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July 20, 2006

HAND DELIVERY

Honorable Sara Kyle, Chairman
c/o Sharla Dillon, Docket & Records Manager
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

RE: In Re: Petition of Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996
TRA Consolidated Docket No. 03-00585

Dear Chairman Kyle:

Please find enclosed an original and thirteen (13) copies of the *CMRS Providers' Preliminary Comments Regarding The Tennessee Rural Coalition's June 23, 2006, Petition for Suspension and Modification Pursuant to Section 251(f)(2).*

An additional copy of this filing is enclosed to be "File Stamped" for our records. If you have any questions or require additional information, please let me know.

Very truly yours,

Melvin J. Malone

cc: Parties of Record

BEFORE THE
TENNESSEE REGULATORY AUTHORITY

Petition of:	)	'06 JUL 20 AM 11 53
	)	
Cellco Partnership d/b/a Verizon Wireless For Arbitration Under the Telecommunications Act of 1996	)	**Consolidated Docket No. 03-00585**
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CMRS PROVIDERS' PRELIMINARY COMMENTS REGARDING THE TENNESSEE RURAL COALITION'S JUNE 23, 2006, PETITION FOR SUSPENSION AND MODIFICATION PURSUANT TO SECTION 251(f)(2)

Petitioners Cellco Partnership d/b/a Verizon Wireless; New Cingular Wireless PCS, LLC d/b/a Cingular Wireless; Sprint Spectrum L.P. d/b/a Sprint PCS; and T-Mobile USA, Inc., (collectively referred to herein as "the CMRS Providers") respectfully submit the CMRS Providers' Preliminary Comments regarding the timing, appropriateness and applicability of the *Tennessee Rural Coalition's June 23, 2006, Petition for Suspension and Modification Pursuant to § 251(f)(2)* (the "*Petition*").[1]

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[1] The CMRS Providers note that the *Petition* was apparently filed as both an original petition and in TRA Docket No. 03-00585. Although the precise status of the *Petition* is unclear, the CMRS Providers submit these preliminary comments in this docket in light of the Authority's decision to cancel a previously scheduled Status Conference in TRA Docket No. 03-00585 *sua sponte* after the *Petition* was filed. The CMRS Providers reserve the right to comment further on the *Petition*, and, if necessary, to submit a motion to dismiss the same. Although the CMRS Providers will address the merits of *Petition* in a subsequent pleading if necessary, they are compelled to preliminarily note here that the *Petition* is neither appropriate nor proper for consideration under section 251(f)(2) of the Federal Telecommunications Act of 1996 (the "Act") since it does not comply with the statute's individual showing requirement(s). *See* Order Denying Amended Petition and Establishing Dates for Implementation of Local Number Portability, *In Re: Tennessee Coalition of Rural Incumbent Telephone Companies and Cooperatives Request for Suspension of Wireline to Wireless Number Portability Obligations Pursuant to Section 251(f)(2) of the Communications Act of 1934, As Amended*, TRA Docket No. 03-00633, p. 7 (Sept. 6, 2005) ("Based upon implementation progress differences of the Coalition members and the FCC's requirement that each company set

(continued...)

I.

BACKGROUND

A brief recitation of the travel of this case is necessary to place the *Tennessee Rural Coalition's June 23, 2006, Petition for Suspension and Modification Pursuant to § 251(f)(2)* in context. On November 6, 2003, the CMRS Providers filed separate section 252 petitions for arbitration under the Act with the Tennessee Regulatory Authority ("TRA" or "Authority").[2] The Tennessee Rural Coalition ("Coalition") members submitted a joint response to said petitions on December 1, 2003. Finding that the petitions for arbitration submitted by the CMRS Providers were proper and complied with the requirements of federal law, the Authority accepted the petitions for arbitration.[3]

On March 4, 2004, the Coalition filed its *Preliminary Motion of the Rural Coalition of Small LECs and Cooperatives to Dismiss, or, in the Alternative, Add an Indispensable Party* ("*Coalition's Motion to Dismiss*" or "*Motion to Dismiss*"). The *Coalition's Motion to Dismiss* was denied in full.[4] The arbitration hearing on the merits was held on August 9-12, 2004, and the Arbitration Panel deliberated the issues presented in the arbitrations at a public meeting on January 12, 2005.

(..continued)
forth specific reasons warranting suspension, the Authority determined that this matter could not be deliberated based on the limited information provided in the original Petition.") (emphasis omitted).

[2] At the request of the CMRS Providers, the petitions for arbitration were consolidated by the Authority, as reflected in the *Amended Order Appointing Hearing Officer*, TRA Consolidated Docket No. 03-00583, pp. 2-3 (Mar. 24, 2004).

[3] Order Accepting Petitions for Arbitration, *In Re: Cellco partnership d/b/a/ Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585, p. 2 (April 12, 2004).

[4] Order Denying Motion, *In Re: Cellco partnership d/b/a/ Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585 (April 12, 2004).

With the sole exception of establishing permanent rates for transport and termination, the Authority has resolved all of the issues in this arbitration.[5] Consistent with the January 12, 2005, deliberations,[6] on May 27, 2005, the Hearing Officer in this matter issued, *sua sponte*, a Notice of Status Conference "for the purpose of discussing the process the Authority should undertake to determine a permanent rate for reciprocal compensation."[7] Subsequent thereto, the Hearing Officer determined that the rates must be symmetrical and that each ICO's costs must be company-specific.[8] In addition, a joint procedural schedule was submitted to the Authority by all of the parties, which provided, among other things, that "[e]ach Rural Independent Telephone Company will file a description of its proposed TELRIC cost study methodology specifying in detail how the company proposed to perform the study."[9] The Authority subsequently adopted the joint procedural schedule[10] and otherwise established a process - pursuant to a request by the Coalition - for the parties to either agree to an appropriate

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[5] Order of Arbitration Award, *In Re: Cellco partnership d/b/a/ Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585 (Jan. 12, 2006).

[6] TRA Transcript of Proceedings, *In Re: Cellco partnership d/b/a/ Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585 (the "*Jan. 12, 2005 Transcript*"). *See also January 12, 2005 Transcript* at 67 ("It is my intention to move as expeditiously as possible to establish permanent rates, because I think we have a duty to do that.") (Comment of TRA Director/Panel Member).

[7] Notice of Status Conference, *In Re: Petition for Arbitration of Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585 (May 27, 2005). Even though the publicly announced purpose of the Status Conference was to discuss the process the Authority should undertake to establish a TELRIC-compliant permanent rate for reciprocal compensation, the Coalition did not object to this Status Conference.

[8] TRA Transcript of Proceedings, *In Re: Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585 at 4:22-24 (July 21, 2005) (the "*July 21, 2005 Transcript*").

[9] Joint Proposed Schedule for Rate Phase of Proceeding, *In Re: Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585 (Aug. 4, 2006).

