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February 17, 1997

**HAND DELIVERED**

Mr. K. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re: AVR of Tennessee, L.P. d/b/a Hyperion Telecommunications of Tennessee
Docket No. 98-00001

Dear Mr. Waddell:

As directed by the TRA at its Conference on February 3, 1998 enclosed please find an original and thirteen (13) copies of the Brief of Tennessee Telephone Company, Concord Telephone Company, Tellico Telephone Company and Humprheys County Telephone Company in the above styled matter.

Copies of this letter and Brief are being hand delivered to counsel of record.

Thanking you, with kindest regards, I remain

Very truly yours,

T. G. Pappas

TGP/bfs:

cc: Val Sanford, Esq.
Dennis McNamee, Esq.
L. Vincent Williams, Esq.
John Feehan

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**
**NASHVILLE, TENNESSEE**

| | | |
|---|---|---|
| **IN RE: AVR of Tennessee, L.P. d/b/a Hyperion Telecommunications of Tennessee, L.P., Application for a Certificate of Public Convenience and Necessity to Extend its Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company** | ) | **Docket No. 98-00001** |

# BRIEF OF INTERVENORS TENNESSEE TELEPHONE COMPANY, CONCORD TELEPHONE COMPANY, TELLICO TELEPHONE COMPANY, AND HUMPHREYS COUNTY TELEPHONE COMPANY

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**BEFORE THE TENNESSEE REGULATORY AUTHORITY**
**NASHVILLE, TENNESSEE**

| | | |
|---|---|---|
| **IN RE: AVR of Tennessee, L.P. d/b/a Hyperion Telecommunications of Tennessee, L.P., Application for a Certificate of Public Convenience and Necessity to Extend its Territorial Area of Operations to Include the Areas Currently Served by Tennessee Telephone Company** | ) | **Docket No. 98-00001** |

# BRIEF OF INTERVENORS TENNESSEE TELEPHONE COMPANY, CONCORD TELEPHONE COMPANY, TELLICO TELEPHONE COMPANY, AND HUMPHREYS COUNTY TELEPHONE COMPANY

## INTRODUCTION

Intervenors Tennessee Telephone Company, Concord Telephone Company, Tellico Telephone Company, and Humphreys County Telephone Company ("Intervenors") file this brief on the legal issue presented in this matter, as ordered by the Tennessee Regulatory Authority ("TRA") at its Directors' Conference on February 3, 1998. The legal issue is whether the TRA may grant the certificate of public convenience and necessity sought by AVR of Tennessee, L.P., d/b/a Hyperion of Tennessee, L.P. ("Hyperion"), in the face of a state statute that prohibits it. Intervenors respectfully submit the answer is clear that the application must be denied.

## STATEMENT OF THE CASE

Hyperion has filed with the TRA an application for a certificate of public convenience and necessity to extend its service area into areas currently served by one of

the Intervenors, Tennessee Telephone Company. Hyperion already holds a certificate of public convenience and necessity to provide telecommunications services throughout Tennessee, except in those areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this State. Tennessee Telephone Company (alone or in combination with the other Intervenors) has fewer than 100,000 total access lines in this state. Thus, the pending application by Hyperion is an effort to enter an area served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this State.

The TRA's decision on Hyperion's application is governed by T.C.A. § 65-4-201, which was enacted by the Tennessee General Assembly in 1995. Subsection (c) sets forth a procedure for a "competing telecommunications service provider" to obtain the requisite certificate of convenience and necessity to enter a service area in competition with an existing "incumbent local exchange telephone company." Subsection (d), however, clearly provides that T.C.A. § 65-4-201(c) does not apply to areas served by an incumbent local exchange telephone company, such as Tennessee Telephone Company, with fewer than 100,000 total access lines in this State, except in two circumstances not relevant to this proceeding.

Faced with this absolute bar to its application for a certificate, Hyperion contends that the clear Tennessee statute has been preempted by the subsequent enactment of the federal Telecommunications Act of 1996, 47 U.S.C. §§ 151 et seq., as interpreted by the

Federal Communications Commission in a case arising under Wyoming law. See In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, FCC 97-336 (Sept. 24, 1996) ("Silver Star"). As will be demonstrated, this is a legal issue with constitutional dimensions which cannot be decided by the TRA. Moreover, the FCC's Silver Star decision did not consider Tennessee law, and cannot have the effect of preempting it. Nor is the Silver Star decision final, as two petitions for reconsideration were filed and are pending before the FCC.[1] Finally, the legal issue of whether the federal act was intended to preempt the Tennessee statute at issue should properly be decided against preemption. In any event, the TRA should deny Hyperion's application.

## STATEMENT OF THE REGULATORY CONTEXT

On January 6, 1995, the Tennessee General Assembly enacted Chapter 408 of the Public Acts of 1995, which instituted major changes in the regulation of telecommunications in this state. The expressed goal of the new regulatory structure was

> to foster the development of an efficient, technologically advanced, state-wide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services provider shall protect the interests of consumers without unreasonable prejudice or

[1]Copies of the two petitions are included in the appendix to this brief at Tabs 1 and 2.

> disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

T.C.A. § 65-4-123. Part of these reforms permits a competitor to enter the service area of an established incumbent local exchange telephone company if it meets certain criteria and obtains a certificate of convenience and necessity. T.C.A. § 65-4-201(b), (c). The legislation also included a provision designed to prevent unfair competition in rural markets against small incumbent local exchange telephone companies to the disadvantage of consumers and to the potential detriment of the goal of the universal service. Accordingly, T.C.A. § 65-4-201(d) provides:

> Subsection (c) is not applicable to areas served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this State unless such company voluntarily enters into an interconnection agreement with a competing telecommunications service provider or unless such incumbent local exchange telephone company applies for a certificate to provide telecommunications services in an area outside its services area existing on the June 6, 1995.

On February 8, 1996, Congress enacted the federal Telecommunications Act of 1996, codified at 47 U.S.C. §§ 251, et seq. Like the Tennessee legislation of a year earlier, the Telecommunications Act also seeks to promote competition among telecommunications carriers. It provides a general duty of telecommunications carriers "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers. . . ." 47 U.S.C. § 251(a)(1). At the same time, the

Telecommunications Act concerns itself with the preservation and advancement of universal service, 47 U.S.C. § 254, and recognizes the exceptional circumstances of small local exchange telephone companies serving rural markets, 47 U.S.C. §§ 251(f), 253(f).

The federal act also provides for the removal of barriers to the entry of new competition as follows:

> (a) In General. No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.
>
> (b) State Regulatory Authority. Nothing in this section shall effect the ability of a State to impose, on a competitively neutral basis and consistent with Section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.
>
> . . .
>
> (d) Preemption. If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed any statute, regulation, or legal requirement that violates subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

47 U.S.C. § 253. Based on that section, the FCC in Silver Star determined that a Wyoming statute prohibiting the entry of a competitor into a service area served by an incumbent local exchange telephone company with fewer than 30,000 access lines in the

state was preempted. It also preempted an order of the Wyoming Public Service Commission that denied Silver Star's application for a certificate that was barred under the Wyoming statute.

## ARGUMENT

### A. The TRA Must Deny Hyperion's Application For A Certificate Because It Is Prohibited By T.C.A. § 65-4-201.

The TRA is a regulatory agency of the State of Tennessee created by the General Assembly. T.C.A. § 65-1-201. It has the duty "to ensure that . . . all laws of this State over which [it has] jurisdiction are enforced and obeyed. . . ." T.C.A. § 65-1-213. Chapters 4 and 5 of Title 65, including T.C.A. § 65-4-201, are laws under the jurisdiction of the TRA, which it has the duty to enforce.

T.C.A. § 65-4-201(d) prohibits the TRA from granting an application for a certificate of convenience and necessity to a competing telephone company for an area served by an incumbent local exchange telephone company with fewer than 100,000 total access lines in this State. Since Tennessee Telephone Company has fewer than 100,000 access lines, to grant a certificate to a competing telecommunications services provider such as Hyperion would directly violate that statute. It is the duty of the TRA to uphold this law. Therefore, Hyperion's application for a certificate must be denied.

## B. The TRA Does Not Have Authority To Determine If T.C.A. § 65-4-201(d) Has Been Preempted By Federal Law.

Hyperion asks this Authority to make the determination that T.C.A. § 65-4-201(d) has been preempted by a section of the Federal Telecommunications Act, 47 U.S.C. § 253(a). That determination would require the Authority to decide a question of law having considerable constitutional ramifications. It would involve the Authority in declaring that a law enacted by the General Assembly is invalid, null, and void. These determinations are not within the jurisdiction of the TRA.

Tennessee law is clear that administrative agencies do not have the authority to declare invalid statutes enacted by the General Assembly, either on a constitutional or other legal basis. "An administrative agency . . . has no inherent or common law powers. Being a creature of statute, it can exercise only those powers conferred expressly or impliedly upon it by statute." General Portland, Inc. v. Chattanooga-Hamilton County Air Pollution Control Board, 560 S.W.2d 910, 914 (Tenn. App. 1976). An agency derives its jurisdiction from its authorizing legislation. Leggett v. Tennessee Board of Nursing, 612 S.W.2d 476, 479 (Tenn. App. 1980). Further,

> [a] department or agency of the State created by the Legislature cannot by the adoption of rules be permitted to thwart the will of the Legislature. The Legislature is elected by the citizens of Tennessee and as an elected body it speaks for the people on matters of public policy of the State. Unelected officers of a department or agency cannot adopt rules to circumvent statutes passed by the Legislature. The

> powers to make the laws of the State are vested in the General Assembly and not in administrative agencies of the State, even when the administrative agency properly promulgates rules and regulations.

Tennessee Department of Mental Health & Mental Retardation v. Allison, 833 S.W.2d 82, 85 (Tenn. App. 1992). In fact, "[i]t is axiomatic that an administrative agency has no power to declare a statute void or otherwise unenforceable." 2 Am. Jur. 2d, "Administrative Law," § 77, at 99. Administrative agencies have considerable factual and technical expertise within their fields, but they are not designed to engage in rigorous analysis of complex legal issues like preemption.

A determination that T.C.A. § 65-4-201(d) is preempted by federal law would require a ruling on an issue of constitutional law. The preemption of a state law by a federal statute is derived from the Supremacy Clause of Article VI of the United States Constitution. See, e.g., Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 368, 106 S. Ct. 1890, 1898, 90 L. Ed. 2d 369 (1986); Grace Thru Faith v. Caldwell, 944 S.W.2d 607, 609 (Tenn. App. 1996). Hyperion seeks a ruling that T.C.A. § 65-4-201(d) has been preempted in all respects by the federal act. Thus, Hyperion is making a facial constitutional challenge to the Tennessee statute. The Tennessee Supreme Court, in the definitive case of Richardson v. Tennessee Board of Dentistry, 913 S.W.2d 446 (1995), held that "[t]he facial constitutionality of a statute may not be determined by an administrative tribunal in an administrative proceeding." Id. at

454. In other words, the preemption issue raised by Hyperion is one that may not be decided by the TRA in this proceeding.

Indeed, Hyperion itself does not expect the issue to be determined at this level. At the Directors' Conference on February 3, 1998, Hyperion's counsel described the issue as "a question of law to be briefed. You can decide whatever you want to decide and then it can go wherever it needs to go, whether it be the court of appeals or to the FCC. . . ." Tennessee Regulatory Authority Directors' Conference Transcript at 4 (Feb. 3, 1998). The TRA is obliged to perform its duty of enforcing and upholding state law, and leave the controversial legal and constitutional questions to be decided by the appropriate forum.

### C. The FCC's Silver Star Decision Does Not Preempt Tennessee Law.

Were the TRA to consider the preemptive effect of the federal Telecommunications Act on Tennessee law, it would not be bound by the FCC's decision in Silver Star. In that proceeding, the FCC was presented only with the question of whether a Wyoming statute violated subsections (a) or (b) of 47 U.S.C. § 253. It did not consider the Tennessee statute.

The power of the FCC to consider the preemption of state or local statutes, regulations, or legal requirements under 47 U.S.C. § 253 is specified and governed by § 253(d). That section envisions that preemption determinations should be made on a case by case basis. It requires the FCC to give notice and an opportunity for public comment

before determining that a state or local statute, regulation or legal requirement violates § 253(a) or (b). No notice has been given by the FCC that the Tennessee statute was under review in the Silver Star proceeding or otherwise.

Finally, in the Silver Star case two petitions for reconsideration have been filed. One was submitted by the Wyoming Public Service Commission; the other by a group of local exchange telephone companies in Wyoming.[2] Those petitions are pending, and a final ruling has not been issued.

### D. Preemption Is A Substantial Legal Question For The Courts, Which Should Be Decided In Favor Of Upholding T.C.A. § 65-4-201(d).

Whether a federal law preempts a state law is a substantial and complex legal and constitutional issue. There are essentially three circumstances in which the Supremacy Clause of the United States Constitution preempts state law:

> First, Congress can define explicitly the extent to which its enactments pre-empt. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.
>
> Second, in the absence of explicit statutory language, state law is preempted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field

[2]See appendix, Tabs 1 and 2.

> in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject."
>
> . . .
>
> Finally, state law is preempted to the extent that it actually conflicts with federal law.

English v. General Electric Co., 496 U.S. 72, 78-79, 110 S. Ct. 2270, 2275, 110 L. Ed. 2d 65 (1990) (citations omitted), quoted in Grace Thru Faith v. Caldwell, 944 S.W.2d 607, 609 (Tenn. App. 1996).

The federal Telecommunications Act can preempt state law only by explicit provision. The Act specifically precludes preemption by implication. It states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly provided in such Act or amendments." Telecommunications Act of 1996, § 601(c)(1), 47 U.S.C.A. § 152 note. In considering the preemptive effective of the federal act on other provisions of the 1995 Tennessee Act, the Tennessee Court of Appeals recently stated:

> The Telecommunications Act of 1996 contains no explicit pre-emption language and does not contain provisions that are in outright or actual conflict with state law. Accordingly, AT&T's pre-emption argument can succeed only if it can demonstrate that Congress's regulatory statutes have completely occupied the field, that it is impossible to comply with the requirements of both the federal and state law, or that the state law somehow obstructs the accomplishment of the objectives of the Telecommunications Act of 1996. AT&T has failed on all counts. Nothing in the text or structure of the Act supports its unfocused pre-emption claims.

> Congress plainly did not desire to displace local telecommunications regulation when it enacted the Telecommunications Act of 1996. The Act itself makes it clear that state commissions play a pivotal role in implementing telecommunications policy. They provide a forum for resolving disputes between existing local telephone companies and their competitors seeking access to an existing telephone network. *See* 47 U.S.C.A. § 252. By the same token, the text of the Act and Tennessee's telecommunications statutes do not suggest that telephone companies will be unable to comply with the requirements of both or that compliance with the state statutes will somehow obstruct the objectives of the Telecommunications Act of 1996.

BellSouth Telecommunications, Inc. v. Greer, 1997 Tenn. App. LEXIS 668, *26 (Tenn. App., October 1, 1997).[3] Accord, BellSouth Telecommunications, Inc. v. Bissell, 1996 Tenn. App. LEXIS 537, *29 (Tenn. App., August 28, 1996) (The Telecommunications Act "does not provide for the wholesale preemption of state regulation of telecommunications services. Instead, the Act permits states to retain authority if the state regulation is consistent with it.").[4]

The federal act does not contain an express provision that mandates preemption of T.C.A. § 65-4-201(d). The sections of the federal law cited by Hyperion and relied upon by the F.C.C. in Silver Star do not require the preemption of state laws limiting competitive access to rural markets served by small incumbent local exchange telephone companies. In fact, one of those sections, 47 U.S.C. § 253(b), emphasizes the ability of

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[3]A copy of this opinion is included in the appendix to this brief at Tab 3.

[4]A copy of this opinion is included in the appendix to this brief at Tab 4.

a state to impose "requirements necessary to preserve and advance universal service, protect the public safety and welfare, insure the continued quality of telecommunications services, and safeguard the rights of consumers." Those are the very concerns that underlie the enactment of T.C.A. § 65-4-201(d). Those legitimate state objectives should not be abandoned.

### E. Hyperion Should Be Precluded From Requesting Termination of Tennessee Telephone Company's Rural Exemption Under 47 U.S.C. § 251(f).

If the TRA should decide to grant Hyperion's application, it should not permit Hyperion to seek interconnection pursuant to 47 U.S.C. § 251(c). On page 10 of its Petition, Hyperion states that it is not asking Tennessee Telephone Company for the interconnection provisions found in 47 U.S.C. § 251(c). In a letter to Tennessee Telephone Company dated October 13, 1997, however, Hyperion explicitly asks Tennessee Telephone Company for the interconnection provisions found in 47 U.S.C. § 251(c)(2)-(6).[5] Moreover, in that same letter, Hyperion explicitly requests each of the interconnection elements found in 47 U.S.C. § 251(c)(2)-(6).

The interconnection provision found in 47 U.S.C. § 251(c) contains the most onerous of all the provisions in the federal Telecommunications Act. They include interconnection at any technically feasible point, unbundled access, resale at wholesale rates, and collocation. These provisions apply only to non-rural telephone companies.

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[5]A copy of this letter is included in the appendix to this brief at Tab 5.

Rural telephone companies were granted an exemption from these provisions by 47 U.S.C. § 251(f)(1). In order for a rural company to be subjected to these provisions, the exemption must be terminated by a state commission.

Hyperion's inconsistent positions with respect to 47 U.S.C. § 251(c) call into question Hyperion's true intentions. Given the various deadlines imposed by state and federal law, it is entirely possible that Hyperion could resume its effort to seek the 47 U.S.C. § 251(c) requirements should the TRA decide to grant Hyperion's application. The arbitration window on Hyperion's interconnection request of Tennessee Telephone Company opens on February 26, 1998, and closes on March 24, 1998. This leaves 14 days after the March 10, 1998, deadline for the TRA's decision on Hyperion's current petition for Hyperion to file an arbitration request, and simultaneously to file a petition to terminate Tennessee Telephone Company's rural exemption. The federal deadline for deciding a rural exemption termination would be shorter than the deadline for the arbitration decision. Thus, it is conceivable for Hyperion to have its current petition granted (despite strong opposing arguments), have Tennessee Telephone Company's rural exemption terminated, and have an arbitration decision for an interconnection agreement with Tennessee Telephone Company, in that order and in rapid succession.

