BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re:	)	
	)	
BellSouth Telecommunications, Inc.	)	**Docket No.** 04-00380
Tariff to Introduce Transit Traffic Service,	)	
Tariff No. 20041259	)	

PETITION TO INTERVENE AND REQUEST TO SUSPEND TARIFF AND TO CONDUCT A CONTESTED CASE PROCEEDING

The Petitioners[1] request that the Tennessee Regulatory Authority allow intervention in the above-captioned tariff filed by BellSouth Telecommunications, Inc. ('BellSouth"). The Petitioners also ask that the Authority suspend the tariff pending the outcome of a contested case proceeding The proposed tariff, scheduled to become effective on November 5, 2004, sets a rate for BellSouth's handling of "transit" traffic i.e., telephone calls that originate with one carrier, transit BellSouth's network and are ultimately delivered to a third carrier for termination. Since it is impractical for every local telecommunications carrier to have a direct connection with every other local carrier, the use of an intermediate, "transit" carrier to take calls from an originating carrier and hand them off to the terminating carrier is a common practice in the industry. In fact, the offering of such "indirect" connections between carriers is expressly required by the Federal Telecommunications Act, 47 U.S.C. §251(a)(1), and such interconnection "transmission" services must be offered at TELRIC rates pursuant to 47 U.S.C. §252(d)(1).

Upon information and belief, the Petitioners submit that BellSouth has in effect a number of interconnection agreements which establish a BellSouth "transit" rate of $.0025 per minute or

[1] At this time, the Petitioners are AT&T Communications of the South Central States, LLC, MCImetro Access Transmission Services, LLC, MCI WorldCom Communications, Inc , NuVox Communications, Inc , US LEC of Tennessee, Inc , XO Tennessee, Inc , Xspedius Communications, LLC and Southeastern Competitive Carriers Association

minute, a rate far in excess of the transit rate set forth in those interconnection agreements and in BellSouth's SGAT on file at the TRA. BellSouth's proposed rate is clearly unjust and unreasonable.

Pursuant to T.C.A §4-5-310(a), the Petitioners have a statutory right to intervene in this proceeding As competitive local telephone carriers, the Petitioners must use BellSouth's transit services to interconnect with other local carriers. Absent an agreement with BellSouth, each Petitioner will presumably have to pay BellSouth the tariffed rate approved by the TRA. Even if a Petitioner has a current agreement which provides for a transit rate that is less than the proposed tariff, it seems likely that, once the current agreement expires, BellSouth will argue that any new agreement must incorporate the tariff rate for transit traffic. For these reasons, the Petitioners have a legal interest in the outcome of this proceeding and, therefore, a statutory right to intervene. Furthermore, granting these Petitions will not impair the interest of justice or the orderly and prompt conduct of these proceedings.

The proposed tariff substantially increases the transit rate found in current interconnection agreements and in the BellSouth SGAT. BellSouth has made no effort to demonstrate that the proposed increase is based on cost or otherwise consistent with the pricing standards set forth in §252(d)(1) of the Telecommunications Act To the contrary, Petitioners believe, upon information and belief, that Bellsouth will contend that the proposed rate of $.006 per minute is a "market" rate and that BellSouth has no legal obligation, to demonstrate that the rate is consistent with the requirements of the Act. On its face, the proposed increase cannot be consistent with that statutory standard For example, if transit rates of $.0025 per minute or less have been found to comply with the pricing standards of §252(d)(1), then there is a substantial likelihood that a "market" rate of more than twice that amount fails to comply with those standards.

Pursuant to T.C A §65-5-201(c), the TRA may suspend the proposed tariff either upon a showing by a complaining party that there is a substantial likelihood that the tariff is illegal and will cause injury to the complaining party or "upon finding such suspension to be in the public interest." Under either standard, the TRA may suspend this proposed tariff pending the outcome of a contested case to determine whether BellSouth's proposed rate complies with the pricing standard set forth in §252(d)(1)

The importance of this proceeding cannot be overstated. The issue before the agency is a case of first impression for the TRA and, for the most part, a case of first impression in the BellSouth region The North Carolina Commission has ruled that BellSouth is required by the federal Telecommunications Act and applicable state law to offer transit services but allowed the parties to negotiate the applicable rate.[2]. (The Connecticut Commission has also ruled that the incumbent Bell carrier must provide transit service and ordered a substantial reduction in the transit rate of Southern New England Telephone Company) Copies of both the North Carolina and Connecticut decisions are attached.

Finally, unlike most proposed tariffs which concern services offered to end users and are usually services which are also offered by other carriers, BellSouth's transit service is offered only to other carriers, not to end users, and is, for all practical purposes, a monopoly service In Tennessee, BellSouth is the only local provider with ubiquitous local connections and, therefore, the only available "transit" carrier in most circumstances. In these circumstances, the TRA must therefore be especially cautious to insure that the monopoly rate charged by BellSouth is just and reasonable, non-discriminatory, and will "permit competition in all telecommunications

[2] To Petitioners' knowledge, no other state commission in the BellSouth region has issued a ruling on BellSouth's legal obligation to provide the transit function The Georgia Public Service Commission recently concluded hearings in a docket addressing transit traffic A decision is expected before January, 2005 See BellSouth Telecommunications, Inc 's Petition For A Declaratory Ruling Regarding Transit Traffic, Docket No 16772-U

service markets," as the General Assembly has instructed T.C.A. §65-4-123. Clearly this is a case where the public interest warrants suspension of the proposed tariff and a careful consideration of the policy issues at stake.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC
By

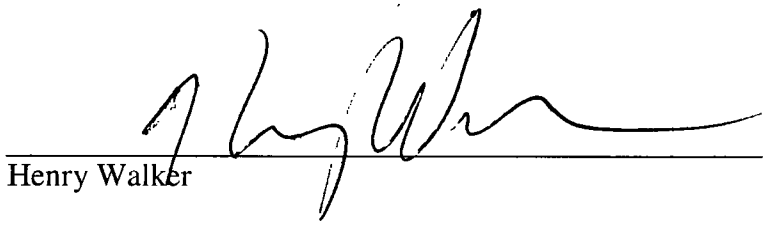
Henry Walker
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2363

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded electronically and via U.S. Mail, postage prepaid, to:

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

on this the 29th day of October, 2004.



Henry Walker

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH

DOCKET NO P-19, SUB 454

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Petition of Verizon South, Inc., for Declaratory Ruling that Verizon is Not Required to Transit InterLATA EAS Traffic between Third Party Carriers and Request for Order Requiring Carolina Telephone and Telegraph Company to Adopt Alternative Transport Method	)	ORDER DENYING PETITION

BY THE COMMISSION: On January 30, 2002, the Commission issued an Order establishing extended area service (EAS) between the Durham exchange of Verizon South, Inc. (Verizon), the Pittsboro exchange of Carolina Telephone and Telegraph Company (Carolina or, collectively with Central Telephone Company, Sprint), and the Hillsborough exchange of Central Telephone Company (Central or, collectively with Carolina Telephone and Telegraph Company, Sprint) (the EAS Order).[1] This EAS was implemented on June 7, 2002. EAS from the Durham exchange to the Pittsboro exchange and zero-rated expanded local calling from the Durham exchange to the Hillsborough exchange were implemented earlier in the tax flow-through docket, Docket No. P-100, Sub 149.

Shortly after the EAS was implemented, the Public Staff began receiving complaints from customers in the Pittsboro exchange who were unable to complete calls to numbers in the Verizon Durham exchange as either local or toll calls. On investigating these complaints, the Public Staff learned that Verizon was blocking calls from the Pittsboro exchange to competing local provider (CLP) and commercial mobile radio service (CMRS) end-users in the Durham exchange. Verizon stated that it blocked the calls because "the proper interconnections between the CLPs, CMRSs and Sprint have not yet been established."[2] Subsequently, the Public Staff learned that Verizon had also begun blocking calls from Central's Roxboro exchange to CLP customers in Durham, calls that it previously had been completing. The Roxboro/Durham route is a two-way interLATA EAS route that has been in service since February 14, 1998. IntraLATA EAS calls from the Hillsborough exchange to CLP end-users in Durham have not been blocked. In its letters

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1 *In the Matter of Carolina Telephone and Telegraph Company – Hillsborough and Pittsboro to Durham Extended Area Service, Order Approving Extended Area Service*, Docket No P-7, Sub 894 (January 30, 2002)

2 See Verizon's letters from Joe Foster to Nat Carpenter dated July 11, 2002, and October 31, 2002, attached as Exhibits A and B to Verizon's Petition

to the Public Staff, Verizon agreed to discontinue its blocking until the matter had been resolved by the Commission.

On December 9, 2002, Verizon filed a Petition for Declaratory Ruling (Petition) requesting "that the Commission issue a ruling clarifying that Verizon is not required to transit Sprint's InterLATA EAS traffic destined to third party CLPs/CMRS providers" and "that the Commission direct Sprint to cease delivering traffic destined for third-parties to Verizon and make alternative arrangements for proper delivery of such traffic."

