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April 25, 1997

David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: Docket No. 97-00309: BellSouth Telecommunications, Inc.'s Entry into Long Distance (interLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996

Dear Mr. Waddell:

Enclosed for filing are the original and 13 copies of "AT&T's Pre-Hearing Brief on the Threshold Legal Issues" in the above-referenced docket.

Please note that we have provided copies of referenced decisions of other commissions; however, we have not provided copies of Congressional record and other legislative materials, as these items are readily available. If the TRA desires, we also would be pleased to provide copies of this material.

Respectfully Submitted,

Jim Lamoureux

Encls.

BEFORE THE
TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re: BellSouth Telecommunications, Inc.'s Entry into Long Distance (interLATA) Service in Tennessee Pursuant to Section 271 of the Telecommunications Act of 1996	)))))	Docket No. 97-00309

AT&T'S PRE-HEARING BRIEF ON THRESHOLD LEGAL ISSUES

Pursuant to the Report and Recommendation of Hearing Officer On April 3, 1997, Status Conference, AT&T Communications of the South Central States, Inc. ("AT&T") submits this pre-hearing brief to the Tennessee Regulatory Authority ("TRA") concerning the threshold legal issues of: (1) whether under the plain language of the Telecommunications Act of 1996 (the "Act"), BellSouth is foreclosed from relying upon an approved Statement of Generally Available Terms and Conditions to obtain authority to provide interLATA services in Tennessee, and (2) whether the requirement of permanent cost-based rates precludes BellSouth from obtaining authority to provide interLATA services in Tennessee under the Act.

As demonstrated Below, even if the TRA approves a Statement of Generally Available Terms and Conditions filed by BellSouth, BellSouth is foreclosed from relying upon any such Statement to obtain authority to provide interLATA services in Tennessee. Also as demonstrated below, the lack of permanent cost-based rates in Tennessee precludes BellSouth from obtaining authority to provide interLATA services in Tennessee, and compels the TRA to reject any Statement of Generally Available Terms and Conditions filed by BellSouth.

I. INTRODUCTION

The principal goal of the Act is to promote competition in the provision of all telecommunications services--local and long distance--in order to afford consumers the myriad benefits of such competition (*i.e.,* lower prices, improved quality, and greater choice). Competition benefits consumers through lower prices, higher quality, and expanded choices.

In order to accomplish these goals, the Act provides a "pro-competitive, de-regulatory national policy framework" for "opening all telecommunications markets to competition."[1] Introducing competition to the local services market is the biggest challenge which regulatory policy-makers must confront under the Act, because of the entrenched local monopolies which control those markets. Sections 251 and 252 of the Act set forth the policies and requirements which are necessary for local exchange competition to emerge under the Act. These policies and requirements include requiring that Regional Bell Operating Companies ("RBOCs") such as BellSouth make available to new entrants essential monopoly inputs at reasonable, cost-based prices (*i.e.,* unbundled network elements, interconnection, and wholesale services).

The Act also recognizes, however, that the RBOCs have little incentive to cooperate in a process that is intended to reduce their monopoly control over local exchange services. BellSouth has everything to gain and nothing to lose by maintaining its local monopoly while at the same time entering the interLATA market. Thus,

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[1] See *Telecommunications Act of 1996*, Conference Report, 104th Congress, 2nd Session, Report 104-458, January 31, 1996, page 1.

implementing these policies and requirements in Tennessee will be difficult, and will be a critical condition to allowing BellSouth into the interLATA market.

To protect the competitive process during the transition to competition for local services, the Act includes a number of special provisions which apply to the major RBOCs to limit their ability to exploit their monopoly power. In particular, Section 271 of the Act identifies the conditions and requirements which must be satisfied before any RBOC may be allowed to compete in interLATA markets. These include a public interest test, a requirement that there exist a facilities-based local exchange competitor, and a fourteen point Competitive Checklist that is intended to assure successful implementation of the policies required by Sections 251 and 252 *before* the restriction against competing in interLATA services is removed.[2] The Act also makes clear that the RBOCs bear the burden of demonstrating that they have met all of the requirements of Section 271 necessary to obtain in-region interLATA relief.

II. STATUTORY FRAMEWORK OF THE ACT

There are two principal provisions of the Act which govern this proceeding. Section 252(f)(1) concerns Statements of Generally Available Terms, and Section 271 concerns Bell Operating Company entry into interLATA Services. Section 252(f)(1) permits, but does not require, a Bell Operating Company such as BellSouth to:

> [F]ile with a State commission a Statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 of this title and the regulations thereunder and the standards applicable under this section.

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[2] See Section 271 of the *Telecommunications Act of 1996*, note 1 *supra*.

Section 252(f) prohibits the TRA from approving any Statement of Generally Available Terms and Conditions which does not comply with: (1) subsection (d) of §252, which contains the pricing standards for interconnection, transport and termination, and resale; or (2) Section 251 of the Act and regulations thereunder, which contain interconnection standards. 47 U.S.C. § 252(f)(2). Thus, under Section 252(f), if BellSouth's Statement of Generally Available Terms and Conditions does not comply with either §252(d), § 251, or the FCC's implementing regulations, the TRA must reject the Statement.

The Act establishes two interconnected but distinct avenues to interLATA authority, which are contained in Sections 271(c)(1)(A) and 271(c)(1)(B), and which are designated respectively as "Presence of A Facilities-Based Competitor" and "Failure to Request Access." These two avenues to interLATA authority are generally referred to as "Track A" and "Track B." Track A permits BellSouth to seek interLATA service in Tennessee only if BellSouth:

> has entered into one or more binding agreements that have been approved under section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more un-affiliated competing providers of telephone exchange service to residential and business customers.

47 U.S.C. § 271(c)(1)(a). Track B is a limited exception to Track A, and allows BellSouth to seek interLATA authority only if:

> after 10 months after the date of enactment of [the Act], no such provider has requested the access and interconnection described in [Track A] before the date which is 3 months before the date the company makes its application [for interLATA authority], and a statement of the terms and conditions that the company generally offers to provide such access and

interconnection has been approved or permitted to take effect by the State commission under 252(f).

47 U.S.C. § 271(C)(1)(B).

Thus, while an RBOC may file and seek approval of a Statement of Generally Available Terms and Conditions independent of any effort on its part to provide interLATA services, an approved Statement of Generally Available Terms and Conditions also may serve, under certain narrow conditions, as a means for an RBOC to seek authority from the FCC to provide interLATA services. As demonstrated below, however, the conditions set forth in the Act to allow an RBOC to proceed under Track B are not present in Tennessee, and BellSouth is thus foreclosed from pursuing Track B as a means to obtain interLATA authority in Tennessee.[3]

[3] Although BellSouth may pursue approval of a Statement of Generally Available Terms and Conditions on its own merits, any such Statement must still comply with Sections 251 and 252(d) of the Act in order to be approved by the TRA. However, BellSouth may not rely upon any such Statement for purposes of obtaining authority under Section 271 to provide interLATA services in Tennessee.

III. THE TRA HAS AUTHORITY UNDER THE ACT TO CONSIDER WHETHER TRACK B IS AVAILABLE AS AN OPTION FOR OBTAINING 271 AUTHORITY IN TENNESSEE

The Act sets forth a division of responsibility between the FCC and state commissions. The Act assigns to state commissions the role of implementing the pro-competitive provisions of Sections 251 and 252 and the federal rules adopted pursuant to those sections. The Act assigns responsibility to the FCC for determining when an Bell Operating Company has met the requirements of Section 271 and of approving applications for authority to provide interLATA services. State commissions, however, have an additional role to play in the Section 271 process. Section 271(d)(2)(B) provides:

> Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell Operating Company with the requirements of subsection (c).

47 U.S.C. § 271(d)(2)(B)(emphasis added).

Thus, while the FCC has responsibility for approving or rejecting BellSouth's application for authority to provide interLATA services in Tennessee, the TRA will be called upon to consult with the FCC as to BellSouth's compliance with Section 271(c). Because Section 271(c) includes subsection 271(c)(1)(B), which sets forth the conditions necessary to seek interLATA authority based upon an approved Statement of Generally Available Terms and Conditions (i.e., Track B), and because the question of "compliance" with subsection 271(c)(1)(B) necessarily includes the question of whether Track B is available to BellSouth, TRA should consider this issue in order to fulfill its consultative role with the FCC.

This is the approach adopted by the Kentucky Public Service Commission ("Kentucky PSC"). The Kentucky PSC concluded that Track B is unavailable to BellSouth in Kentucky. See Investigation Concerning the Propriety of Provision of interLATA Services by BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996, Case No. 96-608 (Kentucky Public Service Commission), Order (April 16, 1997)(copy attached.) Thus even though the Kentucky PSC determined that the FCC is the "ultimate decision maker in this matter," the Kentucky PSC determined that it was appropriate for it to provide its own determination as to whether Track B was available to BellSouth in Kentucky.

Similarly, in order to fulfill its consultative role under the Act, the TRA should resolve whether BellSouth is permitted under the Act to apply for authority to provide interLATA services based upon an approved Statement of Generally Available Terms and Conditions.[4]

IV. THE TRA SHOULD DETERMINE THAT BELLSOUTH MAY NOT PURSUE TRACK B INTERLATA AUTHORITY IN TENNESSEE

The TRA Staff Report on BellSouth Entry Into Long Distance Services (InterLATA) in Tennessee ("Staff Report") concludes that Track B is unavailable to

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[4] Such a determination will end the inquiry with respect to Section 271. However, BellSouth may seek approval of a Statement of Generally Available Terms and Conditions independent of its efforts to obtain interLATA authority under Section 271. Thus, if after the TRA determines that BellSouth may not rely upon a Statement of Generally Available Terms and Conditions to obtain interLATA authority, BellSouth nonetheless files such a Statement, the TRA will remain obligated under Section 252(f) to: (1) determine whether such Statement complies with Sections 251 and 252(d) of the Act; or (2) to permit the Statement to take effect without any affirmative finding by the TRA.

BellSouth, because the TRA has not approved a Statement Of Generally Available Terms And Conditions for BellSouth. While this is true, there is a more fundamental reason Track B is unavailable to BellSouth. In fact, a Statement Of Generally Available Terms And Conditions would be irrelevant, because Track B is unavailable to BellSouth in Tennessee.

A. Because BellSouth Has Received Requests for Interconnection and Access, the Act Forecloses BellSouth from Relying Upon an Approved Statement of Generally Available Terms and Conditions to Seek Authority to Provide InterLATA Services

The Act is quite clear that BellSouth may avail itself of Track B only if it can show, ten months after passage of the Act, that no unaffiliated potential competitor has requested access and interconnection to BellSouth's network. The Track B process was intended by Congress to address concerns raised by the RBOCs that other carriers could prevent an RBOC from applying for distance entry by refraining from filing requests for access and interconnection. The Track B process is thus narrowly tailored to meet a specific circumstance: failure of competitors to request interconnection. Section 271(c)(1)(B) provides:

> (B) Failure to request Access. - A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in paragraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1), and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f).

Track B is an exception to Track A. Congress quite clearly intended that the Track B process would be available to an RBOC only if an unaffiliated potential

competitor had not requested access and interconnection arrangements from the RBOC or, if such requests had been received, only in those limited circumstances where a state commission certified that the requesting competitors had: (1) failed to negotiate in good faith; or (2) failed to comply within a reasonable period of time with the implementation schedule in an approved interconnection agreement. 47 U.S.C. § 271(c)(1)(B).

Obviously, none of these circumstances have occurred in Tennessee. BellSouth has received numerous requests for access and interconnection, including such a request from AT&T, which was the subject of arbitration in Tennessee.[5] Therefore, BellSouth is barred by the explicit terms of the Act from applying for in-region interLATA relief under Track B. See Investigation Concerning the Propriety of Provision of interLATA Services by BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996, Case No. 96-608 (Kentucky Public Service Commission), Order (April 16, 1997).

BellSouth has argued elsewhere (e.g., Georgia) that the "no such provider" language in Section 271(c)(1)(B) can only refer to a facilities-based competitor already providing local exchange service to business and residential customers. BellSouth thus has attempted to "jump the tracks" by contending that it is not foreclosed from proceeding under Track B. BellSouth's argument is that the words "such provider" used in § 271(c)(1)(B) does not refer to the "unaffiliated competing providers of telephone exchange service" described in the first sentence of § 271(c)(1)(A), but only to those providers described in the second sentence of § 271(c)(1)(A) who offer telephone exchange

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[5] The TRA is well aware that AT&T and MCI pursued such negotiations and arbitrations in good faith. Further, no one has demonstrated — and the TRA has not certified — that any carrier has failed to negotiate in good faith or failed to implement an approved agreement.

service "exclusively . . . or predominantly over their own telephone exchange service facilities." BellSouth thus reasons that because no competing provider has as yet met this facilities-based test, it has not received any request for access and interconnection from a qualifying competitor, and thus can proceed under Track B without regard to whether the requirements of Track A have been satisfied.

Thus, under BellSouth's pretzel logic, unless a pre-existing provider of local exchange service requested an access and interconnection agreement before December 8, 1996, BellSouth is free to pursue Track B. This "cart before the horse" argument is foreclosed by the language of the Act, Congressional intent evidenced in both the Conference Report on the 1996 Act and the House Report on the House bill (H.R. 1555), as well as common sense.

BellSouth's interpretation is contrary to the plain language of the Act. See Union CATV, Inv. V. City of Sturgis, Kentucky, 107 F.3d 434, ___ (6th Cir. 1997), 1997 U.S. App. LEXIS 3208 at *10 ("In matters of statutory construction, we look first to the language of the statute.")(Copy attached.) Under the terms of Section 271, Track B comes into play only when "no such provider" has requested access and interconnection.[6] The "no such provider" language in Section 271(c)(1)(B) clearly refers to the "unaffiliated competing provider" language in Section 271(c)(1)(A). See Lyons v. Ohio Adult Parole Authority, et. al., 105 F.3d 1063, __ (6th Cir. 1997), 1997 U.S. App. LEXIS 927 at *21-22("The most relevant of these tools [of statutory construction] is also the most basic: if possible, we must read the statute as a coherent whole, and give effect to every word[.]")(Copy

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6 47 U.S.C. §271(c)(1)(B).

attached.). Indeed, the second sentence of § 271(c)(1)(A) specifically states that the facilities-based definition of "competing provider" in that sentence applies only "for the purpose of this subparagraph" -- that is, subparagraph 271(c)(1)(A), and not subparagraph 271(c)(1)(B).

Moreover, the words "such provider" in § 271(c)(1)(B) plainly refer to the same entities described by the words "such competing providers" in the second sentence of § 271(c)(1)(A), which unquestionably refers to the "unaffiliated competing providers" described in the first sentence of § 271(c)(1)(A). The term "such provider" in § 271(c)(1)(B), therefore, means an "unaffiliated competing provider[] of telephone exchange service," whether or not the competing provider is providing service predominantly over its own telephone exchange service facilities at the time of its request to BellSouth for access and interconnection. See First City Bank, et. al. v. National Credit Union Administration Board, et. al., __ F.3d __, 1997 U.S. App. LEXIS 6753, *16 ("It is a basic canon of statutory construction that phrases within a single statutory section be accorded a consistent meaning. The only reasonable way to read these two phrases, one following on the heels of the other, is as the FNBT II court does.")(Copy attached.) Thus, the fact that competitors have requested interconnection and access from BellSouth in Tennessee precludes BellSouth from pursuing Track B interLATA authority in Tennessee.

BellSouth's argument also is clearly contrary to the Act because it would render certain provisions of the Act useless or superfluous. See Schering-Plough Healthcare products, Inc. v. NBD Bank, N.A., n/k/a NBD Bank, et. al., 98 F.3d 904, 909 (6th Cir. 1997)("It is a well settled rule of statutory construction, however, that courts should avoid interpretations of statutes that render words superfluous.") In particular, BellSouth's

position conflicts with the language of Section 271(c)(1)(B), which permits an RBOC to proceed under Track B if the requesting interconnector does not act to implement the implementation schedule in the approved interconnection agreement within a reasonable time. Such language would be unnecessary if an RBOC could merely file a statement of interconnection terms as soon as the ten month clock expired.

Bell's argument is also undermined by the inclusion in Section 271(c)(1)(B) of the additional exceptions for CLECs that have negotiated in bad faith or that have violated agreed-upon timetables. There simply would be no need for these exceptions if BellSouth could render the entire Track A process moot by simply establishing the lack of a facilities-based competitor. The express inclusion of these exceptions in the statute demonstrates the Congressional intent that, once on the Track A path, BellSouth must be required to see it through to its conclusion, absent TRA certification of certain CLEC actions that, under the statute, amount to a failure to request access. Once again, there has been no such finding here.

Further, the fact that the Section 271(e)(1) joint marketing restrictions imposed on larger interexchange carriers expire once an RBOC is authorized to provide in-region interLATA services or once "36 months have passed since the date of enactment of the Telecommunications Act of 1996, whichever is earlier," (emphasis added) demonstrates Congress' recognition that it could take at least three years or more for the necessary facilities-based competition to develop in a particular state. Again, there would be no need for such language if an RBOC could enter the long distance market any time after December 8, 1996.

Direct expressions of Congressional intent also demonstrate that BellSouth's interpretation is contrary to the Act. One of the overarching principles of the Act is the creation of local exchange competition. The essence of the scheme established by Congress in section 271 was the establishment of a competitive local exchange market as an essential prerequisite to Bell entry into the in-region interLATA market. Congress established the Track A process precisely so that such facilities-based competition would exist before an RBOC could enter the long distance market. To address RBOC concerns that potential competitors might attempt to "game" the process, Track B was created to provide an "out" if no one requested access and interconnection, failed to negotiate in good faith, or failed to implement an approved agreement. Those are the only situations in which Congress permitted an RBOC to avoid the requirement that facilities-based competition exist prior to interLATA entry.

Congress wanted to ensure that if an RBOC did not receive an access and interconnection request from such an unaffiliated competitor, it would not be effectively prevented from seeking entry into the interLATA market. The fact that Congress was referring to a potential provider of residential and business local exchange service is clear from the Conference Report on the Act, which explains that Track B was created so that:

> [A] BOC is not effectively prevented from seeking entry into the interLATA services market simply because no facilities-based competitor that meets the criteria set out in new section 271(c)(1)(A) has sought to enter the market. . . . Consequently, it is important that the Commission rules to implement new section 251 be promulgated within 6 months after the date of enactment, so that potential competitors will have the benefit of being informed of the Commission rules in requesting access and interconnection before the statutory window in new section 271(c)(1)(B) shuts.

Conference Report on S.652, pp. 148-149 (emphasis added). The Conference Report thus makes clear that an access and interconnection request by a potential facilities-based competitor, such as AT&T, MCI and numerous other carriers who have requested access and interconnection from BellSouth in Tennessee, shuts off the Track B route in Tennessee.

The House Report on H.R. 1555, which created the Track A/Track B dichotomy, also confirms that Congress intended the Track B process to be closed once an RBOC receives an access and interconnection request from a potential facilities-based local exchange competitor:

> Because negotiating for access and interconnection may begin on the date of enactment, and in many of these States that have opened their local exchanges to competition, such negotiations have already begun, the Committee believes that it does not create an unreasonable burden on a would-be competitor to step forward and request access and interconnection as prescribed in the legislation.

House Report on H.R. 1555 (Report No. 104-204) pp. 77-78 (emphasis added).

Finally, common sense dictates that Congress could not have intended to create a section of the Act spelling out in detail the requirements for RBOC long distance entry — with only limited exceptions to those requirements — that, under BellSouth's logic, would almost never apply to any RBOC application because facilities-based business and residential local exchange competition did not exist at the time of the Act's passage. See Lyons, 105 F.3d at __, 1997 U.S. App. LEXIS at *21-22 (failing other rules of statutory construction, "'the construction that produces the greatest harmony and the least inconsistency is that which ought to prevail.'"), quoting Norman J. Singer, 2A Sutherland Statutes and Statutory Construction § 46.06 (5th ed. 1992).

Under BellSouth's theory, the existence of facilities-based competition would become totally irrelevant unless a facilities-based competitor emerged within 10 months of the passage of the Telecommunications Act. Under BellSouth's scenario, the only way an RBOC could be required to apply under Track A would be if a new entrant — within ten months after February 8, 1996 — built the facilities necessary to provide local exchange service, began providing such service to business and residential customers without any access or interconnection agreement with BellSouth, and only then requested interconnection with BellSouth. This scenario is not only absurd on its face, it flies in the face of clear Congressional intent that facilities-based competition exist before an RBOC received such interLATA authority. Carrying BellSouth's reasoning to its "logical" conclusion, the absence of competition would essentially become the basis for BellSouth's in-region interLATA entry by way of Track B.

For all of these reasons, BellSouth is foreclosed from pursuing Track B in Tennessee. In this case, Track B is simply not an option for BellSouth in Tennessee, regardless of whether the TRA approves a Statement Of Generally Available Terms And Conditions for BellSouth.

B. The Act Requires the Existence of Facilities-Based Competition in Tennessee Before BellSouth May Enter the Long Distance Market

The Staff Report concludes that facilities based competition is a condition which must be satisfied before BellSouth may provide interLATA service. AT&T agrees that the clear language of the Act imposes this requirement. BellSouth, however, also has argued elsewhere that the Track B process is available *as of right* to any RBOC, because Congress intended for every RBOC to have the ability to obtain in-region interLATA

relief ten months after enactment of the 1996 Act, regardless of whether facilities-based competition exists in the RBOC's state.[7]

This argument is foreclosed by the plain language of the Act, which requires an RBOC to proceed under Track A if it has received interconnection requests, "or" under Track B, if it has not received such requests during the relevant period. BellSouth attempts to take a narrow exception to the express language of Section 271(c)(1)(A), which requires the presence of "one or more" facilities-based competitors providing service to business and residential customers as a pre-condition to RBOC in-region interLATA relief, and subvert Congress' plain intent. BellSouth's interpretation would render Section 271(c)(1)(A) superfluous and read it out of the Act entirely. The most elementary rules of statutory construction argue against such a result.

In addition, the legislative history of the Act demonstrates that Congress intended for the RBOCs to face real facilities-based competition in their local markets before they would be permitted to obtain interLATA relief. As Senator Hollings, one of the principal proponents of the Senate and conference bills, observed:

> The basic thrust of the bill is clear: competition is the best regulator of the marketplace. Until that competition exists, monopoly providers of services must not be able to exploit their monopoly power to the consumer's disadvantage . . . . Telecommunications services should be deregulated after, not before, markets become competitive.

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[7] Indeed, BellSouth has argued in Georgia that Congress created Track A solely to provide RBOCs a means to enter the long distance market without having to wait 13 months (10 months to apply under Track B and 90 days for FCC approval). This contention conflicts with Congress' clearly expressed requirement that, except under narrowly circumscribed conditions, no RBOC should be permitted to provide in-region interLATA service until facilities-based business and residential competition existed.

142 CONG. REC. S6888 (daily ed. Feb. 1, 1996). Senator Kerry similarly noted:

> The bill seeks to assure that no competitor, no business and no technology may use its existing market strength to gain an advantage on the competition. The legislation requires that a company or group of companies satisfy certain competitive tests before being able to offer a new service or enter a new market. Entry into new services and new areas is contingent upon a demonstration that competition exists in the market in which the business currently competes.

142 CONG. REC. S710 (daily ed. Feb. 1, 1996).

> This congressional insistence on the presence of facilities-based competition originated in House bill, H.R. 1555, but was not present in the pre-conference Senate bill, S.652. It was the House bill's requirement of facilities-based competition that was carried forward into the 1996 Act.[8]

The House Commerce Committee believed the presence of a facilities-based competitor providing service to business and residential subscribers demonstrated the local exchange was open to competition.

> Under section 245(a)(2)(A), the Commission must determine that there is a facilities-based competitor that is providing service to residential and business subscribers. This is the integral requirement of the checklist, in that it is the tangible affirmation that the local exchange is indeed open to competition. In the Committee's view, the "openness and accessibility" requirements are truly validated only when an entity offers a competitive local service in reliance on those requirements.[9]

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[8] BellSouth's citations in filings in other states to statements made by Senators during the summer of 1995 are thus interesting, but irrelevant to the issue of whether facilities-based competition must be present — the pre-conference Senate bill, unlike the enacted telecommunications bill, did not have such a requirement.

[9] Id. 76-77.

Comments made in the House of Representative on the need for facilities-based competition also are instructive, not only because the House bill's facilities-based competition requirement was reflected in the 1996 Act, but also because H.R. 1555 created the Track A/Track B dichotomy. Thus, the fact that various Representatives understood that facilities-based competition was a prerequisite to RBOC long distance entry is of particular relevance. As Congressman Hyde recognized:

> H.R. 1555 requires the Bell operating companies to meet various federal and state regulatory requirements to open their local exchanges to competition before they are allowed into the long distance and manufacturing businesses. For example, the Bell companies are required to provide interconnection to their local loops on a nondiscriminatory basis. They must unbundle the services and features of the network and offer them for resale. They must also provide number portability, dialing parity, access to rights of way, and network functionality and accessibility. . . . In particular, there must be an actual facilities-based competitor in place before the Bell companies can get into long distance and manufacturing.

