* 125 Tenn. 270, 141 S.W. 845 (1911).

The order of the Commission demands "particular service." In *Henley v. State,* 98 Tenn. 665, 41 S.W. 352 (1897), the Supreme Court said:

> Particular services must mean peculiar services; limited services; not ordinary or general services of an individual. It is not an easy matter to draw the distinction between particular and ordinary services in every instance, still some general rules may be given to mark the line. It seems clear that ordinary services, such as may be required of all citizens, or officials, by general or valid special laws, are not particular services. A single illustration may suffice. A physician cannot be required to give his time and services and skill and scientific knowledge in making an examination to qualify him to speak as an expert witness. If, however, the same physician may have already made an examination and come into the possession of facts material to be disclosed to attain justice and administer the law, he may be required to testify to them as any other witness may.

*3 *Henley,* Id. at 684.

The order of the Commission "demands" or "takes" property, not for public use, but for private use of an individual at his demand. The utility is entitled to some compensation from the member of the public receiving the benefit of the demand. The right to compensation is "property" which may not be taken without just compensation. *Southern Bell Tel. & Tel. Co. v. Tenn. Pub. Serv. Comm.,* 202 Tenn. 465, 304 S.W.2d 640 (1957).

The Constitution requires "just compensation" for services or property taken by public authority. Just compensation means compensation from the public treasury or, in the case of utilities, from the member of the public receiving the benefit. It does not mean forcing a person not benefitted to pay the compensation for the benefitted non-payer.

The action of the Commission also violates the Fifth Amendment of the Constitution of the United States which is made applicable to the states by the Fourteenth Amendment. *Dolan v. City of Tygard,*

512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

Because of the statutory and constitutional infirmities of the order of the Commission, it is unnecessary to discuss or determine the procedural issue which is pretermitted.

There are other constitutional and authorized means of accomplishing the ends sought by the Commission, but it is not within the province of this Court to render advisory opinions.

The order of the Commission is reversed and vacated. Costs of this appeal are taxed against the Commission. The cause is remanded to the Commission for such further proceedings as may be necessary and appropriate.

Reversed, Vacated and Remanded.

END OF DOCUMENT

TAB 23

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 5, 2003

IN RE:	)	
	)	
CITIZENS TELECOMMUNICATIONS COMPANY OF THE VOLUNTEER STATE TARIFF TO CLARIFY LANGUAGE– Tariff Number 2003592	)	**DOCKET NO. 03-00410**

ORDER CONDITIONALLY APPROVING TARIFF AND INITIATING "WORKSHOP" ON PREVENTING VIOLATIONS OF TENN. CODE ANN. § 65-21-114

This matter came before Chairman Deborah Taylor Tate, Director Pat Miller and Director Ron Jones, of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on August 4, 2003, to consider the Tariff to Clarify Language (Tariff No. 2003592) filed by Citizens Telecommunications Company of the Volunteer State ("Citizens") on June 30, 2003, as amended on July 30, 2003.[1]

Background

On June 30, 2003, Citizens filed Tariff No. 2003592. The proposed effective date of the Tariff was July 14, 2003.

During the regularly scheduled Authority Conference held on July 7, 2003, the panel assigned to this docket considered Tariff No. 2003592. The proposed language in the tariff

---

[1] Citizens does business as Frontier Communications Company of Tennessee, LLC. *See, e.g., Petition for Approval of Interconnection Agreement Between Citizens Telecommunications Company of the Volunteer State, L.L.C. d/b/a Frontier Communications of the Volunteer State and Level 3 Communications, LLC,* Docket No. 02-01341, *Order Approving Interconnection Agreement,* (March 17, 2002).

regarding county-wide calls that terminate to a local exchange company, competing local exchange company or reseller that is not participating in county-wide calling raised concerns regarding its consistency with Tenn. Code Ann. § 65-21-114.[2] Accordingly, the panel voted unanimously to suspend the tariff for thirty days. Citizens was directed to meet with TRA staff in an attempt to revise the tariff during the suspension period.