On December 10, 2002, the Commission issued an Order seeking comments and reply comments. Petitions to intervene have been filed by The Alliance of North Carolina Independent Telephone Companies (the Alliance); BellSouth Telecommunications, Inc., (BellSouth); AT&T Communications of the Southern States, LLC, (AT&T); ALLTEL Carolina, Inc., and ALLTEL Communications, Inc., (collectively, ALLTEL); KMC Telecom, Inc. (KMC); ITC^DeltaCom, Inc., (ITC); Level 3 Communications, Inc., (Level 3); US LEC of North Carolina, Inc , (US LEC), and Barnardsville Telephone Company, Saluda Mountain Telephone Company, and Service Telephone Company (collectively, TDS Companies). All petitions to intervene were allowed.

ITC, Level 3 and KMC, US LEC, Sprint, the Public Staff, BellSouth, and AT&T filed initial comments. Verizon, the Alliance, Sprint, and the Public Staff filed reply comments.

On May 16, 2003, the Commission issued an Order scheduling an oral argument on June 19, 2003, to consider:

(1) Whether Verizon is legally obligated to perform a transiting function or to act as a billing intermediary in regards to third-party traffic, and

(2) If so, the principles that should inform the rates, terms and conditions for such services and the appropriate procedure for arriving at a decision about them.

On May 23, 2003, Verizon filed a Motion for Clarification requesting that the Commission make clear that the oral argument would address only legal and not factual issues. On June 3, 2003, Sprint filed a response to Verizon's Motion for Clarification in which it argued that the only issues to be resolved in this matter are legal.

On June 5, 2003, the Presiding Commissioner issued an Order clarifying that the purpose of the oral argument was to decide whether Verizon is obligated as a matter of law pursuant to the Telecommunications Act of 19963 and other applicable provisions of law to perform a transiting function or to act as a billing intermediary with regards to third-party traffic with particular reference to the third-party interLATA EAS calls at issue in this docket. The Order reserved to Commissioners the right to ask questions of the

3 47 U S C A §§ 151 *et seq* , "the Act "

participants at the oral argument bearing upon the regulatory process should the matter be decided in one way or another.

The oral argument was heard by the Commission, Commissioner Joyner presiding, on July 15, 2002.

On August 29, 2003, the Commission received briefs and/or proposed orders from the following: Verizon, BellSouth Telecommunications, Inc. (BellSouth), Sprint, the Public Staff, AT&T Communications of the Southern States, Inc. (AT&T), and US LEC of North Carolina, Inc (US LEC). Of these, Sprint, the Public Staff, AT&T, and US LEC may be classified as proponents of the duty to provide the transiting function as a matter of law, while Verizon and BellSouth may be classified as opponents. Since the arguments of the proponents are largely the same, their arguments will be summarized collectively as those of the "Proponents." Likewise, those of Verizon and BellSouth will be summarized collectively as those of the "Opponents." Since many of the citations to the law are the same, but with the Opponents and Proponents putting a different construction on them, the text of the most common citations is set out below

Most Common Citations

Telecommunications Act of 1996 (TA96)

Sec. 251(a) General Duty of Telecommunications Carriers.—Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers ...

Sec. 251(b) Obligations of All Local Exchange Carriers—Each local exchange carrier has the following duties....

(5) Reciprocal Compensation.—The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

Sec. 251(c) Additional Obligations of Incumbent Local Exchange Carriers.—In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:....

(2) Interconnection —The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network--

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252.

State Law

G.S. 62-110(f1) The Commission is authorized to adopt rules it finds necessary to provide for the reasonable interconnection of facilities between all providers of telecommunications services. ..

G.S. 62-42(a) Except as otherwise limited in this Chapter, whenever the Commission, after notice and hearing had upon its own motion or upon complaint, finds: (1) That the service of any public utility is inadequate, insufficient or unreasonably discriminatory...or (5) That any other act is necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity, the Commission shall enter and serve an order directing that such...additional services or changes shall be made or affected within a reasonable time prescribed in the order....

Rule R17-4. Interconnection. (a) Interconnection arrangements should make available the features, functions, interface points and other service elements on an unbundled basis required by a requesting CLP to provide quality services. The Commission may, on petition by any interconnecting party, determine the reasonableness of any interconnection request. (b) Interconnection arrangements should apply equally and on a nondiscriminatory basis to all CLPs....

Summary of Proponents' Arguments

The thrust of the Proponents' arguments was that Verizon is obligated under TA96 as well as under State law to perform a transiting function. They argued that this requirement is clearly in the public interest and is in fact necessary to effectuate the purposes of TA96, which include the preserving and extending of the ubiquitous telecommunications network and the encouragement of competition.

With respect to provisions in TA96, the Proponents argue that the transiting obligation follows directly from the obligation to interconnect and the right of non-incumbent carriers to elect indirect interconnection. *See,* Section 251(a)(1) (all carriers to connect directly or indirectly with other carriers) and Section 252(c)(2) (additional ILEC duties regarding interconnection). Transit traffic is an important option to have available because it offers a simple and economical method of interconnection for carriers exchanging a minimal amount of traffic. It was routinely used without objection prior to the enactment of TA96. Otherwise, such carriers would be forced to created redundant and uneconomic arrangements to deliver their traffic. As such, the obligation to provide transit service is necessary to give meaning to the right to interconnect directly

under TA96 and in fulfillment of its purposes The right to transit service exists independently of any given interconnection agreement, although such agreements may certainly establish procedures for it.

Concerning the *Virginia Arbitration Order* of the FCC's Wireline Competition Bureau (July 17, 2002), the Proponents noted that, contrary to Verizon's representations concerning the import of that decision, the Bureau expressly refused to declare that an ILEC is not obligated to provide transit service but rather, in view of the fact that the FCC had not previously decided the issue, it declined to rule on the issue in the context of its delegated arbitration authority.

The Proponents also maintained that authority to require the transit function could be found under State law. For example, G.S. 62-110(f1) allows the Commission to enact rules regarding interconnection. Rule R17-4 expresses similar sentiments. G.S. 62-42 bears on the matter of compelling efficient service, which would certainly be impaired if there was no duty to provide transit service Other states, notably Ohio and Michigan, have held for a transit service obligation None of the Proponents, however, argued that there was a necessary duty for Verizon to perform a billing intermediary function.

Summary of Opponents' Arguments

The key argument of the Opponents was that the provisions of TA96 cited by the Proponents do not create obligations or duties that are separate from interconnection agreements. No such transit obligation, either explicitly or through fair inference, can be found in TA96. Any provision of transit is purely voluntary on the ILECs' part. The Opponents further argue that, since TA96 in both Sections 251 and 252 creates a comprehensive framework with the negotiation and arbitration of interconnection agreements as its centerpiece, this preempts the states from enacting other obligations, such as a transit obligation, based on state law.

With respect to the *Virginia Arbitration Order*, the Opponents contended that the gravamen of that decision was not only that transit services need not be provided at TELRIC rates, they need not be provided at all, since the Bureau stated that it did not find "clear Commission precedent or rules declaring such a duty."

The Opponents declared that at least one state, New York, had decided against a transit obligation, while several others, such as Maryland, Wisconsin, and Michigan, have expressed skepticism about any billing intermediary obligation.

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that good cause exists to find that Verizon is obligated to provide the transit service as a matter of law for the

reasons as generally set forth by the Proponents. Accordingly, Verizon's Petition for Declaratory ruling in its favor is denied.

The Commission is persuaded that a transit obligation can be well supported under both state and federal law. The Commission does not agree with the Opponents' view that duties and obligations under TA96 do not or cannot exist separately from their incarnation in particular interconnection agreements pursuant to the negotiation and arbitration process—or, as Verizon put it, "[TA96] contemplates only duties that are to be codified in interconnection agreements, not duties that apply independent of interconnection agreements."

Aside from not being compelled by the history, structure, or real-world context of TA96, the "interconnection agreements-only" approach suggested by the Opponents would lead to a number of undesirable, even absurd, results For example, it would call into question the status of generic dockets, which are an efficient means by which the Commission can resolve interconnection issues arising under TA96 *en masse*. Apparently, the state commissions would be limited to arbitrating interconnection agreements one-by-one. There is simply no evidence that Congress intended to abolish generic dockets by the states; indeed, quite the opposite is suggested. *See*, for example, Section 251(d)(3) (Preservation of State Access Regulations). *As* a practical consequence, adoption of the Opponents' view would immoderately multiply the number of interconnection agreements—and the economic costs relating to entering into them—because the corollary of the Opponents' view is that, in order to fully effectuate rights and obligations, everyone must have an interconnection agreement with everybody else, even if the amount of traffic exchanged is minimal. The overall impact would be a tendency to stifle competition by the imposition of uneconomic costs as, for example, by the construction of redundant facilities.

