BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	:	
COMPLAINT OF	:	
CONCORD TELEPHONE EXCHANGE, INC.,	:	
HUMPHREYS COUNTY TELEPHONE	:	
COMPANY, TELLICO TELEPHONE	:	
COMPANY, TENNESSEE TELEPHONE	:	
COMPANY, CROCKETT TELEPHONE	:	DOCKET NO.: 1100108
COMPANY, INC. PEOPLES TELEPHONE	:	
COMPANY, WEST TENNESSEE	:	
TELEPHONE COMPANY, INC., NORTH	:	
CENTRAL TELEPHONE COOP., INC. AND	:	
HIGHLAND TELEPHONE COOPERATIVE,	:	
INC. AGAINST HALO WIRELESS, INC.,	:	
TRANSCOM ENHANCED SERVICES, INC.	:	
AND OTHER AFFILIATES FOR FAILURE	:	
TO PAY TERMINATING INTRASTATE	:	
ACCESS CHARGES FOR TRAFFIC AND	:	
OTHER RELIEF AND AUTHORITY TO	:	
CEASE TERMINATION OF TRAFFIC	:	

HALO WIRELESS, INC.'S
REPLY IN SUPPORT OF MOTION TO DISMISS

COMES NOW Halo Wireless, Inc. ("Halo"), and files this its Reply in Support of Motion to Dismiss ("Reply"), and in support thereof would respectfully show as follows:

In their Response in Opposition to Motion to Dismiss (the "Response"), the complainants implicitly ask the Tennessee Regulatory Authority ("TRA") to ignore the rule of law. Therefore, in ruling on the Motion to Dismiss, the TRA must answer the question – does the rule of law apply in proceedings before the TRA or does it not?

Halo's position is that it is providing commercial mobile radio service ("CMRS")-based telephone exchange service to end user customers, and all of the communications at issue originate from end user wireless customer premises equipment ("CPE") that is located in the same MTA as the terminating location. As a CMRS provider, Halo lawfully can provide

telephone exchange service to high-volume end users, such as Transcom, because Transcom is an enhanced service provider ("ESP"). None of the traffic is associated with a telephone toll service provided by or to Halo or Transcom Enhanced Services, Inc. ("Transcom"), so "exchange access" charges cannot apply.

Four federal court decisions (the "ESP rulings") directly construed and then decided Transcom's regulatory classification and specifically held that Transcom (1) is not a carrier; (2) does not provide telephone toll service or any telecommunications service; (3) is an end user; (4) is not required to procure exchange access in order to obtain connectivity to the public switched telephone network ("PSTN"); and (5) may instead purchase telephone exchange service just like any other end user. Three of these decisions were reached after the so-called "IP-in-the-Middle" and "AT&T Calling Card" orders[1] and expressly took them into account.

It was and is eminently reasonable for Halo to rely on these decisions as the basis for its position and business model. No law has changed since they were issued. No court has held to the contrary. The Federal Communications Commission ("FCC") has not held to the contrary.

The complainants' Response fails to adequately deal with the *legal* issue of the TRA's limited jurisdiction under state law and the expansive preemption that has been imposed under federal law. As Halo noted, the TRA cannot decide to undertake whether Halo's services are or are not "CMRS," and therefore, within the scope of activities authorized by Halo's Radio Station Authorization. That issue is within the exclusive province of the FCC. Equally important, the TRA lacks jurisdiction under state law. Halo's license means it is not a public utility under

[1] *See* Order, *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, 19 FCC Rcd 7457 (rel. April 21, 2004) ("*AT&T Declaratory Ruling*" also known as "*IP-in-the-Middle*"); Order and Notice of Proposed Rulemaking, *In the Matter of AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services Regulation of Prepaid Calling Card Services*, WC Docket Nos. 03-133, 05-68, FCC 05-41, 20 FCC Rcd 4826 (rel. Feb. 2005) ("*AT&T Calling Card Order*").

Tenn. Code Ann. § 65-4-101(6)(A)(vi). This provision operates as a "complete removal of regulatory authority." *In Re Declaratory Ruling and Nunc Pro Tunc Designation of Nexus Communications as an Eligible Telecommunications Carrier*, Docket No. 10-00083 (August 2, 2010) PUR Slip Copy, 2010 WL 3564811, at *4.

The TRA went on to set out its perspective on the removal of authority over CMRS:

> The TRA has long recognized the plain language of Tenn. Code Ann. § 65-4-101(6)(F) limits, and removes, the TRA's authority over wireless service providers. Thus, the TRA has consistently acknowledged its lack of state-delegated authority over CMRS providers in both the broad sense and specifically as to ETC designation. As set forth extensively above, Nexus sought a ruling on the issue of wireless ETC designation previously when it filed its Petition for Clarification with the Authority in Docket No. 08-00119. Consistent with its previous rulings on matters involving wireless service, the Authority finds that it does not have jurisdiction over wireless providers based on the express definition of 'nonutilities' found in Tenn. Code Ann. §65-4-101(6)(F), and therefore, specifically does not have subject matter jurisdiction over the precise issue upon which the Company seeks a declaratory ruling.

Id. at *5 (notes omitted).

Note 40 to the *Nexus* case cites to another proceeding in which the TRA applied the state-law removal of jurisdiction even in the context of a section 252 arbitration. *In re: Sprint Communications Company, L.P.*, Docket No. 96-01411, Final Order of Arbitration Awards (March 26, 1997), PUR Slip Copy, 1997 WL 233027 *5. In that proceeding, the TRA ruled that because of the express removal jurisdictional authority to regulate cellular wireless providers, the TRA could not require a CMRS provider to segregate traffic over separate trunk groups.

The TRA lacks jurisdiction. The only lawful course of action is to dismiss. Notwithstanding the potential authority that the TRA may have under federal law, ultimately, the TRA is a legislatively created body of the state and empowered only to exercise the jurisdiction, power, and authority delegated to it by the Tennessee General Assembly. In *BellSouth Advertising & Publishing Corp. v. TRA*, the Supreme Court of Tennessee stated, "[i]n defining

the authority of the TRA, this Court has held that '[a]ny authority exercised by the TRA must be the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power.'" 79 S.W.3d 506, 512 (Tenn. 2002). The General Assembly has charged the TRA with "general supervisory and regulatory power, jurisdiction and control over all public utilities" within Tennessee. *Id.* (notes omitted).

If Tennessee recognizes the rule of law, then Halo has the right to rely on prior rulings and Halo's business model is CMRS and preempted by federal law. Federal preemption requires dismissal. But if the TRA denies Halo's motion, then Tennessee is giving notice to regulated entities that operate nationally that they cannot rely on federal rulings in Tennessee, that the rule of law does not apply in this state, and that they enter and operate in Tennessee at their peril.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Reply in Support of Motion to Dismiss* was served via email and regular mail and/or certified mail, return receipt requested, on the following counsel of record and designated contact individuals on this the 8th day of December, 2011:

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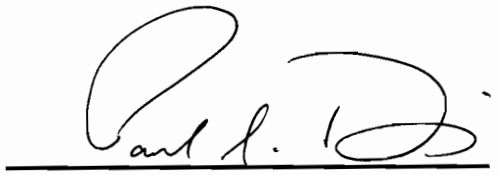

PAUL S. DAVIDSON

79 S.W.3d 506
Supreme Court of Tennessee,
at Nashville.

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION
v.
TENNESSEE REGULATORY AUTHORITY.
and
BellSouth Advertising & Publishing Corporation
v.
Nextlink Tennessee.

No. M1998-01012-SC-R11-CV. | No. M1998-00987-SC-R11-CV. | July 10, 2002.

Telephone directory publisher appealed from orders of the Tennessee Regulatory Authority (TRA) requiring it to brand covers of telephone directory with names and logos of local telecommunications companies in competition with its parent company. On consolidated appeal, the Court of Appeals reversed. Upon grant of permission to appeal, the Supreme Court, Adolpho A. Birch Jr., J., held that: (1) TRA had authority to order publisher to include competitor's names and logos on directory covers; (2) TRA had jurisdiction over directory publisher; and (3) requiring publisher to include competitor's names and logos did not violate First Amendment.

Court of Appeals reversed.

West Headnotes (5)

1 **Telecommunications**
Directories and Listing

Tennessee Regulatory Authority (TRA) had authority to require telephone directory publisher to include names and logos of competing local telephone service providers on cover of directory. T.C.A. §§ 65-2-102(a)(2), 65-4-104, 65-4-106.

2 **Public Utilities**
Review and Determination in General

The Supreme Court interprets the statutes governing the Tennessee Regulatory Authority's (TRA) authority de novo as a question of law, and construes the statutes liberally to further the legislature's intent to grant broad authority to the TRA. T.C.A. § 65-4-104.

1 Cases that cite this headnote

3 **Telecommunications**
Directories and Listing

Tennessee Regulatory Authority (TRA) had jurisdiction over telephone directory publisher, which was subsidiary of incumbent local exchange telephone company, and thus TRA could require that directory publisher include names and logos of competing local telephone service providers on directory cover, where parent company was required by law to provide white pages directory in its market areas, and parent company contracted that duty to subsidiary.

4 **Constitutional Law**
Telephones

Telecommunications
Directories and Listing

Requirement that telephone directory publisher include names and logos of competing local telephone service providers on cover of directory did not violate First Amendment, where requirement was reasonably related to state's interest in advancing competition in provision of local telephone services by informing consumers as to existence of alternative local telephone services, requiring names and logos on directory covers did not impose inordinate burden on incumbent local exchange telephone company, requiring that logos of competing firms be displayed on equal footing with incumbent's logo did not substantially affect incumbent's ability to communicate its own speech to customers in market, and requirement was reasonably related to state's interest in preventing deception of consumers. U.S.C.A. Const.Amend. 1.

5 **Constitutional Law**
Commercial Speech in General

Commercial speech, that is, expression related solely to the economic interests of the speaker and his or her audience, is constitutionally

protected under the First Amendment, as applied to the States under the Fourteenth Amendment. U.S.C.A. Const.Amends. 1, 14.

1 Cases that cite this headnote

Attorneys and Law Firms

***507** J. Richard Collier and Julie M. Woodruff, Nashville, Tennessee, for the appellant, Tennessee Regulatory Authority.

Henry Walker, Nashville, Tennessee, for the appellants, AT&T Communications of South Central States, Inc., MCI Worldcom Network Services, Inc., and XO Tennessee, Inc.

Paul S. Davidson and Guilford F. Thornton, Jr., Nashville, Tennessee, Daniel J. Thompson, Jr., Tucker, Georgia, and James F. Bogan, III, Atlanta, Georgia, for the appellee, BellSouth Advertising & Publishing Corporation.

Opinion

OPINION

ADOLPHO A. BIRCH, JR., J., delivered the opinion of the court, in which FRANK DROWOTA, III, C.J., E. RILEY ANDERSON, JANICE M. HOLDER, and WILLIAM M. BARKER, JJ. joined.

ADOLPHO A. BIRCH, JR., J.

This consolidated appeal presents two very important issues. They are: (1) ***508** whether the Tennessee Regulatory Authority has the authority to require that the names and logos of local telephone service providers who compete with BellSouth Telecommunications, Inc. be included on the cover of white pages telephone directories published by BellSouth Advertising & Publishing Corporation on behalf of BellSouth Telecommunications, Inc.; and (2) whether the Tennessee Regulatory Authority's decisions in these consolidated cases violate the First Amendment of the Constitution of the United States. For the reasons discussed herein, we hold that the Tennessee Regulatory Authority is authorized to require that the names and logos of competing local telephone service providers be included on the covers of the white pages telephone directories published on behalf of BellSouth Telecommunications, Inc., and that the Tennessee Regulatory Authority's decisions in these two cases do not violate the First Amendment. Accordingly, we reverse the judgment of the Court of Appeals in this consolidated appeal and reinstate the judgments of the Tennessee Regulatory Authority.

I. Facts and Procedural History

Prior to June 1995, local telephone services in Tennessee were sold to the consumer by monopoly providers. Provision of those services changed dramatically, however, with the Tennessee General Assembly's enactment of 1995 Tenn. Pub. Acts 408 (effective June 6, 1995) (Chapter 408), which comprehensively reformed the rules under which providers of telephone services operate in Tennessee. One of the more notable changes effected by the enactment of Chapter 408 was the abolition of monopolistic control of the local telephone service market and the initiation of open-market competition in the provision of local telephone service.

Under the two above-cited telecommunications statutes, any local telephone service provider who operated as a monopoly under the prior system was thenceforth designated as an "incumbent local exchange telephone company." Likewise, any telecommunications company providing local telephone services in competition with the incumbent local exchange telephone company was designated as a "competing local exchange telephone company."

BellSouth Telecommunications, Inc. (BellSouth), under its former name, South Central Bell, operated as a monopoly in providing local telephone service in Tennessee markets prior to the enactment of Chapter 408. BellSouth, therefore, is an incumbent local exchange telephone company for purposes of the new state and federal laws. Under the former regulatory system, BellSouth was required to publish for each service area a "white pages" telephone directory listing all telephone subscribers within the area. Tenn. Comp. R. & Regs 1220–4–2–.15 (1999). That obligation continues under the new regulatory scheme. *Id.;* Tenn.Code Ann. § 65–4–124(c) (Supp.2001). *See also* 47 U.S.C.A. § 271(c)(2)(B)(viii) (West Supp.2001). [1]

In order to fulfill its obligation to publish a white pages directory, BellSouth contracted with BellSouth Advertising & Publishing Corporation (BAPCO). BAPCO publishes "white pages" and "yellow pages" directories for BellSouth in many different markets. While BellSouth and BAPCO are separate corporations, both are parts of BellSouth Corporation. The "**BELLSOUTH**" logo is the only logo printed on the white pages and yellow ***509** pages directories published by BAPCO for BellSouth.

A. The AT&T Proceeding

AT&T Communications of South Central States, Inc. (AT&T), a competing local exchange telephone company, negotiated an "interconnection agreement" with BellSouth as was permitted under the new regulations. *See* Tenn.Code Ann. § 65–4–124(a) (Supp.2001). As to any issues relating to the telephone directories BAPCO published for BellSouth, however, BellSouth required AT&T to negotiate with BAPCO.

AT&T then opened negotiations with BAPCO for the purpose of including its subscribers within BellSouth's white pages and its name or logo on the cover of the white pages directories in areas in which AT&T competes with BellSouth in the provision of local telephone services. They reached an agreement and entered into a contract in August 1996 on all terms except the directory-cover issue, which was omitted from the contract.

At the time, the Tennessee Regulatory Authority (TRA), pursuant to the federal act, was conducting an arbitration proceeding pertaining to certain issues that had arisen in the implementation of the new competitive system. AT&T filed a petition in the arbitration proceeding asking the TRA to require BAPCO to place AT&T's name and logo on BellSouth's white pages directory covers. In turn, BAPCO filed a petition asking the TRA to declare that BAPCO was not subject to the TRA's jurisdiction and that issues relating to the publication of telephone directories were beyond the scope of the arbitration proceeding, which was governed by federal law. On October 21, 1996, the TRA formally declined to address the issue, finding that "private negotiations are the preferred method of resolving this issue."

On December 16, 1996, after further negotiations had proved fruitless, AT&T filed a petition with the TRA seeking a declaratory order as to the applicability of Tenn.Code Ann. §§ 65–4–104,—117(3),—122(c), and Tenn. Comp. R. & Regs. 1220–4–2–.15 to the white pages directories published by BAPCO on behalf of BellSouth. In its petition, AT&T asked the TRA to join BellSouth and BAPCO as parties to the proceeding, to conduct a contested case hearing on the petition, and to declare that "telephone directories are an essential aspect of the telephone or telecommunications services of telephone utilities such as [BellSouth]; and that the covers of directories, published and distributed by BAPCO on behalf of [BellSouth] which include the names and numbers of customers of AT&T, must be nondiscriminatory and competitively neutral, and either must include the name and logo of AT&T in like manner to the name and logo of [BellSouth], or include no company's name and logo, including 'BellSouth.' "

The TRA voted to convene a contested case hearing and formally made BellSouth and BAPCO parties to the proceeding.[2] The TRA subsequently granted petitions to intervene filed on behalf of MCI Telecommunications, Inc., American Communications Services, Inc., and Nextlink Tennessee, LLC ("Nextlink"), which, like AT&T, are competing local exchange telephone companies serving various local markets in Tennessee.[3]

***510** After conducting a contested case hearing and considering the testimony and exhibits admitted into evidence, the TRA, in a 2 to 1 decision, ruled in favor of AT&T. In the written declaratory order issued by the majority, it declared that:

> BAPCO, in the publication of basic White pages directory listings on behalf of BellSouth, is required to comply with the directives of the [TRA] and the provisions of Authority Rule 1220–4–2–.15. Further, in the publication of these directory listings on behalf of BellSouth which contain the listings of local telephone customers of AT&T and other competing local exchange providers, BAPCO must provide the opportunity to AT&T to contract with BAPCO for the appearance of AT&T's name and logo on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract. Likewise, BAPCO must offer the same terms and conditions to AT&T in a just and reasonable manner.

The dissenting TRA Director stated in a separate opinion that he agreed with the majority that the names and logos of competing local exchange telephone companies should be placed on the front cover of the directories published by BAPCO on behalf of BellSouth. He concluded, however, that the rule relied upon by the majority (Rule 1220–4–2–.15), which was promulgated during the time of monopoly local telephone service, did not apply to the new competitive system and that the TRA should initiate a rulemaking proceeding to amend the rule to require that competitors' names and logos appear on the white pages directory covers. BAPCO appealed the decision to the Court of Appeals.[4]

B. The Nextlink Proceeding

While the appeal of the AT&T proceeding was pending in the Court of Appeals, Nextlink requested that BAPCO include Nextlink's name and logo on the cover of the white pages directory published by BAPCO for Nextlink's service area. BAPCO denied that request. Nextlink subsequently filed a petition asking the TRA for a declaratory order on the issue. Nextlink asked the TRA to order BAPCO to comply with Rule 1220–4–2–.15 as interpreted in the declaratory order entered in the AT&T proceeding. Nextlink asserted that BAPCO is required to afford *all* competing local exchange telephone companies the opportunity to appear on white pages directory covers in their service areas as a result of the TRA's interpretation of the rule in the AT&T declaratory order.

After hearing oral arguments by the parties, the TRA ruled in favor of Nextlink.[5] In pertinent part, it concluded that its interpretation of Rule 1220–4–2–.15 in the AT&T proceeding "must be equally applied to all similarly situated carriers that seek the same relief." The TRA directed BAPCO "to comply with TRA Rule 1220–4–2–.15, as interpreted in its Declaratory Order entered on March 19, 1998 [the AT&T declaratory order]."

BAPCO appealed the decision to the Court of Appeals. The appeals of the ***511** AT&T and Nextlink proceedings were argued separately in the Court of Appeals, although the court subsequently consolidated the two appeals.[6]

The Court of Appeals reversed the two declaratory orders entered by the TRA. A majority of the three-judge panel agreed that the TRA had exceeded its authority under state law in ordering BAPCO to include the names and logos of competing telecommunications companies on the covers of the white pages directories published by BAPCO for BellSouth. The two-judge majority agreed also that the TRA's declaratory orders violated the First Amendment. In a dissenting opinion, the third member of the panel concluded that the TRA's decisions in these two cases were authorized by state law and did not violate First Amendment principles.

The TRA applied to this Court for permission to appeal pursuant to Tenn. R.App. P. 11, and we granted the application. On appeal, we must address two issues: (1) whether the TRA has the authority to require that the names and logos of "competing local exchange telephone companies" be included on the cover of white pages telephone directories published on behalf of BellSouth; and (2) whether imposing such a requirement violates the First Amendment of the United States Constitution.[7] After a painstaking review of the voluminous record and a thorough consideration of the issues, we hold that (1) the TRA is authorized to require that the names and logos of competing local exchange telephone companies be included on the cover of white pages directories published on behalf of BellSouth; and (2) the TRA's decisions in these two cases do not violate the First Amendment. Accordingly, the judgment of the Court of Appeals is reversed, and the judgments of the TRA are reinstated.

II. Authority of the Tennessee Regulatory Authority

1 We address first the question whether the TRA has the authority to ***512** require that the names and logos of competing telephone companies be included on the cover of white pages directories published on behalf of BellSouth. In defining the authority of the TRA, this Court has held that "[a]ny authority exercised by the [TRA] must be as the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power." *Tennessee Pub. Serv. Comm'n v. Southern Ry. Co.*, 554 S.W.2d 612, 613 (Tenn.1977). The primary grant of authority to the TRA is located at Tenn.Code Ann. § 65–4–104 (Supp.2001), the provision defining the TRA's general jurisdiction. The statute provides, in pertinent part, that "the authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter." *Id.* In the exercise of this general power, Tenn.Code Ann. § 65–4–117 provides, "[T]he authority has the power to ... [a]fter hearing, by order in writing, fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility[.]" Tenn.Code Ann. § 65–4–117(3) (Supp.2001).

In construing these provisions, we are guided both by statute and by the prior decisions of this Court. At the outset,

> This chapter shall not be construed as being in derogation of the common law, but shall be given a liberal construction, and any doubt as to the existence or extent of a power conferred on the authority by this chapter or chapters 1, 3 and 5 of this title shall be resolved in favor of the existence of the power, to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction by this chapter.

