

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**

**NASHVILLE, TENNESSEE**

**June 30, 2008**

**IN RE:**

**PETITION OF THE TENNESSEE RURAL  
INDEPENDENT COALITION FOR SUSPENSION AND  
MODIFICATION PURSUANT TO 47 U.S.C 251(f)(2)**

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**DOCKET NO.  
06-00228**

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**ORDER GRANTING SUSPENSION OF REQUIREMENT TO UTILIZE TELRIC  
METHODOLOGY IN SETTING TRANSPORT AND TERMINATION RATES**

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This matter came before Director Pat Miller, Director Sara Kyle and Director Ron Jones of the Tennessee Regulatory Authority (the “Authority” or “TRA”), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on July 9, 2007 for consideration of the *Petition* of the Tennessee Rural Independent Coalition<sup>1</sup> (collectively, the “Coalition” and individually, “Petitioner”), a coalition of rural and small local exchange carriers (“LECs”) and cooperatives, filed on June 23, 2006 pursuant to 47 U.S.C § 251(f)(2). The *Petition* requests suspension or modification of certain aspects of the requirements of 47 U.S.C §251(b) of the Communications Act of 1934, as amended the Telecommunications Act of 1996 (the “Act”), to the extent that those requirements have been interpreted as requiring members of the Coalition to establish charges for transport and termination of telecommunications traffic on the basis of a Total Element Long Range Incremental Cost (“TELRIC”) methodology.

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<sup>1</sup> The Tennessee Rural Coalition includes the following rural local exchange carrier members: Ardmore Telephone Company, Ben Lomand Rural Telephone Cooperative, Inc., Bledsoe Telephone Cooperative, Century Telephone Enterprises, Inc. Companies consisting of CenturyTel of Adamsville, Inc., CenturyTel of Claiborne, Inc. and CenturyTel of Ooltewa-Collegedale, Dekalb Telephone Cooperative, Highland Telephone Cooperative, Loretto Telephone Company, Inc., Millington Telephone Company, North Central Telephone Cooperative, TDS Telecom Companies consisting of Concord Telephone Exchange, Inc., Humphreys County Telephone Company, and Tennessee Telephone Company, Inc., Twin Lakes Telephone Cooperative, United Telephone Company, and Yorkville Telephone Cooperative.

## **PROCEDURAL HISTORY**

On January 12, 2006, the arbitration panel in Docket No. 03-00585 issued an *Order of Arbitration Award* (“*Arbitration Order*”).<sup>2</sup> In that docket, the panel arbitrated several issues concerning the interconnection agreement between the Coalition and several Commercial Mobile Radio Service providers (collectively “CMRS Providers”),<sup>3</sup> including the appropriate pricing methodology for establishing a reciprocal compensation rate for the exchange of indirect or direct traffic.

In the *Arbitration Order*, the Arbitrators determined that the compensation rate should be based on forward-looking economic costs and that the TELRIC pricing methodology as set forth in 47 C.F.R. § 51.705 would be utilized. The Arbitrators further instituted as the interim reciprocal compensation rate, the rate set for BellSouth Telecommunications, Inc. (“BellSouth”) in TRA Docket No. 97-01262,<sup>4</sup> subject to true-up. The Arbitrators determined that by adopting the rate set for BellSouth and subjecting it to true-up, the risk of either the Coalition or the CMRS Providers being unduly enriched or left inadequately compensated once the final rate is established would be mitigated.<sup>5</sup>

On June 23, 2006, subsequent to the issuance of the *Arbitration Order*, the Coalition filed

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<sup>2</sup> See *In re: Petition for Arbitration of Cellco Partnership d/b/a Verizon Wireless, Petition for Arbitration of BellSouth Mobility, LLC; BellSouth Personal Communications, LLC; Chattanooga MSA Limited Partnership; Collectively d/b/a Cingular Wireless, Petition for Arbitration of AT&T Wireless PCS, LLC d/b/a AT&T Wireless, Petition for Arbitration of T-Mobile USA, Inc., Petition for Arbitration of Sprint Spectrum L.P. d/b/a Sprint PCS*, Docket No. 03-00585 (“*Arbitration Docket*”), *Order of Arbitration Award* (June 12, 2006) (“*Arbitration Order*”).

<sup>3</sup> The CMRS Providers includes Cellco Partnership d/b/a Verizon Wireless, New Cingular Wireless PCS, LLC d/b/a Cingular Wireless (following the December 29, 2006 merger of AT&T, Inc. and BellSouth Corporation, Cingular Wireless became a wholly-owned indirect subsidiary of AT&T, Inc.), Sprint Spectrum L.P. d/b/a Sprint PCS, and T-Mobile USA, Inc.