If there were no obligation to provide transit service, the ubiquity of the telecommunications network would be impaired. Indeed, in a small way this has already happened in this case when Verizon refused to transit certain traffic. It should also be noted that the privilege of initiating arbitration proceedings is not symmetrical. Even if an ILEC, such as a smaller one with less than 200,000 access lines, urgently desires an interconnection agreement from a CLP or CMRS, it may not be able to get one. These effects illustrate the ultimate unsupportability of the Opponents' view of their obligations as ILECs to interconnect indirectly—essentially, as matters of grace, rather than duty.

The fact of the matter is that transit traffic is not a new thing. It has been around since "ancient" times in telecommunications terms. The reason that it has assumed new prominence since the enactment of TA96 is that there are now many more carriers involved—notably, the new CMRS providers and the CLPs—and the amount of traffic has increased significantly. Few, if any, thought about complaining about transit traffic until recently. It strains credulity to believe that Congress in TA96 intended, in effect, to impair this ancient practice and make it merely a matter of grace on the part of ILECs, when doing

so would inevitably have a tendency to thwart the very purposes that TA96 was designed to allow and encourage.

The Opponents rely heavily on the *Virginia Arbitration Order* for the proposition that there is no obligation to provide the transit function. The *Order* was not meant to bear such a heavy burden. A close examination of the *Order* yields a more equivocal conclusion. The fact is that the FCC, as is the case in many matters, has not definitively made its mind up on the matter. In the meantime, the telecommunications market and its regulation march on As much as we would wish for definitive guidance from the FCC, the states cannot always wait for that body to rule one way or another—or somewhere in between.

The Opponents have urged that, in any event, the states are preempted from relying on state law to create a transit obligation. This would seem to follow logically from their view that TA96 has established a comprehensive "interconnection agreements-only" approach. The Commission, as noted above, views this approach as insupportable. In fact, it should be clear that Congress contemplated that states *do* have a role in establishing interconnection obligations as long as they do not thwart the provisions and purposes of Section 251. As alluded to earlier, Sec. 251(d)(3) of TA96 specifically provides that "[i]n prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part." It is significant that the wording of this provision mentions both state "policies" and the "purposes" of Sec. 251. It is also useful to observe that the Opponents' "interconnection agreements-only" view would "read out" this savings provision and render it nugatory, because anything done outside of interconnection agreements would, according to the Opponents, be contradictory to Sec. 251. This is yet another example of the consequences of the Opponents' idiosyncratic interpretation of TA96. Establishing a transit obligation and defining reasonable terms and conditions is well within a state's purview, even *arguendo* that no such positive obligation can be derived from TA96.

The real challenge facing the industry and the Commission is not whether there is a legal obligation for ILECs to provide a transit service. The Commission is convinced that there is. The Commission is confident that, should the FCC ever address the issue, it will find the same. The *real* question is what should be the rates, terms and conditions for the provision of that service. Those are matters included or includible under Docket No. P-100, Sub 151. Certainly, interconnection agreements are by and large desirable things, and as many companies as practicable should enter into them. No one really denies that. But it is not always practicable because, among other things, the privilege of petitioning for arbitration under Sec. 252 of TA96 is not symmetrical This simply reinforces the case that, ultimately, there may need to be a default provision made for those that do not have such agreements or cannot interconnect directly. In such cases, this *may* require ILECs as intermediaries. The equities of the situation are reasonably straightforward—those that

seek to terminate traffic should pay for its termination and the one that transits should be compensated for its services. This *may* also require that an ILEC perform a billing intermediary function—again for reasonable compensation. The system of ubiquitous interconnection and the seamless telecommunications network may well be compromised without this "fail-safe" device. The Commission will move expeditiously on Docket No. P-100, Sub 151 should negotiations come to naught.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 22nd day of September, 2003.

NORTH CAROLINA UTILITIES COMMISSION

Gail L. Mount

Gail L. Mount, Deputy Clerk

pb091903.01

Commissioner Robert V. Owens, Jr. did not participate.

STATE OF CONNECTICUT

DEPARTMENT OF PUBLIC UTILITY CONTROL
TEN FRANKLIN SQUARE
NEW BRITAIN, CT 06051

DOCKET NO. 02-01-23 **PETITION OF COX CONNECTICUT TELCOM, L.L.C. FOR INVESTIGATION OF THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY'S TRANSIT SERVICE COST STUDY AND RATES**

January 15, 2003

By the following Commissioners:

Jack R Goldberg
John W. Betkoski, III
Donald W. Downes

DECISION

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DECISION

I. INTRODUCTION

A. SUMMARY

In this Decision, the Department of Public Utility Control (Department) determines that the Southern New England Telephone Company's (Company or Telco) transit traffic service offering is an interconnection service and subject to the Department's regulatory authority As such, the Telco must continue to offer transit traffic service to certified local exchange companies (CLEC) and reduce the markup for that service. The Telco is also required to develop a transit traffic service offering that mirrors those service offerings currently offered by its affiliates around the country.

B. BACKGROUND OF THE PROCEEDING

On January 18, 2002, the Telco filed its cost study in Docket No. 00-04-35, Application of MCI WorldCom Communications, Inc., MCIMetro Access Transmission Services, Inc., and Brooks Fiber Communications of Connecticut, Inc for Arbitration. Cox Connecticut Telcom, L.L.C. (Cox) petitioned the Department for party status in that docket;[1] however, the Department denied Cox's petition due to the fact that the docket was closed after the issuance of the November 21, 2001 Decision.[2] In the November 21, 2001 Decision in Docket No. 00-04-35, the Department required the Telco to submit a cost of service study to determine an appropriate transit service rate. The Department did not address Cox's alternative request for a separate proceeding to investigate the Telco's transit rates. By petition (Petition) dated January 30, 2002, Cox requested that the Department investigate the Company's transit rates.[3] Cox utilizes the Telco's transit service[4] to transport traffic to end-users and therefore, Cox is affected by the Company's CTTS rates.

In the Petition, Cox renewed its request that the Department initiate a generic proceeding so that all interested parties, including Cox, could participate in the review of the Telco's transit service rates. According to the Petition, transit service rates are an issue of universal interest for all carriers using the Telco's transit service. Cox also states that a proceeding specifically related to the Telco's transit service cost study and rates would provide an efficient process and avoid duplicative efforts by the Department in resolving multiple carriers' related complaints or independently determined rates in interconnection agreement arbitrations. Cox believes that a generic docket, wherein all carriers that are subject to the Telco's transit rates are given the opportunity to comment on the validity of the Company's cost study and transit rates, would best serve the interests of the Department, all carriers and, ultimately, Connecticut consumers. Petition, pp. 1-3.

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[1] See Cox's December 27, 2001 Motion for party status

[2] By letter dated January 22, 2002, Cox's Motion for party status in Docket No. 00-04-35 was denied.

[3] Transit Service allows certified local exchange carriers to utilize the Telco's network to exchange both local and intraLATA toll traffic with third-party carriers with which the CLECs have no direct interconnection Pellerin Testimony, p 3

[4] The Telco offers transit service under the name of Connecticut Transit Traffic Service (CTTS)

C. CONDUCT OF THE PROCEEDING

On March 22, 2002, the Telco filed a motion to dismiss the Petition (Telco Motion). According to the Telco Motion, the Company's CTTS was not within the jurisdiction of the Department either under the General Statutes of Connecticut (Conn. Gen. Stat.) §16-247b(b) or the Telecommunications Act of 1996 (Telcom Act), and that the Telco was entitled to set a market-based rate for CTTS which did not require Department approval. As such, the Telco recommended that the Petition be dismissed. Telco Motion, p. 1.

On April 1, 2002, Cox filed its response opposing the Telco Motion (Cox Response). Cox argued that the Department should deny the Telco Motion because it was untimely and without merit. Cox also argued that the Telco has been offering CTTS for approximately seven years and it remains necessary for facilities-based providers to interconnect with and to deliver traffic to other carriers in an efficient manner. Cox Response, p. 2.

As a result of the Telco Motion and Cox Response, the Department suspended this proceeding's procedural schedule and issued a Notice of Request for Written Comments (Notice),[5] seeking written comments or legal memoranda addressing the Petition and Motion.[6] Specifically, the Department sought comments addressing, but not limited to, the Telco's claims that CTTS: (1) is nonessential and unnecessary to the provision of telecommunications services, is not subject to the Department's authority under Conn. Gen. Stat. §16-247b(b) and is not required under the Telcom Act; (2) does not fall under the provisions of Conn. Gen. Stat. §16-247b(a) and Conn. Gen. Stat. §16-247b(a) does not authorize the Department to set the rates for transit traffic; and (3) does not fall under the purview of the Telcom Act's interconnection obligations.[7]

By Interim Decision dated July 3, 2002, the Department determined that it had jurisdiction over CTTS and that the Telco was obligated to provide CTTS to the CLECs. Accordingly, the Department denied the Telco Motion and resumed the procedural schedule in this proceeding.

