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August 4, 2006

HAND DELIVERY

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

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

Dear Chairman Kyle:

Please find enclosed an original and thirteen (13) copies of the *CMRS Providers' Brief on Selected Issues Set Forth by the Hearing Officer*.

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

Very truly yours,

Melvin J. Malone

cc: Parties of Record

BEFORE THE
TENNESSEE REGULATORY AUTHORITY

Petition of:	)	
	)	
Cellco Partnership d/b/a Verizon	)	**Consolidated Docket**
Wireless For Arbitration Under the	)	**No. 03-00585**
Telecommunications Act of 1996	)	
	)	
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	)	
	)	

CMRS PROVIDERS' BRIEF ON SELECTED ISSUES SET FORTH BY THE HEARING OFFICER

On July 24, 2006, the Hearing Officer in this matter requested the parties to file briefs on the following issues: (1) whether this docket should proceed with the consideration of the cost methodologies previously submitted by the Rural Coalition or submission of cost studies; and (2) whether the request of the Rural Coalition to suspend TELRIC requirements should be granted and proceed to determine an interim rate (to replace the previously established TELRIC interim rate) based on readily available information, to be used until a final decision is made by the FCC in Docket CC 01-92.[1] Petitioners Cellco Partnership d/b/a Verizon Wireless; New Cingular Wireless PCS, LLC d/b/a Cingular Wireless; Sprint Spectrum L.P. d/b/a Sprint PCS; and T-

[1] Transcript of Authority Conference, *In Re: Cellco Partnership d/b/a/ Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585, p. 23 (July 24, 2006). *See also*, Hearing Officer's Order Requesting Briefs, *In Re: Cellco Partnership d/b/a/ Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585, p. 3 (July 25, 2006).

Mobile USA, Inc., (collectively referred to herein as "the CMRS Providers") respectfully submit the CMRS Providers' brief on the afore-referenced issues.[2]

I.

SUMMARY

For the reasons set forth herein, and consistent with the Act and the *Order of Arbitration Award*, the Authority should proceed with either consideration of the cost methodologies previously submitted by the Coalition members or with the Coalition being directed, consistent with the *Order of Arbitration Award*, to timely submit TELRIC-compliant cost studies subject to a full evidentiary hearing. No other course of action is appropriately before the Arbitration Panel. Moreover, neither the Act, FCC precedent, case law nor the *Order of Arbitration Award* permit the reconsideration of the interim rate already established in this proceeding or the application of a cost methodology other than TELRIC, both of which were previously ordered by the Authority.[3] Finally, the Authority should not be persuaded by the Coalition that delay is necessary because the FCC *may* issue a further order on intercarrier compensation at some

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[2] In support of the arguments presented herein, the CMRS Providers rely on previous briefs filed in this docket, including, but not limited to, the *Joint Post-Arbitration Brief Submitted on Behalf of the CMRS Providers* ("*CMRS Providers' Post-Arbitration Brief*") and the *Joint Reply Brief Submitted on Behalf of the CMRS Providers* ("*CMRS Providers' Reply Brief*"), as if incorporated fully herein.

[3] As the Hearing Officer noted in his July 25, 2006, Order, "the Petition is basically a request for an interim reciprocal compensation rate based on past experience [not TELRIC] in the establishment of interconnection rates applicable to the networks of the rural carriers..." Hearing Officer's Order Requesting Briefs, *In Re: Cellco Partnership d/b/a/ Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585, p. 2 (July 25, 2006). A reversal of the Arbitration Panel's TELRIC determination in favor of anything less, such as a "TELRIC-hybrid" methodology, or a revisiting of the long-established interim rate in this proceeding would constitute a clear violation of due process and basic tenets of fairness. Further, such action would clearly violate the well-settled law of the case doctrine. *See, e.g., Westside Mothers v.* Olszeski, 2006 WL 1976057 (6th Cir. July 17, 2006) ("The law of the case doctrine provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case. . . . The doctrine precludes a court from reconsideration of issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition.") (citations omitted) **(copy attached)**.

unknown future time. Changes in law are contemplated in the interconnection agreement to be approved in this proceeding and such provisions have long been used to allow arbitrations to proceed in the face of anticipated regulatory developments whose substance and timing are impossible to predict.[4] No arbitration would ever be completed if parties were permitted to delay pending FCC or other regulatory action.[5]

II.

TRAVEL OF THE CASE

A brief recitation of the travel of this case is necessary to place the *Tennessee Rural Coalition's June 23, 2006, Petition for Suspension and Modification Pursuant to § 251(f)(2)* in context.[6] On November 6, 2003, the CMRS Providers filed separate section 252 petitions for arbitration under the Act with the Tennessee Regulatory Authority ("TRA" or "Authority").[7]

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[4] *See*, e.g., Petition of Cellco Partnership for Arbitration, *In Re: Cellco Partnership d/b/a/ Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585, at Exhibit 1: Section III (Nov. 2003) ("In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, either Party may, on thirty (30) days' written notice, require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required."). In essence, Section III of the above-referenced proposed Interconnection and Reciprocal Compensation Agreement Tennessee sets forth provisions for re-negotiations in the event of a change of law.

[5] Historically, the Authority has generally chosen not to hold Tennessee matters at a standstill while awaiting action from the FCC unless it was awaiting soon-to-be released congressionally mandated action. *See, e.g.*, Initial Order of Hearing Officer, *In Re: Petition of Brooks Fiber to Enforce Interconnection Agreement and for Emergency Relief*, TRA Docket No. 98-00118, p. 11 (April 21, 1998), *aff'd*, Order Affirming the Initial Order of Hearing Officer, TRA Docket No. 98-00118 (Aug. 17, 1998) ("Although the TRA stands ready to apply any modifications to existing law when such modifications occur, it would be inappropriate . . . to bring the agency's docket to a screeching halt in faithful anticipation of the same. To indefinitely delay the resolution of the issues presented in this case because the FCC *may* modify its position, cannot, under the circumstances, be reasonably justified and may seriously undermine the negotiation process contemplated under the Act.") (emphasis in original).

[6] The CMRS Providers note that the *Petition* was apparently filed as both an original petition and in TRA Docket No. 03-00585. *See infra* n. 76.

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

The Tennessee Rural Coalition ("Coalition") members submitted a joint response to said petitions on December 1, 2003. Finding that the petitions for arbitration submitted by the CMRS Providers were proper and complied with the requirements of federal law, the Authority accepted the petitions for arbitration.[8]

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

With the sole exception of establishing permanent rates for transport and termination, the *Authority has resolved all of the issues in this arbitration.*[10] Consistent with the January 12, 2005, deliberations,[11] on May 27, 2005, the Hearing Officer in this matter issued, *sua sponte*, a Notice of Status Conference "for the purpose of discussing the process the Authority should undertake to determine a permanent rate for reciprocal compensation."[12] Subsequent thereto, the

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

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

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

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

[12] Notice of Status Conference, *In Re: Petition for Arbitration of Cellco Partnership d/b/a Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585 (May 27, 2005).

(continued...)

Hearing Officer determined that the rates must be symmetrical and that each ICO's costs must be company-specific.[13] In addition, a joint procedural schedule was submitted to the Authority by all of the parties, which provided, among other things, that "[e]ach Rural Independent Telephone Company will file a description of its proposed TELRIC cost study methodology specifying in detail how the company proposed to perform the study."[14] The Authority subsequently adopted the joint procedural schedule[15] and otherwise established a process - pursuant to a request by the Coalition - for the parties to either agree to an appropriate cost methodology or for the Arbitration Panel to make a determination as to the appropriateness of any particular Coalition proposal.[16] In this regard, the CMRS Providers worked diligently towards moving this docket forward in accordance with the process established by the Hearing Officer and the directions provided by the Arbitration Panel on September 7, 2005.[17]

(..continued)
The stated purpose of the May 27th Notice for Status Conference was to discuss the process the Authority should undertake to establish a TELRIC-compliant permanent rate for reciprocal compensation. The Coalition did not object to this Status Conference.

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

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

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

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

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

On October 25, 2005, the procedural schedule in this proceeding was suspended pending both the issuance of the order "memorializing the arbitration panel's January 12, 2005 decisions" and a determination "concerning the specific methodologies and formulas to be utilized by the coalition members in performing their cost studies."[18] The *Order of Arbitration Award*, which memorialized the January 12, 2005, deliberations, was issued on January 12, 2006.[19] In a May 26, 2006, letter to the Authority, the CMRS Providers respectfully requested that the Arbitration Panel move this matter as follows:

> either (1) consider the parties' respective September 28 and October 18, 2005, filings regarding cost methodologies and make a determination on whether any of the ICOs' proposed methodologies/models are TELRIC-compliant, or (2) direct the Rural Coalition, consistent with the January 12, 2006, *Order of Arbitration Award*, to timely submit TELRIC-compliant cost studies subject to a full evidentiary hearing.[20]

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

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

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

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

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

(continued...)

III.

INTRODUCTION

a. The FCC's Pricing and Costing Rules Are Applicable to Reciprocal Compensation for Telecommunications Traffic Exchanged through Direct and Indirect Interconnection.

As recognized and determined by the Arbitration Panel herein, the Federal Telecommunications Act of 1996 (the "Act") requires all telecommunications carriers "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[22] In implementing this provision of federal law, the Federal Communications Commission (the "FCC") has promulgated rules that allow transport and termination rates to be established by one of three methods:

> An incumbent LEC's rates for transport and termination of telecommunications traffic shall be established, at the election of the state commission, on the basis of:
>
> (1) The forward-looking economic costs of such offerings, using a cost study pursuant to §§ 51.505 and 51.511;
>
> (2) Default proxies, as provided in § 51.707; or
>
> (3) A bill-and-keep arrangement, as provided in § 51.713.[23]

(..continued)

Transcript at 50-53 (Arbitration Panel directing the Coalition to file all models); and *September 7, 2005 Transcript* at 74 ("[T]he whole idea is to be able to provide us - - the Agency as well as the CMRS Providers - - with the opportunity to evaluate the model.") (Comment of TRA Director/Panel Member).

[22] *Order of Arbitration Award*, pp. 14, 16-18. *See also* 47 U.S.C. § 251(b)(5).

[23] 47 C.F.R. § 51.705(a). *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report & Order, 11 FCC Rcd. 15499, ¶1055 (1996) ("*Local Competition Order*") ("States have three options for establishing transport and termination rate levels. A state commission may conduct a thorough review of economic studies prepared using the TELRIC-based methodology outlined above in the section on the pricing of interconnection and unbundled elements. Alternatively, the state may adopt a default price pursuant to the default proxies outlined below. If the state adopts a default price, it must either commence review of a TELRIC-based economic cost study, request that this Commission review such a study, or subsequently modify the default price in accordance with any revised proxies we may adopt. As previously noted, we intend to commence a future rulemaking on developing proxies using a generic cost model, and to complete such proceeding in the first quarter of 1997. As a third alternative, in some circumstances states may order a 'bill-and-keep' arrangement, as discussed below.").

As a practical matter, in this arbitration only two (2) alternatives authorized by the statute and the FCC's rules were offered by the parties for purpose of establishing transport and termination rates: (1) forward-looking rates based on appropriate cost studies, or (2) bill-and-keep.[24] Neither the Coalition nor the CMRS Providers sought to establish asymmetrical rates in this case.[25]

In this arbitration, the Authority explicitly determined that the Act, the FCC's orders, and U.S. Supreme Court precedent all dictate that reciprocal compensation rates must be based on the "forward looking costs" of transport and termination using a TELRIC-compliant cost study, not some type of Coalition created TELRIC-hybrid (or undefined "readily available information").[26] The Coalition did not seek reconsideration of this determination set forth in the order.

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[24] The availability of default proxies is, at best, unsettled. *See Iowa Utilities Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000).

[25] 47 C.F.R. § 51.711(a) ("Rates for transport and termination of local telecommunications traffic *shall be symmetrical.*") (emphasis added). As noted earlier herein, the parties have agreed and the Hearing Officer has ruled that the rates for reciprocal compensation must be symmetrical and that the rate for each ICO must be based on its particular forward-looking costs. *See supra* note 13. No party appealed or otherwise sought reconsideration of these rulings.

[26] *Order of Arbitration Award*, pp. 40-41. *See also Verizon Corp. v. FCC*, 531 U.S. 1124, 122 S.Ct. 1646 (2002) (The Supreme Court upheld the FCC's authority to set a nationwide pricing methodology.); Interim Order on Phase I of Proceeding to Establish Prices for Interconnection and Unbundled Network Elements, *In Re: Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case Proceeding to Establish Permanent Prices for Interconnection and Unbundled Network Elements*, TRA Docket No. 97-01262, p. 8 (Jan. 25, 1999) ("*January 25, 1999 Phase I Order*) (The TRA specifically held, in establishing interconnection and UNE rates for BellSouth, that "prices should be established using the forward-looking economic cost methodology as defined by the FCC's TELRIC methodology, including an appropriate markup for the recovery of shared and common costs."); Order, *In Re: Petition of Ballard Rural Telephone Cooperative Corporation, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection with American Cellular F/K/A ACC Kentucky License LLC, Pursuant to the Communications Act of 1934, As Amended by the Telecommunications Act of 1996*, KPSC, Case No. 2006-00215, p. 3 (July 25, 2006) (**copy attached**) ("TELRIC studies are ordered herein to provide the Commission with a sufficient basis to establish the rates requested by the RLECs."); *Local Competition Order*, 11 FCC Rcd. 15499, ¶ ¶ 1054 *et seq.* (1996); 47 U.S.C. § 252(d)(2); and 47 C.F.R. §§ 51.705 *et seq.*

b. The Coalition Members Failed to Establish Appropriate Rates for Reciprocal Compensation during the Arbitration Hearing.

Although provided the opportunity to do so, the Coalition members failed to produce forward-looking cost studies in either the negotiations or the subsequent arbitration.[27] The only rates proposed by the Coalition members were derived from their interstate-switched access rates as calculated by the National Exchange Carrier Association ("NECA"), which rates include embedded costs.[28] Consistent with FCC precedent, the Arbitration Panel rejected the Coalition's proposed rates.[29] The Coalition did not seek reconsideration of this decision.[30]

In light of the Coalition's failure to establish appropriate rates for reciprocal compensation at the August 2004 hearings, the Arbitration Panel in this proceeding adopted an interim rate that applies until such time as the appropriate TELRIC-based rates for each

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[27] TRA Transcript of Proceeding (Hearing), *In Re: Cellco Partnership d/b/a/ Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585, Vol. IX, 21: 11-13 (Aug. 2004) (hereinafter "*Hearing Transcript*"):

> Q. Have you produced a forward-looking cost study?
> A. No.

[28] Pre-filed Direct Testimony of Coalition Witness Steven E. Watkins, *In Re: Cellco Partnership d/b/a/ Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585 at 35 (Aug. 4, 2004) ("The ICOs have proposed to utilize the per-minute rates for identical transport and termination as they use and apply for interstate access purposes."). *See also Hearing Transcript.*, Vol. IX, 12: 18-19 ("Well, the rates we have proposed are the rates that NECA has calculated"); and *Hearing Transcript*, Vol. IX, 16: 4-8 (costs studies include embedded costs).

[29] *Order of Arbitration Award,* pp. 40-41. *See also* 47 C.F.R. § 51.515 ("Neither the interstate access charges described in part 69 of this chapter nor comparable intrastate access charges shall be assessed by an incumbent LEC on purchasers of elements that offer telephone exchange or exchange access services."); and CFR § 51.505(c)(1) (embedded costs may not be considered). Even the Coalition conceded that the FCC rules for reciprocal compensation do not permit embedded costs. *Hearing Transcript.*, Vol. IX, 15: 16 - 16: 3.

[30] Unfortunately, the *Petition* is yet another attempt by the Coalition members to avoid the submission of cost studies. The Coalition members have skillfully avoided the submission of forward-looking cost studies during negotiations, during the hearing and during the preliminary stages of the rate phase of this proceeding, which stage they requested. *See supra* n. 16.

Coalition member are determined in a formal cost proceeding.[31] The interim rates established by the Authority in this proceeding are based on, and otherwise equivalent to, the TELRIC rate previously established for BellSouth Telecommunications, Inc. ("BellSouth") in TRA Docket 97-01262.[32] The Coalition did not seek reconsideration of the interim rate.

c. The Coalition's Previous Attempt to Object to TELRIC Pricing by Raising the Specter of Section 251(f)(1) Was Rejected.