<sup>4</sup> See *In re: Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case to Establish “Permanent Prices” for Interconnection and Unbundled Network Elements*, Docket No. 97-01262 (June 23, 1997).

<sup>5</sup> *Id.* at pp. 40-41.

its *Petition* for suspension and modification pursuant to 47 U.S.C. § 251(f)(2)<sup>6</sup> in Docket No. 03-00585. The Coalition specifically requested modification of “certain aspects of the requirements of 47 U.S.C. § 251(b)(5)<sup>7</sup> of the Act,” and suspension “to the extent that those requirements may be interpreted as requiring them to establish charges for transport and termination of any traffic on the basis of a TELRIC methodology.”<sup>8</sup> In its *Petition*, the Coalition contends that each of its members is a rural company pursuant to the definition set forth in 47 U.S.C. §153(37), that each of its member companies provides service to fewer than two percent (2%) of the nation’s access lines and that each member is qualified to seek suspension and modification of the interconnection requirements set forth in Section 251(b) and (c) of the Act.<sup>9</sup>

On August 29, 2006, after reviewing briefs and hearing oral argument from the parties, the arbitration panel in Docket No. 03-00585 determined that the Coalition’s *Petition* should be considered in a separate docket. Thereafter, this docket, Docket No. 06-00228, was opened for consideration of the *Petition* and filings pertaining to the *Petition* were transferred to this docket.

At an Authority Conference held on September 11, 2006, the panel voted unanimously to grant the Coalition an interim suspension pending a hearing on the merits on the *Petition* in accordance with 47 U.S.C. §251(f)(2). The panel also voted unanimously to require the Coalition to amend its *Petition* to provide company-specific information addressing the public interest issue and the economic feasibility of providing a TELRIC cost study. The panel set October 2, 2006 as the deadline date for the Coalition to file the amended petition and November

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<sup>6</sup> 47 U.S.C. § 251(f)(2) reads in part:

(2) SUSPENSION AND MODIFICATIONS FOR RURAL CARRIERS. - a local exchange carrier with fewer than 2 percent of the Nation’s subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition....

<sup>7</sup> Subsection (b)(5) provides for “the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.”

<sup>8</sup> *Arbitration Docket, Petition*, p. 1 (June 23, 2006).

<sup>9</sup> *Id.* at pp. 1-2.

2, 2006 as the deadline date for the CMRS Providers to file their response. In addition, Director Miller was appointed Hearing Officer to prepare this matter. Thereafter, on September 11, 2006, the arbitration panel in Docket No. 03-00585 voted unanimously to hold that docket in abeyance pending resolution of the issues in Docket No. 06-00228.

On October 2, 2006, the Coalition filed its *Supplemental Statement* pursuant to the directive of the panel and provided company-specific information and documentation in support of its request to suspend the use of a TELRIC pricing methodology. On November 2, 2006, the CMRS Providers filed *CMRS Providers' Response to Tennessee Rural Coalition's Supplemental Statement Regarding Petition for Section 251(f)(2) Suspension and Modification of Section 251(b)(5) TELRIC Pricing Methodology* ("Response"), requesting that the Coalition's *Petition* as amended by its *Supplemental Statement* be denied, or in the alternative, that the Authority set this matter for hearing subsequent to adequate discovery.

On February 14, 2007, the Hearing Officer issued a *Notice of Status Conference* setting a conference with the parties on February 26, 2007. The Notice set forth several preliminary issues to be addressed during the Status Conference including: the nature and basis for the specific relief sought in the *Petition* and *Supplemental Statement*; the allocation of the burden of proof; the nature, duration, and appropriateness of any interim relief sought; the manner in which reciprocal compensation as previously ordered in Docket No. 03-00585 is being recorded by the parties; and the establishment of a procedural schedule.

On March 19, 2007, the Hearing Officer issued an *Order Establishing Procedural Schedule and Other Preliminary Matters* addressed issues discussed at the Status Conference. The order included resolution of the following matters: that each Coalition member is required to carry the burden of proving entitlement to a suspension or modification of TELRIC as a cost

methodology in the setting of a permanent rate for reciprocal compensation; the Coalition will provide an accounting of its revenues and liabilities, including the rate being utilized, for traffic exchanged with the CMRS Providers by March 28, 2007; the CMRS Providers will provide an accounting of their revenues and liabilities, including the rate being utilized, for traffic exchanged with the Coalition by April 12, 2007; and a procedural schedule for resolution of the issues within the 180-day statutory period.<sup>10</sup> The order further memorialized the agreement of all parties that July 15, 2007 constitutes the 180<sup>th</sup> day for purposes of compliance with the applicable statutory review period.