On December 2, 2002, the Department issued its draft Decision in this proceeding. All parties and intervenors were afforded the opportunity to file written exceptions and present oral argument.

D. PARTIES

The Department recognized Cox Connecticut Telcom L.L.C, the Southern New England Telephone, 310 Orange Street, New Haven, Connecticut 06510; MCI

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[5] See the Department's April 3, 2002 Notice and the April 9, 2002 Amended Notice of Request for Written Comments.

[6] On April 19, 2002, Cox requested an extension until May 16, 2002, to respond to the Notice. By letter dated May 10, 2002, the Department granted Cox's request By that letter, the Department also granted the Telco's request that all parties be permitted to file reply comments on May 23, 2002

[7] In response to the Notice, the Department received written comments on May 16, 2002, from Cox, AT&T Communications of New England, Inc. (AT&T) and WorldCom, Inc. (WorldCom) The Department also received reply comments from the Telco dated May 23, 2002.

WorldCom, Inc., 1133 19th St., NW, Washington, DC 20036; and the Office of Consumer Counsel, Ten Franklin Square, New Britain, Connecticut 06051 as parties to this proceeding. PaeTec Communications, Inc., One PaeTec Plaza, 600 Willowbrook Office Park, Fairpoint, New York 14450; and AT&T Communications of New England, 111 Washington Avenue, Albany, New York requested and were granted party status.[8]

II. POSITIONS OF PARTIES

A. AT&T COMMUNICATIONS OF NEW ENGLAND

AT&T argues that because traffic transit service is an interconnection service that the Telco is required to provide, Section 252(d) of the Telcom Act dictates that it be priced at total element long run incremental cost (TELRIC). AT&T notes that the FCC recently addressed the issue of transit traffic service in an AT&T/WorldCom/Cox arbitration proceeding with Verizon Virginia.[9] Specifically, in the order in that proceeding, the FCC's Wireless Competition Bureau (WCB) required Verizon to charge TELRIC rates for transit service where the combined traffic between two carriers did not exceed 200,000 minutes of use for any three consecutive months. For traffic above that threshold, Verizon was required to continue to provide transit facilities at TELRIC rates, but could impose additional rates for billing and trunk ports. In addition, the FCC recognized that the functionality provided by Tandem Transit Service could be achieved via access to unbundled network elements (UNE) and that there should not be any restrictions imposed on a carrier's ability to obtain transit service functionality via UNE purchases.

While noting that the Telco's CTTS rate includes compensation for the Company to perform a "billing clearinghouse" function for the carriers that use transit traffic service, AT&T asserts that the Telco's current $0.035 rate includes a significant markup. AT&T also asserts that the Company's CTTS rate is not cost-based, and it is incumbent upon the Department to revise that rate so it complies with TELRIC and reflects only a reasonable markup.

Additionally, AT&T compared the Company's transit traffic service rates to that of its SBC Communications Company, Inc. (SBC) affiliates as an indication that the Telco's rates must be reduced. According to AT&T, the Telco's existing rate for CTTS is nearly four times higher than the next highest rate charged by an SBC-affiliated incumbent local exchange carrier (ILEC), and over four times higher than the average for the other 12 SBC states. In the opinion of AT&T, to allow the Telco's rate for transit traffic service to remain at its current inflated level will stifle competition in Connecticut because CLECs do not have any economically viable alternatives to purchasing the service from the Telco. AT&T Brief, pp. 3-5.

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[8] By letter dated September 11, 2002, PaeTec Communications, Inc. (PaeTec) requested that its status be changed to non-party status. On September 19, 2002, the Department granted PaeTec's request

[9] See, Petition of Worldcom, Inc., et al., Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, CC Docket No. 00-218, Memorandum Opinion and Order (July 17, 2002).

Lastly, AT&T argues that Connecticut CLECs lack the practical alternatives to the Company's CTTS. AT&T states that the time, resources, and expense that would be required to negotiate transit traffic arrangements with every other carrier in Connecticut militate against the approach suggested by the Telco, and highlight the fact that in many instances, the Telco's transit traffic service is the only economically viable alternative available to a CLEC in Connecticut. AT&T concludes that it is important to Connecticut CLECs that they have access to cost-based transit traffic service from the Telco. Therefore, AT&T requests that the Department require the Telco to provide transit traffic service at TELRIC-based rates. Id., p. 6.

B. COX CONNECTICUT TELCOM, L.L.C.

Cox maintains that the central issue of this proceeding is the removal of the exorbitant markup that the Telco has placed on its Connecticut CTTS. Cox also maintains that the Company's cost does not equal the price of its CTTS and that the Telco's profit margin for this service substantially deviates from the price of transit service across the nation. Cox claims that the Telco's CTTS price is almost four times higher than the highest transit rate charged by other SBC companies. Cox also states that while its witness has identified numerous errors in the Company's cost study, the correction of these errors serves only to increased the huge profit margin inherent in the Telco's CTTS rate. Cox Brief, pp. 1 and 2.

Cox calculated and provided under protective order the amount that the Company's CTTS rate was priced above its cost. Cox also proposed an adjustment to the Telco's CTTS cost study that resulted in a lower CTTS cost and a larger profit margin to the Company which it also provided under protective order. Cox notes that the Telco's CTTS rate is more than 10 times greater than the transit rate charged to interexchange carriers (IXC) under the Company's intrastate access tariff for the similar functionality provided via Meet Point Billing arrangements. In the opinion of Cox, the Telco's CTTS rate is neither just nor reasonable and recommends that the Department reduce that rate to one which more closely reflects the service's cost. Cox Brief, pp. 4 and 5; Cox Reply Brief, p. 1.

Cox also disagrees with the Telco's claim that the CTTS rate is market-based because no functioning market exists in Connecticut for a comparable service; therefore, no market exists to establish a rate. Cox notes that the Telco is the only carrier currently interconnected with every other carrier operating in its service territory. Consequently, there is no other carrier from whom Cox could obtain transit service to interconnect with other CLECs, ILECs and wireless carriers operating in the Company's service territory.

Cox further disagrees with the Telco suggestion that CLECs' past payment of the CTTS rate illustrates that a market exists. According to Cox, since it and other CLECs are CTTS consumers, the fact that Cox and other CLECs are still using CTTS does not support the existence of a market. Rather, it provides strong evidence that the CLECs have no available lower cost options. Cox states that if a real market did exist for CTTS, competition in that market would dictate that the Telco's rate be reduced to one that is much closer to its costs. Cox Brief, pp. 5-9; Cox Reply Brief, pp. 2 and 3, 7 and 8.

Additionally, Cox maintains that the Telco's bill clearinghouse function does not justify its high transit costs. In other SBC jurisdictions, the ILEC does not perform the middleman or clearinghouse function. In the opinion of Cox, this clearinghouse function provides little value to Cox and other carriers. Cox states that it and other carriers are being asked to pay for something that has little value to them, which is not the sign of a product whose features and price are driven by the market. Moreover, Cox argues that the Telco's CTTS rates are excessive and pose a significant barrier to entry (or survival) of local telephone competition in Connecticut. Accordingly, Cox recommends that the Telco, at a minimum, be required to offer a transit service without the bill clearinghouse function. Cox also recommends that the Department lower the Company's CTTS rate to be more in line with the Telco's costs and with the price charged for transit service in other SBC states. Cox Brief, pp. 9-14; Cox Reply Brief, 6 and 7.

Lastly, Cox suggests that adjustments to the Telco's cost study are warranted. Cox recommends that at a minimum, the Company should be required to lower its rate closer to the level shown in the Telco's cost study. Nevertheless, Cox maintains that additional adjustments should be made to the CTTS cost study. For example, Cox recommends that at a minimum, the Telco's transport termination and transport facilities costs should be adjusted. Id., pp. 11 and 12.

C. THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY

The Telco submits that CTTS is not a service that it is required to offer either under Conn. Gen. Stat. §16-247a et. seq. or the Telcom Act; and as such, it is entitled to set a market-based rate for the service. The Telco also contends that the Department's authority under state law is limited to ensuring that the Company does not unreasonably discriminate in the provision of the service and that the service fosters competition and protects the public interest.

For offerings such as CTTS, where there is no specific requirement to provide a service/facility either under state or federal law, the Telco suggests that the parties be left to negotiate the appropriate arrangements for the provision of the service taking into account their mutual business interests. The Telco claims that the vast majority of the CLEC community has no issue with the rate for this service, and that they have been and continue to utilize the service until their own business decisions justify either direct interconnection or alternative arrangements. In the opinion of the Telco, CTTS is appropriately priced based on what the service offers and the options available to CLECs. Therefore, the Telco requests that the Department endorse the rate for this service. Telco Brief, pp. 1 and 2.