Section 251(f)(1) (the so-called "rural exemption"), as discussed below in Section IV(b), was not formally part of the arbitration proceeding. Nonetheless, during the course of the arbitration the Coalition tried to assert – albeit indirectly - that the rural exemption relieved its members of their obligations to develop reciprocal compensation rates based on forward-looking costs. The Authority clearly rejected that argument and the last two (2) years have been spent trying to get the Coalition members to submit TELRIC-compliant cost studies so that the cost phase of this proceeding can be completed.

Although the 251(f)(1) issue is not before the Authority, in order to fully understand section 251(f)(1) and 251(f)(2), it is necessary to understand the general interconnection obligations imposed by the Act. Section 251 sets forth three (3) tiers of obligations: (a) the general obligation of all telecommunications carriers to interconnect directly or indirectly;[33] (b) the obligations that are imposed specifically upon all local exchange carriers, including the obligation to provide number portability, dialing parity and, *most relevant to this proceeding*, the

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[31] *See January 12, 2005 Transcript*, pp. 38-40. *See also Order of Arbitration Award*, pp. 40-41. The CMRS Providers note that as of this filing no Coalition member has agreed to provide reciprocal compensation at the interim rates ordered by the Authority on January 12, 2005.

[32] *In Re: Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case Proceeding to Establish Permanent Prices for Interconnection and Unbundled Network Elements*, TRA Docket No. 97-01262 ("*TRA Permanent Prices Docket*").

[33] 47 U.S.C. § 251(a).

obligation "to establish reciprocal compensation arrangements for the transport and termination of telecommunications";[34] and (c) the obligations for incumbent local exchange carriers, including the obligations to provide unbundled access and collocation.[35]

As the Arbitration Panel is well aware, the obligations of the Coalition members under section 251(b), and in particular their obligation to provide reciprocal compensation pursuant to section 251(b)(5), was perhaps the most critical issue in the arbitration hearing.[36] With this in mind, it is important to note that section 252(d)(2) explicitly sets forth the pricing standards for determining reciprocal compensation obligations of the incumbent local exchange carriers under section 251(b)(5). Moreover, as noted by the FCC, the obligations of section 251(b)(5) are inextricably tied to the provisions of section 252(d)(2):

> LECs [including rural telephone companies like the ICOs] are obligated, pursuant to section 251(b)(5) (and the corresponding pricing standards of section 252(d)(2)), to enter into reciprocal compensation arrangements with all CMRS providers... [37]

In sum, section 252(d)(2) mandates that compliance with the obligations of section 251(b)(5) requires the "mutual and reciprocal recovery by each carrier of costs associated with the transport and termination ... on the basis of a reasonable approximation of the additional costs of

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[34] 47 U.S.C. § 251(b) (obligations include resale, number portability, dialing parity, access to rights-of-way and reciprocal compensation).

[35] 47 U.S.C. § 251 (c). Although Section 251(c)(2) also refers to "Interconnection," the FCC has stated clearly that reciprocal compensation obligations at issue in this arbitration arise from subsection (b) of Section 251, not subsection (c):

> "[T]he term "interconnection" under section 251(c)(2) refers only to the physical linking of two networks for the mutual exchange of traffic. Including the transport and termination of traffic within the meaning of section 251(c)(2) would result in reading out of the statute the duty of all LECs to establish "reciprocal compensation arrangements for the transport and termination of telecommunications," under section 251(b)(5)." *Local Competition Order*, ¶ 176.

[36] *Order of Arbitration Award*, pp. 7-18.

terminating such calls."[38] The methodologies for establishing the "reasonable approximation of the additional costs," i.e., forward-looking economic costs, proxy rates and bill-and-keep, were then set forth by the FCC in the *Local Competition Order* and in the accompanying federal regulations.[39]

Section 251(f)(1) simply does not relieve the Coalition members of their obligations to develop reciprocal compensation rates based on forward-looking costs.[40] Although it is true that the rural exemption potentially relieves rural carriers of particular duties under section 251(c), it does not in any way affect their obligations to pay reciprocal compensation for transport and termination under section 251(b)(5) based on the pricing standards contained in section 252(d)(2) (and the accompanying regulations).[41]

Thus, to the extent the Coalition wanted to seek an exemption from section 251(b)(5), and the accompanying pricing standards, it had to file a *proper* 251(f)(2) petition at the *appropriate* time. In this case, it elected not to do either.

(..continued)

[37] *Local Competition Order*, ¶ 1008.

[38] Section 252(d)(2).

[39] *See Local Competition Order*, ¶¶ 1054 *et seq.* (establishing, among other things, the forward-looking cost methodology for determining compensation rates for transport and termination under Section 252(d)(2)). *See also* 47 C.F.R. §§ 51.703, 51. 705, 51.707, 51.709, 51.711 and 51.713.

[40] *See, e.g., CMRS Providers' Post Arbitration Brief*, pp. 14, 25; and *CMRS Providers' Reply Brief*, pp. 5, 12-16.

[41] *See* CMRS Providers' Joint Brief Regarding Statutory Requirements for Symmetrical Rates Based on Each ICO's Forward-Looking Costs, *In Re: Cellco Partnership d/b/a/ Verizon Wireless for Arbitration Under the Telecommunications Act of 1996*, TRA Consolidated Docket No. 03-00585, pp. 2-3 (June 28, 2005).

IV.

DISCUSSION

a. The Coalition Cannot Re-Litigate the Interim Rate or the Pricing Methodology Issues by Virtue of this Section 251(f)(2) Petition.

Although the Coalition has consistently objected to the pricing methodology for reciprocal compensation required by section 252(d)(2) of the Act since the commencement of these negotiations some three (3) years ago, it chose not to file a 251(f)(2) petition until late last month. The Coalition has certainly been aware of these issues and has raised them with the Authority on several occasions. For example, since the outset of these consolidated arbitrations, the Coalition has maintained that the Authority "does not have the jurisdiction to decide this matter[.]"[42] Further, the Coalition has argued throughout this proceeding that "the CMRS providers have asked the Authority to apply obligations that are . . . inconsistent with established regulation[.]"[43] Finally, the Coalition has long-contended before the Authority that "the FCC has specifically concluded that the forward-looking cost pricing rules, which the CMRS providers

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

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

seek to utilize, do not apply to the [members of the Coalition]."[44] Each of the foregoing positions of the Coalition, however, have been thoroughly rejected by the TRA in this proceeding.[45]

Despite its many attempts to argue that it was not bound by the Act, the Coalition did not seek relief under section 251(f)(2) at any time either in its 100-page *Response* (to the arbitration petitions), the Coalition's 15-page *Motion to Dismiss*, the Coalition's pre-filed testimony, the hearing transcripts, the Coalition's 70-page Post-Hearing Brief, the Coalition's 55-page Post-Hearing Reply Brief, the Joint Proposed Procedural Schedule for Rate Phase of Proceeding, the submission of the cost methodologies, or the status conferences/hearings in the rate phase of this proceeding.[46] In fact, counsel for the Coalition members expressly and unequivocally conceded that they were not asserting their rights under 251(f)(2) to the Arbitration Panel – "[i]t is true, we could have, **but we elected not to**, ask for a suspension of 251(b)(5)."[47]

This proceeding has been ongoing before the Authority since November 2003, and the Coalition members have knowingly and voluntarily failed to raise section 251(f)(2) and are

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

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

[46] *See, e.g., CMRS Providers' Post-Arbitration Brief*, p. 15 ("[I]t is the CMRS Providers' understanding that the ICOs have filed [a section 251(f)(2)] petition with the TRA in an effort to suspend their obligations to provide wireline to wireless number portability, i.e., another obligation of section 251(b). However, *no such petition has been filed in this proceeding with regard to the ICOs' obligations to provide reciprocal compensation under section 251(b)(5).*") (citations omitted) (emphasis in original).

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

estopped from doing so now.[48] Having waived their section 251(f)(2) rights[49] in the hopes of receiving a favorable arbitration award, the Coalition now inappropriately and untimely raises section 251(f)(2) in what can only be characterized as an improper attempt to have the Authority revisit the interim rates it established almost two years ago and to otherwise prevent the current cost proceeding from moving forward.[50]

b. The Act Prohibits Consideration of the Coalition's Section 251(f)(2) Petition in this Docket.

The Act specifically defines what the TRA can and cannot consider in the context of this arbitration proceeding. As the filing Parties, the CMRS Providers were required to file a petition within a specified time frame, identifying the unresolved issues between the parties, and the parties' respective positions.[51] As the non-petitioning party, the Coalition was required to "respond to the [CMRS Providers'] petition and provide such additional information as it

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

[49] *See, e.g, Kentucky National Ins. Co. v. Gardner*, 6 S.W.3d 493, 498 (Tenn. App. 1999) (Under Tennessee law, the waiver of a legal right occurs where there is a clear act of the party showing such a purpose, or acts amounting to an estoppel.) (citations omitted).

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

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

[51] 47 U.S.C. §§ 252(b)(1) and (b)(2). Pursuant to these provisions the petitioner (for arbitration) should also include a description of issues resolved by the parties.

wish[ed]."[52] Upon the filing of the petitions for arbitration and the *Response*, the statute expressly provides that the TRA "shall limit its consideration of any petition ... (and any response thereto) to the issues set forth in the petition and in the response, if any ..."[53] Thus, to the extent the *Petition* seeks determination of an issue that was not previously raised in the petition and responses in this arbitration proceeding, such issue, and related prayers for relief, cannot be considered at this time.

Moreover, the record is clear that the Coalition apparently made a "strategic" decision early in this process not to file a 251(f)(2) petition in order to address the pricing issue. In the pre-hearing stage of this proceeding, the Coalition strongly opposed the request of the CMRS Providers to address the issue of pricing methodology and the rural exemption (under 251f(1)) on the grounds that the proposed issues were not set forth in the arbitration petitions or in the *Response*, as required by statute.[54] In denying the CMRS Providers' request, the Hearing Officer concluded that the proposed sub-issues were "not set forth in the petitions or response thereto

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[52] 47 U.S.C. § 252(b)(3).

[53] 47 U.S.C. § 252(b)(4).

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

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

within the meaning of Section 252(b)(4)(A)."[55] The CMRS Providers submit that section 252(b)(4)(A), as applied by the Hearing Officer, similarly precludes the consideration of any new issues raised by the *Petition*. Accordingly, as a matter of law, fundamental fairness and procedural consistency, the Arbitration Panel must adhere to the procedural law of the case established by the Hearing Officer. To do otherwise, would clearly violate both "basic principles of fairness"[56] and the law of the case doctrine.[57]

c. The Submission of the Coalition's Section 251(f)(2) Petition in this Proceeding Should Be Rejected Outright.

Regardless of whether a section 251(f)(2) request is appropriate in a separate proceeding,[58] any relief sought in this arbitration proceeding via the *Petition* is inappropriate and

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

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

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

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

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

[57] *See supra* n. 3.

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

untimely.[59] The *Petition* should not delay the rate phase of this proceeding or be allowed to undermine the well-established section 252 arbitration process.[60]

If parties are permitted to "game" the process by "lying in wait" to assess the results of an arbitration hearing before asserting section 251(f)(2), the section 252 arbitration process will be trampled and Congressional intent frustrated.[61] Although Congress clearly intended that section 251(f)(2) be available under appropriate circumstances, nothing in the Act suggests that section 251(f)(2) was intended to either thwart a long-standing section 252 arbitration proceeding or to provide a collateral vehicle to undermine an order arrived at through the section 252 process.[62]

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[59] To the extent individual members of the Coalition wish to pursue a proper, and properly supported, section 251(f)(2) petition in Tennessee, such a petition would only be appropriate under the following circumstances: (1) the petition may involve any issue so long as the CMRS Providers are not implicated; and (2) if the CMRS Providers are implicated, the petition may not concern any of the issues in TRA Consolidated Docket No. 03-00585.

[60] *See supra* n. 50.

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

[62] *See State of Tennessee v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 754-755 (Tenn. Ct. App. 2001) ("[B]ecause words are known by the company they keep, we must construe statute's language in the context of the entire statute and in light of the statute's general purpose."). *See also Lenscrafters, Inc. v. Sundquist*, 33 S.W.3d 772, 777 (Tenn. 2000) ("Ultimately, we must seek the most reasonable construction which avoids statutory conflict and provides for harmonious operation of the laws."); *Knox County Education Ass'n v. Knox County Board of Education, et al*, 60 S.W.3d 65, 74 (Tenn. App. 2001) ("A construction that places one act in conflict with another must be avoided; thus, courts must resolve any possible conflict between acts in favor of each other, so as to provide a harmonious operation of the laws."); and *Finley v. Keisling Lumber Co.*, 35 S.W.2d 388, 388-389 (Tenn. 1931) ("A familiar canon of construction requires that effect be given to every clause and part of the statute, thus producing a consistent and harmonious whole."). Mindful of the general purpose of the Act, construing the Act to prohibit the filing of a section 251(f)(2) petition after a section 252 arbitration hearing has been held and subsequent to the issuance of an order of arbitration award when the rural carrier had ample opportunity to timely seek a section 251(f)(2) suspension but voluntarily *elected* not to do so would yield a consistent and harmonious result between sections 251(f)(2) and 252. *See supra* n. 50. On the other hand, entertaining a section 251(f)(2) petition under the circumstances presented would elevate section 251(f)(2) above section 252 and place the provisions of the Act in clear conflict and disharmony.

In essence, the CMRS Providers are merely asking the Authority to maintain this proceeding within the confines of an arbitration under the section 252 process and to not permit the Coalition's *Petition* to unnecessarily further delay this nearly 3-year old proceeding.[63]

d. The Coalition's Section 251(f)(2) Petition is Deficient on its Face.

Even if the Authority could consider the relief sought by the *Petition* in the context of this proceeding – which for the reasons discussed above it cannot and should not - this *Petition* does not even arguably meet the basic requirements of a proper 251(f)(2) petition established by the Authority and the Act.[64]

As the Authority is aware, the interconnection regime established by the Act was intended to apply to all telecommunications carriers. Accordingly, Congress established stringent standards for a rural carrier to obtain a suspension of its obligations under sections 251(b) or (c).[65] Section 251(f)(2) of the Act permits state commissions to suspend a carrier's obligations under sections 251(b) or (c) **only**:

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

[64] *See* Order Denying Amended Petition and Establishing Dates for Implementation of Local Number Portability, *In Re: Tennessee Coalition of Rural Incumbent Telephone Companies and Cooperatives Request for Suspension of Wireline to Wireless Number Portability Obligations Pursuant to Section 251(f)(2) of the Communications Act of 1934, As Amended*, TRA Docket No. 03-00633, p. 7 (Sept. 6, 2005) ("Based upon implementation progress differences of the Coalition members and the FCC's requirement that each company set forth specific reasons warranting suspension, the Authority determined that this matter could not be deliberated based on the limited information provided in the original Petition.") (emphasis omitted).

[65] 47 U.S.C. § 251(f)(2). Only local exchange carriers with fewer than 2 percent of the nation's aggregate installed subscriber lines ("two percent carriers") are even permitted to request such a suspension.

"to the extent that, and for such duration as, it determines that the suspension or modification"[66] is both:

> (A) necessary to avoid
>
> > (i) a significant adverse economic impact on users of telecommunications services generally;
> >
> > (ii) imposing a requirement that is unduly economically burdensome; or
> >
> > (iii) imposing a requirement that is technically infeasible;
> >
> > **AND**
>
> (B) consistent with the public interest, convenience, and necessity.[67]

In fact, "Congress intended exemption, suspension, or modification of the section 251 requirements to be the exception rather than the rule.... [The FCC] believe[s] that Congress did not intend to insulate smaller or rural LECs from competition. . . . "[68] Hence, the FCC's rules place the burden squarely on *each* petitioning rural carrier to demonstrate that it meets the statutory and regulatory standards for a suspension under section 251(f)(2).[69] Specifically, the FCC stated:

> A LEC with fewer than two percent of the nation's subscriber lines installed in the aggregate nationwide must prove to the state commission, pursuant to section 251(f)(2) of the Act, that it is entitled to a suspension

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[66] 47 U.S.C. § 251 (f)(2).

[67] 47 U.S.C. §§ 251(f)(2)(A)(i)-(iii) and (B).

[68] *Local Competition Order*, ¶ 1262 (emphasis added).

[69] 47 C.F.R. § 51.405(b). *See also Local Competition*, ¶ 1262; 47 C.F.R. § 51.401; Telephone Number Portability, *First Memorandum Opinion and Order on Reconsideration*, 12 FCC Rcd. 7236 (1997), ¶ 112-23 (Blanket suspensions for smaller and/or rural LECs are "unnecessary and may hamper the development of competition in areas served by smaller and rural LECs that competing carriers want to enter.").