141 CONG. REC. H8292 (daily ed. Aug. 2, 1995) (emphasis added). Congressman Hastert echoed the requirement that facilities-based competition exist prior to RBOC entry into the long distance market:

> What's more, we included a facilities-based competitor requirement. This means there must be a competing company actually providing service over his or her own telephone exchange facilities. Just meeting the checklist isn't enough — there must be some proof that it works. We've got that in this bill.

141 CONG. REC. H8289 (daily ed. Aug. 2, 1995) (emphasis added). Other Congressmen also stressed the requirement of facilities-based competition. See, e.g., 141 CONG. REC. E1913 (daily ed. Oct. 11, 1995) (statement of Rep. Ward) ("Bell Companies Cannot Enter the Long Distance Market Until: They Face Facilities-based Competition in Residence and Business Markets. They Comply with Checklist"); 141

CONG. REC. E204 (daily ed. Feb. 23, 1996) (statement of Rep. Forbes) ("[B]efore any regional Bell company enters the long-distance market, there must be competition in its local market. That is what fair competition is all about").

BellSouth cannot obfuscate the obvious — the Act requires the existence of facilities-based local exchange competition before it may obtain in-region interLATA authority.

V. PERMANENT COST-BASED RATES ARE REQUIRED TO APPROVE A STATEMENT OF GENERALLY AVAILABLE TERMS AND CONDITIONS AND TO OBTAIN APPROVAL TO PROVIDE INTERLATA SERVICES

The Act requires the establishment of permanent cost-based rates before BellSouth may provide interLATA services, regardless of whether BellSouth is permitted to apply under Track A or Track B. The Act also requires the establishment of permanent cost-based rates before the TRA may approve a BellSouth Statement of Generally Available Terms and Conditions. Sections 252(f) (governing Statements of Generally Available Terms and Conditions) and 272(c)(2)(B) (governing authority to provide interLATA services) provide that BellSouth's Statement must comply with §252(d)(1) of the Act, which mandates permanent cost-based and nondiscriminatory rates for all unbundled network elements. BellSouth can not meet this requirement in Tennessee.

While the TRA has approved rates for interconnection in conjunction with the AT&T and MCI arbitrations, the TRA has not yet established permanent cost-based rates under the Act, in part because BellSouth failed to present sufficient detail concerning such rates during the arbitrations. As permitted under the Act and the FCC Order implementing the Act, the Arbitrators thus adopted "proxy" prices, "until such time as the

Authority sets permanent rates." Second and Final Order of Arbitration Awards, Docket Nos. 96-01152, 96-01271 (January 23, 1997) at 52.[10] As the Georgia Public Service Commission held in rejecting BellSouth's Statement of Generally Available Terms and Conditions:

> The Commission does not make light of the interim rates established in the arbitration. However, as the Commission expressed in its arbitration rulings, determining cost-based rates is not a light undertaking and neither the parties nor the Commission had the benefit in the arbitrations of a searching evaluation of the cost studies and methodologies underlying the parties' proposed rates.

BellSouth Telecommunications, Inc.'s Statement of Generally Available Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996, Docket No. 7253-U (Georgia Public Service Commission) Order Regarding Statement (March 21, 1997) at 18.

At no time during the AT&T/MCI arbitrations did the TRA determine that the proxy prices contained in the Second and Final Order of Arbitration Awards are cost-based prices as required under Section 271. Indeed, the Arbitrators based the proxy prices largely on existing BellSouth tariffs. Cost-based rates will not be determined until completion of the TRA's generic cost docket.

BellSouth has informed the TRA that its Statement of Generally Available Terms and Conditions for Tennessee will be based upon the AT&T/BellSouth Interconnection Agreement for Tennessee. If this is the case, the TRA will have no choice but to reject

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[10] Such rates were adopted by the TRA when the TRA approved the AT&T/BellSouth Interconnection Agreement.

BellSouth's Statement for two reasons. First, the rates contained in the AT&T/BellSouth Interconnection Agreement are not cost-based rates. Second, all of the rates for network elements are interim.

The lack of cost-based rates will compel rejection of any Statement of Generally Available Terms and Conditions filed by BellSouth. Moreover, without such cost-based rates, BellSouth can not comply with the Act's Competitive Checklist. This was the conclusion reached by the Staff Report: "While the proxy rates may be helpful in executing early interconnection activity, the staff believes that the law is quite clear in its intent to have the rates for these 4 checklist items (i.e., 1,2,3, and 13) based on cost. For this reason the staff believes that BellSouth should not be certified as in compliance with these items until new cost studies are complete, and permanent rates set." Staff Report at 4. The Georgia Public Service Commission, in rejecting BellSouth's Statement of Generally Available Terms and Conditions, relied upon a similar analysis:

> It is unreasonable to expect that this Commission can approve the Statement and pricing arrangements as cost-based, as required by the Act, when the determinations as to a reasonable cost basis have yet to be made. Accordingly, until the Commission has established the cost-based rates for interconnection including collocation, for unbundled elements, for reciprocal compensation, and for access to poles, ducts, conduits, and rights of way, pursuant to Sections 251 and 252(d), which can be used for BellSouth's SGAT, the Commission must reject the SGAT.

BellSouth Telecommunications, Inc.'s Statement of Generally Available Terms and Conditions Under Section 252(f) of the Telecommunications Act of 1996, Docket No. 7253-U (Georgia Public Service Commission) Order Regarding Statement (March 21, 1997) at 17. (Copy attached.) Thus, the lack of cost-based rates will compel rejection of

any Statement of Generally Available Terms and Conditions or any application for authority to provide interLATA services in Tennessee.

The interim nature of the rates approved by the TRA also will compel rejection of any Statement of Generally Available Terms and Conditions and a finding that BellSouth does not meet the Competitive Checklist. Full implementation of the Section 271 checklist requires that all parties — state commissions, RBOCs, and new entrants — know what their respective rights and obligations are under the Act. The lack of permanency of the rates established in the arbitrations and the pending appeal of the FCC's rules specifying some of those rights and obligations precludes any RBOC, including BellSouth, from establishing that it has, in fact, complied with the Competitive Checklist or with Section 252(f). BellSouth apparently agrees. As BellSouth stated to the North Carolina Utilities Commission:

> [P]ending legal challenges to the FCC's local competition order make charting a clear path toward satisfying the requirements for interLATA authority difficult, if not impossible, for any BOC.

Application of BellSouth Telecommunications, Inc. to Provide In-Region InterLATA Service Pursuant to Section 271 of the Telecommunications Act of 1996, Docket No. P-55, Sub 1022, Response of BellSouth to Procedural Order, p. 4 (N.C. Utilities Comm'n, filed September 4, 1996).

Thus, due in part to the appeal by BellSouth and others of the FCC's Order, and the stay that was issued by the United States Court of Appeals for the Eighth Circuit, the entire area of price is now uncertain. For there to be competition, the parties must know their costs, and the appeal before the Eighth Circuit has raised questions as to whether

costs will be based on the methodology set forth in the FCC's Order, or some other methodology.

Unless BellSouth appropriately prices all of the services, elements and functions that all competitors depend upon BellSouth to provide, BellSouth will be able to underprice its competitors at the retail level or set prices at levels which provide BellSouth positive margins, but which provide zero or negative margins to competitors. If the prices of the services and components that competitors must purchase from BellSouth are set at appropriate total element long run incremental costs, then BellSouth can impose costs on AT&T and other competitors that it does not incur itself. This clearly is not the intent of the Act.

Until the TRA and the parties know the methodology on which prices will be based, and until permanent cost-based rates are established based on that methodology, the TRA must reject any Statement of Generally Available Terms and Conditions filed by BellSouth and also conclude that BellSouth has not complied with the requirements of Section 271 necessary to obtain authority to provide interLATA services. AT&T agrees with the TRA staff that BellSouth cannot meet the Competitive Checklist until the TRA completes its upcoming cost proceedings, and permanent cost based rates are established in Tennessee. Moreover, as the Georgia Public Service Commission held, any Statement of Generally Available Terms and Conditions filed by BellSouth must be rejected until permanent cost based rates are established in Tennessee. AT&T also agrees with the schedule set forth by the staff for conducting a generic cost proceeding in Tennessee.[11]

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[11] AT&T further believes that it would be inappropriate to confer interLATA authority before access reform is concluded. Inflated access charges give

CONCLUSION

For the foregoing reasons, AT&T respectfully submits that the TRA should determine that BellSouth can not rely upon an approved Statement of Generally Available Terms and Conditions to obtain authority to provide interLATA services in Tennessee. AT&T also respectfully submits that the TRA should determine that any such Statement must be rejected until permanent cost-based rates are established by the TRA. The TRA also should hold that BellSouth can not comply with the Act's Competitive Checklist until such permanent cost-based rates have been established.

Respectfully submitted,

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BellSouth an artificial competitive advantage in the interLATA market by creating a "price squeeze" that puts other long distance carriers at a disadvantage in competing with BellSouth. Only when access is priced based on forward-looking economic costs will BellSouth's ability to discriminate against other carriers and to introduce competitive distortions in local, access and long distance markets be halted. For these reasons, the requirement of permanent rates based on cost as a condition of BellSouth's entry into long distance in Tennessee should include access.

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April 25, 1997

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this **25th** day of **April, 1997**, a true and correct copy of the foregoing Brief has been hand-delivered or sent via U. S. Mail, postage prepaid to:

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DOCKET# 15118
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Georgia Public Service Commission

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DOCKET NO. 7253-U

ORDER REGARDING STATEMENT

IN RE: BellSouth Telecommunications, Inc.'s Statement of Generally Available Terms and Conditions Under Section 252 (f) of the Telecommunications Act of 1996

Statement Filed: January 22, 1997
Decision: March 20, 1997

APPEARANCES:

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Tiane L. Sommer

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On Behalf of BellSouth Telecommunications, Inc:
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BY THE COMMISSION:

The Commission by this Order issues its decision regarding the Statement of Generally Available Terms and Conditions ("Statement" or "SGAT") filed by BellSouth Telecommunications, Inc. ("BellSouth" or "BST") pursuant to Section 252(f) of the Telecommunications Act of 1996 ("Act"). BellSouth's Statement represents a substantial effort to document the interconnection, services, rates, and related items it has made or will make available, consistent with this Commission's previous orders and rulings in arbitration dockets under the Act and other proceedings (primarily Dockets No. 6352-U and 6415-U/6537-U) under both the Act and state law. As discussed herein, however, the Commission concludes that the Statement does not yet fully comply with all of the standards and requirements of Sections 251 and 252(d) of the Act, and therefore should be rejected. This docket shall remain open for review of any revised Statement that BellSouth may submit, in order to address the aspects of the Statement that are currently premature or deficient as discussed in this Order.

Contents

I. JURISDICTION AND PROCEEDINGS

A. Jurisdiction

The Commission opened this docket to review the Statement of Generally Available Terms and Conditions ("Statement" or "SGAT") submitted by BellSouth in connection with its expected application to provide in-region interLATA services pursuant to Section 271 of the Act. When BellSouth filed its Statement on January 22, 1997, it triggered a 60-day review process under Section 252(f) of the Act. The Commission may approve or reject the Statement, or simply allow it to take effect pursuant to Section 252(f).[1]

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[1] The Act also permits the Commission to continue review of a Statement if it takes effect following the initial 60-day review period. Section 252(f)(4). The 60-day review period on this Statement concludes March 23, 1997.

The Commission's review of the Statement is independent of whether BellSouth proceeds to seek in-region interLATA relief under Section 271 of the Act.[2] BellSouth's filing of the Statement is under a separate section of the 1996 Act, Section 252(f), which provides for Commission review within 60 days whether or not BellSouth even proceeds with any application for in-region interLATA entry. The Commission's decision on the Statement pursuant to Section 252(f) is an order by this Commission. By contrast, the Commission's action on BellSouth's application for interLATA entry will be a consultative recommendation to the FCC submitted 20 days after BellSouth's FCC filing, and will not be a "final" or appealable order of this Commission. The schedule for reviewing the Statement in this docket is thus also separate from proceedings related to Section 271.

In reviewing the Statement, the Commission shall apply the standards and requirements of Sections 251 and 252(d) of the Act. In addition, the Commission may apply other requirements of State law, including requiring compliance with intrastate telecommunications service quality standards or requirements, as recognized by Sections 252(e)(3) and (f)(2).

B. Procedural History

The Commission initially established a procedure and schedule for the general review of BellSouth's expected application to the Federal Communications Commission ("FCC") for authorization to provide in-region interLATA services pursuant to Section 271 of the Act. The Act directs the FCC to consult with the applicable State Commission before making a determination with respect to any Bell Operating Company's entry into the interLATA market within the region of its incumbent local exchange services.[3] According to those procedures, established in Docket No. 6863-U, the Commission instructed BST to prefile testimony that specifically addressed and responded to questions concerning competition in the local market raised in Section 271 (c)(2)(B) of the Act.

On January 3, 1997, BellSouth filed in response to the Commission's procedure in Docket No. 6863-U. In addition, BST submitted a preliminary Statement of General Terms and Conditions for this Commission's review pursuant to Section 252(f). BellSouth filed its final version of the Statement of General Terms and Conditions ("Statement" or "SGAT") pursuant to Section 252(f) of the Act on January 22, 1997. The Statement had been modified to conform with subsequent Commission decisions and revised certain rates contained in the preliminary statement.

Due to the substantive differences and independent timetables for the Statement compared with the original proceeding relating to the expected FCC Section 271 application, the Commission

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[2] Therefore, this review is also independent of whether BellSouth seeks Section 271 relief under "Track A" or "Track B" under Section 271(c)(1).

[3] 47 U.S.C. § 271(d)(2)(B).

divided the proceedings, assigning the new Docket No. 7253-U to this review of the Statement but allowing the two dockets to be heard concurrently.[4]

Notices of Intervention were filed by Access Network Services, Inc. ("ANSI"), AirTouch Cellular of Georgia ("AirTouch"), American Communications Services of Columbus, Inc. ("ACSI"), ATA Communications, LLC ("ATA"), AT&T Communications of the Southern States, Inc. ("AT&T"), BellSouth Long Distance, Inc. ("BSLD"), Cable Television Association of Georgia ("CTAG"), Competitive Telecommunications Association ("CompTel"), Consumers' Utility Counsel ("CUC"), Cox Enterprises ("Cox"), Georgia Public Communications Association, Inc. ("GPCA"), Intermedia Communications, Inc. ("ICI"), LCI International Telecom Corp. ("LCI"), MCI Telecommunications Corporation ("MCI"), MFS Intelenet of Georgia, Inc. ("MFS"), MultiTechnology Services, L.P. ("MTS"), and Sprint Communications Company, L.P. ("Sprint").

The Commission opened the hearings on January 28-31, 1997, taking the testimony of witnesses for BellSouth and BSLD (the latter pertaining to Docket No. 6863-U). On March 3-7 and 10, 1997, the Commission reconvened the hearings and took testimony from the intervening parties, including ANSI, ACSI, AT&T, ICI, MCI, MFS, and Sprint, and rebuttal testimony from BellSouth and BSLD (the latter again pertaining to Docket No. 6863-U).

Under the Act, BST may file a statement of the terms and conditions that are generally available in order to comply with the duties and obligations set forth in Section 251 of the Act.[5] This Commission may not approve the statement unless it complies with Section 251 and the pricing standards for interconnection, network elements, transport and termination of traffic, and wholesale prices set forth in Section 252(d).[6]

The Act also set a definite time frame for the State Commission analysis. Unless the BellSouth agrees to an extension, the Commission must complete review of the statement within 60 days after the date of submission.[7] The statutory deadline for this docket is March 23, 1997.

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[4] Docket No. 7253-U was assigned to this proceeding, In re: BellSouth Telecommunications, Inc.'s Statement of Generally Available Terms and Conditions under Section 252(f) of the Telecommunications Act of 1996, on March 5, 1997.

[5] 47 U.S.C. § 251.

[6] 47 U.S.C. § 252 (d).

[7] 47 U.S.C. § 252(f) (3).

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Overview

Based on a thorough review of the entire body of evidence presented in the record and consideration of general regulatory policy issues, the Commission finds as a matter of fact and concludes as a matter of law that the Statement should not be approved for the reasons discussed in the following sections of this Order. This docket will be kept open for review of any revised Statement to address those aspects currently premature or deficient, as discussed in this Order.

BellSouth asked the Commission to approve the Statement, and asserted that the Statement would be useful to potential new entrants into the local exchange market who do not have the desire or resources to negotiate interconnection agreements, thereby eliminating this potential hurdle for new entrants. In addition, BST requested that the Commission certify that the access and interconnection generally offered within the Statement meets the requirements of the competitive checklist contained in Section 271(c)(2)(B). However, the Commission agrees with the Consumers' Utility Counsel ("CUC") that the Commission need not make any findings in this docket with respect to Section 271, including whether the SGAT would satisfy the competitive checklist of Section 271(c)(2)(B).

Most of the intervenors asked the Commission to reject the Statement. All of the intervenors asked, either as an alternative to requesting rejection or as their primary request, for the Commission not to approve the Statement but only permit it to take effect, so that the Commission can continue its review under Section 252(f) and modify or reject the Statement at a later date. AT&T and other intervenors countered BellSouth's asserted need for the SGAT by stating that potential new entrants, and the existing CLECs in Georgia, really need BellSouth's actual performance under existing agreements and the requirements of Sections 251 and 252(d). BellSouth did not identify any carrier which had requested that BellSouth file the Statement,[8] and no company lacking an agreement intervened to support BellSouth's proposed Statement.

Several intervenors including MFS and Sprint stated that their time for review of the SGAT was so limited that they were able only to address key issues. However, they added that the SGAT provisions on these key issues are so clearly inconsistent with the requirements of the Act that without more, they demonstrate that the Statement must be rejected.

The Commission finds that the Statement does not conform to pertinent provisions of the Act. The Act requires that a State Commission may not approve a statement unless such statement complies with subsection (d) of Section 252, and Section 251 and the regulations thereunder promulgated by the FCC. This signifies that the Commission's evaluation of the Statement must use a different approach from that used in conducting the arbitrations and approving the interconnection

[8] Tr. 2981 (BST witness Varner).

agreements (whether negotiated or arbitrated). Review of an arbitrated agreement merely calls for determining whether its provisions are inconsistent with Sections 251 and 252(d), not whether the agreement addresses every issue which is covered by those sections. In addition, an arbitrated agreement is to be approved if its provisions are not inconsistent with those sections. To approve the Statement, however, the Commission must affirmatively determine that each and every standard and requirement of Sections 251 and 252(d) is actually addressed and that the SGAT's provisions can actually be implemented in a realistic way.[9] This also does not mean that BellSouth must depend upon CLECs actually ordering each item that is "generally offered," in order to prove that each item is functionally available. Instead, if there are items that CLECs have not yet ordered, BellSouth should be able to demonstrate availability through testing procedures.

In other words, the Statement must be comprehensive in order to comply with Sections 251 and 252(d). The Commission's arbitration rulings were directed only to sets of issues as framed by individual parties in four cases (MFS, Docket No. 6759-U; AT&T, Docket No. 6801-U; MCI, Docket No. 6865-U; and Sprint, Docket No. 6958-U). Those issues did not encompass the totality of issues under Sections 251 and 252(d), and in ruling upon what was presented, the Commission did so as an arbitration panel responding within the framework and proposals presented by individual companies. The arbitration decisions also served the limited purpose of determining what the bilateral contracts between disputing parties should provide. Approval of a Statement under Section 252(f) involves much more; it essentially certifies that BellSouth's Statement represents a comprehensive offering that is available to CLECs in compliance with Sections 251 and 252(d).

Moreover, the Statement is not necessary to facilitate the entry of competitive local exchange carriers ("CLECs") into Georgia's local exchange markets. For example, new entrants could rapidly access the provisions of the large number of negotiated and arbitrated interconnection agreements between BellSouth and both large and small CLECs.[10] BellSouth remains free, of course, voluntarily to use its Statement as a representation of its standard offer to CLECs; but it would be premature for this Commission to allow the Statement to have the status of becoming effective under Section 252(f), for the reasons discussed in this Order.

Several CLECs presented evidence that they are proceeding to take steps to implement their interconnection agreements. The Statement also reflects rulings by the Commission in arbitration proceedings, notably those involving AT&T (Docket No. 6801-U) and MCI (Docket No. 6865-U). Portions of the Statement duplicate issues pending before the Commission in its proceeding to establish cost-based rates for interconnection and unbundled network elements (Docket No. 7061-U); as to these matters, the Statement is premature. In addition, the record shows that BellSouth has not

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[9] *Compare* Section 252(e)(2) (the commission "may only reject" an agreement upon certain findings), *with* Section 252(f)(2) (the commission "may not approve" the Statement unless it complies with the pertinent standards and requirements).

[10] *See, e.g.*, Statement at 1.

yet demonstrated that it is able to fulfill important aspects of the Statement's provisions on a nondiscriminatory basis that places CLECs at parity with BellSouth; as to these aspects, it again would be premature to allow the Statement to take effect. The Statement should not be approved so long as BellSouth has not demonstrated that it is able to actually provision the services of interconnection, access to unbundled elements, and other items listed in the Statement and required under Sections 251 and 252(d).[11]

As to the contention that the SGAT helps new entrants, what new entrants, smaller carriers, and all CLECs need is much less a standard offer that takes effect as a Statement under Section 252(f), and much more the actual ability of BellSouth to perform under its existing agreements or a Statement. This does not mean that a Statement is judged by the amount of CLEC activity, but by the ability of BellSouth to actually provide the items offered by the Statement, in compliance with the Act. Until BellSouth is actually able to provide interconnection, cost-based rates not subject to true-up, access to unbundled network elements, electronic interfaces for operational support systems, and the other items required under Sections 251 and 252(d), approval of the Statement would offer no benefit to other carriers. Instead, approval of the Statement under these conditions would be misleading by stating that BellSouth "generally offers" items that are not actually available.

BellSouth recognized that the overall purpose of the Act is to open telecommunications markets to competition. This purpose is served in pertinent part, BellSouth stated, by ensuring that potential entrants to the local exchange market have available to them the set of functions and capabilities to begin providing service, identified in Section 251 of the Act. (BellSouth Brief at 4.) The primary question in this case, however, is whether BellSouth has done its part in making such functions and capabilities available, to date.

BellSouth also argued that the Statement represents the Commission's rulings in arbitration dockets, and therefore meets the requirements of Sections 251 and 252(d). (BellSouth Brief at 5.) This argument overlooks significant differences between an arbitration, and the SGAT. To begin with, the arbitrations were conducted for the specific purpose of resolving disputes between parties over the meaning of provisions within Sections 251 and 252(d), and how they should be applied. The arbitrations did not address, for the most part, whether BellSouth was actually making available unbundled elements (for example) but instead whether certain items such as sub-loop unbundling,

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[11] Some intervenors advanced other objections to the Statement, based on opposition to portions of the Statement that reflect the Commission's decisions in arbitration cases. These include the Commission's ruling that the rebundling or recombination of unbundled network elements, without adding any CLEC facilities, functionalities or capabilities (other than operator services), should be priced and treated as resale under Section 251(c)(4) rather than unbundled elements under Section 251(c)(3); and Commission rulings involving the application of BellSouth tariff restrictions to resale, and resale of contract service arrangements ("CSAs"). These arguments would essentially ask the Commission to reconsider these previous rulings. In light of the Commission's disposition of the Statement on other grounds, the Commission does not engage in such a reconsideration.

network interface devices, mid-span meets, and dark fiber should be required, and what procedures should apply (for example, for accessing rights-of-way). Thus the arbitration rulings resolved disputes about terms and conditions. However, the arbitrations were for the most part not designed to inquire into whether BellSouth had actually made such items available.

For certain items, the arbitrations did inquire into whether BellSouth had made access actually available. The primary example of this is electronic interfaces as a part of operational support systems ("OSS"). There, it was quite clear that electronic interfaces had not yet been developed, and all the Commission could do was affirm its previous rulings in Docket No. 6352-U that BellSouth and the parties continue the development of such interfaces.

There are some aspects of the SGAT that were not addressed in the arbitrations. The major one, of course, is the pricing for unbundled network elements. The arbitrations did not establish rates for such elements pursuant to Section 252(d). The Commission was unable to determine in the arbitrations what rates would comply with Section 252(d), and therefore established Docket No. 7061-U and made the interim arbitrated rates subject to true-up using whatever rates are established in Docket No. 7061-U. A smaller aspect of the SGAT not addressed in the arbitrations, although not without significance for some CLECs, is the price for dark fiber when provisioned as an unbundled network element; the Commission did not adopt any interim rate for dark fiber in the arbitrations.