Because of the danger described above, and in light of Hyperion's inconsistent positions with respect to 47 U.S.C. § 251(c), should the application be granted in the face of controlling authority to the contrary, Tennessee Telephone Company requests that

Hyperion be precluded from filing a petition to terminate Tennessee Telephone Company's rural exemption. It would be fundamentally unfair to Tennessee Telephone Company for Hyperion to be able to receive the certificate it is seeking, based in part on its representation that it does not seek the provisions of 47 U.S.C. § 251(c), only to obtain those very provisions immediately after obtaining its certificate.

## CONCLUSION

For all the foregoing reasons, the application of Hyperion should be denied.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by first class mail, postage prepaid, this 17th day of February, 1998, as follows:

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583701.1

Before the
Federal Communications Commission
Washington, D. C. 20554

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Silver Star Telephone Company, Inc., | ) | CCB Pol 97-1 |
| Petition for Preemption | ) | |
| and Declaratory Ruling | ) | |

PETITION FOR RECONSIDERATION

The Wyoming Public Service Commission (Wyoming Commission) hereby petitions the Federal Communications Commission (FCC), pursuant to 47 CFR § 1.429, to reconsider the decision it rendered in its Memorandum Opinion and Order (the Order) in the above-captioned matter, adopted September 23, 1997, and released September 24, 1997. In support of its petition, the Wyoming Commission respectfully shows the FCC the following:

1. Interest. The Wyoming Commission is an agency of the government of the State of Wyoming having the jurisdiction to regulate, *inter alia*, the intrastate activities of telecommunications companies serving in Wyoming. As such, the Wyoming Commission is an "interested person" as that term is used in 47 CFR § 1.429(a).

2. Requested changes. The FCC should change the action taken in the Order in two respects. First, the preemption of W.S. § 37-15-201(c), in the Wyoming

Telecommunications Act of 1995 (Wyoming Act), concerning rural incumbent local exchange service providers, should be reversed. Second, the action of the FCC in the Order preempting the enforcement of the Wyoming Commission's Order of December 4, 1996, in its Docket No. 70006-TA-96-24, which denied a concurrent competitive certificate of public convenience and necessity (CPCN) to Silver Star Telephone Company to provide competitive local exchange service to the Afton, Wyoming, exchange (the Denial Order), should be reversed.

3. At paragraph 42 of the Order, the FCC found that W.S. § 37-15-201(c) was not "competitively neutral" under Section 253(b) of the federal Telecommunications Act of 1996, and stated, at paragraph 46, that "the lack of competitive neutrality is, in any event, dispositive standing alone." The FCC reiterated, at paragraph 42, its observation in another case, that "Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry . . . ." At paragraph 42, the FCC reads the statute as imposing on potential local exchange service competitors ". . . the ultimate competitive disadvantage -- an insurmountable barrier to entry. Such disparity in the treatment of classes of providers violates the requirement of competitive neutrality and undermines the pro-competitive purpose of the 1996 Act." The discussion of the other aspects of Section 253(b), regarding universal service and necessity are thus not taken up in depth.

4. The Wyoming Telecommunications Act of 1995 seeks to bring competition in telecommunications service to Wyoming and states that it is ". . . the intent of this act to ensure essential telecommunications services are universally available to the citizens of this state while encouraging the development of new infrastructure, facilities, products and services." The Wyoming legislature clearly understood that the change could not reasonably be expected to happen overnight and that a transition period was necessary. Consequently, they stated that: "It is the intent of this act to provide a transition from rate of return regulation of a monopolistic telecommunications industry to competitive markets and to maintain affordable essential telecommunications services through the transition period, and the provisions of this act shall be construed to achieve those goals." W.S. § 37-15-102. In these ways, the Wyoming Act differs little from the federal Act.

5. What differs substantially is the context in which the Wyoming and federal Acts arose. The federal Act must be general in its focus to allow it to apply throughout the United States to the most and least lucrative markets in the nation and to parts of the system which differ in their degree of technological advancement. Wyoming had the comparative luxury of being able to concentrate on producing a procompetitive statute which addresses its specific problems.

Wyoming did, and still does, face the challenges of some of the highest service costs in the United States which are driven by the small and substantially rural population of the state, the adversities of climate and terrain, the small size of even its largest population centers, and the relatively large distances between cities. The smaller rural markets in the state are served by independent telephone companies which have vigorously entered into programs to upgrade their systems with digital technology and increasing placement of modern local and interoffice plant and facilities. Some of these companies purchased a substantial number of rural exchanges from U S WEST and have vigorously upgraded them. These smaller markets are also those in which competition is most likely to develop on a resale basis (i.e., through the use of existing facilities to provide service) and in which it is *least likely* that other companies will compete by building their own facilities -- because of the small size of the markets and the relatively small size of even the largest customers in those markets. Wyoming reached an entirely reasonable conclusion that, if the smaller incumbent companies did not build the facilities required to support modern telecommunications services, *they would probably not be built.* The Wyoming legislature also reached the reasonable conclusion that these companies, faced with high costs to upgrade in relatively unattractive markets, would be unwilling to continue to do so if they did not have at least a reasonable chance to recover their investment. They reached a further reasonable conclusion that the lenders who supported these companies and would be expected to deal with them thereafter would take a negative view of the uncertainty that

would exist absent reasonable provision for the near future. They embodied these sound conclusions in statute.

6. The Wyoming legislature clearly understood the value of competition (the Wyoming Act opened 80% of the market to competition on March 1, 1995) but also realistically understood that the telecommunications system should be technologically modern, affordable, and universally available. The realities of economics and demographics would not allow all of the desired results to happen at once. Wyoming acted reasonably upon its conclusions by enacting the Wyoming Telecommunications Act of 1995 (W.S. § 37-15-101, *et seq.*). Even faced with the expectation that the "invisible hand" of the competitive market would not act evenly and immediately throughout the state, it crafted protections for rural companies which are not absolute prohibitions of competition.

Although the FCC termed it an "insurmountable barrier" to competition, W.S. § 37-15-201(c) is not such a barrier. After notice and the opportunity for a hearing, the Wyoming Commission may issue a competitive certificate in the territory of a rural company if the incumbent "is unable or unwilling to provide the local exchange service for which the concurrent certificate is sought;" if it fails to protest the application; if it has received a concurrent certificate to provide competitive local exchange services anywhere in Wyoming (remembering that 80% of the market was completely opened to competitive certification in 1995); or if it begins to provide

competitive cable radio or video service. W.S. § 37-15-201(c)(ii) through (v). These certificates may be issued whether or not the incumbent provider desires competition. Therefore, the provision of W.S. § 37-15-201(c)(i), which allows issuance of a competitive certificate if the incumbent rural company "consents," is not, contrary to the opinion of the FCC, an absolute prohibition. The statute is also adequately hedged with other statutory provisions which encourage competitive reciprocity and prevent rural incumbents from blocking the provision of new services which might be beyond their abilities to provide.

7. Wyoming's policy of affording a realistic measure of protection to small, high cost rural telephone companies to encourage system upgrading, as discussed above, is not a matter of simple protectionism or of recoiling in horror from the specter of competition. This is clearly demonstrated in W.S. § 37-15-201(d) which states, in part, that: "A local exchange telecommunications company with thirty thousand (30,000) or fewer access lines in the state may apply for an extension of the protections provided for in subsection (c) of this section for a period not to exceed thirty-six (36) months if, after notice and hearing, the commission finds that the applicant has demonstrated by *clear and convincing evidence that it has yet to substantially recover its investment for upgraded services ordered by the commission or for which it has committed as of the effective date of this chapter.*" [Emphasis added.] Protection, if it then still exists with respect to a specific incumbent, [i] can be extended only for the continued recovery of upgrading costs, [ii] is of variable

length not to exceed three years, and [iii] is subject to a standard of proof ("clear and convincing evidence") which was deliberately made higher than the "substantial evidence" standard which normally applies in the Wyoming Commission's proceedings. When the FCC states that the Wyoming statutory protection is "entirely" within the discretion of the rural incumbent, that is not an accurate characterization of the statute.

These provisions recognize that the Wyoming Telecommunications Act of 1995 worked a great change on the telecommunications industry in the state, and recognize the validity of commitments to infrastructure and switch upgrades made before the change happened. Had the Wyoming legislature not made its minimal and realistic statutory concessions to the economic realities of the industry and the needs of the people for improved telecommunications service (policies mirrored throughout the federal Act), it would have made the needed level of upgrading almost impossible to achieve.

8. The Wyoming Act represents the sound judgment of the Wyoming legislature that some protection was a reasonable way to encourage essential system upgrading to take place; but, as discussed above, this judgment does not deny the fact that competition has a role to play even with respect to smaller local exchange service providers. Wyoming made a determination that no protection would be available after a date certain, from which follows the conclusion that

Wyoming intends that *all* incumbent local service providers must face competition regardless of their circumstances at a time certain. The federal Act does not make this harsh a judgment (and such a judgment would be inappropriate for a statute of national application which must be more broadly drawn). The FCC made much of the fact that the time limits in W.S. § 37-15-201 are stated in terms of dates certain (or determinable) and termed this, Order at paragraph 42, ". . . for all practical purposes, an absolute prohibition."

At paragraphs 43 through 45 of the Order, the FCC points to analogous provisions of the later enacted federal Act as the more appropriate model for providing protection to incumbent rural companies. (We note that every rural company in Wyoming which might seek protection under *either* act would qualify under both.)

The heart of the duty of incumbent telephone companies to open up to competition under the federal Act are found at 47 U.S.C. § 251(b) and (c). 47 U.S.C. § 251(f) allows state commissions to suspend their application to rural carriers in certain circumstances and to provide protections effectively identical to those of the preempted W. S. § 37-15-201(c). The Wyoming Commission could relieve a rural telephone company from the duty to comply with 47 U.S.C. § 251(c) unless the Wyoming Commission determines that a request from another carrier for interconnection, services or network elements, is "not unduly economically

burdensome, is technically feasible" and is consistent with applicable universal service provisions of the federal Act. Importantly, the federal Act would allow the Wyoming Commission, acting in the public interest, to relieve rural telephone companies from the duty to comply with 47 U.S.C. § 251(b) or (c) on the petition of a rural telephone company, to the extent *and for so long as*, the state commission determines that such suspension or modification is needed to "avoid a significant adverse economic impact on users of telecommunications services generally;" "to avoid imposing a requirement that is unduly economically burdensome;" or "to avoid imposing a requirement that is technically infeasible." [Emphasis added.]

There is no time limit on this protection. We submit that it is clearly possible for a state commission which was so inclined to extend the protections of the federal Act much farther into the future than the Wyoming Commission could do employing the "anticompetitive" provisions of the Wyoming Act. We also submit that the standards provided in the federal Act, as listed above, are broad enough to support such durable protection. The federal protections, by not providing for their own certain termination, can reasonably be viewed as allowing for their perpetuation, all to the detriment of universal service, technological improvement of the nation's telecommunications system, and robust competition. It is just as reasonable to assign an anticompetitive and protectionist label to the operation of the federal Act as it is to lodge similar, though unfounded, criticisms against Wyoming's analogous provisions. It is unreasonable, therefore, for the FCC to preempt Wyoming's sound,

reasoned judgment in dealing with the special challenges faced in upgrading of rural telecommunications infrastructure. Given these facts, Wyoming's judgment should be respected.

Further support for the proposition that the reasonable judgments of the states taken with respect to local matters should be respected is found in the decision of the United States Court of Appeals for the Eighth Circuit in *Iowa Utilities Bd., et al. v. FCC, et al.*, 120 F.3d 753 (Eighth Cir. 1996). In that case, the Eighth Circuit, in finding sharp limitations on the authority of the FCC to direct the pricing decisions of the states, noted, 120 F.3d at 796 (citing an earlier United States Supreme Court case) that section 2(b) of the Communications Act, 47 U.S.C. § 152(b), ". . . constitutes a specific congressional denial of power to the FCC and suggested that Congress could override section 2(b)'s command only by unambiguously granting the FCC authority over intrastate telecommunications matters by directly modifying section 2(b)." Section 2(b) demonstrates clearly, *inter alia*, that the states should have jurisdiction regarding ". . . classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." The preempted W.S. § 37-15-201(c) clearly falls within the protections afforded to the states by Congress; and, again, the preemption should be overturned.

9. 47 U.S.C. § 254(b)(1), (2) and (3) describe some of the aspects of national telecommunications policy on which the federal Act is premised. Service should be of high quality, rates should be "just, reasonable, and affordable" and "advanced telecommunications and information services should be provided in all regions of the Nation." Particularly, subsection (3) directs that: "Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas." The Wyoming Commission submits that, in addressing the technological upgrading needs of Wyoming in a reasoned manner, it is upholding and furthering the policy goals of the federal Act as well as the similar stated policy goals of the Wyoming Act. The erroneously preempted section of the Wyoming Act is specifically designed to guard against the possibility that technological "haves and have nots" might develop or that parts of the system might become isolated "islands" lagging in technological development.

10. It is clear that the action of the Wyoming legislature in crafting the Act as it did was "necessary" under the rubric of 47 U.S.C. § 253(b). The imperatives to which the Wyoming Act responded as it did in W.S. § 37-15-201(c) are described above; they are factual rather than theoretical; and they are driven by simple and

easily understood technological and market realities which cannot be defined away or ignored. When 47 U.S.C. § 253(b) speaks of the ability of states to impose ". . . requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers", that is precisely what the preempted provision did. It recognized that a technologically incapable telecommunications system does not serve the public safety or welfare and that protection of the rights of consumers to "enjoy" such a system is no protection at all, and that protection of the ultimate consumer can mean affording a measure of protection for the companies upon which they must depend for service.

If the FCC rightly observes, at paragraph 42 of the Order, that "Congress envisioned that in the ordinary case, States and localities would enforce the public interest goals delineated in section 253(b) through means other than absolute prohibitions on entry . . . ."; then the preemption in this case should not stand. First, as we have shown the FCC, Wyoming is not an "ordinary case" facing simple challenges . Second, the wrongly preempted statute is not an absolute bar to entry, but a conditional measure designed to address realistically and effectively the needs of the public for adequately technologically capable and modern telecommunications service *in a market in which such development is not immediately financially attractive.* We submit that the federal Act, in leaving so much responsibility to the states to design and implement local solutions to local problems, describes a

partnership between the federal and state governments, and not a hierarchy in which state solutions can be called invalid simply because they are different. Congress realized that neither they nor the FCC could anticipate every problem that would arise in bringing about a competitive telecommunications market; and it wisely took the cooperative path. It also realized that neither the states nor the federal government acting individually possessed all of the facts, insights or resources needed to make the competitive transition. They realized that it could not be done without the serious engagement and cooperation of all concerned. We submit that the Wyoming Telecommunications Act of 1995 is evidence of that constructive contribution to that partnership and that it should be allowed to operate in Wyoming's particular circumstances.

11. We also observe for the FCC that we have been informed that the negotiations between U S WEST Communications, Inc., and Union Telephone Company regarding the sale of the Afton, Wyoming, exchange to Union are now at an end; and the exchange will remain with U S WEST. Consequently, the controversy before the FCC over whether or not Silver Star Telephone should be prevented by the operation of W.S. § 37-15-201(c) from competing in that exchange would be moot because the Wyoming Telecommunications Act of 1995 opened all of U S WEST's Wyoming exchanges to competition more than two years ago and a year before the passage of the federal Act.

Silver Star has appealed the Wyoming Commission's Denial Order, described above in paragraph 2, to the Wyoming Supreme Court. The fact that the exchange will remain with U S WEST may also render the Wyoming appeal moot.

12. We urge the FCC to grant this Petition for Reconsideration. It will help in obtaining further information about the special situations the Wyoming Telecommunications Act of 1995, and specifically W.S. § 37-15-201(c) therein, were designed to address. This will give the FCC a more detailed understanding of Wyoming's situation and will show that we share the purpose of encouraging a robust and healthy competitive telecommunications market capable of providing service which, in quality, price and availability, fulfill the common goals of the federal and Wyoming Acts. The federal Act wisely recognized, in enlisting the aid of the states, that the public interest is not monolithic but is composed of thousands of good decisions made by many in furtherance of a commonly understood good. In its telecommunications law, Wyoming has shown that it clearly understands that good; and it has offered such carefully considered decisions in the public interest. We believe that they should be accepted. This Petition should be granted.

Respectfully submitted, October 23, 1997.

WYOMING PUBLIC SERVICE COMMISSION

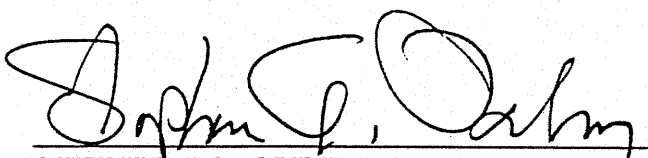
STEVE ELLENBECKER, Chairman

KRISTIN H. LEE, Commissioner

CERTIFICATE OF SERVICE

I hereby certify that I served true and complete copies of the within and foregoing Petition for Rehearing by the Wyoming Public Service Commission in the above-captioned matter upon those persons appearing on the service list furnished to the Wyoming Commission by the Common Carrier Bureau of the Federal Communications Commission by depositing the same in the United States mail, first class postage prepaid, on this 23rd day of October, 1997.

Dated: October 23, 1997.



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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the Matter of | ) | |
| | ) | |
| Silver Star Telephone Company, Inc. | ) | CCB Pol 97-1 |
| | ) | |
| Petition for Preemption and Declaratory Ruling | ) | |

To: The Commission



# PETITION FOR RECONSIDERATION

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## Summary

The Wyoming Group requests that the Commission reconsider its Preemption Order, reverse its decision, and refrain from action that improperly restrains the State of Wyoming from addressing its universal service concerns consistent with its rights under Section 253(b) of the 1996 Act.

Sections 253(a) and (b) must be read together to implement the clear Congressional determination that the states retain the authority to introduce measures designed to protect and promote universal service, even when those measures may otherwise affect competitive entry.

There is ample evidence that the Wyoming Statute does not offend the 1996 Act. To the contrary, it has been demonstrated that the statute was consistent with the spirit and the letter of the 1996 Act's universal service provisions. On that basis, the preemption authority contained in Section 253 was not triggered. Therefore, preemption was inappropriate.