Thereafter, the CMRS Providers propounded discovery upon the Coalition members requesting information and documents pertaining to affiliate interests and ownership, financial data, cost estimates for the production of future cost studies, previous cost studies performed, and a comprehensive chart regarding the status and degree of difficulty for collection of specific data. On March 23, 2007, the Coalition filed its *Joint Response of the Tennessee Rural Independent Coalition to CMRS Providers' Interrogatories and Requests for Production of Documents to Rural Coalition Members*.

Thereafter, on April 9, 2007, the CMRS Providers filed their *Motion to Compel* requesting that the Authority order the Coalition to provide more complete answers to certain discovery requests, specifically those pertaining to financial information, costs studies, and data collection. On April 13, 2007, a *Response to the CMRS Providers' Motion to Compel on Behalf of the Members of the Tennessee Rural Independent Coalition* was filed. The Hearing Officer issued an *Order Granting, In Part, CMRS Providers' Motion to Compel* and an addendum

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<sup>10</sup> 47 U.S.C. §251(f)(2) states, in part, "The State commission shall act upon any petition filed under this paragraph within 180 days after receiving the petition."

thereto on April 23, 2007 and April 25, 2007, respectively. The addendum fixed a date certain for compliance with the order that was issued on April 23, 2007.

On April 27, 2007, the Coalition filed its *Petition for Reconsideration* requesting that the Hearing Officer reconsider his *Order Granting, In Part, CMRS Providers' Motion to Compel* and the addendum thereto, and deny the motion to compel because obtaining the information would be unduly burdensome, or in the alternative, to extend the time for responding to such requests. On April 30, 2007 the CMRS Providers filed their letter advising the Hearing Officer that they did not oppose the extension of time alternatively proposed by the Coalition in its *Petition for Reconsideration*. On May 1, 2007, the CMRS Providers filed its *CMRS Providers' Response in Opposition to Petition for Reconsideration of Order Granting, In Part, CMRS Providers' Motion to Compel* requesting denial of the Coalition's *Petition for Reconsideration* and affirmation of the Hearing Officer's order. On May 4, 2007, the Hearing Officer issued an *Order Denying Petition for Reconsideration and Granting Extension to May 4, 2007 to Comply with Order Compelling Discovery*. Thereafter, on May 4, 2007, the Petitioners filed a *Joint Response of the Tennessee Rural Independent Coalition to CMRS Providers' Interrogatories and Request for Production of Documents to Rural Coalition Members* in compliance with the Hearing Officer's order.

On May 8, 2007 the CMRS Providers filed their *Motion to Modify Procedural Schedule* requesting additional time in which to file pre-filed testimony. On May 9, 2007, after the TRA Staff confirmed with the Coalition's counsel that no opposition to the request for modification would be forthcoming, the Hearing Officer issued an *Order Granting CMRS Providers' Motion to Modify Procedural Schedule*.

On May 1, 2007, the Hearing Officer issued a *Notice of Hearing and Pre-Hearing Conference* setting a pre-hearing conference on May 16, 2007 and a hearing on the merits for May 21 through May 25, 2007. On May 16, 2007, following a telephone conference between the Hearing Officer and parties that occurred on May 11, 2007, the Hearing Officer issued an *Agreed Order Amending Procedural Schedule* memorializing the agreement of the parties to forgo live testimony in favor of a “paper” hearing wherein the panel would deliberate the issues of law and fact based on the evidentiary record in the Authority docket. The order cancelled the pre-hearing conference and provided a schedule for the submission of briefs to the Authority prior to the deliberations of the panel in this matter.

On June 8, 2007, the Coalition filed its *Brief of the Tennessee Rural Independent Coalition* (“*Coalition’s Brief*”) and the CMRS Providers filed their *CMRS Providers’ Brief* for consideration of the Authority as set forth in the *Agreed Order Amending Procedural Schedule*. On June 15, 2007, the CMRS Providers filed their *CMRS Providers’ Reply Brief*, and on June 18, 2007, the Coalition filed its *Reply Brief of the Tennessee Rural Independent Coalition*. On June 20, 2007, the Hearing Officer issued a *Notice of Taking Administrative Notice* advising all parties to the docket that in preparation for deliberations the Authority is taking administrative notice of certain 3.01 Monthly, 3.02 Quarterly, and the Annual Reports of specifically named Coalition companies for the years 2005 and 2006.