> or modification of the application of a requirement or requirements of section 251(b) or 251(c) of the Act.[70]

Even under the most cursory review, however, the *Petition* is substantively and procedurally deficient.

For instance, the members of the Coalition have failed to submit any evidence to support its factual claim that it would be "unduly economically burdensome" for any particular Coalition member, not to mention all of the Coalition members, to submit TELRIC compliant cost studies or to otherwise use the interim rate already ordered by the Authority. Instead, the Coalition relies on unsubstantiated and conclusory "joint" statements that application of the section 251(b) obligations would be economically burdensome. The *Petition* does not set forth any company-specific cost documentation or any company-specific economic burden. More is required.[71] According to clear and unambiguous Authority precedent, the allegations in the *Petition* are simply insufficient to even warrant consideration of a 251(f) petition, regardless of the relief sought by the *Petition*.[72]

In sum, it would be unprecedented, if not unlawful,[73] to bring the arbitration to a standstill once again, or to undo the findings of fact and conclusions of law set forth in the *Order*

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[70] 47 C.F.R. § 51.405(b). *See also Local Competition Order*, ¶1262.

[71] *See, e.g., supra* n. 69.

[72] Moreover, any cost burden relied upon by the Coalition members in an attempt to support a section 251(f)(2) petition must be weighed against both the cost of an (f)(2) proceeding (with company-by-company demonstrations) and other relevant information. *See, e.g.*, Notice, *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 (Aug. 20, 2004) (TRA advising, *sua sponte*, its intent to take administrative notice of certain financial reports relating to section 251(f)(2) petitioners).

[73] The record in this docket substantially undermines the *Petition* as well. First, it appears that the Section 251(b) obligations only became "unduly economically burdensome" after the January 12, 2005, deliberations, the issuance of the *Order of Arbitration Award*, the September 7, 2005, rejection of the Coalitions' methodology submissions by the Arbitration Panel, and after the lawfully prescribed time period for reconsideration had passed. Next, previous

(continued...)

of Arbitration Award (including, but not limited to, the long-established interim rate and the applicability of forward looking cost methodologies set forth in section 252(d)(2)), on the basis of this legally and procedurally deficient section 251(f)(2) petition.[74]

V.

CONCLUSION

As the Authority has properly recognized, the establishment of permanent rates in this proceeding is critical.[75] For the reasons set forth herein, and to avoid further delay, the CMRS Providers respectfully request the Arbitration Panel to sever the *Petition* from TRA Docket No. 03-00585[76] and to either (1) consider the parties' respective September 28 and October 18, 2005, filings regarding cost methodologies and make a determination on whether any of the ICOs' proposed methodologies/models are consistent with the *Order of Arbitration Award*, TELRIC-

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(..continued)
statements by Counsel for the Coalition highlight the necessity of the statutorily required company-specific showing under Section 251(f)(2) and the wisdom of Congress. *See, e.g., September 7, 2005 Transcript*, p. 41 ("TDS has the expertise to be able to do this in-house.") (Counsel for Coalition); and *id.* (Other companies here are in a similar position; . . . because of their own internal work.") (Counsel for Coalition). . *See also id.* at 42-43 ("So I hesitate to try to impose one model on all those people, because they all have an investment in various of their personnel that they've already spent[.]") (Counsel for Coalition).

[74] *See, e.g., supra* notes 3, 4 and 5.

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

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

compliant, or (2) direct the Coalition, consistent with the *Order of Arbitration Award*, to timely submit TELRIC-compliant cost studies subject to a full evidentiary hearing.

Respectfully submitted this 4th day of August, 2006.

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--- F.3d ----, 2006 WL 1976057 (C.A.6 (Mich.)), 2006 Fed.App. 0247P

Briefs and Other Related Documents

United States Court of Appeals,
Sixth Circuit.
WESTSIDE MOTHERS; Families on the Move, Inc.; Michigan Chapter, American Academy of Pediatrics; Michigan Chapter, American Association of Pediatric Dentists; K.E., by her next friend Tina E.; Ja. E., by her next friend Deana H.; Je. E., by her next friend, Deana H.; J.C., by his next friend, Monica C.; and J.T., by his next friend, Veda T., Plaintiffs-Appellants,
v.
Janet OLSZEWSKI, in her official capacity as Director of the State of Michigan Department of Community Health; and Paul Reinhart, in his official capacity as Deputy Director of the State of Michigan Medical Services Administration, Defendants-Appellees.
No. 05-1669.
Argued: March 9, 2006.
Decided and Filed: July 17, 2006.

Background: Welfare rights organization brought action against state officials under § 1983, seeking injunctive relief and appointment of special master to end state's alleged systemic deprivation of early and periodic screening, diagnosis, and treatment services (EPSDT) under its Medicaid program. The United States District Court for the Eastern District of Michigan, 133 F.Supp.2d 549, dismissed action. Organization appealed. The Court of Appeals, 289 F.3d 852, affirmed in part, reversed in part, and remanded. State moved to dismiss or for summary judgment. The United States District Court for the Eastern District of Michigan, Robert H. Cleland, J., 368 F.Supp.2d 740, granted motion in part.

Holdings: The Court of Appeals, Merritt, Circuit Judge, held that:
(1) law of case doctrine did not bar trial court from addressing question of whether plaintiffs had private right of action under § 1983 to compel enforcement of various Medicaid provisions;
(2) Medicaid did not require state to provide medical services directly, but merely to provide financial assistance to eligible persons;
(3) accessibility provision of Medicaid statute did not confer private right of action to compel enforcement under § 1983; and
(4) allegations stated claim for violations of provision of Medicaid statute, requiring state to inform all eligible children about medical services available.

Affirmed in part, modified in part, and reversed in part.

[1] KeyCite Notes

198H Health
Although participation in the Medicaid program is voluntary, participating states must comply with certain requirements imposed by the Social Security Act and regulations promulgated by the Secretary of Health and Human Services. Social Security Act, § 1901 et seq., 42 U.S.C.A. § 1396 et seq.

[2] KeyCite Notes

170B Federal Courts
A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] KeyCite Notes

170B Federal Courts
Law of case doctrine did not bar trial court from addressing question of whether intended beneficiaries of

Medicaid statute had private right of action under § 1983 to compel enforcement of its early and periodic screening, accessibility, financial assistance, and treatment provisions, on remand from decision of the Court of Appeals, holding that private right of action existed under § 1983, where decision of Court of Appeals did not address specific statutory provisions. 42 U.S.C.A. § 1983; Social Security Act, § 1902(a)(8), (a)(10),(a)(30), (a)(43) , 42 U.S.C.A. § 1396a(a)(8), (a)(10) (a)(30), (a)(43).

[4] KeyCite Notes 

⚖170B Federal Courts
The "**law of the case** doctrine" provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.

[5] KeyCite Notes 

⚖170B Federal Courts
The "law of the doctrine" precludes a court from reconsideration of issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition.

[6] KeyCite Notes 

⚖170B Federal Courts
Pursuant to the law of the case doctrine, and the complementary mandate rule, upon remand the trial court is bound to proceed in accordance with the mandate and law of the case as established by the appellate court.

[7] KeyCite Notes 

⚖170B Federal Courts
Under the mandate rule, on remand the trial court is required to implement both the letter and the spirit of the appellate court's mandate, taking into account the appellate court's opinion and the circumstances it embraces.

[8] KeyCite Notes 

⚖170B Federal Courts
The law of the case doctrine precludes reconsideration of a previously decided issue unless one of three exceptional circumstances exists: (1) where substantially different evidence is raised on subsequent trial, (2) where a subsequent contrary view of the law is decided by the controlling authority, or (3) where a decision is clearly erroneous and would work a manifest injustice.

[9] KeyCite Notes 

⚖170B Federal Courts
The law of the case doctrine is limited to those issues decided in the earlier appeal, and the district court may therefore consider on remand those issues not decided expressly or impliedly by the appellate court.

[10] KeyCite Notes 

⚖170B Federal Courts
Where there is substantial doubt as to whether a prior appellate court actually decided an issue, the district court should not be foreclosed from considering the issue on remand.

[11] KeyCite Notes

198H Health
Provisions of Medicaid statute, requiring participating state to provide medical assistance to eligible beneficiaries, did not require state to provide medical services directly, but merely to provide financial assistance to those eligible persons to enable them to obtain the covered services; the Medicaid statute defined the term "medical assistance" as payment for the cost of the medical services, and the implementing regulations also indicated that financial assistance, rather than direct provision of the services, was required. Social Security Act, § 1902(a)(8), (a)(10), 42 U.S.C.A. § 1396a(a)(8), (a)(10); 42 C.F.R. §§ 435.911, 435.930.

[12] KeyCite Notes

198H Health
Provision of Medicaid statute, requiring participating state to ensure that medical services for eligible beneficiaries were accessible and available, and requiring reimbursement rates for services in general be sufficient to enlist enough providers, did not confer private right of action to compel enforcement of that provision under § 1983; provision had aggregate, rather than individual, focus, in that it did not identify individual benefits, but rather state's obligations, and broad language of provision was ill-suited to judicial remedy. 42 U.S.C.A. § 1983; Social Security Act, § 1902(a)(30), 42 U.S.C.A. § 1396a(a)(30).

[13] KeyCite Notes

78 Civil Rights
Section 1983 provides redress only for a plaintiff who asserts a violation of a federal right, not merely a violation of federal law. 42 U.S.C.A. § 1983.

[14] KeyCite Notes

78 Civil Rights
The appropriate inquiry in determining whether a federal statute creates a private right that is enforceable under § 1983 is whether or not Congress intended to confer individual rights upon a class of beneficiaries. 42 U.S.C.A. § 1983.

[15] KeyCite Notes

78 Civil Rights
Critical to determining whether a statute creates a private right enforceable under § 1983 is whether the pertinent statute contains rights-creating language that reveals congressional intent to create an individually enforceable right. 42 U.S.C.A. § 1983.

[16] KeyCite Notes

198H Health
Allegations by welfare rights organization that state participating in Medicaid program refused or failed to effectively inform eligible beneficiaries and their caretakers of the existence of the medical assistance children's healthcare program, the availability of specific child healthcare services, and related assistance stated claim under § 1983 for violations of provision of Medicaid statute, requiring state to inform all eligible children about the medical services available to them. 42 U.S.C.A. § 1983; Social Security Act, § 1902(a)(43)(A), 42 U.S.C.A. § 1396a(a)(43)(A).

[17] KeyCite Notes

⚿78 Civil Rights
In order to establish a § 1983 claim, plaintiff's complaint must allege that (1) the conduct in controversy was committed by a person acting under color of law, and (2) the conduct deprived the plaintiff of a federal right, either constitutional or statutory. 42 U.S.C.A. § 1983.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 99-73442-Robert H. Cleland, District Judge.
ARGUED: Jennifer R. Clarke, Public Interest Law Center of Philadelphia, Philadelphia, Pennsylvania, for Appellants. Morris J. Klau, State of Michigan, Department of Attorney General, Detroit, Michigan, for Appellees. ON BRIEF: Jennifer R. Clarke, Public Interest Law Center of Philadelphia, Philadelphia, Pennsylvania, Arnon D. Siegel, Laura E. Robbins, Dechert LLP, Washington, D.C., for Appellants. Morris J. Klau, Luttrell D. Levingston, State of Michigan, Department of Attorney General, Detroit, Michigan, for Appellees.

Before: BOGGS, Chief Judge; MERRITT and MOORE, Circuit Judges.

OPINION

MERRITT, Circuit Judge.
***1** This suit filed under 42 U.S.C. § 1983 alleges that the State of Michigan has failed to provide services required by the Medicaid program. Plaintiffs, Westside Mothers, other advocacy and professional organizations, and five named individuals, allege that Janet Olszewski, director of the Michigan Department of Community Health, and Paul Reinhart, deputy director of the Michigan Medical Services Administration, did not provide the early and periodic screening, diagnosis, and treatment ("EPSDT") services mandated by the Medicaid Act.

[1] The Medicaid program, created in 1965 when Congress added Title XIX to the Social Security Act, provides federal financial assistance to States that choose to reimburse certain costs of medical treatment for the poor, elderly, and disabled. *See* 42 U.S.C. § 1396 *et seq.* (2000 & Supp.2005); *Harris v. McRae,* 448 U.S. 297, 301 (1980). "Although participation in the program is voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services." *Wilder v. Va. Hosp. Ass'n,* 496 U.S. 498, 502, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). At issue here is the requirement that participating States provide "early and periodic screening, diagnostic, and treatment services ··· for individuals who are eligible under the plan and are under the age of 21." 42 U.S.C. § 1396d(a)(4)(B); *see also* 42 U.S.C. § 1396d(r) (defining such services). The required services include periodic physical examinations, immunizations, laboratory tests, health education, *see* § 1396d(r)(1), eye examinations, eyeglasses, *see* § 1396d(r)(2), teeth maintenance, *see* § 1396d(r)(3), diagnosis and treatment of hearing disorders, and hearing aids, *see* § 1396d(r)(4).
In 1999, plaintiffs filed a civil action pursuant to 42 U.S.C. § 1983, which creates a cause of action against any person who under color of state law deprives an individual of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. They alleged that the defendants had refused or failed to implement the Medicaid Act, its enabling regulations, and its policy requirements by: (1) refusing to provide, and not requiring participating HMOs to provide, the comprehensive examinations required by 42 U.S.C. §§ 1396a(a)(43), 1396d(r)(1) and 42 C.F.R. § 441.57; (2) not requiring participating HMOs to provide the necessary health care, diagnostic services, and treatment required by 42 U.S.C. § 1396d(r)(5); (3) not effectively informing plaintiffs of the existence of the screening and treatment services, as required by 42 U.S.C. § 1396a(a)(43); (4) failing to provide plaintiffs the transportation and scheduling help needed to take advantage of the screening and treatment services, as required by 42 U.S.C. § 1396a(a)(43)(B) and 42 C.F.R. § 441.62; and (5) developing a Medicaid program that lacks the capacity to deliver to eligible children the care required by 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(30)(A), and 1396u-2(b)(5). (J.A. at 40-48.)
***2** In March 2001 the district court granted defendants' motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Westside Mothers v. Haveman,* 133 F.Supp.2d 549 (E.D.Mich.2001). In a detailed and far-reaching opinion, the district court held that Medicaid was only a contract between a State and the federal government, that spending-power programs such as Medicaid were not supreme law of the land, that the court lacked jurisdiction over the case because Michigan was the "real defendant, and

therefore possess[ed] sovereign immunity against suit," *id.* at 553, that in this case *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), was unavailable to circumvent the State's sovereign immunity, and that even if it were available § 1983 does not create a cause of action available to plaintiffs to enforce the provisions in question.

Plaintiffs appealed and, in an opinion dated May 15, 2002, a unanimous panel of the Sixth Circuit reversed all of these rulings. *See Westside Mothers v. Haveman (" Westside Mothers I "), 289 F.3d 852 (6th Cir.2002).* Although our earlier decision focused predominantly on the jurisdictional grounds for the district court's dismissal, we also considered "[w]hether there is a private right of action under § 1983" for alleged noncompliance with the Medicaid Act. *Id.* at 862-63. We held that the "district court erred when it did not apply [the test set out in *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997),] to evaluate plaintiffs' claims." *Id.* at 863. We then applied the *Blessing* test to determine whether the screening and treatment provisions of the Medicaid Act create a right privately enforceable against state officers through § 1983:

First, the provisions were clearly intended to benefit the putative plaintiffs, children who are eligible for the screening and treatment services. *See* 42 U.S.C. § 1396a(a)(10)(A). "[I]t is well-settled that Medicaid-eligible children under the age of twenty-one ··· are the intended beneficiaries of the [screening and treatment] provisions." *Dajour B. v. City of New York*, 2001 WL 830674, at *8 (S.D.N.Y. July 23, 2001); *accord Miller v. Whitburn*, 10 F.3d 1315, 1319 (7th Cir.1993). We have found no federal appellate cases to the contrary. Second, the provisions set a binding obligation on Michigan. They are couched in mandatory rather than precatory language, stating that Medicaid services " *shall* be furnished" to eligible children, 42 U.S.C. § 1396a(a)(8) (emphasis added), and that the screening and treatment provisions " *must* be provided," *id.* § 1396a(a)(10)(A), *see also* 42 C.F.R. § 441.56 (mandatory language). Third, the provisions are not so vague and amorphous as to defeat judicial enforcement, as the statute and regulations carefully detail the specific services to be provided. *See* 42 U.S.C. § 1396d(r). Finally, Congress did not explicitly foreclose recourse to § 1983 in this instance, nor has it established any remedial scheme sufficiently comprehensive to supplant § 1983. *See Blessing*, 520 U.S. at 346-47, 117 S.Ct. 1353, 137 L.Ed.2d 569. ***3** Plaintiffs have a cause of action under § 1983 for alleged noncompliance with the screening and treatment provisions of the Medicaid Act.