Even assuming the Commission was correct in its assessment that Wyoming's rural incumbent provision was in conflict with Section 253 of the 1996 Act, the Commission failed to preempt the Wyoming Statute only to the extent "necessary" to remedy the conflict, as is required by Section 253(d) of the 1996 Act. Moreover, the Commission failed to provide the statutorily mandated notice of the action it was contemplating, i.e., preemption. On these grounds, the Preemption Order should be reversed.

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, D.C. 20554**

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| **Silver Star Telephone Company, Inc.** | ) | **CCB Pol 97-1** |
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| **Petition for Preemption and Declaratory Ruling** | ) | |

**To: The Commission**

## PETITION FOR RECONSIDERATION

The Wyoming Group[1], by its attorneys, and pursuant to Section 1.106 of the Commission's Rules,[2] hereby requests reconsideration of the Memorandum Opinion and Order (hereafter "Preemption Order")[3] issued in response to the above-captioned Petition for Preemption and Declaratory Ruling ("Petition") filed by Silver Star Telephone Company, Inc. ("Silver Star"). The Wyoming Group respectfully submits that the Preemption Order is erroneous as a matter of law and, accordingly, should be reversed.

### I. INTRODUCTION

The Preemption Order granted Silver Star's Petition to the extent it preempted (1) a Wyoming Public Service Commission

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[1] The Wyoming Group consists of Union Telephone Company, Inc. ("Union"), Tri County Telephone Association, Inc., TCT WEST, INC., and RT Communications, Inc. All members of The Wyoming Group participated in these proceedings as interested parties.

[2] 47 C.F.R. § 1.106.

[3] In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, CCB Pol 97-1, Memorandum Opinion and Order, FCC 97-336, rel. Sept. 24, 1997 ("Preemption Order").

("Wyoming PSC") decision denying Silver Star authority to provide local service in Afton, Wyoming[4] and (2) portions of the Wyoming Telecommunications Act of 1995 ("Wyoming Statute")[5], which were the basis of the Wyoming PSC's Denial Order.[6] Reconsideration is warranted because the Preemption Order is based upon an erroneous statutory interpretation.

The Commission erred in determining that Section 253 of the Telecommunications Act of 1996 ("1996 Act")[7] authorizes preemption of a Wyoming statute that neither offends the 1996 Act, nor is inconsistent with the spirit or the letter of the 1996 Act's universal service goals and requirements. The Commission's interpretation of its authority under Section 253(a) of the 1996 Act renders meaningless the authority reserved to the states under Section 253(b) of the 1996 Act.

Assuming, arguendo, that the Wyoming Statute was preemptable, the Commission's preemption decision was overly broad. Rather than tailor its Preemption Order to minimize the intrusion into a state law intended to preserve and promote universal service within its borders, the Commission struck down the law entirely. Section

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[4] Application of Silver Star Telephone Company, Inc. for a Certificate of Public Convenience and Necessity to Service the Afton Local Exchange Area, Order Denying Concurrent Certification, Docket No. 70006-TA-96-24 (Wyoming PSC, Dec. 4, 1996).

[5] Wyo. Stat. Ann., §§ 37-15-101 et seq.

[6] Silver Star amended its petition April 24, 1997 seeking preemption of Sections 37-15-201(c) through (f) of the Wyoming Statute.

[7] Pub. L. No. 104-104, 110 Stat. 56 (1996).

253(d) permits preemption only "to the extent necessary" to correct a violation or inconsistency. Accordingly, the Commission should reconsider and reverse its decision.

## II. BACKGROUND

In 1993, the Wyoming PSC initiated an extensive review of the state's telecommunications infrastructure.[8] It held public hearings in which all segments of its population testified about existing telecommunications facilities as well as future needs. Based upon the evidence compiled in these proceedings, specifically, that U.S. West was not providing service consistent with the public interest, the Wyoming PSC concluded that U.S. West would be required to upgrade its facilities in order to achieve an acceptable level of service.

U.S. West opted to sell exchanges in rural, high cost areas rather than make the enormous investment necessary to upgrade its facilities to the Wyoming PSC's satisfaction. The Wyoming PSC therefore directed the companies purchasing the U.S. West exchanges to make extensive improvements in these facilities to provide subscribers with a level of service most subscribers throughout the nation take for granted as basic, e.g., single-party service and "911" emergency service.[9] Union ultimately entered into a contract

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[8] In the Matter of the Inquiry into Telecommunications Service Capability and Needs in Wyoming, Wyoming Public Service Commission, General Order 67, September 24, 1993 ("Upgrade Order").

[9] The required improvements include the following:

a. to provide equal access, including 10-XXX to all interexchange carriers, where cost-effective, and as soon

(*footnote continues on next page*)

with U.S. West for the Afton, Wyoming exchange.[10]

At the same time, the Wyoming legislature was addressing the telecommunications needs of its citizens, including the issues arising from the transition from a monopolistic to a competitive environment. This inquiry resulted in the legislative passage of the Wyoming Telecommunications Act of 1995. In view of the upgrading requirements imposed by the Wyoming PSC on the small, rural LECs that purchased the outmoded facilities of U.S. West, and in keeping with its intent "to ensure [that] essential telecommunications services [were] universally available,"[11] the Wyoming Statute included a "rural incumbent provision" that

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*(continuation of footnote from previous page)*

as upgrade of facilities permit such service provision;
b. single-party service to all those who desire it;
c. flat-rate or measured service options;
d. touch-tone dialing;
e. adequate private branch exchange trunking;
f. provision of 911;
g. available custom-calling features, call-waiting, etc.;
h. minimum 2400 baud transmission capability; and
i. digital connectivity.

Upgrade Order at pp. 95-99; See In the Matter of Silver Star Telephone Company, Inc. Petition for Preemption and Declaratory Ruling, CCB Pol 97-1, Reply Comments of RT Communications, Inc. dated March 7, 1997, at pp. 5-6.

[10] Union is a local exchange carrier serving 6,396 access lines across 15 exchanges in the State of Wyoming. Silver Star vied for the Afton exchange, but U.S. West decided to sell to Union. The Commission should note that largely as a result of the Commission's actions in this proceeding, as well as the anti-rural LEC/small business positions taken by the Commission during the past several years, the contract between Union and U.S. West has now been cancelled.

[11] Wyo. Stat. Ann. § 37-15-102.

permits incumbent LECs, such as those undertaking massive upgrades in high cost rural areas previously owned by U.S. West, to object to new entrants into those exchanges for a period of ten years.[12] This provision acts as a public interest safety net and assures subscribers in these exchanges that the extensive improvements in telecommunications services mandated by the Wyoming PSC will be made.

Once U.S. West's right to sell its Afton exchange to Union was established, Union was awarded a certificate to serve Afton. When Silver Star applied for a concurrent certificate to serve Afton, Union, as the incumbent LEC,[13] invoked the public interest safety net provision to object to Silver Star entering the Afton market. Consequently, Silver Star was denied a certificate to provide service in Afton concurrent with Union.

In order to gain entrance to the Afton exchange, Silver Star petitioned the Commission to declare the state-crafted public interest provision invalid under Section 253 of the 1996 Act. The Commission granted Silver Star's petition to the extent it preempted this public interest provision of the Wyoming Statute and the Wyoming PSC Order denying Silver Star a certificate to operate in Afton. In reaching this decision, the Commission ignored the public interest considerations addressed by the Wyoming Statute; the Commission also ignored the law, which permits preemption of

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[12] Wyo. Stat. Ann. § 307-15-201(c).

[13] The Commission accepts the determination that Union is the "incumbent" LEC as defined in the Wyoming Statute. Preemption Order at para. 38, n.100.

the enforcement of a state's statute only if the statute violates Section 253(a) or (b) of the 1996 Act, and only "to the extent necessary to correct such violation or inconsistency."[14]

## III. ARGUMENT

### A. THE COMMISSION'S PREEMPTION OF THE WYOMING STATUTE AND WYOMING PSC DECISION RENDERS SECTION 253(B) MEANINGLESS AND, ACCORDINGLY, SHOULD BE REVERSED.

Notwithstanding the provisions of Section 253(a), Section 253(b) of the 1996 Act provides states with the authority to impose requirements necessary to preserve and advance universal service and high quality telecommunications services. Implicit in this specific reservation of state authority is the recognition that all areas of the country, or of a single state, may not be subject to the same market conditions that would sustain the introduction of competitive local exchange service in a manner that will serve the public interest. This same public policy reasoning and concern underlies the authority provided by Section 251(f) of the 1996 Act to limit the interconnection obligations of small rural carriers.[15] But, contrary to the illogical statutory interpretation employed by the Commission in the Preemption Order, Congress clearly did not confine the states to the explicit statutory methods for protecting the interests of rural subscribers, such as Section 251(f).

While standing alone, Section 253(a) of the 1996 Act in general prohibits state statutes that act as barriers to the

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[14] 47 U.S.C. § 253(d).

[15] 47 U.S.C. § 251(f).

ability of an entity to provide telecommunications service, this general provision is subject to explicit exceptions. Indeed, Section 253(a) itself presages the possibility of exceptions by beginning with the words, "IN GENERAL." Section 253(a) is followed by specific sections that take precedence over the general language set forth in Section 253(a) or, at a minimum, must be accorded equal significance.

Section 253(b) of the 1996 Act provides states with the authority to impose requirements necessary to preserve and advance universal service and high quality telecommunications services. This section of the 1996 Act reflects Congressional determination that a state should maintain the authority to enact measures to ensure that the introduction of competition proceeds in a manner that will serve the overall public interest of the citizenry of its state. Thus, 253(b) permits state action under circumstances that would otherwise by impermissible under 253(a).

It is a canon of statutory construction that related portions of legislation must be interpreted together, so as to avoid rendering one section meaningless. As the court stated in its review of the Commission's interconnection rules, one "must look to the structure and the language of statute as a whole" to determine if the Commission's interpretation is reasonable.[16]

In this instance, the Commission applied Section 253(a) in isolation, rather than in concert with Sections 253(b) (and Section

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[16] Iowa Utilities Board v. FCC, 120 F.3d 753 at 800 (8th Cir. 1997) (citations omitted) ("Iowa Utilities Board").

254, to which 253(b) refers). Taken together, these provisions clearly limit Commission preemption over state statutes such as the Wyoming Statute, that are "necessary to preserve and advance universal service" and that are in harmony with the federal statute.

Congress expressly addressed the subject of "barriers to entry" in Section 253 of the 1996 Act.[17] Obviously, a specific action taken by a state pursuant to Section 253(b) will have some effect on the more general prohibition against entry barriers. Therefore, Congress understood that actions under Section 253(b) could be contrary to the general prohibition of Section 253(a), and that is why Congress specifically stated that the prohibition against barriers to entry is a general goal. This general goal, however, must be balanced with the more specific and potentially conflicting goals reflected in other provisions of Section 253, including those of Section 253(b). In other words, Section 253 must have contemplated that the State could take, on a balanced basis, actions that would have the effect of barring entry. Otherwise, Congress would not have included potentially conflicting provisions within the same statutory section.

The reservation of state authority contained in Section 253(b) is completely consistent with Section 2(b) of the Communications Act,[18], which provides that "nothing in this chapter shall be construed to apply or give to the [Commission] jurisdiction with

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[17] 47 U.S.C. § 253.

[18] 47 U.S.C. § 152(b).

respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." The Eighth Circuit, in reviewing the Commission's interpretation of the 1996 Act's interconnection provisions, stated:

> The Supreme Court emphasized that section 2(b) constitutes an explicit congressional denial of power to the FCC and suggested that Congress could override section 2(b)'s command only by unambiguously granting the FCC authority over intrastate telecommunications matters by directly modifying section 2(b).[19]

As the court noted, the 1996 Act did not limit state authority under Section 2(b). To the extent the Commission's Preemption Order intrudes into regulation of intrastate facilities reserved to the states under 2(b), and separation of intrastate and interstate components of Commission regulation and state regulation is not impossible, state action should not be preempted.

1. The Wyoming Statute Was Enacted to Preserve and Advance Universal Service and is Consistent with Section 254 of the 1996 Act.

In order to protect the public interest, Section 253(b) specifically allows a state to impose, on a competitively neutral basis and consistent with universal service goals, requirements that are necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of

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[19] Iowa Utilities Board, 120 F.3d 753, 796, *citing* Louisiana Pub. Serv. Comm'n v. FCC, 46 U.S. 355, 377 (1986).

consumers.[20] Section 253(b) decrees that states retain the ability to address universal service concerns notwithstanding the general prohibition on barriers to entry contained in Section 253(a):

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.[21]

The Wyoming Statute promotes the same universal service goals that were later reflected in the 1996 Act. Specifically, the Wyoming Statute declares that its intent is "to ensure that essential telecommunications services are universally available to the citizens of this state while encouraging the development of new infrastructure facilities, products and services."[22] In furtherance of that goal, and in recognition of the Wyoming PSC's requirement that LECs make massive capital investments in U.S. West's former exchange areas, the Wyoming legislature enacted Section 37-15-201(c). It provides in pertinent part:

> (c) Prior to January 1, 2005, in the service territory of a local exchange telecommunications company with thirty thousand (30,000) or fewer access lines in the State, the Commission shall, after notice and opportunity for a hearing,issue a concurrent certificate or certificates of public convenience and necessity to provide local exchange service, only if the application clearly shows the applicant is willing and able to provide safe, adequate and reliable local exchange service to all persons within the entire existing local exchange area for which the certification is sought, and the incumbent

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[20] 47 U.S.C. § 253(b).

[21] 47 U.S.C. § 253(b).

[22] Wyo. Stat. Ann. § 37-15-101.

local exchange service provider:
(i) consents to a concurrent certificate . . . .

This so-called rural incumbent provision enables rural LECs, such as Union, that are obligated to upgrade the former U.S. West exchange facilities, to do so under circumstances that afford reasonable assurances of cost recovery. This in turn ensures that the statutorily mandated "essential telecommunications services" will be provided to all subscribers in the state.[23]

Accordingly, the Wyoming Statute is wholly consistent with Section 254 of the 1996 Act, which calls for the "preservation and advancement" of universal service and directs a Federal-State Joint Board to pursue universal service objectives. Section 254 also specifically endorses States' efforts "to preserve and advance universal service" so long as such efforts are not inconsistent with the Commission's universal services rules.[24]

Section 254(b) of the 1996 Act specifically includes among the principles of Universal Service the access by consumers in all regions of the Nation, including those in rural areas, insular, and high-cost areas, to telecommunications and information services, comparable to those services provided in urban areas and at rates that are comparable. The Wyoming PSC's directive to the purchasers of U.S. West exchanges is perfectly consistent with these goals.[25]

No party to this proceeding has suggested that the Wyoming

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[23] Wyo. Stat. Ann. § 37-15-103(a)(iv)

[24] 47 U.S.C. § 254(f).

[25] See supra n. 7.

Statute is inconsistent with the 1996 Act's universal service provision. Inexplicably, however, the Preemption Order implies that the specific mechanisms listed in Section 251(f) and Section 214(e)(2) are the exclusive remedies a State may employ to address its universal service concerns.[26]

This conclusion is defective in a several respects. First, none of the sections cited by the Commission either states or implies that it, either alone or in conjunction with other specific sections, is the sole means by which a State may preserve and promote universal service within its borders. Thus, there is no statutory prohibition against Wyoming employing its public interest safety net provision to further universal service by ensuring compliance with its mandate to deploy necessary upgrades in existing networks. Second, the Commission suggests that Sections 214(e)(2) and 251(f) contemplated all of the "unique circumstances of rural telephone companies." For example, the Commission notes that "Section 251(f) affords rural and small LECs certain avenues of relief from the so-called interconnection duties set forth in Sections 251(b) and (c)."[27] Section 251(f) does not, however, provide relief from the obligations imposed by the State of Wyoming on small and rural LECs.[28] The instant case provides a clear

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[26] See, e.g., Preemption Order at paras. 43-44, wherein the Commission delineates Sections 214(e)(2), 251(f) and 253(f) as the "accommodations to the unique circumstances of rural telephone companies . . . ." Id. at para. 44.

[27] Id. at para. 43.

[28] See supra n. 9.

illustration that rural communities and their incumbent telephone companies will face concerns for which the 1996 Act did not specify remedies; nonetheless, the 1996 Act contemplated the possibility of these occurrences by reserving to the states sufficient flexibility to address these issues as they arise. In this instance, the State of Wyoming resolved the conundrum of requiring extensive facilities upgrade for communities suffering poor service while simultaneously introducing competition to the local exchange market to new entrants by temporarily affording LECs in high cost, rural areas with an exclusive certificate for a limited period of time.[29] The public interest safety net provision is simply a specific response to circumstances in the State of Wyoming that required a focused and creative solution.

This aspect of the Preemption Order reflects the Commission's continuing pattern of ignoring the statutory rights of states and disregarding the concerns of rural LECs. Thankfully, Congress mandated a different approach. Congress recognized that it could not foresee every set of circumstances under which state action would be required to protect the overall interests of its citizenry. Accordingly, Congress adopted Section 253(b).[30]

The nexus between Sections 253 and 254 of the 1996 Act is

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[29] Silver Star apparently had no objection to the public interest safety net provision when it appeared that Silver Star was to be the incumbent LEC in Afton with the right to object to new entrants.

[30] Moreover, rural exemption, suspensions and modifications are not a substitute for the Commission's adherence to the limitations on intrusion into state regulation found in Section 253.

the consistent expression of legislative concern regarding the advancement of universal service goals. The 1996 Act relies on competition as a means of reaching universal service goals, not as an end in itself. Thus, Commission preemption on the sole basis that the Wyoming Statute did not meet the competitive entry standard of Section 253(a) is a misapplication of the 1996 Act and undermines Congressional intent.