On June 22, 2007, the CMRS Providers filed a letter refuting a resolution proposed by the Coalition, as well as certain statements which the CMRS Providers characterized as an inappropriate public offer of settlement contained in the *Reply Brief of the Tennessee Rural Independent Coalition*. On June 29, 2007, the Coalition filed its letter in response to the comments set forth in the CMRS Providers’ letter. Finally, the *Petition* and subsequent

amendment through the *Supplemental Statement* was deliberated by the voting panel at a regularly scheduled Authority Conference on July 9, 2007.

### **FINDINGS AND CONCLUSIONS**

At a regularly scheduled Authority Conference held on July 9, 2007, a majority of the voting panel assigned to this docket found that, in accordance with Section 251(f)(2) of the Act, a suspension of that part of the *Arbitration Order*, in Docket No. 03-00585, requiring the use of a TELRIC costing methodology in the setting of transport and termination traffic rates is reasonable and necessary both to avoid imposing further undue economic burden on the Petitioners and to avoid significant adverse economic impact on telecommunications users generally, and that a suspension is consistent with the public interest, convenience and necessity. In arriving at this conclusion the panel made specific findings as set forth below.

Pursuant to 47 U.S.C. §251(f)(2), the Coalition requests relief from the portion of the *Arbitration Order* in Docket No. 03-00585 that requires the development of a rate for the transport and termination of traffic based on TELRIC pricing methodology. Section 251(f)(2) provides:

(2) SUSPENSIONS AND MODIFICATIONS FOR RURAL CARRIERS.—A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

- (i) to avoid a significant adverse economic impact on users of telecommunications services generally;
- (ii) to avoid imposing a requirement that is unduly economically burdensome; or
- (iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.<sup>11</sup>

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<sup>11</sup> 47 U.S.C §251.



Section 251(f)(2) provides three alternative sets of circumstances, only one of which must be met, in order to warrant the grant of a suspension request consistent with the public interest, convenience and necessity. The Coalition does not assert the use of TELRIC to be technically infeasible, nor does this Authority find such a circumstance present in this case. Therefore, neither the possibility of nor the potential for technical infeasibility is a factor in considering the relief being sought.

*I. Significant Adverse Economic Impact on Users of Telecommunications Services*

Under Section 251(f)(2) of the Act, a suspension of TELRIC may be granted when such is necessary to avoid a significant adverse economic impact on users of telecommunications services generally. The Coalition asserts that a suspension of the requirement to employ a TELRIC pricing methodology is necessary to avoid a significant adverse economic impact on users of telecommunications services.

The Coalition argues that the use of a TELRIC methodology for setting reciprocal compensation rates is not required within the Act, and that TELRIC was simply established as an interconnection pricing methodology by the FCC. Nevertheless, the Coalition asserts that the FCC has not imposed TELRIC on rural telephone companies, such as the Coalition, due to a recognition that imposing such a methodology on rural carriers would likely result in “significant adverse economic impact on users of telecommunications services generally.”<sup>12</sup>

The Coalition further contends that the rates and charges of the telecommunications services applicable to Coalition members have not previously been established on the basis of TELRIC. They further assert that the record in this proceeding demonstrates that the CMRS Providers and the Petitioners are able to reach negotiated interconnection agreements, and have done so nationwide, without having to resort to performing a complex and expensive TELRIC

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<sup>12</sup> *Brief of the Tennessee Rural Independent Coalition*, pp. 9-10 (June 8, 2007).

cost study. The Act requires that the costs for just and reasonable reciprocal compensation rates be determined on the basis of a “reasonable approximation.”<sup>13</sup> The Coalition asserts that the evidence demonstrates that a “reasonable approximation of the additional costs of terminating such calls”<sup>14</sup> may be determined through the use of alternative and less burdensome methods.

According to the Petitioners, TELRIC is neither required nor necessary to set reciprocal compensation rates for transport and termination traffic between carriers. Coalition witness, Steven E. Watkins, testified in his pre-filed Testimony that requiring TELRIC as the method for setting rates may result in an inequitable shifting of the recovery of network costs to other users of telecom services:

Any requirement to apply TELRIC methods would result in transport and termination rates that, if applied here, would limit the RLECs [Petitioners] in their recovery from CMRS providers of the network costs incurred in transporting and terminating CMRS providers’ wireless service calls. The application of the TELRIC theory would result in minimizing the compensation from the CMRS providers for use of the RLECs networks. This will, in turn, shift the RLECs total network cost recovery unfairly and inequitably to other service rates and to other service providers’ compensation obligations. The users of these other services will bear a disproportionate and unfair burden of cost recovery through higher prices than would otherwise be the case. In other words, non-CMRS services will bear a greater relative burden of that overall cost recovery through higher rates.”<sup>15</sup>

The CMRS Providers contend that there must be a quantifiable economic harm to telecommunications users in order for the requirement of TELRIC to be suspended, and that there has been no such showing of specific economic detriment demonstrated by the Coalition. The CMRS Providers further assert that the Coalition’s true complaint is that rates set according to TELRIC, which exclude subsidies and historical or embedded costs, are too low and that the resulting reduction in reciprocal compensation rates would create a shortfall for Coalition

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<sup>13</sup> 47 U.S.C. §252(d)(2).