Tenn.Code Ann. § 65–4–106 (Supp.2001). In addition, this Court has held that the issue whether an administrative agency's action is explicitly or implicitly authorized by the agency's governing statute "is a question of law, not of fact, and this Court's role is to interpret the law under the facts of the case." *Sanifill of Tennessee, Inc. v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn.1995). Moreover, this Court has observed:

> [T]he General Assembly has charged the TRA with the "general supervisory and regulatory power, jurisdiction and control over all public utilities." Tenn.Code Ann. § 65–4–104 (1997 Supp.). In fact, the Legislature has explicitly directed that statutory provisions relating to the authority of the TRA shall be given "a liberal construction" and has mandated that "any doubts as to the existence or extent of a power conferred on the [TRA] ... shall be resolved in favor of the existence of the power, to the end that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction...." Tenn.Code Ann. § 65–4–106 (1997 Supp.). The General Assembly, therefore, has "signaled its clear intent to vest in the [TRA] practically plenary authority over the utilities within its jurisdiction." *Tennessee Cable Television Ass'n v. Tennessee Public Service Comm'n*, 844 S.W.2d 151, 159 (Tenn.App.1992). To enable the TRA to effectively accomplish its designated purpose—the governance and supervision of public utilities—the General Assembly has empowered the TRA to "adopt rules governing the procedures prescribed or authorized," including "rules of practice before the authority, together with forms and instructions," and "rules implementing, interpreting or making specific the various laws which ***513** [the TRA] enforces or administers." Tenn.Code Ann. § 65–2–102(1) & (2) (1997 Supp.).

Consumer Advocate Div. v. Greer, 967 S.W.2d 759, 761–62 (Tenn.1998).

2 Thus, in sum, we interpret the statutes governing the TRA's authority *de novo* as a question of law, and we construe the statutes liberally to further the legislature's intent to grant broad authority to the TRA.

A. Chapter 408

In Section I of Chapter 408, the General Assembly outlined the public policy underlying the new regulatory scheme which, as stated earlier, altered in a most significant manner the telecommunications industry in Tennessee:

> **Declaration of telecommunications services policy.** The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

Tenn.Code Ann. § 65–4–123 (Supp.2001).

Another section of Chapter 408, now codified at Tenn.Code Ann. § 65–4–124 (Supp.2001), provides, in pertinent part:

> (a) All telecommunications services providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions; and all telecommunications services providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other telecommunications services providers.
>
> (b) Prior to January 1, 1996, the commission shall, at a minimum, promulgate rules and issue such orders as necessary to implement the requirements of subsection (a) and to provide for unbundling of service elements and functions, terms for resale, interLATA presubscription, number portability, and packaging of a basic local exchange telephone service or unbundled features or functions with services of other providers.
>
> (c) These rules shall also ensure that all telecommunications services providers who provide basic local exchange telephone service or its equivalent provide each customer a basic White Pages directory listing....

Two of the provisions in Tenn.Code Ann. § 65–4–124 are especially relevant to the pending cases: subparagraph (b) requires the TRA to "promulgate rules *and issue such orders as necessary* to implement the provisions of subsection (a)" (emphasis added); and subparagraph (c) requires

the TRA to "ensure that all telecommunications services providers who provide basic local exchange telephone service ... provide each customer a basic White Pages directory listing...."

The TRA relies on the two foregoing provisions of Chapter 408 (Tenn.Code Ann. §§ 65–4–123 and—124) to support its contention that its declaratory orders did not exceed the agency's statutory authority. ***514** In addition to its reliance upon the above-enumerated statutes, the TRA relies upon Rule 1220–4–2–.15 as its authority for the declaratory orders issued in the case under submission. Mindful of the provisions of Chapter 408, we now consider Rule 1220–4–2–.15 in the context of TRA's contentions.

B. Rule 1220–4–2–.15

This rule was originally promulgated by the TRA's predecessor agency, the Public Service Commission, long before the enactment of Chapter 408. [8] The rule provides, in pertinent part:

> 1220–4–2–.15 DIRECTORIES–ALPHABETICAL LISTING (WHITE PAGES)
>
> (1) Telephone directories shall be regularly published, listing the name; address and telephone number of all customers, except public telephones and number unlisted at customer's request.
>
> (2) Upon issuance, a copy of each directory shall be distributed to all customers served by that directory and a copy of each directory shall be furnished to the Commission upon request.
>
> (3) The name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover....

In its declaratory orders in these two proceedings, the TRA interpreted Rule 1220–4–2–.15 to require that the names and logos of competing local exchange telephone companies be placed on the covers of the white pages directories that BAPCO publishes for BellSouth, the incumbent local exchange telephone company that is required by law to publish a white pages directory. As we stated in *Jackson Express, Inc. v. Tennessee Public Service Commission,* "Generally, courts must give great deference and controlling weight to an agency's interpretation of its own rules. A strict standard of review applies in interpreting an administrative regulation, and the administrative interpretation 'becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " 679 S.W.2d 942, 945 (Tenn.1984).

We therefore must give "great deference" to the TRA's interpretation of Rule 1220–4–2–.15, and the TRA's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." In addition, we review the agency's interpretation in light of the statutes, discussed above, governing the TRA. Referring again to those statutes, we note that the General Assembly has provided that the laws governing the TRA shall be given "a liberal construction" and has mandated that "any doubts as to the existence or extent of a power conferred on the [TRA] ... shall be resolved in favor of the existence of the power, to the end that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction...." Tenn.Code Ann. § 65–4–106. The General Assembly also has empowered the TRA to "adopt rules governing the procedures prescribed or authorized," including "rules implementing, interpreting or making specific the various laws which [the TRA] enforces or administers." Tenn.Code Ann. § 65–2–102(2) (Supp.2001). Finally, the legislature has stated that "[i]n addition to any other jurisdiction conferred, the authority shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact ***515** or law arising as a result of the application of Acts 1995, ch. 408." Tenn.Code Ann. § 65–5–210(a) (Supp.2001).

As stated, Rule 1220–4–2–.15 requires that the "name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover[.]" We have considered Tenn.Code Ann. §§ 65–2–102(2), 65–4–104, 65–4–106 and the pertinent provisions of Chapter 408. Additionally, we have accorded the TRA's interpretation of its own rules the deference required. In so doing, we fail to find any demonstration that the TRA has acted in excess of its authority in requiring that the names of competing local exchange providers be included on the cover of BellSouth's white pages directories. The declaratory orders as promulgated serve to "resolve ... contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408." Accordingly, the declaratory orders are expressly authorized by Tenn.Code Ann. § 65–5–210(a).

III. TRA's Jurisdiction over BAPCO

3 While it is abundantly clear that the TRA has jurisdiction over BellSouth, a regulated public utility, BAPCO suggests

that because it is not a public utility, it is beyond the reach of the TRA.

In its declaratory orders, the TRA required that BAPCO provide AT&T and Nextlink the opportunity "to contract with BAPCO for the appearance of AT&T's [and Nextlink's] name[s] and logo[s] on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract."

While we recognize that this issue could have been avoided had the TRA ordered BellSouth, as distinct from BAPCO, to implement the TRA's interpretation of Rule 1220–4–2–.15, we nevertheless conclude that the TRA did not err in ordering BAPCO to allow competing service providers to contract with BAPCO to be included on the covers of BellSouth's white pages directories. Our conclusion is based upon the particular facts of these related proceedings and upon legal precedent governing public utilities and their non-utility subsidiaries and affiliates.

Factually, much of the testimony admitted into evidence during the AT&T proceeding pertained to BAPCO's role in publishing directories on behalf of BellSouth. The testimony of a number of witnesses can be summarized by quoting a single sentence of the testimony of one witness employed by BAPCO: "[a]ll editorial, publishing, and business decisions [regarding the directories] are under BAPCO's exclusive control." R., Vol. 16, p. 37 (Testimony of R.F. Barretto, Director–Local Exchange Carrier Interface for BAPCO). Moreover, BellSouth admitted in its answer to AT&T's petition for a declaratory order that "during the course of the negotiations between AT&T and [BellSouth] for an interconnection agreement ... [BellSouth] properly maintained that negotiations with respect to telephone directories were to be conducted with BAPCO." R., Vol. I, p. 35. Likewise, BAPCO stated in its answer to the AT&T petition that "[t]he issues raised in the AT&T Petition should be resolved between AT&T and BAPCO[.]" R., Vol. I, p. 45.

With regard to precedent, we considered in *Tennessee Public Service Commission v. Nashville Gas Co.,* an analogous issue concerning a parent corporation and its subsidiary in the context of rate-making. 551 S.W.2d 315 (Tenn.1977). In permitting the TRA's predecessor, the Public Service Commission, to consider pertinent financial data of the parent corporation (not a public utility regulated by the Commission) in setting the rates for the subsidiary ***516** corporation (a public utility regulated by the Commission), we stated:

> [A] regulatory body, such as the Public Service Commission, is not bound in all instances to observe corporate charters and the form of corporate structure or stock ownership in regulating a public utility, and in fixing fair and reasonable rates for its operations. The filing of consolidated reports by parent and subsidiary corporations, both for tax purposes and regulatory purposes, is so commonplace as to be completely familiar in modern law and practice. Considerations of "piercing the veil," which are involved in cases involving tort, misconduct or fraud, are largely irrelevant in the regulatory and revenue fields. In order for taxing authorities to obtain accurate information as to revenues and expenses, the filing of consolidated tax returns by affiliated corporations is frequently required, and rate-making and regulatory bodies frequently can and do consider entire operating systems of utility companies in determining, from the standpoint both of the regulated carrier and the consuming public fair and reasonable rates of return.

Id. at 319–20. Continuing, we stated that holding otherwise would allow the regulated utility, "through the device of holding companies, spinoffs, or other corporate arrangements, to place the cream of a utility market in the hands of a parent or an affiliate, and to strip the marketing area of a regulated subsidiary of its most profitable customers." *Id.* at 321.

Although the cases under submission are not rate-making proceedings, we conclude that the reasoning and the principles stated in *Nashville Gas* are applicable thereto. BellSouth is a public utility regulated by the TRA and is required by law to provide a white pages directory in its market areas. BellSouth has contracted that duty to BAPCO, an affiliated company within BellSouth's parent corporation. Thus, for purposes of these two declaratory order proceedings, we conclude that the TRA had jurisdiction over BAPCO. Were we to conclude otherwise, BellSouth could escape the legal responsibilities thrust upon it by Rule 1220–4–2–.15. Because BellSouth delegated its responsibility over the white pages directories to BAPCO, and because BAPCO has exclusive control over the directories, we conclude that the TRA has jurisdiction over BAPCO for the purposes of these two proceedings.

IV. First Amendment Issue

Next, the TRA contends that the Court of Appeals erred in holding that the TRA's decisions in these two cases

amount to "compelled speech" and therefore violate the First Amendment. [9] For the reasons set out below, we hold that the TRA's orders do not violate the First Amendment.

4 The TRA's orders in these two proceedings implicate two lines of First Amendment cases: those pertaining to "compelled speech" and those pertaining to "commercial speech." The parties focus most heavily upon the former line, so we begin with an analysis of the law regarding compelled speech.

The United States Supreme Court, in its cases involving compelled speech, has held that the First Amendment not only bars the government from prohibiting protected speech, it also may bar the government from compelling the expression of certain views or the subsidization of speech to which an individual objects. ***517** *United States v. United Foods, Inc.*, 533 U.S. 405, 410, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001); *see also Lehnert v. Ferris Faculty Ass'n,* 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991); *Wooley v. Maynard,* 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). Although the Court's compelled speech cases may be divided into numerous categories, the parties rely most heavily on those cases involving laws or regulations requiring individuals to contribute financially to speech with which they disagree. This category of cases is typified by *Abood v. Detroit Board of Education* [10] and *Keller v. State Bar of California.* [11] In that pair of cases, the Court set out a "germaneness" test, under which compelled contributions do not offend First Amendment principles so long as they are used for activities that are germane to the organization's central purpose.

The parties focus upon two separate cases discussing *Abood* and *Keller* in the context of compelled financial contributions to commercial speech. [12] The TRA, in contending that the Court of Appeals erred in reversing its orders on First Amendment grounds, relies on *Glickman v. Wileman Bros. & Elliott, Inc.* [13] Conversely, BAPCO, contending that the First Amendment analysis of the Court of Appeals is correct, relies upon *United States v. United Foods, Inc.* Both *Glickman* and *United Foods* involve federal programs administered by the Secretary of Agriculture, in which the Secretary imposed mandatory assessments on two different agricultural industries for funding generic advertising for the respective industries.

In *Glickman,* growers, handlers, and processors of California tree fruits challenged marketing orders promulgated by the Secretary. The orders imposed mandatory assessments on the petitioners to cover the expenses of administering the orders, including the cost of generic advertising of California nectarines, plums, and peaches. The petitioners asserted that the government-mandated financial contribution to the generic advertising campaign violated their First Amendment rights. After summarizing the components of the regulatory scheme of which the marketing orders were a part, the Court concluded that "[t]hree characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge freedom of speech protected by the First Amendment." *Id.* 521 U.S. at 469, 117 S.Ct. 2130. The Court continued:

> First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. *Second, they do not compel any person to engage in any actual or* ***518** *symbolic speech.* Third, they do not compel the producers to endorse or to finance any political or ideological views.

Id. at 469–70, 117 S.Ct. 2130 (emphasis added). The Court then found that the assessments under the marketing orders did not constitute compelled speech. As the Court stated:

> Our compelled speech case law ... is clearly inapplicable to the regulatory scheme at issue here. The use of the assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they "would prefer to remain silent," or require them to be publicly identified or associated with another's message.

Id., 521 U.S. at 470–71, 117 S.Ct. 2130 (citations omitted). Applying the *Abood–Keller* "germane[ness]" test, the Court concluded that the generic advertising program was "unquestionably germane to the purposes of the marketing orders" and that the assessments were not used to fund ideological activities. *Glickman,* 521 U.S. at 473, 117 S.Ct. 2130.

Superficially, *United Foods* appears to be similar to *Glickman. United Foods* involved a mandatory assessment imposed by the Secretary of Agriculture on handlers of fresh mushrooms, to be used primarily for funding advertising for the mushroom industry. Despite the facial similarity between the two cases, however, the Court in *United Foods* distinguished *Glickman* on the grounds that the compelled assessments in *Glickman* were part of a broad regulatory scheme, whereas the assessments in *United Foods* were not. Indeed, the *United Foods* Court found that the only

program served by the compelled contributions was the very advertising scheme in question. 533 U.S. at 411–12, 121 S.Ct. 2334. The Court then applied the *Abood–Keller* principles to the mandatory assessments and ultimately held that they violated the First Amendment.

Having reviewed this authority, however, we cannot conclude that the cases cited by either of the parties are completely apposite to the case under submission. The principles stated in *Abood* and *Keller,* and in the later cases in which *Abood* and *Keller* have been applied (including *Glickman* and *United Foods*), are limited to cases involving compelled *contributions* to speech. The TRA's orders, on the other hand, effectively require BAPCO to engage in *actual speech.* The distinction, we conclude, is significant. *Cf. Glickman,* 521 U.S. at 469, 117 S.Ct. 2130 (stating that the marketing orders did not "compel any person to engage in any actual or symbolic speech"); and 521 U.S. at 470–71, 117 S.Ct. 2130 (stating that the Court's "compelled speech case law ... is clearly inapplicable to the regulatory scheme at issue here. The use of the assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths....").

Because the *Abood–Keller* standards applied in *Glickman* and *United Foods* are inapposite, we next must determine what standard to apply to these two cases. Consequently, our analysis takes us to the United States Supreme Court case law involving commercial speech.

5 Commercial speech, that is, expression related solely to the economic interests of the speaker and his or her audience, is constitutionally protected under the First Amendment, as applied to the States under the Fourteenth Amendment. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980); ***519** *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). The Supreme Court, however, has distinguished between commercial speech and other types of speech in that "[t]he Constitution ... accords a lesser protection to commercial speech than to other constitutionally protected expression." *Central Hudson,* 447 U.S. at 562–63, 100 S.Ct. 2343; *see also United Foods,* 533 U.S. at 409, 121 S.Ct. 2334.

In *Central Hudson,* the Supreme Court adopted a four-part analysis to be used in determining whether a law impermissibly restricts commercial speech. The Court stated:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566, 100 S.Ct. 2343.

The *Central Hudson* test, however, has been a subject of considerable debate. Although the Court has preserved the test in cases involving *restrictions* on commercial speech, [14] it has not applied the test in cases involving *compelled* commercial speech or *compelled financial support of commercial speech. See Glickman,* 521 U.S. at 474, 117 S.Ct. 2130 (holding that the Court of Appeals erred in relying on *Central Hudson* for the purpose of testing the constitutionality of government-mandated assessments for promotional advertising). [15]

In *Walker v. Board of Professional Responsibility of the Supreme Court of Tennessee,* this Court noted that the distinction between restricted speech cases and compelled speech cases is significant, stating, "The fact that a regulation requires disclosure rather than prohibition tends to make it less objectionable under the First Amendment." 38 S.W.3d 540, 545 (Tenn.2001). Accordingly, we looked to the more forgiving standard set forth by the United States Supreme Court in *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), as the defining test for First Amendment analysis of compelled speech cases. *Walker,* 38 S.W.3d at 545. [16] As we noted in *Walker, Zauderer* states:

> We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements ***520** might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers.

Id. at 546 (quoting *Zauderer,* 471 U.S. at 651, 105 S.Ct. 2265). In other words, "under current law—as announced in *Zauderer*—as long as the disclosure requirement is reasonably related to the state's interest in preventing deception of consumers, and not unduly burdensome, it should be upheld." *Id.*

Although both the *Zauderer* and *Walker* cases specifically involved application of First Amendment principles to attorney advertising, we noted in *Walker* that attorney advertising is considered commercial speech under the First Amendment. *Id.* at 544. We see no reason why the compelled commercial speech at issue in *Zauderer* and *Walker* should be governed by a different standard than the compelled commercial speech at issue here; accordingly, we now apply the *Zauderer* standard to the case under submission.

An application of *Zauderer* to the pending appeals requires that we determine:

1. Whether the TRA's disclosure requirement is reasonably related the state's interest in preventing deception of consumers; and

2. Whether the disclosure requirement is unduly burdensome.

We first address the relationship between the TRA's orders and the state's interest in preventing deception of consumers. This interest in preventing deception presents itself in a different context than is seen in the attorney advertising regulations of *Zauderer* and *Walker.* The rules in *Zauderer* and *Walker* compelled attorneys to disclose additional information about themselves, whereas the TRA's orders compel BellSouth to disclose information about the identity of its competitors. The ultimate object of the regulations, however, is the same: to inform consumers. In other words, BellSouth is compelled to disclose information which will prevent consumers from mistakenly believing that no alternative providers of telecommunications services are available.

Richard Guepe, District Manager in the Law & Governmental Affairs organization of AT&T, in his testimony before the TRA, addressed the value of having the names and logos of the competing local exchange telephone companies on the cover of the white pages directory published on behalf of BellSouth:

> The cover of the phone book is a simple, direct, and very important means to communicate to Tennessee consumers. To be effective, consumer communication must be simple, it must be clear, and it must be repeated. That is why the phone book cover is important. Consumers see it often. The cover of the book does tell the consumer what's inside. They read it by its symbols, not by its fine print. We are asking that the cover of the phone book tell Tennessee consumers very clearly that they have a choice in the local service market.

R., Vol. 15, p. 64. As explained by Guepe, the TRA's two declaratory orders directly advance competition in the provision of local telephone services by effectively informing consumers as to the existence of alternative local telephone services. Thus, we conclude that the orders are reasonably related to the state's asserted interest.

The second step of the *Zauderer* test is to determine whether the TRA's orders are unduly burdensome. To assist in this determination, the United States Supreme Court has provided guidance. In *Board of* ***521** *Trustees of the State University of New York v. Fox,* the Supreme Court held that governmental restrictions upon commercial speech are not invalid merely because they go beyond the least restrictive means capable of achieving the desired end. *Fox,* 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). The Court stated:

> [W]hile we have insisted that " 'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing ... the harmless from the harmful,' " we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a " 'fit' between the legislature's ends and the means chosen to accomplish those ends,"—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served"; that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Fox, 492 U.S. at 480, 109 S.Ct. 3028 (citations omitted).

Under *Fox,* the TRA is the proper body to determine "the manner of regulation that may best be employed" to fulfill the government's objective. *Id.* Thus, this Court may not determine whether the manner of regulation chosen by the TRA should have been more or less restrictive. Ours is merely to review the chosen regulation and determine whether it is unduly burdensome.

Reviewing the record thoroughly in light of the principles articulated in *Fox,* we are firmly convinced that the TRA's

decisions requiring the logos and names of competing service providers to be displayed on the directory covers do not impose an inordinate burden on BellSouth. As discussed *supra,* the governmental interest in this case is important, indeed, for informing consumers about their choices in the local telecommunications service market is a fundamental aspect of promoting free competition. Moreover, the government's chosen means to advance its goals, the requirement that logos of competing telecommunications service providers be displayed on equal footing with BellSouth's logo, does not substantially affect BellSouth's ability to communicate its own speech to customers in the market. Given the significant weight of the governmental interest and the relatively narrow impact of the orders in this case, we conclude that the TRA's orders are not unduly burdensome.