2. Wyoming's Actions Are Competitively Neutral.

The Commission concludes that the public interest safety net provision of the Wyoming Statute is not competitively neutral because it "favors certain incumbent LECs." Preemption Order at para. 42. The Commission misconstrues the Wyoming Statute. The Wyoming Statute imposes, on a competitively neutral basis (i.e., a requirement affecting all potential new entrants), requirements to ensure universal service by postponing, not prohibiting, competitive entry in certain cases. Contrary to the Commission's conclusion, the public interest safety net provision is not an absolute ban; it does not, therefore, warrant Commission action analogous to preemption in the case of Classic Telephone, as the Commission argues.[31]

"Neutrality," in the context of the authority granted to the states by Section 253(b) to preserve and advance universal service, requires merely that when states introduce measures to further

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[31] Preemption Order at para. 42, citing Classic Telephone, Inc. Petition for Preemption, Declaratory Ruling and Injunctive Relief, Memorandum Opinion and Order, File No. CCB Pol 96-10, 11 FCC Rcd 13082, 13102 (1996).

these goals, the implementation of these measures must apply equally to all new entrants. Clearly, neither Section 253 specifically, nor the 1996 Act generally, requires that incumbents and new entrants be treated equally. In fact, the very basis of many of the provisions of the 1996 Act relating to the development of a competitive market depends upon the distinction between incumbents and new entrants.[32] Accordingly, the Commission erred in concluding that the public interest safety net provision of the Wyoming Statute is not competitively neutral.

3. The Wyoming Statute was Enacted to Ensure and Promote Quality Telecommunications Services, Protect Public Safety and Welfare and Safeguard the Rights of Consumers.

The Preemption Order impermissibly interferes with the ability of the State of Wyoming to ensure that all its citizens enjoy the minimum level of service specified in the Wyoming Upgrade Order, thereby promoting quality telecommunications services on a state-wide basis. In ignoring the context in which the public interest safety provision was enacted, the Commission effectively denied Wyoming the opportunity to foster robust competition in rural communities at the level of service enjoyed by most urban subscribers nationwide.

Ironically, the news release announcing the Commission's action in this docket stated that

> [b]y taking these [preemptive] actions, the Commission is furthering Congress' goal in the Telecommunications Act of 1996 to accelerate deployment of advances telecommunications services to all Americans by opening

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[32] Compare, e.g., Section 251(b) and Section 251(c); see Section 259.

all telecommunications markets to competition.[33]

In fact, the result of Commission's action is directly contrary to this stated goal, because it undermines a carefully-crafted state remedy to an historic absence of advanced technologies in targeted rural areas.

The Wyoming Statute attempts to correct historic inadequacies in rural areas to ensure the public safety and welfare, and protect the rights of consumers within a public interest framework that also provides for transition into a competitive environment. In providing for the possibility of postponement of the introduction of competition in Wyoming's rural areas, the legislature determined that universal service goals required a mechanism to ensure the deployment of improved facilities and services. The financial burden of extensive upgrades compounds by the generally difficult circumstances of service provision in rural areas, where population density is low and per-line costs are high. These factors are well known to the Commission, and were enumerated in this proceeding as well.[34]

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[33] "Commission Preempts Provision of Wyoming Telecommunications Act of 1995," Report No. CC 97-47 (Sept. 25, 1997)("News Release") (emphasis added).

[34] In general, rural telephone companies face higher per-line costs than carriers in larger areas. This is due primarily to the relatively few subscribers per line-mile compared to more heavily populated urban areas. The sparse nature of subscribers translates into higher costs for the rural carriers; the consequence of fewer lines is a higher per-line cost of service. That result is aggravated by the existence of only a small pool of customers from which costs can be recovered which increases the risk of recovery of both high service costs and investments.

*(footnote continues on next page)*

The Wyoming Statute makes it clear that the period of time in which the incumbent rural LEC may object to a concurrent provider is linked to its ability to "substantially recover its investment for upgraded services ordered by the Commission or for which it has committed. . . ." Thus, the Wyoming statute does not undermine the "pro-competitive deregulatory national policy framework" intended by the 1996 Act.[35] To the contrary, the Wyoming Statute promotes a truly competitive environment at a service level which is enjoyed by most urban subscribers.

**B. ASSUMING, ARGUENDO, THAT SOME PREEMPTION ACTION WERE NECESSARY, THE COMMISSION HAS NOT PROPOSED OR CONSIDERED OTHER OPTIONS THAT WOULD PREEMPT ONLY TO THE EXTENT NECESSARY, AND FAILED TO PROVIDE PROPER NOTICE OF ITS PROPOSED ACTION.**

1. The Commission's Remedy is Overly Broad.

Assuming, arguendo, that preemption were permissible under Section 253(b) of the 1996 Act, the Commission's action exceeds its

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*(continuation of footnote from previous page)*

Carriers serving rural areas may be heavily dependent on several large-volume business customers; loss of revenues from a large customer could affect severely the remaining pool of residential and business customers. Rural carriers also depend on carefully crafted regulatory mechanisms that assist high-cost recovery. Given these factors, incentives and carefully designed regulatory policies are necessary and important to achieve a modern telecommunications network in rural areas.

Operating under the constraints imposed by limited customer pools, the risks carried by the revenue reliance on few large-volume customers, and the dependence on regulatory mechanisms for high-cost recovery, rural carriers must nevertheless meet a demand to provide their customers with advanced services similar to those provided to customers of telecommunications services throughout the Nation. Comments of Union Telephone dated February 20, 1997, at pp. 5-6.

[35] Preemption Order at para. 17.

limited preemption authority. Section 253(d) provides that violation of Section 253(a) or (b) allows the Commission to preempt only the enforcement of such statute, regulation, or legal requirement, and only "to the extent necessary to correct such violation or inconsistency" with Section 253.[36] The Commission has no authority to preempt a statute, only state enforcement of a statute.

The Commission exceeded the authority granted to it in Section 253(d) when it determined that it was "necessary" to: grant an unfettered state certificate to Silver Star, supplant state certification authority entirely, and void the Wyoming statute. All outcomes result from the Commission's Preemption Order. None of these actions are "necessary," even assuming that the Commission had any basis to act under Section 253(d).[37]

The Commission had available to it less draconian options than the wholesale preemption of the rural incumbent provision of the Wyoming Statute. More limited measures could have employed here, if any action were required at all. For example, the Commission could have achieved the same goal of prohibiting barriers to entry by competitive carriers had it directed the State of Wyoming to limit the time period in which an incumbent small, rural LEC could object to a concurrent provider in its service area (the period of

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[36] 47 U.S.C. § 253(d) (emphasis added).

[37] The Commission underscores the limitation on its authority when it notes that Section 253(d) directs the FCC to preempt "only to the extent necessary," (see News Release) but fails to apply this understanding in the Preemption Order.

time being linked to the period of time it will be burdened with mandatory facilities upgrades of high cost rural exchanges). Such an alternative would have satisfied Congressional objectives while affording the state of Wyoming the flexibility it required to meet its universal service objectives under the circumstances. Alternatively, during the ten-year period under the Wyoming Statute, the Commission could have suggested that Wyoming periodically review the balance between the statutory objectives to determine whether legislative changes were required. Furthermore, the Commission could have taken notice of its own commitment to resolution of the "trilogy" proceedings, which ultimately may address and resolve the concerns which prompted the Wyoming Legislature to implement the public interest safety net.

Even if the Commission could justify its suggestion that the temporary nature of the public interest safety is tantamount to a categorical ban, it could have taken less drastic steps than preempting the Wyoming Statute.[38] Instead of minimizing its encroachment on Wyoming's statutory regime, the Preemption Order imposed what amounted to the maximum penalty - total preemption. It took the extreme step of preempting the Wyoming Statute's public interest provision altogether. In so doing, it has impermissibly

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[38] In addition to ignoring the clear statutory requirement to take only necessary preemptive action, the Commission also failed to comply with its own practice of employing narrowly-focused methods to achieve a federal purpose without encroaching on state power. See, e.g., Public Utility Commission of Texas v. FCC, 66 RR 2d 1618, 1623 (D.C. Cir. 1989); see also, Nat'l Ass'n of Regulatory Utility Comm'rs v. FCC, 66 RR 2d 1129, 1135 (Commission is authorized to exercise preemptive power only to the degree necessary to achieve the federal purpose).

restrained the State of Wyoming from addressing its specific universal service concerns, and exceed its statutory authority.

2. The Commission Failed to Provide Proper Notice.

Assuming, arguendo, that the Commission has authority to preempt the Wyoming PSC Order and that preemption is in the public interest and consistent with the requirements of the Act, Section 253(d) requires Commission notice and an opportunity for public comment leading to a determination that a state or local government statute, regulation, or legal requirement violates or is inconsistent with subsection (a) or (b) of Section 253 and should, therefore, be preempted.[39]

The Commission did not provide notice of the action it was considering. It failed to identify any specific statute, regulation, or legal requirement that it considered in violation or inconsistent with the terms of Section 253 of the Act. Inasmuch as the Commission did not provide notice or opportunity for public comment, of the specific measures it was considering in the event it found that the Wyoming Statute violated or was inconsistent with the 1996 Act, preemption was procedurally defective. On that basis, the Preemption Order should be reversed.

The Commission contends that absent a specific directive in the 1996 Act as to the nature of the notice and opportunity for comment to be provided prior to exercising its preemption authority under Section 253, the general notice that was provided in this

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[39] 47 U.S.C. § 253(d).

case was legally sufficient.[40] The Preemption Order did not state why the absence of specifics - the state statute, regulation, or legal requirement that was the subject of the preemption petition - was not required in order for an affected party to have notice that the Wyoming Statute and Wyoming Commission Decision might be preempted by federal law.

As Union pointed out in the proceeding below, "it would be arbitrary and unreasonable for the Commission to completely preempt a State statute leaving the State's consumers unprotected from the concerns the statute was intended to address and the State without an opportunity to first undertake alternative action to address those concerns."[41]

## IV. CONCLUSION

The Preemption Order is based upon an erroneous interpretation of the 1996 Act and, accordingly, should be reversed. Sections 253(a) and (b) must be read together to implement the clear Congressional determination that the states retain the authority to introduce measures designed to protect and promote universal service, even when those measures may otherwise affect competitive entry. Section 253(b) clearly states that "[n]othing in this section shall affect the ability of a State . . ." to further universal service goals.[42]

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[40] Preemption Order at para. 35.

[41] Union Telephone Supplemental Comments, dated May 8, 1997, at p. 5.

[42] 47 U.S.C. § 253(b) (emphasis added).

There is ample evidence that the Wyoming Statute does not offend the 1996 Act. To the contrary, it has been demonstrated that the statute was consistent with the spirit and the letter of the 1996 Act's universal service provisions. On that basis, the preemption authority contained in Section 253 was not triggered. Therefore, preemption was inappropriate.

Even assuming the Commission's assessment that Wyoming's rural incumbent provision was in conflict with Section 253 of the 1996 Act was correct, the Commission failed to preempt the Wyoming Statute only to the extent "necessary" to remedy the conflict, as is required by Section 253(d) of the 1996 Act. Moreover, the Commission failed to provide the statutorily mandated notice of the action it was contemplating, i.e., preemption. On these grounds, the Preemption Order should be reversed.

Accordingly, it is respectfully submitted that the Commission reconsider its Preemption Order, reverse its decision and refrain from action that improperly restrains the State of Wyoming from addressing its universal service concerns consistent with its rights under Section 253(b) of the 1996 Act.

Respectfully submitted,

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October 24, 1997

## CERTIFICATE OF SERVICE

I, Shelley M. Bryce, of *Kraskin & Lesse, LLP*, 2120 L Street, NW, Suite 520, Washington, DC, 20037, hereby certify that on this 24th day of October, 1997, a copy of the foregoing **"Petition for Reconsideration of The Wyoming Group"** was served by first class, U.S. mail, postage prepaid, to the following parties:

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1997 Tenn. App. LEXIS 668 printed in FULL format.

BELLSOUTH TELECOMMUNICATIONS, INC. d/b/a SOUTH CENTRAL BELL TELEPHONE COMPANY, Petitioner/Appellant, VS. H. LYNN GREER, Chairman, SARA KYLE, Director, and MELVIN J. MALONE, Director, Constituting the Tennessee Regulatory Authority, Respondents/Appellees. BELLSOUTH TELECOMMUNICATIONS, INC., Petitioner VS. TENNESSEE PUBLIC SERVICE COMMISSION, Respondent. STATE OF TENNESSEE, on relations of BELLSOUTH TELECOMMUNICATIONS, INC., Petitioner/Appellant VS. KEITH BISSELL, STEVE HEWLETT, and SARA KYLE, in their capacity as Commissioners of the Tennessee Public Service Commission, Respondents/Appellees.

Appeal Nos. 01A01-9601-BC-00008, 01A01-9602-BC-00066, 01A01-9601-CH-00016

COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION, AT NASHVILLE

1997 Tenn. App. LEXIS 668

October 1, 1997, Filed

SUBSEQUENT HISTORY: [*1] Rehearing Denied November 19, 1997, Reported at: *1997 Tenn. App. LEXIS 816.*

PRIOR HISTORY: APPEAL FROM THE TENNESSEE PUBLIC SERVICE COMMISSION, NASHVILLE, TENNESSEE. Nos. 95-03383, 95-02614. Chancery Court. Davidson County. No. 95-2965-II.

DISPOSITION: VACATED AND REMANDED.

COUNSEL: For BellSouth Telecommunications, Inc.: Guy M. Hicks, III, Bennett L. Ross, Nashville, Tennessee. James G. Harralson, Atlanta, Georgia.

For AT&T Communications of the South Central States, Inc.: Val Sanford, John Knox Walkup, Gullett, Sanford, Robinson & Martin, Nashville, Tennessee.

For Tennessee Public Service Comm.: Charles W. Burson, Attorney General & Reporter. Michael E. Moore, Solicitor General. Michael W. Catalano, Associate Solicitor General, Nashville, Tennessee.

For Tennessee Consumers: Charles W. Burson, Attorney General & Reporter. Michael E. Moore, Solicitor General. L. Vincent Williams, Consumer Advocate, Nashville, Tennessee.

JUDGES: WILLIAM C. KOCH, JR., JUDGE, CONCUR: SAMUEL L. LEWIS, JUDGE, BEN H. CANTRELL, JUDGE.

OPINIONBY: WILLIAM C. KOCH, JR.

OPINION: WILLIAM C. KOCH, JR., JUDGE

OPINION

This consolidated appeal of three separate proceedings involves the efforts of BellSouth Telecommunications, Inc. to take advantage of the 1995 legislation easing the traditional regulatory [*2] burdens on telecommunications service providers. After making significant adjustments in BellSouth's reported operating results, the Tennessee Public Service Commission determined that BellSouth's current earned rate of return exceeded its authorized rate of return and that BellSouth was receiving $ 56.285 million in excess revenues. The Commission directed BellSouth to reduce its rates by $ 56.285 million and set the initial rates in the company's price regulation plan accordingly. On this appeal, BellSouth and another intervening party take issue with the procedures employed by the Commission to consider and act upon BellSouth's application for a price regulation plan. We have determined that these proceedings were not preempted by the federal Telecommunications Act of 1996. We have also determined that the General Assembly did not give the Commission authority to adjust BellSouth's reported operating results and that the Commission should have convened a contested case hearing when BellSouth took issue with the Commission's decision to adjust its reported operating results. Accordingly, we vacate the Commission's January 23, 1996 order and all earlier related orders.

I.

Almost [*3] ten years ago, the Tennessee Public


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Service Commission began its efforts to modernize Tennessee's telecommunications network and to explore less cumbersome ways to regulate the telephone companies under its jurisdiction. n1 The Commission's work culminated in its first regulatory reform rule that took effect on January 10, 1993. n2 One day later, BellSouth Telecommunications, Inc. filed its conditional election to operate under this rule.

n1 The details of these early efforts are recounted in Tennessee *Cable Television Assoc. v. Tennessee Pub. Serv. Comm'n, 844 S.W.2d 151, 155-58 (Tenn. Ct. App. 1992).*

n2 Tenn. Comp. R. & Regs. r. 1220-4-2-.55 (1993). This rule was revised again in June 1995.

On August 20, 1993, the Commission entered an order governing BellSouth's rates from 1993 through 1995. See In re Earnings Investigation of South Central Bell Telephone Co., 1993-1995, Docket No. 92-13527. Based on the results of an earnings investigation that had been commenced in 1992, the Commission **[*4]** concluded that a range of return on BellSouth's rate base of 10.65% to 11.85% would be just and reasonable. The Commission adopted BellSouth's recommendation that future rate adjustments and deferred revenue account contributions should be based on the company's actual first-year results, as opposed to projections. n3 It also determined that there would be no rate adjustment for 1993 because BellSouth's forecasted rate of return for 1993 fell within the approved range. This court approved the Commission's order in all respects. *American Assoc. of Retired Persons v. Tennessee Pub. Serv. Comm'n, 896 S.W.2d 127 (Tenn. Ct. App. 1994).*

n3 The Commission specifically declined to follow its staff recommendation favoring forecasts because the company's actual earnings had been below the forecasted earnings. The Commission noted that "continuation of a policy similar to that which we started in 1990 could, if forecasts continue to be missed, result in rate decreases for companies that need rate increases, and rate increases for companies that are overearning." In re Earnings Investigation of South Central Bell Telephone Co., 1993-1995, Docket No. 92-13527, at 7.

**[*5]**

In December 1994, the Consumer Advocate n4 requested the Commission to resolve what he considered to be inappropriate expense allocations in BellSouth's Form PSC-3.01 reports. n5 When the Commission did not respond, the Consumer Advocate filed a petition on January 23, 1995 requesting the Commission to commence an investigation into BellSouth's earnings. In March 1995, the Commission announced that it was commencing another earnings investigation with regard to BellSouth.

n4 The Consumer Advocate Division in the Office of the Attorney General and Reporter was created in 1994 for the purpose of representing the interests of Tennessee's consumers before the Commission. Tenn. Code Ann. § 65-4-118(c) (Supp. 1996).

n5 The Form PSC-3.01 report is a monthly report containing a telephone company's intrastate operating results in accordance with rules and forms established by the Commission. See Tenn. Comp. R. & Regs. r. 1220-4-1-.10(2)(a)(1), - .10(3)(a) (1988).