Id.

On remand, the district court granted in part and denied in part the defendants' second motion to dismiss pursuant to Rule 12(b)(6). In light of the Supreme Court's decision in *Gonzaga University v. Doe*, 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002), the district court reconsidered whether the specific provisions of the Medicaid Act that plaintiffs identified in their amended complaint create enforceable rights under § 1983. The district court concluded that 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10) create enforceable rights under § 1983, but that plaintiffs failed to state a claim that defendants had not discharged their obligations to provide medical assistance under §§ 1396a(a)(8), 1396a(a)(10). The district court further concluded that § 1396a(a)(43) creates enforceable rights under § 1983, that plaintiffs stated a cause of action for violations of § 1396a(a)(43)(B) to the extent that they alleged that the state of Michigan has a policy or practice of not providing the EPSDT services to eligible children who have requested them, but that plaintiffs failed to state a claim for violations of § 1396a(a)(43)(A). The district court also dismissed plaintiffs' claim for violations of § 1396a(a)(30) for failure to state a claim, reasoning that § 1396a(a)(30) "does not unambiguously confer individual rights enforceable under § 1983." (J.A. at 525.)

This appeal followed. For the reasons set forth below, we reverse in part and affirm in part but modify the district court's order.

I. Standard of Review

[2] We review de novo a district court's dismissal of claims pursuant to Federal Rule of Civil Procedure 12(b)(6). *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 451 (6th Cir.2003). In deciding whether to grant a Rule 12(b)(6) motion, we "must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations [of the plaintiff] as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *Id.* at 451-52. Our function is not to weigh the evidence or assess the credibility of witnesses, *Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir.1997), but rather to examine the complaint and determine whether the plaintiff has pleaded a cognizable claim, *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir.1988). The motion should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Marks*, 342 F.3d at 452 (quoting *Cameron v. Seitz*, 38 F.3d 264, 270 (6th Cir.1994)).

II. Discussion

A.

[3] As a preliminary matter, we must consider whether our determination in *Westside Mothers I* that "[p]laintiffs have a cause of action under § 1983 for alleged noncompliance with the screening and treatment provisions of the Medicaid Act," *Westside Mothers I*, 289 F.3d at 863, was binding on the district court under the law of the case doctrine. On appeal, plaintiffs argue that the district court's reconsideration of whether the screening and treatment provisions of the Medicaid Act create enforceable rights under § 1983 was barred by the law of the case doctrine, and the district court therefore had "no power or authority to deviate" from our earlier decision in this case.

*4 [4] [5] [6] [7] The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Scott v. Churchill*, 377 F.3d 565, 569-70 (6th Cir.2004) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)). The doctrine precludes a court from reconsideration of issues "decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition." *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir.1997) (quoting *Coal Res., Inc. v. Gulf & Western Indus., Inc.*, 865 F.2d 761, 766 (6th Cir.1989)). Pursuant to the law of the case doctrine, and the complementary "mandate rule," upon remand the trial court is bound to "proceed in accordance with the mandate and law of the case as established by the appellate court." *Id.* (quoting *Petition of U.S. Steel Corp.*, 479 F.2d 489, 493 (6th Cir.), *cert. denied*, 414 U.S. 859, 94 S.Ct. 71, 38 L.Ed.2d 110 (1973)). The trial court is required to "implement both the letter and the spirit" of the appellate court's mandate, "taking into account the appellate court's opinion and the circumstances it embraces." *Brunet v. City of Columbus*, 58 F.3d 251, 254 (6th Cir.1995).

[8] The law of the case doctrine precludes reconsideration of a previously decided issue unless one of three "exceptional circumstances" exists: (1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice. *Hanover Ins. Co.*, 105 F.3d at 312. None of these "exceptional circumstances" are present which would permit the district court to reconsider whether the provisions in question create enforceable rights under § 1983.

[9] However, the district court reasoned that the law of the case doctrine did not preclude it from reconsidering whether specific provisions of the Medicaid Act create enforceable rights under § 1983 because our earlier decision in *Westside Mothers I* did not decide this issue as to each specific statutory provision identified in the amended complaint. In support of the district court's decision, defendants contend that our failure to explicitly decide whether 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10), 1396a(a)(30), 1396a(a)(43) confer enforceable rights left the matter open for review by the district court. As the district court recognized, the law of the case doctrine is limited to those issues decided in the earlier appeal, and the district court may therefore consider those issues not decided expressly or impliedly by the appellate court. *See Hanover Ins. Co.*, 105 F.3d at 312. Thus, we must determine whether we expressly or impliedly decided in plaintiffs' first appeal whether §§ 1396a(a)(8), 1396a(a)(10), 1396a(a)(30), 1396a(a)(43) create rights enforceable under § 1983.

In *Westside Mothers I*, we identified a specific issue, i.e., "whether there is a private right of action under § 1983." 289 F.3d at 862. We held that the district court erred in failing to consider this issue within the framework established by the Supreme Court in *Blessing*, *Id.* at 863. Applying the *Blessing* test, we then concluded that "[p]laintiffs have a cause of action under § 1983 for alleged noncompliance with the screening and treatment provisions of the Medicaid Act." *Id.* In reaching this conclusion, we determined that the "provisions" were "clearly intended to benefit the putative plaintiffs," impose "a binding obligation on Michigan," and are "not so vague and amorphous as to defeat judicial enforcement." *Id.*

*5 [10] Because the holding refers generally to the "screening and treatment provisions," the opinion in *Westside Mothers I* creates considerable ambiguity as to whether the prior panel applied the *Blessing* test to each of the statutory provisions identified in the plaintiffs' amended complaint. There is therefore no assurance that the panel considered whether the specified provisions of the Medicaid Act confer enforceable

rights under § 1983 before holding that the plaintiffs have a cause of action under § 1983. Where there is substantial doubt as to whether a prior panel actually decided an issue, the district court should not be foreclosed from considering the issue on remand. *See United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 392, 398 (3d Cir.2003). Accordingly, we conclude that the law of the case doctrine does not apply and that our earlier decision in this case did not foreclose the district court's consideration of whether plaintiffs have a right of action under § 1983 to enforce violations of §§ 1396a(a)(8), 1396a(a)(10), 1396(a)(30), 1396a(a)(43).

B.

[11] The district court ruled that plaintiffs failed to state a claim for violations of 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10) "to the extent that they alleged failure by Defendants in their official capacity to ensure the actual provision of, or arrangement for, medical services." [FN1] (J.A. at 529.) In so ruling, the district court concluded that §§ 1396a(a)(8), 1396a(a)(10) require the State to pay some or all of the costs of certain medical services available to eligible individuals, but do not require the State to provide the services directly. (J.A. at 509.) Before the district court and in their briefs before this court, plaintiffs argued that §§ 1396a(a)(8), 1396a(a)(10) mandate the actual provision of, or arrangement for, certain medical services, including care, medicine, and equipment. Thus, the issue presented by this claim is whether the individual rights to "medical assistance" created by these provisions imposes an obligation on the State to provide services directly.

There appears to be some disagreement among the courts of appeals as to whether, pursuant to the Medicaid Act, a State must merely provide financial assistance to eligible individuals to enable them to obtain covered services, or provide the services directly. *See Sabree v. Richman,* 367 F.3d 180, 181 n. 1 (3d Cir.2004); *Bruggeman v. Blagojevich,* 324 F.3d 906, 910 (7th Cir.2003) ("[T]he statutory reference to 'assistance' appears to have reference to *financial* assistance rather than to actual medical *services,* though the distinction was missed in *Bryson v. Shumway,* 308 F.3d 79, 81, 88-89 (1st Cir.2002), and *Doe v. Chiles,* 136 F.3d 709, 714, 717 (11th Cir.1998)."). However, the Medicaid Act explicitly defines the term "medical assistance" as used in §§ 1396a(a)(8), 1396a(a)(10). "Medical assistance" means "payment of part or all of the cost of the [enumerated] services" to eligible individuals "who are under the age of 21." 42 U.S.C. § 1396d(a); *see Schott v. Olszewski,* 401 F.3d 682, 686 (6th Cir.2005) ("The Act defines 'medical assistance' as 'payment of part or all of the cost of the [covered] care and services ··· for individuals." ').

***6** Plaintiffs nevertheless contend that the language of §§ 1396a(a)(8), 1396a(a)(10) expands the definition of "medical assistance" beyond simply payment for services to include actual provision of services. After examining the text and the structure of the statute, we do not believe §§ 1396a(a)(8), 1396a(a)(10) require the State to provide medical services directly. The most reasonable interpretation of § 1396a(a)(8) is that all eligible individuals should have the opportunity to apply for medical assistance, i.e., financial assistance, and that such medical assistance, i.e., financial assistance, shall be provided to the individual with reasonable promptness. The most reasonable interpretation of § 1396a(a)(10) is that medical assistance, i.e., financial assistance, must be provided for at least the care and services listed in paragraphs (1) through (5), (17) and (21) of § 1396d(a). *See Clark v. Richman,* 339 F.Supp.2d 631, 641 (M.D.Pa.2004). The regulations that implement these provisions also indicate that what is required is a prompt determination of eligibility and a prompt payment to eligible individuals to enable them to obtain the necessary medical services. *See* 42 C.F.R. §§ 435.911, 435.930.

At oral argument, plaintiffs asserted that the payments were insufficient to enlist an adequate number of providers, which effectively frustrates §§ 1396a(a)(8), 1396a(a)(10) by foreclosing the opportunity for eligible individuals to receive the covered medical services. They now argue, for example, that they want to show that such payments are so inadequate in the Upper Peninsula of Michigan that there are no available providers. *See Health Care for All, Inc. v. Romney,* 2005 WL 1660677, at *10-11 (D.Mass. July 14, 2005) ("Setting reimbursement levels so low that private dentists cannot afford to treat Medicaid enrollees effectively frustrates [§ 1396a(a)(8)] by foreclosing the opportunity for enrollees to receive medical assistance at all, much less in a timely manner."); *Okla. Chapter of Am. Acad. of Pediatrics v. Fogarty,* 366 F.Supp.2d 1050, 1109 (N.D.Okla.2005) (finding a violation of § 1396a(a)(8) and reasoning that "[w]ithout financial assistance (provider reimbursement) sufficient to attract an adequate number of providers, reasonably prompt assistance is effectively denied"); *Sobky v. Smoley,* 855 F.Supp. 1123 (E.D.Cal.1994) (holding defendants liable for failure to comply with § 1396a(a)(8) where "insufficient funding ··· has caused providers of methadone maintenance to place eligible individuals on waiting lists for treatment"). Plaintiffs did not raise this argument in the amended complaint, before the district court, or in their briefs before this court. Because this appeal is from a dismissal for failure to state a claim, we are concerned with the sufficiency of the complaint, which does not contain this allegation. We therefore affirm the district court's

dismissal of the claim for violations of §§ 1396a(a)(8), 1396a(a)(10). However, because plaintiffs may be able to amend the complaint to allege that inadequate payments effectively deny the right to "medical assistance," we modify the district court's order to reflect a dismissal without prejudice to the filing of a motion to amend along with a proposed amendment to the complaint.

C.

*7 [12] Plaintiffs allege that defendants have developed a Medicaid program that does not provide access to eligible children to the care and services available under the plan, in violation of 42 U.S.C. § 1396a(a)(30). That provision requires a State plan for medical assistance to:

[P]rovide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan ··· as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area····

42 U.S.C. § 1396a(a)(30)(A). The district court held that § 1396a(a)(30) "does not unambiguously confer individual rights enforceable under § 1983" and that plaintiffs therefore failed to state a claim for violations of § 1396a(a)(30). (J.A. at 525.)

[13] Section 1983 provides a cause of action against State officials for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" but does not provide a mechanism through which citizens can enforce federal law generally. 42 U.S.C. § 1983. Instead, it provides redress only for a plaintiff who asserts a "violation of a federal *right,* not merely a violation of federal *law."* *Blessing v. Freestone,* 520 U.S. 329, 340, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997); *see also* *Wilder v. Va. Hosp. Ass'n,* 496 U.S. 498, 508, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990).

[14] [15] In *Blessing v. Freestone,* the Supreme Court set forth three requirements for establishing that a federal statute confers rights enforceable by § 1983:

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. at 340-41 (citations omitted). In *Gonzaga University v. Doe,* the Supreme Court acknowledged the continuing relevance of the *Blessing* test to "guide judicial inquiry into whether or not a statute confers a right." 536 U.S. 273, 282, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002); *see* *ASW v. Oregon,* 424 F.3d 970, 975 n. 6 (9th Cir.2005). The Court then clarified the first of *Blessing's* three requirements, making clear that only unambiguously conferred rights, as distinguished from mere benefits or interests, are enforceable under § 1983. *Gonzaga,* 536 U.S. at 282-83. The appropriate inquiry, therefore, is "whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Id.* at 285. Critical to this inquiry is whether the pertinent statute contains "rights-creating" language that reveals congressional intent to create an individually enforceable right. *Id.* at 287.

*8 Prior to *Gonzaga,* the circuits were split on the question of whether § 1396a(a)(30) provides Medicaid recipients or providers with a right enforceable under § 1983. The Fifth and Eighth Circuits each held that Medicaid recipients have a private right of action under § 1396a(a)(30). *See* *Evergreen Presbyterian Ministries Inc. v. Hood,* 235 F.3d 908, 927-28 (5th Cir.2000); *Ark. Med. Soc'y, Inc. v. Reynolds,* 6 F.3d 519, 528 (8th Cir.1993); *cf.* *Pa. Pharmacists Ass'n v. Houstoun,* 283 F.3d 531, 543-44 (3d Cir.2002) (en banc) (positing, in dicta, a right for recipients while rejecting such a right for providers); *Visiting Nurse Ass'n v. Bullen,* 93 F.3d 997, 1004 n. 7 (1st Cir.1996) (positing, in dicta, a right for recipients while holding that such a right existed for providers). The First, Seventh, and Eighth Circuits held that a private right of action existed for Medicaid providers. *See* *Bullen,* 93 F.3d at 1005; *Methodist Hosps., Inc. v. Sullivan,* 91 F.3d 1026, 1029 (7th Cir.1996); *Ark. Med. Soc'y,* 6 F.3d at 528. By contrast, the Third and Fifth Circuits explicitly held that § 1396a(a)(30) did not create a right enforceable by Medicaid providers. *See* *Pa. Pharmacists Ass'n,* 283 F.3d at 543; *Walgreen Co. v. Hood,* 275 F.3d 475, 478 (5th Cir.2001); *Evergreen Presbyterian Ministries,* 235 F.3d at 929. Since *Gonzaga,* the federal courts of appeals considering whether § 1396a(a)(30) provides Medicaid recipients or providers with a right enforceable under § 1983 have also come to conflicting conclusions. *Compare* *Long Term Pharmacy Alliance v. Ferguson,* 362 F.3d 50, 59 (1st Cir.2004) (holding that Medicaid providers do not have a private right of action under § 1396a(a)(30)), *and* *Sanchez v. Johnson,*

416 F.3d 1051, 1062 (9th Cir.2005) (concluding that § 1396a(a)(30) does not unambiguously manifest congressional intent to create individual rights), *with* Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs., 443 F.3d 1005, 1015-16 (8th Cir.2006) (holding that § 1396a(a)(30) is enforceable by Medicaid recipients and providers through a § 1983 private cause of action).

After examining the text and structure of § 1396a(a)(30), we agree with the First and Ninth Circuits that § 1396a(a)(30) fails the first prong of the *Blessing* test and does not therefore provide Medicaid recipients or providers with a right enforceable under § 1983. First, § 1396a(a)(30) has an aggregate focus rather than an individual focus that would evince congressional intent to confer an individually enforceable right. *See* Gonzaga, 536 U.S. at 282 (When a "provision focuse[s] on 'the aggregate services provided by the State,' rather than 'the needs of any particular person,' it confer[s] no individual rights and thus [cannot] be enforced by § 1983."); Sanchez, 416 F.3d at 1059. The provision speaks, not of individual benefits, but rather of the State's obligation to develop "methods and procedures." *See* § 1396a(a)(30)(A); Long Term Care Pharmacy Alliance, 362 F.3d at 57 (noting that "[t]he provision focuses instead upon the state as 'the person regulated rather than individuals protected' "). The only reference in § 1396a(a)(30) to recipients of Medicaid is in the aggregate, as members of "the general population in the geographic area." *See* § 1396a(a)(30)(A). The only reference to Medicaid providers is as indirect beneficiaries "enlisted" as subordinate partners in the administration of Medicaid services. *See* § 1396a(a)(30)(A). Far from focusing on a specific class of beneficiaries, § 1396a(a)(30) "is simply a yardstick for the Secretary to measure the *systemwide* performance of a State's [Medicaid] program." Blessing, 520 U.S. at 343.