<sup>14</sup> *Id.*

<sup>15</sup> Testimony of Steven E. Watkins, p. 8

members.<sup>16</sup> The CMRS Providers argue that no “shortfall” would be created, even if the Petitioners income decreased, because the Petitioners would be compensated at a rate sufficient to cover the actual costs incurred in terminating such traffic.<sup>17</sup>

The Authority is not persuaded that the Coalition must first incur the harm it seeks to avoid in order to demonstrate that such harm would result. This Authority may, and in fact should, employ reason and logic in deducing the proper course of action based on law and fact, and endeavors to do so in this matter. It does not require a leap in logic to conclude that when costs decline for one group they invariably must increase for another group. As a general business principle, it is nearly inevitable that when the expenses of a business increase, the price of the services or products provided by that business must also rise. If not, the business would not sustain itself.

A majority of the voting panel found that the Petitioners produced evidence sufficient to demonstrate that users of telecommunications services generally would be adversely economically impacted if the TELRIC methodology was imposed on the members of the Coalition. Additionally, that the use of TELRIC is not required or necessary and, in fact, there are alternative, less costly and less burdensome, means to achieving the end result of determining an appropriate rate for transporting and terminating telecommunications traffic. To institute TELRIC despite these valid concerns would be detrimental to users of telecommunications services generally and the public at-large.

## *II. Unduly Economically Burdensome*

A separate and distinct requirement for granting a suspension of the use of the TELRIC methodology in Docket No. 03-00585 can be met through proof of undue economic burden on

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<sup>16</sup> *CMRS Providers' Brief*, p.8 (June 8, 2007).

<sup>17</sup> *Id.*

the carrier petitioner. Although Section 251(f)(2) of the Act allows for a suspension when necessary to avoid undue burden, it does not provide any specific criteria to aid in determining when a particular requirement is unduly burdensome. The Act leaves the determination of “undue economic burden” to the discretion of the FCC and state commissions.

The Coalition asserts that undue economic burden is manifested both by the quantifiable costs associated with preparing and defending the TELRIC studies and by the operational burden which would result from the necessary use of managerial and employee resources to undertake such studies. The Coalition states that its members are average schedule companies<sup>18</sup> and until now, have not been required to perform cost studies. As a result, the Coalition asserts that some of its members do not have the requisite data to readily perform the studies, which would further contribute to an increase in costs. To demonstrate the excessive cost of the study itself, the Coalition submitted TELRIC estimates in varying amounts, falling generally between \$20,000 and \$80,000 per Petitioner. These estimates did not include the additional expenses of defending the study or recasting the study as necessary.

Additionally, the Coalition argues that economic burden is not measured by whether a company can or cannot afford to pay for a TELRIC study, but instead goes more appropriately to the burden created through the imposition of unnecessary, unwarranted and inefficient costs upon a company.<sup>19</sup> The production of a TELRIC study and the needless incurring of costs related thereto results in an undue economic burden on Petitioners. This is particularly so when the Act requires only that a reciprocal compensation rate be “a reasonable approximation of the

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<sup>18</sup> The Coalition identifies two types of companies, “cost study” and “average schedule,” and asserts that “cost study” companies perform cost studies on the basis of FCC processes while “average schedule” companies use formulas based on average costs. *Petition*, ¶ 12.

<sup>19</sup> Testimony of Jeffery W. Reynolds, p. 11; *see also*, Testimony of Emmanuel Staurulakis, p.12.

additional costs of terminating such calls.”<sup>20</sup>

The Coalition further contends that the CMRS Providers are in essence attempting to force the Petitioners to either move forward with the establishment of transport and termination rates using a complex and costly TELRIC cost methodology, or accept far lower reciprocal compensation rates than those utilized between rural carriers and the CMRS Providers throughout the nation. The Coalition asserts that this choice of alternatives, combined with the costs already incurred and the prospect of further economic burden each Petitioner would incur as a result of a TELRIC rate setting proceeding, justifies the requested suspension.