The Telco also maintains that CTTS allows CLECs to utilize the Company's network to exchange both local and intraLATA toll traffic with third-party carriers with which the CLECs have no direct interconnection. According to the Company, CTTS is a value added service providing CLECs the option to complete its end users' originating traffic to end users of other local exchange carriers (LEC), CLECs and wireless carriers (i.e., non-Telco end users) via the Telco's network, without the necessity of separate interconnection arrangements with each of these third parties. The Company's end users are not part of these transited calls because these calls do not originate from nor

terminate to the Telco's network or end users. The Telco argues that absent CTTS, CLECs can interconnect directly with third-party carriers or use the facilities or networks of other) carriers to indirectly interconnect with third-party carriers.

Additionally, the Telco asserts that CTTS was developed in response to CLEC requests for provisioning options that would offer them service alternatives for the delivery of traffic to non-Telco end users. The Telco states that it agreed to negotiate and provide CTTS arrangements to CLECs pursuant to contracts at a market-based rate that it negotiated through interconnection agreements with numerous CLECs since it began offering the service.

The Telco asserts that CTTS is an optional service and that other carriers are able to provide the same service. The Telco also asserts that the manner in which it provides the service allows carriers to avail themselves of the Company's interconnections, without the administrative worry of having to deal with the third-party carrier. The Telco states that it purchases and establishes the facilities to terminate a CLEC-originated transit traffic call to a third-party carrier. The Telco is also responsible for payments to the third-party carrier to complete the call, either through local reciprocal compensation or terminating switched access. According to the Telco, CTTS allows carriers to send up to one DS-1 worth of traffic per month (24 trunks carrying approximately 240,000 minutes) over these trunks to these third-party carriers. The Telco claims that the current CTTS rate considers these factors. The rate was arbitrated and approved by the Department in the arbitration proceeding with MCI in 1996. The Telco also states that nothing has changed in the law that would render that decision invalid today. Telco Brief, pp. 2-4.

The Telco also disagrees with the Cox and AT&T assertion that the Company's CTTS rate is excessive because pursuant to the Telcom Act, the Company is obligated to provide transit service at a cost-based rate. In the opinion of the Telco, the Cox and AT&T legal arguments are misplaced because they are trying to impose an obligation on the Company that does not exist. According to the Telco, there is no requirement under the Telcom Act that the Company or any carrier provide indirect interconnection. The Telco claims that § 251(a)(1) of the Telcom Act obligates all telecommunications carriers to interconnect their networks. Carriers may satisfy this obligation through direct or indirect interconnection with the facilities and equipment of other telecommunications providers.

The Telco concludes that § 251(a)(1) of the Telcom Act constitutes a general obligation on all carriers to interconnect with the facilities of another telecommunications carrier. Section 251(a) of the Telcom Act also provides that that duty pertains to direct or indirect interconnection. The Company notes that in stark contrast to §251(c) of the Telcom Act, there are no specified parameters on what the interconnection would be used for, nor are there restrictions on how that specific carrier may charge for that interconnection. The Telco claims that this is significant because whereas the Company may provide carriers the ability to indirectly interconnect through use of the CTTS, the Telco is free to establish the terms and conditions and the price, associated with that indirect interconnection, just as any other telecommunications carrier.

Additionally, the Telco notes that equally significant is the fact that §251(c) of the Telcom Act does not address indirect interconnection. Rather, the duty under §251(c) of the Telcom Act is limited to a requesting telecommunications carrier's direct interconnection with the ILEC's network. Finally, Section 251(c) of the Telcom Act requires an ILEC to provide "for the facilities and equipment of any requesting telecommunications carrier, interconnection . . . for the transmission and routing of telephone exchange service and exchange access." 47 USC §251(c)(2)(A). The Telco argues that its CTTS is not a "telephone exchange service" as defined by §3(47) or "exchange access" as defined under §(3)(16).[10]

The Telco further claims that the FCC has similarly interpreted these statutory provisions. In its First Report and Order,[11] the FCC expounded on the ILECs' obligations under §251(c) of the Telcom Act. In the opinion of the Telco, the FCC envisioned that §251(c)(2) of the Telcom Act involved the interconnection of two networks, the incumbent's and the requesting carrier's, for the mutual exchange of traffic between their end users. The Company states that as interpreted by the FCC, §251(c) of the Telcom Act applies to traffic terminating on the ILEC's network and not traffic transiting the ILEC's network to terminate to another carrier. The Telco also states that there is no support for the Cox and AT&T assertions that the Telcom Act requires CTTS to be provisioned and clearly no support that the service be priced at cost.

Regarding the FCC's WCB ruling, the Telco asserts that the Cox and AT&T efforts to create a legal requirement that the Telco provide CTTS when the Telcom Act, the First Report and Order and the other cited cases recognize no such legal obligation. Therefore, the Telco concludes that CTTS is a discretionary service and it should be free to offer the service on terms and at a rate that the market will bear. Telco Brief, pp. 5-10.

Moreover, the Telco argues that the Department cannot regulate the Company's CTTS rate any differently than it would CLECs' rates for their telecommunications services. Citing the Connecticut Supreme Court July 23, 2002 decision in Southern New England Telephone Company v. Department of Public Utility Control (Supreme Court's EPS Decision), 261 Conn. 1, * (2002), the Company claims that the Connecticut Supreme Court (Court) construed Conn. Gen, Stat. §16-247b(b) as granting the Department authority to regulate the rates for necessary services. The Telco also

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[10] Telephone exchange service is defined as a: (A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service. 47 U.S.C §3(47) The term Exchange Access is defined as the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services 47 U.S C. §(16).

[11] First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996), modified on recon , 11 FCC Rcd 13042 (1996), vacated in part, Iowa Utils Bd. v FCC, 120 F 3d 753 (8th Cir 1997), aff'd in part, rev'd in part sub nom., AT&T Corp. v. Iowa Utils. Bd , 525 U S 366 (1999), decision on remand, Iowa Utils. Bd. v. FCC, 219 F.3d 744 (8th Cir. 2000), aff'd in part, rev'd in part sub nom , Verizon Communications Inc v. FCC, 122 S Ct. 1646 (2002) (First Report and Order).

states that the Supreme Court however, found that the Department had authority to review the rates for Enhanced Provisioning Services (EPS) under Conn. Gen. Stat. §16-247b(a) and §16-247f.

While the Supreme Court found that §16-247b(a) empowers the Department to ensure that the Company does not unreasonably discriminate in the provision of its services, the Telco notes that the Supreme Court held that the authority granted under Conn. Gen. Stat. §16-247b(a) did not empower the Department to prescribe the markup on these services. In addition, the Telco claims that the Supreme Court found that Conn. Gen. Stat. §16-247f(a) grants the Department the authority to regulate the provision of telecommunications in a manner to foster competition and protect competition and protect the public interest. The Company contends that while the Supreme Court's opinion discusses the Telco's rates for EPS, the analysis is significant in determining the extent of the Department's authority over services that the Telco offers that do not fall under the restrictions of Conn. Gen. Stat. §16-147b(b). Namely, if the service is necessary as defined by Conn. Gen. Stat. §16-247b(b), the Department may still ensure the Telco does not discriminate in the provision of the service, and in doing so, order the Telco to provide cost information so that the costs of the service could be judged by neutral criteria. According to the Court, pursuant to Conn. Gen. Stat. §16-247f, the Department may prescribe the markup for the service. However, any inherent public interest authority the Department has under Conn. Gen. Stat. §16-247f to set the markup for telecommunications services that do not fall under Conn. Gen. Stat. §16-247b(b) as essential, would apply equally to all carriers. The Telco concludes that in essence, the service would be treated as "competitive" and the rates for such services would be allowed unless they did not foster competition or were found to be contrary to the public interest.

In support of its position that the Department cannot regulate the Company's CTTS rate, the Telco submits that it does not fall under the parameters of Conn. Gen. Stat. §16-247b(b). Citing to the Supreme Court's EPS Decision, the Telco claims that the Supreme Court has construed Conn. Gen. Stat. §16-247b(b) as applying to "necessary" services. The Company notes that pursuant to §251(a)(1) of the Telcom Act, Cox or another other carrier has the obligation to interconnect directly or indirectly with any other carrier when requested. Cox can complete these calls by directly interconnecting with the originating or terminating carriers or by using a carrier other than the Telco to transit the traffic. Accordingly, the Telco concludes that while CTTS is a substitute for a CLEC's provision of direct connections to other carriers, it is not necessary for a CLEC's provision of telecommunications services.

After concluding that Conn. Gen. Stat. §16-247b(b) is inapplicable, the Telco states that the next step under the Supreme Court's analysis is to ensure that, if the Company offers an optional service like CTTS, that the rate for the service does not unreasonably discriminate amongst carriers purchasing the service. The Company states that since Conn. Gen. Stat. §16-247b(b) does not apply, the discriminatory test would be conducted under Conn. Gen. Stat. §16-247b(a). According to the Company, the Supreme Court held that under Conn. Gen. Stat. §16-247b(a), the Department may prescribe a cost methodology to determine if there is an unreasonable variation in rates charged competing carriers. However, consistent with the Supreme Court's ruling, the

Department cannot use this statutory authority to prescribe what markup would apply to CTTS.