***9** Second, the "broad and nonspecific," Gonzaga, 536 U.S. at 292 (Breyer, J., concurring in the judgment), language of § 1396a(a)(30) is ill-suited to judicial remedy, *see* Sanchez, 416 F.3d at 1060. The provision sets forth general objectives, including "efficiency, economy, and quality of care," but does not identify what standards are required by such terms. *See* § 1396a(a)(30)(A); Long Term Care Pharmacy Alliance, 362 F.3d at 58 (noting that "the criteria (avoiding overuse, efficiency, quality of care, geographic equality) are highly general"). The interpretation and balancing of these general objectives "would involve making policy decisions for which this court has little expertise and even less authority." Sanchez, 416 F.3d at 1060; *see also* Long Term Care Pharmacy Alliance, 362 F.3d at 58 (noting that the generality of the goals "suggests that plan review by the Secretary is the central means of enforcement intended by Congress"). Furthermore, § 1396a(a)(30) is not confined to particular services; rather, it speaks generally of "methods and procedures." *See* § 1396a(a)(30)(A). Such broad language suggests that § 1396a(a)(30) is "concerned with overall methodology rather than conferring individually enforceable rights on individual Medicaid recipients." Sanchez, 416 F.3d at 1059-60.

Because the text of § 1396a(a)(30) does not focus on individual entitlements, nor is the "broad and nonspecific" language of this provision amendable to judicial remedy, we are not persuaded that Congress has, with a clear voice, intended to create an individual right that either Medicaid recipients or providers would be able to enforce under § 1983. Without such unambiguous intent, plaintiffs cannot satisfy the first requirement of the *Blessing* test. We therefore hold that § 1396a(a)(30) does not confer enforceable rights and affirm the district court's dismissal of plaintiffs' § 1396a(a)(30) claim.

D.

[16] The district court held that plaintiffs failed to state a claim for violations of 42 U.S.C. § 1396a(a)(43)(A) because § 1396a(a)(43)(A) does not require "a participating State to 'effectively' inform all potentially eligible children of the EPSDT services." (J.A. at 527.) Section 1396a(a)(43)(A) requires a State plan for medical assistance to provide for:

[I]nforming all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance including services described in section 1396d(a)(4)(B) of this title, of the availability of early and periodic screening, diagnostic, and treatment services as described in section 1396d(r) of this title and the need for age-appropriate immunizations against vaccine-preventable diseases····

42 U.S.C. § 1396a(a)(43)(A). Implementing regulations obligate States to provide for written and oral methods designed to "effectively" inform all eligible individuals about the EPSDT program. 42 C.F.R. § 441.56(a).

***10** [17] The complaint, read in the light most favorable to the plaintiffs, supports a § 1983 claim for violations of § 1396a(a)(43)(A). In order to establish a § 1983 claim, plaintiff's complaint must allege that (1) the conduct in controversy was committed by a person acting under color of law, and (2) the conduct deprived the plaintiff of a federal right, either constitutional or statutory. Lugar v. Edmondson Oil Co., 457 U.S. 922, 930, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). The amended complaint alleges that defendants "refused or failed to *effectively inform* Plaintiffs and their caretakers of the existence of the Medical

--- F.3d ----, 2006 WL 1976057 (C.A.6 (Mich.)), 2006 Fed.App. 0247P

Briefs and Other Related Documents

United States Court of Appeals,
Sixth Circuit.
WESTSIDE MOTHERS; Families on the Move, Inc.; Michigan Chapter, American Academy of Pediatrics; Michigan Chapter, American Association of Pediatric Dentists; K.E., by her next friend Tina E.; Ja. E., by her next friend Deana H.; Je. E., by her next friend, Deana H.; J.C., by his next friend, Monica C.; and J.T., by his next friend, Veda T., Plaintiffs-Appellants,
v.
Janet OLSZEWSKI, in her official capacity as Director of the State of Michigan Department of Community Health; and Paul Reinhart, in his official capacity as Deputy Director of the State of Michigan Medical Services Administration, Defendants-Appellees.
No. 05-1669.
Argued: March 9, 2006.
Decided and Filed: July 17, 2006.

Background: Welfare rights organization brought action against state officials under § 1983, seeking injunctive relief and appointment of special master to end state's alleged systemic deprivation of early and periodic screening, diagnosis, and treatment services (EPSDT) under its Medicaid program. The United States District Court for the Eastern District of Michigan, 133 F.Supp.2d 549, dismissed action. Organization appealed. The Court of Appeals, 289 F.3d 852, affirmed in part, reversed in part, and remanded. State moved to dismiss or for summary judgment. The United States District Court for the Eastern District of Michigan, Robert H. Cleland, J., 368 F.Supp.2d 740, granted motion in part.

Holdings: The Court of Appeals, Merritt, Circuit Judge, held that:
(1) law of case doctrine did not bar trial court from addressing question of whether plaintiffs had private right of action under § 1983 to compel enforcement of various Medicaid provisions;
(2) Medicaid did not require state to provide medical services directly, but merely to provide financial assistance to eligible persons;
(3) accessibility provision of Medicaid statute did not confer private right of action to compel enforcement under § 1983; and
(4) allegations stated claim for violations of provision of Medicaid statute, requiring state to inform all eligible children about medical services available.

Affirmed in part, modified in part, and reversed in part.

[1] KeyCite Notes

⇦198H Health
Although participation in the Medicaid program is voluntary, participating states must comply with certain requirements imposed by the Social Security Act and regulations promulgated by the Secretary of Health and Human Services. Social Security Act, § 1901 et seq., 42 U.S.C.A. § 1396 et seq.

[2] KeyCite Notes

⇦170B Federal Courts
A motion to dismiss for failure to state a claim should not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

[3] KeyCite Notes

⇦170B Federal Courts
Law of case doctrine did not bar trial court from addressing question of whether intended beneficiaries of

Medicaid statute had private right of action under § 1983 to compel enforcement of its early and periodic screening, accessibility, financial assistance, and treatment provisions, on remand from decision of the Court of Appeals, holding that private right of action existed under § 1983, where decision of Court of Appeals did not address specific statutory provisions. 42 U.S.C.A. § 1983; Social Security Act, § 1902(a)(8), (a)(10),(a)(30), (a)(43) , 42 U.S.C.A. § 1396a(a)(8), (a)(10) (a)(30), (a)(43).

[4] KeyCite Notes 

⌐170B Federal Courts
The "**law of the case** doctrine" provides that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.

[5] KeyCite Notes 

⌐170B Federal Courts
The "law of the doctrine" precludes a court from reconsideration of issues decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition.

[6] KeyCite Notes 

⌐170B Federal Courts
Pursuant to the law of the case doctrine, and the complementary mandate rule, upon remand the trial court is bound to proceed in accordance with the mandate and law of the case as established by the appellate court.

[7] KeyCite Notes 

⌐170B Federal Courts
Under the mandate rule, on remand the trial court is required to implement both the letter and the spirit of the appellate court's mandate, taking into account the appellate court's opinion and the circumstances it embraces.

[8] KeyCite Notes 

⌐170B Federal Courts
The law of the case doctrine precludes reconsideration of a previously decided issue unless one of three exceptional circumstances exists: (1) where substantially different evidence is raised on subsequent trial, (2) where a subsequent contrary view of the law is decided by the controlling authority, or (3) where a decision is clearly erroneous and would work a manifest injustice.

[9] KeyCite Notes 

⌐170B Federal Courts
The law of the case doctrine is limited to those issues decided in the earlier appeal, and the district court may therefore consider on remand those issues not decided expressly or impliedly by the appellate court.

[10] KeyCite Notes 

⌐170B Federal Courts
Where there is substantial doubt as to whether a prior appellate court actually decided an issue, the district court should not be foreclosed from considering the issue on remand.

[11] KeyCite Notes

198H Health
Provisions of Medicaid statute, requiring participating state to provide medical assistance to eligible beneficiaries, did not require state to provide medical services directly, but merely to provide financial assistance to those eligible persons to enable them to obtain the covered services; the Medicaid statute defined the term "medical assistance" as payment for the cost of the medical services, and the implementing regulations also indicated that financial assistance, rather than direct provision of the services, was required. Social Security Act, § 1902(a)(8), (a)(10), 42 U.S.C.A. § 1396a(a)(8), (a)(10); 42 C.F.R. §§ 435.911, 435.930.

[12] KeyCite Notes

198H Health
Provision of Medicaid statute, requiring participating state to ensure that medical services for eligible beneficiaries were accessible and available, and requiring reimbursement rates for services in general be sufficient to enlist enough providers, did not confer private right of action to compel enforcement of that provision under § 1983; provision had aggregate, rather than individual, focus, in that it did not identify individual benefits, but rather state's obligations, and broad language of provision was ill-suited to judicial remedy. 42 U.S.C.A. § 1983; Social Security Act, § 1902(a)(30), 42 U.S.C.A. § 1396a(a)(30).

[13] KeyCite Notes

78 Civil Rights
Section 1983 provides redress only for a plaintiff who asserts a violation of a federal right, not merely a violation of federal law. 42 U.S.C.A. § 1983.

[14] KeyCite Notes

78 Civil Rights
The appropriate inquiry in determining whether a federal statute creates a private right that is enforceable under § 1983 is whether or not Congress intended to confer individual rights upon a class of beneficiaries. 42 U.S.C.A. § 1983.

[15] KeyCite Notes

78 Civil Rights
Critical to determining whether a statute creates a private right enforceable under § 1983 is whether the pertinent statute contains rights-creating language that reveals congressional intent to create an individually enforceable right. 42 U.S.C.A. § 1983.

[16] KeyCite Notes

198H Health
Allegations by welfare rights organization that state participating in Medicaid program refused or failed to effectively inform eligible beneficiaries and their caretakers of the existence of the medical assistance children's healthcare program, the availability of specific child healthcare services, and related assistance stated claim under § 1983 for violations of provision of Medicaid statute, requiring state to inform all eligible children about the medical services available to them. 42 U.S.C.A. § 1983; Social Security Act, § 1902(a)(43)(A), 42 U.S.C.A. § 1396a(a)(43)(A).

[17] KeyCite Notes

78 Civil Rights
In order to establish a § 1983 claim, plaintiff's complaint must allege that (1) the conduct in controversy was committed by a person acting under color of law, and (2) the conduct deprived the plaintiff of a federal right, either constitutional or statutory. 42 U.S.C.A. § 1983.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit. No. 99-73442- Robert H. Cleland, District Judge.
ARGUED: Jennifer R. Clarke, Public Interest Law Center of Philadelphia, Philadelphia, Pennsylvania, for Appellants. Morris J. Klau, State of Michigan, Department of Attorney General, Detroit, Michigan, for Appellees. ON BRIEF: Jennifer R. Clarke, Public Interest Law Center of Philadelphia, Philadelphia, Pennsylvania, Arnon D. Siegel, Laura E. Robbins, Dechert LLP, Washington, D.C., for Appellants. Morris J. Klau, Luttrell D. Levingston, State of Michigan, Department of Attorney General, Detroit, Michigan, for Appellees.

Before: BOGGS, Chief Judge; MERRITT and MOORE, Circuit Judges.

OPINION

MERRITT, Circuit Judge.
***1** This suit filed under 42 U.S.C. § 1983 alleges that the State of Michigan has failed to provide services required by the Medicaid program. Plaintiffs, Westside Mothers, other advocacy and professional organizations, and five named individuals, allege that Janet Olszewski, director of the Michigan Department of Community Health, and Paul Reinhart, deputy director of the Michigan Medical Services Administration, did not provide the early and periodic screening, diagnosis, and treatment ("EPSDT") services mandated by the Medicaid Act.

[1] The Medicaid program, created in 1965 when Congress added Title XIX to the Social Security Act, provides federal financial assistance to States that choose to reimburse certain costs of medical treatment for the poor, elderly, and disabled. *See* 42 U.S.C. § 1396 *et seq.* (2000 & Supp.2005); *Harris v. McRae,* 448 U.S. 297, 301 (1980). "Although participation in the program is voluntary, participating States must comply with certain requirements imposed by the Act and regulations promulgated by the Secretary of Health and Human Services." *Wilder v. Va. Hosp. Ass'n,* 496 U.S. 498, 502, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990). At issue here is the requirement that participating States provide "early and periodic screening, diagnostic, and treatment services ··· for individuals who are eligible under the plan and are under the age of 21." 42 U.S.C. § 1396d(a)(4)(B); *see also* 42 U.S.C. § 1396d(r) (defining such services). The required services include periodic physical examinations, immunizations, laboratory tests, health education, *see* § 1396d(r)(1), eye examinations, eyeglasses, *see* § 1396d(r)(2), teeth maintenance, *see* § 1396d(r)(3), diagnosis and treatment of hearing disorders, and hearing aids, *see* § 1396d(r)(4).
In 1999, plaintiffs filed a civil action pursuant to 42 U.S.C. § 1983, which creates a cause of action against any person who under color of state law deprives an individual of "any rights, privileges, or immunities secured by the Constitution and laws" of the United States. They alleged that the defendants had refused or failed to implement the Medicaid Act, its enabling regulations, and its policy requirements by: (1) refusing to provide, and not requiring participating HMOs to provide, the comprehensive examinations required by 42 U.S.C. §§ 1396a(a)(43), 1396d(r)(1) and 42 C.F.R. § 441.57; (2) not requiring participating HMOs to provide the necessary health care, diagnostic services, and treatment required by 42 U.S.C. § 1396d(r)(5); (3) not effectively informing plaintiffs of the existence of the screening and treatment services, as required by 42 U.S.C. § 1396a(a)(43); (4) failing to provide plaintiffs the transportation and scheduling help needed to take advantage of the screening and treatment services, as required by 42 U.S.C. § 1396a(a)(43)(B) and 42 C.F.R. § 441.62; and (5) developing a Medicaid program that lacks the capacity to deliver to eligible children the care required by 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(30)(A), and 1396u-2(b)(5). (J.A. at 40-48.)
***2** In March 2001 the district court granted defendants' motion to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). *See Westside Mothers v. Haveman,* 133 F.Supp.2d 549 (E.D.Mich.2001). In a detailed and far-reaching opinion, the district court held that Medicaid was only a contract between a State and the federal government, that spending-power programs such as Medicaid were not supreme law of the land, that the court lacked jurisdiction over the case because Michigan was the "real defendant, and

therefore possess[ed] sovereign immunity against suit," *id.* at 553, that in this case *Ex parte Young*, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), was unavailable to circumvent the State's sovereign immunity, and that even if it were available § 1983 does not create a cause of action available to plaintiffs to enforce the provisions in question.

Plaintiffs appealed and, in an opinion dated May 15, 2002, a unanimous panel of the Sixth Circuit reversed all of these rulings. *See Westside Mothers v. Haveman (" Westside Mothers I ")*, 289 F.3d 852 (6th Cir.2002). Although our earlier decision focused predominantly on the jurisdictional grounds for the district court's dismissal, we also considered "[w]hether there is a private right of action under § 1983" for alleged noncompliance with the Medicaid Act. *Id.* at 862-63. We held that the "district court erred when it did not apply [the test set out in *Blessing v. Freestone*, 520 U.S. 329, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997),] to evaluate plaintiffs' claims." *Id.* at 863. We then applied the *Blessing* test to determine whether the screening and treatment provisions of the Medicaid Act create a right privately enforceable against state officers through § 1983:

First, the provisions were clearly intended to benefit the putative plaintiffs, children who are eligible for the screening and treatment services. *See* 42 U.S.C. § 1396a(a)(10)(A). "[I]t is well-settled that Medicaid-eligible children under the age of twenty-one ··· are the intended beneficiaries of the [screening and treatment] provisions." *Dajour B. v. City of New York*, 2001 WL 830674, at *8 (S.D.N.Y. July 23, 2001); *accord Miller v. Whitburn*, 10 F.3d 1315, 1319 (7th Cir.1993). We have found no federal appellate cases to the contrary. Second, the provisions set a binding obligation on Michigan. They are couched in mandatory rather than precatory language, stating that Medicaid services " *shall* be furnished" to eligible children, 42 U.S.C. § 1396a(a)(8) (emphasis added), and that the screening and treatment provisions " *must* be provided," *id.* § 1396a(a)(10)(A), *see also* 42 C.F.R. § 441.56 (mandatory language). Third, the provisions are not so vague and amorphous as to defeat judicial enforcement, as the statute and regulations carefully detail the specific services to be provided. *See* 42 U.S.C. § 1396d(r). Finally, Congress did not explicitly foreclose recourse to § 1983 in this instance, nor has it established any remedial scheme sufficiently comprehensive to supplant § 1983. *See Blessing*, 520 U.S. at 346-47, 117 S.Ct. 1353, 137 L.Ed.2d 569. ***3** Plaintiffs have a cause of action under § 1983 for alleged noncompliance with the screening and treatment provisions of the Medicaid Act.