The CMRS Providers argue that an economic burden is only undue when a significant harm would result to the overall financial health of a Petitioner, and that a suspension is not warranted unless specific harm over and above the high costs of the studies themselves is demonstrated. In essence, the CMRS Providers urge the Authority to adopt a standard that requires a demonstration of extreme and irreparable financial hardship before allowing relief. Applying their interpretation of undue economic burden, the CMRS Providers assert that none of the Petitioners have made the requisite showing to justify a suspension.

In further support of its contention that the suspension request should be denied, the CMRS Providers cite the Authority’s *LNP Suspension Order*<sup>21</sup> as binding precedent applicable in this docket. In that case, the Coalition requested that the Authority, pursuant to Section 251(f)(2) of the Act, grant a suspension of the deadline to implement wireline to wireless local number

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<sup>20</sup> *Id.*

<sup>21</sup> See *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, *Order Denying Amended Petition and Establishing Dates for Implementation of Local Number Portability* (September 6, 2005) (hereinafter, *LNP Suspension Order*).

portability (“LNP”)<sup>22</sup> obligations established by Section 251(b)(2) of the Act and the FCC. The Authority denied the request for suspension, finding that the Petitioners did not prove technical infeasibility or that users of telecommunications services would suffer significant adverse economic impact or that the LNP implementation requirement is unduly economically burdensome, and further, that the Coalition failed to demonstrate that its request was consistent with the public interest. In so finding, the voting panel stated, “Section 251 of the Act and the Authority’s instructions to file company-specific data require more than the anecdotal and general policy statements contained in the record.”<sup>23</sup> Further, the panel determined:

. . . that the intermodal LNP implementation would result in the assessment of a customer surcharge of between 4 cents (\$0.04) and 26 cents (\$0.26) a month per access line for five years. This range is extremely reasonable. There was no quantifiable showing demonstrating that the LNP surcharges are not just and reasonable or that the assessment of such is not financially viable.<sup>24</sup>

As a result, “the panel determined that the Coalition failed to meet the burden of proof established by the Act and voted unanimously to deny the Coalition’s *Amended Petition*.”<sup>25</sup>

A majority of the panel finds that the Authority’s decision in *TRA LNP Suspension Order* is not applicable in this docket. While the suspension requests in both dockets were initiated pursuant to Section 251(f)(2) of the Act, the suspension request in this docket is distinguishable from the request in the *LNP Suspension Order* docket.

First, in the *LNP Suspension Order* docket, the Coalition requested additional time to implement LNP, thereby delaying a service from which end users would receive a tangible benefit. In this docket, the request to suspend the use of a TELRIC methodology in the

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<sup>22</sup> Number Portability and Service Provider Portability are defined as “the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another.” 47 C.F.R. § 52.21(1)(q); *see also, Id.* at 2.

<sup>23</sup> *TRA LNP Suspension Order*, p. 17 (September 6, 2005).

<sup>24</sup> *Id.* at 17-18.

<sup>25</sup> *Id.* at 18.

determination of rates exchanged between carriers does not provide a similar tangible service or benefit to end users. The underlying dispute in this case – one of payment between carriers – is not likely to obstruct an end-user’s access to service or choice. In fact, the Coalition’s request does not involve a service provided to consumers at all, and it does not seek suspension of any requirement to provide a service to an interconnecting carrier. The suspension requested seeks only a modification in the manner in which a rate for reciprocal compensation is established.

Additionally, in the *LNP Suspension Order* docket, the Authority “recognized that rural customers are entitled to the same level of services and choices that are available in all parts of Tennessee and the nation and that the LNP mandate is but one step in ensuring that advanced services are available.”<sup>26</sup> Despite the denial of the *Amended Petition* in that case, many Coalition members did, in fact, receive an extension of time in which to implement LNP, albeit not an indefinite amount of time. Prior to the Authority’s consideration of the Coalition’s LNP request, the FCC had on several occasions extended the deadline industry-wide for the implementation of LNP, providing in excess of eight years additional time in which carriers could comply.

While the Authority found that the Coalition had not met its burden of proof in the *LNP Suspension Order* docket, it did so in part because the Coalition, in that case, had failed to provide company-specific financial and cost data in support of its contentions. In this docket, the CMRS Providers claim that the Coalition has failed to provide actual proof, supported by individual company financial records, that the TELRIC requirement creates an undue economic burden. Nevertheless, during the discovery phase of this docket, this Authority ordered and the Petitioners produced detailed and substantial financial and rate-cost information. In fact, the CMRS Providers utilized this financial information in crafting their arguments regarding

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<sup>26</sup> *Id.*

economic burden. Notwithstanding the purported lack of evidence, the CMRS Providers argue that the estimated costs of the TELRIC studies represent a very small percentage of each Petitioner's total revenue and, in fact, that the costs fall within a monetary range previously found to be acceptable by the Authority in the *LNP Suspension Order*.