Concluding the *Zauderer* analysis, we find that the TRA's orders are reasonably related to the state's substantial interest in preventing the deception of consumers, and we further find that the orders under review directly advance the state's interest without imposing an excessive burden. Thus, we hold that the TRA's orders survive *Zauderer* scrutiny and consequently are valid under the First Amendment.

V. BAPCO's Additional Arguments

BAPCO raises two other arguments in its brief; however, neither was considered and decided as an issue by the TRA or by the Court of Appeals. We find that both arguments are without merit.

In its first argument, BAPCO contends that the TRA's orders amount to a confiscatory taking in violation of the state and federal constitutions. BAPCO's claim is ***522** based upon a factual premise that the TRA's orders require BAPCO to display AT&T's name and logo (and those of other competing providers) without compensation. BAPCO's factual premise simply is incorrect. The TRA ordered BAPCO to permit AT&T and, as a result of the Nextlink proceeding, all other competing local exchange telephone companies to contract with BAPCO for the display of their names and logos on the covers of the white pages directories "under the same terms and conditions as BAPCO provides to BellSouth by contract." It is true that the evidence shows BellSouth was not paying BAPCO at the time of the hearing for displaying the BellSouth logo on the directory covers, but nothing in the TRA's orders precludes BAPCO from charging BellSouth for displaying BellSouth's name and logos on the directory covers. The TRA's orders merely require BAPCO to contract with the competing providers "under the same terms and conditions as BAPCO provides to BellSouth by contract." BAPCO therefore has a choice—it may charge BellSouth for displaying BellSouth's name and logo, in which case BAPCO also may charge the competing companies, or it may choose not to charge BellSouth, in which case it may not charge the other companies. For this reason, BAPCO's confiscatory-taking argument is without merit.

BAPCO's second argument is that the TRA's orders violate BAPCO's trademark rights. This argument is based upon the erroneous premise that the "**BELL** SOUTH" trademark displayed on the directory covers is intended to represent BAPCO, not BellSouth. Throughout the administrative proceedings, BAPCO claimed that the "**BELL**SOUTH" trademark on the covers indicates that the directories are published by BAPCO and that the trademark only coincidentally represents BellSouth. The TRA rejected BAPCO's factual argument on this point and found that the "**BELL**SOUTH" trademark on the directories referred to BellSouth, the incumbent local exchange telephone company. The record fully supports the TRA's factual finding on this point. Moreover, we note that BAPCO has failed to cite any authority that would support striking down a regulatory agency's actions over a regulated utility on trademark-infringement grounds. For these reasons, we find that BAPCO's trademark issue is without merit.

VI. Conclusion

Accordingly, we hold that the TRA's two declaratory orders are not in excess of the statutory authority of the agency and that the TRA had jurisdiction over BAPCO for the purposes of these proceedings. In addition, we hold that the orders do not violate the First Amendment. Therefore, we reverse the judgment of the Court of Appeals in these two cases and reinstate the judgments of the Tennessee Regulatory Authority.

The costs are taxed to BellSouth Advertising & Publishing Corporation, for which execution may issue if necessary.

Footnotes

1 Section 271(c)(2)(B)(viii) requires any Bell operating company (which includes BellSouth) that seeks to enter the long distance market to list customers of competing local exchange carriers in its white pages directory listings.

2 Both BellSouth and BAPCO participated in the AT&T declaratory order proceeding before the TRA. BellSouth, however, did not enter an appearance in the pending appeals.

3 MCI Telecommunications, Inc., and Nextlink Tennessee, LLC now operate under new names, MCI WORLDCOM Network Services, Inc. and XO Tennessee, Inc., respectively. For purposes of clarity, each company is referred to in this opinion by the name it had at the time of the administrative proceedings.

4 *See* Tenn.Code Ann. § 4–5–322(b)(1) (1998) (stating, in pertinent part, "A person who is aggrieved by any final decision of the Tennessee regulatory authority ... shall file any petition for review with the middle division of the court of appeals.").

5 Like the AT&T declaratory order, the Nextlink order was the result of a 2 to 1 vote. The dissenting TRA Director in the Nextlink proceeding "voted not to support the decision of the majority because the Declaratory Order [from the AT&T proceeding] interpreting TRA Rule 1220–4–2–.15[was] currently pending before the Court of Appeals[.]"

6 The Court of Appeals stated in the Nextlink case: "Because of the substantial similarity of the issues, this appeal will be consolidated for consideration with *BellSouth Advertising & Publishing Corp. v. Tennessee Regulatory Auth.,* No. 01A01–9805–BC–00248. However, both appeals shall maintain their separate appeal numbers and papers filed in either of these appeals shall bear the appeal number of the proceeding in which they are filed."

7 The Uniform Administrative Procedures Act, Tenn.Code Ann. § 4–5–322(h) (1998), sets forth the analysis to be applied when reviewing decisions of administrative agencies. Section 4–5–322(h) provides:

> The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
>
> (2) In excess of the statutory authority of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
>
> (5) Unsupported by evidence which is both substantial and material in the light of the entire record.
>
> In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

Although BAPCO refers to all five subsections of the above-quoted statute in its brief, the pertinent provisions for purposes of the consolidated appeal are Tenn.Code Ann. §§ 4–5–322(h)(1) and—322(h)(2)—in other words, we must determine whether, under those subsections, the TRA's decisions either were "in violation of constitutional ... provisions" or "in excess of the statutory authority of the agency" and subject to reversal or modification for those reasons.

8 The Administrative History for Rule 1220–4–2–.15 states: "Original rule certified May 9, 1974. Amendment filed August 18, 1982; effective September 17, 1982. Amendment filed November 9, 1984; effective December 9, 1984."

9 The First Amendment applies to the States through the Fourteenth Amendment. *Bigelow v. Virginia,* 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

10 431 U.S. 209, 235–36, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (holding that teachers' compulsory union dues could not be used for political or ideological purposes that were not "germane" to the union's duties as a collective-bargaining representative).

11 496 U.S. 1, 14, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) (holding that a state bar's use of compulsory dues to finance political activities with which the petitioners disagreed violated their right to free speech when the expenditures were not "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of [legal services]' ").

12 The TRA argues in the alternative that its two orders meet the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). BAPCO argues in response that the orders do not meet the requirements of *Central Hudson.* The application of *Central Hudson* is discussed later in this opinion.

13 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997).

14 *See Greater New Orleans Broad. Ass'n v. United States,* 527 U.S. 173, 184, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999); *see also United Foods,* 533 U.S. at 409–10, 121 S.Ct. 2334 (noting criticism of *Central Hudson* test but declining to "enter into the controversy").

15 The *United Foods* Court noted that the *Central Hudson* test has been criticized, but did not revisit the *Central Hudson* test and did not apply it to the mandatory assessments at issue in that case. The Court simply noted that the mandatory assessments could not be sustained under *any* of the Court's precedents. *Id.* 533 U.S. at 410, 121 S.Ct. 2334.

16 Notably, several federal circuits also have applied the *Zauderer* test to governmental regulations that require disclosure of information. *See, e.g., Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n,* 233 F.3d 981, 994 (7th Cir.2000); *Commodity Futures Trading Comm'n v. Vartuli,* 228 F.3d 94, 108 (2d Cir.2000); *Consolidated Cigar Corp. v. Reilly,* 218 F.3d 30, 54 (1st Cir.2000).

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Re Sprint Communications Company, L.P.
Docket No. 96-01411

Tennessee Regulatory Authority
March 26, 1997

Before Greer, chairman, and Kyle and Malone, directors.

BY THE AUTHORITY:

FINAL ORDER OF ARBITRATION AWARDS

***1** This Final Order of Arbitration Awards (the 'Final Order') embodies all decisions made by Chairman Lynn Greer, Director Melvin Malone, and Director Sara Kyle, acting as Arbitrators, during an Arbitration Conference held on January 7, 1997, and constitutes the valid, binding, and final decision of the Arbitrators. [FN1]

INTRODUCTION:

A properly convened Arbitration Conference was held under Docket No. 96-01411 on Tuesday, January 7, 1997, in the hearing room of the Tennessee Regulatory Authority (the 'Authority'), 460 James Robertson Parkway, Nashville, Tennessee before Chairman Lynn Greer, Director Melvin Malone, and Director Sara Kyle, acting as Arbitrators. [FN2]The Arbitration Conference was open to the public at all times.

The purpose of the Arbitration Conference was to render decisions on certain issues which were previously submitted to the Arbitrators and refined by the parties and the Arbitrators in a number of documents, arguments, both oral and written, filings, and Orders of the Arbitrators, including, but not limited to:

1. Petition by Sprint for Arbitration under the Telecommunications Act of 1996, filed on September 19, 1996 (the 'Petition'); *2*. Response of BellSouth to the Petition for Arbitration filed October 15, 1996; *3*. Issue List filed by Sprint on November 25, 1996; *4*. Issue List filed by BellSouth on November 26, 1996.*5*. Briefs of Sprint and BellSouth filed on December 19, 1996.*6*. Order from Pre-hearing Conference held December 11, 1996

After due consideration of the arguments made, the documents, testimony, and briefs filed, the partial agreements reached among the parties, the applicable federal and state laws, rules, and regulations in effect on January 7, 1997, and the entire record of this proceeding, the Arbitrators deliberated and reached decisions with respect to the issues before them.

PRELIMINARY MATTERS:

At the January 7, 1997, Arbitration Conference, Director Malone clarified a statement set forth in Sprint's December 19, 1997, Brief. On page 2 of its Brief, Sprint states that 'In an effort to ease the administrative burden placed on the Arbitrators, Sprint and BellSouth agreed to waive formal hearings [.]' Noting that this statement implied that the Arbitrators requested Sprint and BellSouth to waive oral hearing, Director Malone stated that the Arbitrators did not at any time request the parties to waive oral hearing. The parties voluntarily waived the opportunity for oral hearing without any request whatsoever from the Arbitrators. [FN3]

DECISIONS OF THE ARBITRATORS ON THE ISSUES PRESENTED:

ISSUE 1:

SHOULD BELLSOUTH MAKE AVAILABLE ANY INTERCONNECTION, SERVICE OR NETWORK ELEMENT PROVIDED UNDER AN AGREEMENT APPROVED UNDER 47 U.S.C. SECTION 252, TO WHICH IT IS A PARTY, TO SPRINT UNDER THE SAME TERMS AND CONDITIONS PROVIDED IN

THE AGREEMENT ?

COMMENTS AND DISCUSSION:

Section 252(i) of the Act provides that 'A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this Section, to which it is a party, to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.'

***2** The FCC concludes that this Section of the Act allows requesting carriers to choose among individual provisions contained in any approved agreement to which the local exchange carrier is a party, upon the same rates, terms, and conditions as those provided in the agreement. [FN4]Further, the FCC comments that Section 252(i) allows a requesting carrier to 'avail itself of more advantageous terms and conditions subsequently negotiated by any other carrier for the same individual interconnection, service, or element once the subsequent agreement is filed with, and approved by, the state commission. ' [FN5] Sprint's position is that the Arbitrators should accept and adopt the FCC's interpretation of Section 252(i).

The parties agree that something must be made available under Section 252(i). But, they disagree as to what must be made available. While the parties argue over the interpretation of this Section, neither party cites any legislative history that might shed some light on Congress' intent.

BellSouth's position is that Sprint can pick and choose certain 'chunks' [FN6] of interconnection agreements and that there are basically four chunks: (1) interconnection; (2) unbundling; (3) resale; and (4) number portability or interim-number portability. BellSouth witness Scheye argues that interconnection, service, or network element arrangements along with their associated rates, terms, and conditions as set forth in a given agreement are not severable. BellSouth maintains in its brief that any other interpretation of this provision impairs the negotiation process prescribed in the Act by destroying any incentive for parties such as BellSouth to make concessions during the negotiation process and undercutting the finality of any negotiated contract.

The Arbitrators considered whether BellSouth should make available any interconnection, service, or network element provided under an agreement approved under Section 252 of the Act to which it is a party to Sprint upon the same terms and conditions provided in the agreement. While Director Kyle accepts the FCC's, and thus Sprint's, interpretation of Section 252(i) in total, neither Chairman Greer nor Director Malone are persuaded to accept, in total, the interpretations submitted by Sprint or BellSouth. [FN7]

BellSouth asks the Arbitrators to accept its reading of the statute without any cited authority, and Sprint asks the Arbitrators to accept the FCC's reading of the statute, although the FCC's pick and choose rule (Rule 51.809) has been stayed by the Eighth Circuit.

Although BellSouth's arguments regarding the impairment of the negotiation process and the undermining of the finality of negotiated contracts have merit, the majority notes that the plain language of Section 252 (i) appears, on its face, to be inconsistent with BellSouth's so-called 'chunk' theory. Nonetheless, while BellSouth's interpretation may be too restrictive, Sprint's position may arguably be too liberal. Although Sprint's interpretation of Section 252(i) may have been reasonably constructed from the FCC's Report and Order, such interpretation, like BellSouth's, may lead to consequences which we are not currently persuaded were intended by Congress.

***3** While it appears that Congress intends a level of disaggregation in adopting Section 252(i) in order to foster competition, it cannot be determined from the language of the Section whether the disaggregation is intended to so completely dismantle interconnection agreements, as Sprint's interpretation suggests. The legislative history of Section 252(i), as set forth in paragraph 1311 of the FCC Order, suggests that Congress did not intend for requesting telecommunications carriers to remain perpetually fluid in their ability to pick and choose terms and conditions from approved interconnection agree-

ments. Instead, paragraph 1311 seems to suggest that previously negotiated terms and conditions would be available upon request up to the point where the requesting telecommunications carrier executes its own interconnection agreement, whereupon terms and conditions of subsequently executed agreements would be beyond its reach. Specifically, the Senate Commerce Committee states that its provision, Section 251(g), which, according to the FCC, does not differ substantively from Section 252(i), is intended to 'make interconnection more efficient by making available to other carriers the individual elements of agreements that have been *previously* negotiated. ' [FN8] (emphasis added).

This is a critical issue, and one that must be resolved if competition in the local market is to flourish. Still, in the opinion of the majority, immediate resolution of this issue is not requisite to Sprint's ability to enter into an interconnection agreement with BellSouth. Moreover, Sprint's capacity to begin providing local service to the residents of Tennessee will not be hampered in the short term.

Given the circumstances, and the aforementioned concerns, the majority believes that the more prudent course to take is to defer action on this issue. The comments made by the Arbitrators at the Conference should provide the parties with enough guidance to enable them to negotiate a mutually acceptable 'most favored nations clause.' Director Malone then moved that the Arbitrators take no action on this issue at this time. It is his opinion that the Directors of the Tennessee Regulatory Authority may wish to take some action regarding Section 252(i) at a later time. Chairman Greer seconded the motion. Director Kyle voted no. The motion passed by a vote of two to one.

ORDERED:

1. That the Arbitrators defer ruling on issue one.

ISSUE 2:

HOW MANY POINTS OF INTERCONNECTION ARE APPROPRIATE AND WHERE SHOULD THEY BE LOCATED ?

COMMENTS AND DISCUSSION:

As articulated in the record in this matter, Sprint desires to designate at least one point of interconnection ('POI') on BellSouth's network and within BellSouth's calling area for the purpose of routing local traffic. According to Sprint's direct testimony, the ability to choose to interconnect to one or more than one POI in a LATA or local calling area, for local or toll traffic, provides Sprint with the flexibility to design an efficient network. In Sprint's own terms, 'The Sprint position is that we don't want to be required to have more than one point of interconnection in a LATA. The BellSouth position is that we should interconnect at each access tandem in the local calling area.' [FN9] BellSouth's witnesses make various arguments against Sprint's request, but do not challenge its technical feasibility.

4 Sprint also requests under this issue the utilization of mid-span or mid-air meets. According to Sprint, mid-span meets involve two (2) telecommunications companies connecting their networks at some point between their respective networks. While BellSouth's witnesses Scheye and Atherton oppose Sprint's specific request regarding mid-span meets, BellSouth does not controvert the technical feasibility of Sprint's request.

Section 251(2)(B) of the Act provides that incumbent local exchange companies ('ILECs') have the duty to provide interconnection 'at any technically feasible point within the carrier's network[.]' It is the Arbitrators' opinion that since BellSouth does not refute the technical feasibility of establishing points of interconnection, it is incumbent upon BellSouth to comply with Sprint's request. With respect to Sprint's request regarding mid-span meets, the Arbitrators conclude that BellSouth's position that the parties should work together to develop mutually acceptable arrangements for costs recovery and safeguards for the integrity of the network is reasonable. The Arbitrators further agree that if the parties are unable to reach a mutually satisfactory arrangement, then they may petition the Authority for relief.

Director Malone moved that, consistent with the Arbit-

rators' comments, Sprint should be allowed to interconnect without segregating traffic at one or more POIs in a LATA or local calling area, but that the Arbitrators should adopt BellSouth's position on mid-span meets. The motion passed unanimously.

ORDERED:

2. That Sprint is allowed to interconnect without segregating traffic at one or more POIs in a LATA or local calling area.

3. That if Sprint desires to establish a point of interconnection at mid-air or mid-span meet points on BellSouth's network, it shall be entitled to do so.

4. That, with respect to mid-air or mid-span meets, the parties shall work together to develop mutually acceptable arrangements for costs recovery and safeguards for the integrity of the network.

5. That if the parties are unable to reach agreement on mid-air or mid-span meet arrangements, either of them may petition the Authority for a resolution.

ISSUE 3:

SHOULD JURISDICTIONAL MIXED TRAFFIC BE ALLOWED ON EACH TRUNK? IF SO, WHAT SHOULD BE THE TERMS AND CONDITIONS ?

COMMENTS AND DISCUSSION:

As articulated by Sprint's witness James Burt at the Louisiana Arbitration Hearing, Sprint requests to put combined traffic types (local, toll and wireless) on the same trunk groups, but BellSouth wants Sprint to separate different traffic types onto different trunks. [FN10] BellSouth contends, in part, that this is not the proper forum to modify existing cellular arrangements or to combine cellular issues with wireline to wireline interconnection issues.

In addressing this issue, the majority, after a careful examination of T.C.A. Section 65-4-101(a)(6), concludes that the transport of cellular traffic of any kind is beyond the scope of this Arbitration. It is their opinion that the trunking arrangements deemed appropriate by AT&T and MCI in the AT&T and BellSouth Consolidated Arbitration is adequate and appropriate, at least in the interim, for Sprint and BellSouth to negotiate an acceptable interconnection agreement. [FN11]

***5** Chairman Greer moved that 'pursuant to T.C.A. Section 65-4-101(a)(6), which is the section of Tennessee law which removes domestic public cellular radio telephone service from the jurisdiction of the Tennessee Regulatory Authority, that the issue of jurisdictional mixed traffic being allowed on each trunk is beyond the scope of this Arbitration.' [FN12] He further moved that, for the purpose of Sprint and BellSouth negotiating an acceptable interconnection agreement, Sprint and BellSouth shall be bound by the trunking arrangements deemed appropriate by AT&T, MCI and BellSouth in the AT&T and BellSouth Consolidated Arbitration unless Sprint and BellSouth reach an alternative agreement. Director Kyle seconded Chairman Greer's motion.

Director Malone voted no on Chairman Greer's motion. Referring to the testimony of BellSouth's witness Scheye, Director Malone states that although BellSouth maintains that the inclusion of cellular traffic is a sufficiently substantial reason for the Arbitrators not to address this issue as requested by Sprint, BellSouth's testimony indicates that this issue is more appropriately described as a billing issue, as opposed to a jurisdictional one. [FN13]Moreover, Director Malone notes that BellSouth does not dispute the technical feasibility of Sprint's request. In fact, Mr. Scheye concedes that the request is technically feasible. [FN14]

With respect to the majority's reliance upon T.C.A. Section 65-4-101(a)(6), it is Director Malone's position that this statute is non-controlling. This statute, in his opinion, merely means that the Tennessee Regulatory Authority has no authority to regulate cellular telecommunications service providers. This statute, however, does not prohibit the Arbitrators from addressing an issue regarding the transport of cellular traffic if such issue is appropriately before them under the Act.

Chairman Greer's motion passed by a vote of two to

one.

ORDERED:

6. That the transport of cellular traffic is beyond the scope of this Arbitration.

7. That unless Sprint and BellSouth agree otherwise, the trunking arrangements deemed appropriate by AT&T, MCI and BellSouth in the AT&T and BellSouth Consolidated Arbitration shall be used by Sprint and Bell- South.

ISSUE 4:

HOW SHOULD MISDIRECTED SERVICE CALLS BE HANDLED BY BELLSOUTH ?

COMMENTS AND DISCUSSION:

BellSouth's testimony indicates that it is prepared to handle misdirected calls. While BellSouth sets forth a somewhat reasonable plan to handle misdirected customers, We believe that true competition and parity requires BellSouth to go beyond what is stated in its original plan. Also, to promote parity and fairness, it is our position that BellSouth should not attempt to market its services to misdirected customers in any manner whatsoever, including, but not limited to, the playing of marketing messages to misdirected customers placed on hold.