Id.

On remand, the district court granted in part and denied in part the defendants' second motion to dismiss pursuant to Rule 12(b)(6). In light of the Supreme Court's decision in *Gonzaga University v. Doe*, 536 U.S. 273, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002), the district court reconsidered whether the specific provisions of the Medicaid Act that plaintiffs identified in their amended complaint create enforceable rights under § 1983. The district court concluded that 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10) create enforceable rights under § 1983, but that plaintiffs failed to state a claim that defendants had not discharged their obligations to provide medical assistance under §§ 1396a(a)(8), 1396a(a)(10). The district court further concluded that § 1396a(a)(43) creates enforceable rights under § 1983, that plaintiffs stated a cause of action for violations of § 1396a(a)(43)(B) to the extent that they alleged that the state of Michigan has a policy or practice of not providing the EPSDT services to eligible children who have requested them, but that plaintiffs failed to state a claim for violations of § 1396a(a)(43)(A). The district court also dismissed plaintiffs' claim for violations of § 1396a(a)(30) for failure to state a claim, reasoning that § 1396a(a)(30) "does not unambiguously confer individual rights enforceable under § 1983." (J.A. at 525.)

This appeal followed. For the reasons set forth below, we reverse in part and affirm in part but modify the district court's order.

I. Standard of Review

[2] We review de novo a district court's dismissal of claims pursuant to Federal Rule of Civil Procedure 12(b)(6). *Marks v. Newcourt Credit Group, Inc.*, 342 F.3d 444, 451 (6th Cir.2003). In deciding whether to grant a Rule 12(b)(6) motion, we "must construe the complaint in the light most favorable to the plaintiff, accept all factual allegations [of the plaintiff] as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief." *Id.* at 451-52. Our function is not to weigh the evidence or assess the credibility of witnesses, *Weiner v. Klais & Co.*, 108 F.3d 86, 88 (6th Cir.1997), but rather to examine the complaint and determine whether the plaintiff has pleaded a cognizable claim, *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir.1988). The motion should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Marks*, 342 F.3d at 452 (quoting *Cameron v. Seitz*, 38 F.3d 264, 270 (6th Cir.1994)).

II. Discussion

A.

[3] As a preliminary matter, we must consider whether our determination in *Westside Mothers I* that "[p]laintiffs have a cause of action under § 1983 for alleged noncompliance with the screening and treatment provisions of the Medicaid Act," *Westside Mothers I*, 289 F.3d at 863, was binding on the district court under the law of the case doctrine. On appeal, plaintiffs argue that the district court's reconsideration of whether the screening and treatment provisions of the Medicaid Act create enforceable rights under § 1983 was barred by the law of the case doctrine, and the district court therefore had "no power or authority to deviate" from our earlier decision in this case.

***4** [4] [5] [6] [7] The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Scott v. Churchill*, 377 F.3d 565, 569-70 (6th Cir.2004) (quoting *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983)). The doctrine precludes a court from reconsideration of issues "decided at an early stage of the litigation, either explicitly or by necessary inference from the disposition." *Hanover Ins. Co. v. Am. Eng'g Co.*, 105 F.3d 306, 312 (6th Cir.1997) (quoting *Coal Res., Inc. v. Gulf & Western Indus., Inc.*, 865 F.2d 761, 766 (6th Cir.1989)). Pursuant to the law of the case doctrine, and the complementary "mandate rule," upon remand the trial court is bound to "proceed in accordance with the mandate and law of the case as established by the appellate court." *Id.* (quoting *Petition of U.S. Steel Corp.*, 479 F.2d 489, 493 (6th Cir.), *cert. denied*, 414 U.S. 859, 94 S.Ct. 71, 38 L.Ed.2d 110 (1973)). The trial court is required to "implement both the letter and the spirit" of the appellate court's mandate, "taking into account the appellate court's opinion and the circumstances it embraces." *Brunet v. City of Columbus*, 58 F.3d 251, 254 (6th Cir.1995).

[8] The law of the case doctrine precludes reconsideration of a previously decided issue unless one of three "exceptional circumstances" exists: (1) where substantially different evidence is raised on subsequent trial; (2) where a subsequent contrary view of the law is decided by the controlling authority; or (3) where a decision is clearly erroneous and would work a manifest injustice. *Hanover Ins. Co.*, 105 F.3d at 312. None of these "exceptional circumstances" are present which would permit the district court to reconsider whether the provisions in question create enforceable rights under § 1983.

[9] However, the district court reasoned that the law of the case doctrine did not preclude it from reconsidering whether specific provisions of the Medicaid Act create enforceable rights under § 1983 because our earlier decision in *Westside Mothers I* did not decide this issue as to each specific statutory provision identified in the amended complaint. In support of the district court's decision, defendants contend that our failure to explicitly decide whether 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10), 1396a(a)(30), 1396a(a)(43) confer enforceable rights left the matter open for review by the district court. As the district court recognized, the law of the case doctrine is limited to those issues decided in the earlier appeal, and the district court may therefore consider those issues not decided expressly or impliedly by the appellate court. *See Hanover Ins. Co.*, 105 F.3d at 312. Thus, we must determine whether we expressly or impliedly decided in plaintiffs' first appeal whether §§ 1396a(a)(8), 1396a(a)(10), 1396a(a)(30), 1396a(a)(43) create rights enforceable under § 1983.

In *Westside Mothers I*, we identified a specific issue, i.e., "whether there is a private right of action under § 1983." 289 F.3d at 862. We held that the district court erred in failing to consider this issue within the framework established by the Supreme Court in *Blessing*. *Id.* at 863. Applying the *Blessing* test, we then concluded that "[p]laintiffs have a cause of action under § 1983 for alleged noncompliance with the screening and treatment provisions of the Medicaid Act." *Id.* In reaching this conclusion, we determined that the "provisions" were "clearly intended to benefit the putative plaintiffs," impose "a binding obligation on Michigan," and are "not so vague and amorphous as to defeat judicial enforcement." *Id.*

***5** [10] Because the holding refers generally to the "screening and treatment provisions," the opinion in *Westside Mothers I* creates considerable ambiguity as to whether the prior panel applied the *Blessing* test to each of the statutory provisions identified in the plaintiffs' amended complaint. There is therefore no assurance that the panel considered whether the specified provisions of the Medicaid Act confer enforceable

rights under § 1983 before holding that the plaintiffs have a cause of action under § 1983. Where there is substantial doubt as to whether a prior panel actually decided an issue, the district court should not be foreclosed from considering the issue on remand. *See United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 392, 398 (3d Cir.2003). Accordingly, we conclude that the law of the case doctrine does not apply and that our earlier decision in this case did not foreclose the district court's consideration of whether plaintiffs have a right of action under § 1983 to enforce violations of §§ 1396a(a)(8), 1396a(a)(10), 1396(a)(30), 1396a(a)(43).

B.

[11] The district court ruled that plaintiffs failed to state a claim for violations of 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10) "to the extent that they alleged failure by Defendants in their official capacity to ensure the actual provision of, or arrangement for, medical services." [FN1] (J.A. at 529.) In so ruling, the district court concluded that §§ 1396a(a)(8), 1396a(a)(10) require the State to pay some or all of the costs of certain medical services available to eligible individuals, but do not require the State to provide the services directly. (J.A. at 509.) Before the district court and in their briefs before this court, plaintiffs argued that §§ 1396a(a)(8), 1396a(a)(10) mandate the actual provision of, or arrangement for, certain medical services, including care, medicine, and equipment. Thus, the issue presented by this claim is whether the individual rights to "medical assistance" created by these provisions imposes an obligation on the State to provide services directly.

There appears to be some disagreement among the courts of appeals as to whether, pursuant to the Medicaid Act, a State must merely provide financial assistance to eligible individuals to enable them to obtain covered services, or provide the services directly. *See Sabree v. Richman,* 367 F.3d 180, 181 n. 1 (3d Cir.2004); *Bruggeman v. Blagojevich,* 324 F.3d 906, 910 (7th Cir.2003) ("[T]he statutory reference to 'assistance' appears to have reference to *financial* assistance rather than to actual medical *services,* though the distinction was missed in *Bryson v. Shumway,* 308 F.3d 79, 81, 88-89 (1st Cir.2002), and *Doe v. Chiles,* 136 F.3d 709, 714, 717 (11th Cir.1998)."). However, the Medicaid Act explicitly defines the term "medical assistance" as used in §§ 1396a(a)(8), 1396a(a)(10). "Medical assistance" means "payment of part or all of the cost of the [enumerated] services" to eligible individuals "who are under the age of 21." 42 U.S.C. § 1396d(a); *see Schott v. Olszewski,* 401 F.3d 682, 686 (6th Cir.2005) ("The Act defines 'medical assistance' as 'payment of part or all of the cost of the [covered] care and services ··· for individuals." ').

***6** Plaintiffs nevertheless contend that the language of §§ 1396a(a)(8), 1396a(a)(10) expands the definition of "medical assistance" beyond simply payment for services to include actual provision of services. After examining the text and the structure of the statute, we do not believe §§ 1396a(a)(8), 1396a(a)(10) require the State to provide medical services directly. The most reasonable interpretation of § 1396a(a)(8) is that all eligible individuals should have the opportunity to apply for medical assistance, i.e., financial assistance, and that such medical assistance, i.e., financial assistance, shall be provided to the individual with reasonable promptness. The most reasonable interpretation of § 1396a(a)(10) is that medical assistance, i.e., financial assistance, must be provided for at least the care and services listed in paragraphs (1) through (5), (17) and (21) of § 1396d(a). *See Clark v. Richman,* 339 F.Supp.2d 631, 641 (M.D.Pa.2004). The regulations that implement these provisions also indicate that what is required is a prompt determination of eligibility and a prompt payment to eligible individuals to enable them to obtain the necessary medical services. *See* 42 C.F.R. §§ 435.911, 435.930.

At oral argument, plaintiffs asserted that the payments were insufficient to enlist an adequate number of providers, which effectively frustrates §§ 1396a(a)(8), 1396a(a)(10) by foreclosing the opportunity for eligible individuals to receive the covered medical services. They now argue, for example, that they want to show that such payments are so inadequate in the Upper Peninsula of Michigan that there are no available providers. *See Health Care for All, Inc. v. Romney,* 2005 WL 1660677, at *10-11 (D.Mass. July 14, 2005) ("Setting reimbursement levels so low that private dentists cannot afford to treat Medicaid enrollees effectively frustrates [§ 1396a(a)(8)] by foreclosing the opportunity for enrollees to receive medical assistance at all, much less in a timely manner."); *Okla. Chapter of Am. Acad. of Pediatrics v. Fogarty,* 366 F.Supp.2d 1050, 1109 (N.D.Okla.2005) (finding a violation of § 1396a(a)(8) and reasoning that "[w]ithout financial assistance (provider reimbursement) sufficient to attract an adequate number of providers, reasonably prompt assistance is effectively denied"); *Sobky v. Smoley,* 855 F.Supp. 1123 (E.D.Cal.1994) (holding defendants liable for failure to comply with § 1396a(a)(8) where "insufficient funding ··· has caused providers of methadone maintenance to place eligible individuals on waiting lists for treatment"). Plaintiffs did not raise this argument in the amended complaint, before the district court, or in their briefs before this court. Because this appeal is from a dismissal for failure to state a claim, we are concerned with the sufficiency of the complaint, which does not contain this allegation. We therefore affirm the district court's

dismissal of the claim for violations of §§ 1396a(a)(8), 1396a(a)(10). However, because plaintiffs may be able to amend the complaint to allege that inadequate payments effectively deny the right to "medical assistance," we modify the district court's order to reflect a dismissal without prejudice to the filing of a motion to amend along with a proposed amendment to the complaint.

C.

***7** [12] Plaintiffs allege that defendants have developed a Medicaid program that does not provide access to eligible children to the care and services available under the plan, in violation of 42 U.S.C. § 1396a(a)(30). That provision requires a State plan for medical assistance to:

[P]rovide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan ··· as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area····

42 U.S.C. § 1396a(a)(30)(A). The district court held that § 1396a(a)(30) "does not unambiguously confer individual rights enforceable under § 1983" and that plaintiffs therefore failed to state a claim for violations of § 1396a(a)(30). (J.A. at 525.)

[13] Section 1983 provides a cause of action against State officials for "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws" but does not provide a mechanism through which citizens can enforce federal law generally. 42 U.S.C. § 1983. Instead, it provides redress only for a plaintiff who asserts a "violation of a federal *right,* not merely a violation of federal *law."* *Blessing v. Freestone,* 520 U.S. 329, 340, 117 S.Ct. 1353, 137 L.Ed.2d 569 (1997); *see also Wilder v. Va. Hosp. Ass'n,* 496 U.S. 498, 508, 110 S.Ct. 2510, 110 L.Ed.2d 455 (1990).

[14] [15] In *Blessing v. Freestone,* the Supreme Court set forth three requirements for establishing that a federal statute confers rights enforceable by § 1983:

First, Congress must have intended that the provision in question benefit the plaintiff. Second, the plaintiff must demonstrate that the right assertedly protected by the statute is not so "vague and amorphous" that its enforcement would strain judicial competence. Third, the statute must unambiguously impose a binding obligation on the States. In other words, the provision giving rise to the asserted right must be couched in mandatory, rather than precatory, terms.

520 U.S. at 340-41 (citations omitted). In *Gonzaga University v. Doe,* the Supreme Court acknowledged the continuing relevance of the *Blessing* test to "guide judicial inquiry into whether or not a statute confers a right." 536 U.S. 273, 282, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002); *see ASW v. Oregon,* 424 F.3d 970, 975 n. 6 (9th Cir.2005). The Court then clarified the first of *Blessing's* three requirements, making clear that only unambiguously conferred rights, as distinguished from mere benefits or interests, are enforceable under § 1983. *Gonzaga,* 536 U.S. at 282-83. The appropriate inquiry, therefore, is "whether or not Congress intended to confer individual rights upon a class of beneficiaries." *Id.* at 285. Critical to this inquiry is whether the pertinent statute contains "rights-creating" language that reveals congressional intent to create an individually enforceable right. *Id.* at 287.

***8** Prior to *Gonzaga,* the circuits were split on the question of whether § 1396a(a)(30) provides Medicaid recipients or providers with a right enforceable under § 1983. The Fifth and Eighth Circuits each held that Medicaid recipients have a private right of action under § 1396a(a)(30). *See Evergreen Presbyterian Ministries Inc. v. Hood,* 235 F.3d 908, 927-28 (5th Cir.2000); *Ark. Med. Soc'y, Inc. v. Reynolds,* 6 F.3d 519, 528 (8th Cir.1993); *cf. Pa. Pharmacists Ass'n v. Houstoun,* 283 F.3d 531, 543-44 (3d Cir.2002) (en banc) (positing, in dicta, a right for recipients while rejecting such a right for providers); *Visiting Nurse Ass'n v. Bullen,* 93 F.3d 997, 1004 n. 7 (1st Cir.1996) (positing, in dicta, a right for recipients while holding that such a right existed for providers). The First, Seventh, and Eighth Circuits held that a private right of action existed for Medicaid providers. *See Bullen,* 93 F.3d at 1005; *Methodist Hosps., Inc. v. Sullivan,* 91 F.3d 1026, 1029 (7th Cir.1996); *Ark. Med. Soc'y,* 6 F.3d at 528. By contrast, the Third and Fifth Circuits explicitly held that § 1396a(a)(30) did not create a right enforceable by Medicaid providers. *See Pa. Pharmacists Ass'n,* 283 F.3d at 543; *Walgreen Co. v. Hood,* 275 F.3d 475, 478 (5th Cir.2001); *Evergreen Presbyterian Ministries,* 235 F.3d at 929. Since *Gonzaga,* the federal courts of appeals considering whether § 1396a(a)(30) provides Medicaid recipients or providers with a right enforceable under § 1983 have also come to conflicting conclusions. *Compare Long Term Pharmacy Alliance v. Ferguson,* 362 F.3d 50, 59 (1st Cir.2004) (holding that Medicaid providers do not have a private right of action under § 1396a(a)(30)), *and Sanchez v. Johnson,*

416 F.3d 1051, 1062 (9th Cir.2005) (concluding that § 1396a(a)(30) does not unambiguously manifest congressional intent to create individual rights), *with* Pediatric Specialty Care, Inc. v. Ark. Dep't of Human Servs., 443 F.3d 1005, 1015-16 (8th Cir.2006) (holding that § 1396a(a)(30) is enforceable by Medicaid recipients and providers through a § 1983 private cause of action).