The Telco also notes that, unlike in the EPS proceeding, no carrier has alleged any claim of rate discrimination. The Telco maintains that it has and continues to offer its CTTS under the same terms and conditions to any requesting CLEC. Regarding the CTTS cost study, the Telco maintains that cost study was conducted in accordance with the Department's total service long run incremental cost (TSLRIC) study requirements and details the Company's cost per minute in providing carriers CTTS. The cost study reflects a projection of the forward-looking costs the Telco expects to incur in providing the service based on CLECs' traffic mix (local, toll and wireless) and the compensation (reciprocal compensation and access) and interconnection rates in effect at the time the study was conducted. In the opinion of the Telco, it provided the requisite cost information for the Department to conduct a neutral analysis. Since the Telco offers its CTTS to all CLECs under essentially the same terms, conditions and rates, there can be no unreasonable discrimination.

Lastly, the Telco disagrees with the claim that CTTS is excessively priced because of the fact that carriers are using CTTS even though they have the volumes of traffic that would justify their direct interconnection with other carriers. The Telco states that it offers CTTS via its interconnection agreements to 56 carriers. The Telco also argues that CTTS, at its current rate, is the most economic and efficient method to provide service. In the opinion of the Telco, Cox's claim of excess are equally flawed because in its previous interconnection agreement, Cox had terms for CTTS that provided a lower rate for CTTS based upon the volume of traffic and the percentage of that traffic being local. In particular, the Telco cites to the month of January 2002, wherein Cox paid the Telco on average $0.016 per minute. In April 2002, Cox opted-in to TCG Connecticut's 1997 interconnection agreement that provided for renegotiation of the rate on request. The Telco states that no carrier with such contract provisions elected to exercise those conditions.

The Telco also states that probably most fatal to the Cox and AT&T argument that the rate for CTTS is excessive is the fact that, despite the significant volumes of traffic carriers are sending via the service, they have continued to use CTTS rather than seeking to directly interconnect with terminating carriers. The Company questions that if the Telco's CTTS were priced at an excessive rate, why the carriers would not have invested in direct interconnection with other carriers years ago, especially considering the volumes of traffic transiting the Telco's network. Telco Brief, pp. 17-22.

III. DEPARTMENT ANALYSIS

A. INTRODUCTION

Connecticut Transit Traffic Service (CTTS) is an interconnection product that enables traffic originating and/or terminating from a CLEC's end user and passed through the Telco's tandem switch where that traffic neither originates nor terminates from/to a Telco end user. Rather, CTTS is used for transmitting telephone exchange service to other carriers. Pellerin Testimony, p. 3; Lafferty Testimony, p. 4. Pursuant to

§§251 and 252 of the Act, the Department has an obligation to ensure that all ILEC interconnection and network element services are just and reasonable.

CTTS first became an issue during the MCI WorldCom Communications, Inc. (WorldCom)/Southern New England Telephone Company interconnection negotiations which led to WorldCom's request for arbitration before the Department and subsequently, Docket No. 00-04-35. In that docket, the Department agreed to examine more closely the Telco's offering of its transit service by requiring a cost study of the product and agreed to take up the complaints of WorldCom in a new proceeding. The Department's assertion of jurisdiction in Docket No. 00-04-35 was the impetus for this proceeding. Moreover, the Department deemed the Telco's compliance with the Department's order with the November 21, 2001 Decision in Docket No. 00-04-35 as an indication of its assertion of jurisdiction in the matter.

B. STATUTORY AUTHORITY

The Department is asserting authority over the Telco's CTTS based on Conn. Gen. Stat. §§ 16-247b(b) in conjunction with 16-247f(a) and 16-247a. Such exercise of authority is consistent with the federal provisions of §§ 251 and 252 of the Act. Furthermore, the jurisdictional authority of this Department over a regulated and certificated public service company such as the Telco is clear. The Telco is a public service company as defined by Conn. Gen. Stat. § 16-1(4) and a telephone company as defined by Conn. Gen. Stat. § 16-1(23). The Connecticut legislature also granted the Department broad statutory authority pursuant to Conn. Gen. Stat. § 16-247f(a) to "regulate the provisions of telecommunications services in the state in a manner designed to foster competition and protect the public interest." In addition, Conn. Gen. Stat. § 16-247a expressly enumerates the goals of the State with respect to telecommunications services and the Department's authority to help meet and serve the public interest considerations that accompany a robust, affordable and efficient deployment of telecommunications services in Connecticut. Based on the above-mentioned state and federal statutes and the Supreme Court's EPS Decision, the Department concludes it has authority to adjudicate Cox's claims.

In the instant docket, Cox argues that the Department is authorized by state and federal law to set transit traffic arrangement rates and that the rate set by the Telco is excessive and cannot be justified by the Company's cost of providing these arrangements. Similarly, AT&T argues that it is within the Department's jurisdiction to investigate the Telco's rate, that the rate is not cost-based and includes a significant markup and that the Company is legally obligated to provide transit traffic service to CLECs at just and reasonable rates. However, in its Written Exceptions to the Draft Decision, the Telco continues to argue that CTTS is not necessary for CLECs to provide service in the state.[12] Telco Written Exceptions, p. 6. The question before the Department now is whether it has the authority to set the mark-up for CTTS, it is not a subject matter jurisdiction issue; rather, it is a question of authority to act pursuant to the

[12] The Telco further argues that Conn. Gen. Stat. §16-247b(b) only deals with "necessary" elements, functions or services and where the statute does address rates for "interconnection and unbundled network elements and any combination thereof," it requires that they be consistent with the provisions of 47 USC 252(d) Telco Written Exceptions, p. 9

relevant statutes.[13] The July 3, 2002 Interim Decision determined both issues conclusively. No appeal ensued.[14] The Department will not revisit that Decision.

The Department concluded in the Interim Decision that Conn. Gen. Stat. § 16-247b(b) provides the authority to regulate the rates and charges for telephone company services. A plain reading of that statute does not place any restriction on the rates for interconnection services, including the Telco's CTTS. Conn. Gen. Stat. § 16-247b(b) states in pertinent part:

> Each telephone company shall provide reasonable nondiscriminatory access and pricing to all telecommunications services, functions and unbundled network elements and any combination thereof necessary to provide telecommunications services to customers. The department shall determine the rates that a telephone company charges for telecommunications services, functions and unbundled network elements and any combination thereof, that are necessary for the provision of telecommunications services. The rates for interconnection and unbundled network elements and any combination thereof shall be based on their respective forward looking long-run incremental costs, and shall be consistent with the provisions of 47 USC 252(d).

Accordingly, the Department has authority over rates and charges for interconnection services including the Telco's CTTS without first having to demonstrate the necessity of such service.[15] The Department believes that the Legislature

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[13] See, Supreme Court's EPS Decision, 261 Conn. 1, * (2002) at p. 3. Fn 2, wherein Justice Katz addressed the distinction of subject matter jurisdictional issues raised on grounds of a court to hear a particular matter versus the authority to act pursuant to a particular statute.

[14] The July 3, 2002 Interim Decision to which the Department refers was never challenged in any court of competent jurisdiction. On July 8, 2002, the Department received a petition from the Company requesting that the Department reconsider its July 3, 2002 Interim Decision (Petition). The Department did not act on the Petition, resulting in the finality of the issue as set forth in the Interim Decision for purposes of appeal.

[15] Without conceding that such a finding is required and only in response to the Telco's claim as raised in its Written Exceptions that the evidence on the record does not support a finding of necessity, the Department notes that there is sufficient evidence on the record to render such a finding In this proceeding, the participating CLECs have demonstrated a need for CTTS so that they may compete effectively in the market . The Telco would have the Department believe that the sparse participation of certificated CLECs in this docket indicates how insignificant the Telco's CTTS service is in its ability to provide service or to compete effectively. However, the Department considers that reasoning flawed and will not indulge in such speculation The lack of a market for CTTS and the Department's legislative mandate to foster competition justifies Department oversight of CTTS. See also, Conn Gen. Stat 16-247(f)a Lastly, regarding the Telco's contention as explained in its Written Exceptions that the Department has in some manner wrongly passed the Burden of Proof onto the Company in this proceeding, the Department offers the following, Conn. Gen. Stat. § 16-22 expressly states in relevant part "At any hearing involving a rate of a public service company, the burden of proving that said rate under consideration is just and reasonable or . is in the public interest shall be on the public service company." As such, the Department disagrees with the Company that it acted contrary to the principles of administrative law or to any prior Department Decisions. Telco Written Exceptions

recognized the "necessary" nature of interconnection services and their value to an integrated telecommunications network (i.e., the public switched telecommunications network) when drafting Conn. Gen. Stat. §16-247b(b). To interpret the exception otherwise would be of little value to individual telecommunications service providers since end users would only be able to communicate with other subscribers to their respective service providers or require the maintaining of multiple service accounts with other service providers to reach those subscribers of those providers. Clearly, interconnection was a necessary function in the Legislature's eyes in order to provide for an efficient mutual exchange of telecommunication traffic.