In offering a Statement of Generally Available Terms and Conditions, BellSouth is asking the Commission to do something else not addressed in the arbitrations: to approve a "statement of the terms and conditions that such company generally offers" to comply with the requirements of Section 251 and the regulations thereunder, and the standards under Section 252(d). "Generally offering" terms and conditions is meaningless if the offer is on paper only, without the capability to provide the actual service. This was not an issue in the arbitrations, but is an issue under Section 252(f).

The following points represent a summary of the major findings and conclusions in this Order:

- The Statement is not necessary to facilitate the entry of competitive local exchange carriers ("CLECs") into Georgia's local exchange markets.

- The Statement's pricing for interconnection, unbundled network elements, interim number portability, and reciprocal compensation represents interim rates subject to true-up. The cost-based prices for most or all of these items will be established by the Commission in Docket No. 7061-U. Such interim rates subject to true-up are not cost-based under Section 252(d), and as a matter of policy, if not law, should not be sanctioned in a Statement which results in retroactive ratemaking.

- The Statement's rates for dark fiber and for access to poles, ducts, conduits, and rights-of-way are also interim rates subject to true-up, and were not taken from the arbitration rulings so there is even less basis to find that such rates meet the cost-based requirements of the Act. Further, one of the unbundled items is directly contrary to a ruling by the Commission in the

AT&T arbitration, Docket No. 6801-U: the recurring (monthly) charge for end office switching of $0.0016 should include all features and functions of the switch, rather than impose additional prices for features and functions as the SGAT proposes.

- For unbundled access to network elements and for resale, BellSouth has not yet demonstrated that it is able to provide access to operational support systems ("OSS") on a nondiscriminatory basis that places CLECs at parity with BellSouth.

- The record shows that BellSouth is not yet able to fulfill important aspects of the Statement's provisions for interconnection and unbundled access to network elements on a nondiscriminatory basis that places CLECs at parity with BellSouth. The Commission is concerned that approval of the Statement under current conditions would be misleading, by stating that BellSouth "generally offers" items that are not actually available.

- The Statement does not meet the interconnection requirements of Section 251(c)(2), because BellSouth is not yet providing interconnection including full physical collocation to carriers on a basis (including standards and intervals) that is at least equal in quality to that provided to itself or to a subsidiary.

- BellSouth proposed that intervals and many other aspects of collocation be governed by its Negotiations Handbook. However, that handbook is not part of the SGAT, and it is subject to unilateral change. (Some other aspects of interconnection are to be governed by BellSouth manuals, which again are subject to unilateral change by BellSouth.) In addition, BellSouth is still developing its processes for physical collocation, so the Statement is incomplete as to those processes.

- BellSouth is not yet able to provide certain unbundled loops as requested by new CLECs and the underlying operations support and billing systems on a fully tested and nondiscriminatory basis that provides parity to CLECs.

- The Statement provides little information on how CLECs can actually order switching elements, on the time frames for ordering, or on billing and auditing. The SGAT refers to a document entitled "OLEC-to-BellSouth Ordering Guidelines (Facilities-based)" for information regarding ordering and delivery of unbundled switching. The latter document is not a part of the SGAT.

These points are discussed in further detail in the following sections of this Order.

B. Interconnection Requirements of Section 251(c)

Section 251(c)(2) of the Act provides that the duties of an incumbent LEC such as BellSouth include:

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

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

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

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

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

A closely related topic is collocation, as to which the Act at Section 251(c)(6) provides that BellSouth's duties include:

(6) COLLOCATION. -- The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

Georgia's Telecommunications and Competition Development Act of 1995 also contains provisions relating to interconnection. O.C.G.A. § 46-5-164(a) provides that all LECs shall permit reasonable interconnection with other certificated LECs, including all or portions of such services as needed to provide local exchange services.

1. Positions of the Parties

BellSouth argued that its Statement complies with the requirements of Section 251, including the Commission's arbitration decisions which applied Section 251 standards for interconnection. According to BellSouth, Section I of the Statement provides for complete and efficient interconnection of requesting telecommunications carriers' facilities and equipment with BellSouth's network. This involves the following components: (1) trunk termination points generally at BellSouth tandems or end offices for the reciprocal exchange of local traffic; (2) trunk directionality allowing the routing of traffic over a single one-way trunk group or a two-way trunk group depending upon the type of traffic; (3) trunk termination through virtual collocation, physical collocation, and interconnection via purchase of facilities from either company by the other company; (4) intermediary

local tandem switching and transport services for interconnection of CLECs to each other; and (5) interconnection billing.[12]

AT&T, MCI and other intervenors argued that the requirements of Section 251(c)(2) have not been met because, for example, BellSouth has not made physical collocation fully available and numerous technical requirements for physical collocation have not been established. BellSouth placed many of the terms and conditions for collocation in its "Negotiations Handbook," which is not a part of the SGAT and which BellSouth reserves the right to change unilaterally at any time. MCI argued that this is untenable, and further that even if the handbook contains reasonable intervals, no physical collocations have yet been completed so it is unknown whether BellSouth would be successful in meeting such intervals. (MCI Brief at 10.) MCI and Sprint pointed out that BellSouth's processes for implementation of physical collocation are still in a developmental phase.[13]

Many of the intervenors opposed Commission approval of the Statement stating that the evidence demonstrates that it does not comply with Section 251 and 252(d) of the Act. These intervenors added that approval of the Statement would significantly delay the development of local competition. This is because they are concerned that if the Statement is approved and BellSouth subsequently obtains approval from the FCC for in-region interLATA services, BellSouth will no longer have the incentive to do its best in meeting its obligations under Sections 251 and 252(d). The intervenors who advanced this argument included ACSI, ICI, MFS, and MCI.

ICI, MCI, MFS, and others asserted that approving or allowing the SGAT to go into effect is not necessary for new CLECs seeking to enter Georgia's local exchange market, because numerous other negotiated and arbitrated agreements exist from which new entrants can select provisions. Under their view, BellSouth can still offer and new entrants can still accept the rates, terms and conditions contained in BellSouth's Statement simply by voluntarily signing a contract with BellSouth. This would render the Statement essentially a "standardized contract" (ICI Brief at 6) offered by BellSouth, without the added status of "taking effect" under Section 252(f).

AT&T contended that there is insufficient evidence for the Commission to determine that the interconnection offered under the SGAT is at least at parity with the access BellSouth provides itself, as required under Section 251(c)(2). AT&T pointed to the fact that BellSouth has not filed its internal measures of quality, as it was requested to do on the last day of the hearings (March 10, 1997). If and when BST complies with that request, AT&T added, there is no way to determine whether the measures are complete or whether interconnection that is not yet available for use under the Statement will be provided at the same level of quality BellSouth provides itself. The SGAT does not contain quality standards, interval commitments, measures of quality, or incentives associated

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[12] BellSouth Brief at 6, citing Tr. 283-90 (BST witness Scheye).

[13] Tr. 2082-83 (AT&T witness Tamplin); Tr. 2427; MCI witness Agatston prefiled direct testimony at 13.

with such items. AT&T also argued that the Commission could not make a finding that the interconnection offered under the SGAT is nondiscriminatory, because BellSouth has yet to file the interconnection agreements it entered into with other incumbent local exchange carriers prior to the Act, and will not do so until June or July, 1997.[14]

With respect to collocation under Section 251(c)(6), AT&T objected that the Statement omits a price for an element which would allow collocated carriers to connect one cage to another. AT&T also objected that the rates for physical collocation are interim rates subject to true-up, and are not cost-based.[15] AT&T and MCI both pointed out that the Statement does not establish any time intervals for physical collocation; such intervals must be negotiated with BellSouth. For instance, physical collocation may take two to four months or longer to provide in some circumstances, but AT&T argued that there is no evidence that BellSouth experiences similar delays and thus that BellSouth has not shown that it can actually provide collocation on a nondiscriminatory basis.[16] AT&T and MCI concluded that for these and the other arguments they advanced, the Commission should reject BellSouth's Statement.

2. Commission Decision

The Commission finds and concludes that although BST has entered into numerous interconnection agreements with competing LECs, participated in arbitration proceedings with several carriers, developed ordering procedures for implementing other aspects of the agreements, BellSouth is not yet providing interconnection to carriers that is at least equal in quality to that provided to itself or to a subsidiary. While partial physical collocation has taken place, full physical collocation has not yet occurred and the record shows that BellSouth is still developing its procedures and may not be yet be able to make physical collocation available on a basis equal to the installation of BellSouth's own facilities. In reaching this conclusion, the Commission does not draw upon the problems cited by intervenors that have been experienced in other states. The Commission believes it is appropriate to confine its review only to what is demonstrated in Georgia.

BellSouth proposed that the intervals and many other aspects of collocation be governed by its Negotiations Handbook. However, that handbook is not part of the SGAT, and it is subject to unilateral change.[17] Given that BellSouth is still developing its processes for physical collocation,

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[14] Tr. 423 (BST witness Scheye). The Commission's September 27, 1996 Order in Docket No. 6703-U does not require such pre-Act agreements to be filed until such time.

[15] AT&T Brief at 24-25, citing Tr. 727, 730 (BST witness Scheye).

[16] AT&T Brief at 24-25, citing Tr. 731 (BST witness Scheye).

[17] Tr. 795 (BST witness Scheye).

BellSouth has not demonstrated that physical collocation is currently actually available as promised by the SGAT and required under Section 251(c)(2).

The record shows that some network elements are not yet available for interconnection, and that BellSouth's provisioning of interconnection under existing agreements has involved significant delays and problems.[18] As early as July, 1996, ICI requested connection to certain BellSouth subloops, and BellSouth had not fulfilled the request as of the time of the hearings in this docket.[19]

To show compliance with the interconnection requirements of Section 251(c)(2), the Statement must be more than a written outline of what BellSouth intends to offer. In order to generally offer interconnection, BellSouth must be able to make it actually available, both technically and operationally.

The reciprocal exchange aspect and other pricing aspects of interconnection are discussed separately in the following section of this Order. As for interconnection billing, there was testimony indicating that BellSouth may not have fully verified its billing systems for use in interconnection and other aspects of billing with CLECs, so it would be appropriate for BellSouth to provide some documentation of its billing system testing in connection with any revised Statement.

C. Pricing Standards of Sections 251 and 252(d)

Pricing standards are contained within Sections 252 and 252(d) of the Act. Perhaps the primary price-related sections are contained within Section 252(d) with respect to interconnection, unbundled elements, and resale. To begin with, Section 252(d)(1) provides:

> (1) INTERCONNECTION AND NETWORK ELEMENT CHARGES. — Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section --
>
> (A) shall be --
>
> (i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and
>
> (ii) nondiscriminatory, and
>
> (B) may include a reasonable profit.

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[18] Tr. 745 (BST witness Scheye); Tr. 1773-74 (MFS witness Meade); Tr. 2270-89 (ICI witness Strow); see also prefiled direct testimony and cross-examination of ACSI witness Robertson.

[19] Tr. 2887 (ICI witness Strow).

Georgia's Telecommunications and Competition Development Act of 1995 at O.C.G.A. § 46-5-164(b) provides that the rates, terms, and conditions for interconnection services (which includes unbundled elements) shall not unreasonably discriminate between providers.

Section 251(b)(5) establishes that BellSouth's duties include the following with respect to reciprocal compensation:

> (5) RECIPROCAL COMPENSATION. — The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

The pricing standard for such reciprocal compensation is set forth in Section 252(d)(2), as follows:

> (2) CHARGES FOR TRANSPORT AND TERMINATION OF TRAFFIC.-
> (A) IN GENERAL- For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless--
> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and
> (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

The pricing standard for resale of local exchange services is provided in Section 252(d)(3), as follows:

> (3) WHOLESALE PRICES FOR TELECOMMUNICATIONS SERVICES- For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

1. Positions of the Parties

BellSouth argued that its Statement complies with the requirements of Section 252(d), in that the interim rates subject to true-up for unbundled elements are those applied by the Commission in arbitration dockets, and the true-up will be according to permanent cost-based rates to be established by the Commission in the cost proceeding, Docket No. 7061-U. BellSouth's Statement offers its tariffed retail telecommunications services for resale to other telecommunications carriers, and outlines specific limitations on resale generally (e.g., prohibition against cross-class selling) and on the resale of specific services (e.g., short-term promotions, grandfathered services, contract service arrangements, etc.). In the Statement, BellSouth offers a wholesale discount of 20.3 percent for residential customers, and 17.3 percent for business services. BellSouth stated that these discounts

as well as the resale limitations are consistent with the Commission's previous orders.[20] The interim wholesale pricing for resale of services was affirmed in the arbitration rulings, and established by the Commission in Docket No. 6352-U.

BellSouth stated that its reciprocal compensation arrangements are in compliance with Section 252(d)(2), and that the rates for reciprocal transport and termination of local calls are consistent with the requirements of the Act and the Commission's previous Orders.[21]

A primary objection by intervenors was that the interim rates for unbundled elements cannot by definition be cost-based, because the Commission has not yet undertaken its review in the cost study proceeding in Docket No. 7061-U. They pointed out that these rates are not only interim, but are also subject to true-up according to rates that are established in the cost proceeding (Docket No. 7061-U), which both adds to the uncertainty and business risk facing the CLECs, and also proves that the interim rates are not cost-based in compliance with Section 252(d).[22] The intervenors who put forward this argument included AT&T, ICI, MCI, MFS, and Sprint.

MCI argued that Section 252(d)(1) is clearly stated in terms that indicate the present, and are not anticipatory in any way - that the Act simply does not contemplate that its requirements can be met on the basis of future compliance, however near. (MCI Brief at 13.) MCI also objected to the rates, terms and conditions associated with reciprocal compensation for transport and termination, arguing that they must be set in a way that does not reward incumbent carriers for network inefficiencies that they may experience relative to new entrants or punish new entrants for network efficiencies that they may experience relative to the incumbent. MCI argued that the SGAT's reciprocal compensation process is not equitable because it permits BellSouth to bill CLECs for tandem switches used to terminate calls from CLEC customers, but does not permit CLECs to bill BellSouth for the use of CLECs' switches performing the same functionality and covering the same geographic scope as BellSouth's tandems.[23]

In addition, AT&T and ICI pointed out that the Statement's rates for dark fiber were not based upon the Commission's rulings in the arbitration dockets; this is because the parties in those dockets did not propose, and the Commission did not establish rates for dark fiber in those

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[20] BellSouth Brief at 11-12, citing Tr. 351-56 (BST witness Scheye).

[21] BellSouth Brief at 11, citing Tr. 350-51 (BST witness Scheye).

[22] MCI witness Wood, prefiled direct testimony at 14; AT&T witness Winegard, prefiled direct testimony at 20; AT&T witness Gillan, prefiled direct testimony ("[m]ost of the pricing provisions set forth in Attachment A [to the SGAT] have not yet been found by the Commission to satisfy Section 252(d), and therefore, cannot meet the checklist.").

[23] MCI Brief at 29-30, citing Tr. 2641-42, 2777-78, MCI witness Wood's prefiled direct testimony.

proceedings. AT&T objected that prices set at tariffed rates cannot be accepted as cost-based rates pursuant to Section 252(d). ICI contended that BellSouth has thus not attempted to make a showing that these rates meet the pricing standard under Section 252(d)(1) of the Act.

AT&T also objected to the monthly charge of $0.0016 for end office switching, which the SGAT states does not include retail services.[24] This qualification was not adopted by the Commission in the AT&T arbitration,[25] and AT&T also argued that it is contrary to FCC Rules which require that end office switching must include all features and functionality of the switch, including those needed to provide retail vertical service.

The Consumers' Utility Counsel argued that this docket is not the proper forum to revisit the Commission's arbitration rulings on the topics of geographic deaveraging, "rebundling" or "network platform" pricing issues, or whether contract service arrangements ("CSAs") should be sold at a discounted price to CLECs for resale. The CUC added that the Commission should not await access reform by the FCC or the reductions in intrastate access charges mandated by O.C.G.A. § 46-5-166(f) before reaching its decision regarding the Statement. (CUC Brief at 5.)

2. Commission Decision

With respect to the pricing of interconnection, unbundled network elements, reciprocal compensation, and access to poles, ducts, conduits, and rights-of-way, the Commission notes that it has initiated a docket for the purpose of establishing cost-based rates that will no longer be subject to true-up. That docket may also be used for establishing cost-based rates for interim number portability. The Commission has granted BellSouth's requests for an extension of time to file its proposed cost studies and rates in that docket.[26] It is unreasonable to expect that this Commission can approve the Statement and pricing arrangements as cost-based, as required by the Act, when the determinations as to a reasonable cost basis have yet to be made.[27] Accordingly, until the Commission has established the cost-based rates for interconnection including collocation, for unbundled elements, for reciprocal compensation, and for access to poles, ducts, conduits, and rights-of-way, pursuant to Sections 251 and 252(d), which can be used for BellSouth's SGAT, the Commission must reject the SGAT.

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[24] Tr. 826 (BST witness Scheye).

[25] Tr. 827 (BST witness Scheye).

[26] At the time of this Order, BellSouth had been granted its request for an additional 30-day extension of time in order to file its proposed cost studies and rates by April 30, 1997.

[27] The Commission also notes that the Eighth Circuit has not yet issued its decision regarding the pricing and other provisions of the FCC's First Report and Order. That decision could have a significant impact on the actual standards by which to judge a Statement.

The Commission does not make light of the interim rates established in the arbitrations. However, as the Commission expressed in its arbitration rulings, determining cost-based rates is not a light undertaking and neither the parties nor the Commission had the benefit in the arbitrations of a searching evaluation of the cost studies and methodologies underlying the parties' proposed rates. Therefore the Commission moved quickly to establish the cost study proceeding in Docket No. 7061-U, although the Commission has subsequently granted BellSouth's requests for extension of time to compile data and revise cost study models to use an open, non-proprietary format.

The Statement's interim prices for interconnection including collocation, for unbundled elements, and for reciprocal compensation for transport and termination are taken from the Commission's rulings in arbitration dockets involving MFS (Docket No. 6759-U), AT&T (Docket No. 6801-U), and MCI (Docket No. 6865-U). In those rulings, issued by the Commission acting as an arbitration panel under Section 252(e), the Commission refrained from adopting any particular methodology or approving any cost study. For those very reasons, the Commission initiated the cost proceeding in Docket No. 7061-U. Thus, the Commission did not adopt those rates as cost-based rates under Section 252(d), and so the Commission adopted the true-up mechanism linked to cost study proceeding in Docket No. 7061-U.[28]

The true-up mechanism was acceptable for the arbitration rulings because those rulings addressed contractual disputes between two private parties, with the Commission acting as the arbitration panel under Section 252(e). However, a true-up mechanism is not appropriate for a statement of generally available terms and conditions under Section 252(f). Approval in a Statement of generally available rates that are interim and subject to true-up based upon subsequent proceedings appears equivalent to retroactive ratemaking. As a matter of policy, if not law,[29] a Statement that takes effect with the imprimatur of state and federal law should not provide for generally available rates that change retroactively.

The Commission also agrees with ICI that the Statement's rates for dark fiber were not taken from the arbitration rulings, and thus there is even less reason to find that such rates meet the cost-based requirement of Section 252(d)(1). In addition, BellSouth's witness Mr. Scheye agreed that some of the rates for network elements listed in Tab 2 of the Statement do not represent any form

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[28] Thus the status of the interim rates for interconnection including collocation, for unbundled elements, and for transport and termination is different from that of the interim pricing for resale of BellSouth's retail services. While the wholesale discount was established for the interim and is intended to be reviewed in a subsequent proceeding for purposes of a permanent discount, at least the interim discount was intended to be consistent with the pricing standard of Section 252(d)(3). Furthermore, the interim wholesale discount is not subject to a true-up reconciling the interim with any permanent discount.

[29] *See* O.C.G.A. § 46-2-25(d); *see also* Commission Rule 515-2-1-.03.

of total element long-run incremental cost ("TELRIC") pricing;[30] thus it has not been established that such items have been priced in compliance with Section 252(d). Further, one of the unbundled items is directly contrary to a ruling by the Commission in the AT&T arbitration, Docket No. 6801-U: the recurring (monthly) charge for end office switching of $0.0016 should include all features and functions of the switch, rather than impose additional prices for features and functions as the SGAT proposes.[31]

D. Other Requirements of Sections 251(b) and (c)

Section 251 contains various requirements in addition to the interconnection requirements (discussed previously) under Section 251(c)(2). One of these is the requirement under Section 251(c)(3) that incumbent LECs provide unbundled access to network elements. Specifically, Section 251(c)(3) provides that the duties of incumbent LECs include:

> (3) UNBUNDLED ACCESS. -- The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

Georgia's Telecommunications and Competition Development Act of 1995 also contains provisions relating to unbundled network elements. O.C.G.A. § 46-5-164(d) provides:

> (d) Such interconnection services shall be provided for intrastate services on an unbundled basis similar to that required by the FCC for services under the FCC's jurisdiction.

All LECs have a duty to provide nondiscriminatory access to poles, ducts, conduits and rights of way, pursuant to Section 251(b)(4), as follows:

> (4) ACCESS TO RIGHTS-OF-WAY. – The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of

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[30] Tr. 720.

[31] This was discussed in the Commission's February 26, 1997 Order Denying Motion for Rehearing in the AT&T arbitration, Docket No. 6801-U.

telecommunications services on rates, terms, and conditions that are consistent with section 224.

Local exchange companies also have the duty to provide dialing parity under Section 251(b)(3), as follows:

> (3) DIALING PARITY. -- The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

Section 251(b)(2) describes BellSouth's duty with respect to number portability as:

> (2) NUMBER PORTABILITY. -- The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

Each LEC has the following duty with respect to resale of its services, under Section 251(b)(1):

> (1) RESALE. -- The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

In addition, incumbent LECs such as BellSouth have additional duties with respect to resale, pursuant to Section 251(c)(4), as follows:

> (4) RESALE. -- The duty --
>
> (A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and
>
> (B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

Similarly, BellSouth as a company that has elected alternative regulation under Georgia's Telecommunications and Competition Development Act of 1995 has the obligation to allow resale of its services, under O.C.G.A. § 46-5-169(7).

1. Positions of the Parties

BellSouth argued that its Statement complies with the requirements of Section 251, including the Commission's arbitration decisions which applied Section 251 standards. According to BellSouth, its Statement provides nondiscriminatory access to network elements on an unbundled basis at any technically feasible point under just and reasonable rates, terms, and conditions, including: collocation, operations support systems ("OSS"), the provision of dark fiber, and other unbundled elements. The Statement also contains a Bona Fide Request process to facilitate requests by any new entrant for interconnection or unbundled capabilities not included in the Statement.[32]

As to operational support systems (OSS), BellSouth stated that it has already spent a considerable amount of time and resources developing interfaces and related systems, in compliance with the Commission's previous orders in Docket No. 6352-U and the arbitration decisions. BellSouth also contended that the "web" interface projected to be available on March 31, 1997 will provide sufficient functionality for CLECs to access the services they need.

BellSouth stated that Section III of the Statement offers access to poles, ducts, conduits, and rights-of-way via a standard license agreement, consistent with the Commission's previous orders.[33]

For local loops, BellSouth stated that Section IV offers several loop types: 2-wire, 4-wire voice grade analog, 2-wire ISDN, 2-wire and 4-wire Asymmetrical Digital Subscriber Line ("ADSL"), 4-wire High-bit-rate Digital Subscriber Line, and 4-wire DS1 digital grade. Other loop types not identified in the Statement may be obtained pursuant to the Bona Fide Request Process. In addition, the Statement provides for loop distribution, loop cross connects, loop concentration, and access to Network Interface Devices ("NIDs"). BellSouth asserted that its provisioning of unbundled loops and additional local loop transmission components, as well as the rates for these items, are consistent with the Commission's previous orders.[34]

Local transport from the trunk side of a wireline local exchange carrier switch, unbundled from switching or other services, is covered by Section V of the Statement. BellSouth stated that this offers unbundled local transport with optional channelization from the trunk side of its switch, and that it offers both dedicated and common transport including DS0 channels, DS1 channels in conjunction with central office multiplexing or concentration, and DS1 or DS3 transport. Again,

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[32] BellSouth Brief at 6-7, citing Tr. 290-302 (BST witness Scheye).

[33] BellSouth Brief at 7, citing Tr. 302-04 (BST witness Scheye).

[34] BellSouth Brief at 7, citing Tr. 304-10 (BST witness Scheye).