In the meantime, two competing telecommunications **[*6]** bills were introduced in the first session of the Ninety-Ninth General Assembly that had convened in January 1995. The avowed purpose of both bills was to ease the traditional regulatory constraints on local telephone companies and to permit greater competition for local telecommunications services. Filed concurrently with these bills was a bill to replace the Commission with a new regulatory entity. On May 26, 1995, the Governor signed a bill replacing the Commission with the Tennessee Regulatory Authority effective July 1, 1996. n6 Two weeks later, the Governor signed another bill dramatically altering the regulation of local telephone companies and opening up the local telecommunications market to unprecedented opportunities for competition. n7

n6 Act of May 24, 1995, ch. 305, 1995 Tenn. Pub. Acts 450.

n7 Act of May 25, 1995, ch. 408, 1995 Tenn. Pub. Acts 703, codified at Tenn. Code Ann. §§ 65-4-101, -123 & -124, 65-4-201, -203, -207, and 65-5-208 to -213 (Supp. 1996).

The expressed goal of the **[*7]** new regulatory structure was

to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative

forms of regulation for telecommunications services and telecommunications services providers.

See Tenn. Code Ann. § 65-4-123 (Supp. 1996). In broad terms, the 1995 legislation set out to accomplish this goal in five ways. First, it mandated the universal availability of basic telephone service at affordable rates and froze basic and non-basic telephone rates for four years. n8 Second, it required incumbent local telephone companies to make available non-discriminatory interconnection to their public networks to other providers. n9 Third, it eased the traditional limitations on the ability of new providers to enter the market. n10 Fourth, it provided a transition procedure to enable existing local telephone companies to take advantage of the newly relaxed regulatory environment. n11 Fifth, it established a five-year, $ 10 million loan guarantee program to induce small and minority businesses to enter the telecommunications [*8] market. n12

n8 Tenn. Code Ann. §§ 65-5-207, -208, -209(f), (h) (Supp. 1996).

n9 Tenn. Code Ann. § 65-4-124(a).

n10 Prior to 1995, the Commission could not permit new competitors to enter a market already served by another provider unless it found that the current service was "inadequate to meet the reasonable needs of the public." Tenn. Code Ann. § 65-4-203(a) (Supp. 1996). The 1995 legislation exempts telecommunications service providers from this requirement. Tenn. Code Ann. § 65-4-203(c). The 1995 legislation also permits new competitors to enter a market if they demonstrate that they will adhere to the applicable legal requirements and that they possess sufficient managerial, financial, and technical abilities to provide the service. Tenn. Code Ann. § 65-4-201(c).

n11 Tenn. Code Ann. § 65-5-209.

n12 Tenn. Code Ann. § 65-5-212, -213. For the purposes of this program, a "small business" is one with annual gross revenues of less than $ 4,000,000. Tenn. Code Ann. § 65-5-212.

[*9]

The transition procedure for existing local telephone companies was designed to be simple and expeditious. It requires an existing local telephone company desiring to take advantage of the new regulatory environment to file an application for a price regulation plan and envisions that the Commission will act on the application within ninety days. See Tenn. Code Ann. § 65-5-209(c). It requires the Commission to base its decision whether to grant the application on an audit of the applicant's most recent Form PSC-3.01 report. See Tenn. Code Ann. § 65-5-209(c), -209(j).

Tenn. Code Ann. § 65-5-209(c) states that the company's rates existing on June 6, 1995 will be the initial rates under its price regulation plan if the company's earned rate of return on its most recent Form PSC-3.01 report is less than its current authorized fair rate of return existing when the application was filed. The statute also empowers the Commission or Authority to initiate a contested rate-making proceeding if the audit of the Form PSC-3.01 report reveals that the company's earned rate of return is greater than its current authorized fair rate of return. Conversely, the statute permits the company [*10] to request a contested rate-making hearing if the audit reveals that its earned rate of return is less than its current authorized fair rate of return.

The Commission's revised regulatory reform rules took effect one week after the Governor signed the telecommunications reform legislation. n13 On June 20, 1995, BellSouth filed its application for a price regulation plan. On July 24, 1995, the Commission permitted AT&T Communications of the South Central States, Inc. to intervene in the proceeding. Approximately two weeks later, the Commission directed its staff to conduct the audit of BellSouth's most recent Form PSC-3.01 report in accordance with Tenn. Code Ann. § 65-5-209(c), (j).

n13 Tenn. Comp. R. & Regs. r. 1220-4-2-.55 (1995).

On August 17, 1995, the Commission's staff issued the results of its audit of BellSouth's Form PSC-3.01 report for the twelve-month period ending on December 31, 1994. At the outset, the staff determined that, except for four minor discrepancies, BellSouth's December 1994 report [*11] accurately reflected the company's books and records, that it reflected the Commission's previously ordered rate-making adjustments, and that it complied with the generally accepted accounting principles as adopted in Part 32 of the Uniform System of Accounts. Accordingly, the staff concluded that BellSouth's corrected rate of return for 1994, as taken from its books, was 10.21%.

Even though BellSouth's corrected rate of return for 1994 was less than its authorized rate of return in the Commission's August 20, 1993 order, the Commission's staff decided that BellSouth's audited rate of return should be adjusted to reflect "out-of-period and non-

recurring items" and "known charges" occurring during the audit period. Accordingly, the staff concluded that BellSouth's adjusted rate of return for 1994 was 12.29% and that this adjusted rate of return "more accurately reflects the earnings potential of the rates in effect at the end of the audit period." Since this adjusted rate of return exceeded BellSouth's currently authorized rate of return, the staff recommended that the Commission initiate a contested rate-making proceeding under Tenn. Code Ann. § 65-5-209(c) to establish the initial [*12] rates for BellSouth's price regulation plan.

The staff's August 17, 1995 report and recommendations provoked a swift and strong reaction from BellSouth. On September 12, 1995, the company filed a petition for a declaratory order pursuant to Tenn. Code Ann. § 4-5-223(a) (1991) questioning the staff's authority to recommend adjustments to its corrected Form PSC-3.01 report. In the meantime, the Commission rejected the August 17, 1995 report because it was based on an incorrect Form PSC-3.01 report n14 and directed its staff to audit the proper Form PSC-3.01 report.

n14 Tenn. Code Ann. § 65-5-209(c) required an audit of the existing telephone company's most recent Form PSC-3.01 report available when the company filed its application for a price regulation plan. When BellSouth filed its application for a price regulation plan, it had already filed a Form PSC-3.01 report for the twelve months ending on March 31, 1995. This report, as opposed to the report for the twelve months ending on December 31, 1994, was BellSouth's most recent report.

[*13]

On September 15, 1995, the Commission's staff issued its second audit report - this time covering BellSouth's Form PSC-3.01 report for the twelve months ending on March 31, 1995. This report employed the same audit methodology used in the August 17, 1995 report. The staff made three corrections to BellSouth's Form PSC-3.01 report and then concluded that the corrected report accurately reflected the company's books and records and the Commission's previously ordered rate-making adjustments and that it complied with the generally accepted accounting principles as adopted in Part 32 of the Uniform System of Accounts. As a result of its corrections, the staff concluded that BellSouth's corrected rate of return for the twelve months ending on March 31, 1995 was 10.30%. n15

n15 BellSouth had reported a 10.20% earned rate of return on its Form PSC-3.01 report and contested the corrections made by the Commission's staff. We need not resolve this dispute here.

The staff again recommended making "adjustments" to the [*14] results in BellSouth's Form PSC-3.01 report. It recommended fifteen "out-of-period" adjustments to remove items recorded on BellSouth's books during the twelve months ending on March 31, 1995 that applied to months prior to April 1994 and for items recorded outside the audit period that applied to the audit period. It recommended nine additional adjustments for abnormal or unusual expenses that were not expected to occur. Finally, it recommended twelve adjustments for "known changes" reflecting the annualized cost of rate changes or volume changes occurring during the period covered by the Form PSC-3.01 report. As a result of these adjustments, the Commission's staff concluded that BellSouth's adjusted rate of return was 12.74%. Since this adjusted rate of return exceeded BellSouth's currently authorized rate of return, the staff again recommended that the Commission initiate a contested rate-making proceeding to establish BellSouth's initial rates.

On September 20, 1995, the Commission accepted its staff's September 15, 1995 report and convened a contested case proceeding to set BellSouth's initial rates. Approximately one month later, it also convened a contested case proceeding [*15] to consider BellSouth's petition for a declaratory order concerning the staff's audit methodology and directed that the proceeding be consolidated with the pending contested rate-making proceeding. The consolidated proceeding commenced on November 1, 1995. After denying BellSouth's request for a declaratory order without permitting BellSouth to introduce proof substantiating its challenge to the staff's audit methodology and conclusions, n16 the Commission proceeded with the proof establishing a fair rate of return for BellSouth. On November 7, 1995, the Commission determined that BellSouth's rate of return should be 10.35% and, based on the adjustments in its staff's September 15, 1995 report, directed BellSouth to reduce its rates by $ 56.285 million.

n16 The Commission entered an order on November 9, 1995 formally denying BellSouth's petition for a declaratory order. BellSouth filed a Tenn. R. App. P. 12 petition in this court on January 5, 1996, seeking appellate review of this order. *BellSouth Telecommunications, Inc. v. Greer, 1997 Tenn. App. LEXIS 668,* App. No. 01A01-9601-BC-00008.

[*16]

On November 20, 1995, the Commission resumed its hearing to consider recommendations from BellSouth, the Consumer Advocate, and AT&T concerning the most appropriate way to reduce BellSouth's rates by $ 56.285 million. On January 23, 1996, the Commission entered an order formally determining that BellSouth's rate of return should be 10.35% and, therefore, that BellSouth was earning $ 56.285 million in excess revenues. The Commission prescribed changes in BellSouth's rate design to eliminate these excess revenues n17 and determined that BellSouth's rates would be affordable for the purpose of Tenn. Code Ann. § 65-5-209(c) once these reductions were in place.

n17 The Commission allocated $ 21.5 million to reduce IntraLATA long distance message toll rates, $ 27.4 million to eliminate the $ 1.50 residential touchtone rates, and $ 7.4 million to eliminate the $ 1.00 zone charge. The Commission also directed BellSouth to waive the service connection charges for computer lines at schools and libraries and to provide a flat-rate option to customers who have expressed a desire to be included in Metro Area Calling.

[*17]

On February 14, 1996, BellSouth filed a Tenn. R. App. P. 12 petition to review the Commission's January 23, 1996 order. *BellSouth Telecommunications, Inc. v. Tennessee Pub. Serv. Comm'n, 1997 Tenn. App. LEXIS 668,* App. No. 01A01-9602-BC-00066. On February 27, 1996, this court stayed the Commission's January 23, 1996 order and, in orders filed on February 27, 1996 and March 30, 1996, consolidated this appeal with two other related appeals by BellSouth. n18 On April 3, 1996, we clarified our earlier stay order by stating that it applied to both the rate reductions ordered by the Commission as well as the implementation of BellSouth's price regulation plan. On this appeal, both BellSouth and AT&T take issue with numerous aspects of the procedure and reasoning employed by the Commission to dispose of BellSouth's application for a price regulation plan under Tenn. Code Ann. § 65-5-209.

n18 BellSouth had already appealed from an October 16, 1995 order entered by the Chancery Court of Davidson County dismissing its petition for a writ of mandamus to compel the Commission to implement its price regulation plan. *State ex rel. BellSouth Telecommunications, Inc. v. Bissell, 1997 Tenn. App. LEXIS 668,* App. No. 01A01-9601-CH-00016. This appeal and the appeal from the Commission's denial of BellSouth's petition for a declaratory order, *BellSouth Telecommunications, Inc. v. Greer, 1997 Tenn. App. LEXIS 668,* App. No. 01A01-9601-BC-00008, were consolidated with the appeal from the Commission's January 23, 1996 order. Later, on BellSouth's motion, we dismissed the appeal in the mandamus case on the grounds of mootness but reserved taxing costs pending the resolution of this appeal. State ex rel. BellSouth Telecommunications, Inc. v. Bissell, App. No. 01A01-9601-CH-00016 (Tenn. Ct. App. May 3, 1996).

[*18]

II.

PREEMPTION BY THE TELECOMMUNICATIONS ACT OF 1996

As a threshold matter, we take up AT&T's assertion that this appeal should be remanded to enable the Authority to determine whether the federal Telecommunications Act of 1996 preempts state law authorizing BellSouth to begin operating under a price regulation plan. n19 AT&T claims that the preemption issue should be addressed before the approval of BellSouth's price regulation plan because the interconnection provisions in state law differ from those in the Telecommunications Act of 1996 and because state law contains no provision for modifying a price regulation plan once it has been approved. We have determined that the possibility of preemption is not so pressing that it requires a remand to the Authority for further proceedings.

n19 The Commission ceased to exist on June 30, 1996. While the General Assembly provided transition provisions with regard to the Commission's rules, employees and property, see Tenn. Code Ann. § 65-1-301 to -306 (Supp. 1996), it did not address the status of regulatory proceedings pending before the Commission or of pending judicial proceedings involving actions of the Commission. The members of the Authority did not succeed to the offices of the members of the Commission. However, the Authority has assumed the regulatory power formerly possessed by the Commission with regard to the matters at issue on this appeal. Accordingly, on July 16, 1996, we substituted the members of the Authority in place of the members of the Commission.

[*19]

A.

Our federal system of government recognizes the dual sovereignty of the federal government and the various state governments. *Printz v. United States, 138 L. Ed. 2d 914, U.S. , 117 S. Ct. 2365, 2376 (1997); Gregory v. Ashcroft, 501 U.S. 452, 457, 111 S. Ct. 2395, 2399, 115 L. Ed. 2d 410 (1991).* The states possess sovereignty within their particular spheres concurrent with the federal government subject only to the limitations imposed by the Supremacy Clause, U.S. Const. art. VI, cl. 2. *Tafflin v. Levitt, 493 U.S. 455, 458, 110 S. Ct. 792, 795, 107 L. Ed. 2d 887 (1990).*

The Supremacy Clause provides Congress with the power to preempt state law. n20 The courts are, however, reluctant to presume that preemption of state law has occurred. *Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. 218, 224, 113 S. Ct. 1190, 1194, 122 L. Ed. 2d 565 (1993); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 132, 98 S. Ct. 2207, 2217, 57 L. Ed. 2d 91 (1978).* Thus, the courts work from the assumption that the historic powers of the states are not displaced by a federal statute unless that **[*20]** was the clear and manifest intent of Congress. *California Div. of Labor Standards Enforcement v. Dillingham Contr., NA., 136 L. Ed. 2d 791, U.S. , , 117 S. Ct. 832, 838 (1997); BFP v. Resolution Trust Corp., 511 U.S. 531, 544, 114 S. Ct. 1757, 1765, 128 L. Ed. 2d 556 (1994); Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355 at 368, 106 S. Ct. 1890 at 1898.*

n20 Preemption may result from action by Congress itself or by action of a federal agency acting within the scope of its authority. *City of New York v. F.C.C., 486 U.S. 57, 63-64, 108 S. Ct. 1637, 1642, 100 L. Ed. 2d 48 (1988); Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. 355, 369, 106 S. Ct. 1890, 1898-99, 90 L. Ed. 2d 369 (1986).* Federal agencies must declare their intent to preempt state law with some specificity. *Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 309 n.12, 108 S. Ct. 1145, 1155 n.12, 99 L. Ed. 2d 316 (1988).*

Preemption occurs when there is an outright or actual conflict between federal **[*21]** and state law. *Freightliner Corp. v. Myrick, 514 U.S. 280, 287, 115 S. Ct. 1483, 1487, 131 L. Ed. 2d 385 (1995); Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. at 368, 106 S. Ct. at 1898.* It can also occur by implication when compliance with both federal and state law is impossible or when state law obstructs the accomplishment of Congress's objectives. Boggs v. Boggs, U.S. , , *117 S. Ct. 1754, 1760-61 (1997); CSX Transp. Inc. v. Easterwood, 507 U.S. 658, 663, 113 S. Ct. 1732, 1737, 123 L. Ed. 2d 387 (1993); California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 281, 107 S. Ct. 683, 689, 93 L. Ed. 2d 613 (1987).* Preemption may also arise when Congress's legislation is so pervasive that it leaves no room for state legislative action. *Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516, 112 S. Ct. 2608, 2617, 120 L. Ed. 2d 407 (1992); Louisiana Pub. Serv. Comm'n v. F.C.C., 476 U.S. at 368, 106 S. Ct. at 1898.*

Preemption is basically a question of Congressional intent. Barnett Bank of Marion County, N.A. v. Nelson, U.S. , , *116 S. Ct. 1103, 1107, 134 L. Ed. 237 (1996);* Hawaiian Airlines, **[*22]** *Inc. v. Norris, 512 U.S. 246, 252, 114 S. Ct. 2239, 2243, 129 L. Ed. 2d 203 (1994); R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 140, 107 S. Ct. 499, 506, 93 L. Ed. 2d 449 (1986).* This intent must be reflected in the text and structure of the federal statute. *Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 138, 111 S. Ct. 478, 482, 112 L. Ed. 2d 474 (1990); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95, 103 S. Ct. 2890, 2899, 77 L. Ed. 2d 490 (1983).* The best evidence of preemptive intent is an express preemption clause. *CSX Transp., Inc. v. Easterwood, 507 U.S. at 664, 113 S. Ct. at 1737.* However, in the absence of explicit preemption language, the courts must also examine the structure and purpose of the federal statute for implicit preemptory intent. De Buono v. NYSA-ILA Medical & Clinical Servs. Fund, U.S. , , *117 S. Ct. 1747, 1751 (1997);* Barnett Bank of Marion County, N.A. v. Nelson, U.S. at , 116 S. Ct. at 1108; *FMC Corp. v. Holliday, 498 U.S. 52, 56-57, 111 S. Ct. 403, 407, 112 L. Ed. 2d 356 (1990).*

The courts begin their inquiry with the presumption that Congress did **[*23]** not intend to preempt state law. *Building & Constr. Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island, Inc., 507 U.S. at 224, 113 S. Ct. at 1194.* The proper approach is to reconcile the federal and state laws, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127, 94 S. Ct. 383, 389-90, 38 L. Ed. 2d 348 (1973),* rather than to seek out conflict where none clearly exists. *Exxon Corp. v. Governor of Maryland, 437 U.S. at 130, 98 S. Ct. at 2216.* State law should be displaced by federal law only to the extent there is a conflict. *Dalton v. Little Rock Family Planning Servs., 134 L. Ed. 2d 115, U.S. , , 116 S. Ct. 1063, 1064 (1996).*

B.