[10] Order Establishing Procedural Schedule for Rate Phase of Proceeding, *In Re: Petition for Arbitration of Cellco Partnership d/b/a Verizon Wireless Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585 (Aug. 24, 2005).

cost methodology or for the Arbitration Panel to make a determination as to the appropriateness of any particular Coalition proposal.[11] In this regard, the CMRS Providers have worked diligently towards moving this docket forward in accordance with the process established by the Hearing Officer and the directions provided by the Arbitration Panel on September 7, 2005.[12]

On October 25, 2005, the procedural schedule in this proceeding was suspended pending both the issuance of the order "memorializing the arbitration panel's January 12, 2005 decisions" and a determination "concerning the specific methodologies and formulas to be utilized by the coalition members in performing their cost studies."[13] The *Order of Arbitration Award*, which memorialized the January 12, 2005, deliberations, was issued on January 12, 2006.[14] In a May 26, 2006, letter to the Authority, the CMRS Providers respectfully requested that the Arbitration Panel move this matter as follows:

> either (1) consider the parties' respective September 28 and October 18, 2005, filings regarding cost methodologies and make a determination on whether any of the ICOs' proposed methodologies/models are TELRIC-compliant, or (2) direct the Rural Coalition, consistent with the January

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[11] *See, e.g., July 21, 2005 Transcript* at 27:12 – 28:2; *see also id.* at 30:1-3 ("MR. RAMSEY: If we have a dispute on what the methodology proposals are, we would ask you to resolve that[.]"). *See also* TRA Transcript of Proceedings, *In Re: Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585 at 70:9-11 (Sept. 7, 2005) (the "*September 7, 2005 Transcript*") ("And Mr. Ramsay, let me remind you that this – you know, settling on a formula was your idea.") (Comment of TRA Director/Panel Member); and *September 7, 2005 Transcript* at 77:6-9.

[12] *See, e.g., September 7, 2005 Transcript* at 82 ("Because the whole point of this was to save time, not make additional time[.]") (Comment of TRA Director/Panel Member).

[13] Order Suspending Procedural Schedule, *In Re: Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585, p. 3 (Oct. 25, 2005).

[14] The CMRS Providers timely filed a *Joint Petition for Reconsideration of January 12, 2006, Order of Arbitration Award Submitted on Behalf of CMRS Providers on January 27, 2006* (the "*Petition for Reconsideration*"). The Authority has not yet issued an order memorializing the Arbitration Panel's April 17, 2006, action on the *Petition for Reconsideration*.

12, 2006, *Order of Arbitration Award*, to timely submit TELRIC-compliant cost studies subject to a full evidentiary hearing.[15]

On June 21, 2006, the Hearing Officer issued a Notice of Status Conference for a Status Conference to be held in this matter on July 10, 2006, for the purpose of discussing "how to proceed in this docket." Three (3) days later, the Coalition filed the *Petition*.[16]

II.

DISCUSSION

a. The Coalition *Elected* Not to File a Section 251(f)(2) Petition in The Course of These Long-Standing Efforts to Establish Interconnection Agreements under The Act.

Although the Coalition has taken issue with, among other things, the pricing methodology required by the Act since the commencement of these negotiations some three (3) years ago, it chose not to file a 251(f)(2) petition until late last month. The Coalition has certainly been aware of these issues and has raised them with the Authority on several occasions. For example, since the outset of these consolidated arbitrations, the Coalition has maintained that

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[15] May 26, 2006, Letter from the CMRS Providers to the Authority, *In Re: Cellco Partnership d/b/a/ Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Docket No. 03-00585 (hereinafter "*May 26, 2006, Letter from the CMRS Providers*").

[16] In support of the *Petition*, the Coalition argues that the CMRS Providers "objected to" the Coalition's well intended submission of TELRIC-compliant methodologies. *Petition* at 4. Not surprisingly, however, the Coalition neglected to acknowledge that its members had been ordered by the Authority to submit such studies and in fact they had agreed to the same in the August 4, 2005, joint filing. In addition, the Coalition failed to note that the Arbitration Panel rejected the afore-referenced proposed cost study methodologies submitted by the members of the Coalition. *See, e.g., September 7, 2005 Transcript* at 45-50, 53 and 61 (Arbitration Panel declaring that the Coalition's August 11th filing did not provide sufficient information for an evaluation of whether the Coalition's proposed methodologies are TELRIC-compliant). *See also, e.g., September 7, 2005 Transcript* at 75 ("[E]very model you submit . . . should stand on its own.") (Comment of TRA Director/Panel Member); *September 7, 2005 Transcript* at 50-53 (Arbitration Panel directing the Coalition to file all models); *September 7, 2005 Transcript* at 74 ("[T]he whole idea is to be able to provide us - - the Agency as well as the CMRS Providers - - with the opportunity to evaluate the model.") (Comment of TRA Director/Panel Member).

the Authority "does not have the jurisdiction to decide this matter[.]"[17] Further, the Coalition has argued throughout this proceeding that "the CMRS providers have asked the Authority to apply obligations that are . . . inconsistent with established regulation[.]"[18] Finally, the Coalition has long-contended before the Authority that "the FCC has specifically concluded that the forward-looking cost pricing rules, which the CMRS providers seek to utilize, do not apply to the [members of the Coalition]."[19] Each of the foregoing positions of the Coalition, however, have been thoroughly rejected by the TRA in this proceeding.[20]

Moreover, despite its many attempts to argue that it was not bound by the Act, the Coalition did not seek relief under section 251(f)(2) at any time either in its 100-page *Response* (to the arbitration petitions), the Coalition's 15-page *Motion to Dismiss*, the Coalition's pre-filed testimony, the hearing transcripts, the Coalition's 70-page Post-Hearing Brief, the Coalition's

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[17] *See, e.g., Order of Arbitration Award*, p. 7. *See also, e.g.,* TRA Transcript of Proceedings (Hearing), *In Re: Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585, Vol. I at 16:4-6 (Aug. 9, 2004) (hereinafter "*Hearing Transcript*") ("[Y]ou do not have jurisdiction to decide the questions the CMRS providers want you to decide[.]") (counsel for Coalition); Post-Hearing Reply Brief of the Rural Coalition of Small LECs and Cooperatives, *In Re: Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585, p. 4 (Oct. 5, 2004) ("[F]rom the outset of this proceeding, the Coalition has contended that the CMRS Issues are not subject to arbitration[.]"); and Preliminary Motion of the Rural Coalition of Small LECs and Cooperatives to Dismiss, or, in the Alternative, Add an Indispensable Party, *In Re: Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585, p. 14 (Mar. 4, 2004) ("The imposition of any such terms and conditions is beyond the scope of the standards pursuant to which the Authority is authorized to resolve an arbitration.").