Accordingly, Sprint should treat misdirected BellSouth customers who call Sprint in the same manner that BellSouth is herein directed to treat misdirected Sprint customers who call BellSouth. The testimony of Mr. Burt on behalf of Sprint indicates that Sprint has already agreed to this directive. The record reveals that both Sprint and BellSouth are seeking an automated long-term solution with respect to misdirected calls.

***6** For the foregoing reasons, Director Malone moved as follows: (1) that BellSouth shall treat misdirected service calls by informing customers that BellSouth is not their local service provider, that their local service provider is Sprint, and that they may reach Sprint by dialing a number to be quoted by BellSouth (which number shall be provided to BellSouth by Sprint); (2) that BellSouth shall not attempt to market its services to misdirected customers in any manner whatsoever, including, but not limited to, the playing of marketing messages to misdirected customers placed on hold; (3) Sprint shall treat misdirected service calls from BellSouth customers in the same manner that BellSouth is herein directed to treat misdirected service calls from Sprint customers; and (4) that the parties work together towards some type of automated arrangement as the long-term solution. The motion passed unanimously.

ORDERED:

8. That BellSouth shall treat misdirected service calls in the following manner: (1) by informing customers that BellSouth is not their local service provider; (2) by informing customers that their local service is Sprint; and (3) by informing customers that Sprint may be reached by dialing a number provided to BellSouth by Sprint (which number shall be quoted directly to customers by BellSouth).

9. That BellSouth shall not attempt to market its services to misdirected customers in any manner whatsoever, including, but not limited to, the playing of marketing messages to misdirected customers placed on hold.

10. That Sprint shall treat misdirected BellSouth customers who call Sprint in the same manner that BellSouth is herein directed to treat misdirected Sprint customers who call BellSouth;

11. That the parties shall work together towards the development of an automated arrangement as the long term solution.

ISSUE 5:

WHAT ARE THE APPROPRIATE STANDARDS, IF ANY, FOR PERFORMANCE METRICS, SERVICE RESTORATION, AND QUALITY ASSURANCE RELATED TO SERVICES PROVIDED BY BELLSOUTH FOR RESALE AND FOR NETWORK ELEMENTS PROVIDED

TO SPRINT BY BELLSOUTH ?

COMMENTS AND DISCUSSION:

The testimony of BellSouth indicates that it is committed to providing Sprint with the same quality of services that BellSouth provides to itself and its end users. The Arbitrators note that the intent of the Act is parity. To that end, the Act requires incumbent local exchange companies to provide new entrants with the same quality of services that it provides itself and its end users. Since this is a requirement of the Act, it is imperative that new entrants are afforded a mechanism to determine compliance with the Act for service quality.

In a previous arbitration before Chairman Greer, Director Malone and Director Kyle involving AT&T, MCI and BellSouth, the parties were requested to submit final best offers on this same issue. We conclude that it is best for the consumers of Tennessee that, until such time that Sprint and BellSouth jointly adopt, or the industry develops, quality standards and performance metrics, the interim standards utilized in this State should be consistent and uniform. Thus, the most prudent manner in which to address Sprint's request is to require that BellSouth and Sprint operate under the same quality standards and performance metrics adopted by the Arbitrators in the AT&T and BellSouth Consolidated Arbitration. Director Malone so moved. The motion passed unanimously.

ORDERED:

12. That, until such time as they agree otherwise or the industry develops quality standards and performance metrics, BellSouth and Sprint shall operate under the same quality standards and performance metrics adopted by the Arbitrators in the AT&T and BellSouth Consolidated Arbitration, Docket 96-01152.The quality standards and performance metrics adopted by the Arbitrators in the AT&T and BellSouth Consolidated Arbitration are attached hereto as Exhibit A.

ISSUE 6:

**7 WHAT IS APPROPRIATE REMEDY FOR BREACH OF THE STANDARDS IDENTIFIED IN ISSUE 5* ?

COMMENTS AND DISCUSSION:

Sprint asks for two items under this issue: (1) the appropriate remedy for a breach of the standards adopted under issue 5 herein; and (2) indemnification by BellSouth for any Tennessee Regulatory Authority-issued fines and/or penalties against Sprint due to the actions or inaction of BellSouth. Any remedy not contained in the standards adopted in the previous issue may be sought by filing a complaint before the Tennessee Regulatory Authority. The adoption of additional remedies requested by Sprint at this time appears to be premature, and further, Sprint fails to cite any provision in the Act that entitles it to the requested indemnification. Before the Tennessee Regulatory Authority issues a fine or penalty against Sprint related to quality-of-service matters, Sprint may request a hearing at which time it could show that BellSouth is the responsible party. In the alternative, Sprint may wish to file a separate complaint against BellSouth.

For the foregoing reasons, Director Malone moved that Sprint's requests for other remedies and indemnification be rejected in accordance with his comments. The motion passed unanimously.

ORDERED:

13. That Sprint's requests for other remedies and indemnification are rejected.

ISSUE 7:

IS IT APPROPRIATE FOR BELLSOUTH TO PROVIDE CUSTOMER SERVICE RECORDS TO SPRINT FOR PREORDERING PURPOSES ?

COMMENTS AND DISCUSSION:

After reviewing the testimony, it is evident that both BellSouth and Sprint agree that BellSouth should make available to Sprint the necessary customer service re-

cords information for the functions of pre-ordering and provisioning maintenance, and billing data. The issue is when should BellSouth make the customer service records information available.

While, we believe, electronic interfacing or on-line access is technically feasible, BellSouth may not currently have the necessary technology to provide the method of on-line access requested by Sprint without jeopardizing the proprietary information of BellSouth's customers, as well as other competitors' customers. With respect to credit history information, the Arbitrators believe that this information is proprietary. There are other means available for competing telecommunications service providers to obtain the credit history of a customer without BellSouth supplying such information.

For the foregoing reasons, Chairman Greer moved that BellSouth be ordered to use all available means to meet Sprint's request for on-line access to perform pre-service ordering and provisioning maintenance, and billing data, and that BellSouth should do so in a manner that does not place Sprint at a competitive disadvantage. He further moved that Sprint's request for BellSouth to provide the credit history of a customer be denied. Finally, Chairman Greer moved that BellSouth be ordered to work in conjunction with Sprint and other competing telecommunications service providers. Their goal is to establish a means by which BellSouth can restrict Sprint's and other competing telecommunications service providers' on-line access to BellSouth customers' service records database so that Sprint and other competing telecommunications service providers can only access the files that they have been previously authorized to access.

***8** Director Malone moved to amend the motion to provide an interim solution with respect to this issue. He moved that BellSouth be ordered in the interim to provide customer service records to Sprint via the methods proffered by BellSouth in its testimony. [FN15]

The motion, as amended, passed unanimously.

ORDERED:

14. That BellSouth shall use all means available to meet Sprint's request for on-line access to perform pre-service ordering and provisioning maintenance, and billing data and should do so in a manner that does not place Sprint at a competitive disadvantage.

15. That Sprint's request for BellSouth to provide credit history information is denied.

16. That BellSouth is ordered to work in conjunction with Sprint and other competing telecommunications service providers to establish a means to provide Sprint and other competing telecommunications service providers on-line access without jeopardizing the proprietary information of BellSouth's customers.

17. That BellSouth is ordered to provide, in the interim, customer service records via the methods proffered in its testimony.

CONCLUSION:

The Arbitrators voted unanimously that the decisions made on January 7, 1997, are considered rendered when voted upon that day. In addition, the Arbitrators voted unanimously to require the parties to submit a fully executed Interconnection Agreement thirty (30) days after the entry of the Arbitrators' final order. The Arbitrators conclude that the foregoing Final Order of Arbitration Awards, including the attached exhibit, reflects a resolution of the issues presented by the parties for arbitration. The Arbitrators conclude that their resolution of these issues complies with the provisions of the Act, and is supported by the record in this proceeding.

APPEARANCES:

Patrick Turner, Esquire, and Paul T. Stinson, 333 Commerce Street, Suite 2101, Nashville, Tennessee 37201-3300, appearing on behalf of BellSouth Telecommunications, Inc. ('BellSouth').

Carolyn Tatum Roddy, Esquire and Tony H. Key, 3100 Cumberland Circle, Atlanta, GA 30339, appearing on behalf of Sprint Communications Company L.P.

('Sprint').

TENNESSEE ISSUE #3 AT&T FINAL BEST OFFER

3. What are the appropriate standards, if any, for performance metrics, service restoration, and quality assurance related to services provided by BellSouth for resale and for network elements provided to AT&T and MCI by BellSouth?

AGREEMENT - GENERAL TERMS AND CONDITIONS

12. *Performance Measurement*

12.1 In providing Services and Elements, BellSouth will provide AT&T with the quality of service BellSouth provides itself and its end-users. BellSouth's performance under this Agreement shall provide AT&T with the capability to meet standards or other measurements that are at least equal to the level that BellSouth provides or is required to provide by law and its own internal procedures. BellSouth shall satisfy all service standards, measurements, and performance requirements set forth in the Agreement and the Direct Measures of Quality ('DMOQs') that are specified in Attachment 12 of this Agreement. In the event that BellSouth demonstrates that the level of performance specified in Attachment 12 of this Agreement are higher than the standards or measurements that BellSouth provides to itself or its end users pursuant to its own internal procedures, BellSouth's own level of performance shall apply. 12.2 The Parties acknowledge that the need will arise for changes to the DMOQ's specified in Attachment 12 during the term of this Agreement. Such changes *may include the addition or deletion of measurements or a change* in the performance standard for any particular metric. The parties agree to review all DMOQ's on *on a quarterly basis to determine if any changes are appropriate.*

***9** 12.3 The Parties agree to monitor actual performance on a *monthly* basis and develop a Process Improvement Plan to continually *i* mprove quality of service provided as measured by the DMOQs.

ATTACHMENT 4 - PROVISIONING AND ORDERING

9.1 AT&T will specify on each order its Desired Due Date (DDD) for completion of that particular order. *Standard intervals do not apply to orders under this Agreement.* BellSouth will not complete the order prior to DDD or later than DDD unless authorized by AT&T. If the DDD is less than the following element intervals, the order will be considered an 'expedited order.'

INTERVALS FOR ORDER COMPLETION

Network Element	Number of Days
LD	2
LC	2
LF	2
LS	2

OS	2
DT	
SS	3
SL	2
DB	2
TS	2
C-Loop	2
C-Local Switch Conditioning Combination	20

9.2 Within *two (2) Business hours* after a request from AT&T for an expedited order, BellSouth shall notify AT&T of BellSouth's confirmation to complete, or not complete, the order within the expedited interval. A Business Hour is any hour occurring on a business day between *8 a.m. and 8 p.m.* within each respective continental U.S. time zone. 9.3 Once an order has been issued by AT&T and AT&T subsequently requires a new DDD that is less than the minimum interval defined, AT&T will issue an 'expedited modify order.' BellSouth will notify AT&T within two (2) Business Hours of its confirmation to complete, or not complete, the order requesting the new DDD. 9.4 AT&T and BellSouth will agree to escalation procedures and contacts. BellSouth shall notify AT&T of any modifications to these contacts within one (1) week of such modifications.

ATTACHMENT 12

1. PERFORMANCE MEASUREMENT

1.1 BellSouth, in providing Services and Elements to AT&T pursuant to this Agreement, shall provide AT&T the same quality of service that BellSouth provides itself and its end-users. This attachment includes AT&T's minimum service standards and measurements for those requirements. The Parties have agreed to five (5) categories of DMOQs: (1) Provisioning; (2) Maintenance; (3) Billing (Data Usage and Data Carrier); (4) LIDB; and (5) Account Maintenance. Each category of DMOQ includes measurements which focus on timeliness, accuracy and quality. BellSouth shall measure the following activities to meet the goals provided herein. 1.2 All DMOQs shall be measured on a monthly basis and shall be reported to AT&T *in a mutually agreed upon format* which will enable AT&T to compare BellSouth's performance for itself with respect to a specific measure to BellSouth's performance for AT&T for that same specific measure. Separate measurements shall be provided for residential customers and business customers. 1.3 DMOQs being measured pursuant to this Agreement shall be reviewed by AT&T and BellSouth quarterly to determine if any additions or changes to the measurements and the standard shall be required or, if process improvements shall be required.

2. PROVISIONING DMOQs

***10** 2.1 Installation functions performed by BellSouth will meet the following DMOQs:

Desired Due Date 90% Committed Due Date Residence: >99% met Business: >99.5% met Feature Additions and

Changes (if received by 12pm, provisioned same day) - 99% Installation Provisioned Correctly in less than five (5) days Residence: > 99% met Business: >99.5 met UNE: >99% met Missed Appointments Residence: less than 1% Business: 0% Firm Order Confirmation within 24 hours - 99%

Notice of reject or error status within 1 hour of receipt - 98%

No trouble reports within 60 days of installation - 99%

3. MAINTENANCE DMOQs

3.1 Where an outage has not reached the threshold defining an emergency network outage, the following quality standards shall apply with respect to restoration of Local Service and Network Elements or Combination. Total outages requiring a premises visit by a BellSouth technician that are received between 8 a.m. to 6 p.m. on any day shall be restored within four (4) hours of referral, ninety percent (90%) of the time. Total outages requiring a premises visit by a BellSouth technician that are received between 6 p.m. and 8 a.m. on any day shall be restored during the following 8 a.m. to 6 p.m. period in accordance with the following performance metric: within four (4) hours of 8 a.m., ninety percent (90%) of the time. Total outages which do not require a premises visit by a BellSouth technician shall be restored within two (2) hours of referral, eighty-five percent (85%) of the time. 3.2 Trouble calls (e.g., related to Local Service or Network Element or Combination degradation or feature problems) which have not resulted in total service outage shall be resolved within twenty-four (24) hours of referral, ninety-five percent (95%) of the time, irrespective of whether or not resolution requires a premises visit. For purposes of this Section, Local Service or a Network Element or Combination is considered restored, or a trouble resolved, when the quality of the Local Service or Network Element or Combination is equal to that provided before the outage, or the trouble, occurred. 3.3 The BellSouth repair bureau shall provide to AT&T the 'estimated time to restore' with at least ninety-seven percent (97%) accur- acy.

3.4 Repeat trouble reports from the same customer in a 60 days period shall be less than one percent (1%). Repeat trouble reports shall be measured by the number of calls received by the BellSouth repair bureau relating to the same telephone line during the current and previous report months. 3.5 BellSouth shall inform AT&T *within ten (10) minutes* of restoration of Local Service, Network Element, or Combination after an outage has occurred. 3.6 *If service is provided to AT&T Customers before an Electronic Interface is established between AT&T and BellSouth, AT&T will transmit repair* calls to the BellSouth repair bureau by telephone. In such event, the following standards shall apply: The BellSouth repair bureau shall answer its telephone and begin taking information from AT&T within *twenty (20) seconds of the first ring, ninety-five percent (95%)* of the time. Calls answered by automated response systems, and calls placed on hold, shall be considered not to meet these standards.

4. BILLING (CUSTOMER USAGE DATA)

***11** 4.1 File Transfer

BellSouth will initiate and transmit all files error free and without loss of signal.

Metric: Number of FILES Received X 100 Number of FILES Sent

Notes: All measurement will be a on a rolling period.

Measurement:
Meets Expectations

6 months of file transfers
without a failure

**During the first six (6) months, no rating will be applied.

NECT:Direct, all usage records to AT&T's Message Processing Center three (3) times a day.

4.2 Timeliness

BellSouth will mechanically transmit, via CON-

Measurement:
Meets Expectations

99.94% of all messages
delivered on the day the
call was Recorded.

4.3 Completeness

delivered during current month minus Number of Usage Call Records held in error file at the end of the current month. X 100 Total number of Recorded Usage Data Records delivered during current month

BellSouth will provide all required Recorded Usage Data and ensure that it is processed and transmitted within thirty (30) days of the message create date.

Metric: Total number of Recorded Usage Data records

Measurement:

Criteria

Meets Expectations

99.99% of all records
delivered

4.4 Accuracy

Total Number of Recorded Usage Data Transmitted Correctly X 100 Total Number of Recorded Usage Data Transmitted

BellSouth will provide Recorded Usage Data in the format and with the content as defined in the current BellCore EMR document.

Metric:

Measurement:
Meets Expectations

>= 99.99% of all recorded
records delivered

4.5 Data Packs

BellSouth will transmit to AT&T all packs error free in the format agreed.

Measurement:
Meets Expectations

6 months of Transmitted Packs without a rejected pack

**During the first six (6) months, No Rating will be applied. Notes: All measurements will be on a Rolling Period.

4.6 Recorded Usage Data Accuracy

BellSouth will ensure that the Recorded Usage Data is transmitted to AT&T error free. The level of detail includes, but is not limited to: detail required to Rating the call, Duration of the call, and Correct Originating/ Terminating information pertaining to the call. The error is reported to BellSouth as a Modification Request (MR). Performance is to be measured at 2 levels defined below. AT&T will identify the priority of the MR at the time of hand off as Severity 1 or Severity 2. The following are AT&T expectations of BellSouth for each:

Measurement:
Severity 1:
Meets Expectations

90% of the MR fixed in 24 hours and 100% of the MR fixed in 5 Days

Severity 2:
Meets Expectations

90% of the MR fixed in 3 Days and 100% of the MR fixed in 10 Days

4.7 Usage Inquiry Responsiveness

BellSouth will respond to all usage inquiries within twenty-four (24) hours of AT&T's request for information. It is AT&T's expectation to receive continuous status reports until the request for information is satisfied.

Measurements:

Rating

12 Meets Expectations 100% of the Inquiries responded to within 24 hours

5. BILLING (CONNECTIVITY BILLING AND RECORDING)

5.1 The Parties have agreed to negotiate a pre-bill certification process set forth in Section 12 of Attachment 6. At a minimum the process will include measurement of the following:

Billing Accuracy: • bill format • other charges and credits • minutes of use • Customer Service Record Timeliness • bill Delivery • service order billing • late billing notification • correction/adjustment dollars • bill period closure cycle time • minutes of use charges • customer service record Customer satisfaction rating

6. LINE INFORMATION DATA BASE (LIDB)

6.1 BellSouth shall provide processing time at the LIDB within 1 second for 99% of all messages under normal conditions as defined in the technical reference in Sec-

tion 13.8.5 of Attachment 2. 6.2 BellSouth shall provide 99.9% of all LIDB queries in a round trip within 2 seconds as defined in the technical reference in Section 13.8.5 of Attachment 2. 6.3 Once appropriate data can be derived from LIDB, BellSouth shall measure the following: 6.3.1 There shall be at least a 99.9% reply rate to all query attempts. 6.3.2 Queries shall time out at LIDB no more than 0.1% of the time. 6.3.3 Data in LIDB replies shall have at no more than 2% unexpected data values, for all queries to LIDB. 6.3.4 Group troubles shall occur for no more than 1% of all LIDB queries. Group troubles include: 6.3.4.1 Missing Group - When reply is returned 'vacant' but there is no active record for the 6-digit NPA-NXX group. 6.3.4.2 Vacant Code - When a 6-digit code is active but is not assigned to any customer on that code. 6.3.5 There shall be no defects in LIDB Data Screening of responses.

7. ACCOUNT MAINTENANCE

7.1 When notified by a CLEC that an AT&T Customer has switched to CLEC service, BellSouth shall provision the change, and notify AT&T via CONNECT: Direct that the customer has changed to another service provider ('OUTPLOC ') within one (1) business day, 100% of the time. 7.2 When notified by AT&T that a customer has changed his/her PIC only from one interexchange carrier to another carrier, BellSouth shall provision the PIC only change and convey the confirmation of the PIC change via the work order completion feed with 100% of the orders contained within one (1) business day. 7.3 If notified by an interexchange carrier using an '01' PIC order record that an AT&T Customer has changed his/her PIC only, BellSouth will reject the order and notify that interexchange carrier a CARE PIC record should be sent to the serving CLEC for processing. 100% of all orders shall be rejected within one (1) business day.

FOOTNOTES

FN1 Please note that the term the 'Act' when used throughout this Final Order refers to the Federal Telecommunications Act of 1996; the term 'FCC Report and Order' refers to the First Report and Order issued by the Federal Communications Commission (the 'FCC') in CC Docket No. 96-98, In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, as the same was in effect on January 7, 1997; words in the masculine also denote the feminine and neural and *vice versa*; and words that are singular may also denote the plural and *vice versa*.

FN2 The appearances entered at the Arbitration Conference are recorded on the last page of this Final Order of Arbitration Awards.

FN3 During the December 11, 1996, Pre-Hearing Conference, the parties informed the Arbitrators that the parties desired to submit to arbitration without a hearing for oral testimony. *See* Transcript of December 11, 1996, Pre-Hearing Conference, pages 4-5. The Arbitrators accepted this joint proposal by the parties.*See* Transcript of December 11, 1996, Pre-Hearing Conference, page 43 and Order from Pre-Hearing Conference held December 11, 1996.

FN4 *See* FCC Report and Order, paragraph 1310 and FCC Report and Order, Rule 51.809.

FN5 *See* FCC Report and Order, paragraph 1316.

FN6 'Chunks' is the terminology BellSouth introduced with respect to this issue.