After examining the text and structure of § 1396a(a)(30), we agree with the First and Ninth Circuits that § 1396a(a)(30) fails the first prong of the *Blessing* test and does not therefore provide Medicaid recipients or providers with a right enforceable under § 1983. First, § 1396a(a)(30) has an aggregate focus rather than an individual focus that would evince congressional intent to confer an individually enforceable right. *See* Gonzaga, 536 U.S. at 282 (When a "provision focuse[s] on 'the aggregate services provided by the State,' rather than 'the needs of any particular person,' it confer[s] no individual rights and thus [cannot] be enforced by § 1983."); Sanchez, 416 F.3d at 1059. The provision speaks, not of individual benefits, but rather of the State's obligation to develop "methods and procedures." *See* § 1396a(a)(30)(A); Long Term Care Pharmacy Alliance, 362 F.3d at 57 (noting that "[t]he provision focuses instead upon the state as 'the person regulated rather than individuals protected' "). The only reference in § 1396a(a)(30) to recipients of Medicaid is in the aggregate, as members of "the general population in the geographic area." *See* § 1396a(a)(30)(A). The only reference to Medicaid providers is as indirect beneficiaries "enlisted" as subordinate partners in the administration of Medicaid services. *See* § 1396a(a)(30)(A). Far from focusing on a specific class of beneficiaries, § 1396a(a)(30) "is simply a yardstick for the Secretary to measure the *systemwide* performance of a State's [Medicaid] program." Blessing, 520 U.S. at 343.

***9** Second, the "broad and nonspecific," Gonzaga, 536 U.S. at 292 (Breyer, J., concurring in the judgment), language of § 1396a(a)(30) is ill-suited to judicial remedy, *see* Sanchez, 416 F.3d at 1060. The provision sets forth general objectives, including "efficiency, economy, and quality of care," but does not identify what standards are required by such terms. *See* § 1396a(a)(30)(A); Long Term Care Pharmacy Alliance, 362 F.3d at 58 (noting that "the criteria (avoiding overuse, efficiency, quality of care, geographic equality) are highly general"). The interpretation and balancing of these general objectives "would involve making policy decisions for which this court has little expertise and even less authority." Sanchez, 416 F.3d at 1060; *see also* Long Term Care Pharmacy Alliance, 362 F.3d at 58 (noting that the generality of the goals "suggests that plan review by the Secretary is the central means of enforcement intended by Congress"). Furthermore, § 1396a(a)(30) is not confined to particular services; rather, it speaks generally of "methods and procedures." *See* § 1396a(a)(30)(A). Such broad language suggests that § 1396a(a)(30) is "concerned with overall methodology rather than conferring individually enforceable rights on individual Medicaid recipients." Sanchez, 416 F.3d at 1059-60.

Because the text of § 1396a(a)(30) does not focus on individual entitlements, nor is the "broad and nonspecific" language of this provision amendable to judicial remedy, we are not persuaded that Congress has, with a clear voice, intended to create an individual right that either Medicaid recipients or providers would be able to enforce under § 1983. Without such unambiguous intent, plaintiffs cannot satisfy the first requirement of the *Blessing* test. We therefore hold that § 1396a(a)(30) does not confer enforceable rights and affirm the district court's dismissal of plaintiffs' § 1396a(a)(30) claim.

D.

[16] The district court held that plaintiffs failed to state a claim for violations of 42 U.S.C. § 1396a(a)(43)(A) because § 1396a(a)(43)(A) does not require "a participating State to 'effectively' inform all potentially eligible children of the EPSDT services." (J.A. at 527.) Section 1396a(a)(43)(A) requires a State plan for medical assistance to provide for:

[I]nforming all persons in the State who are under the age of 21 and who have been determined to be eligible for medical assistance including services described in section 1396d(a)(4)(B) of this title, of the availability of early and periodic screening, diagnostic, and treatment services as described in section 1396d(r) of this title and the need for age-appropriate immunizations against vaccine-preventable diseases····

42 U.S.C. § 1396a(a)(43)(A). Implementing regulations obligate States to provide for written and oral methods designed to "effectively" inform all eligible individuals about the EPSDT program. 42 C.F.R. § 441.56(a).

***10** [17] The complaint, read in the light most favorable to the plaintiffs, supports a § 1983 claim for violations of § 1396a(a)(43)(A). In order to establish a § 1983 claim, plaintiff's complaint must allege that (1) the conduct in controversy was committed by a person acting under color of law, and (2) the conduct deprived the plaintiff of a federal right, either constitutional or statutory. Lugar v. Edmondson Oil Co., 457 U.S. 922, 930, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982). The amended complaint alleges that defendants "refused or failed to *effectively inform* Plaintiffs and their caretakers of the existence of the Medical

Assistance children's healthcare program, the availability of specific child healthcare services, and related assistance." (J.A. at 205.) (Emphasis added.) In concluding that plaintiffs' allegation that defendants failed to "effectively inform" them of the EPSDT services does not state a viable § 1983 claim, the district court ignored the Medicaid Act's implementing regulations, which obligate participating States to "effectively" inform all eligible individuals. *See* 42 C.F.R. § 441.56(a). Plaintiffs have stated a cognizable claim under § 1983 for violations of § 1396a(a)(43)(A) and should proceed to discovery for further development of the facts.

III. Conclusion

For the foregoing reasons, we affirm the district court's judgment of dismissal of the claim for violations of §§ 1396a(a)(8), 1396a(a)(10), but we modify the district court's order to reflect a dismissal without prejudice; affirm the dismissal of the § 1396a(a)(30) claim; reverse the dismissal of the § 1396a(a)(43) claim; and remand for further proceedings consistent with this opinion.

FN1. Section 1396a(a)(8) provides in relevant part:

A State plan for medical assistance must ··· provide that all individuals wishing to make application for *medical assistance* under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals····

42 U.S.C. § 1396a(a)(8) (emphasis added).

Section 1396a(a)(10) states in relevant part:

A State plan for medical assistance must ··· provide for making *medical assistance* available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1396d(a) of this title to all [eligible] individuals····

42 U.S.C. § 1396a(a)(10)(A) (emphasis added).

Copr. (C) West 2006 No Claim to Orig. U.S. Govt. Works C.A.6 (Mich.),2006.
Westside Mothers v. Olszewski
--- F.3d ----, 2006 WL 1976057 (C.A.6 (Mich.)), 2006 Fed.App. 0247P

Briefs and Other Related Documents (Back to top)

• 05-1669 (Docket) (May 26, 2005)
END OF DOCUMENT

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF BALLARD RURAL TELEPHONE COOPERATIVE CORPORATION, INC. FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF PROPOSED INTERCONNECTION AGREEMENT WITH AMERICAN CELLULAR F/K/A ACC KENTUCKY LICENSE LLC, PURSUANT TO THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996	)	CASE NO. 2006-00215

O R D E R

This matter is before the Commission on the joint motion to consolidate arbitration proceedings filed by Alltel Communications, Inc. ("Alltel"); American Cellular Corporation ("ACC"); New Cingular Wireless PCS, LLC, successor to BellSouth Mobility LLC and BellSouth Personal Communications LLC and Cincinnati SMSA Limited Partnership d/b/a Cingular Wireless ("Cingular"); Sprint Spectrum L.P., on behalf of itself and SprintCom, Inc., d/b/a Sprint PCS ("Sprint PCS"); T-Mobile USA, Inc., Powertel/Memphis, Inc., and T-Mobile Central LLC ("T-Mobile"); and Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated, and Kentucky RSA No. 1 Partnership ("Verizon Wireless") (collectively referred to as the "CMRS Providers"). A response has been filed on behalf of Ballard Rural Telephone Cooperative Corporation, Inc., Brandenburg Telephone Company, Duo County Telephone Cooperative Corporation, Inc., Foothills Rural Telephone Company, Logan

Telephone Cooperative, Inc., Mountain Rural Telephone Cooperative Corporation, Inc., North Central Telephone Cooperative, Inc., Peoples Rural Telephone Cooperative Corporation, Inc., South Central Rural Telephone Cooperative Corporation, Inc., Thacker-Grigsby Telephone Company, Inc., and West Kentucky Rural Telephone Cooperative Corporation, Inc. (collectively referred to as the "RLECs"), and the motion is now ripe for review.

These cases are filed pursuant to Section 252 of the Communications Act of 1934 as amended by the Telecommunications Act of 1996 (the "Act"). Following a telephonic conference with counsel of record and Commission staff, on June 19, 2006, the Commission ordered the CMRS Providers to file a consolidated response to the arbitration petitions filed by the RLECs in the cases set forth in Appendix A, attached hereto. The CMRS Providers were also permitted to file the instant joint motion to consolidate and the RLECs were permitted to file a joint response to any joint motion to consolidate.

The Act authorizes the Commission to consolidate arbitration proceedings when appropriate:

> Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings. . .in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under the Act.

47 U.S.C. § 252(g).

The consolidated response identifies 28 issues common to the majority of the arbitration petitions which generally relate to the scope of the interconnection agreements, the terms of direct and indirect interconnection, and compensation for

services. While the Commission agrees that there are significant areas of commonality presented by the arbitration petitions, the Commission also notes that the CMRS Providers concede that the calculation of appropriate total long run incremental cost ("TELRIC") based rates for transport and termination will be unique to each RLEC.

Although the Commission recognizes that other state regulatory commissions have elected to consolidate numerous arbitration cases into a single proceeding, we are not convinced that such an omnibus consolidation is the best method for resolving these cases. Accordingly, the Commission will consolidate the 41 cases which are covered by the joint motion to consolidate into 12 cases centered upon the RLECs which are participating in these cases. The RLECs assert that if consolidation is ordered, the cases should be grouped according to individual RLECs' filings. This grouping should permit the parties to enjoy many of the benefits of consolidation suggested in the CMRS Providers' joint motion while minimizing participation in matters not relevant to any given party. We find such a consolidation to be entirely consistent with the mandate of the Act. A listing of the cases as consolidated is attached hereto as Appendix B.

We also hereby enter the schedule set forth in Appendix C of this Order to govern in each of the 12 consolidated proceedings. TELRIC studies are ordered herein to provide the Commission with a sufficient basis to establish the rates requested by the RLECs. Due to the number of arbitration petitions at issue and the relatively short time period for processing each case, the Commission will not deviate from the schedule except in the most rare instance of good cause being shown. The Commission will not impose any additional procedural conditions on the parties at this time, but fully anticipates that the parties will act whenever possible to minimize unnecessary

duplication of efforts and resources in each of the 12 consolidated proceedings. The Commission may enter a separate order at a later date setting forth in detail the process and procedures to be followed in conducting the hearings of the consolidated cases and may permit portions of the hearings to be further consolidated as circumstances may warrant.

IT IS THEREFORE ORDERED that:

1. The CMRS Providers' joint motion for consolidation of arbitration petitions is granted in part and denied in part as set forth more fully herein.

2. The 41 cases identified in Appendix A shall be consolidated into 12 cases as set forth in Appendix B with the first-filed case by each RLEC to be the lead case and the case in which all subsequent pleadings and documents are to be filed of record.

3. The following cases are hereby consolidated into this proceeding and are stricken from the Commission's docket: 2006-00216, 2006-00233, 2006-00239, 2006-00243, and 2006-00249.

4. The parties shall abide by the schedule set forth in Appendix C unless otherwise ordered by the Commission.

Done at Frankfort, Kentucky, this 25th day of July, 2006.

By the Commission

ATTEST:

Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN CASE NO. 2006-00215 DATED July 25, 2006

2006-00215	Petition of Ballard Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With American Cellular F/K/A ACC Kentucky License LLC, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00216	Petition of Ballard Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00217	Petition of Duo County Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00218	Petition of Logan Telephone Cooperative, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With American Cellular Corporation f/k/a ACC Kentucky License LLC, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00219	Petition of Logan Telephone Cooperative, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

2006-00220	Petition of West Kentucky Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With American Cellular Corporation f/k/a ACC Kentucky License LLC, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00221	Petition of West Kentucky Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00232	Petition of Duo County Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Alltel Communications, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00233	Petition of Ballard Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Alltel Communications, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00234	Petition of West Kentucky Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Alltel Communications, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00235	Petition of Logan Telephone Cooperative, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Alltel Communications, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00239	Petition of Ballard Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

2006-00240	Petition of Duo County Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00241	Petition of Logan Telephone Cooperative, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00242	Petition of West Kentucky Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00243	Petition of Ballard Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With New Cingular Wireless PCS, LLC and Cincinnati SMSA Limited Partnership Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00244	Petition of Duo County Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With New Cingular Wireless PCS, LLC and Cincinnati SMSA Limited Partnership Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00245	Petition of West Kentucky Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With New Cingular Wireless PCS, LLC and Cincinnati SMSA Limited Partnership Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00249	Petition of Ballard Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Sprint Spectrum, L.P., and SprintCom, Inc. d/b/a Sprint PCS Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

2006-00250	Petition of Duo County Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Sprint Spectrum, L.P., and SprintCom, Inc. d/b/a Sprint PCS, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00251	Petition of Logan Telephone Cooperative, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Sprint Spectrum, L.P., and SprintCom, Inc. d/b/a Sprint PCS Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00252	Petition of North Central Telephone Cooperative Corporation, For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With American Cellular Corporation f/k/a ACC Kentucky License LLC, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00253	Petition of North Central Telephone Cooperative Corporation, For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00254	Petition of North Central Telephone Cooperative Corporation, For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00255	Petition of South Central Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

2006-00256	Petition of West Kentucky Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Sprint Spectrum, L.P., and SprintCom, Inc. d/b/a Sprint PCS Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00257	Petition of North Central Telephone Cooperative Corporation, For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Sprint Spectrum, L.P., and SprintCom, Inc. d/b/a Sprint PCS Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00288	Petition of Brandenburg Telephone Company For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00289	Petition of Brandenburg Telephone Company For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00290	Petition of South Central Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With New Cingular Wireless PCS, LLC and Cincinnati SMSA Limited Partnership, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00291	Petition of South Central Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc., Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

2006-00292	Petition of Foothills Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00293	Petition of Foothills Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00294	Petition of Gearheart Communications Inc. d/b/a Coalfields Telephone Company, For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00295	Petition of Gearheart Communications Inc. d/b/a Coalfields Telephone Company, For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00296	Petition of Mountain Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00297	Petition of Mountain Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

2006-00298	Petition of Peoples Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00299	Petition of Peoples Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00300	Petition of Thacker-Grigsby Telephone Company, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00301	Petition of Thacker-Grigsby Telephone Company, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

APPENDIX B

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN CASE NO. 2006-00215 DATED July 25, 2006

BALLARD RURAL TELEPHONE COOPERATIVE CORPORATION, INC.

2006-00215	Petition of Ballard Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With American Cellular F/K/A ACC Kentucky License LLC, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996 (Lead Case)
2006-00216	Petition of Ballard Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00233	Petition of Ballard Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Alltel Communications, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00239	Petition of Ballard Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00243	Petition of Ballard Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With New Cingular Wireless PCS, LLC and Cincinnati SMSA Limited Partnership Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00249	Petition of Ballard Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Sprint Spectrum, L.P., and SprintCom, Inc. d/b/a Sprint PCS Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

BRANDENBURG TELEPHONE COMPANY

2006-00288	Petition of Brandenburg Telephone Company For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996 (Lead Case)
2006-00289	Petition of Brandenburg Telephone Company For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

DUO COUNTY TELEPHONE COOPERATIVE CORPORATION, INC.

2006-00217	Petition of Duo County Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996 (Lead Case)
2006-00232	Petition of Duo County Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Alltel Communications, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00240	Petition of Duo County Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00244	Petition of Duo County Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With New Cingular Wireless PCS, LLC and Cincinnati SMSA Limited Partnership Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

2006-00250 Petition of Duo County Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Sprint Spectrum, L.P., and SprintCom, Inc. d/b/a Sprint PCS, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

FOOTHILLS RURAL TELEPHONE COOPERATIVE CORPORATION, INC.