[18] *Hearing Transcript*, Vol. I at 17:25-18:1-9 ("[W]e say that the FCC has not established rules and regulations for the indirect connections that we're talking about here today.") (counsel for Coalition). *See also, e.g.*, Post-Hearing Brief of the Rural Coalition of Small LECs and Cooperatives, *In Re: Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585, p. 3 (Sept. 10, 2004); and *Coalition's Motion to Dismiss*, p. 3 ("[A] Section 252 Arbitration proceeding is not the appropriate statutory forum to address the interconnection terms and conditions sought by the CMRS providers[.]").

[19] Response of the Rural Coalition of Small LECs and Cooperatives, *In Re: Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585, p. 63 (Dec. 1, 2003) (hereinafter the "*Response*"). *See also* Response at 64 and Pre-filed Rebuttal Testimony of Coalition Witness Steven Watkins, *In Re: Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585, p. 19 (June 24, 2004).

[20] *Order of Arbitration Award*, pp. 39- 41.

55-page Post-Hearing Reply Brief, the Joint Proposed Procedural Schedule for Rate Phase of Proceeding, the submission of the cost methodologies, or the status conferences/hearings in the rate phase of this proceeding.[21] In fact, counsel for the Coalition members expressly and unequivocally conceded that they were not asserting their rights under 251(f)(2) to the Arbitration Panel – "[i]t is true, we could have, **but we elected not to**, ask for a suspension of 251(b)(5)."[22]

This proceeding has been ongoing before the Authority since November 2003, and the Coalition members have knowingly and voluntarily failed to raise section 251(f)(2) and should be estopped from doing so now.[23] Having waived their section 251(f)(2) rights in the hopes of receiving a favorable arbitration award, the Coalition now inappropriately and untimely raises section 251(f)(2) in what can only be characterized as an improper attempt to have the Authority

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[21] *See, e.g.,* Joint Post-Arbitration Brief Submitted on Behalf of the CMRS Providers, *In Re: Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585, p. 15 (Sept. 10, 2004) (hereinafter "*CMRS Providers' Post-Arbitration Brief*") ("[I]t is the CMRS Providers' understanding that the ICOs have filed [a section 251(f)(2)] petition with the TRA in an effort to suspend their obligations to provide wireline to wireless number portability, i.e. another obligation of section 251(b). However, *no such petition has been filed in this proceeding with regard to the ICOs' obligations to provide reciprocal compensation under section 251(b)(5).*") (citations omitted) (emphasis in original).

[22] *Hearing Transcript*, Vol. X at 8:18-19 (Aug. 11, 2004) (counsel for Coalition) (emphasis added). *See also, Order Establishing Procedural Schedule for Rate Phase of Proceeding* (Hearing Officer accepted "jointly filed" proposed procedural schedule in which each member of the Coalition agreed to "file a description of its proposed TELRIC cost study methodology, specifying in detail how the company proposes to perform the study."); Joint Proposed Schedule for Rate Phase of Proceeding, *In Re: Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585 (Aug. 4, 2006).

[23] At the hearing, counsel for the CMRS Providers acknowledged that while the rural exemption (section 251(f)(1)) did not exempt the Coalition members from sections 251(a) and (b), section 251(f)(2) could be asserted in an attempt to suspend the obligations of section 251(b). *Hearing Transcript*, Vol. X at 6-8. But, counsel for the CMRS Providers appropriately noted that the Coalition members had not sought a section 251(f)(2) suspension in this proceeding. *Id.* at 7:14.

revisit the interim rates it established almost two years ago and to otherwise prevent the current cost proceeding from moving forward.[24]

b. The Act Precludes Consideration of the *Petition* in this Docket.

The Act specifically defines what the TRA can and cannot consider in the context of this arbitration proceeding. As the filing Parties, the CMRS Providers were required to file within a specified time frame, identify the unresolved issues between the parties, including the parties' respective positions.[25] As the non-petitioning party, the Coalition was required to "respond to the [CMRS Providers'] petition and provide such additional information as it wish[ed]."[26] Upon the filing of the petitions for arbitration and the *Response*, the statute expressly provides that the TRA "shall limit its consideration of any petition ... (and any response thereto) to the issues set forth in the petition and in the response, if any ..."[27]

Thus, to the extent the *Petition* seeks determination of an issue that was not previously the subject of the arbitration proceeding, such issue, and related prayers for relief, cannot be entertained at this time.

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[24] *See cf.* Order, *In Re: Petition of Southeast Telephone, inc. for Arbitration of Certain Terms and Conditions of the Proposed Agreement with Kentucky ALLTEL, Inc., Pursuant to the Communications Act of 1934, As Amended by the Telecommunications Act of 1996*, Ky. Pub. Serv. Comm'n Case No. 2003-00115, p. 9 (Dec. 19, 2003) (ALLTEL was precluded from raising section 251(f)(2) in an arbitration proceeding because "Had ALLTEL wished to avoid those obligations, it should have made its position known to us in [an earlier proceeding]" and because "ALLTEL erred in waiting until a carrier requested interconnection to request an exemption.") (copy attached hereto); and *Old Ben Coal Co. v. U.S. Depart. of Labor*, 62 F.3d 1003, 1007 (7th Cir. 1995) ("Of course, a litigant cannot simply sit back, fail to make good faith arguments and then, because-of developments in the law, raise a completely new challenge.") (citations omitted).

Whether the relief sought by the Coalition in the *Petition* is appropriate in a separate proceeding is not a question being addressed at this time by the CMRS Providers, who otherwise respectfully reserve the right to comment on this question should the Authority consider it.

[25] 47 U.S.C. §§ 252(b)(1) and (b)(2). Pursuant to these provisions the petitioner (for arbitration) should also include a description of issues resolved by the parties.

[26] 47 U.S.C. § 252(b)(3).

Moreover, the record is clear that the Coalition apparently made a "strategic" decision early in this process not to file a 251(f)(2) petition in order to address the pricing issue. In the pre-hearing stage of this proceeding, the Coalition strongly opposed the request of the CMRS Providers to address the issue of pricing methodology and the rural exemption (under 251f(1)) on the grounds that the proposed issues were not set forth in the arbitration petitions or in the *Response*, as required by statute.[28] In denying the CMRS Providers' request, the Hearing Officer concluded that the proposed sub-issues were "not set forth in the petitions or response thereto within the meaning of Section 252(b)(4)(A)."[29] The CMRS Providers submit that section

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(..continued)

[27] 47 U.S.C. § 252(b)(4).