FN7 One of the concerns was that the Eighth Circuit Court of Appeals has stayed the FCC's commonly called 'pick and choose rule,' which rule is based upon Section 252(i) of the Act. According to the Eighth Circuit, when the FCC promulgated its rule, it expanded the statutory language of section 252(i) to include the word 'rates,' which word does not actually appear in section 252(i).

FN8 *See* FCC Report and Order, paragraph 1311.

FN9 *See* November 21, 1996, Transcript of Arbitration Hearing between Sprint and BellSouth before the Louisiana Public Service Commission, Docket No. U-22146, page 71 (hereinafter 'The Louisiana Transcript'). The Louisiana Transcript was made a part of the record in this proceeding by agreement of the parties.*See* Transcript of December 11, 1996, Pre-Hearing Conference, page 5 and Order from Pre-Hearing Conference held December 11, 1996.

FN10 *See* Louisiana Transcript, page 74.

FN11 The trunking arrangements referred to by Chairman Greer were reached by and among AT&T, MCI and BellSouth with respect to issue 20 in the AT&T and BellSouth Consolidated Arbitration, Docket No. 96-01152.It should be noted that issue 20 in the AT&T and BellSouth Consolidated Arbitration was removed from consideration before the Arbitrators by the parties. Hence, the Arbitrators are without knowledge of the specifics of the trunking arrangements negotiated among AT&T, MCI and BellSouth.

FN12 *See* Transcript of January 7, 1997, Arbitration Conference, page 15.

FN13 *See* Louisiana Transcript, pages 158-61. Moreover, Director Malone noted that BellSouth indicated in its brief that Sprint will be permitted to mix different traffic types over the same trunk group subsequent to the parties agreeing on a mutually acceptable means of billing such traffic.

FN14 *See* Louisiana Transcript, page 160. Mr. Scheye stated that 'I'm not disputing with you, sir, that physically it is possible to run a whole bunch of different kind of traffic on one trunk. You're absolutely right.' Mr. Scheye further stated that 'It has to do with our ability to record it, ability to identify it, ability to bill, ability to audit, those types of measures.'

FN15 The methods proffered by BellSouth in its testimony were as follows: (1) Sprint could obtain the information sought from the customer; (2) Sprint could obtain the information sought via a three-way call among Sprint, BellSouth and the customer; and (3) Sprint could use a switch as is process.

END OF DOCUMENT

PUR Slip Copy

Re Declaratory Ruling and Nunc Pro Tunc Designation of Nexus Communications as an Eligible Telecommunications Carrier
Docket No. 10-00083

Tennessee Regulatory Authority
August 2, 2010

Before Kyle, chairman, and Hill and Freeman, directors.

BY THE DEPARTMENT:

*1 *ORDER REFUSING ISSUANCE OF DECLARATORY RULING*

This matter came before Chairman Sara Kyle, Director Kenneth C. Hill and Director Mary W. Freeman of the Tennessee Regulatory Authority ('Authority' or 'TRA'), the voting panel assigned to this docket, at a regularly scheduled Authority Conference held on May 24, 2010, for consideration of the *Petition for Declaratory Ruling and Nunc Pro Tunc Designation of Nexus Communications as an Eligible Telecommunications Carrier to Offer Wireless Service in Tennessee* (' *Petition* ') filed by Nexus Communications, Inc. ('Nexus') on April 28, 2010.

BACKGROUND & PROCEDURAL HISTORY

On October 18, 2007, Nexus filed with the Authority an application for a Certificate of Public Convenience and Necessity ('CCN') to provide competing facilities-based and resold local telecommunications services in Tennessee. [FN1]In its application, among other things, Nexus stated that it would be providing service through an interconnection/resale agreement with BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee ('AT&T Tennessee') and had no plans to install facilities. [FN2]Nexus further agreed to adhere to all Authority policies, rules, and orders and to submit wireline activity reports as required. [FN3]The application, however, makes no mention of Nexus providing wireless service in Tennessee. In an Order dated January 8, 2008, the TRA granted Nexus' application for a CCN, authorizing Nexus to provide competing facilities-based and resold local telecommunications services in Tennessee as described in its application. [FN4]

On July 11, 2008, Nexus filed an application for designation as an eligible telecommunications carrier ('ETC') with the Authority in Docket No. 08-00119. [FN5]In its ETC application, Nexus stated that it was applying for designation in the service territory of AT&T Tennessee and provided a list of the wire centers for which it requested ETC status. [FN6]In addition, Nexus stated that it was seeking designation only for low-income support [FN7] and affirmed that it satisfied all statutory requirements for designation. [FN8]Consistent with its CCN application, Nexus' ETC application also omitted any mention that Nexus provided wireless service or that it intended to provide wireless service as an ETC.

Thereafter, the Authority conducted a review of Nexus' qualifications in accordance with the information provided by Nexus in its ETC application. On October 27, 2008, finding the statutory requirements satisfied, the TRA granted Nexus' ETC application and, based thereon, issued an Order designating Nexus as an ETC in the Tennessee service area footprint of AT&T Tennessee. [FN9]As designated by a state commission, like the TRA, Nexus' ETC designation enables it to receive federal low-income universal service support funding in accordance with, and subject to, the authority of the state commission to grant such designation under both state and federal law. [FN10]

Subsequently, on March 23, 2009, Nexus filed a petition requesting that the TRA amend its ETC Order

to describe Nexus' services in Tennessee as 'wireline and wireless.' [FN11] Nexus' request for modification of the ETC Order revealed for the first time that Nexus serves its customers using both wireline and wireless technologies. On June 7, 2009, the TRA declined to amend the language of the ETC Order as Nexus requested and instead amended its ETC Order to definitively state that Nexus had ETC designation for 'wireline local exchange services.' [FN12]

***2** On November 25, 2009, Steven Fenker, President of Nexus, filed a letter in Docket No. 08-00119 indicating that, based on the TRA's orders, Nexus applied for and was assigned two Study Area Codes enabling it to receive federal universal service low-income funding for the provision of Lifeline service using both wireline and wireless technologies. [FN13]In his letter, Mr. Fenker asserted that such action was consistent with Nexus' interpretation of Federal Communications Commission ('FCC') Rule 54.201(h), which directs state commissions to designate ETC status to qualified carriers regardless of the technology used to provide service. Moreover, Nexus contended that FCC rule § 54.201(h) broadly authorizes a state-designated ETC to provide service to, and receive federal universal service support funding for, low-income customers using any technology the carrier wishes to offer. [FN14]In addition, Mr. Fenker stated that Nexus, as a 'certified carrier,' is subject to TRA enforcement of Lifeline and Link Up regulations as to both wireline and wireless service. Yet, Nexus also stated that it 'voluntarily submits' to the TRA's jurisdiction and would comply with TRA rulings enforcing state and federal Lifeline and Link Up regulations 'irrespective of the technology Nexus uses to provide service.' [FN15]

THE PETITION

Subsequent to its notification from USAC that certain universal service support payments made to Nexus for wireless ETC service were not authorized, [FN16] Nexus filed on April 28, 2010, a *Petition* urging the Authority to declare that the TRA has jurisdiction under federal and state law to designate Nexus as a wireless ETC, and further, to declare *nunc pro tunc* that Nexus' ETC designation includes authority to provide a wireless low-income offering, *i.e.*, Lifeline and/or Link Up service, in Tennessee. [FN17]In its *Petition*, Nexus acknowledges that neither the initial ETC Order nor the Amended ETC Order mentioned or specifically granted authority to Nexus to provide wireless ETC services. [FN18]Despite this admission, Nexus reiterates its earlier contentions that based on the TRA's orders designating Nexus as an ETC and Nexus' interpretation of FCC Rules, specifically 47 C.F.R. §54.201(h), it is justified in applying for and obtaining two Study Area Codes to provide federally-subsidized service to low-income customers using wireline [FN19] and wireless technologies. [FN20]

In its *Petition*, Nexus further asserts that the Authority is empowered to authorize Nexus to provide federally subsidized low-income wireless service not only under federal law, but also under state law. [FN21]At paragraph 17, Nexus proffers its interpretation of Tenn. Code Ann. §65-4-101(6)(F) concerning the limits of regulation upon providers of 'domestic public cellular radio telephone service,' commonly known as commercial mobile radio service ('CMRS ') or wireless telephone service, and the statute's classification of providers of such services as 'nonutilities.' According to Nexus, Tenn. Code Ann. § 65-4-101(6)(F) does not preclude but, instead, preserves, the exercise of TRA jurisdiction over the wireless service of a certificated carrier that is subject to regulation under Chapter 5 of Title 65. [FN22]

***3** Nexus asserts that Tenn. Code Ann. §65-4-101 (6)(F) distinguishes between a CMRS provider that exclusively offers wireless service in competition with another CMRS provider and a CMRS provider that is classified as a public utility due to also furnishing services regulated by the TRA. Further, Nexus contends that because it is subject to TRA jurisdiction for its wireline/landline services, it is

likewise subject to TRA regulation as a CMRS provider for its wireless service, at least insofar as concerns designation of ETC. [FN23]

On May 11, 2010, Nexus filed an *Amendment to Petition* supplementing its interpretation of the statutory provision at issue and inserting an additional argument in support of its assertion that the TRA's jurisdiction currently includes wireless telephone service. In its *Amendment to Petition* , Nexus asserts that the language of Tenn. Code Ann. §65-4-101(6)(F) acts to deregulate only certain entities that provide wireless service, and not the service itself. [FN24]To illustrate its point, Nexus offers its comparative analysis of the language of the subject statute with language found in Tenn. Code Ann. §65-5-203 (2006), which prohibits the exercise of TRA jurisdiction over broadband services. Based on its comparison of the statutes, Nexus contends that the regulatory exemption found in Tenn. Code Ann. § 65-4-101(6)(F) is not for uniform application. Rather, Nexus surmises that had the legislature intended to exempt wireless service from the TRA's jurisdiction, it could have done so using the language of the later-enacted broadband statute. [FN25]In other words, because Tenn. Code Ann. §65-4-101(6)(F) [FN26] does not utilize language identical to the 2006 broadband statute, this somehow evidences an intent to provide, and not to remove, TRA jurisdiction for particular entities only, *i.e.*, that providers of wireless service that also offer a service that the TRA has jurisdiction to regulate, should be subject to TRA regulation for services that it provides that the TRA would not otherwise have jurisdiction.

Finally, Nexus contends that because it purports to supply landline telephone service and does not exclusively provide wireless telephone services and, thus, 'is not one of those entities' to which, under its interpretation of the statute, the regulatory exemption applies. [FN27]That is, because the TRA has jurisdiction over Nexus' landline service, it follows that the TRA also has jurisdiction and authority over Nexus' wireless service - but only to the extent necessary to designate it eligible to receive federal subsidies for wireless service to qualified low-income consumers. In short, Nexus claims that as a certificated competing local exchange carrier ('CLEC'), and therefore a public utility subject to TRA jurisdiction, it is and remains a public utility, if not for all of its services, then at least for the limited purpose of receiving wireless ETC designation.

FINDINGS AND CONCLUSIONS

In this docket, Nexus asks the TRA to declare that it has jurisdiction under federal and state law to designate Nexus as a wireless ETC provider, and further, to declare *nunc pro tunc* that the ETC designation for wireline services granted to Nexus by the TRA on October 27, 2008, included authority to provide wireless Lifeline and Link Up services in Tennessee, thereby, making Nexus eligible as of that date to receive federal universal support funding for provision of wireless services.

***4** To preserve and advance universal telecommunications service, the United States Congress has made federal funding, or subsidies, available to telecommunications carriers that meet certain minimum requirements. [FN28]The Authority agrees with Nexus insofar as that, under federal law, state commissions, such as the TRA, hold relatively broad power to designate as ETCs telecommunications carriers that meet those requirements, thereby enabling such carriers to receive federal universal service subsidies. [FN29]In addition, under 47 C.F.R. § 54.201(h), a state commission that determines that a carrier has satisfied the prerequisites for ETC designation is not restricted from granting, nor permitted to deny, ETC designation due to such carrier's chosen method of distributing service. [FN30] The TRA further recognizes that when a carrier seeking ETC designation is not subject to the jurisdiction of a state commission, whether due to the nature or geographical location of its service, federal law directs that the FCC perform the designation. [FN31]

Notwithstanding the potential authority that the TRA may have under federal law, ultimately, the TRA is a legislatively created body of the state and empowered only to exercise the jurisdiction, power, and authority delegated to it by the Tennessee General Assembly. [FN32]In *BellSouth Advertising & Publishing Corp. v. TRA*, the Supreme Court of Tennessee stated, 'In defining the authority of the TRA, this Court has held that '[a]ny authority exercised by the TRA must be the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power.'' [FN33] The General Assembly has charged the TRA with 'general supervisory and regulatory power, jurisdiction and control over all *public utilities*' within Tennessee. [FN34]

While 'public utility' is defined broadly within Tenn. Code Ann. § 65-4-101, the General Assembly has expressly excluded 'nonutilities' from the TRA's jurisdiction. [FN35] 'Nonutilities' has been defined to include any entity 'offering domestic public cellular radio telephone service' (*i.e.*, CMRS and wireless service providers): [FN36]

(6) ...'Public utility' as defined in this section shall not be construed to include the following *nonutilities*:

(F) Any individual, partnership, copartnership, association, corporation or joint stock company offering *domestic public cellular radio telephone service* authorized by the federal communications commission ... [FN37]

In addition, the statute provides a regulatory exception to the complete removal of regulatory authority over such providers so long as competition is restricted to one CMRS provider in the same cellular geographical area. Even then, the TRA has limited jurisdiction to review only the customer rates of such providers:
...until at least two (2) entities, each independent of the other, are authorized by the federal communications commission to offer domestic public cellular radio telephone service in the same cellular geographic area within the state, the *customer rates only of a company offering domestic public cellular radio telep hone servi ce sha ll be subject to review by the Tennessee Regulatory Authority* pursuant to §§65-5-101 - 65-5-104 ... [FN38]

***5** The TRA's delegated authority over wireless service providers is limited to rates, conditioned on and extending only until the FCC has authorized two wireless providers to offer service in the same cellular geographical area of the state. Expressly set out within the statutory provision itself is the triggering event that rescinds the TRA's limited grant of jurisdiction over wireless providers:
... *Upon existence* in a cellular geographical area *of the c onditions set fo rth* in the preceding sentence, *domestic public cellular radio telephone service in such area [where the FCC has authorized two providers], for all purposes, shall automatically cease to be treated as a public utility* ... . The [TRA's] authority ...is *expressly limited* [to the absence of two authorized providers] and the authority shall have no authority over resellers of domestic public cellular radio telephone service ... . This subdivision (6)(F) does not affect, modify or lessen the regulatory authority's authority over public utilities that are subject to regulation pursuant to chapter 5 of this title. [FN39]

The TRA has long recognized the plain language of Tenn. Code Ann. § 65-4-101(6)(F) limits, and removes, the TRA's authority over wireless service providers. Thus, the TRA has consistently acknowledged its lack of state-delegated authority over CMRS providers in both the broad sense [FN40] and specifically as to ETC designation. [FN41]As set forth extensively above, Nexus sought a ruling on the issue of wireless ETC designation previously when it filed its *Petition for Clarification* with the Authority in Docket No. 08-00119. [FN42]Consistent with its previous rulings on matters involving wireless service, the Authority finds that it does not have jurisdiction over wireless providers based on the express definition of 'nonutilities' found in Tenn. Code Ann. §65-4-101(6)(F), and therefore,

specifically does not have subject matter jurisdiction over the precise issue upon which the Company seeks a declaratory ruling.

Tenn. Code Ann. §4-5-223 [FN43] provides that a state agency, upon petition for a declaratory order, must either convene a contested case hearing and issue a declaratory order or refuse to issue a declaratory order within sixty days of receipt of the petition. In the case of *Hughley v. State*, the Tennessee Supreme Court found that the lack of a contested case hearing on the petition constitutes refusal to issue a declaratory order under Tenn. Code Ann. §4-5-223(a)(2), even when the agency provides a decision with reasons that may go to the merits of the petition. [FN44]Accordingly, for the above stated reasons, the panel voted unanimously to refuse to issue a declaratory order pursuant to Tenn. Code Ann. §4-5-223(a)(2).

IT IS THEREFORE ORDERED THAT:

In accordance with Tenn. Code Ann. §4-5-223 (a)(2), the Tennessee Regulatory Authority refuses to issue a declaratory order on the *Petition for Declaratory Ruling and Nunc Pro Tunc Designation of Nexus Communications as an Eligible Telecommunications Carrier to Offer Wireless Service in Tennessee* filed by Nexus Communications, Inc.

***6** FOOTNOTES

FN1 *See In re: Application of Nexus Communications, Inc. for a CCN to Provide Competing Local Exchange and Interexchange Telecommunications Services in Tennessee*, Docket No. 07-00241,*Application of Nexus Communications, Inc. for Authority to Provide Competing Local Exchange & Interexchange Service* (October 18, 2007).

FN2 *Id.* at 1 and 7.

FN3 *Id.* at 11 and 13.

FN4 *See In re: Application of Nexus Communications, Inc. for a CCN to Provide Competing Local Exchange and Interexchange Telecommunications Services in Tennessee*, Docket No. 07-00241,*Initial Order Granting Certificate of Public Convenience and Necessity* (January 8, 2008).

FN5 *See In re: Application of Nexus Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 08-00119,*Application for Designation as an Eligible Telecommunications Carrier* (July 11, 2008).

FN6 *Id.*

FN7 Lifeline and Link Up are two components of the Low Income Program of the Universal Service Fund. The Fund, administered by the Universal Service Administration Company ('USAC'), is designed to ensure that quality telecommunications services are available to low-income customers at just, reasonable and affordable rates. Lifeline support lowers the monthly charge of basic telephone service for eligible consumers. Link Up support reduces the cost of initiating new telephone service. The Federal Communications Commission's rules concerning Lifeline and Link Up are codified at 47 C.F.R. §54.400-417. See, *Assessment of Payments Made Under the Universal Service Fund's Low Income Program*, 2008 WL 5205212 (2008).

FN8 *See In re: Application of Nexus Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 08-00119,*Application for Designation as an Eligible Telecommunications Carrier* (July 11, 2008).

FN9 *See In re: Application of Nexus Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 08-00119,*Order Designating Nexus Communications, Inc. as an Eligible Telecommunications Carrier* ('ETC Order') (October 27, 2008).

FN10 47 U.S.C.A. §§254(e) and §214(e)(2) and (6).

FN11 *See In re: Application of Nexus Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 08-00119,*Petition of Nexus Communications, Inc. for Clarification of Final Order ('Petition for Clarification')* (March 23, 2009).

FN12 *See In re: Application of Nexus Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 08-00119,*Order Granting Petition for Clarification and Issuance of Amended Order*, p. 2, and attached thereto, *Amended Order Designating Nexus Communications, Inc. as an Eligible Telecommunications Carrier* ('Amended ETC Order'), p. 3 £ 3 (June 7, 2009).

FN13 *See In re: Application of Nexus Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 08-00119, Letter from Steven Fenker, President, Nexus Communications, Inc. (November 25, 2009).

FN14 *Id.*

FN15 *Id.*

FN16 As referenced in the *Petition*, p. 4 £ 13, a letter dated April 16, 2010, from USAC indicated that because Nexus did not appear to be authorized or designated by the TRA to provide wireless ETC service, disbursement of subsidies to Nexus for wireless low-income program subscribers would be discontinued and further, USAC might seek reimbursement from Nexus of monies previously paid to it for such unauthorized services.

FN17 *Petition for Declaratory Ruling and Nunc Pro Tunc Designation of Nexus Communications as an Eligible Telecommunications Carrier to Offer Wireless Service in Tennessee ('Petition')* (April 28, 2010).

FN18 *Petition*, pp. 2-3, ££ 2 and 7 (April 28, 2010).

FN19 *Petition*, p. 3, ££ 8-9 and footnote 2 (April 28, 2010) ('Nexus applied for a wireline code on July 24, 2009, and received it two days later on July 31, 2009.'); see also, *Affidavit of Steven Fenker* attached to *Petition*, £ 16 (April 28, 2010) ('On July 29, 2009 Nexus submitted to USAC a Study Area Code ('SAC Code') request form for technology type 'wireline.' USAC after only a two day review of the Original Order issued Nexus a separate 'wireline' SAC Code on July 31, 2009.').

FN20 *Petition*, p. 3 (April 28, 2010) ('Two months later, on August 21, 2009, USAC issued Nexus a wireless code for Tennessee.'); see also, *Affidavit of Steven Fenker* attached to *Petition*, £ 15 (April 28, 2010) ('USAC after a two month review of the application and an analysis of both Orders, finally issued Nexus a separate 'wireless' SAC Code on August 21, 2009.').

FN21 *Petition*, p. 5, ££ 16-17.

FN22 *Petition*, pp. 5-6, £ 17(a-g).

FN23 *Petition*, p. 6, £ 17(d-f).

FN24 *Amendment to Petition* (May 11, 2010).

FN25 *Id.*

FN26 Tenn. Code Ann. §65-4-101(6)(F) was enacted prior to 1995, while the Tennessee Public Service Commission ('TPSC') was still in existence. In 1995, the 99th General Assembly abolished the TPSC and thereafter created the TRA in its stead to effectively govern and regulate public utilities in the state of Tennessee.