BellSouth stated that these items and their rates are consistent with the Commission's previous orders.[35]

Section VI of the Statement relates to unbundled local switching. BellSouth stated that it offers a variety of switching ports and associated usage unbundled from transport, local loop transmission and other services. These include a 2-wire and 4-wire analog port, 2-wire ISDN digital and 4-wire ISDN DS1 port, and 2-wire analog hunting. Additional port types are available under the Bona Fide Request process. Until a long-term solution is developed, BellSouth stated that it provides selecting routing on an interim basis to a CLEC's desired platform using line class codes (subject to availability).[36]

BellSouth asserted that the Statement offers nondiscriminatory access to 911 and E911 services, directory assistance, and operator call completion services, to both facilities-based providers and resellers. In Section VII of the Statement, BellSouth offers to perform directory assistance and other number services on behalf of facilities-based CLECs, which allow end user customers in exchanges served by BellSouth to access BellSouth's directory assistance service by dialing 411 or the appropriate area code and 555-1212. BellSouth asserted that it offers CLECs access to its Directory Assistance database under the same terms and conditions currently offered to other telecommunications providers. BellSouth makes available its operator services in the same manner that it provides operator services to its own customers. In addition, BellSouth stated that it offers Centralized Message Distribution System ("CMDS") - Hosting and Non-Sent Paid Report System processing. BellSouth asserted that its provision of 911, directory assistance, and operator call completion services, as well as the rates for these services, are consistent with the Commission's previous orders.[37]

According to BellSouth, its Statement provides nondiscriminatory access to databases and associated signaling necessary for call routing and completion, including Signaling Links, Signal Transfer Points, and Service Control Points ("SCPs") (databases). The SCPs/Databases to which CLECs have access include, but are not limited to, Line Information Database ("LIDB"), Toll Free Number Database, Automatic Location Identification and Data Management System, Advanced Intelligent Network, and Selecting Routing. BellSouth stated that its signaling/database offering for call routing and completion is consistent with the Commission's previous orders.[38]

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[35] BellSouth Brief at 8, citing Tr. 310-13 (BST witness Scheye).

[36] BellSouth Brief at 8, citing Tr. 313-18 (BST witness Scheye).

[37] BellSouth Brief at 9, citing Tr. 318-31 (BST witness Scheye).

[38] BellSouth Brief at 10, citing Tr. 335-43 (BST witness Scheye).

BellSouth added that it arranges with its directory publisher to make available White Pages directory listings to CLECs and their subscribers which include the subscriber's name, address, and telephone number. BellSouth asserted that CLEC subscribers receive no less favorable rates, terms, and conditions for directory listings than are provided to BellSouth's subscribers (e.g., the same information is included, the same type size is used, and the same geographic coverage is offered).[39] In addition, BellSouth asserted that it is providing nondiscriminatory access to telephone numbers. BellSouth serves as the North American Numbering Plan ("NANP") Administrator for its territory, and stated that it has established procedures to provide nondiscriminatory NXX code assignments to CLECs.[40]

BellSouth's Statement describes the interim number portability arrangements that are available, which include Remote Call Forwarding ("RCF") and Direct Inward Dialing ("DID"). BellSouth asserted that these arrangements comply with the FCC's regulations issued on July 2, 1996, in the First Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 95-116. BellSouth asserted that these arrangements, and the rates for RCF and DID, are consistent with this Commission's previous orders, and added that in conjunction with other industry participants BellSouth is pursuing an aggressive schedule to implement a long-term number portability solution as required by FCC orders.[41]

BellSouth stated that the local dialing parity requirement of Section 251(b)(3) is met because local service subscribers in BellSouth's region dial the same number of digits to place a local call, without the use of an access code, regardless of their choice of local service provider.[42]

A primary objection by intervenors was that nondiscriminatory operations support systems (OSS) have not yet been developed, tested, and implemented, and thus that CLECs do not have access to unbundled elements on the same basis that BellSouth has access to the same elements.[43] AT&T, MCI and others argued that before the Commission can approve any Statement, BellSouth must demonstrate that all the interfaces offered in the Statement for access to OSS for pre-ordering, ordering, provisioning, maintenance and repair, and billing are operationally ready for the purpose of providing service through resale and unbundled network elements. AT&T pointed out that BellSouth admitted that the interfaces to its OSS as described in Section 2 of the Statement are not

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[39] BellSouth Brief at 9-10, citing Tr. 331-34 (BST witness Scheye).

[40] BellSouth Brief at 10, citing Tr. 334-35 (BST witness Scheye).

[41] BellSouth Brief at 10-11, citing Tr. 343-48 (BST witness Scheye), Tr. 2195-96 (AT&T witness Danforth).

[42] BellSouth Brief at 11,citing Tr. 348-50 (BST witness Scheye).

[43] *See, e.g.*, Tr. 387-89 (BST witness Scheye); Tr. 2047, 2053 (AT&T witness Pfau); Tr. 3043-53, 3062, 2077 (BST witness Calhoun).

yet available for use by CLECs,[44] and AT&T asserted that the interfaces are not operationally ready.[45] AT&T argued that even if the interfaces were operational, there is no evidence before the Commission to indicate that the interfaces would be nondiscriminatory; it is not evident that the testing being done addresses whether the interfaces will provide an experience equivalent to the customer's experience in ordering and receiving BellSouth services. (AT&T Brief at 15-18.) MCI stated that it is undisputed that many of BellSouth's systems are still in development, some planned systems do not conform with industry standards, and none is fully tested and operational. (MCI Brief at 6.)

MCI argued that, to the extent new competitors must rely on the incumbent LEC's networks and OSS capabilities for a realistic opportunity to compete, it will be essential for the incumbent LEC to develop and implement OSS interfaces and downstream processes sufficient to ensure that they can provide unbundled network elements and resale in a timely, reliable, and nondiscriminatory fashion in volumes that realistically reflect market demand. MCI contended that paper promises are not enough to ensure effective real-world application, and that Act compliance calls for parity in at least three respects: the scope of information available, the accuracy of information supplied, and the timeliness of communications. After detailed criticism of the status of development, MCI concluded that BellSouth has not shown it is providing OSS that meets the Act's requirement that it can actually be used. (MCI Brief at 15-19.)

The Consumers' Utility Counsel, while recommending that the Statement be allowed to take effect, identified the operations support systems (OSS) as "one of the most troublesome issues confronting the Commission." (CUC Brief at 6.) OSS is evolving from a manual, carrier-specific process to electronic interfaces that require extensive industry development, communication and coordinated effort as between competing carriers. The CUC noted that there are difficult privacy issues that concern the pre-ordering phase. The CUC concluded that there does not appear to be any "final" or permanent method or methods by which it can be concluded that the OSS offered at a given time suffices for future interactions between BellSouth and CLECs. The relative scarcity of access lines provided presently by CLECs in Georgia, according to the CUC, underscores the testimony of CLEC witnesses that many of the OSS systems have not been implemented or tested under circumstances in which there are large volumes of orders.[46] The CUC recommended that the SGAT be allowed to take effect, and that the Commission keep the docket open under Section 252(f)(4) of the Act in order to address and review such issues that may arise.

ACSI's testimony documented significant problems that ACSI experienced in completing its initial unbundled loop cutovers from BellSouth and in providing quality service over BellSouth

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[44] Tr. 382 (BST witness Scheye).

[45] Tr. 2047 (AT&T witness Pfau).

[46] CUC Brief at 6, citing Tr. 1230 (ACSI witness Robertson).

unbundled loops. Specifically, Mr. Robertson testified to undue delays and serious customer service disruptions experienced by ACSI in the provisioning of unbundled loops and number portability. These are the subject of ACSI's complaints to the FCC and to this Commission in Docket No. 7212-U. ACSI also presented evidence and expressed concern as to whether BellSouth's building management preferred provider, exclusive sales agency, and contract sales arrangements are anticompetitive.[47]

In addition to difficulties experienced with on-net and off-net service for customers of ACSI and MFS (which have their own fiber loops), and the testing for provisioning unbundled loops, ICI has not been able to obtain local transport due to BellSouth delays in providing other elements ICI needed to enter the local exchange market as a facilities-based competitor.[48] Therefore, they argue, the terms and conditions for access to unbundled elements are not just, reasonable, or nondiscriminatory, as required by Section 251(c)(3). They also contended that the OSS interfaces must be proven to work under actual conditions before the Commission can determine whether they comport with the requirements of Section 251. These arguments were advanced by ACSI, AT&T, ICI, MCI, MFS, and Sprint.

MCI objected that the Statement does not make clear that BellSouth offers common (local) transport. According to MCI, BellSouth's first clear offer to provide common transport appeared in its rebuttal testimony, and should be clarified in the Statement.[49]

With respect to resale, MFS recounted problems such as disconnection of the customer during conversion of the customer's service over to MFS, although disconnection should never have occurred in the first place and the reconnection was not prompt.[50] AT&T argued that this example shows resale is not yet "available" under the Statement. (AT&T Brief at 23-24.) MCI also stated that the Statement is deficient because it does not provide for notification to resellers when their customers have migrated to another carrier. Prompt notification is important so that the reseller can adjust its billing system to stop billing its former customers. Further, MCI noted that the SGAT does not make Centrex services available for resale as grandfathered services, even though both the Commission and the FCC have required that such grandfathered services be available for resale.[51]

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[47] ACSI Brief at 4-5, citing its witness Robertson's prefiled direct testimony at 8-10, 16-19.

[48] Tr. 2292 (ICI witness Strow).

[49] MCI Brief at 22, citing Tr. 2438, 2466.

[50] Tr. 1772 (MFS witness Meade).

[51] MCI Brief at 34, citing Docket No. 6865-U Order at p. 47; 47 C.F.R. § 51.615.

In general, these intervenors also argued that BellSouth has not shown actual availability of access to unbundled elements, access to rights-of-way, and the other items required by Section 251. Instead, they argued, BellSouth's SGAT only provides promises to deliver at some future time, available on paper only, and in many cases not even available for testing, let alone actual use. They also argued that BellSouth has not yet received orders for some items, such as local transport and unbundled local switching,[52] so BST cannot verify that such items will be "available" if and when they are ordered.

MCI pointed out that BellSouth promises to provide unbundled loops to MCI and other competitors in a much longer time period than the 48 (or fewer) hours in which BellSouth establishes service to its own customers. MCI contended that such delays will greatly impede competition in local markets.[53]

AT&T and others pointed out that the problems experienced by ICI, MFS, and ACSI discussed during the hearings are likely to multiply as additional requests for unbundled loops are made in the future. Thus, AT&T asked that the Commission not endorse illusory promises relating to key elements of BellSouth's network, through approval of the Statement. (AT&T Brief at 12-13.)

Although the Statement says BellSouth will provide access to its operator services, AT&T objected that BST did not set forth how it would comply if any carrier requested access to operator services, or that such access actually could be provided. AT&T was also concerned that at the hearing, BellSouth could not confirm whether any carrier had requested access to operator services and whether such access had been provided.[54] AT&T and MCI both expressed concern that the Statement does not provide for immediate migration of "as-is" directory listings.[55]

AT&T also objected that BellSouth is not providing nondiscriminatory access to poles, ducts, conduits and rights-of-way in accordance with Section 251(b)(4). The Statement provides that CLECs must wait up to 20 days from submitting an order before BellSouth will confirm that space is available, and another 60 days before the CLEC will obtain a license from BellSouth (or other owner) of the pole or conduit. In contrast, BellSouth has access to the same information and use of the right-of-way, conduit or pole for itself immediately.[56] AT&T also expressed concern that it is

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[52] Tr. 409, 411 (BST witness Scheye); *see also* MCI Brief at 23, citing Tr. 2442, 2443 (MCI witness Agatston).

[53] MCI Brief at 20-21, citing Tr. 2436-37.

[54] AT&T Brief at 19, citing Tr. 412 (BST witness Scheye).

[55] AT&T Brief at 20; MCI Brief at 33; Tr. 2645, 2731 (MCI witness Martinez).

[56] AT&T Brief at 18-19, citing Tr. 403-05 (BST witness Scheye).

premature to evaluate whether the Statement fully complies with Section 251(b)(4) because additional problems with respect to such access may surface once other problems have been resolved which have delayed facilities-based competition.

MCI criticized Attachment D of the SGAT regarding nondiscriminatory access to poles, ducts, conduits and rights-of-way, because it does not discuss the "critical issue" of the compensation to CLECs who have improved BellSouth's structure when another carrier subsequently attaches to the structure. MCI cited the FCC's First Report and Order (at ¶ 1214) which stated that the modifying party should be allowed to recover a proportionate share of the modification costs from parties that later are able to obtain access as a result of the modification. (MCI Brief at 20.)

MCI also criticized the SGAT for not providing parity for such items as access to databases, and for not containing a commitment to supply information needed by CLECs to properly establish, implement and sustain their 911 networks.[57] According to MCI, BellSouth has not promised to provide critical network data, including rate center data and selective routing boundary information; and the SGAT does not establish procedures to reroute calls during times of network overload. Once again, the SGAT refers to an external handbook. (MCI Brief at 24, citing SGAT Art. VII, ¶ A.6, p. 14.) MCI also argued that the FCC has found access to incumbent LEC's Advanced Intelligent Network ("AIN") database and Service Creation Environment ("SCE")/Service Management System ("SMS") is required.

MCI charged that the SGAT is further deficient with respect to directory assistance services, in that it does not guarantee parity of features and performance for CLECs. (MCI Brief at 24, citing SGAT Art. VII, ¶ B.2, p. 14.)

As to number portability pursuant to Section 251(b)(2), AT&T objected that the SGAT makes no commitment for the delivery time on interim number portability, stating only that it will often be provided within 24 hours, and that BellSouth will commit only to discuss and agree on a time frame for each order upon receipt.[58] AT&T asserted that BST certainly can retain a number for a customer and route calls to a new location for its own purposes within a defined and much shorter period of time, and charged that BST proposes disparate treatment. (AT&T Brief at 21.)

MCI pointed out that the rates for interim local number portability were not reviewed or set by the Commission, and are proposed as interim, subject to true-up. MCI thus objected to the Statement's rates for interim local number portability. MCI also objected that the SGAT improperly allows carriers to block number portability when a customer has past due charges. Citing the FCC's Number Portability Order (*see* 47 C.F.R. Pt. 52, subpt. C), MCI argued that a carrier may not prevent a customer from porting its number to another carrier if the customer has unpaid charges. Further,

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[57] MCI Brief at 24, citing Tr. 2636 (MCI witness Martinez).

[58] Tr. 415, 417 (BST witness Scheye).

MCI contended that paragraph G of the SGAT's Attachment G is too vague in providing that number portability can be discontinued based upon BellSouth's determination as to whether another carrier is "impairing or interfering" its system. MCI's concern is that a vague standard could permit anticompetitive practices, and allow BellSouth to turn off number portability almost at will or at least during high traffic periods.[59]

With respect to the "change charge" in paragraph H of the SGAT's Article XIV, page 22, MCI argued that unilateral determinations and assessments by BellSouth without procedures to contest "slamming" allegations is inappropriate and unsuited to the newly competitive environment in local telephone services.[60]

ACSI noted that BellSouth testified that the SGAT does not include performance standards.[61] ACSI and others argued that such standards are necessary to ensure that CLECs are treated on a nondiscriminatory basis and to ensure that local markets are opened for competition as intended by the Act. (ACSI Brief at 6-7.)

2. Commission Decision

BellSouth's Statement represents a substantial effort to comply with the other requirements of Section 251 quoted above. However, these requirements require additional implementation by BellSouth in order to make elements, operations support systems, and billing and other systems actually available. In other words, those sections require more than a written statement with facial compliance. They require actions to be taken by the local exchange company or the incumbent LEC. Therefore, in order for the Commission to determine whether the Statement should be approved as complying with those sections, it is appropriate for the Commission to determine whether it reflects actual BellSouth compliance.

Nondiscriminatory access to operational support systems (OSS) is an integral part of providing access to unbundled network elements, as well as making services available for resale. The record shows that BellSouth has not yet demonstrated that it is able to fulfill these important aspects of the Statement's provisions on a nondiscriminatory basis that places CLECs at parity with BellSouth. In addition, the pre-ordering and ordering interim "web" interfaces, and the interfaces for maintenance and repair, are not projected to be fully operational for roughly two months.[62] BellSouth is still working on an interface for Customer Records Information System ("CRIS") billing and for

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[59] MCI Brief at 28, citing Tr. 2640 (MCI witness Martinez).

[60] MCI Brief at 34, citing Tr. 2647 (MCI witness Martinez).

[61] BST witness Scheye's prefiled rebuttal testimony at 67-68.

[62] Tr. 387-88, 802 (BST witness Scheye).

local usage data, both of which may not be ready for two months.[63] Before BellSouth can offer the interfaces for actual CLEC use, testing must be completed. However, internal testing has not begun for some of the interfaces; and it is not yet known what standards for reliability BellSouth uses for its internal testing,[64] although comparative standards must be evaluated to ensure that the interfaces provide nondiscriminatory access. Consumer resale ordering interfaces have not completed systems readiness testing, or subsequent market readiness testing.[65] Thus it would be premature to allow the Statement to take effect. The Statement should not be approved so long as BellSouth has not demonstrated that it is able to actually provision the services of interconnection and access to unbundled elements, make services available for resale (including OSS interfaces), and other items listed in the Statement and required under Sections 251 and 252(d).

BellSouth continues to be engaged in a substantial effort to develop electronic interfaces. Many of these, including pre-ordering, ordering, directory listing, trouble reporting, and maintenance and repair, are projected to be available in at least a limited form by March 31, 1997; BellSouth also projects that work will continue with further improvements planned by December 31, 1997. As these milestones are met, BellSouth may present the results to the Commission and show whether they meet appropriate requirements.

As to making elements available upon CLEC request, there was evidence that BellSouth has been unable to provide certain unbundled loops as requested by new CLECs, cannot yet provide an unbundled network interface device ("NID"), and has experienced significant problems in testing and providing other elements that the Statement describes as available.[66] The Commission recognizes that not all the problems have been caused by BellSouth, but it remains the case that BellSouth has not yet completed its part to ensure that the items required under Section 251 will be actually available upon request by CLECs. Certain loops that are supposed to be unbundled, such as ADSL and HDSL, likewise are not currently available. ACSI's testimony documented significant problems that ACSI experienced in completing its initial unbundled loop cutovers from BellSouth and in providing quality service over BellSouth unbundled loops. Specifically, Mr. Robertson testified to undue delays and serious customer service disruptions experienced by ACSI in the provisioning of unbundled loops

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[63] Tr. 389-90 (BST witness Scheye).

[64] Tr. 3037, 3056-57, 3077 (BST witness Calhoun). Requests were made at the hearings for BellSouth to provide information on its internal standards. Such information has not been provided as of the date of this decision (March 20, 1997).

[65] Tr. 3043 (BST witness Calhoun).

[66] Tr. 3081 (BST witness Calhoun), Tr. 817 (BST witness Scheye), Tr. 1773-74 (MFS witness Meade), Tr. 2273-2289 (ICI witness Strow). The Commission notes that its rulings in the AT&T and MCI arbitrations (Dockets No. 6801-U and 6865-U) provided that CLEC direct connection to BellSouth's NID is to be considered on a CLEC-by-CLEC basis to verify that the CLEC has the technical ability to maintain proper safety conditions.

and number portability. These are the subject of ACSI's complaints to the FCC and to this Commission in Docket No. 7212-U.[67]

BellSouth can improve the Statement by specifying the standards to which it can commit in providing interconnection and unbundled access to network elements. To demonstrate parity and nondiscriminatory interconnection and unbundled access, BellSouth may submit its internal standards for comparative purposes. BellSouth's internal standards need not be a part of the Statement, but will be relevant in documenting that CLECs are treated on a nondiscriminatory basis.

The Statement provides little information on how CLECs can actually order switching elements, on the time frames for ordering, or on billing and auditing. The SGAT refers to a document entitled "OLEC-to-BellSouth Ordering Guidelines (Facilities-based)" for information regarding ordering and delivery of unbundled switching. The latter document is not a part of the SGAT, but is a BellSouth document which could be revised unilaterally. In addition, the specifics are sketchy, which does not facilitate use by CLECs. The Statement should contain sufficient information to support the conclusion that CLECs have parity with BellSouth as to relevant functions including information for 911 networks, directory assistance services, operator call completion services, and access to databases including the call completion, call-routing and line information databases. The Statement should also clarify that customers can migrate their directory listings "as-is" when they change to a new local service provider. In addition, BellSouth has not yet provided an electronic interface for directory listings; the Commission required BST to set this up by April 1, 1997. The Statement should also provide for prompt notification to reseller CLECs if and when their customers switch to another provider, so the reseller can stop billing to former customers.

This is not to say that BellSouth will be unable to work through the development and testing necessary to verify that elements can actually be provisioned and billing systems will operate correctly. However, the impact of additional requests for unbundled loops and other items required by CLECs will place additional pressure on BellSouth's systems, both technological and personnel who need to be trained. In addition, the mere fact that some items have not been ordered by CLECs does not prove that BellSouth is unable to provide them; for such items, what is significant is whether BellSouth can verify availability through testing procedures. In other words, even if CLECs have not ordered a particular item, or if billing has not yet been initiated for a particular service, BellSouth should be able to demonstrate through testing that the item is functionally available or that the billing system will function accurately.

Given that BellSouth has not yet shown that it can reliably provide unbundled loops and other unbundled elements in the controlled environment of pilot tests, unbundled elements are not yet

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[67] ACSI Brief at 4, citing its witness Robertson's prefiled direct testimony at 8-10. ACSI also presented evidence regarding BellSouth's practices with respect to building management preferred provider, exclusive sales agency, and contract sales arrangements, which the Commission does not reach with respect to ruling on the Statement.

available as promised in the Statement and as required by Section 251.[68] In addition, the Statement's proposed interfaces are only interim solutions (*see* SGAT at 6). One example of an OSS interface that will not be fully operational for some time is on-line access to Customer Service Records ("CSRs").[69] Indeed, the Commission notes that in the arbitrations involving AT&T and MCI, BellSouth is required to develop such access in a manner that protects customer privacy, working with the CUC, and after developing such CSR access the parties must return to the Commission to demonstrate the appropriate privacy protections before the relevant interface is implemented.[70] Approval of the Statement under these conditions would be misleading by stating that BellSouth "generally offers" items that are not actually available.

With respect to interim number portability, the rates are interim, subject to true-up. As mentioned previously, establishing such interim number portability rates on a general basis as a part of a Statement may violate the law against retroactive ratemaking. Also, the Commission has not determined whether these interim rates are cost-based. Therefore as a matter of policy if not as a matter of law, an additional basis for rejecting the Statement is the interim nature of the interim number portability rates which are subject to true-up and which the Commission has not determined to be cost-based. In addition, if BellSouth submits a revised Statement that permits blocking of number portability when a customer has past due charges but has not been disconnected, BellSouth should also submit a supporting argument showing why BellSouth believes that number portability may be used as a method of enforcing the recovery of past due amounts. BellSouth should also attempt to revise the Statement's standard regarding shutting down of number portability to ensure that such shutting down occurs only during network emergencies or on the basis of other, specific technical requirements.

With respect to resale, the Commission notes that subsequent to BellSouth's January 22, 1997 filing of the Statement, the Commission undertook further review and action to approve BellSouth's resale tariff in Docket No. 6352-U. Therefore, revision of the SGAT should include any revisions necessary to conform to the resale tariff and related decisions in Docket No. 6352-U. With respect to charges for switching local exchange carriers or unauthorized transfers of customers, the Statement should be subject to any Commission rulings in current or future proceedings on these topics.

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[68] *See* Tr. 2010 (Sprint witness Burt), Tr. 1791 (MFS witness Meade), Tr. 2049 (AT&T witness Pfau); prefiled testimony of MCI witness Martinez at 15.

[69] Tr. 1979, 1986, 3128-30.

[70] This was ordered in the AT&T arbitration, Docket No. 6801-U, MCI arbitration, Docket No. 6865-U, and Sprint arbitration, Docket No. 6958-U.

E. Other Requirements of Sections 251(c), (d), (e) and (g)

Section 251 contains other requirements within subsections (c), (d), (e) and (g) as to which the Commission finds no deficiency in the Statement, or which are not directly applicable to the Statement.

251 (c)(1) relates to the duty to negotiate. It provides for:

> (1) DUTY TO NEGOTIATE. -- The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

Although ICI raised numerous questions at the hearing regarding BellSouth's negotiations, ICI did not appear to ask for rejection of the Statement upon those grounds. Many other companies have negotiated agreements, and the arbitrations to date have not proven bad faith on the part of BellSouth. Any confusion of the sort ICI may have experienced appear to have been resolved by the very submission of BellSouth's proposed Statement. The Commission does not find any deficiency with respect to BellSouth's negotiations, and therefore does not base its rejection decision upon any concern about BellSouth's good faith in negotiations.

Section 251(c)(5) relates to BellSouth's duty to give CLECs notice of certain changes. It provides:

> (5) NOTICE OF CHANGES. -- The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

The Statement reflects terms and conditions that were established pursuant to negotiation and arbitration in the AT&T and MCI arbitration cases, Dockets No. 6801-U and 6865-U. The Commission does not find any deficiency with respect to this portion of the Statement, and therefore does not base its rejection decision upon any concern about BellSouth's provision for notice to CLECs of changes.