2006-00292 Petition of Foothills Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
(Lead Case)

2006-00293 Petition of Foothills Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

GEARHEART COMMUNICATIONS INC.
D/B/A COALFIELDS TELEPHONE COMPANY

2006-00294 Petition of Gearheart Communications Inc. d/b/a Coalfields Telephone Company, For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
(Lead Case)

2006-00295 Petition of Gearheart Communications Inc. d/b/a Coalfields Telephone Company, For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

LOGAN TELEPHONE COOPERATIVE, INC.

2006-00218	Petition of Logan Telephone Cooperative, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With American Cellular Corporation f/k/a ACC Kentucky License LLC, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996 (Lead Case)
2006-00219	Petition of Logan Telephone Cooperative, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00235	Petition of Logan Telephone Cooperative, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Alltel Communications, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00241	Petition of Logan Telephone Cooperative, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00251	Petition of Logan Telephone Cooperative, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Sprint Spectrum, L.P., and SprintCom, Inc. d/b/a Sprint PCS Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

MOUNTAIN RURAL TELEPHONE COOPERATIVE CORPORATION, INC.

2006-00296	Petition of Mountain Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996 (Lead Case)

2006-00297 Petition of Mountain Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

NORTH CENTRAL TELEPHONE COOPERATIVE CORPORATION

2006-00252 Petition of North Central Telephone Cooperative Corporation, For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With American Cellular Corporation f/k/a ACC Kentucky License LLC, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996 (Lead Case)

2006-00253 Petition of North Central Telephone Cooperative Corporation, For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

2006-00254 Petition of North Central Telephone Cooperative Corporation, For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

2006-00257 Petition of North Central Telephone Cooperative Corporation, For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Sprint Spectrum, L.P., and SprintCom, Inc. d/b/a Sprint PCS Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

PEOPLES RURAL TELEPHONE COOPERATIVE CORPORATION, INC.

2006-00298 Petition of Peoples Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996 (Lead Case)

2006-00299 Petition of Peoples Rural Telephone Cooperative Corporation, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

SOUTH CENTRAL RURAL TELEPHONE COOPERATIVE CORPORATION, INC.

2006-00255 Petition of South Central Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
(Lead Case)

2006-00290 Petition of South Central Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With New Cingular Wireless PCS, LLC and Cincinnati SMSA Limited Partnership, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

2006-00291 Petition of South Central Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc., Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

THACKER-GRIGSBY TELEPHONE COMPANY, INC.

2006-00300 Petition of Thacker-Grigsby Telephone Company, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
(Lead Case)

2006-00301 Petition of Thacker-Grigsby Telephone Company, Inc., For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

WEST KENTUCKY RURAL TELEPHONE COOPERATIVE CORPORATION, INC.

2006-00220	Petition of West Kentucky Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With American Cellular Corporation f/k/a ACC Kentucky License LLC, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996 (Lead Case)
2006-00221	Petition of West Kentucky Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Cellco Partnership d/b/a Verizon Wireless, GTE Wireless of the Midwest Incorporated d/b/a Verizon Wireless, and Kentucky RSA No. 1 Partnership d/b/a Verizon Wireless, Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00234	Petition of West Kentucky Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Alltel Communications, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00242	Petition of West Kentucky Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With T-Mobile USA, Inc. Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00245	Petition of West Kentucky Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With New Cingular Wireless PCS, LLC and Cincinnati SMSA Limited Partnership Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996
2006-00256	Petition of West Kentucky Rural Telephone Cooperative Corporation, Inc. For Arbitration of Certain Terms and Conditions of Proposed Interconnection Agreement With Sprint Spectrum, L.P., and SprintCom, Inc. d/b/a Sprint PCS Pursuant To the Communications Act of 1934, As Amended by the Telecommunications Act of 1996

APPENDIX C

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION IN CASE NO. 2006-00215 DATED July 25, 2006

Parties negotiate a protective agreement to govern the exchange of confidential information 8/1/06

RLECs file and serve TELRIC-based cost studies and written testimony in support of those cost studies, on which they rely to demonstrate that their proposed reciprocal compensation rates meet the pricing standards of 47 U.S.C. § 252(d)(2) and the FCC's part 51 pricing rules. The cost studies will be provided in both hard copy and in electronic format that will allow the Commission and the CMRS Providers to track each element from initial input to final results. All cost studies will be provided in open format 8/16/06

Written discovery requests shall be filed with the Commission and served on all parties electronically 8/23/06

Responses and all objections to discovery shall be filed and served electronically 9/7/06

Supplemental discovery requests shall be filed with the Commission and served on all parties electronically 9/14/06

Responses and objections to supplemental discovery shall be filed and served electronically 9/22/06

Direct testimony (other than RLEC cost witnesses) shall be filed and served 9/29/06

Rebuttal testimony shall be filed and served 10/6/06

Public hearing is to begin at 9:00 a.m., Eastern Daylight Time, in Hearing Room 1 Of the Commission's offices at 211 Sower Boulevard, Frankfort, Kentucky 10/16-18/06

Opening briefs shall be filed by 11/3/06

Reply briefs shall be filed by 11/15/06

Commission decision ..... End of December

-2003 KY Order Book

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

O R D E R

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

Allegations by ALLTEL Concerning Due Process

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

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

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

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

[2] ALLTEL Brief at 58.

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

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

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

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

[4] ALLTEL Brief at 55.

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

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

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

[5] Tr. at 53-54.

[6] ALLTEL Brief at 56-57.

[7] ALLTEL Brief at 57.

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

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

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

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

[10] ALLTEL Brief at 56.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[17] KRS 278.020(5).

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

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

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

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

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

Access to Unbundled Local Switching and Transport

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

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

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

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

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

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

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

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

[24] TRO Order, Paragraph 135.

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

[26] TRO Order, Paragraph 87.

[27] TRO Order, Paragraph 87.

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

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

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

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

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

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

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

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

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[30] ALLTEL Brief at 25-26.

[31] TRO Order at Paragraph 495.

[32] TRO Order at Paragraph 496.

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

UNE Pricing

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

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

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

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

UNE Port Usage

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

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

Reciprocal Compensation

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

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

Interconnection and Direct Trunk Groups

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

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

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

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

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

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

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

By the Commission

ATTEST:

Executive Director

Not Reported in S.W.2d, 1997 WL 92079 (Tenn.Ct.App.)
(Cite as: Not Reported in S.W.2d)

Only the Westlaw citation is currently available.
SEE COURT OF APPEALS RULES 11 AND 12
Court of Appeals of Tennessee,Middle Section, at Nashville.
TENNESSEE CONSUMER ADVOCATE,
Plaintiff/Appellant,
v.
TENNESSEE REGULATORY AUTHORITY AND UNITED CITIES GAS COMPANY,
Defendant/Appellee.
March 5, 1997.

Appeal from the Davidson County Tennessee Public Service Commission, at Nashville, Tennessee.

Charles W. Burson, Attorney General & Reporter, L. Vincent Williams, Consumer Advocate Division, Nashville, for Plaintiff/Appellant.
H. Edward Phillips, III, Tennessee Regulatory Authority, Nashville, for Defendant/Appellee.

OPINION

TODD, Presiding Judge.

***1** The petitioner, Tennessee Consumer Advocate, has petitioned this Court for review of administrative decisions of the Tennessee Public Services Commission pursuant to T.R.A.P. Rule 12. By order entered by this Court on October 3, 1996, the review is limited to an order entered by the Commission on May 3, 1996. However, the circumstances stated hereafter require reference to an order previously entered by the Tennessee Public Service Commission on May 12, 1995.

The Parties.

Prior to June 30, 1996, the Public Service Commission controlled the charges of public utilities in Tennessee. On June 30, 1996, the Public Service Commission was discontinued by enactment of the Legislature which created the Tennessee Regulatory Commission which has been substituted for the Public Service Commission in proceedings before this Court.

By T.C.A. § 65-4-118, the Consumer Advocate Division of the Office of Attorney General and Reporter may with the approval of the Attorney General and Reporter appear before any administrative body in the interests of Tennessee consumers of public utility services.

United Cities Gas Company is a public utility which purchases and distributes natural gas through its pipelines to patrons in parts of Tennessee.

The Administrative Proceedings.

On January 20, 1995, United filed with the Public Utilities Commission (hereafter P.S.C.), an application for approval of a scheme of variable rates based upon the wholesale price of gas purchased from suppliers.

P.S.C. granted leave to the Consumer Advocate to intervene.

On May 12, 1995, the P.S.C. entered an order approving the proposed scheme on condition that an independent consultant be engaged to review the " mechanism" and report to the commission annually.

On October 31, 1995, United Gas submitted to the Commission for approval, a contract with Consulting & Systems Integration, providing that the work was to be performed by a Mr. Frank Creamer. Subsequently, United Gas requested that Anderson Consulting be substituted for Consulting Systems because Mr. Creamer had severed his connection with Consulting Systems and affiliated with Anderson.

The May 3, 1996, order of the Commission, which

is the subject of this appeal, approved the contract with Anderson Consulting and thereby satisfied all of the conditions for activation of the rate plan conditionally approved in the May 12, 1995 order.

On appeal, the Consumer Advocate presents ten issues for review. Only those which relate to the May 3, 1996, order will be considered.

The appellant's fourth, fifth, sixth and seventh issues are:
IV. The commission's action violated statutory provisions, was asked upon unlawful procedure, was arbitrary and capricious, or was clear error when it took judicial notice of a report prepared by a consultant of UCG.
V. The Consumer Advocate was denied an opportunity to be heard as to the propriety of taking judicial notice of the report.
VI. The Consumer Advocate division was not notified of the material noticed and afforded an opportunity to contest and rebut the facts or material so noticed.
***2** VII. A decision of the Tennessee Public Service Commission is void or voidable when agency members receive aid from staff assistants, and such persons received ex parte communications of a type that the administrative judge hearing officer or agency members would be prohibited from receiving, and which furnish, augment, diminish or modify the evidence in the record in violation of Tenn.Code Ann. § 4-5-304(b).

At a hearing before the Commission on February 3, 1996, the following occurred:
Mr. Irion: We have the independent consultant here. Does the Commission on wish to hear from him?
Chairman: I think what we have agreed to is just summarize his testimony.
Mr. Williams: He has not made any testimony, and-
Mr. Irion: He has only filed a report, and he is not technically our witness or-
Mr. Williams: I think he is their witness. They chose him and paid for him. We did not have any choice. The Consumer Advocate was not given any choice in the matter who was going to be the witness.
Chairman: The Commission can take judicial notice of that, that record. That's our record.
Com. Hewlett: This is our consultant.
Mr. Hal Novak: That's correct, sir. The Commission staff chose this consultant.
Chairman: We can take judicial notice of that and it can referred to in your argument here.
Mr. Williams: I would say that the Commission staff approved the consultant after the company selected the consultant.
Mr. Novak: That's not true, sir.
Chairman: Well, now wait a minute now, fellows. We can take judicial notice, and will take judicial notice of all our records and reports like that to the Commission and you can refer to that in your argument.
Mr. Williams: What I would also like to do, Commissioner, maybe we need to have a longer period of time. I would like to know what the staff's position-it was indicated that the staff had a position that the rule operated effectively, that the Commissioners had obviously heard and were considering. I would like disclosure under the statute of the staff's position on why they think that it operates correctly.
Com. Hewlett: Well, that would be in my way of thinking not impossible to get into the record, but very difficult it is most appropriate, as I understand the law, for us to discuss withour technical staff. That's the reason that the Consumer Advocate Division was created because of the ex parte concerns of when our staff were parties to the case and when they are not. Our staff, as I understand it, it not a party to this case, and they are a resource for us for analyzing anything that is before this Commission. In this case this situation. So, I think you are trying to make a party to the case somebody that is not.
Mr. Williams: No, sir, what we are trying to do is get all the salient information on the record. The statute explicitly, the UAPA explicitly requires that the Commission disclose when it has any of the position papers that are presented by the staff, and the Public Records Act does not prevent the disclosure of those items either.
***3** Chairman: We will rule on that at the beginning of the meeting at 1:30.
Mr. Williams: Okay.
Chairman: Well, we will evaluate that with our

legal counsel, and rule on it before issuing an order or in the order in this manner.

The record of proceedings clearly indicates that the Commission considered a report of an expert despite the objections of the Consumer Advocate and his efforts to impeach the report by cross-examination of the expert. T.C.A. § 65-2-109(1) and (2), authorize the consideration of a broad spectrum of evidence. However, no authority is cited to empower the Commission to deny a protesting party access to all evidence considered by the Commission and opportunity to impeach it by cross-examination of the origin of such evidence.

The issue of consideration of documents and/or communications is not an issue of "judicial notice" or "administrative notice," but an issue of admissibility of evidence and procedural fairness in respect to notice of the matter to be considered and opportunity to cross-examine, or impeach the source or contradict the evidence to be considered.

It is elementary that administrative agencies are permitted to consider evidence which, in a court of law, would be excluded under the liberal practice of administrative agencies. Almost any matter relevant to the pending issue may be considered, provided interested parties are given adequate notice of the matter to be considered and full opportunity to interrogate, cross-examine and impeach the source of information and to contradict the information.

No error is found in the consideration of informal forms of communication. However, error is found in the failure to give timely notice of the communication with opportunity to question, cross-examine and impeach the source and contradict the information.

As illustrated by the above quotation from the record, the Commission was unfamiliar with basic rules of fairness in an administrative hearing.
Tenn.Code Ann. § 4-5-312(b)
Procedure of hearing. To the extent necessary for full disclosure of all relevant facts and issues, the administrative judge or hearing officer shall afford to all parties the opportunity to respond, present evidence and argument, conduct cross-examination, and submit rebuttal evidence, as restricted by a limited grant of intervention or by the pre-hearing order. (Emphasis added.)
Tenn.Code Ann. § 4-5-313(6)

Parties must be notified before or during the hearing, or before the issuance of any initial or final order that is based in whole or in part on facts or material noticed, of the specific facts or material noticed and the source thereof, including any staff memoranda and data, and be afforded anopportunity to contest and rebut the facts or material so noticed.
Tenn.Code Ann. § 4-5-304(a)(b)
Ex parte communications.
(a) Unless required for the disposition of ex parte matters specifically authorized by statute, an administrative judge, hearing officer or agency member serving in a contested case proceeding may not communicate, directly or indirectly, regarding any issue in the proceeding, while the proceeding is pending, with any person without notice and opportunity for all parties to participate in the communication.
***4** (b) Notwithstanding subsection (a), an administrative judge, hearing officer or agency member may communicate with agency members regarding a matter pending before the agency or may receive aid from staff assistants, members of the staff of the attorney general and reporter, or a licensed attorney, if such persons do not receive ex parte communications of a type that the administrative judge, hearing officer or agency members would be prohibited from receiving, and do not furnish, augment, diminish or modify the evidence in the record. (Emphasis added.)

This Court concludes that the Commission commited a violation of basic principles of fairness in failing to afford the Consumer Advocate reasonable access to the materials to be considered and reasonable opportunity to cross-examinate or otherwise impeach the origin of such materials..

For the foregoing reasons, the order entered by the Public Service Commission on May 3, 1996, is reversed, vacated, and the cause is remanded to the Tennessee Regulatory Authority for such further proceedings and actions as it may deem appropriate including a reconsideration of the subject of the May 3, 1996, order of the Public Service Commission.

Should the Regulatory Authority reach a conclusion different from that expressed in the May 3, 1996, order of the Commission, the way may be opened for a further consideration of the subject matter of the May 26, 1995, order, in which event the authority will be free to examine the merits of the order and the proposal dealt with therein.

Of particular interest and concern are the propriety of omitting certain income from considering "fair return," of "rewarding" utility for keeping its expenses at the minimum, and of utilizing the services of an expert employed by the utility. These issues have not been discussed in this opinion because of the limitation of the scope of the appeal granted by this Court.

Costs of this appeal are assessed against the Tennessee Regulatory Authority.

REVERSED AND REMANDED.

CANTRELL and KOCH, JJ., concur.
Tenn.App.,1997.
Tennessee Consumer Advocate v. Tennessee Regulatory Authority
Not Reported in S.W.2d, 1997 WL 92079 (Tenn.Ct.App.)

END OF DOCUMENT

CERTIFICATE OF SERVICE

I hereby certify that on August 4th, 2006, a true and correct copy of the foregoing has been served on the parties of record, via the method indicated:

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