FN27 *Id.*

FN28 47 U.S.C.A. §254(e).

FN29 47 U.S.C.A. §214(e)(2).

FN30 47 C.F.R. §54.201(h).

FN31 47 U.S.C.A. §214(e)(6).

FN32 *BellSouth Advertising & Publishing Corp. v. Tennessee Regulatory Auth.*, 79 S.W.3d 506, 512 (Tenn. 2002); *Tennessee Pub. Serv. Comm'n v. Southern Ry. Co.*, 554 S.W.2d 612, 613 (Tenn. 1977).

FN33 *Id.*

FN34 Tenn. Code Ann. §65-4-104 (*emphasis added*).

FN35 Tenn. Code Ann. §65-4-101(6).

FN36 Tenn. Code Ann. §65-4-101(6)(F).

FN37 Tenn. Code Ann. §65-4-101(6)(F) (*emphasis added*).

FN38 *Id.*

FN39 *Id.*

FN40 *See In re: Sprint Communications Company, L.P.*, Docket No. 96-01411,*Final Order of Arbitration Awards* (March 26, 1997), PUR Slip Copy, 1997 WL 233027 *5 (during an Arbitration Conference held on March 26, 1997, the Authority acknowledged its lack of jurisdictional authority to regulate cellular wireless providers when, in ruling on a dispute between Sprint and BellSouth concerning the placement of combined traffic types (local, toll, and wireless) on the same trunk groups, and despite ultimately voting two to one on the specific issue, the Authority panel members all agreed that the Authority lacked jurisdiction over wireless.)

FN41 *See In re: Application of Advantage Cellular Systems, Inc. to be Designated as an Eligible Telecommunications Carrier*, Docket No. 02-01245,*Order* (April 11, 2003) (dismissing the application of Advantage Cellular Systems, Inc. for designation as an ETC because, as Advantage Cellular was a CMRS provider, the TRA lacked subject matter jurisdiction because the definition of public utilities under Tenn. Code Ann. §65-4-101 specifically excludes CMRS providers. In addition the panel noted that under 47 U.S.C.A. §214(e)(6), the FCC is authorized to perform ETC designations for carriers that are not subject to TRA jurisdiction and that its *Order* serves as an affirmative statement that it lacks jurisdiction to perform the ETC designation as to CMRS carriers.)

FN42 *See In re: Application of Nexus Communications, Inc. for Designation as an Eligible Telecommunications Carrier*, Docket No. 08-00119,*Petition of Nexus Communications, Inc. for Clarification of Final Order* (March 23, 2009).

FN43 Tenn. Code Ann. §4-5-223(a) provides:
(a) Any affected person may petition an agency for a declaratory order as to the validity or applicability of a statute, rule, or order within the primary jurisdiction of the agency. The agency shall:
(1) Convene a contested case hearing pur-

> suant to the provisions of this chapter and issue a declaratory order, which shall be subject to review in the chancery court of Davidson County, unless otherwise specifically provided by statute, in the manner provided for the review of decisions in contested cases; or
> (2) Refuse to issue a declaratory order, in which event the person petitioning the agency for a declaratory order may apply for a declaratory judgment as provided in §4-5-225.

Tenn. Code Ann. §4-5-223(c) states, '[i]f an agency has not set a petition for declaratory order for a contested case hearing within sixty (60) days after receipt of the petition, the agency shall be deemed to have denied the petition and to have refused to issue a declaratory order.'

> FN44 *Hughley v. State*, 208 S.W.3d 388 (Tenn. 2006) (holding that a letter of denial from the Department of Correction, issued without a hearing in response to a petition for declaratory order, is not equivalent to a 'final order' in a contested case proceeding even when such response is issued after research and analysis of petitioner's grounds for seeking same and purports to deny petitioner's claims on the merits, and accordingly, the sixty-day statute of limitations established in Tenn. Code Ann. §4-5-322(b)(1) is not applicable.).

END OF DOCUMENT

19 F.C.C.R. 7457, 19 FCC Rcd. 7457 (F.C.C.), 32 Communications Reg. (P&F) 340 (F.C.C.), 2004 WL 856557 (F.C.C.)

Federal Communications Commission (F.C.C.)
Order

IN THE MATTER OF PETITION FOR DECLARATORY RULING THAT AT&T'S PHONE-TO-PHONE IP TELEPHONY SERVICES ARE EXEMPT FROM ACCESS CHARGES

WC Docket No. 02-361
FCC 04-97
Adopted: April 14, 2004
Released: April 21, 2004

**1 *7457 By the Commission: Chairman Powell and Commissioners Abernathy, Copps, Martin, and Adelstein issuing separate statements.

I. INTRODUCTION

1. On October 18, 2002, AT&T filed a petition for declaratory ruling that its "phone-to-phone" Internet protocol (IP) telephony services are exempt from the access charges applicable to circuit-switched interexchange calls. [1] The service at issue in AT&T's petition consists of an interexchange call that is initiated in the same manner as traditional interexchange calls - by an end user who dials 1 + the called number from a regular telephone. [2] When the call reaches AT&T's network, AT&T converts it from its existing format into an IP format and transports it over AT&T's Internet backbone. [3] AT&T then converts the call back from the IP format and delivers it to the called party through local exchange carrier (LEC) local business lines. [4] We clarify that, under the current rules, the service that AT&T describes is a telecommunications service upon which interstate access charges may be assessed. We emphasize that our decision is limited to the type of service described by AT&T in this proceeding, i.e., an interexchange service that: (1) uses ordinary customer premises equipment (CPE) with no enhanced functionality; (2) originates and terminates on the public switched telephone network (PSTN); and (3) undergoes no net protocol conversion and provides no enhanced functionality to end *7458 users due to the provider's use of IP technology. Our analysis in this order applies to services that meet these three criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport.

2. We note that the Commission recently adopted a Notice of Proposed Rulemaking concerning IP-enabled services, including Voice over Internet Protocol (VoIP). [5] In that proceeding, we sought comment on, among other things, whether access charges should apply to VoIP or other IP-enabled services. [6] In this order, we provide clarification about the application of our rules to AT&T's specific service because of the importance of this issue for the telecommunications industry. [7] There is significant evidence that similarly situated carriers may be interpreting our current rules differently. [8] These divergent interpretations may have significant implications for competition between these providers, for the ability of LECs to receive appropriate compensation for the use of their networks, and for the application of important Commission rules, such as the obligation to contribute to the universal service support mechanisms. Accordingly, we adopt this order to provide clarity to the industry with respect to the application of access charges pending the outcome of the comprehensive *IP-Enabled Services* rulemaking proceeding. We in no way intend to preclude the Commission from adopting a different approach when it resolves the *IP-Enabled Services* rulemaking proceeding or the *Intercarrier Compensation* rulemaking proceeding. [9]

II. BACKGROUND

**2 3. VoIP technologies, including those used to facilitate IP telephony, enable real-time delivery of voice and voice-based applications. When VoIP is used, a voice communication traverses at least a portion of its communications path in an IP packet

format using IP technology and IP networks. VoIP can be provided over the public Internet or over private IP networks. VoIP can be transmitted over a variety of media (e.g., copper, cable, fiber, wireless). Unlike ***7459** traditional circuit-switched telephony, which establishes a dedicated circuit between the parties to a voice transmission, VoIP relies on packet-switching, which divides the voice transmission into packets and sends them over the fastest available route. Thus, VoIP uses available bandwidth more efficiently than circuit-switched telephony and allows providers to maintain a single IP network for both voice and data.

4. The first set of definitions relevant to the Commission's regulatory treatment of VoIP was developed in the *Computer Inquiries* line of decisions. [10] In those decisions, the Commission created a distinction between basic services and enhanced services. A basic service is transmission capacity for the movement of information without net change in form or content. [11] By contrast, an enhanced service contains a basic service component but also involves some degree of data processing that changes the form or content of the transmitted information. [12] Therefore, the Commission found that, generally, services that result in a protocol conversion are enhanced services, while services that result in no net protocol conversion to the end user are basic services. [13] The Commission found that, "[i]n enhanced services, communications and data processing technologies have become intertwined so thoroughly" that they are distinctly separate from basic services. [14] The Commission concluded that enhanced services constitute the ***7460** electronic transmission of writing, signs, signals, pictures, etc., over the interstate telecommunications network and therefore are subject to the Commission's jurisdiction. [15] It further found, however, that the enhanced service market was highly competitive with low barriers to entry; therefore, the Commission declined to treat providers of enhanced services as common carriers subject to regulation under Title II of the Communications Act of 1934, as amended (the Act). [16] The Commission exercised its Title I jurisdiction to impose conditions on both telephone carriers' entry into the enhanced services market and their provision of basic service to enhanced service providers. [17]

5. In the Telecommunications Act of 1996 (the 1996 Act), [18] Congress included definitions of the terms "telecommunications," "telecommunications service," and "information service." [19] Telecommunications is defined in the statute as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received." [20] A "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." [21] An "information service" consists of "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." [22]

****3** 6. In the *Non-Accounting Safeguards Order*, the Commission has determined that the statutory term "telecommunications service" is similar to the Commission's *Computer Inquiries* definition of a basic service, and the statutory term "information service" is similar to the ***7461** definition of an enhanced service. [23] The Commission found that, like basic services and enhanced services, telecommunications services and information services are separate and distinct categories, with Title II regulation applying to telecommunications services but not to information services. [24] The Commission also found that services that involve no net protocol conversion are telecommunications services, rather than information services, under the 1996 Act definitions. [25]

7. With respect to protocol conversion and phone-to-phone services, the Commission noted in the *Stevens Report* that its *Non-Accounting Safeguards Order* determined that "certain protocol processing services that result in no net protocol conversion to the end user are classified as basic services; those services are deemed telecommunications services." [26] The Commission further stated that "[t]he protocol processing that takes place incident to phone-to-phone IP telephony does not affect the service's classification, under the Commission's current approach, because it results in no net protocol conversion to the end user." [27] Moreover, the Commission observed that "[t]he Act and the Commission's rules impose various requirements on providers of telecommunications, including contributing to universal service mechanisms, paying interstate access charges, and filing

interstate tariffs."[28] The Commission also discussed two types of IP telephony: computer-to-computer telephony and phone-to-phone telephony.[29] In its examination of computer-to-computer IP telephony, the Commission focused on IP telephony provided over the Internet.[30] In this scenario, callers use software and hardware at their premises to place calls using Internet access provided by an unregulated Internet service provider (ISP), and the ISP may not even be aware that a voice call is taking place.[31] Thus, the Commission found that the ISP did not appear to be providing telecommunications to its subscribers.[32]

***7462** 8. In its examination of phone-to-phone IP telephony, the Commission stated that:

"we tentatively intend to refer to services in which the provider meets the following conditions: (1) it holds itself out as providing voice telephony or facsimile transmission service; (2) it does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) it transmits customer information without net change in form or content."[33]

****4** The Commission found that the record then before it suggested that this type of phone-to-phone IP telephony lacks the characteristics of an information service and bears the characteristics of a telecommunications service.[34] The Commission declined, however, to make a definitive pronouncement as to the regulatory status of phone-to-phone IP telephony absent a more complete record focused on individual service offerings.[35] The Commission also stated that it would address in future proceedings the regulatory requirements, including interstate access charges, to which specific types of phone-to-phone VoIP services might be subject if they were determined to be telecommunications services.[36] Specifically with regard to interstate access charges, the Commission stated, "to the extent we conclude that certain forms of phone-to-phone IP telephony service are 'telecommunications services,' and to the extent the providers of those services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we may find it reasonable that they pay similar access charges."[37]

9. Between the issuance of the *Stevens Report* and the date AT&T filed its petition for declaratory ruling in this proceeding, the Commission took no further action with regard to classifying IP telephony for purposes of determining if carriers are subject to interstate access ***7463** charges for such traffic.[38] In its *Intercarrier Compensation* notice of proposed rulemaking, the Commission mentioned the application of access charges to VoIP, stating that "[IP] telephony threatens to erode access revenues for LECs because it is exempt from the access charges that traditional long-distance carriers must pay."[39] AT&T filed its petition for declaratory ruling that interstate access charges do not apply to its phone-to-phone IP telephony service on October 18, 2002. In response to a Public Notice seeking comment on the petition, numerous parties filed comments by December 18, 2002, and reply comments by January 24, 2003.[40]

III. DISCUSSION

10. At the outset, we note that the Commission recently has determined that the VoIP service provided by pulver.com's Free World Dialup is an unregulated information service subject to the Commission's jurisdiction,[41] and has commenced a comprehensive rulemaking proceeding to address IP services generally.[42] That proceeding will entail an analysis of the regulatory characterization of a variety of IP services, including VoIP, and the applicability of access charges to those services. The decision we make in this order with regard to AT&T's specific service is meant to provide clarity to the industry with respect to the application of interstate access charges pending the outcome of the rulemaking proceeding. Commenters supporting divergent outcomes on AT&T's petition have asked the Commission for clarification on this issue.[43] This order represents our analysis of one specific type of service under existing law based on the record compiled in this proceeding. It in no way precludes the Commission from adopting a fundamentally different approach when it resolves the IP services rulemaking, or ***7464** when it resolves the *Intercarrier Compensation* proceeding.[44]

****5** 11. In its petition, AT&T seeks a ruling that access charges do not apply to its specific service. AT&T's specific service consists of a portion of its interexchange voice traffic routed over AT&T's Internet backbone.[45] Customers using this service

place and receive calls with the same telephones they use for all other circuit-switched calls. The initiating caller dials 1 plus the called party's number, just as in any other circuit-switched long distance call. These calls are routed over Feature Group D trunks, and AT&T pays originating interstate access charges to the calling party's LEC.[46] Once the call gets to AT&T's network, AT&T routes it through a gateway where it is converted to IP format, then AT&T transports the call over its Internet backbone. This is the only portion of the call that differs in any technical way from a traditional circuit-switched interexchange call, which AT&T would route over its circuit-switched long distance network.[47] To get the call to the called party's LEC, AT&T changes the traffic back from IP format and terminates the call to the LEC's switch through local business lines, rather than through Feature Group D trunks.[48] Therefore, AT&T does not pay terminating interstate access charges on these calls.[49]

***7465 A. AT&T's Specific Service is a Telecommunications Service**

12. We clarify that AT&T's specific service is a telecommunications service as defined by the Act. AT&T offers "telecommunications" because it provides "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[50] And its offering constitutes a "telecommunications service" because it offers "telecommunications for a fee directly to the public."[51] Users of AT&T's specific service obtain only voice transmission with no net protocol conversion, rather than information services such as access to stored files. More specifically, AT&T does not offer these customers a "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information;" therefore, its service is not an information service under section 153(20) of the Act.[52] End-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service; the decision to use its Internet backbone to route certain calls is made internally by AT&T. To the extent that protocol conversions associated with AT&T's specific service take place within its network, they appear to be "internetworking" conversions, which the Commission has found to be telecommunications services.[53] We clarify, therefore, that AT&T's specific service constitutes a telecommunications service.[54]

13. We are not persuaded by arguments that AT&T's specific service is an information service due to its future potential to provide enhanced functionality and net protocol conversion.[55] AT&T argues that IP services increasingly involve net protocol conversions and are enhanced services under the Commission's rules.[56] Commenters similarly argue that VoIP services that today have characteristics of telecommunications services may evolve into integrated voice, data and enhanced services platforms.[57] This order, however, addresses only AT&T's specific service, and that service does not involve a net protocol conversion and does not meet the statutory definition of an information service. If the service evolves such that it meets the definition of an information service, the Commission could revisit its decision in this ***7466** order.[58]

B. Access Charges Apply to AT&T's Specific Service

****6** 14. After determining that AT&T's specific service falls within the Act's definition of a telecommunications service, we must decide whether access charges should apply to the service. Under our rules, access charges are assessed on interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.[59] In determining whether access charges should be assessed on AT&T's specific service, we are mindful that the Commission may soon decide to reform its intercarrier compensation regime, and of Congress' directive in section 230 "to foster and preserve the dynamic market for Internet-related services" and "the strong federal interest in ensuring that regulation does nothing to impede the growth of the Internet - which has flourished under our 'hands off' regulatory approach - or the development of competition."[60] We are also mindful of the equally compelling statutory obligation to preserve and advance universal service, a policy goal that remains intertwined with the interstate and intrastate access charge regime.[61]

15. We are undertaking a comprehensive examination of issues raised by the growth of services that use IP, including carrier compensation and universal service issues, in the *IP-Enabled Services* rulemaking proceeding.[62] In the interim, however, to provide regulatory certainty, we clarify that AT&T's specific service is subject to interstate access charges. End users place calls using the same method, 1+ dialing, that they use for calls on AT&T's circuit-switched long-distance network. Customers

of AT&T's specific service receive no enhanced functionality by using the service. AT&T obtains the same circuit-switched interstate access for its specific service as obtained by other interexchange carriers, and, therefore, AT&T's specific ***7467** service imposes the same burdens on the local exchange as do circuit-switched interexchange calls.[63] It is reasonable that AT&T pay the same interstate access charges as other interexchange carriers for the same termination of calls over the PSTN, pending resolution of these issues in the *Intercarrier Compensation and IP-Enabled Services* rulemaking proceedings.[64]

16. AT&T argues that, even if section 69.5(b) of our rules applies on its face, the Commission waived it or otherwise established a carve-out for AT&T's specific service in the *Stevens Report*.[65] We disagree. If the Commission had wanted to establish an exemption from section 69.5(b) for certain telecommunications services, it would have been obligated to conduct a rulemaking in conformity with the Administrative Procedure Act.[66] Statements of policy in a Report to Congress or a Notice of Proposed Rulemaking – even if clear[67] – cannot change our rules. The Commission can, of course, grant a waiver for a particular type of service,[68] but we conclude that neither the *Stevens Report* nor the *Intercarrier Compensation* NPRM constitutes a waiver of section 69.5(b) as applied to AT&T's specific service. As discussed below,[69] although ***7468** we decide that the Commission did not waive section 69.5(b) or otherwise create a blanket exemption for AT&T's specific service, we do not decide at this time whether AT&T or any similarly situated party has a valid defense against damages based on equitable considerations.

****7** 17. Some commenters argue that AT&T's specific service should not be assessed interstate access charges because it utilizes the Internet rather than a private IP network.[70] These commenters cite the substantial investment AT&T and other providers have made in upgrading their common Internet backbone to allow for quality voice message transmission.[71] These commenters, however, fail to explain why using the Internet, as opposed to a private IP network or some other type of network, is at all relevant to our analysis of whether AT&T's specific service should be assessed interstate access charges, particularly here where AT&T merely uses the Internet as a transmission medium without harnessing the Internet's broader capabilities. In the *IP-Enabled Services* rulemaking proceeding it is possible that we may draw such distinctions, but we have not done so under our current rules. Commenters also argue that applying access charges to AT&T's specific service would constitute a tax on the Internet, contrary to Congress' decree in section 230(b)(2) of the Act that the Internet should be "unfettered by Federal or state regulation."[72] As discussed above, we must foster the growth of IP services through a "hands off" regulatory approach in a manner that is nonetheless consistent with our other statutory obligations, pending the resolution of intercarrier compensation issues in the rulemaking proceedings.[73] We do not believe that a service of the type described above - which provides no enhanced functionality to the end user due to the conversion to IP - is the kind of use of the "Internet or interactive services" that Congress sought to single out for exceptional treatment. Certainly, AT&T's investment in Internet backbone facilities and the development of network technologies are important, as is the goal of designing a minimally regulatory approach to the Internet that will reduce, as far as possible, regulatory barriers to investment and technology and market entry. On the other hand, we see no benefit in promoting one party's use of a specific technology to engage in arbitrage at the cost of what other parties are entitled to under the statute and our rules, particularly where, based on the record before us, end users have received no benefit in terms of additional functionality or reduced prices. Pending resolution of these issues in the rulemaking proceedings, we conclude that it is reasonable to apply access charges to AT&T's specific service.

18. Commenters also oppose the application of interstate access charges to AT&T's specific service on the basis that these access charges are above cost and inefficient.[74] In ***7469** response, commenters urging denial of the petition argue that the Commission recently has reformed its interstate access charge regime to address inefficiencies, and if AT&T believes that access charges are not cost-based it should challenge the rates through the Commission's tariff procedures.[75] The Commission currently is considering access charge reform in its *Intercarrier Compensation* proceeding,[76] and any issues raised by current access rate levels or rate structures will be addressed there, on the basis of a detailed record. Until such time, however, interstate access charges are the charges assessed on interexchange carriers that use local exchange switching facilities for the provision of interstate telecommunications services.[77] Furthermore, at this time we are not persuaded that we should exempt AT&T's specific service from interstate access charges. For the reasons described above, we clarify that AT&T's specific service does not qualify as an information service, nor does it provide any enhanced functionality to its customers. End users place and

receive calls from their regular touch-tone telephones, use 1+ dialing, and do not subscribe to a service separate from, or pay rates that differ from, those paid for AT&T's traditional circuit-switched long distance service. AT&T's specific service utilizes the LECs' originating and terminating switching facilities in the same manner as its circuit-switched interstate traffic. Although AT&T asserts that conversion to IP can produce enormous efficiencies by allowing the integrated provision of voice, data, and enhanced services, exempting from interstate access charges a service such as AT&T's that provides no enhanced functionality would create artificial incentives for carriers to convert to IP networks. Rather than converting at a pace commensurate with the capability to provide enhanced functionality, carriers would convert to IP networks merely to take advantage of the cost advantage afforded to voice traffic that is converted, no matter how briefly, to IP and exempted from access charges. IP technology should be deployed based on its potential to create new services and network efficiencies, not solely as a means to avoid paying access charges. [78]

**8 19. Commenters argue that it is inequitable to impose access charges on AT&T's specific service if access charges do not apply to other types of IP-enabled voice services. [79] The Commission is sensitive to the concern that disparate treatment of voice services that both use IP *7470 technology and interconnect with the PSTN could have competitive implications. We note that all telecommunications services are subject to our existing rules regarding intercarrier compensation. Consequently, when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges. [80] Our analysis in this order applies to services that meet these criteria regardless of whether only one interexchange carrier uses IP transport or instead multiple service providers are involved in providing IP transport. [81] Thus our ruling here should not place AT&T at a competitive disadvantage. [82] We are adopting this order to clarify the application of access charges to these specific services to remedy the current situation in which some carriers may be paying access charges for these services while others are not.