Section 251(d)(2) involves directions to the FCC regarding its determinations for regulations implementing the requirements for unbundled access to network elements under Section 251(c)(3). It provides:

(2) ACCESS STANDARDS.-- In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether --

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

The Commission finds that no issue has been raised in this case involving this provision of the Act. In addition, this provision of the Act speaks to the FCC, not directly to the Georgia Commission. Therefore, the Commission concludes that this provision has no bearing on its decision in this Order as to whether to approve, reject, or allow the Statement to take effect.

Section 251(d)(3) also speaks to the FCC in its development of regulations implementing Section 251. It provides:

(3) PRESERVATION OF STATE ACCESS REGULATIONS.-- In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that--

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirement of this section and the purposes of this part.

The Commission finds that no issue has been raised in this case involving this provision of the Act. In addition, this provision of the Act speaks to the FCC, not directly to the Georgia Commission. Therefore, the Commission concludes that this provision has no bearing on its decision in this Order as to whether to approve, reject, or allow the Statement to take effect.

Section 251(e)(1) relates to the FCC's activities regarding telecommunications numbering. It provides:

(1) COMMISSION AUTHORITY AND JURISDICTION.-- The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

The Commission finds that no issue has been raised in this case involving this provision of the Act. In addition, this provision of the Act speaks to the FCC, not directly to the Georgia Commission. The only issues raised regarding access to telephone numbers were raised under separate provisions of the Act discussed previously in this Order. Therefore, the Commission concludes that this Section 251(e)(1) has no bearing on its decision in this Order as to whether to approve, reject, or allow the Statement to take effect.

Section 251(g) pertains to services provided to interexchange carriers ("IXCs") by local exchange carriers. It provides:

> (g) CONTINUED ENFORCEMENT OF EXCHANGE ACCESS AND INTERCONNECTION REQUIREMENTS.-- On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

The Commission finds that no issue has been raised in this case involving this provision of the Act. In addition, this provision of the Act speaks to the FCC, not directly to the Georgia Commission. Therefore, the Commission concludes that this provision of the Act has no bearing on its decision in this Order as to whether to approve, reject, or allow the Statement to take effect.

IV. ORDERING PARAGRAPHS

For the reasons discussed in the foregoing sections of this Order, the Commission finds and concludes that it would be premature to approve BellSouth's proposed Statement of Generally Available Terms and Conditions as it stands, or to allow the Statement to take effect, and that the Statement should be rejected pursuant to Section 252(f) of the Act. BellSouth clearly undertook a substantial effort in developing and supporting its Statement, however, and the Commission's decision is simply based on finding that various aspects of the Statement are premature, not fully developed, or require additional support.

The Commission further concludes that rejection of the Statement now, with the identification of premature and deficient aspects, is a better course than simply allowing the Statement to take effect and continuing to review it. This is because the latter course would place BellSouth in jeopardy of having an effective Statement that is subject to subsequent rejection. The approach the Commission adopts and applies in this Order provide BellSouth with more certainty, even though it also does not grant BellSouth the affirmative approval which BellSouth requested.

The Commission will keep this docket open for review of any revised Statement that BellSouth may choose to submit. Such Commission review will be for the purpose of addressing aspects of the Statement that are currently premature or deficient, as discussed in this Order.

WHEREFORE THE COMMISSION ORDERS that:

A. BellSouth's Statement of Generally Available Terms and Conditions is rejected as being a premature and incomplete Statement, for the reasons discussed in the preceding sections of this Order, pursuant to Section 252(f) of the Telecommunications Act of 1996.

B. This docket shall be kept open for Commission review of any revised Statement that BellSouth may choose to submit, in order to address the aspects of the Statement that are currently premature or deficient as discussed in this Order.

C. All statements of fact, law, and regulatory policy contained within the preceding sections of this Order are hereby adopted as findings of fact, conclusions of law, and conclusions of regulatory policy of this Commission.

D. A motion for reconsideration, rehearing or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

E. Jurisdiction over these matters is expressly retained for the purpose of entering such further Order or Orders as this Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 20th day of March, 1997.

Terri M. Lyndall
Executive Secretary

3/21/97
Date

Stan Wise
Chairman

3-21-97
Date

BEFORE THE GEORGIA PUBLIC SERVICE COMMISSION

In the matter of:	)	
	)	
BellSouth Telecommunications, Inc.'s Statement of	)	**7253-U**
Generally Available Terms and Conditions Under	)	
Section 252 (f) of the Telecommunications Act of 1996	)	

CERTIFICATE OF SERVICE

I hereby certify that the Order Regarding Statement dated March 21, 1997 in the above-referenced docket was filed with the Commission's Executive Secretary, and copies of same were served upon all parties and persons listed below or via hand-delivery where indicated by an asterisk, or by first-class mail addressed as follows:

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So certified this 24th day of March, 1997.

B. B. Knowles

B. B. Knowles
Director, Utilities Division

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION CONCERNING THE PROPRIETY OF PROVISION OF INTERLATA SERVICES BY BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996	) CASE NO. 96-608

O R D E R

On March 31, 1997, MCI Telecommunications Corp. and MCIMetro Access Transmission Services, Inc. (collectively "MCI") filed a motion requesting this Commission to take action to ensure that these proceedings conform to the Commission's Order dated December 20, 1996 which initiated this docket. AT&T Communications of the South Central States, Inc. ("AT&T") and Sprint Communications Company L.P. ("Sprint") have filed supporting motions. Movants argue that this Commission should disregard BellSouth Telecommunications, Inc.'s ("BellSouth") Statement of Generally Available Terms ("Statement") filed March 31, 1997, because this action is intended to determine whether BellSouth has fulfilled the requirements of Section 271(c)(1)(A) of the Telecommunications Act of 1996, Pub L. No. 104-104, 110 Stat., 56, 47 U.S.C. 151 et seq. (the "Act") in order to receive this Commission's recommendation that BellSouth should be permitted to provide in-region, interLATA services in Kentucky. The Commission is also requested to alter its procedural schedule, submitted by BellSouth and adopted by this Commission in its March 5, 1997 Order. The procedural schedule, among other things, provides for filing of a Statement of Generally Available Terms and for simultaneous filing of direct testimony

by all parties. BellSouth filed its response to these motions ("BellSouth Response") on April 10, 1997.

As MCI states, there are two methods by which a Bell operating company may satisfy the requirements of Section 271 of the Act. The first, "Track A," appears in subparagraph (c)(1)(A); the second, "Track B," appears in subparagraph (c)(1)(B). Under Track A, BellSouth must show interconnection with a competitor that provides, predominantly over its own facilities, local service to residential and business customers. Track B, available to a Bell operating company which has had no interconnection requests, allows a Bell operating company to submit a Statement of Generally Available Terms. Movants correctly state that the Commission's Order of December 20 requires BellSouth to demonstrate that its entry into the in-region, interLATA market is appropriate under Track A.

BellSouth responds that its Statement "plays a role" in both tracks. BellSouth Response at 2. It also argues that accepting MCI's argument effectively gives the IXCs, with whom BellSouth will compete in the interLATA market, the power of deciding when BellSouth may enter that market. This is so because, according to BellSouth, the carriers most likely to be the facilities-based providers who will provide competition in the local market are the large IXCs. Those IXCs have, says BellSouth, "every incentive" to delay the beginning of facilities-based competition in the local market in order to protect their power in the interLATA market. BellSouth Response at 11. Foreclosing Track A on the theory that no competitor offers facilities-based competition and simultaneously foreclosing Track B on the theory that competitors have requested interconnection could indeed leave

BellSouth at the mercy of the IXCs and delay BellSouth's provision of in-region, interLATA competition as contemplated in the Act.

In its December 20 Order, the Commission signaled its intent to determine whether Track A factors justify BellSouth's entry into the in-region, interLATA market. The Commission disagrees with BellSouth regarding its contention that the Statement of Generally Available Terms is relevant in a Track A proceeding. Moreover, the Commission continues to believe that Track A, rather than Track B, is the appropriate one in Kentucky, for the simple reason that it appears to this Commission that carriers who will provide service predominantly over "their own facilities" after their respective interconnection agreements are finalized have requested interconnection from BellSouth. In the opinion of this Commission, it is not necessary for a carrier literally to build its own facilities in order to be considered "facilities-based." It is sufficient that the carrier requesting interconnection plans to provide service through use of appropriately priced unbundled elements purchased from BellSouth, as opposed to reselling BellSouth service. Defining "facilities-based" carriers to include only those carriers building their own local exchange facilities would indeed subject BellSouth's entry into the interLATA market to the decisions of other carriers which may wish to block BellSouth's entry into the interLATA market through the simple expedient of failing to build. The Act is meant to open all telecommunications markets to competition, and BellSouth unquestionably will provide meaningful interLATA competition.

The Commission will, however, consider BellSouth's Statement in this docket. Although the Commission concludes herein that Track A and Track B are mutually exclusive, and that interconnection requests made by carriers providing residential and business service through use of unbundled elements are sufficient to trigger a Track A

inquiry, the Commission recognizes that these issues have not yet been decided by the Federal Communications Commission ("FCC"), the ultimate decisionmaker in this matter. In particular, the Commission is unaware of any decision of the FCC defining "facilities based carrier" either to include or to exclude carriers providing service through use of unbundled elements purchased from an incumbent local exchange carrier ("ILEC"). Accordingly, because the FCC will ultimately decide whether BellSouth may enter the interLATA market pursuant to Section 271, and because it is this Commission's role to advise the FCC in making that determination, the lawfulness of BellSouth's Statement, as well as appropriateness of BellSouth's entry into the in-region, interLATA market under Track A, will be considered in this proceeding.

Finally, as BellSouth points out, the Commission's current procedural schedule provides intervenors with the opportunity to file rebuttal testimony. Thus, there is no need to alter the schedule to allow the intervenors to file their direct testimony after the filing of BellSouth's.

The Commission, having considered the record and having been otherwise sufficient advised, THEREFORE ORDERS that the motions of MCI, AT&T, and Sprint are hereby denied.

Done at Frankfort, Kentucky, this 16th day of April, 1997.

By the Commission

ATTEST:

Executive Director

LEVEL 1 - 1 OF 485 CASES

FIRST CITY BANK, Plaintiff-Appellant, TENNESSEE BANKERS ASSOCIATION, Intervening, Plaintiff-Appellant, v. NATIONAL CREDIT UNION ADMINISTRATION BOARD, Defendant-Appellee, AEDC FEDERAL CREDIT UNION, TENNESSEE CREDIT UNION LEAGUE, and CREDIT UNION NATIONAL ASSOCIATION, INC., Intervening Defendants-Appellees.

No. 95-6543

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1997 U.S. App. LEXIS 6753; 1997 FED App. 0125P (6th Cir.)

October 15, 1996, Argued
April 14, 1997, Decided
April 14, 1997, Filed

PRIOR HISTORY: [*1] ON APPEAL from the United States District Court for the Middle District of Tennessee. 94-00334. Thomas A. Wiseman, Jr.

DISPOSITION: AFFIRMED.

COUNSEL: For FIRST CITY BANK, Plaintiff - Appellant: Randall S. Mashburn, ARGUED, BRIEFED, Baker, Donelson, Bearman & Caldwell, Nashville, TN. Rodney M. Scott, Murfreesboro, TN.

For TENNESSEE BANKERS ASSOCIATION, Plaintiff - Appellant INTERVENOR: Randall S. Mashburn, (See above). Scott D. Carey, BRIEFED, Baker, Donelson, Bearman & Caldwell, Nashville, TN. Rodney M. Scott, (See above).

For NATIONAL CREDIT UNION ADMINISTRATION BOARD, Defendant - Appellee: Jacob M. Lewis, ARGUED, BRIEFED, Department of Justice, Appellate Staff, Civil Division, Washington, DC. Douglas N. Letter, Department of Justice, Appellate Staff, Civil Division, Washington, DC. Anne L. Weismann, Department of Justice, Washington, DC.

For TENNESSEE CREDIT UNION LEAGUE, CREDIT UNION NATIONAL ASSOCIATION, INC., Defendants - Appellees INTERVENORS: William M. Leech, Jr., Michael R. Paslay, Waller, Lansden, Dortch & Davis, Nashville, TN. Teresa Burke, BRIEFED, Paul J. Lambert, Bingham, Dana & Gould, Washington, DC.

For AEDC FEDERAL CREDIT UNION, Defendant - Appellee INTERVENOR: Teresa Burke, (See above). Paul J. Lambert, (See above).

JUDGES: Before: JONES, RYAN, and MOORE, Circuit Judges. RYAN, J., delivered the opinion of the court, in which MOORE, J., joined. JONES, J. (pp. 13-20), delivered a separate dissenting opinion.

OPINIONBY: RYAN

OPINION:

RYAN, Circuit Judge. The plaintiff, First City Bank, filed this action under the Federal Credit Union Act (FCUA), 12 U.S.C. @@ 1751-1795k, the

Administrative Procedure Act, 5 U.S.C. @ 706, and the Declaratory Judgment Act, 28 U.S.C. @@ 2201-02, challenging the National Credit Union Administration's (NCUA) interpretation of the FCUA. The Tennessee Bankers Association subsequently intervened as a plaintiff, and the AEDC Federal Credit Union, the Tennessee Credit Union League, and the Credit Union National Association intervened as defendants. The district court granted summary judgment for the defendants and intervenor-defendants, and the plaintiffs appeal arguing that the district court erred in concluding that the NCUA reasonably interpreted the FCUA to allow multiple occupational groups, each of which independently shares a "common bond," to join a single credit union. As [*2] we shall explain, we agree that the district court erred, and will reverse.

I.

A.

First City is a Tennessee banking corporation, and a member of the Tennessee Bankers Association, the principal state trade association for commercial banks in Tennessee. Defendant NCUA is an executive branch government agency responsible for regulating federally insured credit unions. See generally 12 C.F.R. Ch. VII. It was established in 1970 to "prescribe rules and regulations for the organization and operation of federal credit unions." NATIONAL CREDIT UNION ADMINISTRATION, OFFICE OF EXAMINATION AND INSURANCE, FEDERAL CREDIT UNION HANDBOOK 2 (1988). Defendant AEDC Federal Credit Union is a federally chartered credit union. Defendants Tennessee Credit Union League and Credit Union National Association are trade associations for credit unions in Tennessee and nationally, respectively.

Congress passed the FCUA, creating federal credit unions, in response to the failed banks, high interest rates, and diminished credit opportunities that were a hallmark of the Great Depression. See T I Federal Credit Union v. DelBonis, 72 F.3d 921, 931-32 (1st Cir. 1995). The purpose of [*3] the FCUA was to "establish a Federal Credit Unions System, to establish a further market for securities of the United States and to make more available to people of small means credit for provident purposes through a national system of cooperative credit, thereby helping to stabilize the credit structure of the United States." 12 U.S.C. @ 1751, reprinted in CREDIT UNION NATIONAL ASSOCIATION, INC., LEGISLATIVE HISTORY OF THE FEDERAL CREDIT UNION ACT: A STUDY OF THE HISTORICAL DEVELOPMENT FROM 1934 TO 1980 OF THE STATUTE GOVERNING FEDERAL CREDIT UNIONS, quoted in DelBonis, 72 F.3d at 931. Thus, "in effect, the Federal Credit Union Act created a localized and liberalized system of federal credit services," and FCUs

enable the federal government to make credit available to millions of working class Americans. These organizations, often described as "cooperative associations organized . . . for the purpose of promoting thrift among [their] members and creating a source of credit for provident or productive purposes," provide credit at reasonable rates to millions of individuals who--because they lack security or, as recent studies show, reside in low income areas or in [*4] communities primarily inhabited by racial minorities--would otherwise be unable to acquire it.

DelBonis, 72 F.3d at 931-32 (citation omitted). As DelBonis suggests, then, the purpose of the FCUA was "to encourage the proliferation of credit unions, which were expected to provide service to the would-be customers that banks

disdained." First Nat'l Bank & Trust Co. v. National Credit Union Admin., 300 U.S. App. D.C. 314, 988 F.2d 1272, 1275 (D.C. Cir. 1993) (FNBT I).

Under the FCUA, a federal credit union, or FCU, is owned and controlled by its members. 12 U.S.C. @ 1757(6). An FCU can only make loans to and accept deposits from its own members and other credit unions. Id. @ 1757(5).

Section 109 of the FCUA provides in pertinent part that

Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.

Id. @ 1759 (emphasis added). The issue presented in this case involves only the "common bond" requirement for occupational credit unions, and does not involve associational or community credit unions.

One court has observed [*5] that

Congress assumed implicitly that a common bond amongst members would ensure both that those making lending decisions would know more about applicants and that borrowers would be more reluctant to default. . . . The common bond was seen as the cement that united credit union members in a cooperative venture, and was, therefore, thought important to credit unions' continued success.

FNBT I, 988 F.2d at 1276. Another court has described the purpose of the common bond provision somewhat differently, emphasizing the need of members to elect directors who will represent their interests:

The purpose of the common bond provision is evident from the nature of the institutions created by the Act. A credit union has been aptly described as "a democratically controlled, cooperative, nonprofit society organized for the purpose of encouraging thrift and self-reliance among its members. . . . [It] is fundamentally distinguishable from other financial institutions in that the customers may exercise effective control." The union's purposes are threatened by directors that are unmindful of members' funds or unresponsive to their collective interests. Thus [*6] Congress ensured that federal credit unions would retain their character as self-managed cooperatives by establishing democratic principles of decision and control. The common bond provision reinforces this aim by advancing the formation of credit unions among groups that may realistically operate with unity of purpose. It encourages the election of directors who possess a common interest or occupation with the membership they serve.

Branch Bank & Trust Co. v. National Credit Union Admin. Bd., 786 F.2d 621, 626 (4th Cir. 1986) (citation omitted).

"From 1934 until 1982 the NCUA interpreted the common bond requirement to mean that the members of each occupational FCU . . . must be drawn from a single occupational group, defined to mean the employees of a single employer." First Nat'l Bank & Trust Co. v. National Credit Union Admin., 319 U.S. App. D.C. 302, 90 F.3d 525, 526 (D.C. Cir. 1996) (FNBT II) (citing 58 Fed. Reg. 40473 (July 28, 1993)), petition for cert. filed, 65 U.S.L.W. 3416 (U.S. Nov. 26, 1996) (No. 96-843) and petition for cert. filed, 65 U.S.L.W. 3416 (U.S. Nov. 27, 1996) (No. 96-847). However, the NCUA had been tinkering with the common-bond requirement

since 1967, [*7] gradually and consistently broadening the definition of the term. Finally, in 1982, the NCUA departed from its prior interpretation of the "common bond" language, and adopted a policy statement allowing multiple, or select, groups, each of which independently shared a common bond, to join together to form a credit union, so long as all the occupational groups "are located within a well defined area." Interpretative [sic] Ruling and Policy Statement (IRPS) 82-1, 47 Fed. Reg. 16775 (Apr. 20, 1982). The NCUA stated that its purpose for the change was to "clarify NCUA's policy on membership in Federal credit unions, . . . and to ensure the continued availability of credit union service." Id. Other available information suggests that

the 1982 change of interpretation was intended to enable each FCU to realize economies of scale and to facilitate occupational diversification within the ranks of its membership. . . . The new policy also made it possible for the employees of a company with fewer than 500 employees, the minimum for forming a new FCU, to join an existing FCU.

FNBT II, 90 F.3d at 526-27 (citing Letter from E.F. Callahan, Chairman of the NCUA, [*8] to Congressman Fernand J. St. Germain, Chairman of the House Committee on Banking, Finance and Urban Affairs 8-9 (Oct. 28, 1983); IRPS 89-1, 54 Fed. Reg. 31165, 31171 (July 27, 1989)). The NCUA has continued to reiterate this position on the common-bond requirement, doing so most recently in 1994. See IRPS 89-1, 54 Fed. Reg. 31165 (July 27, 1989).

B.

First City originally filed suit against the NCUA in April 1994, seeking an order that the NCUA cease and desist from its current interpretation of the common-bond requirement. A credit union and two credit union trade associations--the AEDC Federal Credit Union, the Tennessee Credit Union League, and the Credit Union National Association, respectively--moved to intervene as defendants, and the Tennessee Bankers Association moved to intervene as a plaintiff. Both motions were granted. The plaintiffs then amended their complaint to include a request for invalidation of charter amendments expanding the membership base of AEDC, which amendments had been approved by the NCUA.

The parties filed cross-motions for summary judgment, and the district court ruled in favor of the defendants. First City Bank v. National Credit [*9] Union Admin., 897 F. Supp. 1042 (M.D. Tenn. 1995). The court reasoned that "the sole issue is the purely legal question of whether NCUA's select group policy is a valid interpretation of the FCUA's common bond provision," and concluded that its analysis was governed by the Chevron doctrine. 897 F. Supp. at 1043 (citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984)). The court concluded that both parties' "readings of the common bond provision are plausible. When an agency's interpretation is one of two plausible alternatives, the statute is ambiguous. Thus, the Court cannot discern Congress' precise intent of the common bond provision from the statutory language alone." 897 F. Supp. at 1044 (citation omitted). It also concluded that the legislative history was meager, and "expressed no intent on whether multiple groups with common bonds could join a single credit union." 897 F. Supp. at 1045. It nonetheless concluded that "NCUA's change to its select group policy was entirely consistent with the[] congressional goals of promoting the continued growth and stability of credit unions," and that the policy was justified because without it, many [*10] credit unions would not have survived. 897 F. Supp. at 1046.

The plaintiffs filed this timely appeal.

II.

Our review of the district court's grant of summary judgment, which was premised on a question of statutory construction, is de novo. See Douglas v. Babcock, 990 F.2d 875, 877 (6th Cir. 1993). The same rules of review apply where, as here, the parties have filed cross-motions for summary judgment. See Taft Broadcasting Co. v. United States, 929 F.2d 240, 248 (6th Cir. 1991).

III.

Our analysis hinges on an application of the administrative-law doctrine announced by the Supreme Court in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). In Chevron, the Court explained as follows:

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines [*11] Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

467 U.S. at 842-43 (emphasis added) (footnotes omitted). Step one of a Chevron analysis, then, is an inquiry whether the statute dictates a particular answer, while in step two, a court may proceed to considering the permissibility of the agency construction.

The plaintiffs contend that the issue may be resolved at Chevron step one because the FCUA statutory language is clear and unambiguous. The NCUA, on the other hand, argues that its reading of the FCUA must be upheld because it reasonably resolves an issue as to which the intent of Congress has not been clearly expressed, either by the plain language of the statute or in the legislative history; that is, it believes that a Chevron step two analysis is required, and that its interpretation is owed deference by [*12] this court. Like the NCUA, the credit-union-intervenors believe that a Chevron step two analysis is necessitated because there is no basis for concluding that Congress had any intention with respect to the issue in this case. While contending that the literal language of the statute supports the NCUA's interpretation, they also argue that even if the plaintiffs' interpretation is plausible, that simply demonstrates that the statute is ambiguous, and the agency's interpretation is owed deference.

To reiterate, the statutory language in question is the following:

Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district.

12 U.S.C. @ 1759 (emphasis added). The leading case, indeed the only court of appeals case, addressing the issue presented to this court, was decided only recently by the D.C. Circuit. See FNBT II, 90 F.3d 525. The D.C. Circuit concluded, under a Chevron step one analysis, that the statutory language and purpose were plain, and that the NCUA's interpretation of the statute stood in direct contradiction [*13] We agree.

The parties offer various syntactical arguments in support of their positions. The plaintiffs argue that the statutory language is plain, since it requires every credit union to have "a common bond," which they read to mean a single common bond. The NCUA counters first by arguing that because the statute includes the word "groups," its multiple group policy constitutes a reasonable read; second by observing that the statute says "Federal credit union membership," as opposed to "membership in Federal credit unions," suggesting that the reference to plural "groups" was meant to be within a single credit union, not multiple credit unions; and third by pointing out that the statute does not say that the groups must "share" a common bond, a word that it contends denotes mutuality, but only that the groups must "have" a common bond, suggesting that each group can separately have a common bond.

The FNBT II court considered and rejected similar, if not identical, arguments:

[The plaintiff] contends, first, that the article "a" in the phrase "groups having a common bond" means that all members of an FCU must be united by a single occupation. [*14] The NCUA counters that the plural noun "groups" in the same phrase indicates that there may be multiple groups in an FCU, so that the statute makes sense only if it is understood to contemplate multiple bonds, each uniting a single group even if the same bond does not unite all groups, i.e., the membership as a whole.

90 F.3d at 527-28. Like the FNBT II court, we find all the parties' syntactical arguments to be unconvincing. Id. at 528. "The article 'a' could as easily mean one bond for each group as one bond for all groups in an FCU, and the plural noun 'groups' could refer not to multiple groups in a single FCU but to each of the groups that forms a credit union under the FCUA." Id.