[28] The CMRS Providers note that their attempt to include the additional pricing methodology sub-issues was motivated in part by their concern over precisely the type of gamesmanship represented by the *Petition*. In brief, the CMRS Providers wanted to make sure these pricing issues were flushed out to avoid future 251(f) filings aimed at derailing these consolidated arbitrations. *See Hearing Transcript* Vol. II at 114:15-22 (Aug. 9, 2004) ("But, again, the important thing to us is that we were concerned about the rural exemption from the very beginning of our negotiations. We spoke to you and your clients about it and you agreed to negotiate with us. And it's my understanding you agreed that any issues we couldn't resolve through negotiations would be resolved in this arbitration before the TRA.") (Cross-Examination of CMRS Witness William H. Brown by counsel for Coalition); and *id.* at 115:5-9 ("And we raised that because we were concerned about your clients maybe – the possibility of your clients using the rural exemption as a way to avoid resolution of these issues and entering into interconnection agreements with us.") (Cross-Examination of CMRS Witness William H. Brown by counsel for Coalition).

As discussed above, the pricing issues were ultimately decided by the Authority without the additional sub-issues, and the Coalition should not be allowed to re-litigate those issues now, regardless of whether it attempts to disguise the underlying issue as a 251(f)(2) petition or not.

[29] Order Denying Request to Add Issues to the Final Joint Issues Matrix, *In Re: Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585 at 3 (Aug. 2, 2004).

In particular, the CMRS Providers sought to add the following sub-issues to the joint issues matrix:

> 8(b) Does the rural exemption under 47 U.S.C. § 251(f)(1) affect the appropriate pricing methodology for establishing a reciprocal compensation rate for either the direct and/or indirect exchange of traffic?
>
> 8(c) If so, what is the appropriate pricing methodology for establishing a reciprocal compensation rate for the direct and/or indirect exchange of traffic where the rural exemption under 47 U.S.C. § 251 (f)(1) is applicable?

(continued...)

252(b)(4)(A), as applied by the Hearing Officer, similarly precludes the consideration of any new issues raised by the *Petition*. Accordingly, as a matter of law, fundamental fairness and procedural consistency, the Arbitration Panel must adhere to the procedural law of the case established by the Hearing Officer. To do otherwise, would clearly violate "basic principles of fairness[.]"[30]

c. The Submission of The *Petition* in This Proceeding Should Be Rejected.

Regardless of whether a section 251(f)(2) request is appropriate in a separate proceeding, any relief sought in this arbitration proceeding via the *Petition* is inappropriate.[31] The *Petition* should not delay the rate phase of this proceeding or be allowed to undermine the well-established section 252 arbitration process.[32]

If parties are permitted to "game" the process by "lying in wait" to assess the results of an arbitration hearing before asserting section 251(f)(2), the section 252 arbitration process will be trampled and Congressional intent frustrated.[33] Although Congress clearly intended that section

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(..continued)
Given that the Coalition had not filed a 251(f)(2) petition prior to the filing of the arbitration petitions, the CMRS Providers' concern was understandably more focused on 251(f)(1).

[30] *Tennessee Consumer Advocate v. TRA*, 1997 WL 92079 at *4 (Tenn. App. Mar. 5, 1997) (reversing action of TPSC on due process grounds).

[31] The CMRS Providers reserve their right to comment on the *Petition* to the extent it is considered as a separate proceeding.

[32] *See supra* n. 24.

[33] *See cf. Old Ben Coal*, 62 F.3d at 1007 ("Of course, a litigant cannot simply sit back, fail to make good faith arguments and then, because of developments in the law, raise a completely new challenge.") (citations omitted); and *CMRS Providers' Post-Arbitration Brief* at 15, n. 33 ("If the ICOs believed that the Rural Exemption was somehow relevant to the TRA's jurisdiction to conduct this arbitration, or to the pricing methodology to be utilized by the TRA in setting the reciprocal compensation rates, they should have brought that to the attention of all of the parties well before the hearing so that the TRA could determine whether it was indeed relevant to the issues before it and if so, initiate the proper proceeding to determine whether the exemption should be terminated. In this regard, it is particularly puzzling that the ICOs did not include the issue in their motion to dismiss and resisted adding it to the joint issue matrix prior to the hearing. Accordingly, . . . the ICOs should otherwise be estopped from raising this issue at this time.").

251(f)(2) be available under appropriate circumstances, nothing in the Act suggests that section 251(f)(2) was intended to either thwart a long-standing section 252 arbitration proceeding or to provide a collateral vehicle to undermine an order arrived at through the section 252 process.[34]

In essence, the CMRS Providers are merely asking the Authority to maintain this proceeding within the confines of an arbitration under the section 252 process and to not permit the Coalition's *Petition* to unnecessarily further delay this nearly 3-year old proceeding.[35]

III.

CONCLUSION

As the Authority has properly recognized, the establishment of permanent rates in this proceeding is critical.[36] Post-hearing negotiations having failed, there is no need to continue the

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[34] *See State of Tennessee v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 754-55 (Tenn. Ct. App. 2001) ("[B]ecause words are known by the company they keep, we must construe statute's language in the context of the entire statute and in light of the statute's general purpose."). *See also Lenscrafters, Inc. v. Sundquist*, 33 S.W.3d 772, 777 (Tenn. 2000) ("Ultimately, we must seek the most reasonable construction which avoids statutory conflict and provides for harmonious operation of the laws."); *Knox County Education Ass'n v. Knox County Board of Education, et al*, 60 S.W.3d 65, 74 (Tenn. App. 2001) ("A construction that places one act in conflict with another must be avoided; thus, courts must resolve any possible conflict between acts in favor of each other, so as to provide a harmonious operation of the laws."); and *Finley v. Keisling Lumber Co.*, 35 S.W.2d 388, 388-89 (Tenn. 1931) ("A familiar canon of construction requires that effect be given to every clause and part of the statute, thus producing a consistent and harmonious whole."). Mindful of the general purpose of the Act, construing the Act to prohibit the filing of a section 251(f)(2) petition after a section 252 arbitration hearing has been held and subsequent to the issuance of an order of arbitration award when the rural carrier had ample opportunity to timely seek a section 251(f)(2) suspension but voluntarily *elected* not to do so would yield a consistent and harmonious result between sections 251(f)(2) and 252. *See supra* n. 24. On the other hand, entertaining a section 251(f)(2) petition under the circumstances presented would elevate section 251(f)(2) above section 252 and place the provisions of the Act in clear conflict and disharmony.