On July 16, 2003, Citizens filed revisions to the county-wide calling provisions in Tariff No. 2003592. After consulting with the TRA staff, Citizens filed a second revision to the county-wide calling provisions in its tariff on July 30, 2003.[3]

Findings and Conclusions

During the August 4, 2003 Authority Conference, the panel considered the Tariff to Clarify Language (Tariff No. 2003592) and the revision thereto. The panel concluded that the revised language contained in the county-wide calling provisions did not fully assuage their concerns regarding its consistency with Tenn. Code Ann. § 65-21-114. In recognition that industry-wide technical limitations gave rise to the method proposed in the Tariff for addressing

---

[2] Tenn. Code Ann. § 65-21-114 states:

> (a) Any telephone call made between two (2) points in the same county in Tennessee shall be classified as toll-free and shall not be billed to any customer.
>
> (b) This section shall apply to all companies or entities providing telephone service in this state as public utilities, including, but not limited to, telephone companies regulated by the Tennessee regulatory authority. However, this section does not apply to any telephone company which is prohibited by federal law from providing countywide service in a particular county.
>
> (c) Nothing in this section is intended to modify or repeal the rate-making and telephone regulatory authority of the authority or the right of telephone companies to earn a fair rate of return.

[3] The revised language states:

> County-wide calls originated by a Frontier customer which are carried by an IXC (Interexchange Carrier) via 1 + dialing and terminate to a customer of another Local Exchange Company (LEC) or a Competitive Local Exchange Carrier (CLEC) that is not participating in County-wide Calling (code not available in the TAR code database) are rated and billed at the applicable toll charge. Any Frontier customer who is billed for an intra-county call of this type who notifies Frontier of the billing error will receive credit for the associated toll charges if Frontier is the billing agent for the IXC involved. At the time credit is issued Frontier will notify the TRA of the billing violation caused by noncompliance of the terminating LEC or CLEC so the TRA can take proper corrective action.

wide calling issue, the panel unanimously decided to open a docket for the purpose of conducting a workshop to gather information and input from the telecommunications industry related to preventing violations of Tenn. Code Ann. § 65-21-114. The panel appointed Director Jones as moderator of the workshop and directed him to file a report on the status of the workshop within one hundred and twenty days. Based on the decision to commence a workshop on county-wide calling, the panel voted unanimously to approve the Tariff, conditioned upon Citizens' agreement to provide notice on its customers' monthly bills that they may call Citizens to receive a credit for erroneous charges assessed for county-wide calls.

IT IS THEREFORE ORDERED THAT:

1. The Tariff to Clarify Language (Tariff No. 2003592) filed by Citizens Telecommunications Company of Tennessee is conditionally approved as stated herein.

2. Director Ron Jones shall facilitate a "workshop" to gather information from the telecommunications industry related to preventing violations of Tenn. Code Ann. § 65-21-114.

3. Director Jones is directed to file a report on the status of the workshop no later than one hundred and twenty days from August 4, 2003.

4. A docket shall be opened to receive official filings related to the workshop.

Deborah Taylor Tate, Chairman

Pat Miller, Director

Ron Jones, Director

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 8, 2003

IN RE:	)	
	)	
CITIZENS TELECOMMUNICATIONS COMPANY	)	**DOCKET NO.**
OF TENNESSEE TARIFF TO CLARIFY	)	**03-00411**
LANGUAGE– Tariff Number 2003593	)	

ORDER CONDITIONALLY APPROVING TARIFF AND INITIATING "WORKSHOP" ON PREVENTING VIOLATIONS OF TENN. CODE ANN. § 65-21-114

This matter came before Director Pat Miller, Director Sara Kyle and Director Ron Jones, of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on August 4, 2003, to consider the Tariff to Clarify Language (Tariff No. 2003593) filed by Citizens Telecommunications Company of Tennessee ("Citizens") on June 30, 2003, as amended on July 30, 2003.[1]

Background

On June 30, 2003, Citizens filed Tariff No. 2003593. The proposed effective date of the Tariff was July 14, 2003.