The plaintiffs offer another basis for their position, however, and we find it far more persuasive. They argue that because the occupational clause ("limited to groups having a common bond of occupation") is followed directly by the community clause ("groups within a well-defined neighborhood, community, or rural district"), and because the two share the same syntactical structure, the two ought to be interpreted consistently. Therefore, since the NCUA only permits community-based [*15] credit unions to be based on membership in a single group from a single neighborhood, as opposed to multiple neighborhoods, the agency should apply the same interpretation to the occupation-based credit unions. The NCUA addresses this argument by asserting that the word "within" makes the difference; the statute states that a credit union must be composed of "groups within a well-defined neighborhood," and it is the word "within" that necessitates the NCUA's policy that membership may not consist of groups from widely dispersed locales. The credit-union-intervenors, on the other hand, address the plaintiffs' "community" argument in an interesting way that the NCUA has not espoused: they contend that just because the NCUA has always interpreted the phrase to require membership from a single community does not mean that it could not employ a different interpretation, allowing multiple community

common bond provision is ambiguous and that the district court properly determined that the National Credit Union Administration's ("NCUA") interpretation of the common bond provision is reasonable. Because I believe that this case must be examined under both prongs of the doctrine articulated in Chevron U.S.A. v. Natural Res. Def. Council, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), I must respectfully dissent from the majority's opinion reversing the judgment of the district court. Instead, I would affirm the judgment of the district court.

The Chevron decision requires that courts undertake a two-step process in reviewing an agency's interpretation [*19] of a statute that it is entrusted to administer. The first step is to determine "whether Congress has directly spoken to the precise question at issue." Chevron, 467 U.S. at 842. If Congress has clearly addressed the issue, courts must "give effect to the unambiguously expressed intent of Congress." 467 U.S. at 842-843. If the court determines that Congress has not "directly addressed the precise question at issue," the court must then reach the second prong of the Chevron test and determine the reasonableness of the agency's interpretation of the statute. Id. This court has adopted the Chevron standard. See e.g., Nationwide Mut. Ins. Co. v. Cisneros, 52 F.3d 1351, 1356 (6th Cir. 1995), cert. denied, 133 L. Ed. 2d 893, 116 S. Ct. 973 (1996); Garcia v. Secretary of Health and Human Services, 46 F.3d 552, 555 (6th Cir. 1995).

In the case at bar, the statutory provision at issue is ambiguous. The statute provides: "federal credit union membership shall be limited to groups having a common bond of occupation or association." 12 U.S.C. @ 1759 (emphasis added). In determining whether Congress has addressed the common bond requirement, this court should look to the plain meaning [*20] of the statute and the legislative history. See Chevron, 467 U.S. at 859-63. Neither of these sources expresses the clear intent of Congress concerning the common bond provision.

Unlike the majority in this case and the D.C. Circuit in First Nat'l Bank & Trust Co. v. National Credit Union Administration, 319 U.S. App. D.C. 302, 90 F.3d 525 (D.C. Cir. 1996), cert. granted, 65 U.S.L.W. 3580 (U.S. Feb. 24, 1997) (Nos. 96-843, 96-847), I do not believe that the words of the statute clearly and unambiguously define the common bond requirement. The majority rejects the syntactical arguments raised by both parties and bases its decision on the relationship between the occupational clause and the community clause. Maj. Op. at 10. The majority concludes that because the two clauses have a similar syntactical structure, the "two ought to be interpreted consistently." Id. This is not clear from the words of the statute.

Although the majority contends that this is a Chevron step 1 case, the majority, nevertheless, utilizes a Chevron step 2 analysis. The majority's argument that the terms of the occupational and community-based clauses should be interpreted consistently goes to the [*21] reasonableness of the NCUA's interpretation of the statute rather than to a consideration of whether the words of the statute are clear on their face. In fact, the majority notes that "the only reasonable way to read these two phrases, one following on the heels of the other, is as the FNBT II court does." Maj. Op. at 12. This is a Chevron step 2 analysis determining whether the NCUA's interpretation of the statute is reasonable. This syntactical argument does not support the position that the words of the common bond provision are clear on their face.

The common bond provision can be read one of two ways. Either the provision requires that each group in a credit union have a bond with the other groups in the credit union, or the provision requires that each group joining a credit union have a common bond among the members of the group, but not necessarily a common bond with the other groups in the credit union. The statute does not clearly establish the unambiguous congressional intent concerning the common bond requirement and determine which reading of the statute is appropriate. I agree with the district court's conclusion that "when an agency's interpretation [*22] is one of two plausible alternatives, the statute is ambiguous." First City Bank v. National Credit Union Admin., 897 F. Supp. 1042, 1044 (M.D. Tenn. 1995).

The language of the statute simply indicates that credit unions are to be formed based on common bonds of occupation or community. The words of the statute do not go so far as to define the limits of the common bond requirement. I believe that the majority's conclusion that the terms of the common bond provision and the community provision must be interpreted in exactly the same way is reading more into the statute than the actual words suggest. The statute does not define the contours of the common bond requirement and offers no clear answer to the question at bar. As a result, we must conclude that Congress has not "directly spoken to the precise question at issue."

In addition, the legislative history of the common bond requirement does not clarify the ambiguity in the words of the statute. I agree with the majority that the legislative history of the common bond requirement is murky at best and does not demonstrate a clear intention concerning the common bond provision.

This court has previously recognized that the [*23] NCUA is given the authority to regulate credit union membership. Community First Bank v. National Credit Union Administration, 41 F.3d 1050, 1055 (6th Cir. 1994). In Community First Bank, this court examined the regulations promulgated by the NCUA concerning community-based credit unions and concluded that the NCUA's regulations constituted a permissible interpretation of the word "community." Id. While this court did not explicitly conduct a Chevron inquiry, it appears that the court concluded that the words of the statute were ambiguous because it engaged in a determination of whether the NCUA's interpretation of the word "community" was reasonable, the second prong of Chevron. Id. ("The NCUA's regulations defining 'community' (a clearly defined geographical area whose residents identify it as a distinct area) constitute a permissible definition of community."). I believe that a similar inquiry is necessary in this case, as we must decide whether the NCUA's interpretation of the common bond provision is reasonable.

Neither the words nor the legislative history of the common bond provision clearly evidence the intent of Congress. Therefore, it is necessary [*24] to determine whether the NCUA's interpretation of the common bond provision is reasonable. The interpretation of the common bond provision is embodied in an interpretive ruling rather than a regulation promulgated by the NCUA. An interpretive ruling is not entitled to the same amount of deference as given to a regulation. Threlkeld v. Commissioner, 848 F.2d 81, 84 (6th Cir. 1988). However, this does not mean that interpretive rulings are not entitled to any deference at all. In CenTra, Inc. v. United States, this court noted that an IRS revenue ruling is "entitled to some deference unless 'it conflicts with the statute it supposedly interprets or with that statute's legislative history or if it is otherwise unreasonable.'" 953 F.2d 1051, 1056 (6th Cir. 1992)

(quoting Threlkeld, 848 F.2d at 84). The standard of "some deference" enunciated in CenTra is applicable to the NCUA interpretive ruling at issue in this case. While the NCUA's interpretive ruling is not entitled to presumptive deference, because it is an interpretive ruling rather than a regulation, it is, nevertheless, entitled to "some deference."

It is a clearly established legal principle that courts accord [*25] deference to an agency's interpretation of a statute that it is entrusted to administer. See Chevron, 467 U.S. at 842-45 (giving deference to the Environmental Protection Agency's interpretation of the Clear Air Act Amendments); Smiley v. Citibank (South Dakota), N.A., 135 L. Ed. 2d 25, 116 S. Ct. 1730, 1733 (1996) (giving deference to the regulations of the Comptroller of the Currency); Lansing Dairy, Inc. v. Espy, 39 F.3d 1339, 1355 (6th Cir. 1994) (giving deference to the Secretary of Agriculture's amendments to the Agricultural Marketing Agreement Act of 1937), cert. denied, 116 S. Ct. 50 (1995). This deference is required even if the court would have reached a different conclusion than the administrative agency. "The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." Chevron, 467 U.S. at 843 n.11 (citations omitted). Thus, this court cannot strike down the NCUA's interpretation of the common bond provision because it would have interpreted the clause differently; instead, we [*26] must give deference to the NCUA's interpretation as long as it is reasonable.

To determine the reasonableness of the NCUA's common bond policy, we must examine the policy within the context of the Federal Credit Union Act as a whole. Chevron, 467 U.S. at 864-65. The purpose of the Federal Credit Union Act as set forth in 1934 at the time of its enactment was to:

establish a Federal Credit Union System, to establish a further market for securities of the United States and to make more available to people of small means credit for provident purposes through a national system of cooperative credit, thereby helping to stabilize the credit structure of the United States.

Federal Credit Union Act, Pub. L. 73-467, 48 Stat. 1216 (1934) (codified with some differences in language at 12 U.S.C. @@ 1751-1795). It is helpful to trace the socio-economic background of the credit union movement when looking to the reasonableness of the NCUA's interpretation of the common bond provision.

Credit unions experienced steady growth from the enactment of the Federal Credit Union Act in 1934 until the 1970's. At the end of the 1970's credit unions were hit with the impact [*27] of rising interest rates, which affected the entire financial services industry. A. Burger & T. Dacin, Field of Membership: An Evolving Concept, Center for Credit Union Research, University of Wisconsin-Madison School of Business, at 25 (2d ed. 1992). The rise in interest rates increased the competition for customers between banks and credit unions.

In 1979, the rate of growth was slowed at all financial institutions but credit unions were especially hard hit. 135 L. Ed. 2d 25 at 27. In the period of 1978-79, credit unions had changed from being the fastest growing financial institution in 1978 to the second slowest growing financial institution in 1979. Id. As a result of these economic considerations, many credit unions limited their consumer lending. Id. In 1981, an economic recession developed, which continued into 1982. Id. at 29.

The 1982 adjustment to the common bond policy was a response to the volatile economic conditions of the late 1970's and early 1980's. The revision of the common bond interpretation allowed groups to join existing credit unions if they did not have the number of members to make an individual credit union economically feasible. The revision [*28] protected against two potential problems. First, it allowed credit unions to shield themselves from the economic consequences of wide-spread layoffs or plant closings of a particular employer. Second, it allowed credit unions to create economies of scale to provide services to its members in the most cost effective manner available. Without the more expansive interpretation of the common bond provision many credit unions would have failed, and many other groups would not have been able to attain credit union services. These effects would have been clearly inconsistent with the Congressional intent to make credit available to those with limited means.

The NCUA is entrusted with the administration of federal credit unions. 12 U.S.C. @ 1766(a). It is authorized to charter, examine, and prescribe rules and regulations for the administration of the Federal Credit Union Act. Id. In Interpretive Ruling and Policy Statement 82-1, the NCUA permitted occupational credit unions to accept members of different occupational groups as long as the following guidelines are met:

1) The occupational groups to be included (new charter) or added (amendment, merger, conversion) [*29] have specifically requested credit union service. 2) The applicant demonstrates that credit union service can be provided and that each group wishes to be served by the applicant. 3) All the occupational groups to be included (new charter) or added (amendment, merger, conversion) are located within a well defined area. 4) The applicant has adequately supported the proposal as economically feasible and advisable.

47 Fed. Reg. 16775 (1982). In addition, the NCUA Interpretive Ruling and Policy Statement 89-1 states:

[a] select group of persons seeking credit union service from an occupational, associational or multiple group Federal credit union must have its own common bond. The select groups themselves may be either employee (occupational) groups or associational groups. However, a select group for expansion purposes cannot be defined by a common bond of community. The group's common bond need not be similar to the common bond(s) of the existing Federal credit union.

54 Fed. Reg. 31165, 31176 (1989). Each of these rulings was intended to clarify the interpretation of Sections 107(14) and 109 of the Federal Credit Union Act. 47 Fed. Reg. 16775, 16775 (1982); [*30] 54 Fed. Reg. 31165, 31165 (1989).

The common bond approach adopted by the NCUA is a reasonable policy choice in light of the economic circumstances discussed above. Therefore, it is entitled to deference by this court.

Finally, it is immaterial that the NCUA interpreted the common bond provision in the manner that the majority suggests from 1934 until 1982. The Supreme Court has noted:

of course the mere fact that an agency interpretation contradicts a prior agency position is not fatal. Sudden and unexplained change . . . may be "arbitrary, capricious [or] an abuse of discretion. . . ." But if these pitfalls are avoided, change is not invalidating, since the whole point of Chevron is to

leave the discretion provided by the ambiguities of a statute with the implementing agency.

Smiley v. Citibank (South Dakota), N.A., 135 L. Ed. 2d 25, 116 S. Ct. 1730, 1734 (1996) (citations omitted). Similarly in Rust v. Sullivan, 500 U.S. 173, 186-87, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991), the Supreme Court rejected the idea that agency principles must last forever. The Court observed that agencies "must be given ample latitude to 'adapt [its] rules and policies to the demands of changing circumstances.'" [*31] Id. (citation omitted). Agency policies are not etched in stone. An agency is permitted to change its policies to address continually changing circumstances. The NCUA's decision was not arbitrary or capricious nor was it an abuse of discretion. As a result, the change is not "invalidating."

We should AFFIRMAFFIRM the judgement of the district court determining that the NCUA's interpretation is reasonable under the two-step approach enunciated in Chevron.

Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1997 FED App. 0025P (6th Cir.)

File Name: 97a0025p.06

No. 96-3489

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

LARRY LYONS,

Petitioner-Appellant,

v.

OHIO ADULT PAROLE

AUTHORITY, et al.,

Respondents-Appellees.

>

ON APPEAL from the United States District Court for the Southern District of **Ohio**

Decided and Filed January 22, 1997

Before: JONES, RYAN, and MOORE, Circuit Judges.

MOORE, J., delivered the opinion of the court, in which JONES, J., joined. RYAN, J. (pp. 29-32), delivered a separate concurring opinion.

KAREN NELSON MOORE, Circuit Judge. Petitioner-Appellant Larry Lyons appeals the denial of his habeas corpus petition. This appeal requires that we, for the first time, interpret several provisions of the recent statutory

amendments to the federal habeas corpus framework. As explained below, we hold that district courts

have the power to issue certific s of appealability under the Antiterrori and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified, inter alia, at 28 U.S.C. § 2244 et. seq.) [hereinafter "AEDPA" or "the Act"]. Because the district court's certificate of probable cause failed to comply with the requirements for certificates of appealability under the Act, we remand the case to the district court to issue a new certificate of appealability.

I. FACTS AND PROCEDURAL HISTORY

In 1984 Lyons was convicted in **Ohio** state court of aggravated robbery and sentenced to ten- to-twenty-five years imprisonment. Ten years later, in May 1994, Lyons was paroled. His freedom was short- lived: in June he was arrested for attempted petty theft. He quickly posted bond but, when he failed to appear in court to answer the charge, the state declared him a **parole**- violator- at- large. On August 3, Lyons was again arrested, and charged with theft and obstructing official business. This time, he was not released on bond; he has been incarcerated ever since. Instead, he was notified that he was in danger of having his **parole** revoked because of the theft charges and for failing to return to his halfway house.

Lyons pleaded guilty to all three offenses–theft, petty theft, and obstruction–and did not challenge them on direct appeal. He received thirty days in jail for one offense and suspended sentences for the other two. Meanwhile, the **Ohio Adult Parole** Authority was moving to revoke Lyons's **parole**. In August Lyons had signed a form waiving his right to an "on- site" revocation hearing; the form stated that this hearing would occur within sixty days or, if Lyons was "unavailable," within a reasonable time. Lyons became "available" to the **Parole** Authority when he was

sentenced for the misdemeanors[1] on October 6, an event which had little immediate effect in his life: he remained in the county jail until November 4, when he was transferred to the state prison in Orient, **Ohio**.

Soon after arriving at the prison in Orient, Lyons began challenging the revocation of his **parole**. On November 8 he filed an administrative motion asking that the revocation be set aside. The next month, he filed an action in mandamus, or in the alternative for a writ of habeas corpus, in the **Ohio** Supreme Court, alleging that the state's failure to grant him a final **parole** revocation hearing within sixty days of his arrest violated a "protected liberty interest." Dist. Ct. Order at 3. Lyons attempted to amend his original pleading, but failed to get the requisite permission to do so. The **Ohio** Supreme Court dismissed the action without opinion on January 18, 1995.

On January 5, 1995, Lyons was finally given a formal **parole** hearing. The **parole** board revoked his probation based purely on the three misdemeanor convictions but dismissed the **parole** violations based on uncharged conduct. His case was continued until 1999. Lyons then asked a state appeals court for permission to take a delayed appeal of his misdemeanor convictions, asking to withdraw his guilty pleas. This request and a subsequent motion for reconsideration were denied. Dist. Ct. Order at 4.

In May 1995, Lyons filed this petition for habeas corpus. The initial and supplemental petitions raised six claims for

relief.[2]Dist. Ct. Order at 5; Petition for Writ of Habeas Corpus at 5 and Supp. Pleadings. The district court found three of these to be procedurally barred, because Lyons had failed to raise them in his state habeas petition. *Id.* at 7. The court found the other three claims meritless and denied the writ on March 25, 1996. *Id.* at 12. On April 21, 1996, Lyons delivered his notice of appeal and request for a certificate of probable cause[3] to a prison official to file with the court. The district court issued a certificate of probable cause for the appeal on May 1, nearly a week after President Clinton signed the Antiterrorism and Effective Death Penalty Act of 1996 on April 24.[4]appeal has been filed. *See Wilson v. O'Leary*,

895 F.2d 378, 382 (7th Cir. 19[illegible] ("In cases decided initially by the distr[illegible]udge, FED. R. APP. P. 22(b) requires an appellant to seek a [certificate of probable cause] from the district judge, commonly done after filing the notice of appeal; district judges' actions on CPCs cannot be thought blocked by the notice of appeal."); *Latella v. Jackson*, 817 F.2d 12, 13 (2d Cir. 1987) ("[T]he more appropriate procedure for [appealing the denial of a habeas petition] is for an applicant to take an appeal by filing a timely notice of appeal, seek a certificate of probable cause, and then proceed with the appeal."); *Fabian v. Reed*, 707 F.2d 147, 148-49 (5th Cir. 1983) (noting that certificate may be sought from district court after notice of appeal filed).

II. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction over this habeas petition by a state prisoner under 28 U.S.C. § 2254(a). Lyons is currently imprisoned because his **parole** was revoked. The essence of his claim is that the misdemeanor convictions which led to this revocation are constitutionally invalid and that his revocation hearing violated his Due Process rights. To the extent these legal claims have merit, Lyons is "in custody in violation of the Constitution . . . of the United States." 28 U.S.C. § 2254(a). *See Ex Parte Hull*, 312 U.S. 546, 550 (1941) (where petitioner's "**parole** was revoked and he was ordered to serve out his first sentence only because of the second conviction," he could challenge that second conviction in federal habeas petition); *Peyton v. Rowe*, 391 U.S. 54, 67 (1968) ("[T]his Court has held that a prisoner whose first-sentence **parole** was revoked upon a second conviction could challenge the second conviction in a habeas corpus proceeding though he would not be released if he prevailed.") (citing *Hull*); *Brewer v. Dahlberg*, 942 F.2d 328, 334 (6th Cir. 1991). The district court determined that Lyons had exhausted his state-law remedies, and the state does not question this determination. *See* 28 U.S.C. § 2254(b) (exhaustion requirement).

This court has jurisdiction over the district court's final order under 28 U.S.C. §§ 1291, 2253. All of the novel issues presented by the Act are purely legal, and are thus

reviewed de novo. *United States v. Spinelle*, 41 F.3d 1056, 1057 (6th Cir. 1994).

III. ANALYSIS

The timing of Lyons's appeal makes this case more complicated than it would otherwise be. In order to prevent frivolous appeals, Congress has long required that state prisoners whose habeas corpus petitions are denied in federal district court obtain a certificate of probable cause before appealing that denial. *See Barefoot v. Estelle*, 463 U.S. 880, 892-93 (1983). When Lyons applied for a certificate of probable cause, it was well settled that a district court could grant such a certificate and that if it did issue one a prisoner could then appeal every claim raised in his petition to this court. *See Houston v. Mintzes*, 722 F.2d 290, 293 (6th Cir. 1983) ("the grant of the certificate of probable cause by the district court, in spite of its purported limiting provision [in this case], brings before us the final judgment for review in all respects"). After the passage of the AEDPA, however, neither of these propositions is necessarily true: the Act requires that certificates of appealability "indicate which specific issue or issues" are found to be appealable, 28 U.S.C. § 2253(c)(3), and there is a question whether the Act divests district courts of the authority to issue any such certificates. *Compare* 28 U.S.C. § 2253(c)(1) (no appeal allowed "[u]nless a circuit justice or judge issues a certificate of appealability") *with* FED. R. APP. P. 22(b) (appeal "may not proceed unless a district or a circuit judge issues a certificate of appealability"). Before we can address the petition's merits, then, we must decide whether to apply these provisions of the AEDPA to this case.

The Supreme Court has provided the framework for this retroactivity analysis:

When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules.

When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, *i.e.*, whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, . . . it does not govern absent clear congressional intent favoring such a result.

Landgraf v. USI Film Prods., 511 U.S. 244, 280 (1994). Thus, we must first look to the statute's text for an expression that the AEDPA should, or should not, apply to pending cases. Absent an expression by Congress of the statute's proper reach, we must determine what change, if any, the new legislation makes to the controlling law. We must then decide whether applying the new law to the pending case would have an impermissible retroactive effect by impairing a party's rights when he acted or imposing new liabilities or duties with respect to past conduct. *See id.* at 270 ("The conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.").

A. Effective Date and Retroactivity

As a preliminary matter, we hold that the Act took effect on April 24, 1996. "It is well established that, absent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment." *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991). There is nothing in AEDPA which can be construed as a "clear direction" that this should not be the case. *See Qasguargis v. INS*, 91 F.3d 788, 789 (6th Cir. 1996) (order) ("No specific effective date was provided for [the relevant AEDPA provision,] § 440(a), and it accordingly took effect upon the date of enactment."); *Reyes v. Keane*, 90 F.3d 676, 679 (2d Cir. 1996) (applying AEDPA certificate of appealability provision to pending non-capital state-habeas case); *Hatch v. Oklahoma*, 92 F.3d 1012, 1014 n.2 (10th Cir. 1996) (assuming, in absence of explicit "effective date," that AEDPA was effective when enacted).

The next question–whether Congress expressed any clear intent that the relevant parts of the new law be applied to pending cases–is only slightly more difficult. Section 107(c) of the Act states that § 107(a) applies to pending capital cases; Lyons asks us to infer from this that the Act does not apply to pending non-capital cases. We reject this line of reasoning for several reasons. First, this type of negative inference argument presupposes a well-crafted piece of legislation, which the AEDPA is not. *See United States v. Bass*, 404 U.S. 336, 343-44 (1971) (rejecting argument based on structure of other legislation where amendment in question was "hastily passed" and thus could not be expected to "dovetail neatly" with other provisions of law); Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 Buff. L. Rev. 381, 381 (1996) (hereinafter "*New Habeas Corpus*") ("The new law is not well drafted.").[5] Second, it is likely that "the specification of applicability to pending cases in section 107 reflects only Congress's explicit concern as to death penalty cases, and carries no negative implication as to other habeas cases." *Reyes*, 90 F.3d at 679.[6] Finally, Lyons's argument here is similar to, but weaker than, the one which the Supreme Court rejected in *Landgraf*. *See Landgraf*, 511 U.S. at 259 (rejecting argument that "because Congress provided specifically for prospectivity in two places . . . . we should infer that it intended the opposite for the remainder of the statute"). No other provision in the AEDPA intimates whether the Act should apply to pending cases. Thus, there is no clear

statement from Congress regar g the Act's proper reach.

B. Effect of the New Law on Authority to Issue Certificates of Appealability

Before we can decide whether applying the new habeas appellate procedure to Lyons's petition would have retroactive effect, we need to determine what this new law is. The major question here is whether, under the AEDPA, district courts have the authority to issue certificates of appealability. As usual, we begin our analysis with the text of the statute.

The Act's two provisions governing the issuance of certificates of appealability are in direct conflict with each other. Section 102 of the Act provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." AEDPA § 102, codified at 28 U.S.C. § 2253(c)(1). However, Federal Rule of Appellate Procedure 22(b), as amended by section 103 of the Act, expressly allows district judges to issue certificates of appealability, and sets out the procedure for issuance in

considerable detail.[7] The text of the Act thus presents us with a rare but difficult form of ambiguity: two parts of the same statute seem to require quite different procedures for appeal. Our task, then, is to decide which of these procedures is the one intended by Congress.