[35] Section 252 of the Act expressly contemplates arbitrations being concluded in a timely manner. *See also* February 25, 2004, Letter of CMRS Providers to the Authority, *In Re: Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585 ("Having been requested by the Tennessee Regulatory Authority to waive the Section 252(b)(4)(C) nine-month deadline, the CMRS Providers respond in the affirmative. The CMRS Providers hereby waive said deadline, with the understanding that the agency and the parties will strive to move this matter forward in a *reasonable timeframe*.") (emphasis added). While the CMRS Providers reluctantly, but cooperatively, waived the nine-month requirement, we did not waive, directly or indirectly, our due process rights to have this matter concluded within a reasonable period of time. *See City of Los Angeles v. David*, 538 U.S. 715, 716-717 (2003) (The "fundamental requirement of due process" is "the opportunity to be heard at a meaningful time and in a meaningful manner.") (citation omitted). A stay of the arbitration at this stage would run afoul of 47 U.S.C. § 252(b)(4)(C).

suspension of this matter.[37] For the reasons set forth herein, and to avoid further delay, the CMRS Providers respectfully request the Arbitration Panel to sever the *Petition* from TRA Docket No. 03-00585[38] and to either (1) consider the parties' respective September 28 and October 18, 2005, filings regarding cost methodologies and make a determination on whether any of the ICOs' proposed methodologies/models are, consistent with the *Order of Arbitration Award*, TELRIC-compliant, or (2) direct the Rural Coalition, consistent with the *Order of Arbitration Award*, to timely submit TELRIC-compliant cost studies subject to a full evidentiary hearing. Finally, the Arbitration Panel should direct the Hearing Officer to convene a Status Conference immediately following the Authority's July 24, 2006, Conference for the purpose of establishing a procedural schedule to complete the rate phase of this proceeding.

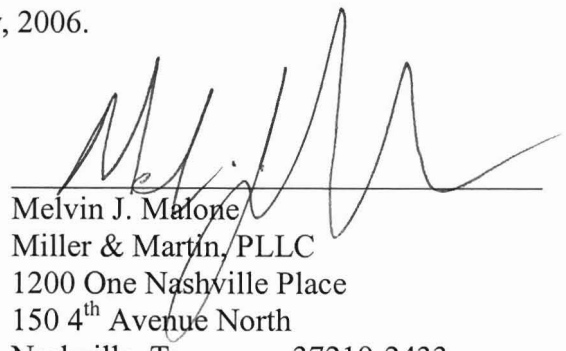
(..continued)

[36] *See, e.g., January 12, 2005 Transcript* at 67 ("I think it's incumbent on us to make sure that we establish a permanent price in these matters as expeditiously as we possibly can . . . I am going to push it to a conclusion as quickly as I can.") (Comment of TRA Director/Panel Member).

[37] *See, e.g., September 7, 2005 Transcript* at 55, 57, and 77-81. *See also, e.g., September 7, 2005 Transcript* at 81 (After the parties submit the second round of methodological filings, "then we'll deliberate[.]") (Comment of TRA Director/Panel Member); *see also id.* at 72:17-19 ("[T]he long and short of it is y'all are going to disagree on this and we're going to have to decide.") (Comment of TRA Director/Panel Member).

[38] In its *Petition*, the Coalition states that the *Petition* is being filed "as an Initial Petition pursuant to Chapter 1220-1-2 of the Rules of the Tennessee Regulatory Authority. This pleading is also filed in the pending proceeding, Consolidated Docket No. 03-00585 since the issues involved in this Petition are closely related to the issues in 03-00585." *Petition for Suspension and Modification Pursuant to 47 U.S.C. § 251(f)(2)* at 1, n. 1 (June 23, 2006). By its own language, and to ensure the maintenance of a fair and proper record, the *Petition* should be stricken from TRA Docket No. 03-00585.

Respectfully submitted this 20th day of July, 2006.



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-2003 KY Order Book

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF SOUTHEAST TELEPHONE, INC. FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF THE PROPOSED AGREEMENT WITH KENTUCKY ALLTEL, INC., PURSUANT TO THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996	)))))))	CASE NO. 2003-00115

O R D E R

On August 7, 2003, SouthEast Telephone, Inc. ("SouthEast") petitioned for arbitration of 20 issues between itself and Kentucky ALLTEL, Inc. ("ALLTEL"). ALLTEL filed a response on September 2, 2003, and included a petition for suspension or modification based on its "fewer than 2%" rural carrier status pursuant to 47 U.S.C. Section 251(f)(2). On September 23, 2003, SouthEast responded to ALLTEL's petition. On October 15, 2003, parties and Commission Staff held an informal conference. By the time of the informal conference, all but four issues had been resolved. These issues were presented by the parties in filings and at the hearing. Post-hearing briefs have been filed. The issues are now ripe for decision.

Allegations by ALLTEL Concerning Due Process

Before turning to the merits of this case, we must consider the allegations made by ALLTEL that it has been denied due process of law. At hearing, and in its post-hearing brief, ALLTEL argues that a SouthEast witness, Wesley Glen Maynard, should not have been permitted to take the stand in order to respond to questions relating to a

response SouthEast furnished to ALLTEL's data requests regarding the capability of the SouthEast switch. ALLTEL claims that the testimony was essentially live direct testimony, in violation of our procedural order requiring direct testimony to be prefiled. ALLTEL also objects to staff questioning on other issues presented in this case that were "beyond the scope of SETel's prefiled direct."[1] "[I]ssue statements and Discovery responses are not evidence and are not prefiled direct testimony," ALLTEL states.[2] Accordingly, ALLTEL claims, no questions regarding statements so made should have been asked.

ALLTEL also alleges that our Staff demonstrated bias in this case. We take such accusations very seriously indeed, and have looked closely into the matter. It appears that the core of ALLTEL's argument here is based on two facts: (1) the Commission Staff Attorney on the case had called the attorney for SouthEast a day or two before the hearing to ask what SouthEast witness would answer questions by Staff in regard to statements made by SouthEast in its responses to data requests that were propounded by ALLTEL and that concerned the capabilities of SouthEast's switch; and (2) at hearing, Staff questioned SouthEast's witnesses on statements that appeared in the record but were beyond the scope of SouthEast's prefiled direct testimony. ALLTEL

[1] Post Hearing Brief on Behalf of Kentucky ALLTEL, Inc. ("ALLTEL Brief") at 58.

[2] ALLTEL Brief at 58.

characterizes the telephone call as an improper *ex parte* contact,[3] and refers to Staff's cross-examination as a "presentation" by Staff of a SouthEast witness conducted for the purpose of remedying weaknesses in SouthEast's case.

We reject any notion that the contact in question was inappropriate. As the Kentucky Court of Appeals explained in *Louisville Gas & Electric Co. v. Commonwealth ex rel Cowan*, 862 S.W.2d 897, 900 (1993), "an *ex parte* contact is condemnable, *when it is relevant to the merits of the proceeding.*" (Emphasis added.) *See also AT&T Communications of the Southwest, Inc. v. Southwestern Bell Telephone Co.*, 86 F.Supp.2d 932 (W.D. Mo. 1999) (explaining that "contact between close aides to the decisionmaker and a party about the *merits* of a decision" should take place in the presence of all parties). (Emphasis added.) Thus, when there is an allegation that an improper *ex parte* contact has occurred, the key question is whether the contact in question concerned the "merits" of the proceeding. The phone call in question concerned a procedural issue (the identity of a witness to testify regarding the switch), not the merits of the case (the capabilities of the switch).