During the regularly scheduled Authority Conference held on July 7, 2003, the panel assigned to this docket considered Tariff No. 2003593. The proposed language in the tariff regarding county-wide calls that terminate to a local exchange company, competing local

[1] Citizens does business as Frontier Communications Company of Tennessee, LLC. *See, e.g., Petition for Approval of the Interconnection Agreement Between Citizens Communications Company of Tennessee, L.L.C. d/b/a Frontier Communications Company of Tennessee, LLC and ICG Communications, Inc.*, Docket No. 02-00897, *Order Approving Interconnection Agreement,* (October 4, 2002).

exchange company or reseller that is not participating in county-wide calling raised concerns regarding its consistency with Tenn. Code Ann. § 65-21-114.[2] Accordingly, the panel voted unanimously to suspend the tariff for thirty days. Citizens was directed to meet with TRA staff in an attempt to revise the tariff during the suspension period.

On July 16, 2003, Citizens filed revisions to the county-wide calling provisions in Tariff No. 2003593. After consulting with the TRA staff, Citizens filed a second revision to the county-wide calling provisions in its tariff on July 30, 2003.[3]

Findings and Conclusions

During the August 4, 2003 Authority Conference, the panel considered the Tariff to Clarify Language (Tariff No. 2003593) and the revision thereto. The panel concluded that the revised language contained in the county-wide calling provisions did not fully assuage their concerns regarding its consistency with Tenn. Code Ann. § 65-21-114. In recognition that industry-wide technical limitations gave rise to the method proposed in the Tariff for addressing the county-wide calling issue, the panel unanimously decided to open a docket for the purpose of

---

[2] Tenn. Code Ann. § 65-21-114 states:

> (a) Any telephone call made between two (2) points in the same county in Tennessee shall be classified as toll-free and shall not be billed to any customer.
>
> (b) This section shall apply to all companies or entities providing telephone service in this state as public utilities, including, but not limited to, telephone companies regulated by the Tennessee regulatory authority. However, this section does not apply to any telephone company which is prohibited by federal law from providing countywide service in a particular county.
>
> (c) Nothing in this section is intended to modify or repeal the rate-making and telephone regulatory authority of the authority or the right of telephone companies to earn a fair rate of return.

[3] The revised language states:

> County-wide calls originated by a Frontier customer which are carried by an IXC (Interexchange Carrier) via 1 + dialing and terminate to a customer of another Local Exchange Company (LEC) or a Competitive Local Exchange Carrier (CLEC) that is not participating in County-wide Calling (code not available in the TAR code database) are rated and billed at the applicable toll charge. Any Frontier customer who is billed for an intra-county call of this type who notifies Frontier of the billing error will receive credit for the associated toll charges if Frontier is the billing agent for the IXC involved. At the time credit is issued Frontier will notify the TRA of the billing violation caused by noncompliance of the terminating LEC or CLEC so the TRA can take proper corrective action.

a workshop to gather information and input from the telecommunications industry related to preventing violations of Tenn. Code Ann. § 65-21-114.[4] The panel appointed Director Jones as moderator of the workshop and directed him to file a report on the status of the workshop within one hundred and twenty days. Based on the decision to commence a workshop on county-wide calling, the panel voted unanimously to approve the Tariff, conditioned upon Citizens' agreement to provide notice on its customers' monthly bills that they may call Citizens to receive a credit for erroneous charges assessed for county-wide calls.

IT IS THEREFORE ORDERED THAT:

1. The Tariff to Clarify Language (Tariff No. 2003593) filed by Citizens Telecommunications Company of Tennessee is conditionally approved as stated herein.

2. Director Ron Jones shall facilitate a "workshop" to gather information from the telecommunications industry related to preventing violations of Tenn. Code Ann. § 65-21-114.