AT&T asserts that the case should be remanded to the Authority to consider whether the Telecommunications Act of 1996 preempts state law because the federal Act's interconnection provisions differ from their state law counterparts. However, the mere existence of a federal regulatory program does not imply preemption of similar state laws. *English v. General Electric Co., 496 U.S. 72, 87, 110 S. Ct. 2270, 2279, 110 L. Ed. 2d 65 (1990)*. Thus, AT&T must demonstrate **[*24]** something more if its preemption argument is to succeed.

The goals of the federal Telecommunications Act of 1996 and Tennessee's 1995 telecommunications legislation are similar. n21 Neither the federal Act nor the regulations promulgated by the Federal Communications Commission pursuant to the Act contain explicit preemption provisions. In fact, the Act specifically states that "this Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly provided in such Act or amendments." Telecommunications Act of 1996, § 601(c)(1), *47 U.S.C.A. § 152* note (West Supp. 1997). Congress included this provision to prevent "affected parties from asserting that the bill impliedly preempts other laws." House Conference Report No. 104-458, 104th Cong., 2d Sess., 201, reprinted in 1996 U.S.C.C.A.N. 124, 215. With specific reference to the interconnection issue, the Act also states that it should not be construed to prohibit state commissions from enforcing or promulgating regulations or from imposing additional requirements that "are necessary to further competition in the provision of telephone exchange service **[*25]** or exchange access" as long as they are "not inconsistent" with the Act. See *47 U.S.C.A. § 261*(b), (c) (West Supp. 1997). n22

n21 The Telecommunications Act of 1996 "promotes competition and reduces regulation in order to secure lower prices and higher quality services for American telecommunications consumers and to encourage the rapid development of new telecommunications technologies." House Rpt. No 104-204, 104th Cong., 2d Sess. 47, reprinted in 1996 U.S.C.C.A.N. 10, 11. One of the principal ways it accomplishes its goal is to impose a general duty of interconnection on all telecommunications carriers thereby requiring local telephone companies to offer competitors access to part of their networks. *47 U.S.C.A. § 251* (West Supp. 1997); House Rpt. No. 104-204, 104th Cong., 2d Sess. 48, reprinted in 1996 U.S.C.C.A.N. 10, 11. Tenn. Code Ann. § 65-4-123 states a similar purpose, and Tenn. Code Ann. § 65-4-124(a) (Supp. 1996) imposes a similar duty of interconnection on local telephone companies.

n22 See also *47 U.S.C.A. § 251*(d)(3) (West Supp. 1997) which directs the Federal Communications Commission not to promulgate regulations that prevent state commissions from enforcing local regulations, orders, or policies (1) that establish local telephone companies' access and interconnection obligations, (2) that are "consistent" with the *47 U.S.C.A. § 251*, and (3) that do not substantially prevent the implementation of the requirements of *47 U.S.C.A. § 251* or the Telecommunications Act of 1996.

**[*26]**

The Telecommunications Act of 1996 contains no explicit preemption language and does not contain provisions that are in outright or actual conflict with state law. Accordingly, AT&T's preemption argument can succeed only if it can demonstrate that Congress's regulatory statutes have completely occupied the field, that it is impossible to comply with the requirements of both the federal and state law, or that the state law somehow obstructs the accomplishment of the objectives of the Telecommunications Act of 1996. AT&T has failed on all counts. Nothing in the text or structure of the Act supports its unfocused preemption claims.

Congress plainly did not desire to displace local telecommunications regulation when it enacted the Telecommunications Act of 1996. The Act itself makes it clear that state commissions play a pivotal role in implementing telecommunications policy. They provide a forum for resolving disputes between existing local telephone companies and their competitors seeking access to an existing telephone network. See *47 U.S.C.A. § 252*. By the same token, the text of the Act and Tennessee's telecommunications statutes do not suggest that telephone companies will **[*27]** be unable to comply with the requirements of both or that compliance with the state statutes will somehow obstruct the objectives of the Telecommunications Act of 1996.

AT&T has already invoked the remedies before the Authority made available by *47 U.S.C.A. § 252*. In March 1996, it initiated interconnection negotiations with BellSouth. One month later, it requested BellSouth to provide information concerning BellSouth's costs for providing certain telecommunications services. After BellSouth declined to provide the information on the ground that it was not relevant to the interconnection negotiations, AT&T filed a petition in May 1996 requesting the Authority to resolve the dispute over the issue of access to the requested information. As far

as this record shows, this proceeding remains before the Authority. This type of proceeding, and others like it, provide the parties with an appropriate forum to air out and resolve more clearly defined issues concerning the possible preemptive effect of specific provisions of the Telecommunications Act of 1996 or of the Federal Communications Commission's regulations.

III.

PRICE REGULATION PLANS UNDER TENN. CODE ANN. § 65-5-209

The determinative **[*28]** issues on this appeal involve the Commission's process for considering BellSouth's application for a price regulation plan. BellSouth essentially asserts that the Commission and its staff exceeded the plain mandate of Tenn. Code Ann. § 65-5-209. For its part, AT&T argues that the Commission did not go far enough in fashioning the details of BellSouth's price regulation plan. The resolution of these issues requires us to construe Tenn. Code Ann. § 65-5-209 and other related statutes enacted by the General Assembly in 1995 to foster the development of an efficient, technologically advanced, statewide system of telecommunications in Tennessee.

A.

The search for the meaning of statutory language is a judicial function. *Roseman v. Roseman, 890 S.W.2d 27, 29 (Tenn. 1994); State ex rel. Weldon v. Thomason, 142 Tenn. 527, 540, 221 S.W. 491, 495 (1920).* Courts must ascertain and give the fullest possible effect to the statute without unduly restricting it or expanding it beyond its intended scope. *Perry v. Sentry Ins. Co., 938 S.W.2d 404, 406 (Tenn. 1996); Kultura, Inc. v. Southern Leasing Corp., 923 S.W.2d 536, 539 (Tenn. 1996).* At the same time courts must avoid inquiring **[*29]** into the reasonableness of the statute or substituting their own policy judgments for those of the legislature. *State v. Grosvenor, 149 Tenn. 158, 167, 258 S.W. 140, 142 (1924); State v. Henley, 98 Tenn. 665, 679-81, 41 S.W. 352, 354-55 (1897); Hamblen County Educ. Ass'n v. Hamblen County Bd. of Educ., 892 S.W.2d 428, 432 (Tenn. Ct. App. 1994).*

When approaching statutory text, courts must also presume that the legislature says in a statute what it means and means in a statute what it says there. *Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 253-54, 112 S. Ct. 1146, 1149, 117 L. Ed. 2d 391 (1992); Worley v. Weigel's, Inc., 919 S.W.2d 589, 593 (Tenn. 1996).* Accordingly, we must construe statutes as they are written, *Jackson v. Jackson, 186 Tenn. 337, 342, 210 S.W.2d 332, 334 (1948),* and our search for the meaning of statutory language must always begin with the statute itself. *Neff v. Cherokee Ins. Co., 704 S.W.2d 1, 3 (Tenn. 1986); Pless v. Franks, 202 Tenn. 630, 635, 308 S.W.2d 402, 404 (1957); City of Nashville v. Kizer, 194 Tenn. 357, 364, 250 S.W.2d 562, 564-65 (1952).*

Statutory terms draw their meaning from the context of the entire statute, **[*30]** *Lyons v. Rasar, 872 S.W.2d 895, 897 (Tenn. 1994); Knox County ex rel. Kessel v. Lenoir City, 837 S.W.2d 382, 387 (Tenn. 1992),* and from the statute's general purpose. *City of Lenoir City v. State ex rel. City of Loudon, 571 S.W.2d 297, 299 (Tenn. 1978); Loftin v. Langsdon, 813 S.W.2d 475, 478 (Tenn. Ct. App. 1991).* We give these words their natural and ordinary meaning, *State ex rel. Metropolitan Gov't v. Spicewood Creek Watershed Dist., 848 S.W.2d 60, 62 (Tenn. 1993),* unless the legislature used them in a specialized, technical sense. *Cordis Corp. v. Taylor, 762 S.W.2d 138, 139-40 (Tenn. 1988).*

The legislative process does not always produce precisely drawn laws. When the words of a statute are ambiguous or when it is just not clear what the legislature had in mind, courts may look beyond a statute's text for reliable guides to the statute's meaning. We consider the statute's historical background, the conditions giving rise to the statute, and the circumstances contemporaneous with the statute's enactment. *Still v. First Tenn. Bank, N.A., 900 S.W.2d 282, 284 (Tenn. 1995); Mascari v. Raines, 220 Tenn. 234, 239, 415 S.W.2d 874, 876 (1967); Davis* ***[*31]*** *v. Aluminum Co. of Am., 204 Tenn. 135, 143, 316 S.W.2d 24, 27 (1958).* We also resort to legislative history. *Storey v. Bradford Furniture Co. (In re Storey), 910 S.W.2d 857, 859 (Tenn. 1995); University Computing Co. v. Olsen, 677 S.W.2d 445, 447 (Tenn. 1984); Chapman v. Sullivan County, 608 S.W.2d 580, 582 (Tenn. 1980).* n23

n23 Some courts have even cited a statute's legislative history to buttress their interpretation when a statute is not ambiguous. See, e.g., *Worley v. Weigel's, Inc., 919 S.W.2d at 593; VanArsdall v. State, 919 S.W.2d 626, 632 (Tenn. Crim. App. 1995).*

Courts consult legislative history not to delve into the personal, subjective motives of individual legislators, but rather to ascertain the meaning of the words in the statute. The subjective beliefs of legislators can never substitute for what was, in fact, enacted. There is a distinction between what the legislature intended to say in the law and what various legislators, as individuals, expected or hoped the consequences **[*32]** of the law would be. The answer to the former question is what

courts pursue when they consult legislative history; the latter question is not within the courts' domain.

Relying on legislative history is a step to be taken cautiously. *Piper v. Chris-Craft Indus., Inc., 430 U.S. 1, 26, 97 S. Ct. 926, 941, 51 L. Ed. 2d 124 (1977); North & South Rivers Watershed Ass'n, Inc. v. Town of Scituate, 949 F.2d 552, 556 n.6 (1st Cir. 1991).* Legislative records are not always distinguished for their candor and accuracy, *Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 396, 71 S. Ct. 745, 751, 95 L. Ed. 1035 (1951)* (Jackson, J., concurring), and the more that courts have come to rely on legislative history, the less reliable it has become. Rather than reflecting the issues actually debated by the legislature, legislative history frequently consists of self-serving statements favorable to particular interest groups prepared and included in the legislative record solely to influence the courts' interpretation of the statute. *National Small Shipments Traffic Conf., Inc. v. Civil Aeronautics Bd., 199 U.S. App. D.C. 335, 618 F.2d 819, 828 (D.C. Cir. 1980);* ANTONIN SCALIA, **[*33]** A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 34 (1997); W. David Slawson, Legislative History and the Need to Bring Statutory Interpretation Under the Rule of Law, 44 Stan. L. Rev. 383, 397-98 (1992); Kenneth W. Starr, Observations About the Use of Legislative History, 1987 Duke L. J. 371, 377; Note, Why Learned Hand Would Never Consult Legislative History Today, *105 Harv. L. Rev. 1005, 1018-19 (1992).*

Even the statements of sponsors during legislative debate should be evaluated cautiously. 2A Norman J. Singer, Statutes and Statutory Construction § 48:15 (rev. 5th ed. 1992). These comments cannot alter the plain meaning of a statute., *D. Canale & Co. v. Celauro, 765 S.W.2d 736, 738 (Tenn. 1989); Elliott Crane Serv., Inc. v. H.G. Hill Stores, Inc., 840 S.W.2d 376, 379 (Tenn. Ct. App. 1992),* because to do so would be to open the door to the inadvertent, or perhaps planned, undermining of statutory language. *Regan v. Wald, 468 U.S. 222, 237, 104 S. Ct. 3026, 3035, 82 L. Ed. 2d 171 (1984).* Courts have no authority to adopt interpretations of statutes gleaned solely from legislative history that have no statutory reference points. *Shannon v. United [*34] States, 512 U.S. 573, 583, 114 S. Ct. 2419, 2426, 129 L. Ed. 2d 459 (1994).* Accordingly, when a statute's text and legislative history disagree, the text controls. *Stromberg Metal Works, Inc. v. Press Mechanical, 77 F.3d 928, 931 (7th Cir. 1996).*

B.

THE SCOPE OF A TENN. CODE ANN. § 65-5-209 AUDIT

The pivotal dispute between BellSouth and the Commission involves the scope and purpose of the audit required by Tenn. Code Ann. § 65-5-209. BellSouth, citing the statute, asserts that the audit's sole purpose is to verify the accuracy of its most recent Form PSC-3.01 report. The Commission, citing a portion of the statute's legislative history, responds that the audit is more akin to a traditional earnings investigation and that its audit power under Tenn. Code Ann. § 65-5-209 includes the power to reduce a company's rate of return and to order the company to reduce its rates. We turn first to the statute itself for an answer to this dispute.

1.

The 1995 telecommunications reform legislation requires the Commission to set the initial rates of any incumbent local telephone company that applies for a price regulation plan. Tenn. Code Ann. § 65-5-209(c) requires that these **[*35]** initial rates must be the same as the applicant's existing rates if the rate of return on the company's most recent Form PSC-3.01 report is equal to or less than the company's currently authorized rate of return. The comparison of the company's existing rate of return with its currently authorized rate of return must be preceded by a staff audit of the company's most recent Form PSC-3.01 report conducted in accordance with Tenn. Code Ann. § 65-5-209(j).

Tenn. Code Ann. § 65-5-209(j) states that the purpose of the audit is "to assure that the Tennessee Regulatory Authority 3.01 report accurately reflects . . . the incumbent local exchange telephone company's achieved results." The audit must verify that the company reported its achieved results "in accordance with generally accepted accounting principles as adopted in Part 32 of the Uniform System of Accounts." It must also verify that the company's reported achieved results reflect "the ratemaking adjustments to operating revenues, expenses and rate base used in the authority's most recent order applicable to the incumbent local exchange telephone company."

Since Tenn. Code Ann. § 65-5-209(a) directs the Commission to set an **[*36]** incumbent local telephone company's initial rates "using the procedures established in this section," the statute is the sole source of the Commission's authority to adopt a price regulation plan. It envisions an expeditious, n24 three-phase proceeding. The purpose of the first phase is to verify the accuracy of the information contained in the company's most recent Form PSC-3.01 report. See Tenn. Code Ann. § 65-5-209(j). The purpose of the second phase is to compare the company's reported rate of return with its currently authorized rate of return. See Tenn. Code Ann. § 65-5-209(c). No further proceedings are required if the

company's rate of return based on its audited achieved results in its most recent Form PSC-3.01 report is equal to or less than its currently authorized rate of return. See Tenn. Code Ann. § 65-5-209(c). However, a third phase is required of the company's rate of return exceeds its currently authorized rate of return. The purpose of the third phase is to set the company's initial rates in a traditional, rate-setting proceeding.

n24 Tenn. Code Ann. § 65-5-209(c) envisions that the process will be completed within ninety days after the company files its application for a price regulation plan.

[*37]

Tenn. Code Ann. § 65-5-209 contains no specific language suggesting that the first or second phases of the proceeding have any of the attributes of a traditional rate-setting proceeding. The audit is conducted by the Commission's staff, and the staff has no specific statutory authority to make or recommend reductions in a company's rate of return. The term "audit" does not appear in any other statute or rule in conjunction with the Commission's rate-setting authority. n25

n25 The term "audit" appears only twice in Title 65 of the Tennessee Code Annotated. Other than Tenn. Code Ann. § 65-5-209, it appear in Tenn. Code Ann. § 65-15-201 (Supp. 1996) which relates to "safety management audits" for motor carriers.

The textual analysis of Tenn. Code Ann. § 65-5-209 suggests that neither the Commission nor its staff has the power to adjust any of the figures contained in the applicant's Form PSC-3.01 report as long as these reports are correct, based on required auditing principles, and consistent with [*38] the Commission's previously ordered rate-making adjustments. The Commission, however, argues that the term "audit" can mean more than simply a "methodical examination of records with intent to verify their accuracy." See *National Health Corp. v. Snodgrass, 555 S.W.2d 403, 405 (Tenn. 1977)*. It asserts that an audit under Tenn. Code Ann. § 65-5-209 includes investigating, deciding whether reported achieved results are accurate, and determining the weight to be given these reported results. Citing a staff memorandum that was read into the legislative record, the Commission insists that its Tenn. Code Ann. § 65-5-209 authority to audit includes the authority to determine whether the amounts reported on the Form PSC-3.01 "do not include unusual or abnormal financial occurrences," including "known charges." n26

n26 The staff audit report dated September 15, 1995 explains that

the Staff has followed the statements of the sponsors of the Bills that became the new law by auditing the Company's financial records for the twelve months ended March 31, 1995, to determine if the amounts on the TPSC 3.01 Report:

* are accurately taken from the company's books and records;
* accurately reflect any Commission ordered rate making adjustments;
* do not include unusual or abnormal financial occurrences;
* were calculated following proper accounting rules and procedures for separating the company's interstate and intrastate operations, as well as, its regulated and nonregulated operations;
* accurately reflect allowable charges from affiliated companies.

These points were taken from a memo by Dr. Chris Klein, Director of the Utility Rate Division, and Mike Gaines, Manager of the Telecommunications Section, to PSC Chairman Keith Bissell in response to a letter from Senator Rochelle. This memo, and the transcripts of the "legislative intent" statements read by Senator Rochelle and Representative Purcell on the Senate and House floors, are attached as Appendices B, C, and D to this Report.

[*39]

Tenn. Code Ann. § 65-5-209 does not specifically authorize adjustments for "unusual or abnormal financial occurrences." Nonetheless, because the General Assembly may have meant something different when it used the term "audit," we have reviewed the legislative history of Tenn. Code Ann. § 65-5-209 to determine whether the General Assembly used the term "audit" in its common, ordinary meaning.

2.