In evaluating whether the estimated cost of the TELRIC studies represented an undue economic burden to the Coalition members, the Authority compared the cost of the study to three years of individual company data on net income, operating revenues, and capital expenditures. While the trends in these statistics and the impact of the cost study on the individual financial indicators differed from company to company, the cost of the TELRIC study represented a significant impact to each of the companies. For example, certain companies experience negative net income and returns on equity over the three years examined. Others saw double digit declines in net income and operating revenues, or returns on equity of less than 2%. In one instance, the cost of the TELRIC study amounted to over half of the company's net income for the most recent year evaluated. For several companies, the TELRIC study cost, as a percentage of capital costs, rose into the double digits. While for most companies the analysis did not demonstrate economic ruin, it did illustrate an appreciable strain on resources that the Authority finds unwarranted given the acceptable alternatives to the TELRIC methodology. It is also important to note that the costs of the study excluded the inevitable expense of data collection and defense of the study.

In the *LNP Suspension Order*, the Authority found that the assessment of a customer surcharge in the amount of between 4 cents (\$0.04) and 26 cents (\$0.26) a month per access line was reasonable, and not unduly economically burdensome to telecommunications users.<sup>27</sup> On this point, the *LNP Suspension Order* stated, "There was no quantifiable showing demonstrating

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



that the LNP surcharges are not just and reasonable or that the assessment of such is not financially viable [to customers].”<sup>28</sup> Importantly, the Authority in finding this particular monetary range to be reasonable for the end-users in that case was not required to consider whether such a monetary range would be a reasonable expense for telecommunications providers, and did not do so.

A majority of the panel finds no support for the CMRS Providers’ theory that a particular monetary range found to be appropriate as a pass-through customer LNP surcharge continues to be reasonable in the context of reciprocal compensation rates, which may or may not be amortizable. Whether a monetary range is reasonable can only be considered on a case-by-case basis, and passage of time and context should not be disregarded. Finally, in the instant docket, a majority of the panel finds that the unduly economically burdensome standard applies not to users of telecommunications generally, but rather is more properly considered from the perspective of the individual carrier petitioner. Therefore, the majority panel further determines that the Authority’s decision in the *LNP Suspension Order* docket is not applicable or binding in this case.

The CMRS Providers suggest that only evidence of quantifiable loss may be considered by this Authority in the determination of whether a requirement is unduly economic burdensome. The Authority considers the evidence and the totality of the circumstances to arrive at a decision grounded in fact and law. While a majority of the panel agrees that high cost alone may not constitute undue economic burden, it finds that cost is an appropriate factor for consideration in such an inquiry. Both the quantifiable data regarding cost and the qualitative arguments presented in the record are relevant to a determination of the Coalition’s request for suspension of TELRIC. The Act does not require a strict construction based exclusively on empirical data,

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<sup>28</sup> *Id.*

nor does the FCC in its interpretation of the Act's requirements. The determination of undue economic burden necessitates that the Authority exercise discretion in consideration of all relevant factors placed in the appropriate context.

Further, a majority of the panel rejects the CMRS Providers' arguments that an economic burden is "undue" only when a requirement will result in significant and irreparable harm to the overall financial health of a Petitioner. A majority of the panel finds that a rural carrier need not prove financial ruin in order to be granted relief under the Act. The majority panel does not agree that "undue economic burden" is synonymous with an inability to afford, but rather finds that undue burden may constitute costs that are determined to be unjust or unwarranted. The mandatory expenditure of the limited resources of time, money, and personnel, particularly when such is not necessary to a resolution of the issues and represents a disproportionate portion of the anticipated net revenues of each Petitioner, is not reasonable and constitutes a requirement that is unduly economically burdensome.

### *III. Public Interest, Convenience and Necessity*

In addition to a showing of at least one of the three alternative requirements set forth in Section 251(f)(2)(A), before a suspension may be granted a petitioner must demonstrate that the grant of its request is consistent with the public interest, convenience and necessity. The Petitioners contend that resolution of this litigation, which has extended over several years, provides a compelling public interest reason for the grant of a suspension of the TELRIC requirement in the arbitration docket. The Coalition asserts that, in fact, "the application of TELRIC costing methodology, as the record in Docket No. 03-00585 reveals, has been the single greatest obstacle to resolution."<sup>29</sup>

Further, the Coalition draws the Authority's attention to a docket pending at the FCC,

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<sup>29</sup> *Coalition's Brief*, p.4 (June 8, 2007).