3. Director Jones is directed to file a report on the status of the workshop no later than one hundred and twenty days from August 4, 2003.

4. A docket shall be opened to receive official filings related to the workshop.

Pat Miller, Director

Sara Kyle, Director

Ron Jones, Director

[4] During deliberations, Director Kyle expressed her desire that the Consumer Advocate and Protection Division of the Office of the Attorney General participate in the workshop.

TAB 24

Accxx Communications, LLC 4035 Tampa Road Ste. 6000 Oldsmar, FL 34677 888-800-0878 800-245-7353 Fax

Friday, October 31, 2003

Robert Fulmer
Accxx Communications, LLC
4035 Tampa Rd.
Suite 6000
Oldsmar, FL 34677

Larry Davis
9584 Fields Road
South Fulton, TN 38257

Reference: **61559**

Dear **Mrs. Curran,**
I am writing in response to complaint file number 03-1861, Larry Davis at phone number 731-479-1648 received 10-27-03 via fax.

After speaking with you on the phone to get an understanding of how I should respond to a complaint made in this unusual fashion. While this is not a complaint actually against Accxx, included is the chain of events that led to the complaint.

In reaction to the Tennessee state law, 65-21-114, that states that any two calls within the same county shall be classified as free calls. Accxx had to stop offering service in the customer's county, Obion County, because of how the law is structured. Because Tennessee allows the local telephone company to bill each carrier for the calls the laws states are free calls, Accxx is forced to not only credit the customer for the calls, but also pay the network invoice sent by the carrier. Accxx loses 100% in this scenario. The complaint is actually about this situation. The customer is upset that Accxx is forced by the state to stop offering services in his area and that if the local telephone company were to be required to abide by the state law 65-21-114, we would not be in this situation.

Per your request, the carrier in which Accxx placed the Mr. Davis's phone number is Williams Communications. Williams does not credit Accxx for the calls that are billed within Tennessee and that are classified by rule to be included within state law 65-21-114.

As always, Accxx seeks fully to comply with the rules and regulations set forth by the commission. Should you need further information, please contact me directly at 813-749-1403 or via email at rfulmer@accxx.com

Robert Fulmer
Accxx Communications LLC

JOHN J. STANTON
Attorney And Counselor At Law
2560 North Santiago Boulevard
Orange, California 92867
Telephone (714) 974-8941
Facsimile (714) 974-8972

03-1892

VIA U.S. MAIL AND FACSIMILE (615) 741-8953

November 17, 2003

Eddie Roberson
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re:	Complainant:	Betty and Audrane Leach
	Complaint Number:	03-1892
	Company:	U.S. Telecom Long Distance
	Bill Number:	(731) 783-5302

Dear Mr. Roberson:

This letter is written on behalf of U.S. Telecom Long Distance, Inc. (U.S. Telecom) in response to the above-referenced complaint wherein the complainant is objecting to being charged for calls made within the county that he lives. We are informed of the following with respect to this complaint:

On/or about August 16, 2003, the customer's long distance service was switched to U.S. Telecom pursuant to a telemarketing order that was verified by an independent third party. The transfer of service was verbally authorized over the telephone by Betty Lou Leach and this authorization was confirmed by an independent verification company and was recorded pursuant to current regulations. As this is not a slamming complaint, a copy of the third party tape verification is not enclosed herewith.

On November 12, 2003, a customer service representative contacted Mrs. Leach in regard to her complaint. Mrs. Leach is upset for being charged for calls made in her same county as she believes that they are required to be free local calls. She said that she filed the complaint because she wanted to confirm whether the calls were required to be free local calls.