In attempting to establish that this tribunal is not impartial, ALLTEL further claims that Commission Staff "presented" SouthEast Witness Maynard.[4] Actually, after

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[3] ALLTEL alleges, in fact, that "Staff, by its own admission, conducted *ex parte* communications with SETel with respect to Staff's anticipated cross examination and deficiencies in SETel's direct case" [ALLTEL Brief at 55]. In footnote 176 following this statement ALLTEL cites "Transcript at pages 13-14." In fact, pages 13-14 of the Transcript do not contain an "admission" by Staff that it conducted any discussions whatever concerning "deficiencies in SETel's direct case." The alleged "admission" appears at ll. 18-20 of page 13, and consists of these words: "We do have questions about their responses to the data requests, and I asked who would be able to answer those questions."

[4] ALLTEL Brief at 55.

objections from ALLTEL, which were overruled from the bench, the witness was presented by SouthEast's attorney, who established Mr. Maynard's identity and familiarity with the data responses to which he was to testify.[5] ALLTEL also finds fault with the phrasing of Staff's questions, claiming they were "leading" and calculated to elicit "direct" testimony.[6] ALLTEL further infers Staff bias from the fact that Staff did not cross the ALLTEL witness on the issue of SouthEast's switch,[7] although ALLTEL witnesses' testimony was extensive and although the switch in question belongs to SouthEast.

KRS 278.310 provides that, in conducting its hearings, the Commission is not "bound by the technical rules of legal evidence." The rules of legal evidence concerning whether attorney questioning is "leading," whether testimony is "direct" or in "rebuttal," and whether cross-examination questions are within the "scope" of direct, are surely as technical as rules of evidence can be.

Further, Commission Staff's purpose is to ensure that all relevant facts are brought before the Commission, and that positions taken by the parties are adequately probed at hearing, so that the Commission can reach its decision based on a complete record. Here, SouthEast had made totally unsupported and unexplained allegations in response to data requests from ALLTEL, stating that "SouthEast Telephone does not own, control, or utilize any type of switch, [sic] that is used to provide a qualifying

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[5] Tr. at 53-54.

[6] ALLTEL Brief at 56-57.

[7] ALLTEL Brief at 57.

service anywhere in Kentucky";[8] and "SouthEast Telephone does not have a switch that is technically capable of providing a qualifying service in Kentucky."[9] We see no due process problem in our Staff's decision to probe these unsubstantiated statements. We also find no reason to believe that, if ALLTEL had made relevant and unsubstantiated responses to data requests with regard to which no witness was scheduled to appear, a Commission Staff Attorney would not have made the same call to ALLTEL that was made to SouthEast.

Parties before Commission cases are, of course, entitled to due process, to notice and opportunity to be heard. We find that ALLTEL received its due process rights, despite its objections to the rather more informal hearing than that which it appears to have anticipated. ALLTEL was certainly on notice that the capabilities of SouthEast's switch were at issue, having raised the issue itself. What's more, it has been extensively heard on the issue. Despite its claim that it was "sandbagged" at hearing when Mr. Maynard took the stand,[10] it certainly did not seem unprepared to conduct meaningful cross-examination of Mr. Maynard. Its cross-examination of this witness fills 22 pages of the transcript[11] and covers such technical issues as the definition of "qualifying services" under Federal Communications Commission ("FCC") decisions; whether there are "numbers housed in" SouthEast's switch "that are identified

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[8] SouthEast Response to ALLTEL Data Request, Item No. 1, filed November 7, 2003.

[9] Southeast Response to ALLTEL Data Request, Item No. 18, filed November 7, 2003.

[10] ALLTEL Brief at 56.

[11] Our Staff Attorney's cross-examination fills only 9 pages.

in the LERG"; whether, if called, the numbers would "pass through ALLTEL's tandem switch ... and be directed to [SouthEast's] switch"; whether SouthEast obtains transport from other CLECs; and so forth.[12]

Despite our findings that ALLTEL was accorded due process, and that our Staff properly executed its function in making every effort to ensure a complete and adequate record on the contested issues, in our decisions in this matter we will not consider any of the evidence submitted by Mr. Maynard for SouthEast. His testimony simply is not necessary to our decision in this case. Moreover, in order to avoid further unpleasant accusations against the Staff Attorney who appeared at hearing, we have removed her from the Staff team advising us on this case.

ALLTEL'S Petition for Exemption from Certain Requirements of ILECs Pursuant to Section 251(f) of the Telecommunications Act of 1996.

ALLTEL, in its response to the petition for arbitration, requested that the Commission find that, as it is a carrier with fewer than 2 percent of the nation's subscriber lines, it is entitled to an exemption, pursuant to Section 251(f)(2) of the Telecommunications Act of 1996, from the ordinary incumbent local exchange carrier ("ILEC") obligation to provide unbundled local switching and transport[13] to competing local exchange carriers ("CLECs"). Pursuant to the statute, ALLTEL requests that the Commission find that the provision of unbundled switching and transport would (1) impose a significant economic burden on users of telecommunications services

[12] Tr. at 62-81; 214-216.

[13] We treat these issues together, as the FCC has stated that unbundled local switching and shared transport are "inextricably linked." TRO, Paragraph 534.

generally; (2) impose requirements that are unduly economically burdensome; and (3) be inconsistent with the public interest.

ALLTEL states in its testimony that provision of unbundled switching would lead to revenue loss by ALLTEL and increased rates for ALLTEL's remaining subscribers. ALLTEL further states that the provision of unbundled switching and transport to ALLTEL would trigger other carriers' right, under law, to opt-in to the agreements. If competing carriers request these UNEs, ALLTEL says, there will be pressure on ALLTEL's revenues and rates. ALLTEL further surmises that this would lead to rate increases to replace the revenue streams lost and would affect its ability and incentives to continue to invest in the Kentucky network. ALLTEL concludes that the combination of all of these things would not be in the public interest.

ALLTEL's position on this issue poses a number of problems, both legally and as a matter of policy. First, the Commission addressed arguments concerning the Telecommunications Act's rural exemption for portions of this same territory when it was owned by GTE South Incorporated ("GTE South") in Case No. 1996-00313.[14] In that case, the Commission concluded that the existing exemption afforded under 47 U.S.C. Section 251(f)(1) should be terminated. The Commission found, consistent with the FCC's guidelines, that Congress intended exemptions to be "the exception rather than the rule" and that GTE South had not established that there should be no competition in its Contel study area.

[14] Case No. 1996-00313, Application of GTE South Incorporated for the Rural Telephone Company Exemption From Certain Requirements of the Telecommunications Act of 1996.