Docket No. 01-92, dubbed the “Missoula Plan,” which may have some bearing on this matter. The Coalition states that this docket, which addresses a comprehensive proposal for interconnection rules and pricing, may be completed prior to the conclusion of a TELRIC rate setting process, further rendering the TELRIC process wasteful. It is the Coalition’s position that “rational alternatives exist to the TELRIC requirement and the ‘drain on resources’ that will be incurred by the TELRIC rate setting process [is unnecessary].”<sup>30</sup>

The CMRS Providers assert that the Coalition has not established that its request for suspension is consistent with the public interest as required by the Act. They argue that the Coalition has failed to provide the data necessary to show that establishment of transport and termination rates using the TELRIC methodology is not in the public interest. Additionally, the CMRS Providers contend that the suspension request is designed to avoid a requirement by the FCC that transport and termination rates be forward-looking.

The CMRS Providers state that the public interest is served by encouraging competition and further, that such competition may only be encouraged by requiring the Coalition to conduct TELRIC cost studies.<sup>31</sup> Specifically, the CMRS Providers state that the grant of the TELRIC suspension request would leave Petitioners free to “establish rates in excess of both what Congress and the FCC intended. Such higher rates would not encourage competition in rural Tennessee; certainly they would not encourage the development of wireless service in rural areas.”<sup>32</sup>

The potential for additional time-consuming and costly TELRIC proceedings that impair the resources of the parties is a concern that is both an appropriate and responsible consideration for this Authority. Contentious and protracted litigation diverts valuable resources and distracts

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<sup>30</sup> *Supplemental Statement*, p. 20 (October 2, 2006).

<sup>31</sup> *CMRS Providers’ Brief*, p. 19 (June 8, 2007).

<sup>32</sup> *Id.* at 19-20.

management from the operations of the utility, and is not consistent with the interests of the citizens of Tennessee or the general public. Further, the continued diversion of utility resources may reduce opportunity for investment, thereby contributing to the delay of the deployment of advanced services, such as broadband, in the rural areas of Tennessee.

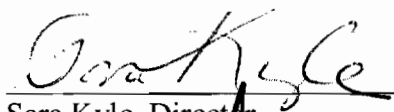
A majority of the panel is not persuaded that a resolution consistent with the public interest can result only from the production of TELRIC cost studies, or that such studies are the exclusive avenue for promoting competition, as advocated by the CMRS Providers. The majority panel further finds that competition is not thwarted by this decision, but rather that the resolution of this dispute may in fact promote the expansion of end-user services and technology. Therefore, in light of the significant time, money, and resources already expended, and the genuine probability for additional and substantial costs in the future, combined with the availability of alternative and less burdensome methods of establishing a rate, a majority of the panel finds that suspension in this matter is consistent with the public interest, convenience and necessity.

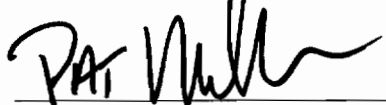
For the reasons discussed above, the Coalition's request for suspension of the Authority's requirement to use a TELRIC costing methodology in the setting of transport and termination traffic rates is granted.

The Authority notes that the decision to suspend the TELRIC requirement set forth previously in the *Arbitration Order* does not foreclose the opportunity of the parties or TRA to utilize a forward-looking model or a variation thereof in the setting of a permanent rate for reciprocal compensation in the underlying *Arbitration Docket*. Further with the suspension of TELRIC-compliant costing studies, the parties are encouraged to continue productive negotiations in an attempt to bring about a mutually agreeable resolution of this litigation.

**IT IS THEREFORE ORDERED THAT:**

The *Petition* of the Tennessee Rural Independent Coalition, as amended its *Supplemental Statement*, requesting suspension or modification pursuant to 47 U.S.C. §251(f)(2) of certain aspects of the requirements of 47 U.S.C §251(b) of the Communications Act of 1934, as amended the Telecommunications Act of 1996, to the extent that those requirements have been interpreted as requiring them to establish charges for transport and termination of any telecommunications traffic on the basis of a Total Element Long Range Incremental Cost methodology, and as ordered by the arbitration panel in its *Order of Arbitration Award*, Docket No. 03-00585, is granted.

  
Sara Kyle, Director

 11-30-07  
Pat Miller, Director

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Ron Jones, Director<sup>33</sup>

<sup>33</sup> Director Jones dissented from the decision to grant the petition and filed a separate opinion explaining his analysis.