1. Prior Rule Making and Case Law

The only two circuits which have as yet resolved this inconsistency have done so by rule making rather than adjudication.[8] The First and Seventh Circuits have both promulgated circuit rules allowing district courts to issue certificates of appealability and in fact requiring that petitioners apply initially to the district court, rather than to the court of appeals, for such certificates. 1st CIR. R.

22.1(b) (Interim Rule) ("In this circuit, ordinarily neither the court nor a judge thereof will initially receive or act on a request for a certificate of appealability if the district judge who refused the writ is available unless an application has first been made to the district court judge."); 7th CIR. R. 22.1(b) ("Every request for a certificate of appealability must be made initially to a judge of the district court."). In the Seventh Circuit, the district court's issuance of a certificate of appealability allows the appeal to go forward. The First Circuit, however, has adopted a mandatory two-step process and requires that "[o]nce the district court *grants or denies* a certificate of appealability, the petitioner should promptly apply to the court of appeals for issuance of a certificate of appealability." 1st CIR. R. 22.1(c) (Interim Rule) (emphasis added). It is only this second certificate of appealability, issued by the circuit court, which allows an appeal. *Id.* ("The effect of a denial is to terminate the appeal."). The two circuits' new local Rules thus give conflicting answers to the question before us.

Both courts emphasize that their respective local Rules 22.1 do not necessarily embody the procedure which Congress intended in the AEDPA. *See* 1st CIR. R. 22.1 Interim Processing Guideline I(B) ("In adopting this two-step process as an interim measure, we do not now finally determine how any ambiguity in the amendments will be interpreted, but rather leave the matter for comment during the rule making process, 28 U.S.C. § 2071, or development in the course of litigation."); 7th CIR. R. 22.1 1996 Note ("Because some potential for doubt remains, however, the new Circuit Rule 22.1(c) calls on every district judge to take a position on the merits, even if the judge believes that the new § 2253(c)(1) deprives the district court of the ability to issue a certificate."). The local Rules are instead meant to allow habeas appeals to proceed in an orderly manner until the question can be settled more firmly. Since we have decided to try to provide a resolution to this quandary through adjudication, we take note of our

sister circuits' provisional solut s and continue our analysis.

The district courts that have examined this issue squarely have arrived at conflicting decisions. For example, in *Houchin v. Zavaras*, 924 F. Supp. 115, 117 (D. Colo. 1996), the court held that it did have the authority to issue a certificate of appealability, on the grounds that Rule 22 specifically addressed district courts and authorized them to issue certificates of appealability, whereas § 2253 "applies by its wording only to circuit justices and judges," and does not prohibit district judges from issuing certificates. This reading of § 2253, however, does not address the question of whether a certificate of appealability issued by the district court gives us jurisdiction over the appeal. *See* 28 U.S.C. § 2253(c)(1) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals.").[9]

Another district court came to the opposite conclusion. In *Parker v. Norris*, 929 F. Supp. 1190 (E.D. Ark. 1996), the court, after noting that the Act's legislative history "shines absolutely no light on this patently apparent conflict," and agreeing with the *Houchin* court that "'it is unlikely contemplation played any role at all' in the drafting of these particular amendments," held that, because Rule 22 specifically refers to § 2253, the procedures of that statute control. *Id.* at 1192. The *Parker* court concluded that Congress simply failed fully to amend Rule 22 to conform to the amendments to § 2253(c). *Id.* at 1193.

We do not find this reasoning persuasive.[10] Rule 22(a) does state that "[t]he applicant may, pursuant to section 2253 of title 28, United States Code, appeal to the appropriate court of appeals from the order of the district court denying the writ," and Rule 22(b) states that an appeal requires that "a district or a circuit judge issue[] a certificate of appealability pursuant to section 2253(c)." However, the remainder of Rule 22(b) clearly contemplates that district courts will issue certificates of appealability, requiring that "the district judge who rendered the judgment shall either issue a certificate of appealability or state the reasons why such a certificate should not issue." FED. R. APP. P. 22(b). The Rule also provides that if a "district judge has denied the certificate, the applicant for the writ may then request issuance of the certificate by a circuit judge." *Id.* Thus, although this incorporation argument offers a plausible-sounding rationale for favoring the statute over the Rule, it really does no more than restate the issue as a conflict within Rule 22, and not just between the rule and the statute or between two parts of the statute. The basic question remains: does the retention in Rule 22(b) of a detailed framework including district court issuance of certificates of appealability indicate Congress's true intent, or does the "circuit justice or judge" language of § 2253(c)(1) indicate that Congress intended to preclude district judges from exercising this power?

2. Textual Analysis

We next look to our traditional tools of statutory construction to solve this puzzle. *See NLRB v. United Food and Commercial Workers Union*, 484 U.S. 112, 123 (1987) ("On a pure question of statutory construction, our first job is to try to determine congressional intent, using 'traditional tools of statutory construction.' If we can do so, then that interpretation must be given effect. . . ."); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 202

(1819) ("Where words conflict with each other, where the different clauses of an instrument bear upon each other, and would be inconsistent unless the natural and common import of words be varied, construction becomes necessary. . . .). The most relevant of these tools are also the most basic: if possible, we must read the statute as a coherent whole and give effect to every word of the AEDPA. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979); NORMAN J. SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46.06 (5th ed. 1992) [hereinafter SUTHERLAND STAT. CONSTR.]. If that is not possible, "the construction that produces the greatest

harmony and the least inconsis cy is that which ought to prevail." *Id.* § .05 at p. 104 (citation omitted).

These considerations lead us to believe that district courts retain the authority to issue certificates of appealability under the AEDPA. Section 2253(c)(1) can, albeit with considerable effort, be read to invest district judges with the authority to issue the certificates: if "circuit" in "circuit justice or judge" is read as the antecedent only of "justice" and not of "judge" then the phrase means "circuit justice or any judge." This is, indeed, a tortured interpretation, but a possible one. Rule 22, in contrast, can only be read as authorizing both district and circuit judges to issue certificates. The Rule refers to the "district judge who rendered the judgment," and provides a procedure for obtaining a certificate from a circuit judge "*[i]f* the district judge has denied the certificate." Rule 22(b) (emphasis added). If § 2253(c)(1) controls, then all of this explicit language in the present Rule 22(b) is superfluous and misleading, and must be ignored. If the Rule controls, then we need only modify the punctuation of § 2253(c)(1), or perhaps add an article.[11]with Rule 22(b). *See* 7th Cir. R. 22.1 1996 Note (provision in Rule 22(b) allowing district courts to issue certificates of appealability "implies that 'circuit justice or judge' in § 2253(c)(1) should be read as '(circuit justice) or judge' rather than 'circuit (justice or judge)'"). We do not, of course, purport to rewrite the statute; rather this shows that Congress could more easily have overlooked minor errors in § 2253(c) than have ignored the entire text of Rule 22(b). *Cf.* 2A SUTHERLAND STAT. CONSTR. § 47.15 ("Although it has been frequently asserted that 'Punctuation is a most fallible standard by which to interpret a writing,' it is more satisfactory to treat the rules of punctuation equally with other rules of interpretation.") (citation omitted); *id.* § 47.38 ("In construing a statute, it is always safer not to add to or subtract from the language of a statute unless imperatively required to make it a rational statute."). *See Lake Cumberland Trust,*

Inc., v. U.S. EPA, 954 F.2d 1218, 1222 (6th Cir. 1992) ("[W]e must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous.") (quoting *Boise Cascade Corp. v. U.S. EPA*, 942 F.2d 1427, 1432 (9th Cir. 1991)); 2A SUTHERLAND STAT. CONSTR. § 46.06 ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous . . . and so that one section will not destroy another unless the provision is the result of obvious mistake or error"); *id.* § 46.07 ("[W]ords or clauses may be enlarged or restricted to harmonize with other provisions of an act.").

We also find some slight support for this position in the oft-quoted canon that specific provisions take precedence over more general ones. *See id.* § 46.05 at 105. Although § 2253(c)(1) and Rule 22(b) are equally specific in that they both explicitly govern the issuance of certificates of appealability, the Rule provides more specific procedures than does § 2253(c)(1). To the extent that this canon rests on the notion that greater detail and specificity indicate greater legislative attention to a particular provision, it would suggest favoring Rule 22(b) over § 2253(c)(1).

In the end, we find that these canons of statutory construction point toward giving effect to the lengthy and detailed provisions of Rule 22(b), rather than to the easily overlooked language of § 2253(c)(1).

3. Legislative History

Because this textual solution is not unassailable, we next examine the Act's background and legislative history. Certificates of probable cause have been a prerequisite to appellate review of denials of habeas petitions since 1908. *Barefoot v. Estelle*, 463 U.S. 880, 892 n.3 (1983). Before this year, both district and circuit judges could, and did, issue the certificates. *See* 28 U.S.C. § 2253 (1995); *Barefoot*, 463 U.S. at 893. Since at least as far back as 1982, however, there have been efforts in Congress to strip district

courts of this authority and req[illegible] petitioners to apply to the courts of a[illegible]als for the certificates. *See* proposed Habeas Corpus Reform Act of 1982, S. 2216, 97th Cong., 128 CONG. REC. S4336-38, §§ 3, 4 (1982) (proposing amendment of § 2253 and Rule 22(b) to allow only appellate judges to issue certificates of probable cause). Throughout the 1980s and the first years of this decade numerous proposals would have amended habeas corpus procedure; most of these would have divested the district courts of the authority to issue the certificates. *Compare, e.g.*, proposed Habeas Corpus Reform Act of 1989, S. 811, 101st Cong., 135 CONG. REC. S811-01, §§ 3, 4 (1989) (proposing to amend § 2253 and Rule 22(b) to remove district courts from process) *with* proposed Omnibus Crime Control Act of 1991, H.R. 7892, 102d Cong., 137 CONG. REC. H7892-02, § 1107 (proposing to amend § 2253 so that only non-capital appeals require certificates of probable cause, issuable by either a district or a circuit judge); proposed amendment No. 2043 to S. 55, 102d Cong., 138 CONG. REC. S8002-02, § 207 (1992) (same). It is impossible to say whether these bills died in Congress because of, despite, or regardless of the changes they did or did not make to this aspect of habeas procedure. This history therefore does little to help decide the issue. *See* 2A SUTHERLAND STAT. CONSTR. § 48.01 at p.

302 ("[I]t should be remembered the statements made by persons in favor of a rejected or failed bill are meaningless and cannot be used as an extrinsic aid.").

The 1996 Act's legislative history is similarly unhelpful; to the extent it relates to the question of who may issue the certificates it serves to muddy rather than clarify. The record in Congress reveals that the conflict between § 2253(c) and Rule 22(b) is not the product of a last-minute compromise, but existed for more than a year before the bill's passage: the proposed amendments to § 2253 and Rule 22 have been in conflict since the spring of 1995. *See* S. 623, 104th Cong., §§ 3, 4 (1995) (amending § 2253 and Rule 22 inconsistently). *But see* Yackle, *New Habeas Corpus*, 44 Buff. L. Rev. at 390 n.33 (failure to amend Rule 22 to conform with § 2253 is "almost certainly an oversight"). That the House version of the bill did not contain this inconsistency only adds to the confusion. *See* H.R. 729, 104th Cong., §§ 102, 103 (1995) (which would have amended both § 2253 and Rule 22 to allow only appellate judges to issue certificates).

At oral argument, the state emphasized that the Act's amendment to § 2253 specifically deleted that section's reference to district courts' authority to issue certificates of appealability. The amendment to § 2253 deleted the language "the justice or judge who rendered the order or," and retained the language "a circuit justice or judge." *Compare* § 2253 (1995) *with* § 2253(c)(1) (1996). This, the state claimed, demonstrates a clear intent to remove district judges from the process. This argument would be persuasive if we were attempting to determine only the meaning of § 2253, but nobody claims that § 2253 is itself unclear. Rather, the statute as a whole is ambiguous because of the conflict between § 2253(c) and Rule 22(b); additional evidence that § 2253 means what it clearly says is superfluous.

The other relevant part of the Act's legislative history is even more puzzling. On April 4, 1996–almost two weeks

before the final votes on the bill in the House and Senate[12]–the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States sent a letter to Representative John Conyers, the ranking minority member of the House Judiciary Committee, pointing out the conflict between Rule 22(b) and § 2253(c). The letter noted that "the courts will have a nearly impossible task" of resolving the conflict, and suggested two alternate amendments which would resolve the conflict one way or the other, respectively. The committee apparently ignored the letter; in any case, no change was made, and there is no record of any response. In the end, then, none of the Act's legislative history gives any indication as to how Congress would decide this issue.

4. Statutory Purpose and Policy

We next look to see whether the statute's purpose can help us decide the text's meaning. Congress enacted the AEDPA to streamline habeas corpus process, particularly in capital cases, without violating prisoners' due process rights. *See supra* note 6. Congress would thus appear to favor a reading of the statute which would expedite the appeals process.

On the one hand, allowing district judges to issue certificates of appealability may have inefficient aspects. If a district judge refuses to issue a certificate, the petitioner may seek a certificate from a circuit judge, adding another time-consuming step to the process. *See* FED. R. APP. P. 22(b); Ira P. Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 **Ohio** St. L. J. 307, 330 n.153 (divesting district courts of power to issue certificates of

probable cause would "alleviate the problem argued by some that review by the district judge and then the circuit judge has developed into two time-consuming quasi-appeals" before the merits are considered on appeal).

On the other hand, however, it seems clear that a district judge who has just denied a habeas petition will be able to evaluate that petitioner's request for a certificate of appealability more quickly than would a circuit judge fresh to the case. The district judge will have an intimate knowledge of both the record and the relevant law and could simply determine whether to issue the certificate of appealability when she denies the initial petition. *See Taylor v. Mitchell*, 939 F. Supp. 249, 258 (S.D.N.Y. 1996) (denying writ and certificate of probable cause in single order); *Nichols v. Kelly*, 923 F. Supp. 420, 427 (W.D.N.Y. 1996) (denying writ and certificate of probable cause in single order); *Huffman v. Moore*, 333 F. Supp. 1315, 1317 (E.D. Tenn. 1971) (including certificate of probable cause as part of opinion denying writ). *But see* note 4, *supra* (citing cases in which district judges ruled on the motion for a certificate of probable cause after the notice of appeal had been filed). Circuit judges, in contrast, would have to to obtain and then spend time familiarizing themselves with the often-chaotic records and pro-se briefs before they could evaluate requests for certificates. *See* Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 **Ohio** St. L. J. at 330 (1983) (arguing that "the certificate was designed to free the appellate courts from reviewing frivolous habeas petitions, but the [proposed change] places them at the center of the decision regarding frivolousness and requires them to delve into the merits of the claims"). If the certificate were issued by a circuit judge, there is no guarantee that the same circuit judge would even sit on the panel assigned to hear the merits of the case. In this respect, then, allowing district judges to issue certificates of appealability would better serve the Act's purposes.

It is not clear to us whether restricting issuance of certificates of appealability to circuit judges or permitting

district judges to issue certificates would necessarily lead to speedier resolution of habeas appeals. Courts are not well-suited to answering such empirical questions. However, we believe that efficiency considerations point toward permitting district judges to issue certificates of appealability, consistent with the detailed framework of Rule 22(b). *See* Robbins, *The Habeas Corpus Certificate of Probable Cause*, 44 **Ohio** St. L. J. at 332-333 (arguing that in order "both to fulfill further the congressional intent [to eliminate habeas petitions 'that are frivolous and cause unnecessary delay'] and to conform to the purpose of habeas corpus relief . . . . [d]istrict judges should retain the power to issue certificates.").

Lyons suggests that the principle of lenity, that ambiguous criminal statutes should be construed narrowly, is relevant to this discussion. *See generally United States v. R.L.C.*, 503 U.S. 291, 305-13 (1992) (discussing rule of lenity). We do not believe this principle applies per se, because neither Rule 22(b) nor § 2253 is a criminal statute. *Cf. id.* at 305 ("rule has been applied not only to resolve issues

about the substantive scope of minal statutes, but to answer questions out the severity of sentencing"). We do, however, share the underlying "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Id.* (quoting *United States v. Bass*, 404 U.S. 336, 348 (1971), and HENRY J. FRIENDLY, BENCHMARKS 209 (1967)). Because Congress may have intended that prisoners still have the choice of asking the district court to issue a certificate of appealability, a court should hesitate take that right away from them. This lends some support to our conclusion that the AEDPA allows district courts to issue certificates of appealability.

Because neither the legislative history nor any overwhelming policy considerations support a contrary reading, we hold that district judges may issue certificates of appealability under the AEDPA. We emphasize that this is what we believe Congress intended, and that we, too, welcome the clarification of this statutory conflict sought

initially by the Judicial Conference prior to the Act's passage.

5. General Showing Required for Certificates of Appealability under the AEDPA

Before we can decide whether the new certificate of appealability provisions apply to Lyons's appeal we must also determine whether these new certificates of appealability require a different general showing than did the former certificates of probable cause. When Lyons filed his application for a certificate of probable cause he assumed that he had to make a "substantial showing of the denial of [a] federal right" before a certificate would issue. *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983) (alteration in original). To require that his pre-Act request meet a higher burden under the new Act would raise obvious retroactivity concerns under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). It seems clear, however, that, *at least so far as this case is concerned*, the AEDPA merely codifies the *Barefoot* standard. The new law states that certificates may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because there is no indication that Congress intended to change the standard, its use of the language from *Barefoot* indicates an endorsement of that case's approach. *See* 2A SUTHERLAND STAT. CONSTR. § 45.15 ("[T]he legislature's use of statutory language similar to that used in a prior judicial decision should constitute legislative approval of that decision."). The AEDPA thus makes no change to the general showing required to obtain a certificate, and, aside from the new specificity requirement discussed below, essentially makes only a change in nomenclature from a "certificate of probable cause" to a "certificate of appealability."[13]2255 (allowing collateral attack by state and federal prisoners, respectively, imprisoned "in violation of the Constitution or laws" of the United States) (unchanged by AEDPA). *But see Lennox v. Evans,* 87 F.3d 431, 434 (10th Cir. 1996) (AEDPA did not change law because the "decision on a motion for a certificate for probable cause must cohere to the principle that a federal habeas court does not review a state conviction for legal error in a broad sense, but only for federal constitutional error"), *cert. denied*, ___ S. Ct. ___, 1996 WL 665079 (1997). *Accord Herrera v. United*

States, 96 F.3d 1010, 1012 (7th Cir. 1996); *Reyes v. Keane*, 90 F.3d 676, 680 (2d Cir. 1996); *Lennox*, 87 F.3d at 434-35. *But see Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996) (referring in dicta, without any discussion, to "the Act's more demanding standard" for the issuance of a certificate of appealability).

6. Retroactivity under *Landgraf* of Specificity Requirement for Certificates of Appealability

The AEDPA, then, affects neither the authority of district courts to issue certificates of appealability nor the general showing necessary to obtain such a certificate. The new Act does, however, require that certificates of appealability, unlike the former certificates of probable cause, specify which issues are

appealable, 28 U.S.C. § 2253(c), i.e., which claims present a "substan showing of the denial of a constitutional right." § 2253(c)(2). The final question we must address is whether applying this new specificity provision to Lyons's appeal would have retroactive effect under *Landgraf* and would thus be improper.

In most, but not all, cases, new laws which affect only procedure or jurisdiction will not have an impermissible retroactive effect. *Landgraf*, 511 U.S. at 274-75. *See Qasguargis v. INS*, 91 F.3d 788, 789 (6th Cir. 1996) (order). For the reasons set forth below, we hold that the new requirement that a certificate of appealability indicate which specific issues make the "substantial showing" of

§ 2253(c)(2) falls well within the general rule and is not impermissibly retroactive.

As an initial matter, it is plain that retrospective application of this provision does not violate the Ex Post Facto Clause. The requirement that the certificate of appealability include a specification of appealable issues "does not punish as a crime an act previously committed, which was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed." *Collins v. Youngblood*, 497 U.S. 37, 52 (1990).

Retroactivity analysis is not a science. *See Landgraf*, 511 U.S. at 270 ("Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity."). Although courts often state that the appropriate test is whether application of a new law "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed," *id.* at 280, there is more to *Landgraf* than just this. "[A] statute 'is not made retroactive merely because it draws upon antecedent facts for its operation.'" *Id.* at 270 n.24 (quoting *Cox v. Hart*, 260 U.S. 427, 435 (1922)). In deciding whether such a statute has retroactive effect we must also consider, at a minimum, "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 270.

We first address whether applying the Act would "impair rights a party possessed when he acted." Before this year, a prisoner who could convince a judge that one of the claims in his rejected habeas petition was substantial was thereby entitled to appellate review of all the claims in that petition. If the Act applies, however, a court of appeals will address only the issues which are specified in the

certificate of appealability. The Act could, then, be seen as impairing Lyons's right to have all his claims reviewed on appeal. However, "[n]o one has a vested right in any given mode of procedure." *Crane v. Hahlo*, 258 U.S. 142, 147 (1922). *See Landgraf*, 511 U.S. at 275 (noting "the diminished reliance interests in matters of procedure"). If the district court were to certify only certain issues for appeal, Lyons could seek a broader certificate of appealability from a circuit judge.[14] Lyons thus retains the right to request appellate consideration of his entire petition, and the change to the law does not impair his rights.[15]

Similarly, applying the new law does not increase Lyons's liability for past conduct, because the law does not increase the punishment which attaches to Lyons's offenses. *Collins v. Youngblood*, 497 U.S. 37, 52 (1990). Nor does the AEDPA impose new duties with respect to his past conduct. The documents accompanying Lyons's application for a certificate of probable cause included a clear statement of which issues he intended to appeal and argued that "the[se] issues are debatable among jurists of reason [and] a court could resolve [them] in a different manner." The application was proper both before and after the AEDPA went into effect. It could, of course, be argued that Lyons might have better developed each

issue or certain issues had he tl ght that the AEDPA would be applied. owever, as noted above, *Landgraf* requires that we take into account the extent of the change in the law, which is, in this case, minor.

Our conclusion that the specificity requirement of the Act should be applied to this case also finds support in our prior decisions. In *Forest v. United States Postal Service*, 97 F.3d 137 (6th Cir. 1996), Judge Jones held in an opinion for the court that the 1991 Civil Rights Act's extension of a statute of limitations should apply to a case where the defendant's discriminatory conduct predated the new law, in part because "the 1991 Act applies to [plaintiff's] conduct, the filing of the complaint, which occurred after the enactment of the statute." *Id.* at 140. Similarly, in the case now before us the new Act applies more to the district court's conduct than to Lyons's: § 2253(c)(3) requires only that the court issue a more detailed certificate than was required before. Just as new jurisdictional laws will regularly be applied to pending cases because "jurisdictional statutes 'speak to the power of the court rather than to the rights or obligations of the parties,'" *Landgraf*, 511 U.S. at 274, (quoting *Republic Nat. Bank of Miami v. United States*, 506 U.S. 80, 100 (1992) (Thomas, J., concurring)), so does § 2253(c)(3) address the court's responsibility. The district court thus should have followed the law in effect at the time it issued Lyons's certificate of probable cause.

We hold, then, that the provision of § 2253(c)(1) requiring that certificates of appealability specify which issues are appealable should apply to the case before us. We are aware that this ruling puts us squarely in conflict with the Seventh Circuit's holding in *Martin v. United States*, 96 F.3d 853, 855 (7th Cir. 1996). In *Martin*, Chief Judge Posner held under quite similar circumstances that the new "certificate of appealability is not required for an appeal perfected before the effective date of the new statute." We agree with *Martin* that, under Federal Rule of Appellate Procedure 4(c), an inmate's appeal is "deemed filed when the prisoner hands the notice of appeal to the

prison officials for filing."[16] *Martin*, 96 F.3d at 855. We do not, however, agree that requiring district judges to apply this portion of the AEDPA to petitions filed before April 24 "would attach a new legal consequence to a completed act." *Id.* The *Martin* decision does not explain the reasoning behind this conclusion, but instead directs us to *Landgraf*, 511 U.S. at 275 n.29, and to Judge Posner's opinion in *Reyes-Hernandez v. INS*, 89 F.3d 490, 492 (7th Cir. 1996). The citation to *Landgraf* refers, we assume, to the Court's statement that "[a] new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime . . . ." *Landgraf*, 511 U.S. at 275 n.29. The rule at issue in *Martin* and the case at bar does not, of course, concern the filing of anything; it directs the district court to issue certificates of appealability which are more specific than the old certificates of probable cause. Moreover, although Lyons (and Martin) had perfected their appeals by filing a notice of appeal and request for a certificate before the AEDPA's enactment, the district court had not yet issued certificates by the enactment date. Thus *Landgraf*'s footnote 29 regarding the retroactivity of applying a filing rule to an already-filed complaint does not apply here or in *Martin*; rather it would be applicable if the district court had issued a certificate of probable cause before the enactment date. The *Landgraf* footnote does not, then, really explain *Martin*'s conclusion that a court should not follow the current law when it issues a certificate of

appealability. Nor is *Reyes-Hernandez* an apposite precedent.[17]

We note, too, that the approach taken in *Martin* seems incompatible with the Seventh Circuit's later en banc opinion in *Lindh v. Murphy*, 96 F.3d 856 (7th Cir. 1996) (en banc), *cert. granted*, ___ S. Ct. ___, 1997 WL 8539 (1997). The *Landgraf* analysis in *Lindh* seems to take as its touchstone a party's reliance on the old statute in conducting his affairs. *See id.* at 867 ("Lindh's litigating decisions were not affected by the difference between the versions of § 2254. . . . The new law therefore governs our consideration of

Lindh's contentions."). *See als l.* at 863 ("We take it that under *Land* a certificate of probable cause to appeal *issued* before April 24, 1996, authorizes an appeal, although after April 24 appeal depends on a 'certificate of appealability' under § 102 of the 1996 Act . . . .") (emphasis added). *Lindh* was decided eight days after *Martin* but does not mention the earlier case.