Next, we take note that ALLTEL previously apprised us, in the case in which we approved its acquisition of Verizon South Incorporated's ("Verizon") telecommunications business in Kentucky, that it did not oppose providing unbundled switching or transport.[15] There is no testimony to establish that circumstances have changed substantially since that time. Moreover, our ruling in Case No. 2001-00399, at 20, explicitly required ALLTEL, as a condition of its acquisition of Verizon's territory in Kentucky, to honor all interconnection agreements previously entered into by Verizon. Several of those agreements contain provisions entitling CLECs to the very unbundled switching and transport ALLTEL now says it should not have to provide.[16]

The ALLTEL acquisition of Verizon was not meant to require Kentucky's competitive telecommunications market to take so huge a step backward. In fact, pursuant to Kentucky statutes, we are not empowered to approve the acquisition of a utility unless such acquisition is in the public interest.[17] We have interpreted the "public interest" standard to mean, at the very least, that no harm will accrue as a result of the acquisition:

> This standard establishes a two-step process: first, there must be a showing of no adverse effect on service or rates; and, second, there must be a demonstration that there will be some benefits....[w]hile the standard does not require benefits to be immediate or readily quantifiable, the

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[15] Case No. 2001-00399, Petition by ALLTEL Corporation to Acquire the Kentucky Asets of Verizon South, Incorporated (Order dated February 13, 2002).

[16] *See, e.g.,* Agreement by and between Cinergy Communications Company and Verizon South, Inc., f/k/a GTE South Incorporated for the Commonwealth of Kentucky, at Network Elements Attachment (providing for unbundled network elements ("UNEs"), including the unbundled network platform ("UNE-P")) and Agreement between Brandenburg Telecom, LLC and Verizon South (same).

[17] KRS 278.020(5).

benefits referred to therein are what must be demonstrated after satisfying the first step by a showing of no adverse effect on service or rates.[18]

Pursuant to this standard, our Order in Case No. 2001-00399 is replete with our concerns that the competitive obligations of Verizon be met by ALLTEL after the acquisition. For example, we imposed conditions requiring operational support systems adequacy and compliance with interconnection obligations previously assumed by Verizon. Had ALLTEL wished to avoid those obligations, it should have made its position known to us in Case No. 2001-00399.

As a final matter, we note the process in which ALLTEL has requested a rural exemption is not in compliance with the statute. 47 U.S.C. Section 252(f) requires that a carrier requesting the exemption petition for it; it further gives a state commission 180 days to reach its decision. ALLTEL erred in waiting until a carrier requested interconnection to request an exemption. An arbitration proceeding is not only too brief to conduct the required analysis; it forecloses the participation of all other parties who may wish to interconnect with ALLTEL and who have the right to be notified and to be heard.

Accordingly, ALLTEL's request to be accorded an exemption from unbundled local switching and transport obligations should be denied.

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[18] Case No. 2002-00475, Application of Kentucky Power Company d/b/a American Electric Power for Approval, to the Extent Necessary, to Transfer Functional Control of Transmission Facilities Located in Kentucky to PJM Interconnection, LLC, Pursuant to KRS 278.218 (Order dated August 25, 2003), at 4-5; Case No. 2002-00018, Application for Approval of the Transfer of Control of Kentucky-American Water Company to RWE Aktiengesellschaft and Thames Water Aqua Holdings GMBH (Order dated May 30, 2002), at 7-8.

Access to Unbundled Local Switching and Transport

ALLTEL has also asserted to this Commission that it should not have to provide unbundled switching and transport to SouthEast due to the FCC's Triennial Review Order ("TRO Order").[19] Thus, this case presents us with something of an anomaly. This Commission is to enforce Section 251 of the Telecommunications Act,[20] an obligation which includes determining whether UNEs should be furnished to a CLEC on the basis that the CLEC's ability to provide the services it seeks to offer would be "impaired" if the UNEs cannot be obtained.[21] Section 2(d) of Section 251 also provides, however, that the FCC is to set the standards for "impairment." Rather than definitively setting those standards itself, the FCC, in its TRO Order, has delegated to the states the duty to evaluate the issue on an intrastate, market-by-market basis, and to include ILEC "hot cut" capacity in our analysis. Thus, we have instituted a separate proceeding, Case No. 2003-00397,[22] to make these determinations. Here, however, we must decide the issue of "impairment" as it affects these two carriers alone, without having reached a final determination based on markets within Kentucky in our own TRO proceeding. Accordingly, we must use such standards as currently exist in the FCC's TRO Order.

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[19] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order on Remand*, CC Docket No. 01-00338, rel. August 21, 2003 ("TRO Order").

[20] 47 U.S.C. 252.

[21] 47 U.S.C. 251(d)(2).

[22] Case No. 2003-00397, Review of Federal Communications Commission's Triennial Review Order Regarding Unbundling Requirements for Individual Network Elements.

First, the FCC in its TRO Order presumes impairment when a CLEC seeks to provide to the mass market[23] "qualifying services," *e.g.*, those services that have traditionally been provided by ILECs, including local exchange service, local data service, and access services.[24] The services SouthEast seeks to provide are "qualifying services." The FCC presumption of impairment is so strong, in fact, that it finds that a state could conclude that impairment exists even if the otherwise "automatic" triggers for a "no-impairment" finding are met: "exceptional circumstances may preclude a state determination that there is no impairment in a given market, even when one of the triggers has been satisfied."[25]

The guidelines provided by the FCC also include the statement that "[s]cale economies, particularly when combined with sunk costs and first-mover advantages, ... can pose a powerful barrier to entry."[26] Accordingly, when an ILEC seeks to demonstrate that a CLEC is not impaired by inability to obtain UNEs, factors at issue include "whether the cost differences caused by scale economies are sufficiently large and persistent, alone or in combination with other factors, to be likely to make entry uneconomic."[27] The FCC also found significant barriers in the mass market in the United States as a whole, including churn rate, high non-recurring charges, service

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[23] "Mass market" customers are "residential and very small business customers." TRO Order at 286, n. 1402.

[24] TRO Order, Paragraph 135.

[25] TRO Order, Paragraph 494, n. 1534.

[26] TRO Order, Paragraph 87.

[27] TRO Order, Paragraph 87.

disruptions, and ILEC difficulty in handling "hot cuts."[28] ALLTEL has offered insufficient evidence to overcome the presumption that SouthEast will be impaired if it is denied unbundled switching and transport. Although it claims that SouthEast has options other than obtaining ALLTEL UNEs, including upgrading its own switch[29] and looking to other carriers for services, it simply does not establish that SouthEast's current economies of scale are sufficient to render the expense involved in such options anything other than a barrier to economical market entry.