The Department also believes the Telco has misinterpreted Conn. Gen. Stat. § 16-247b(b) and the reference that the rates for interconnection services be consistent with the provisions of 47 USC §252(d). Specifically, the Telco's contention that 47 USC §252(d) limits the application of interconnection services that fall under the purview of 47 USC §251(c)(2) does not discuss interconnection services (i.e., transit traffic services) for the purpose of transporting calls across the local exchange carrier's network for the purpose of indirect interconnection.

However, § 251(a) of the Act provides that each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. Moreover, the Department believes that § 251(c)(2) of the Act provides for the physical linking of telecommunications networks for the mutual exchange of traffic. Specifically, this statute is explicit in that it provides for the interconnection of telecommunications carriers' network facilities (e.g., ILECs, CLECs etc.) for purposes of exchanging traffic. The Department also notes that the FCC has provided for tandem transiting arrangements based on its discussion in its First Report and Order in CC Docket 96-98.[16] In particular, the FCC's determination that indirect connection satisfies a telecommunications carrier's duty to interconnect pursuant to §251(a) of the Act.[17]

Lastly, the Department believes its conclusion is correct based on the Supreme Court EPS Decision's treatment of the above mentioned federal provisions and J. Katz's analysis that:

> There is no express limitation in § 251, however, on an incumbent carrier's duty to provide reasonable and nondiscriminatory rates. Even if we assume that § 251 cannot be construed to *authorize* the department to ensure reasonable and nondiscriminatory rates for network elements that are not necessary, there clearly is no language that *prohibits* any action with respect to those elements Indeed, under the plaintiff's view, § 251 (c)

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p. 15, Fn. 17 The Department notes that the majority of Department Decisions the Company cites regarding Department precedent on the issue of Burden of Proof are primarily billing disputes in which the customer carries that burden and are distinct from issues on rates such as the case at hand

[16] CC Docket No. 96-98, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, and CC Docket No 95-185, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers, First Report and Order (FRO), Released August 8, 1996

[17] Cox Comments p. 9, citing the FRO, ¶ 997

> simply does not apply to services that are not necessary. Accordingly, we find nothing in the express language of the 1996 federal act that would preclude the department from regulating under state law in the present case to protect the public's interest in affordable, high quality telecommunications service.[18]

C. CTTS RATES

The issue now before the Department is the alleged excessiveness of the CTTS rates. Pursuant to the November 21, 2001 Decision in Docket No. 00-04-35, the Telco filed its CTTS cost study with the Department. Docket No. 00-04-35 Compliance Filing, January 18, 2002; Pellerin PFT, p. 4. That cost study was prepared in accordance with Department directives regarding TSLRIC principles. Id. Because the Telco viewed CTTS as neither necessary nor essential, it priced the service based on what the market would bear. Id., p. 6. Cox argues that the Telco's CTTS rates are unreasonable and not market-based. Cox Brief, pp. 4 and 5. Cox also reviewed the Telco's CTTS cost study and determined that the Company's transit traffic rates are significantly higher than those charged by its SBC affiliates. Lafferty PFT, pp. 15 and 16. Cox also proposed various adjustments to the Telco's CTTS cost study. Lafferty PFT, pp.18-24; Late Filed Exhibit No. 5, Exhibit FWL-3R (Rev).

The Department has reviewed the CTTS cost study and finds that it is a long run cost analysis, auditable, and contains the data and documentation necessary so that interested parties may replicate the study. The Department also finds that the CTTS cost study comports with the Department's June 29, 2001 Decision in Docket No. 00-01-02, Application of the Southern New England Telephone Company for Approval of Cost Studies for Unbundled Network Elements. Telco Response to Interrogatory TE-1. While Cox has proffered adjustments to the Telco's cost study, the Department notes that Cox's proposed adjustments suggest that more than transit traffic service expenses have been included in the study. Based on its review of the cost study and the record, the Department finds that only those facilities and expenses associated with CTTS have been included in the study. Tr. 10/02/02, pp. 318-321. Additionally, the Department is not persuaded by Cox's claim that transport and termination facilities' costs are overstated and an adjustment is required to remove that portion which would be associated with non-transit traffic. Brief, p. 12; Tr. 9/17/02, p. 126. In the opinion of the Department, the Telco's cost study has identified all costs with respect to CTTS and all costs directly incremental to the service or caused by the service. Tr. 9/17/02, p. 31. Therefore, the Department rejects Cox's proposed adjustments and hereby accepts the Telco's CTTS cost study as filed.

In addition to proposing certain adjustments to the Telco's CTTS cost study, Cox expressed concerns over the CTTS market-based rate and the bill clearinghouse function provided by the Company. Cox asserts that the CTTS bill clearinghouse function does not justify its high transit costs and that the CTTS rate exceeds other SBC affiliates' rates for transit service. Cox Brief, pp. 4-14. The Department agrees with Cox

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[18] 261 Conn 1 at p 36

on this issue. While the Department has accepted the Company's CTTS cost of service study, it is the magnitude of the service's markup that is truly at issue.

The Department also believes that although 56 carriers[19] that have agreed to the Telco's terms and conditions to purchase CTTS in their respective interconnection agreements, they may have done so in order to have access to the transit traffic portion of CTTS. The Department is not persuaded by the Company's suggestion that because only four carriers have objected to CTTS, the remaining carriers' silence indicates that the CTTS service offering and associated rates are acceptable. In this proceeding two carriers have actively participated seeking alternative rates or a service offering to the Telco's current CTTS. Although the Telco has argued that there are alternatives to CTTS that are available to the carriers, the Department does not believe that the record supports a finding that there are a large number of alternatives or that the existing carriers possess sufficient market share to warrant the existing CTTS markup. Pellerin Testimony, pp. 5 and 6. Rather, the record supports a finding that while there may be a large number of providers offering transit-like services, only the Telco through its extensive network deployed throughout the state as well as the large number of interconnection agreements can offer to the carriers, such as Cox and AT&T the economies and efficiencies that they require to offer competitive services. Lafferty Testimony, pp. 5 and 6.

Cox also argues and demonstrates that the Telco's CTTS rate, including markup is excessive. See for example Lafferty Proprietary Testimony, p. 16; Late Filed Exhibit 1-R Revised, Attachment A, p. 1. The Department notes that §252(d)(1)(B) of the Act requires interconnection service rates to include a "reasonable profit." In fact, in a recent ruling, the US Supreme Court reaffirmed the FCC's definition of profit to mean "the total revenue required to cover all of the costs of a firm including its opportunity costs."[20] The Supreme Court also noted that:

> a "reasonable profit" may refer to a "normal" return based on "the cost of obtaining debt and equity financing" prevailing in the industry. First Report and Order ¶700. This latter sense of "cost" (and accordingly "reasonable profit") is fully incorporated in the FCC's provisions as to "risk-adjusted cost of capital," namely, that "States may adjust the cost of capital if a party demonstrates . . . that either a higher or a lower level of cost of capital is warranted, without . . . conducting a 'rate-of-return or other rate based proceeding" *Id.*, ¶702.[21]

In the opinion of the Department, for all intents and purposes, the Telco is the only market force by which its CTTS rates have been based. The Department also believes the Telco's claim that its CTTS rates are market-based are disingenuous at best. Pellerin Testimony, pp. 2 and 9. Accordingly, the Department concludes that the CTTS markup and rates are excessive and are contrary to the Act, existing FCC provisions, Verizon, state statutes, and the public interest and should be reduced.

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[19] Telco Interrogatory Response to TE-2, Attachment A

[20] Verizon Communications Inc. v. FCC, LL S Ct 1646 (2002) (Verizon), p 19

[21] Id

As noted above, the US Supreme Court reaffirmed that the Act provides the states the authority, in those cases when incumbent and requesting carriers fail to agree, to set just and reasonable rates for interconnection or the lease of network elements based on the cost of providing those functions plus a reasonable profit or markup.[22] Conn. Gen. Stat. §16-247b(b) also requires that interconnection rates be consistent with the provisions of §252(d) of the Act which requires that those rates be reasonable. Moreover, Conn. Gen Stat. §§16-247f(a) and 16-247a afford the Department the authority (261 Conn.1, at pp. 15 and 16), to set the limits on the maximum markup an incumbent carrier may charge for services the Department has previously determined to possess excessive rates that have been found to be contrary to the public interest. Based on the record, the Department hereby exercises that authority and will require the Telco to reduce the CTTS markup to 35% pending the filing and approval by the Department of a transit traffic service offering that more closely resembles those which are offered by SBC in other states. The Department will require a 35% markup in view of the number of alternative providers and competitive services currently available to the carriers.