20. Several commenters argue that it is difficult to determine which calls utilize IP technology for purposes of assessing access charges. [83] Other commenters argue that the Commission should impose a minimum surcharge for any IP traffic that cannot be measured and should require all providers of telecommunications services that utilize the SS7 network to pass calling party number information to identify where the call originated. [84] The Commission has recognized the potential difficulty in determining the jurisdictional nature of IP telephony. [85] We intend to address this issue in our comprehensive *IP-Enabled Services* rulemaking proceeding and do not address it here.

C. Retroactivity of Access Charges

21. Several commenters argue that AT&T's phone-to-phone service has always been a telecommunications service to which interstate access charges have applied. [86] These commenters thus argue that this declaratory ruling recognizing the applicability of access charges to AT&T's service necessarily has a retroactive effect. In contrast, AT&T and other commenters *7471 argue that the *Stevens Report* expressly exempted all VoIP services – including AT& T's specific service – from interstate access charges, necessitating a prospective-only application of access charges to AT&T's service. [87] Alternatively, AT&T and others argue that, even if the Commission did not formally establish an exemption, it would be inequitable for the Commission to permit retroactive application of this declaratory ruling in light of various statements by the Commission – in the *Stevens Report*, the *Intercarrier Compensation* NPRM, and elsewhere – suggesting that access charges did *not* apply. [88]

**9 22. As discussed above, we do not believe that the Commission waived section 69.5(b) or otherwise created an exemption for AT&T's specific service. The absence of any waiver or exemption, however, does not end the retroactivity inquiry. The courts have made clear that retroactive effect may be denied if the equities so require. The Supreme Court found in *SEC v. Chenery* that "retroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles." [89] The D.C. Circuit has explained that whether to permit retroactive application of an agency decision "boil[s] down to ... a question grounded in notions of equity and fairness." [90] One relevant factor is whether there has been "detrimental reliance" on prior pronouncements by the Commission. [91]

23. We do not make any determination at this time regarding the appropriateness of retroactive application of this declaratory ruling against AT&T or any other party alleged to owe access charges for past periods.[92] While we recognize the strong interest in providing certainty – and indeed that is a primary reason for issuing this ruling – we are unable to make a blanket determination regarding the equities of permitting retroactive liability. We believe that the equitable inquiry is inherently fact-specific. For example, the nature of a particular phone-to-phone service offering, when the service was introduced, the purported basis for detrimental reliance on Commission pronouncements, and the course of dealings between the parties in a dispute all may prove relevant to the analysis. Accordingly, if disputes arise, the question whether access charges can be collected for past periods may be addressed on a case-by-case ***7472** basis.[93]

IV. CONCLUSION

24. We find AT&T's specific service, which an end-user customer originates by placing a call using a traditional touch-tone telephone with 1+ dialing, utilizes AT&T's Internet backbone for IP transport, and is converted back from IP format before being terminated at a LEC switch, is a telecommunications service and is subject to section 69.5(b) of the Commission's rules.

V. ORDERING CLAUSES

25. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 201, 202, and 203 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), (j), 201, 202, 203, and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, that the Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges IS DENIED as set forth herein.

FEDERAL COMMUNICATIONS COMMISSION

****10** Marlene H. Dortch
Secretary

*7473 ATTACHMENT A

Comments Filed:

Alaska Exchange Carriers Association, Inc. (AECA)

American Internet Service Providers Association, *et al.* (AISPA)

Americans for Tax Reform

Association for Communications Enterprises, *et al.* (ASCENT)

Beacon Telecommunications Advisors, LLC

BellSouth Corp.

California RTCS

Fair Access Charge Rural Telephone Group (Rural Telephone Group)

Fred Williamson and Associates, Inc. (FW&A)

Frontier Telephone of Rochester, Inc.

Global Crossing North America, Inc.

GVNW Consulting, Inc.

ICORE Companies

John Staurulakis, Inc. (JSI)

Level 3 Communications, LLC

Minnesota Independent Coalition

Missouri Small Telephone Company Group

National Exchange Carrier Association (NECA)

National Telecommunications Cooperative Association (NTCA)

NetAction

Net2Phone, Inc.

New Hampshire Public Utilities Commission

New York State Department of Public Service

Organization for the Promotion and Advancement of Small Telecommunications Companies

(OPASTCO)

Qwest Communications International, Inc.

Rural Iowa Independent Telephone Association

SBC Communications Inc.

Small Business Survival Committee (SBSC)

Southeastern Services, Inc. (SSI)

Sprint Corp.

TCA

Time Warner Telecom

United States Telecom Association (USTA)

Verizon

VON Coalition

Warinner, Gesinger & Associates, LLC

Washington Independent Telephone Association, *et al.* (WITA)

Western Alliance

WorldCom

***7474 Reply Comments Filed:**

Regulatory Commission of Alaska (Alaska Commission)

American Internet Service Providers Association, *et al.* (AISPA)

AT&T Corp.

AT&T Wireless Services, Inc.

Beacon Telecommunications Advisors, LLC

BellSouth Corp.

California Public Utilities Commission (California Commission)

California Telephone Association

Competitive Telecommunications Association (CompTel)

Fred Williamson and Associates, Inc. (FW&A)

Global Crossing North America, Inc.

GVNW Consulting, Inc.

ICG Communications, *et al.* (ICG Joint Comments)

IDT Corporation

Information Technology Association of America (ITAA)

ISP/VoIP Coalition

Michigan Public Service Commission (Michigan Commission)

Minnesota Independent Coalition

National Cable & Telecommunications Association (NCTA)

National Exchange Carrier Association (NECA)

Net2Phone, Inc.

Northeast Florida Telephone Company (NEFCOM)

Organization for the Promotion and Advancement of Small Telecom. Cos. (OPASTCO)

Qwest Communications International, Inc.

SBC Communications Inc.

State Members of the Federal-State Joint Board on Separations

Sprint Corporation

Southeastern Services, Inc. (SSI)

Texas Office of Public Utility Counsel, *et al.* (TOPUC)

Texas Statewide Telephone Cooperative, Inc. (TSTCI)

United States Telecom Association (USTA)

Verizon

Warinner, Gesinger & Associates, LLC

Washington Independent Telephone Association, *et al.* (WITA)

WorldCom

***7475 STATEMENT OF CHAIRMAN MICHAEL K. POWELL**

Re: Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges, WC Docket No. 02-361, Order

Today's decision is correctly decided on very narrow grounds. A straightforward application of existing law places the long distance telephone service, as it is factually described by AT&T, squarely in the category of a telecommunications service. The carrier has long been obligated to pay access charges for this service and we unanimously confirm that it still is required to do so.

I have stated my solid view that VOIP offers enormous potential for consumers and should be very lightly regulated. I remain staunchly committed to that position. VOIP is clearly not your father's telephone service. It represents a uniquely new form of communication that promises to offer dramatic advances in the consumer experience. Consumers can anticipate greater value, greater personalization, and a wealth of features that are only possible through the convergence of voice and data on a broadband network that pushes more intelligence to the edge of the network and into the hands of end-users. The promise of such services and the potential for greater competition combine to justify a minimal and innovation-friendly regulatory policy.

In that vein, the objectives of digital migration are achieved by moving to networks and services that empower individuals. Therefore, it is important to be guided by the perspective of consumers that are purchasing service, in determining how a service should be understood. The services that are the subject of this petition merely use IP technology in a manner that does not offer consumers any variation in experience or capability. We therefore should approach AT&T's request that it not be subject to the obligations of a telecommunications carrier with skepticism. The petitioner argues that its service should be exempt from the access charge regime because it may use IP in its transport system. Yet, as the Order notes, customers are in no discernable way receiving the transforming benefits of an IP-enabled service. In fact, the consumer receives the same plain old telephone service. To allow a carrier to avoid regulatory obligations simply by dropping a little IP in the network would merely sanction regulatory arbitrage and would collapse the universal service system virtually overnight.

Carriers understandably are anxious to lower their significant access costs as long distance revenue declines. The Commission has recognized that our intercarrier compensation system is under severe stress in light of technological change. We have committed ourselves to reforming the system and I am aware that carriers themselves are working toward solutions. The appropriate way to address these challenges is through intercarrier compensation reform and we will focus our efforts there.

***7476 STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY**

Re: Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges, WC Docket No. 02-361, Order

I support this important effort to clarify the obligations of long-distance carriers to pay access charges in connection with their use of the public switched telephone network. The advent of IP technology opens up exciting new opportunities for providers of communications services and consumers, but it also challenges existing regulatory structures. In particular, it has become abundantly clear that the Commission needs to overhaul its intercarrier compensation regime to address artificial distinctions among various types of traffic. At the same time, however, I have always stressed that carriers are bound by our

current rules unless and until the Commission changes them in accordance with the Administrative Procedure Act. Carriers cannot unilaterally effect rule changes by engaging in self-help.

As the foregoing Order makes clear, there is no doubt that AT&T's "phone-to-phone IP telephony service" is a telecommunications service. In fact, this service – which begins and ends on the PSTN, provides no enhanced functionalities, and entails no net protocol conversion – does not differ in any material respect from traditional long distance services. Nor can there be any serious claim that the Commission formally exempted these services from the access charge regime. While the Commission has unfortunately muddied the waters by issuing some opaque statements regarding the appropriate regulatory treatment of phone-to-phone services that employ IP in the backbone, the Commission never waived the requirement that interexchange carriers pay access charges in connection with such traffic. Thus, carriers that provide such phone-to-phone services must comply with our access charge rules, even if those rules create anomalies and inefficiencies that warrant reform. [1]

A number of parties have suggested deferring resolution of this issue and deciding it in the pending rulemaking on IP-enabled services. While I understand the desire for a comprehensive approach, I believe such arguments misapprehend the difference between a declaratory ruling proceeding and a rulemaking. The former clarifies the *existing* state of the law, while the latter establishes *new* rules (which may modify or eliminate existing rules). It is not possible for the Commission to elucidate carriers' *existing* compensation obligations in a rulemaking. Nor would it have been appropriate to delay issuing this ruling any longer; rather, we should have issued it long ago. AT&T's unilateral decision to stop paying access charges in connection with "phone-to-phone" traffic has created significant competitive distortions. When some carriers are paying access charges in connection with such traffic while others are not, customers end up choosing service providers based on regulatory arbitrage rather than service quality or other more legitimate factors. Therefore, while I strongly endorse calls to reform our ***7477** intercarrier compensation rules – and I stand ready to work with my colleagues and interested parties on a broad range of options – we must enter into that process with carriers competing on a level playing field and with a common understanding of existing obligations.

*7478 STATEMENT OF COMMISSIONER MICHAEL J. COPPS

Re: Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges (WC Docket No. 02-361)

Today's decision clarifies the scope of carrier access charge obligations when interexchange carriers provide phone-to-phone IP telephony services. I support this Order because the decision we reach is the one that flows most logically from our current rules.

Nonetheless, I am concerned that we have reached this conclusion without taking into consideration the full context that good policy-making requires. By approaching the subject of access charges and VoIP through occasional and discrete petitions, we are nickel-and-diming much larger intercarrier compensation issues. We should have begun at the beginning and undertaken the sorely needed reform of intercarrier compensation and then considered petitions such as this. We have in place today an intercarrier compensation regime under which the amounts and direction of payments vary depending on whether carriers route traffic to local providers, long-distance providers, Internet providers, CMRS carriers, or paging providers. This system is an open invitation for abuse. In an era of convergence of markets and technologies, its patchwork of rates should have been consigned by now to the realm of historical curiosity. But rather than grasp the whole, today's decision sets the stage for proceeding piecemeal. It only prolongs the development of a better system that would rely more heavily on market forces to drive technological advances and innovation.

As a separate matter, I am concerned that unsuspecting carriers may wind up caught in the crossfire and rendered collateral damage by today's Order. To date, the Commission's pronouncements concerning VoIP services and access charges have been unfortunately opaque. The Commission suggested that access charges "may apply" in its 1998 Report to Congress, but reserved further judgment until future proceedings with more focused records. The Commission prolonged this uncertainty by declining to move ahead on a 1999 petition from US West. It provided another vague sign in the Initial Regulatory Flexibility Analysis accompanying the 2001 Intercarrier Compensation Notice of Proposed Rulemaking. As a result, innovative and entrepreneurial VoIP upstarts may have been encouraged to believe they had a green light to go ahead and develop business plans based on the assumption that access charges were not required. This may not have been the best interpretation of our precedent. But the Commission surely played a role in this state of affairs by sending out mixed signals.

Today the Commission does not acknowledge the confusion it created. Instead, this decision is eerily silent on the equities of retroactive liability, the degree to which there has been detrimental reliance on our muddled pronouncements, and the auditing and litigation burden that would follow from retroactive application. This is unfortunate. Because the Communications Act does not contemplate that the Commission will act as a collection agent for carriers with unpaid tariffed charges, carriers seeking recovery will proceed directly to court. The ensuing litigation could tie up the resources of carriers providing services similar to AT&T's phone-to-phone IP telephony, carriers caught in the middle of access charge disputes between incumbent local exchange carriers and VoIP providers, and entrepreneurial VoIP providers that heretofore ***7479** believed their services were exempt from access payments.

We can and should do better. We have a three-year old proceeding on intercarrier compensation that is still pending. We are late to these issues, and the pit stop we take here to straighten out one issue leaves behind a system in need of more comprehensive improvement.

*7480 STATEMENT OF COMMISSIONER KEVIN J. MARTIN

Re: Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, **WC Docket No. 02-361**

In today's decision, the Commission determines for the first time that AT&T's specific service is subject to interstate access charges.

In assessing whether agency decisions may be applied retroactively, the Supreme Court found in *SEC v. Chenery* that the harms from retroactive application of the decision must be weighed against the harm of producing a result that is "contrary to a statutory design or to legal and equitable principles." [1] The D.C. Circuit has explained that the retroactive application of an agency decision "boil[s] down to...a question of concerns grounded in notions of equity and fairness." [2] As the Order notes, one relevant factor is whether there has been "detrimental reliance" on prior pronouncements by the Commission. [3]

As also noted in the item, in the 1998 *Report to Congress* the Commission stated that, after examining specific services with focused records in future proceedings, it "may find it reasonable" that providers of phone-to-phone VoIP service pay interstate access charges. [4]

In upcoming proceedings with the more focused records, we undoubtedly will be addressing the regulatory status of various specific forms of IP telephony, including the regulatory requirements to which phone-to-phone providers may be subject if we were to conclude that they are "telecommunications carriers."...We note that, to the extent we conclude that certain forms of phone-to-phone IP telephony service are "telecommunications services," and to the extent the providers of those services obtain the same circuit-switched access as obtained by other interexchange carriers, and therefore impose the same burdens on the local exchange as do other interexchange carriers, we may find it reasonable that they pay similar access charges. [5]

***7481** The Commission also noted that access charges different from those assessed on circuit-switched interexchange traffic "may" apply to VoIP services. [6] Furthermore, in its *Intercarrier Compensation* notice of proposed rulemaking, the Commission noted in the Initial Regulatory Flexibility Analysis that the notice of proposed rulemaking was motivated in part by the need to address the potential erosion of access revenues for LECs "because [IP telephony] is exempt from the access charges that traditional long-distance carriers must pay." [7]

Prior to our decision in this order, it was unclear what, if any, interstate access charges applied to AT&T's specific service. The Commission contributed to this uncertainty as to the applicability of access charges by its discussion in the *Report to Congress* and by mentioning an exemption from access charges in the Intercarrier Compensation notice of proposed rulemaking. Furthermore, the Commission prolonged the uncertainty by declining to rule on US West's petition on the issue that was filed soon after the release of the *Report to Congress.* [8] This is the first opportunity the Commission has taken to provide guidance as to the applicability of interstate access charges to AT&T's specific service.

*7482 STATEMENT OF COMMISSIONER JONATHAN S. ADELSTEIN

Re: Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, WC Docket No. 02-361, Order

I support this Order clarifying the application of the Commission's access charge rules because it provides critical guidance on an issue of importance to the long distance and local telephone industries and ultimately to consumers. Through this Order, we address the regulatory status of a distinct but increasingly prevalent form of communications - long distance telephone calls that employ some form of protocol conversion in the backbone of a carrier's network but which in all other significant respects are the same as traditional phone calls. Despite the technical nature of the questions we address here, this Order preserves many of the Commission's highest priorities.

This Order makes clear that the service in question - which is marketed as, and is identical in all significant respects to, traditional long distance service - is a telecommunications service. As a result, consumers will enjoy the protections of our rules for telecommunications services and local phone providers will receive adequate compensation for carrying these calls. Were the Commission to reach another result - classifying this service as an information service - providers could avoid the obligation to observe consumer protection rules, to comply with public safety and law enforcement provisions, and to contribute to the universal service fund, which ensures access to essential services for low income consumers and consumers in rural areas. If the Commission had avoided this question or simply permitted providers to avoid our access charge rules for this service, we would have removed substantial amounts of support for the local phone providers which ultimately carry these calls to consumers. This support is particularly vital for smaller providers serving Rural America.

Carriers deserve proper compensation for use of their network. We must continue to promote and create incentives for the deployment of new technologies, but these innovative services will not be able to reach their full audience or potential if we undermine the ability of providers to support their networks.

By issuing this Order, we answer the calls of participants throughout the industry who asked for guidance on the Commission's rules. Indeed, the one point of unanimity in our record was the desire for a Commission decision. While some parties have asked us to go further and address more of the issues raised in our recent Notice of Proposed Rulemaking on Voice over Internet Protocol (VoIP), delay in answering the question at hand would serve only to create instability for the long distance industry and to increase the rapidly-growing stakes for each side.

I welcome the opportunity to address the wide scope of issues raised in the VoIP rulemaking and to consider the issues raised in the broader intercarrier compensation debate. This Commission must make sure that it employs a framework that continues to foster innovation and that enables our rules to evolve as the services and technologies of the industry evolve. The Order we adopt today preserves the Commission's flexibility to address the broader issues raised in these rulemakings and to revise our rules as necessary. As we move forward to ***7483** address these broader issues, I am committed to a process that takes into account the needs of consumers, who often are not directly included at the industry bargaining table, and the needs of those in hard-to-serve areas of Rural America. Through this proceeding and through our broader rulemakings, we must ensure that we preserve the affordable and universally-available communications services that American consumers and businesses have come to rely on and that Congress has mandated.

Footnotes

1 Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges (filed Oct. 18, 2002) (AT&T Petition). AT&T seeks a declaratory ruling as to the applicability of interstate access charges to these services, and it asserts that such a ruling will provide guidance to states that mirror federal rules in assessing intrastate access charges. AT&T Petition at 1.

2 AT&T Petition at 19.

3 AT&T Petition at 18-19.

4 AT&T Petition at 19.

5 *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 (Mar. 10, 2004) (*IP-Enabled Services*).

6 *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28 at paras. 61-62.

7 *See, e.g.*, Sprint Comments at 9 ("there is a pressing need for the Commission to clarify whether phone-to-phone VOIP traffic should be subject to or exempt from access charges"); Letter from David L. Sieradzki, Counsel for WilTel Communications Group, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-361, Att. at 1, 3-4 (filed Mar. 12, 2004) (WilTel March 12 *Ex Parte* Letter) (WilTel takes no position on the outcome of the proceeding, but asks the Commission to act to provide clarity to the industry); Letter from Thomas Jones, Counsel for Time Warner Telecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, WC Docket Nos. 02-361 and 03-211, 1-2 (filed Nov. 25, 2003) (Time Warner November 25 *Ex Parte* Letter) (urging the Commission to act quickly to provide clear policy guidance on the application of interstate access charges to VoIP traffic).

8 Sprint Comments at 10, 12-13; Time Warner Comments at 2-3; Letter from Peter A. Rohrbach, Counsel for WilTel Communications, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-361, Att. at 1 (filed Jan. 23, 2004) (WilTel January 23 *Ex Parte* Letter);

9 *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610 (2001) (*Intercarrier Compensation*).