We caution the parties that our decision in this matter is not to be considered a prejudgment of our final decision in Case No. 2003-00397. ALLTEL may refile all its arguments in this proceeding, as well as other arguments and evidence it deems appropriate, in Case No. 2003-00397. This proceeding, by virtue of its statutory deadline and its limitation as to parties, simply does not permit analysis of the complex factors that will be at issue in that case, including applicable markets. The difficulty is illustrated by ALLTEL's attempt to establish the geographic scope of the market that applies here under the FCC's "granularity" standards. However, its evidence on that issue is neither complete nor compelling. It suggests that the "market" be defined in unacceptably broad geographic terms, providing for a radius 200 miles in any direction

[28] A conference concerning, among other things, hot cut and collocation issues, is scheduled for January 14, 2004 in Case No. 2003-00379. These issues are among the many that the Commission will consider in that case.

[29] The evidence submitted by ALLTEL in this proceeding includes call detail records ("CDRs") that purport to show that SouthEast's switch switches voice service. However, those CDRs do not show that the SouthEast switch has provided dial tone to local end-users.

from Lexington/Louisville and 200 miles from each wholesale provider of switching.[30] However, the FCC mandates that states

> ...may not define the market as encompassing the entire state. Rather, state commissions must define each market on a granular level, and in doing so they must take into consideration the locations of customers actually being served (if any) by competitors, the variation in factors affecting competitors' ability to serve each group of customers, and competitors' ability to target and serve specific markets economically and efficiently using currently available technologies. ...[S]tate commissions should consider how competitors' ability to use self-provisioned switches or switches provided by a third-party wholesaler to serve various groups of customers varies geographically and should attempt to distinguish among markets where different findings of impairment are likely. The state commissions must use the same market definitions for all of its analysis.[31]

The FCC also suggests that a state commission, in defining the markets, consider differences within the state based on "retail ratemaking, the establishment of UNE loop rate zones, and the development of intrastate universal service mechanisms."[32] ALLTEL's proposed market definition is not only too large; it is insufficiently supported by evidence required by the FCC's standards. Absent a finding on the threshold issue of an appropriate market definition, it is impossible to evaluate whether any of the FCC's "trigger" mechanisms have been satisfied. Further, other carriers who clearly have strong interest in the Commission's determinations in this matter have had no opportunity to comment.

Given the current standards and presumptions established by the FCC, the rights of other interested parties to weigh in on our ultimate determination as to the

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[30] ALLTEL Brief at 25-26.

[31] TRO Order at Paragraph 495.

[32] TRO Order at Paragraph 496.

appropriate scope of telecommunications markets and impairment standards in Kentucky, the preexisting obligation of ALLTEL to honor interconnection agreements entered into by Verizon, including those requiring provision of UNE-P, and the record evidence here, we find ALLTEL has not adequately established that SouthEast is not impaired absent the availability of unbundled local switching and transport. Accordingly, ALLTEL must provide unbundled local switching and transport to SouthEast until and unless the Commission finds that mass market unbundled local switching and transport should no longer be made available as UNEs by ALLTEL in specific areas of the Commonwealth.

UNE Pricing

SouthEast objects to the prices ALLTEL offers for UNEs, and has proposed prices that are essentially the same as those they pay pursuant to their interconnection agreement with BellSouth Telecommunications, Inc. ("BellSouth"). ALLTEL has proposed that the prices set by the Commission under the Verizon agreements be used in this proceeding, with the exception of the pricing specified for unbundled local switching and transport. In our Order approving the sale of the Verizon properties in Kentucky to ALLTEL, however, we required ALLTEL to adopt the interconnection agreements of Verizon. UNE rates were contained therein. Those rates, therefore, continue to apply until we have concluded our process to establish UNE rates for ALLTEL in Administrative Case No. 382.[33] ALLTEL has been ordered to file its

[33] Administrative Case No. 382, An Inquiry Into the Development of Deaveraged Rates for Unbundled Network Elements.

proposed UNE rates no later than February 5, 2004. The Commission will rule as expeditiously as possible on the rates when they are filed.

SouthEast has not brought forth any evidence that the rates the Commission has set for Verizon would not be appropriate for ALLTEL to use in this interconnection agreement. The Commission, at this time lacking any substantive evidence that the costs of providing UNEs by ALLTEL would be any different than those of Verizon, finds that the rates previously approved by the Commission for Verizon and present in the Verizon interconnection agreements adopted by ALLTEL should be those that are available to SouthEast.

UNE Port Usage

The parties disagree whether ALLTEL should assess a port usage charge in addition to its fixed rate for unbundled local switching. ALLTEL claims that the usage portion is appropriate to adequately recover costs. SouthEast alleges that such a usage component is cost-prohibitive.

The Commission finds that a port usage charge is an appropriate component of unbundled local switching so long as it is cost justified. The Verizon UNE rates, as required herein, have included and should continue to include a port usage component until such time as they are amended by the Commission.

Reciprocal Compensation

The parties have agreed to a rate for reciprocal compensation; however, SouthEast has requested that the reciprocal compensation rate be applied to traffic destined for the Internet and terminating at an Internet service provider ("ISP"), as well as to voice traffic. ALLTEL disputes that the reciprocal compensation rate should be

applied to Internet traffic and proposes that Internet traffic be exchanged on a bill-and-keep basis. The FCC has concluded that ISP-bound traffic is not subject to the reciprocal compensation obligations of Section 251(b)(5) and that the appropriate cost recovery mechanism for this traffic is bill and keep.[34] Accordingly, the appropriate cost recovery mechanism for traffic destined for the Internet is bill and keep.

Interconnection and Direct Trunk Groups

The parties appear to disagree regarding the appropriate level of traffic that should exist between an ALLTEL end-office and SouthEast's Interconnection Point ("IP") before direct trunk groups between the end-office and SouthEast's IP would have to be employed by SouthEast. ALLTEL claims that traffic exceeding a DS1 capacity is appropriate to require direct trunk groups while SouthEast maintains that a DS3 threshold is more appropriate. SouthEast further requests that the language in the agreement clarify that its IP may remain at its existing location regardless of the level of traffic being exchanged.

The Commission finds that a DS3 threshold is an appropriate level of traffic before direct trunks would have to be employed by SouthEast. The Commission further clarifies that, pursuant to our previous rulings on this issue,[35] SouthEast need only

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[34] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* CC Docket No. 96-98 and *Intercarrier Compensation for ISP-Bound Traffic,* CC Docket No. 99-68, FCC 01-131, Order of April 18, 2001.

[35] *See, e.g.,* The Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996, Case No. 2000-00404, Orders dated March 14, 2001 and April 23, 2001.

maintain one IP per LATA regardless of the level of traffic exchanged between the two companies.

IT IS THEREFORE ORDERED that the parties hereto shall file their interconnection agreement no later than 30 days from the date of this Order, incorporating the decisions reached herein.

Done at Frankfort, Kentucky, this 19th day of December, 2003.

By the Commission

ATTEST:

Executive Director

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2006, a true and correct copy of the foregoing has been served on the parties of record, via the method indicated:

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