Regarding the alternative service offering, the Department will require the Telco to develop a transit traffic service offering that mirrors those service offerings currently offered by its SBC affiliates, (i.e., one that does not include the bill clearing house function). Telco Response to Interrogatory TE-8. The Department does not believe that the new transit traffic service should replace CTTS, but rather once it is approved, would complement that service offering. In developing a new transit traffic service offering, the Department expects the Company to price that service according to acceptable TSLRIC principles and federal and state pricing guidelines including a reasonable markup. The Department recognizes the Company's concerns regarding billing validation (Tr. 9/17/02, p. 93) and would expect the Telco to identify and assign a reasonable expense within its cost study for that function. Finally, because the new transit traffic service will be a competitive service offering to the Telco's CTTS, the Department believes that this new product could impose the pricing pressures on CTTS that the Company claims currently exists.

Finally, the Department disagrees with the Telco's suggestion that in light of the Supreme Court's EPS Decision, Conn. Gen. Stat. §16-247f allows the Company to price CTTS to the same extent as a CLEC's rates for a competitive service. Although it is true that Conn. Gen. Stat. §16-247f applies to all telecommunications services, that statute also prescribes the level of regulatory treatment for telecommunications services. See for example Conn. Gen. Stat. §16-247f(b) that classified various telecommunications services as competitive, or Conn. Gen. Stat. §16-247f(e) which prescribes how competitive and emerging competitive tariffs would be implemented. Most important however for purposes of this Decision is that Conn. Gen. Stat. §16-247f(d) prescribes the "market" factors that the Department must consider when reclassifying a telecommunications service from noncompetitive to emerging competitive or competitive. Although the Telco argues that there are alternative providers to transit traffic service and that the market regulates the markup on the service (Telco Brief, p. 16), the record does not support a finding that there are a

[22] Id., pp. 20 and 21

sufficient number of carriers to make transit service economical to the CLECs or that the existing providers possess a sufficient market share which would permit a reclassification of a noncompetitive service to emerging competitive or competitive pursuant to Conn. Gen. Stat. §16-247f(d). Clearly, were the Department to allow the Telco to price CTTS as a competitive service, such a move would not foster competition nor protect the public interest as required by Conn. Gen. Stat. §16-247f(a). The Department notes that the Supreme Court's EPS Decision is silent on the service reclassification provisions of Conn. Gen. Stat. §16-247f(d).

The Department questions the Telco's argument that CTTS should be treated as "competitive" when the Supreme Court has repeatedly reaffirmed the Department's regulatory role throughout its opinion yet, making no reference to requiring a relaxation of the level of regulatory treatment by the Department of incumbent (Telco) telecommunications services such as CTTS. Had the Telco been correct in its suggestion, the Supreme Court would have been just as explicit as it was in reaffirming the Department's regulatory responsibilities and that Conn. Gen. Stat. §16-247f(d) would no longer apply except in those cases when there is a claim of discriminatory rate treatment on behalf of the Company. In the opinion of the Department, the Telco's argument is unfounded and contrary to statutory construction because if accepted, it would supersede the provisions required by the Legislature to reclassify telecommunications services from noncompetitive to emerging competitive or competitive. Therefore, before CTTS and any other noncompetitive or emerging competitive service may be treated as a competitive service, the reclassification provisions prescribed in Conn. Gen. Stat. §16-247f(d) must be satisfied by the provider (in this case, the Telco). Accordingly, the Telco's suggestion that CTTS be afforded the same treatment as CLEC services and priced as a competitive service is hereby rejected.

IV. FINDINGS OF FACT

1. The Telco is a public service company as defined by Conn. Gen. Stat. §16-1(4) and a telephone company as defined by Conn. Gen. Stat. §16-1(23).

2. The FCC has provided for tandem transiting arrangements in that indirect connections satisfy a telecommunications carrier's duty to interconnect pursuant to §251(a) of the Telcom Act.

3. The Telco did not provide the evidence required by Conn. Gen. Stat. §16-247f(d) which demonstrates that CTTS is a competitive service.

4. The CTTS cost study is a long run cost analysis, auditable, and contains the data and documentation necessary so that interested parties may replicate the study.

5. The CTTS cost study comports with the Department's June 29, 2001 Decision in Docket No. 00-01-02.

6. Only those facilities and expenses associated with CTTS have been included in its cost of service study.

7. The Telco's cost study identifies all costs with respect to CTTS and all costs directly incremental to the service or caused by the service.

8. Only the Telco through its extensive network deployed throughout the state as well as the large number of interconnection agreements can proffer carriers, such as Cox and AT&T the economies and efficiencies they require to offer competitive services.

9. The CTTS markup and rates are excessive and are contrary to the public interest and should be reduced.

10. SBC's transit traffic service offering in other states does not include a bill clearing house function.

11. Conn. Gen. Stat. §16-247b(b) provides the Department with authority to regulate the rates and charges for telephone company services, functions and UNEs that are necessary for the provision of telecommunications services.

12. Conn. Gen. Stat. §16-247f(a) together with Conn. Gen. Stat. §16-247a provides the Department with the authority to investigate telephone company and other telecommunications company service rates and charges to guard against excessive rates that are contrary to the public interest.

13. 47 USC §252(d)(A) and (B) require interconnection and network element charges to be based on the cost of providing interconnection and may include a reasonable profit.

14. Section 251a of the Telcom Act imposes on each telecommunications carrier the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers.

15. Section 251(c)(2) of the Telcom Act provides for the physical linking of telecommunications networks for the mutual exchange of traffic.

16. Pursuant to Conn. Gen. Stat. §16-247b(a), the Department may prescribe a cost methodology to determine if there is an unreasonable variation in rates charged competing carriers, but cannot use this statute to prescribe a markup.

17. Cost of service responsibilities and service tariffing procedures are the best tools that the Department has before it to analyze the Company's filings to ensure that those requirements are met.

18. Conn. Gen. Stat. §16-247f prescribes the level of regulatory treatment for telecommunications services.

19. Conn. Gen. Stat. §16-247f(d) prescribes the "market" factors that the Department must consider when reclassifying a telecommunications service from noncompetitive to emerging competitive or competitive.

20. The Supreme Court's EPS Decision is silent on the service reclassification provisions of Conn. Gen. Stat. §16-247f(d).

21. Before CTTS and any other noncompetitive or emerging competitive service may be treated as a competitive service, the reclassification provisions prescribed in Conn. Gen. Stat. §16-247f(d) must be satisfied by the provider (in this case, the Telco).

22. Conn. Gen. Stat. §§16-247f(a) and 16-247a afford the Department the authority to set the limits on the maximum markup an incumbent carrier may charge for services.

V. CONCLUSION AND ORDERS

A. CONCLUSION

The Department reaffirms its July 3, 2002 Interim Decision that it has subject matter jurisdiction over the petitioner's claims and statutory authority to regulate CTTS and its rates. Due to the Telco's vast network and the number of interconnection agreements with other carriers as well as the limited number of alternatives available to the CLECs, no real competitive market for CTTS exists and that the service's markup is excessive and the corresponding rate, overpriced. The Supreme Court's EPS Decision has not made obsolete the service reclassification provisions outlined in Conn. Gen. Stat. §16-247f(d). Therefore, before CTTS treated as a CLEC service, the Telco must satisfy the reclassification provisions outlined in Conn. Gen. Stat. §16-247f(d). Accordingly, the Department will require the Telco to reduce the markup for CTTS. The Department will also require the Company to develop a transit traffic service offering that is similar to that currently provided by its SBC affiliates. The Department views this new service as an alternative offering to CTTS that is intended to place pricing pressure on the Company so that its CTTS can be priced based on real market forces.

B. ORDERS

For the following Orders, please submit an original and 10 copies of the requested material, identified by Docket Number, Title and Order Number to the Executive Secretary.

1. Effective the date of this Decision, the Telco shall reduce its CTTS rates to reflect a 35% markup and submit proof to the Department that it has complied with this Order.

2. No later than March 3, 2003, the Telco shall file a new transit traffic service offering that is consistent with that offered by its SBC affiliates. The new service offering shall be priced according ~~to acceptable principles and federal and state~~ pricing guidelines and include a reasonable markup.

DOCKET NO. 02-01-23 PETITION OF COX CONNECTICUT TELCOM, L.L.C. FOR INVESTIGATION OF THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY'S TRANSIT SERVICE COST STUDY AND RATES

This Decision is adopted by the following Commissioners:

Jack R. Goldberg

John W. Betkoski, III

Donald W. Downes

CERTIFICATE OF SERVICE

The foregoing is a true and correct copy of the Decision issued by the Department of Public Utility Control, State of Connecticut, and was forwarded by Certified Mail to all parties of record in this proceeding on the date indicated.

01/16/2003

Louise E. Rickard
Acting Executive Secretary
Department of Public Utility Control

Date