Our conclusion that the specificity requirement for certificates of appealability should apply to this case accords with the view of the Second Circuit. In *Reyes v. Keane*, 90 F.3d 676 (2d Cir. 1996), the petitioner had applied for a certificate of probable cause in 1995, long before the AEDPA took effect. *Reyes*, 90 F.3d at 679. Nonetheless, the Second Circuit could "see no reason why the new [certificate of appealability] provision, with its

procedural requirement of specifying issues warranting an appeal, should not apply" to the case, and viewed the change as "well within the category of procedural changes that pose no issue of retroactivity under *Landgraf*." *Id.* at 680. For the reasons discussed above, we agree with the *Reyes* court's conclusion as to this issue.

IV. CONCLUSION

We hold that under the AEDPA, district courts have the authority to issue certificates of appealability and that these certificates must state which issues are certified for appeal. Because the certificate issued by the district court does not comply with this requirement, we believe it would be improper for us to examine the merits of Lyons's petition.[18] Accordingly, we remand the case to allow the district court to issue a proper certificate of appealability consistent with this opinion. If the district court believes that more information from the parties would be helpful, it can of course request it from them.

Accordingly we REMAND this case to allow the district court to issue a certificate that complies with the Act.

RYAN, Circuit Judge, concurring. With something less than absolute certainty, I concur in my colleagues' conclusion that the district court in this case has the authority to issue a certificate of appealability permitting the petitioner to appeal the denial of his request for a writ of *habeas corpus*. I do not reach that conclusion, however, for all of the reasons enunciated in my sister's opinion; as a matter of fact, I disagree very strongly with some of them. The challenge, of course, is to determine the intent of Congress and the President in enacting and approving, respectively, the amendments to 28 U.S.C. § 2253 and Fed. R. App. P. 22(b).

I.

A.

Under ordinary circumstances the plain language of a statute should control the statute's interpretation. In this case, however, the relevant provisions of the Antiterrorism and Effective Death Penalty Act do not yield a plain interpretation. Whereas section 102 of the Act, amending 28 U.S.C. § 2253, provides that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal [of denial of a writ of *habeas corpus*] may not be taken to the court of appeals," section 103 of the Act, amending Rule 22(b), provides that such an appeal may not be taken "unless a district or a circuit judge issues a certificate of appealability."

I recognize that it is possible to read sections 102 and 103 of the Act in harmony by supposing that, in section 2253(c)(1), Congress intended the word "circuit" to modify only "justice" and not "judge." To my

mind, however, this contortion . oo extreme to be considered meaningfi ıd I am unwilling to rely upon it merely to avoid the fairly unremarkable conclusion that the Act points in two directions at once. My resistance to this approach is fortified by the fact that, prior to the Act, section 2253 provided that "[a]n appeal may not be taken to the court of appeals . . . unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of

probable cause." Unless this passage was unnaturally redundant, the pre-Act phrase "circuit justice or judge" did not include the judges of the district courts.

I also reject the argument that Rule 22(b) does not conflict with section 2253 because it provides that the certificate of appealability should be issued "pursuant to section 2253(c)." To suppose that this clause renders a district court's issuance of a certificate unauthorized or, at the least, ineffectual, is to make nonsense of the great bulk of Rule 22(b)'s plain language.

To my mind, then, it is clear that, as amended, section 2253 excludes the district courts from the certification process while, at the same time, Rule 22(b) expressly includes them. In such circumstances, our usual course is to consider the statute's legislative history. Unfortunately, the legislative history pertaining to these amendments is not enlightening. Both parties before this court, and the courts that have previously considered the problem, have concluded that the legislative history does not speak specifically to the role of the district courts in the issuance of certificates of appealability. I have found no legislative history to upset this conclusion.

Unable to locate a precise statement of intent, both Lyons and the state have endeavored to find support for their positions in the undisputed but general congressional intent to make the *habeas* process more efficient. Indeed, both parties have suggested colorable reasons why efficiency concerns might favor their respective positions. However, whether district courts, appellate courts, or both courts acting in concert would be more or less efficient in the consideration of certificates of appealability is a legislative question. It is not within a court's competence to suppose Congress's intent by speculating as to the balance of these efficiencies.

Recognizing that the weighing of efficiencies is a peculiarly legislative function does not, of course, resolve the statutory conundrum before us. Rather, it leads me to the conclusion that the intended application of Rule 22(b)

and section 2253 must be gleaned solely from an analysis of the present and past language of these provisions. To this end, it seems most likely that Congress either: (1) intended to delete the district court's authority in section 2253(c) but neglected to amend Rule 22(b) accordingly; or (2) intended to retain the district court's authority in Rule 22(b) but inadvertently deleted it in section 2253(c). The possibility that Congress intended to require both the district court and the circuit court to issue a certificate of appealability is one I reject because it offends the apparent meaning of *both* section 2253 and Rule 22(b).

I conclude that district courts are authorized to issue certificates of appealability and that, where the district court does issue such a certificate, "a circuit justice or judge" is not also required to do so. It seems to me more likely that Congress accidentally excluded the district courts from section 2253 than it does that Congress intended this exclusion but failed to notice or remedy the substantial contradictory language of Rule 22(b). Had Congress made no changes whatsoever to Rule 22(b), the contrary result might be more reasonably inferred. In light of section 103 of the Act, however, there can be no doubt that Congress was cognizant of Rule 22(b).

Ultimately, the interpretation c .e Act which includes the district court .volvement appears to me to be a less flagrant affront to the statutory language of section 2253(c) than a contrary conclusion would be to the language of Rule 22(b). This is, there can be no doubt, a sorry foundation for the construction of a statute. We do not, however, have the luxury of nondecision and, as I have argued, the alternative bases for interpreting the Act are either less sound or, worse yet, altogether improper.

I do not reach my conclusion in this case easily. In fact, my instincts argue against my conclusion. Congress has considered transferring the certification process from the district court to the circuit court many times in the last fourteen years. It is plausible that the new amendments were intended to effect this change and, in my judgment,

it could well be more efficient to do so. But, as I have said, it would be inappropriate to impute to the enactors of the legislation my notions of judicial economy. Moreover, the many attempts over the years to remove the district courts from the certification process may, in the final analysis, just as easily portend another failure as they may a final success.

In my opinion, the amendments to section 2253 and Rule 22(b) are more reasonably read as retaining the district court's authority to certify *habeas* appeals to this court. Accordingly, I concur in my colleagues' judgment.

B.

I also agree that the law of *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), means that the amended certificate of appealability provisions of the Antiterrorism and Effective Death Penalty Act of 1966 discussed above apply to this case. I agree that the case must be remanded to allow the district court to issue a certificate that complies with 28 U.S.C. § 2253(c)(3).

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ELECTRONIC CITATION: 1997 FED App. 0075P (6th Cir.)

File Name: 97a0075p.06

No. 96-5053

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNION CATV, INC.,

Plaintiff-Appellant,

v.

CITY OF STURGIS, KENTUCKY,

Defendant-Appellee.

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ON APPEAL from the United States District Court for the Western District of Kentucky

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Decided and Filed February 24, 1997

Before: MERRITT, KENNEDY, and GUY, Circuit Judges.

KENNEDY, Circuit Judge. Plaintiff **Union CATV**, Inc. ("**Union**") sought judicial review, pursuant to the Cable Communications Policy Act of 1984 ("Cable Act"), 47 U.S.C. §§ 521-559 (1988 & Supp. V 1993), of the decision by the City of Sturgis to deny **Union**'s proposal for renewal of a cable television franchise. The District Court granted summary judgment for the City. For the following reasons, we AFFIRM.

I.

Sturgis (the "City") is a municipal corporation located in **Union** County, Kentucky. In 1979, the City granted **Union** a franchise to provide cable television service in the City for a term of fifteen years. The

franchise was set to expire on C ›ber 8, 1994.

On September 11, 1991, **Union** notified the City pursuant to 27 U.S.C. § 546(a)(1) of its intent to seek renewal of its cable franchise. After receiving the notice, the City commenced the process of identifying its cable-related needs and evaluating **Union**'s performance under its current franchise, as required by § 546(a)(1). The City conducted public hearings to obtain input from citizens concerning the franchise renewal. It mailed surveys to citizens in the City to obtain information concerning their needs and interests. On May 31, 1994, **Union** submitted a formal proposal for franchise renewal.

As of the time **Union**'s franchise was due to expire, the City had not indicated whether it would accept or reject **Union**'s proposal to renew the franchise.[1] On April 11, 1995, **Union** filed this action for declaratory judgment and injunctive relief. At a hearing on April 25, 1995, the parties agreed to continue the process for franchise renewal as set forth in the Cable Act, but in an accelerated form. The parties agreed that the City would complete its identification of the community needs and interests as required by § 546(a) and that **Union** would then have an opportunity to submit its proposal in response. **Union** waived its right to a full administrative proceeding under § 546(c)(1) and agreed to a "paper hearing" instead.

On May 26, 1995, the City adopted its Needs Assessment Report, which identified the future cable-related community needs and interests. **Union** subsequently submitted a revised proposal for franchise renewal. On July 10, 1995, the City adopted a resolution denying **Union**'s renewal proposal on the ground that the revised proposal failed to meet the identified cable-related community needs and interests. Two weeks later, **Union** filed an amended complaint with the District Court, alleging that the City's denial was not supported by a preponderance of the evidence as required by § 546(e)(2)(B). On December 29, 1995, the District Court granted the City's motion for summary judgment.

II.

Union claims on appeal that the District Court erred in refusing to conduct any review of the City's identification of its needs and interests. It is **Union**'s position that at least two of the cable needs identified by the City are not supported by the evidence in the record: the City's demand that every elementary school classroom be wired for cable service, and the City's demand that the length of the franchise term be limited to five years. The District Court held that its role under 47 U.S.C. § 546(e)(2)(B) was to review whether a preponderance of the evidence supported the City's determination that **Union**'s proposal was not reasonable to meet the City's cable-related needs and interests as those needs and interests were identified by the City. We review this question of statutory construction *de novo*. *See Douglas v. Babcock*, 990 F.2d 875, 877 (6th Cir. 1993).

One purpose of the Cable Act is to "establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal." 47 U.S.C. § 521(5). Section 546 of the Cable Act sets forth the procedural requirements when a cable operator and a franchising authority cannot agree to renewal of a franchise.[2] Between thirty and thirty-six months prior to the expiration of the franchise, the franchising authority may commence a proceeding to review the cable operator's past performance and to identify the future cable-related community needs and interests. 47 U.S.C. § 546(a). The public must be given appropriate notice of the proceeding and afforded an opportunity to participate. Upon the completion of this identification stage, the operator may submit a proposal for franchise renewal. 47 U.S.C. § 546(b). Within four months following the operator's submission of its renewal proposal, the franchising authority

must renew the franchise or iss a "preliminary assessment" that the fra se should not be reviewed. 47 U.S.C. § 546(c)(1). If the franchising authority decides not to renew the cable franchise, the operator may demand an administrative proceeding to consider whether the denial was justified. 47 U.S.C. § 546(c)(1). The public must be given notice of the administrative proceeding, and a transcript must be made of the proceeding. 47 U.S.C. § 546(c)(1)-(2). The cable operator may introduce evidence regarding both the franchising authority's needs and its proposal. At the completion of the administrative proceeding, the franchising authority must issue a written decision, based on the record of the administrative proceeding, granting or denying the renewal proposal. 47 U.S.C. § 546(c)(3). In the instant case, the record resulted from a "paper hearing." The City and **Union** agreed that **Union** would waive its right to a full administrative proceeding and submit its proposal, along with any disagreement with the City's identified cable-related needs and interests, on a paper record.

The Cable Act limits the grounds on which a franchising authority may deny a cable operator's proposal for franchise renewal. Under 47 U.S.C. § 546(c)(1), a franchising authority must consider whether

(A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;

(B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix or quality of cable services or other services provided over the system, has been reasonable in light of community needs;

(C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and

(D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

47 U.S.C. § 546(c)(1). A franchising authority may deny a renewal proposal only if it makes an adverse finding with respect to one or more of these four factors. 47 U.S.C. § 546(d). The administrative proceeding provided for in § 546(c) is intended to ensure that the denial of a renewal proposal is based on at least one of these factors. In the instant case, the City relied upon § 546(c)(1)(D) as the sole basis for denying **Union**'s proposal for renewal of its franchise: the City determined that **Union**'s proposal failed to meet the City's future cable-related needs and interests.

A cable operator whose proposal for renewal has been denied may, following the administrative proceeding provided for in § 546(c), appeal to a state or federal district

court.[3] 47 U.S.C. § 546(e). The court may grant appropriate relief if it finds that

the operator has demonstrated that the adverse finding of the franchising authority with respect to each of the factors described in subparagraphs (A) through (D) of subsection (c)(1) on which the denial is based is not supported by a preponderance of the evidence, based on the record of the proceeding conducted under subsection (c).

47 U.S.C. § 546(e)(2)(B). The parties disagree on the scope of the district court's review and the application of § 546(e)(2)(B) to § 546(c)(1)(D). **Union** contends that § 546(e)(2)(B) requires a district court reviewing the City's denial of its renewal proposal under § 546(c)(1)(D) to determine first whether **Union** has demonstrated that the City's identified needs and interests are not supported by a preponderance of the evidence, and second whether **Union**

has demonstrated that the City's finding that **Union**'s renewal proposal is not reasonable to meet the City's needs and interests is not supported by a preponderance of the evidence, excluding any needs that the court has found not to be supported by the evidence.[4] The City argues that the District Court was correct to accept the judgment of the City as to its cable-related needs and interests, whether supported by the record or not, and that judicial review is limited to determining whether the operator's proposal is reasonable to meet the City's needs and interests as they have been identified by the City. This is a case of first impression in the federal circuit courts.

In matters of statutory construction, we look first to the language of the statute. *See Baum v. Madigan*, 979 F.2d 438, 441 (6th Cir. 1992). As already indicated, the Cable Act permits a franchising authority to deny a cable operator's proposal for franchise renewal if it determines that the operator has not met one of four criteria set forth in § 546(c)(1). Appeal from the denial of a proposal under any of the first three subsections is the kind of matter routinely reviewed by district courts. It would not be particularly difficult, for example, for a court to determine whether a preponderance of the evidence supports a city's determination that a cable operator did not comply with the terms of the existing franchise, a ground for denial under § 546(c)(1)(A).

It is not as clear, however, how judicial review should proceed when denial is based on § 546(c)(1)(D) because this subsection refers to more than one procedural stage under § 546. First, a franchising authority identifies its future cable-related needs and interests. 17 U.S.C. § 546(a)(1). Second, it determines whether a cable

operator's proposal for franchise renewal is reasonable to meet those identified needs and interests, considering the costs thereof. 17 U.S.C. § 546(c)(1)(D). In determining whether the proposal is reasonable, the franchising authority must take into account the cost of meeting each need. In order to do so, it must weigh the importance of the need against the cost. Section 546(e)(2)(B) does not specify whether a district court is required to subject both of these stages -- the identification of cable needs, and the determination of a proposal's reasonableness -- to judicial review, or, as the District Court held, merely the latter stage.

Section 546(c)(1)(D) does not appear to require an operator's proposal for renewal to meet every need and interest identified by the franchising authority, without regard to cost. A proposal for renewal must be granted if it is "reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests." 47 U.S.C. § 546(c)(1)(D). This language indicates that some needs and interests identified by the franchising authority may be outweighed by the cost of implementing them. Stated differently, the statute does not require a cable operator to meet demands by the franchising authority that are unreasonable in view of their costs. The franchising authority is required to balance the community's need for a certain cable service against the cost of providing that service. Indeed, the House Report states: "[I]t is not intended that [§ 546(c)(1)(D)] requires the operator to respond to every person or group that expresses an interest in any particular capability or service. Rather, the operator's responsibility is to provide those facilities and services which can be *shown* to be in the interests of the community to receive in view of the costs thereof." H.R. REP. NO. 98-934, at 74, *reprinted in* 1984 U.S.C.C.A.N. at 4711 (emphasis added). Moreover, "in assessing the costs [under § 546(c)(1)(D)], the cable operator's ability to earn a fair rate of return on its investment and the impact of such costs on subscriber

rates are important considerations." H.R. REP. NO. 98-934, at 74, *reprinted in* 1984 U.S.C.C.A.N. at 4711.

In order to allow the franchising authority to balance the need for a cable service against its cost, the operator is permitted at the administrative proceeding to introduce evidence challenging the necessity of the needs and interests previously identified by the franchising authority. 47 U.S.C. § 546(c)(2). The operator is also permitted to introduce evidence of the cost of providing such needs and interests. *Id.* As indicated below, such evidence is necessary if the operator hopes to appeal successfully the denial of its renewal proposal to federal court.

A court reviewing the denial of a cable operator's proposal for renewal must decide whether the operator has shown that the franchising authority's decision is not supported by a preponderance of the evidence introduced at the administrative proceeding. 47 U.S.C. § 546(e)(2)(B). When that denial is based on § 546(c)(1)(D), as it is here, the court must determine whether there is sufficient evidence to support the franchising authority's finding that the operator's proposal for renewal was not "reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests." Thus, the court's task is not limited solely to deciding whether the operator's proposal, in fact, met all the cable-related needs and interests identified by the franchising authority. The court must determine whether, based on the administrative record, the cable operator has demonstrated that its proposal is "reasonable" despite its failure to meet certain identified community needs and interests. When a proposal does not satisfy an identified need, the court must decide whether the operator has established that the cost of meeting that need so outweighs the value of the need that the proposal is nonetheless reasonable.

In reviewing whether a proposal not satisfying an identified need is reasonable, a court must necessarily

evaluate the relative importance of the need to balance it against the cost of providing the need. It is not possible for a court to determine whether an identified need is unreasonably costly without considering the value of that need. This does not mean, however, that the district court is required to engage in a *de novo* review of the franchising authority's identification of its cable-related needs and interests. We do not believe that Congress intended the federal courts to exert such a degree of control over franchising authorities. The granting of a cable franchise is a legislative act traditionally entitled to considerable deference from the judiciary. *See Communications Sys., Inc. v. City of Danville*, 880 F.2d 887, 891-92 (6th Cir. 1989). Nothing in the Cable Act suggests that Congress intended to eliminate judicial deference to a municipality's legislative acts. While the Cable Act establishes federal standards governing the renewal of cable franchises, Congress made clear that the Act "preserve[s] the critical role of municipal governments in the franchise process." H.R. REP. NO. 98-934, at 19, *reprinted in* 1984 U.S.C.C.A.N. at 4656. The House Report states:

It is the Committee's intent that the franchise process take place at the local level where city officials have the best understanding of local communications needs and can require cable operators to tailor the cable system to meet those needs. However, if that process is to further the purposes of this legislation, the provisions of these franchises, and the authority of the municipal governments to enforce these provisions, must be based on certain important uniform Federal standards that are not continually altered by Federal, state or local regulation.

H.R. REP. NO. 98-934, at 24, *reprinted in* 1984 U.S.C.C.A.N. at 4661. The Cable Act recognizes that municipalities are best able to determine a community's cable-related needs and interests. The city council's knowledge of the community gives it an institutional advantage in identifying the community's cable needs and

interests. It would be inappropriate for a federal court to second-guess the city in its identification of such needs and interests.

We conclude, therefore, that judicial review of a municipality's identification of its cable-related needs and interests is very limited. A court should defer to the franchising authority's identification of the community's needs and interests except to the extent necessary to weigh the needs and interests against the cost of implementing them. However, the review is not limited to the rational basis review ordinarily applied to legislative decisions. The statute requires reversal of decisions by the franchising authority that could not have been based on a preponderance of the evidence. The House Report notes that the preponderance of the evidence standard to be applied on judicial review is the standard commonly used in civil proceedings and not the standard "used in the traditional court review of municipal decisions." H.R. REP. NO. 98-934, at 75, *reprinted in* 1984 U.S.C.C.A.N. at 4712. Judicial review is, thus, similar to the review of a jury verdict on a motion for a judgment as a matter of law under FED. R. CIV. P. 50. *See, e.g., Tarrant Serv. Agency, Inc. v. American Standard, Inc.*, 12 F.3d 609, 613 (6th Cir. 1993) (in considering motion under FED. R. CIV. P. 50, a court must not substitute its judgment for that of the jury, but instead must view evidence in light most favorable to nonmoving party, giving that party the benefit of all reasonable inferences, and must grant the motion if reasonable minds could not come to a conclusion other than one in favor of the movant). We believe that Congress intended that courts would give a franchising authority a degree of deference comparable to that owed a jury.

Such an interpretation of the scope of judicial review is consistent with the purpose of the statute. The introductory section of the Cable Act states that the purposes of the Act are to:

(2) establish franchise procedures and standards which encourage the growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community;

. . . .

(5) establish an orderly process for franchise renewal which protects cable operators against unfair denials of renewal where the operator's past performance and proposal for future performance meet the standards established by this subchapter;

47 U.S.C. § 521. Congress, thus, sought in the Cable Act to provide a balance between respecting the needs and interests of communities and protecting cable operators against unreasonable demands. The House Report confirms this dual purpose:

This legislation . . . contains procedures and standards designed to give some stability and certainty to the renewal process, while continuing to provide the franchising authority with the ability to assure that renewal proposals are reasonable to meet community needs and interests, relative to the costs thereof. These procedures and standards are also designed to assure that the renewal process does not impose unreasonable requirements on the operator.

H.R. REP. NO. 98-934, at 25-26, *reprinted in* 1984 U.S.C.C.A.N. at 4662-63. Our holding today preserves this dual purpose. The limited review we permit of the franchising authority's identified cable needs and interests protects the cable operators against unfair denials of renewal. If the reviewing court were required to accept a franchising authority's identified needs and interests, a franchising authority would be able to deny franchise renewal with impunity simply by asserting unreasonable needs that an operator could not possibly meet. Such a result would be contrary to the purposes of the statute. At the same time, however, by reviewing the identified cable needs only insofar as necessary to weigh the needs against their costs, and by giving considerable deference to the franchising authority's identified

cable needs and interests, we p. ..rve the "critical role" of the franchisin.. ..thority in the franchise process.

Turning to the instant case, we find that there is sufficient evidence to support the City's determination that **Union**'s proposal was not reasonable to meet the City's identified cable needs and interests, taking into account the cost of meeting such needs and interests. **Union**'s proposal calls for a franchise term of twenty years, in contrast to the City's identified need for a five-year franchise term. **Union**'s primary justification for the longer term is to amortize the capital costs it has already incurred in improving the cable system. Whether fair or not, this is not a factor that a court may consider under the statute. **Union** failed to introduce into the record any evidence of the cost -- either in diminished profits or in increased subscriber rates -- of limiting the term for franchise renewal to five years. Without such evidence, a court cannot conclude that the City's need for a five-year term is outweighed by the high cost of a five-year term. **Union** argues that the evidence does not support the City's need for a five-year term, but in the absence of evidence that the cost would be excessive, the issue is not reviewable. A court's task is to weigh the value of an identified need against its cost. Where, as here, the operator fails to present evidence of the cost of meeting a need, the operator cannot successfully argue on judicial review that that balance weighs against meeting the need.

In addition, **Union**'s proposal does not satisfy the City's declared need to wire the local elementary school for cable service. **Union** suggests that this demand is unreasonable. However, **Union** presented no evidence at the administrative proceeding regarding the cost of meeting this need. The only evidence presented was the cost of an entire school district, not the single elementary school the

City had identified. Again, without such evidence, a court cannot conclude that the cost of providing such a service outweighs its value.

III.

In conclusion, we disagree with the analysis of the District Court and hold that the Cable Act provides for limited judicial review of a franchising authority's identified cable-related community needs and interests. We agree, however, with the District Court's conclusion that a preponderance of the evidence supports the City's determination that **Union**'s proposal for franchise renewal is not reasonable to meet the City's cable needs and interests. Accordingly, we AFFIRM the order of summary judgment for the City.

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