10 *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Notice of Inquiry, 7 FCC 2d 11 (1966) (*Computer I NOI*); *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Docket No. 16979, Final Decision and Order, 28 FCC 2d 267 (1971) (*Computer I Final Decision*); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Tentative Decision and Further Notice of Inquiry and Rulemaking, 72 FCC 2d 358 (1979) (*Computer II Tentative Decision*); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980) (*Computer II Final Decision*); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986) (*Computer III*) (subsequent cites omitted) (collectively the *Computer Inquiries*).

11 *Computer II Final Decision*, 77 FCC 2d at 419-22, paras. 93-99.

12 *Computer II Final Decision*, 77 FCC 2d at 420-21, para. 97.

13 *Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorization Thereof; Communications Protocols Under Section 64.702 of the Commission's Rules and Regulations*, CC Docket No. 85-229, Report and Order, 2 FCC Rcd 3072, 3081-82, paras. 64-71 (1987) (*Computer III Phase II Order*); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21957-58, para. 106 (1996) (*Non-Accounting Safeguards Order*). The Commission identified three categories of protocol processing services that would be treated as basic services. These categories include protocol processing: (1) involving communications between an end user and the network itself (e.g., for initiation, routing, and termination of calls) rather than between or among users; (2) in connection with the introduction of a new basic network technology (which requires protocol conversion to maintain compatibility with existing CPE); and (3) involving internetworking (conversions taking place solely within the carrier's network to facilitate provision of a basic network service that result in no net conversion to the end user). *Computer III Phase II Order*, 2 FCC Rcd at 3081-82, paras. 64-71; *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21957-58, para. 106. The first and third identified categories of processing services result in no net protocol conversion to the end user. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, Order on Reconsideration, 12 FCC Rcd 2297, 2297-99, para. 2 (1997).

14 *Computer II Final Decision*, 77 FCC 2d at 430, para. 120.

15 *Computer II Final Decision*, 77 FCC 2d at 432, para. 125.

16 *Computer II Final Decision*, 77 FCC 2d at 432-35, paras. 126-132. Title II of the Communications Act imposes certain requirements on common carriers, including requiring carriers to provide service on just, reasonable, and nondiscriminatory rates and terms; to comply with tariffing requirements for dominant carriers; to meet certain certification and discontinuance requirements; to comply with interconnection obligations; to contribute to the universal service fund; to provide access to law enforcement for authorized wiretapping pursuant to CALEA, the Communications Assistance for Law Enforcement Act; to comply with disability accessibility requirements; and to comply with privacy requirements. 47 U.S.C. §§ 201-276.

17 *Computer I Final Decision*, 28 FCC 2d at 268-70, 277, paras. 4-10, 24; *Computer II Final Decision*, 77 FCC 2d at 435, 474, paras. 132, 229.

18 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

19 47 U.S.C. §§ 153(20), (43), and (46).

20 47 U.S.C. § 153(43).

21 47 U.S.C. § 153(46).

22 47 U.S.C. § 153(20).

23 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955-58, paras. 102-107; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, 11507-08, 11516-17, paras. 13, 33 (1998) (*Stevens Report*).

24 *Stevens Report*, 13 FCC Rcd at 11507-08, para. 13.

25 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21957-58, para. 106. Similarly, the Commission found that certain classes of "excepted" protocol processing services are telecommunications services as well. *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958, para. 106.

26 *Stevens Report*, 13 FCC Rcd at 11526, para. 50 (citing *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21958 para. 107).

27 *Stevens Report*, 13 FCC Rcd at 11527, para. 52.

28 *Stevens Report*, 13 FCC Rcd at 11544, para. 91.

29 *Stevens Report*, 13 FCC Rcd at 11541-45, paras. 83-93.

30 *Stevens Report*, 13 FCC Rcd at 11543, para. 87.

31 *Stevens Report*, 13 FCC Rcd at 11543, para. 87.

32 *Stevens Report*, 13 FCC Rcd at 11543, para. 87. The Commission recognized, however, that its analysis focused on ISPs as entities procuring inputs from telecommunications service providers. Thus, classifying Internet access as an information service in this context left open significant questions regarding the treatment of the Internet (and information) service providers that own their own transmission facilities and that engage in data transport over those facilities to provide an information service. *Stevens Report*, 13 FCC Rcd at 11534, para. 69. In addition, the Commission did not expressly address the regulatory classification of wireline broadband Internet access services in the *Stevens Report*; classification of those services is being addressed in the *Wireline Broadband NPRM. Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, 3027-28, para. 14 (2002) (*Wireline Broadband NPRM*).

33 *Stevens Report*, 13 FCC Rcd at 11543-44, para. 88.

34 *Stevens Report*, 13 FCC Rcd at 11544, para. 89.

35 *Stevens Report*, 13 FCC Rcd at 11544, para. 90.

36 *Stevens Report*, 13 FCC Rcd at 11544, para. 91.

37 *Stevens Report*, 13 FCC Rcd at 11544-45, para. 91.

38 In 1999, U S West filed a petition seeking a declaratory ruling that access charges apply to phone-to-phone IP telephony services provided over private IP networks. Petition of U S West for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony (filed Apr. 5, 1999). The Commission took no action on the petition and U S West subsequently withdrew it. Letter from Melissa E. Newman, Vice President-Federal Regulatory, Qwest, to Magalie Roman Salas, Secretary, Federal Communications Commission (Aug. 10, 2001).

39 *Intercarrier Compensation*, 16 FCC Rcd at 9657, para. 133. The Commission made this statement in the Initial Regulatory Flexibility Analysis section of the notice as an explanation for the need for and objectives of the rulemaking.

40 *Wireline Competition Bureau Seeks Comment on AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Public Notice, 17 FCC Rcd 23,556 (Wireline Comp. Bur. 2002); *Wireline Competition Bureau Extends Deadline for Filing Reply Comments to Comments on AT&T's Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, Public Notice, 17 FCC Rcd 24,471 (Wireline Comp. Bur. 2002). A list of parties filing comments and reply comments is included at Attachment A.

41 *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, WC Docket No. 03-45, Memorandum Opinion and Order, FCC 04-27 (Feb. 19, 2004).

42 *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28.

43 *See* Sprint Comments at 2-3 (seeking prompt clarification that AT&T's type of service should be subject to access charges); Time Warner Comments at 4 (seeking prompt clarification that AT&T's type of service is exempt from access charges); WilTel January 23 *Ex Parte* Letter, Att. at 1 (seeking prompt resolution of the issue while taking no position on what should be the outcome).

44 *Intercarrier Compensation*, 16 FCC Rcd 9610.

45 AT&T Petition at 18.

46 AT&T Petition at 18-19. Feature Group D trunks allow end users to use 1 + dialing for long-distance calls, with the call being handled by the caller's preselected interexchange carrier. Without use of Feature Group D, the user must first dial a 7- or 10-digit number, a calling card number and PIN number, and then the desired telephone number. Harry Newton, *Newton's Telecom Dictionary* 318 (19th ed. 2003).

47 Although AT&T's specific service uses the LECs' terminating switching facilities in the same manner as traditional circuit-switched long-distance calls that are subject to access charges, we note that local calls, which are not subject to access charges, also use terminating switching facilities in the same manner. As we stated in the *IP-Enabled Services* notice of proposed rulemaking, "[a]s a policy matter, we believe that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether traffic originates on the PSTN, on an IP network, or on a cable network. We maintain that the cost of the PSTN should be borne equitably among those that use it in similar ways." *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28, para. 61. Therefore, we initiated the *Intercarrier Compensation* proceeding to address troublesome consequences of disparate intercarrier compensation regimes and to advance the policy goal of a unified intercarrier compensation regime. *Intercarrier Compensation*, 16 FCC Rcd 9610. We will also examine appropriate compensation mechanisms for IP services' use of switching facilities in the *IP-Enabled Services* rulemaking proceeding. *IP-Enabled Services*, WC Docket No. 04-36, FCC 04-28.

48 AT&T Petition at 19. AT&T pays the lower local business line rate for terminating calls in this manner, as opposed to paying the higher terminating access charge rate that would apply to traffic terminated over Feature Group D trunks.

49 AT&T terminates these calls through local primary rate interface (PRI) trunks to LEC end offices. To the extent AT&T purchases PRIs from a competitive LEC and the called party is served by an incumbent LEC, the competitive LEC terminates the call over reciprocal compensation trunks. Therefore, the incumbent LEC receives either (1) the rate paid for the PRI trunk if AT&T purchased it from the incumbent LEC; or (2) the reciprocal compensation rate for terminating the call from the competitive LEC if AT&T purchased the PRI trunk from a competitive LEC. AT&T Petition at 19.

50 47 U.S.C. § 153(43).

51 47 U.S.C. § 153(46).

52 47 U.S.C. § 153(20).

53 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21957-58, para. 106.

54 This determination is consistent with the Commission's tentative conclusion in the *Stevens Report* that phone-to-phone IP telephony bears the characteristics of telecommunications service. *Stevens Report*, 13 FCC Rcd at 11544, para. 89. AT&T's specific service meets the four conditions that the Commission stated "it tentatively intend[ed] to refer to" as phone-to-phone IP telephony. *Stevens Report*, 13 FCC Rcd at 11543-44, para. 88.

55 *See* Global Crossing Comments at 8-11; Net2Phone Comments at 2-4; ITAA Reply at 4-6.

56 AT&T Reply at 27-28.

57 AT&T Petition at 28; Global Crossing Comments at 16-17; AT&T Reply at 28-30.

58 The ISP/VoIP Coalition asks the Commission to rule that, even if some forms of VoIP are found to be telecommunications services, services that do not use 1+ dialing are information/enhanced services. ISP/VoIP Coalition Reply at 4-5. Because AT&T's specific service does utilize 1+ dialing, other VoIP services that do not are beyond the scope of this proceeding.

59 "Carrier's carrier charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." 47 C.F.R. § 69.5(b).

60 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689, 3693, para. 6 (1999) (*ISP Reciprocal Compensation Declaratory Ruling*), *vacated and remanded, Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000). As an example of the Commission's "hands off" regulatory approach, it exempted enhanced service providers (ESPs) from paying access charges to avoid imposing severe rate increases on ESPs and to avoid disrupting the industry segment. *MTS and WATS Market Structure*, CC Docket No. 78-72 Phase I, Memorandum Opinion and Order, 97 FCC 2d 682, 715, para. 83 (1983) (*MTS/WATS Market Structure Order*); *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket No. 87-215, Order, 3 FCC Rcd 2631, 2633, para. 17 (1988) (*ESP Exemption Order*).

61 47 U.S.C. § 254. As AT&T recognizes, some states mirror federal rules in assessing intrastate access charges; therefore, our decision may affect intrastate access charges in those states. AT&T Petition at 1.

62 *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 at paras. 61-66.

63 Under section 69.5(b) of the Commission's rules, "[c]arrier's carrier [access] charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." 47 C.F.R. § 69.5(b).

64 Some commenters ask us to find that IP telephony is within the Commission's exclusive jurisdiction and subject to federal preemption. American ISP Ass'n Joint Comments at 17-19; Global Crossing Comments at 7-8; IDT Reply at 10-11. We find, however, that AT&T's specific service is a telecommunications service to which access charges apply. Therefore, we do not address the preemption issue in this proceeding. In the *IP-Enabled Services* proceeding, however, the Commission is seeking comment on whether there are categories of IP-enabled services that should be regulated only at the federal level. *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 at paras. 40-41.

65 AT&T Petition at 12-17; AT&T Reply at 7-13; Letter from David L. Lawson, Sidley, Austin, Brown & Wood LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-361, 2-3 (filed Dec. 22, 2003) (AT&T December 22 *Ex Parte* Letter); Letter from Patrick H. Merrick, Director-Regulatory Affairs, AT&T Federal Government Affairs, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 02-361, Att. at 1-6 (filed Feb. 20, 2004) (AT&T February 20 *Ex Parte* Letter).

66 *Sprint Corp. v. FCC*, 315 F.3d 369, 374 (D.C. Cir. 2003) (the Commission must use the notice-and-comment rulemaking process to make "substantive changes in prior regulations").

67 The intent underlying the Commission's prior statements regarding phone-to-phone services such as AT&T's remains a matter of significant dispute. As the Commission recently observed in the *IP-Enabled Services* NPRM, the *Stevens Report* includes statements that can be read to suggest that phone-to-phone services such as AT&T's are telecommunications services subject to access charges, but also includes statements that appear to suggest that access charges or similar charges would be imposed on such services only at some future date, if at all. *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 at paras. 29-30 (citing *Stevens Report* paras. 50, 52, 91). The *IP-Enabled Services* NPRM also noted that the Initial Regulatory Flexibility Analysis in the *Intercarrier Compensation* NPRM stated that IP telephony "threatens to erode access revenues for LECs because it is exempt from the access charges that traditional long-distance carriers must pay." *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28 at para. 30 (citing *Intercarrier Compensation*, 16 FCC Rcd at 9657, para. 133). It is not clear whether or not this reference to "IP telephony" was intended to include phone-to-phone services that use IP in the backbone.

68 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

69 *See* paras. 22-23 *infra*.

70 AT&T Petition at 24; Global Crossing Comments at 6.

71 AT&T Petition at 24; Global Crossing Comments at 4-5.

72 47 U.S.C. § 230(b)(2). AT&T Petition at 25; Americans for Tax Reform Comments at 1; Small Business Survival Committee Comments at 1; AT&T Reply at 19-23; ITAA Reply at 12-13.

73 *See* para. 14, *supra*.

74 AT&T Petition at 25; American ISP Ass'n Joint Comments at 32; WorldCom Comments at 6-7; AT&T Reply at 28, 32-33. AT&T cites the Commission's ESP exemption as a basis for declaring AT&T's specific service free from access charges. AT&T Petition at 26 (the ESP exemption applies to Internet service providers (ISPs) and is sometimes referred to as the ISP exemption). As AT&T also notes, however, the ESP exemption applies to interactive computer services, not to telecommunications services. AT&T Petition at 8.

75 FW&A Comments at 12-13; JSI Comments at 6; OPASTCO Comments at 5-6; TCA Comments at 5-6; Western Alliance Comments at 9-10. *See Access Charge Reform*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 13027, para. 158 (2000) (*CALLS Order*) (changes to the Commission's price cap rules drove interstate switched access usage charges for price cap carriers closer to their actual costs more quickly than would have occurred under the prior price cap regime); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613, 19651, para. 83 (2001) (*MAG Order*) ("Based on examination of the record in the above-captioned proceedings, we have not identified any rate structure modifications, other than the modifications addressed below, that would remove non-cost-based rate elements or implicit subsidies from the rate structure of rate-of-return carriers.").

76 *Intercarrier Compensation*, 16 FCC Rcd 9610.

77 47 C.F.R. § 69.5(b).

78 Time Warner Comments at 6; Qwest Reply at 6-7; WITA Reply at 7-8.

79 AT&T Petition at 28-31; ASCENT Joint Comments at 24-25; Level 3 Comments at 12-13.

80 *See* 47 C.F.R. § 69.5(b) (imposing access charges on "interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services"). Depending on the nature of the traffic, carriers such as commercial mobile radio service (CMRS) providers, incumbent LECs, and competitive LECs may qualify as interexchange carriers for purposes of this rule.

81 WilTel March 12 *Ex Parte* Letter at Att.

82 We are examining reform of our current intercarrier compensation rules in our *Intercarrier Compensation* proceeding and expect to act further on that proceeding in the near future. *See Intercarrier Compensation*, 16 FCC Rcd 9610. In that proceeding, the Commission will address further reconciliation of the access charge regime with reciprocal compensation arrangements pursuant to section 251(b)(5) of the Act.

83 AT&T Petition at 31-32; ASCENT Joint Comments at 18-19; AT&T Reply at 30-31; ICG/Vonage Reply at 7-8; ITAA Reply at 13-14.

84 Beacon Comments at 2-5; Fred Williams & Associates Comments at 17-19; Verizon Comments at 8; Time Warner November 25 *Ex Parte* Letter at 3 n.10.

85 *Stevens Report*, 13 FCC Rcd at 11545, para. 91.

86 BellSouth Comments at 10; Qwest Comments at 15-16; SBC Comments at 8-9; Verizon Comments at 6-7.

87 AT&T Petition at 12-17; Sprint Comments at 6-7; AT&T Reply at 7-13; AT&T December 22 *Ex Parte* Letter at 1-4; AT&T February 20 *Ex Parte* Letter at 13-25; Time Warner November 25 *Ex Parte* Letter at 3-7.

88 AT&T December 22 *Ex Parte* Letter at 1-2; AT&T February 20 *Ex Parte* Letter at 13-22; Time Warner November 25 *Ex Parte* Letter at 4-7.

89 *SEC v. Chenery*, 332 U.S. 194, 203 (1947).

90 *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (quoting *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 n.6 (D.C. Cir. 1987)). *See also Clark-Cowlitz*, 826 F.2d at 1081 (stating that "a retrospective application can properly be withheld when to apply the new rule to past conduct or prior events would work a 'manifest injustice'").

91 *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1109 (D.C. Cir. 2001).

92 We note that, pursuant to section 69.5(b) of our rules, access charges are to be assessed on interexchange carriers. 47 C.F.R. § 69.5(b). To the extent terminating LECs seek application of access charges, these charges should be assessed against interexchange carriers and not against any intermediate LECs that may hand off the traffic to the terminating LECs, unless the terms of any relevant contracts or tariffs provide otherwise.

93 We note that the courts appear to have sanctioned deferring such equitable considerations to case-by-case determinations. *See, e.g., Verizon*, 269 F.3d at 1101 (affirming general finding of liability but expressing "no opinion as to the Commission's authority to impose damages" on parties that may have detrimentally relied on "the agency's initial (and mistaken) interpretations"). Under sections 206-209 of the Act, the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges. Therefore we expect that LECs will file any claims for recovery of unpaid access charges in state or federal courts, as appropriate. *See Beehive Tele., Inc. v. Bell Operating Cos.*, File No. E-94-57, Memorandum Opinion and Order, 10 FCC Rcd 10562 (1995) (holding that the Commission does not have jurisdiction to resolve claims for collection of unpaid tariff charges); *Illinois Bell Tel. Co. v. AT&T*, File Nos. E-88-73, E-88-118, E-88-120, E-88-119, E-89-41 through E-89-61, E-89-133, Order, 4 FCC Rcd 5268 (1989); *Illinois Bell Tel. Co. v. AT&T*, File Nos. E-88-73, E-88-118, E-88-120, E-88-119, E-89-41 through E-89-61, E-89-133, Order, 4 FCC Rcd 7759 (1989); *Tel-Central v. United Tel. Co.*, File No. E-87-59, Memorandum Opinion and Order, 4 FCC Rcd 8338 (1989); *Long Distance/USA, Inc. v. Bell Tel. Co. of Pa.*, File Nos. E-89-03 through E-89-32, Memorandum Opinion and Order, 7 FCC Rcd 408 (Com. Car. Bur. 1992); *American Sharecom, Inc. v. Mountain States Tele. & Telegraph Co.*, File Nos. E-88-36, E-88-37, Memorandum Opinion and Order, 8 FCC Rcd 6727 (Com. Car. Bur. 1993); *C.F. Communs. Corp. v. Century Tele. of Wisconsin*, File Nos. E-89-170 through E-89-172, E-89-179 through E-89-182, Memorandum Opinion and Order, 8 FCC Rcd 7334 (Com. Car. Bur. 1993). *But see MGC Comm., Inc., v. AT&T*, File No. EAD-99-002, Memorandum Opinion and Order, 15 FCC Rcd 308 (1999) (deciding claim for recovery of tariffed charges without discussing jurisdiction issue, which neither party raised).

1 While I am receptive to arguments that we should not extend legacy regulations to nascent services such as VoIP, those arguments overlook the facts present here. We are not choosing to extend regulatory requirements in this Order; rather, such requirements *already* apply under section 69.5(b) of the Commission's rules, and can be eliminated only through a rulemaking proceeding or by waiver. Moreover, the service at issue appears no different from traditional long distance services, and thus is unlike true VoIP services, which are provided via broadband connections and offer enhanced functionalities to consumers.

1 *SEC v. Chenery*, 332 U.S. 194, 203 (1947).

2 *Cassell v. FCC*, 154 F.3d 478, 486 (D.C. Cir. 1998) (quoting *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1082 n.6 (D.C. Cir. 1987)). *See also Clark-Cowlitz*, 826 F.2d at 1081 (stating that "a retrospective application can properly be withheld when to apply the new rule to past conduct or prior events would work a 'manifest injustice'").

3 *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1110 (D.C. Cir. 2001).

4 Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45, 13 FCC Rcd 11501, 11545, at para. 91 ("Report to Congress").

5 *Id.*

6 *Id.*

7 Developing a Unified Intercarrier Compensation Regime, FCC 01-132, 16 FCC Rcd at 9657, at para. 133 ("Intercarrier Compensation").

8 In 1999, US West filed a petition seeking a declaratory ruling that access charges apply to phone-to-phone IP telephony services provided over private IP networks. Petition of US West for Declaratory Ruling Affirming Carrier's Carrier Charges on IP Telephony

(filed Apr. 5, 1999). The Commission took no action on the petition and US West subsequently withdrew it. Letter from Melissa E. Newman, Qwest, to Magalie Roman Salas, Secretary, Federal Communications Commission (Aug. 10, 2001).

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