It was explained to Mrs. Leach that U.S. Telecom is charged by the underlying carrier for these calls; that the Attorney General of the State of Tennessee has already expressed an opinion that the statute is unconstitutional as applied to long distance carriers like U.S. Telecom; and it was further explained that if she did not want to be charged for these calls that she needed to select a different carrier

The customer service representative placed a conference call with Mrs. Leach and Bell South, her local carrier, to confirm that Mrs. Leach was back with Bell South service. At this time Bell South also confirmed that they adjusted in full all U.S. Telecom charges off of Mrs. Leach's billing. The adjustment was in the approximate amount of $116.15. To further resolve this matter the U.S. Telecom customer service representative agreed to contact Mrs. Leach next week after she has received her final billing from U.S. Telecom so that any further in county calls can be adjusted.

We have been advised that all matters have been resolved.

Best regards,

John J. Stanton

JJS:mmw

cc: U.S. Telecom Long Distance

Betty and Audrane Leach
7705 Highway 220
Lavinia, TN 38348

MOUNTAINET
121 Woodland Street • P.O. Box 488 • Gate City, VA 24251
Phone: 276-452-3333 or (866) SIMPLY2 / (866) 746-7592
www.mounet.com
November 13, 2003

Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Dear Ms. Curran,

On November 10, 2003, I received a letter from you regarding a complaint that had been lodged against our company by James Anderson, file number 03-1944. He sent you the complaint upon my suggestion. I, too, would like to get this issue resolved. Below you will find our position.

According to the enclosed mandate, after January 1, 1996, any telephone call made between two (2) points in the same county in Tennessee shall be classified as toll-free and shall not be billed to any customer.

MountaiNet Long Distance is a subsidiary of Scott County Telephone Cooperative. We have been in business since September 1999. We are a reseller of Qwest. Since we started doing business, we have had ongoing problems being billed for toll charges within counties in Tennessee. Sprint, Bell South or other local exchange carrier is passing these calls as if they are toll and Qwest is passing these calls on to us, their customer. We, in turn, are billing the end user. MountaiNet Long Distance has assumed the loss for credits issued to customers because a law has been put into place of which there has been no enforcement and which there is no penalty if the law is broken.

MountaiNet Long Distance will continue to zero rate these calls when it is brought to our attention that a consumer has been charged for calls made within the county. Qwest has refused to give us credit back for these calls. Their attorney, Tom Snyder, has taken the stand that they are not required to zero rate these calls. His contact number is 303-672-2841 and his e-mail address is Tom.Snyder@qwest.com.

I am requesting that you open a case and investigate this matter thoroughly. We are seeking one of two solutions. Either an amendment needs to be made and this law be changed to not mandate toll free countywide calling or it needs to be enforced with fines charged to anyone not abiding by the law. If there is no negative consequence for breaking this law, then it is useless.

Credit Adj.
$1.26

I look forward to receiving your response on this matter. I am going to send copies of this letter along with the complaint to our legislators. It is our hope that this can get resolved in a timely manner.

Sincerely,

Gwendolyn R. Godsey

Gwendolyn R. Godsey
MountaiNet Long Distance
Operations & Sales Manager

MOUNTAINET
121 Woodland Street • P.O. Box 488 • Gate City, VA 24251
Phone: 276-452-3333 or (866) SIMPLY2 / (866) 746-7592
www.mounet.com

November 14, 2003

Holston Business Development Center
Mr. Jim Anderson
2005 Venture Park
Kingsport, TN 37660

Dear Mr. Anderson,

I am writing this letter in regard to your complaint made to the Tennessee Regulatory Authority, file number 03-1944. MountaiNet Long Distance will adjust the calls on your current bill. I cannot guarantee that we will be able to zero rate these calls in the future.

MountaiNet Long Distance has requested that an investigation be made into toll derived from calls within a county. These findings will dictate what we can do in the future regarding credit.

Thank you for taking the time to express your concern to the Tennessee Regulatory Authority. I appreciate your understanding and I want to assure you that we are doing everything possible to correct this problem.

Sincerely,

Gwendolyn R. Godsey

Gwendolyn R. Godsey
MountaiNet Long Distance
Operations & Sales Manager