The original substance of the telecommunications reform legislation was far different from the substance of the legislation that eventually became law. The original legislation contained no procedure for re-examining an incumbent local telephone company's rates. Instead, it simply provided that the company's "rates, terms and conditions for the services provided on February 1, 1995" were just and reasonable and that these rates would be the company's initial rates. n27 This provision

encountered immediate opposition from the Consumer Advocate and other consumer groups because they believed that it would enable BellSouth to earn between $ 350 and $ 800 million in excess revenues.

n27 Senate Bill No. 891/House Bill No. 695, Section 6.

[*40]

The concern about excess revenues was the focus of the debate on April 11, 1995, when the Senate State and Local Government Committee considered the bill and a proposed amendment containing what would later become Tenn. Code Ann. § 65-5-209. Several committee members expressed concern about using BellSouth's existing rates because the Commission had not reviewed the company's rate of return since 1992. The Consumer Advocate pointed out that the proposed amendment substituted an "audit of . . . [the Form PSC-3.01 report] . . . for an earnings review." Whitfield Burcham, the former director of the Commission's Utility Rate Division who appeared on behalf of the American Association of Retired Persons, echoed the Consumer Advocate's concern about the efficacy of an audit of the Form PSC-3.01 report. He stated that "we believe that if you have an evidentiary hearing, there's a high probability that the evidence will show that the telephone company's prices need to be adjusted." These statements prompted Senator Cohen, the chair of the committee, and Senator Gilbert to suggest that there should be a full rate review before BellSouth's initial rates should be set. A BellSouth representative [*41] responded to this suggestion by stating that "we don't feel that a rate hearing is necessary because we are earning within the authorized range."

The Senate State and Local Government Committee convened on April 18, 1995 to continue its consideration of the bill. The hearing again focused on the advisability of conducting a "full-blown rate hearing" before approaching BellSouth's initial rates. The Commission's General Utility Counsel described an audit of the Form PSC-3.01 report as follows:

in order to audit the 3.01 statement . . . it's not just a matter of adding up math on a single sheet of paper. It's knowing that they [the company] have accurately reported those figures to us. So that we will send our auditors on site, they'll look at all the items as reported on the company's books and correlate that with the statement. And that's what we mean by a full audit . . . When the staff concludes their audit, and they may find some discrepancies or some items that need to be corrected, that'll be re-presented to the Commission for approval in a contested case format . . .

The current Director of the Utility Rate Division also informed the Committee that the Commission's [*42] staff had already commenced an audit of BellSouth and that they intended to proceed with the audit no matter which telecommunications bill passed. He explained that an audit of a Form PSC-3.01 report was an "historical audit" of the company's earnings for the preceding twelve months and that the staff planned to complete its work in September 1995.

Commissioner Steve Hewlett also pointed out to the Committee that "looking at the backup on a 3.01 is significantly different than a full blown audit." Mr. Burcham repeated that the Form PSC-3.01 report, which he designed, "wouldn't give you a representative picture of the future." In addition, he pointed out that he had objected to similar language in the Commission's proposed rule and that he had attempted "to get the Commission to change that language, and we were unsuccessful in doing that; and we think this language here is so restrictive that, really, you're not going to get an earnings investigation." The Consumer Advocate agreed with Mr. Burcham. He pointed out again that the Form PSC 3.01 report "doesn't accurately state what prices should be in the future" and that "the rate review only goes forward if you meet certain tests, [*43] and the test is whether or not the PSC 3.01 is within the range. If it's within the range, the different ranges, then there's no earnings review."

When the Senate State and Local Government Committee considered the bill again on April 25, 1995, Chairman Cohen offered an amendment requiring the continuation of rate hearings for basic telephone services through 1996. Senator Rochelle, the bill's sponsor, opposed this amendment on the ground that "rate of return regulation . . . encourages everybody to be fat; it encourages monopolistic practices, it encourages lack of innovation." After tabling Chairman Cohen's amendment, the Committee approved the bill as amended for passage by a 6 to 3 vote.

The debate over the need for a full-blown rate hearing before permitting incumbent local telephone companies to operate under a price regulation plan continued on the Senate floor on May 11, 1995 when the bill came up for third and final reading. Senator Rochelle offered an amendment to the bill containing what would later become Tenn. Code Ann. § 65-5-209(j) n28 and explained that "there was a concern that they [the incumbent local telephone companies] could cook the books, and what this [*44] does is expressly state that the Commission shall conduct an audit of the audit to

verify that the figures are correct." After the Senate tabled Senator Cohen's motion to invite Mr. Burcham to address them concerning Senator Rochelle's amendment, Senator Rochelle reiterated that the purpose of his amendment was to "[set] out very exactly that the Public Service Commission has the . . . power to do a full blown audit of that audit [the Form PSC-3.01 report] to make sure they've been given correct figures." He also stated categorically that this amendment "doesn't address rate setting. This addresses auditing of an audit."

n28 See Amendment No. 2 to Amendment No. 2, Senate Journal of the Ninety-Ninth General Assembly of the State of Tennessee, First Session, 1157-58 (1995) ("Senate Journal").

Upon hearing Senator Rochelle's explanation of his proposed amendment, other senators, including Senators Cohen, Cooper, and Gilbert pointed out that the amendment would permit the Commission to make sure that the [*45] numbers are correct but not to go behind the numbers. These senators asserted that the Commission should conduct a traditional earnings investigation before approving an incumbent local telephone company's initial rates. Senator Rochelle opposed these suggestions on the ground that the rate hearings demanded by these senators would be a "three-year ordeal." The Senate finally adopted Senator Rochelle's amendment on a voice vote. n29

n29 Senate Journal, at 1159.

The adoption of Senator Rochelle's amendment did not end the matter. The Senate considered and defeated three other amendments that would have replaced the audit of the Form PSC-3.01 report with a more traditional rate proceeding. One amendment would have authorized the Commission to conduct a contested case proceeding "to determine the justness and reasonableness of the existing rates" and to "make appropriate adjustments to arrive at just and reasonable rates." n30 Another amendment was to the same effect. n31 The third amendment would have required [*46] the Commission to "make public the anticipated revenues and profits each provider will make under such plan." n32

n30 Amendment No. 8 was tabled by a vote of 18 to 15. See Senate Journal, at 1160.

n31 Amendment No. 9 failed by a vote of 13 to 16. See Senate Journal, at 1164-65.

n32 Amendment No. 18 failed under Senate Rule 39(3) by a vote of 11 to 19 to 1. See Senate Journal, at 1167.

Senator Rochelle opposed each of these amendments on the ground that they were motivated by the "greed" of BellSouth's competitors who desired to delay the company's ability to compete in a less regulated market. He disagreed with Senator Gilbert's observation that it would make "better sense to have a full evidentiary hearing before we turn those market forces loose." When asked by Senator Gilbert to point out the language in his amendment that permitted the Commission to adjust the rate "if there is a problem with the audit or that things have not been stated as they should have been stated," Senator [*47] Rochelle responded:

We're using the existing rules that have already been adopted by the PSC and that gives them the ability to set the rates. It wouldn't be in the bill. We're using existing practices, rules, and statutes.

In response to Senator Rochelle's explanation, Senator Gilbert then pointed out to his colleagues that

We're passing a statutory scheme that may be interpreted to override every one of those existing rules. Let me tell you why he can't point to any language in subsection (c) that tells you that the PSC will change . . . the rates if they find out through their audit that something's wrong, because there isn't any language in that section that allows them to do that.

Senator Rochelle ended the colloquy by pointing out that the Commission could adjust the rates if it determined that BellSouth's earnings were above the company's authorized rate of return. The Senate thereafter approved the amended version of Senate Bill No. 891 by 24 to 8 to 1 vote and sent the bill to the House of Representatives. n33

n33 Senate Journal, at 1168.

[*48]

The House leadership was not satisfied with the Senate's version of the bill. Accordingly, when Senate Bill 891 came on for third and final reading on May 24, 1995, Representative Purcell, one of the bill's House sponsors, convinced his colleagues to adopt an amendment that added several new provisions to the Senate's version of the bill. This amendment contained the re-

stated version of the telecommunications policy that now appears in Tenn. Code Ann. § 65-4-123, n34 the provision requiring the General Assembly to review the implementation of the Act every two years that now appears in Tenn. Code Ann. § 65-5-211 (Supp. 1996), n35 and the provisions creating a $ 10 million small and minority telecommunications business assistance program that now appear in Tenn. Code Ann. §§ 65-5-212, 213. n36

n34 Amendment No. 17, § 1, 2 House Journal of the Ninety-Ninth General Assembly of the State of Tennessee, First Session, 1847 (1995) ("House Journal").

n35 Amendment No. 17, § 15, House Journal, at 1858.

n36 Amendment No. 17, § 17, House Journal, at 1859-60.

[*49]

The House amendment did not alter the portions of the Senate amendment containing Tenn. Code Ann. § 65-5-209(c) and adding the language that was to become Tenn. Code Ann. § 65-5-209(j). In fact, the differences between an earnings investigation and an audit of a Form PSC-3.01 report that had preoccupied the Senate were never mentioned during the House discussion of the bill. In his closing remarks after the House cut off further debate on the bill, Representative Purcell told his colleagues:

I need to, at this point, with your indulgence, read three brief statements into the record for legislative intent purposes as this bill leaves this House and goes to the Senate. The first was requested by the AARP. The audit provisions in this bill were requested by the AARP, and it was their hope that we would, as a matter of legislative intent, make it clear what we mean. And so, let me say on the subject of Section 13, legislative intent is that this bill establishes a process by which consumers are assured affordable rates. To achieve this, the bill provides that the rates of incumbent local exchange companies will be based on an audit of the company's actual achieved results [*50] and not on a speculative forecast.

An audit consistent with the provisions of this bill is currently being performed by the TPSC staff by their compliance unit of SCB's TPC 3.01 form. As stated by Dr. Chris Klein, Director of the PSC's Utility Rate Division, in a letter sent earlier this year, n37 the TPSC 3.01 form is a monthly report showing monthly, year-to-date, and twelve month-to-date financial information including rate of return, adjusted to reflect the Commission's prior rate-making decision. The compliance audit verifies that the amounts shown on the TPSC 3.01, (1) are actually taken from the company's books and records; (2) accurately reflect any Commission order of rate making adjustments; (3) do not include unusual or abnormal financial occurrences; (4) were calculated following proper accounting rules and procedures for separating the company's interstate and intrastate operations, as well as its regulated and non-regulated operations; and finally, accurately reflect allowable charges from affiliated companies.

Section 13 makes clear that this TPSC 3.01 compliance audit of actual achieved results and without speculative forecasts will be completed, and affordable rates [*51] will be set pursuant to Section 10 (c) and (j) of this bill. n38

See House Journal, at 1865. The House then passed Senate Bill No. 891 by an 89 to 8 vote. n39

n37 Representative Purcell is referring to an April 13, 1995 memorandum from Chris Klein and Mike Gaines to Chairman Keith Bissell. The memorandum describes the intended scope of the compliance audit that had already been initiated by the Commission in March 1995. The Commission's staff later cited this memorandum as authority for the scope of the audit of BellSouth's most recent Form PSC-3.01 report on which its September 15, 1995 report was based.

n38 Representative Purcell's description of the scope of the compliance audit was drawn completely from the April memorandum written by Messrs. Klein and Gaines. The version of his remarks appearing in the House Journal contains minor, non-substantive differences with his actual remarks on the House floor. See House Journal, at 1865.

n39 See House Journal, at 1864. The House Journal infers that Representative Purcell's remarks followed the final vote on the bill; however, the tapes of the legislative debates show to the contrary.

[*52]

The bill containing the House amendments was returned to the Senate and was called up for consideration on May 25, 1995. On this occasion, Senator Rochelle read the same statement that Representative Purcell had read the previous day. When asked to explain how the amended bill would assure affordable telephone service, Senator Rochelle replied

we have read . . . for legislative intent purposes, the

language requested that helped everybody understand that the authority of the Consumer Advocate and the authority of the PSC and such as that remains in place and is there to . . . help insure that all reports, audits and such as that are based on actual figures, not speculative forecasts and such as that. So I would refer you to the statement of legislative intent, and to the language that's previously been in the bill, plus the language in Amendment No. 2 to 2.

When asked how the House's version of the bill differed from the Senate's version, Senator Rochelle explained that the principal change was the creation of the fund for small and minority businesses and that "there are language changes, of course, but they were changes that were worked out with the AARP, they were **[*53]** after consultation with the AARP, Mr. Burcham, and these other folks." The Senate proceeded to concur in the House amendments by a 23 to 10 vote. n40 Both Senator Rochelle and Senator Gilbert, who had voted against the bill and the House amendments, requested that Senator Rochelle's statements concerning the scope of the audit of the Form PSC-3.01 report be included verbatim in the Senate Journal. n41

n40 See Senate Journal, at 1631.

n41 See Senate Journal, at 1631-32.

3.

The legislative history of Tenn. Code Ann. § 65-5-209 reveals several significant milestones in the formulation of this statute. The original version of the bill contained no procedure of any sort for reviewing incumbent local telephone companies' rates. The bill's critics objected to this omission because they believed that it would enable the telephone companies to earn excessive profits and argued that the Commission should hold one last "full blown" traditional earnings investigation before the competitive market forces **[*54]** were turned loose. The bill's proponents opposed this suggestion and proposed instead that the Commission audit the telephone companies' most recent Form PSC-3.01 report. Their adversaries asserted that this proposal did not go far enough because auditing the Form PSC-3.01 report would not provide a representative picture of the companies' future earnings. The only concession that the bill's proponents were willing to make was to specifically empower the Commission to satisfy itself that the information on the Form PSC-3.01 report was accurate. The opponents tried repeatedly to convince their legislative colleagues to require one last traditional rate-setting proceeding. When they were rebuffed three times, they abandoned their efforts to amend the bill and resorted to the tactic of including a statement in the legislative record containing an interpretation of the legislation similar to the position that their colleagues had repeatedly declined to adopt.

The statements concerning the scope of the audit read into the record by Senator Rochelle and Representative Purcell are inconsistent with the language of Tenn. Code Ann. § 65-5-209. By its own terms, this statute, not the Commission's **[*55]** other statutes and regulations, governs the manner in which the Commission must consider and act upon applications for price regulation plans. The Commission's powers under Tenn. Code Ann. § 65-5-209 are more limited than its powers in the context of a traditional earnings investigation, as long as the company's rate of return on its Form PSC-3.01 report is less than its currently authorized rate of return.

The Commission, like any other administrative agency, must conform its actions to its enabling legislation. Tennessee *Pub. Serv. Comm'n v. Southern Ry., 554 S.W.2d 612, 613 (Tenn. 1977); Pharr v. Nashville, C. & St. L. Ry., 186 Tenn. 154, 161, 208 S.W.2d 1013, 1016 (1948).* It has no authority or power except that found in the statutes. Tennessee-*Carolina Transp., Inc. v. Pentecost, 206 Tenn. 551, 556, 334 S.W.2d 950, 953 (1960).* While its statutes are remedial and should be interpreted liberally, see Tenn. Code Ann. § 65-4-106 (Supp. 1996), they should not be construed so broadly as to permit the Commission to exercise authority not specifically granted by law. *Pharr v. Nashville, C. & St. L. Ry., 186 Tenn. at 161, 208 S.W.2d at 1016.*

Both the language **[*56]** of Tenn. Code Ann. § 65-5-209 and its legislative history confirm that the General Assembly established a three-phase process for considering applications for a price regulation plan. The first and second phases involve verifying the accuracy of the information in the applicant's Form PSC-3.01 report and comparing the applicant's reported rate of return with its currently authorized rate of return. During these phases, the Commission and its staff are empowered to audit the applicant's most recent Form PSC-3.01 report for three purposes: (1) to verify that the information on the report accurately reflects the information in the applicant's books and records, (2) to verify that the report was prepared consistently with generally accepted accounting principles, and (3) to verify that the applicant's calculations reflected the Commission's previously issued orders. The Commission's authority to adjust the figures on the Form PSC-3.01 report is limited to correcting errors with regard to these three categories. The Commission may only adjust an applicant's rate of return after it determines that the rate of return reported

on the applicant's most recent Form PSC-3.01 report exceeds the [*57] applicant's currently authorized rate of return.

The Commission exceeded its authority under Tenn. Code Ann. § 65-5-209(c) & (j) by adjusting the figures in BellSouth's Form PSC-3.01 report to compensate for out of period items, abnormal or unusual expenses, and known charges. It had already concurred with its staff's conclusion that the rate of return on BellSouth's corrected Form PSC-3.01 report was 10.30%. Since this rate of return did not exceed BellSouth's currently authorized rate of return of between 10.65 and 11.85%, the Commission should have found that BellSouth's existing rates were affordable under Tenn. Code Ann. § 65-5-209(a) and should have approved BellSouth's application for a price regulation plan based on BellSouth's rates existing on June 6, 1995 as required by Tenn. Code Ann. § 65-5-209(c).

C.

BELLSOUTH'S RIGHT TO A CONTESTED CASE HEARING

BellSouth also asserts that the Commission should have granted its request for a contested case hearing to challenge the legal and factual basis for the adjustments to BellSouth's Form PSC-3.01 report. The Commission responds that BellSouth is not entitled to a contested case hearing because the first two phases of a [*58] Tenn. Code Ann. § 65-5-209 proceeding are essentially an audit, and an audit is not a contested case. The Commission overlooks two significant points. First, BellSouth desired to challenge the Commission's interpretation and use of its staffs audit. Second, the Commission's use of the audit affected BellSouth's legal rights and privileges.

The Commission relies on *National Health Corp. v. Snodgrass, 555 S.W.2d 403 (Tenn. 1977)* to support its argument; however, this case is significantly different from the one before us. In National Health Corp., the state comptroller audited several related intermediate care facilities to determine whether their charges were consistent with federal and state law. After the auditors concluded that the company had overcharged the State, the Department of Public Health informed National Health Corp. that it intended to withhold a portion of its next regularly scheduled payment to offset the overcharge. Instead of proceeding against the Department of Public Health, National Health Corp. sought judicial review of the comptroller's audit under the Uniform Administrative Procedures Act.

The Chancery Court for Davidson County dismissed National [*59] Health Corp.'s petition for review under Tenn. Code Ann. § 4-5-322 (Supp. 1996) based on its conclusion that the comptroller's audit reports were not contested cases, and the Tennessee Supreme Court affirmed the decision. The court concluded that the audit was not a contested case because an audit

in and of itself, does not determine any legal rights, duties or privileges of any party to the audit. It is merely a report of factual material, with recommendations of the auditor. If some action is taken or decision is made by a state official based on the audit report, the decision made or action taken may constitute a "contested case," but not the audit or the report based on the audit, which at most would be only "evidence" to support the decision or action taken.

*National Health Corp. v. Snodgrass, 555 S.W.2d at 405-06.*

BellSouth has the right to have its application for a price regulation plan considered in accordance with Tenn. Code Ann. § 65-5-209. It also has the right to base its initial rates on its existing rates if its earned rate of return does not exceed its currently authorized rate of return. The Commission's decision to trigger a rate-setting proceeding [*60] by adjusting the figures on BellSouth's Form PSC-3.01 report affected BellSouth's rights. While the Commission permitted BellSouth to present legal arguments concerning its authority to adjust its Form PSC-3.01 report, it did not provide BellSouth with an opportunity to prove that the staff's findings or conclusions with regard to the "out-of-period adjustments," "abnormal or unusual expenses," and "known charges" were factually incorrect. Given the interests at stake, the Commission should have permitted BellSouth to prove that the suggested adjustments were incorrect or not supported by the facts.

IV.

REVIEW OF ALL BELLSOUTH'S RATES AND TARIFFS

AT&T also argues that the Commission did not complete its task because it failed to review each of BellSouth's rates and tariffs to determine whether they were affordable and non-discriminatory. n42 We need not address this issue in light of our holding that the Commission should have approved BellSouth's application for a price regulation plan based on the rates in existence on June 6, 1995. Since the Commission had already determined that these rates and tariffs were just and reasonable and nondiscriminatory, it is not required to make [*61] this determination again absent some specific reason to do so.

n42 AT&T made a similar argument with regard to the Commission's approval of the price regulation plan for United Telephone Southeast, Inc. This court did not reach the substance of this argument because a majority of the panel that heard the case concluded that the court lacked jurisdiction over the appeal. AT&T Communications of the South Central States, Inc. v. Greer, App. No. 01*A01-9512-BC-00556, 1996 WL 697945, at 7* (Tenn. Ct. App. Dec. 6, 1996) (No Tenn. R. App. P. 11 application filed).

V.

In summary, we vacate the Commission's January 23, 1996 order and all related earlier orders with regard to BellSouth's application for a price regulation plan. Since the Commission has adopted its staff's conclusion that BellSouth's rate of return reported on its Form PSC-3.01 report for the twelve months ending March 31, 1995 is less than its current authorized rate of return, we remand the case to the Tennessee Regulatory Authority with directions **[*62]** to approve BellSouth's application for a price regulation plan. In light of our conclusion that the Commission did not have the authority to adjust the actual results on BellSouth's Form PSC-3.01 report, we need not consider the remaining issues raised by BellSouth and AT&T. These issues and all other issues raised by the parties are accordingly pretermitted.

We tax the costs of this appeal which includes BellSouth Telecommunications, Inc. v. Greer; App. No. 01A01-9601-BC-00008 *and BellSouth Telecommunications Inc. v. Tennessee Pub. Serv. Comm'n, 1997 Tenn. App. LEXIS 668,* App. No. 01A01-9602-BC-00066 to the Tennessee Regulatory Authority. We tax the costs of the appeal in *State ex rel. BellSouth Telecommunications, Inc. v. Bissell, 1997 Tenn. App. LEXIS 668,* App. No. 01A01-9601-CH-00016 to BellSouth Telecommunications, Inc. and its surety for which execution, if necessary, may issue.

WILLIAM C. KOCH, JR., JUDGE

CONCUR:

SAMUEL L. LEWIS, JUDGE

BEN H. CANTRELL, JUDGE

LEVEL 1 - 2 OF 2 CASES

BELLSOUTH TELECOMMUNICATIONS, INC. d/b/a SOUTH CENTRAL BELL TELEPHONE COMPANY, Petitioner/Appellant, v. KEITH BISSELL, CHAIRMAN; STEVE HEWLETT, COMMISSIONER; SARA KYLE, COMMISSIONER; Constituting the Tennessee Public Service Commission, Respondents/Appellees.

Consolidated Appeal No. 01A01-9504-BC-00165

COURT OF APPEALS OF TENNESSEE, MIDDLE SECTION, AT NASHVILLE

1996 Tenn. App. LEXIS 537

August 28, 1996, FILED

SUBSEQUENT HISTORY: [*1] As Corrected September 19, 1996.

PRIOR HISTORY: APPEAL FROM THE TENNESSEE PUBLIC SERVICE COMMISSION AT NASHVILLE, TENNESSEE. Tennessee Public Service Commission Docket Numbers: 94-02610, 94-04482, 94-04483, 94-04485, 95-01137, 95-01139, 95-01140, 95-01141, 95-01142, 95-02207, 95-02208, 95-02639, 95-02640, 95-02641.

DISPOSITION: AFFIRMED AND REMANDED

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JUDGES: SAMUEL L. LEWIS, JUDGE, CONCUR: BEN H. CANTRELL, JUDGE, WILLIAM C. KOCH, Jr., JUDGE

OPINIONBY: SAMUEL L. LEWIS

OPINION: OPINION

Introduction

This appeal involves the judicial review of five Tennessee Public Service Commission orders. The orders approved tariffs filed by AT&T [*2] Communications of the South Central States, Inc., Sprint Communications Company, L.P., and MCI Telecommunications Corporation. BellSouth Telecommunications Inc., d/b/a South Central Bell, has appealed directly to this Court pursuant to Tenn.R.App.P. 12. They assert that the Tennessee Public Service Commission (Commission or PSC) should have denied the tariffs, as they violated the Commission's prior orders and policies. Additionally, BellSouth contends that the tariffs at issue in this proceeding violate the Tennessee Telecommunications Reform Act of 1995.

We have decided that the PSC did not act arbitrarily or abuse its discretion in approving the tariffs. Also, we decline to decide whether the tariffs violate the Tennessee Telecommunications Reform Act of 1995. The Commission did not render a decision with respect to its interpretation of the Tennessee Act. Accordingly,

we affirm the Commission's decision.

Procedural History

This case began on September 8, 1994, the date AT&T filed Tariff No. 94-200 n1 in the offices of the Tennessee Public Service Commission. From that date to June 8, 1995, AT&T filed thirteen additional tariffs n2, MCI filed three tariffs n3, and Sprint filed [*3] two tariffs. n4 After each of these companies filed their respective tariffs, petitioner/appellant, BellSouth Telecommunications, Inc. ("BellSouth"), filed petitions for leave to intervene, to suspend the tariffs, and to set hearings.

n1 A tariff is the schedule of prices and regulations for a particular service which is filed with the Commission and serves as the official published list of charges, terms and conditions governing the provision of the service or facility. Tariffs functions in lieu of a contract between an end user and a service provider.

n2 The numbers of the AT&T tariffs are 94-200, 94-277, 94-289, 94-292, 94-293, 94-280, 94-284, 95-014, 95-016, 95-103, 95-094, 95-127, 95-139, and 95-140.

n3 The numbers of the MCI tariffs are 94-247, 95-003, and 95-009.

n4 The numbers of the Sprint tariffs are 94-269 and 95-008.

As to the first six tariffs filed, including five AT&T tariffs and one MCI tariff, the Commission granted BellSouth's petitions to intervene, suspended the tariffs, and [*4] consolidated the petitions into docket number 94-02610. On February 22, 1995, the Commission heard oral arguments concerning the six petitions. In its final order, dated March 24, 1994, the Commission held "that the promotions and tariffs involved here are consistent with previous orders and rulings of this Commission and should be approved."

On April 24, 1995, BellSouth filed a petition to review pursuant to Rule 12 of the Tennessee Rules of Appellate Procedure. The petition asked that this court review the March 24, 1995 order as it applied to all six of the tariffs ("Appeal One"). Later, AT&T and MCI filed a joint notice of appearance pursuant to Rule 12(e) of the Tennessee Rules of Appellate Procedure. Sprint, pursuant to Rule 21(b) of the Tennessee Rules of Appellate Procedure, filed a Notice of Appearance, and requested that this Court allow it to adopt the briefs of intervenors AT&T and MCI. We granted the motion.

The next set of tariffs at issue includes two AT&T tariffs and one Sprint tariff. Again, BellSouth responded to the filings of the tariffs with petitions to intervene, to set hearings, and to suspend. Although the Commission failed to consolidate these petitions, [*5] it did treat them similarly. It granted BellSouth's petitions to intervene, but denied BellSouth's requests to suspend the tariffs. On May 12, 1995, the Commission filed its final order as to all three tariffs and stated as follows: "These tariffs were not in violation of the Commission's policy on intraLATA competition as established in prior Commission Orders and should be allowed to remain in effect." BellSouth appealed this decision on July 7, 1995, by filing a petition to review pursuant to Rule 12 ("Appeal Two").

The third group of tariffs includes two AT&T tariffs, two MCI tariffs, and one Sprint tariff. For all practical purposes, the history of this group is the same as that of the second group. BellSouth filed petitions as to each tariff. The Commission then granted the petitions to intervene, but denied BellSouth's requests that the Commission suspend the tariffs. The Commission held a hearing and entered a final order on May 12, 1995. The Commission concluded "that these tariffs were not in violation of any prior Commission Order and should be allowed to remain in effect." In response to the Commission's order, BellSouth filed a petition to review pursuant to Rule 12 ("Appeal [*6] Three").

The fourth group of tariffs includes two tariffs filed by AT&T. After the filings, BellSouth filed two petitions to "suspend the tariff filing, convene a contested case, and allow leave to intervene." In separate orders, the Commission allowed BellSouth to intervene in both proceedings and denied both of BellSouth's requests to suspend the tariffs. Later, the Commission considered the tariffs at its conference and concluded "that the[] tariffs were not in violation of the Commission's policy on intraLATA competition as established in prior Commission Orders and should be allowed to remain in effect." Following the decision in these cases, BellSouth filed a petition to review pursuant to Rule 12 on September 8, 1995 ("Appeal Four").

The final group of tariffs also involves only AT&T. On May 22, 1995, AT&T filed one tariff, and on June 8, 1995, AT&T filed two additional tariffs. In June 1995, BellSouth filed three petitions to "suspend [the] tariff filing, convene a contested case, and allow leave to intervene." Unlike the other cases, here the Commission denied BellSouth's petitions to intervene and its requests to suspend the tariffs. The Commission found: "Bell's filings [*7] fail to allege any new issues or evidence raised by these tariffs other than those previously re-

viewed and decided by the Commission." Once again, BellSouth filed a petition to review pursuant to Rule 12 on September 25, 1995 ("Appeal Five").

Thus, as of September 25, 1995, BellSouth had five appeals pending in this court. As a result, on September 26, 1995, the Commission, AT&T, and MCI filed a joint motion to consolidate the appeals and a memorandum in support of the motion. This court reserved judgment on the motion until October 25, 1995, when it ordered the appeals consolidated.

As these facts developed, another set of facts relevant to the outcome of this case began to unfold. On June 6, 1995, Governor Don Sundquist signed the Telecommunications Reform Act of 1995 ("the Act") into law. 1995 Tenn. Pub. Acts Ch. 408 § 7. Section seven of the Act amended Tennessee Code Annotated section 65-4-201 by adding subsection (b). This subsection provides as follows:

(b) Except as exempted by provisions of state or federal law, no individual or entity shall offer or provide any individual or group of telecommunications services, or extend its territorial areas of operations without [*8] first obtaining from the commission a certificate of convenience and necessity for such service or territory; provided, that no telecommunications services provider offering and providing a telecommunications service under the authority of the commission on June 6, 1995, is required to obtain additional authority in order to continue to offer and provide such telecommunications services as it offers and provides as of June 6, 1995.

Tenn. Code Ann. § 65-4-201(b) (Supp. 1995).

On July 24, 1995, AT&T filed a petition asking the Commission to amend its existing certificate of convenience and necessity. AT&T wanted the commission to authorize it to "provide interexchange telecommunication services throughout Tennessee regardless of LATA boundaries." An administrative judge held a hearing and issued an initial order on September 22, 1995. In the initial order, the judge denied AT&T's petition to amend its certificate of convenience and necessity, but issued AT&T a new certificate as a "Competing Telecommunications Service Provider." On October 13, 1995, the Commission entered an order ratifying the initial order of the administrative judge. None of the parties in the present [*9] action filed an appeal as to this order before time expired.

At the beginning of oral argument, BellSouth stated that it was voluntarily dismissing the appeal as to the AT&T tariffs. As a result, Appeal Four and Appeal Five are voluntarily dismissed because both contained only AT&T tariffs. Further, AT&T had filed seven of the tariffs in the remaining appeals. Thus, this court is left with three appeals, which we consolidated into one appeal, and a total of five tariffs, three filed by MCI and two filed by Sprint. BellSouth has presented this court with two issues as to each of the tariffs. The issues are as follows:

[I] Whether the tariffs at issue in this proceeding violate the Tennessee Public Service Commission's Orders and its policy on intraLATA competition? [II] Whether the tariffs at issue in this proceeding violate the Telecommunication reform Act of 1995?

Standard of Review

Tenn. Code Ann. § 4-5-322 provides the appropriate standard of review for Tennessee appellate courts reviewing state agency decisions. Subsection (h) of that statute states:

(h) the court may affirm the decision of the agency or remand the case for further proceedings. The [*10] court may reverse or modify the decision if the rights of the petitioner have been prejudiced because of administrative findings, inferences, conclusions or decisions are:

(1) In violation of constitutional or statutory provisions;

(2) In excess of the statutory authority of the agency;

(3) Made upon unlawful procedure

(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or

(5) Unsupported by evidence which is both substantial and material in the light of the entire record.

In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.

BellSouth contends that subsections (1), (4), and (5) provide grounds for reversal.

This Court examines the Commission's adjudicatory decisions using the same standards of review applicable to the decisions of other administrative agencies. *Jackson Mobilphone Co., Inc., v. Tennessee Public Service Com'n, 876 S.W.2d 106, 110 (Tenn.Ct.App. 1993).* Thus, we observe the narrow, [*11] statutorily defined standard contained in Tenn. Code Ann. § 4-5-322(h)(4), and Tenn. Code Ann. § 4-5-322(h)(5),

rather than the broad standard used in other civil appeals. *Wayne County v. Tennessee Solid Waste Disposal Control Bd., 756 S.W.2d 274, 279 (Tenn.Ct.App. 1988);* citing *CF Indus. v. Tennessee Pub. Serv. Comm'n, 599 S.W.2d 536, 540 (Tenn. 1980).*

Additionally, courts defer to the decisions of administrative agencies when they are acting within their area of specialized knowledge, experience, and expertise. Wayne County v. Tennessee Solid Waste Disposal Control Bd., at 279; citing *Southern Ry. v. State Bd. of Equalization, 682 S.W.2d 196, 199 (Tenn.1984); Freels v. Northrup, 678 S.W.2d 55, 57-58 (Tenn. 1984).* We do not review the factual issues de novo, and therefore, do not substitute our judgment for the agency's as to the weight of the evidence. Id. citing *Humana of Tennessee v. Tennessee Health Facilities Comm'n, 551 S.W.2d 664, 667 (Tenn. 1977).* However, we may construe statutes, and apply the law to the facts. *Sanifill of Tennessee v. Tennessee Solid Waste Disposal Control Bd., 907 S.W.2d 807, 811 (Tenn. 1995).*

As to Tenn. Code **[*12]** Ann. § 4-5-322(h)(4)'s "arbitrary and capricious" standard, this court should determine "whether the administrative agency has made a clear error in judgment." Jackson Mobilphone Co., Inc., v. Tennessee Public Service Com'n, at 110-11. An arbitrary decision is one not based on any course of reasoning or exercise of judgment, or one which disregards the facts or circumstances of the case without some basis that would lead a reasonable person to reach the same conclusion. Id.

Tenn. Code Ann. § 4-5-322(h)(5) does not define what amounts to "substantial and material evidence." However, in reviewing an administrative decision with regard to Tenn. Code Ann. § 4-5-322(h)(5), this court should examine the record carefully to determine whether the administrative agency's decision is supported by "such relevant evidence as a rational mind might accept to support a rational conclusion." Jackson Mobilphone Co., Inc., v. Tennessee Public Service Com'n at 111, quoting *Clay County Manor v. State Dep't of Health & Environment, 849 S.W.2d 755, 759 (Tenn. 1993).* In general terms this amounts to something less than a preponderance of the evidence, but more than a scintilla **[*13]** or glimmer. Wayne County v. Tennessee Solid Waste Disposal Control Bd., at 280.

The Development of Long Distance Telephone Regulation in the

United States

Early this century the American Telephone and Telegraph Company (AT&T) developed a long distance telephone network superior to its competitors. Later, AT&T'S long distance dominance extended to local calling when it limited connection of its long distance network to its local service network. Eventually, AT&T monopolized all telephone traffic in the United States. See *GTE Sprint Communications Corp. v. Public Util. Comm'n, 753 P.2d 212, 213 (Colo. 1988).* In 1974 the U.S. Department of Justice, responded to AT&T's hegemony by filing an antitrust claim. This claim, settled in 1982, resulted in the largest judicially supervised divestiture in American history. n5

n5 At the time of the settlement, or "Modified Final Judgment," AT&T was the largest corporation in the world. In 1980 the Bell System's total operating revenues exceeded $ 50 billion which constituted almost two percent of the gross national product of the U.S. that year. *United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 152 (D.D.C. 1982),* aff'd sub nom. *Maryland v. United States, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983).*

**[*14]**

The 1982 court-approved order, also known as the Modified Final Judgment (MFJ), accomplished two things significant to this appeal:

(1) it divested AT&T of its twenty-two subsidiaries, which now operate independently as regulated local monopolies. *United States v. American Tel. & Tel. Co., 552 F. Supp. 131, 226 (D.D.C. 1982),* aff'd sub nom. *Maryland v. United States, 460 U.S. 1001, 75 L. Ed. 2d 472, 103 S. Ct. 1240 (1983);*

(2) it created a new framework of ownership and rate structure by establishing "Regional Bell Operating Companies" (RBOCs), like BellSouth, which were to divide their territories into new geographical classifications known as "local access and transport areas" (LATAs). GTE Sprint Communications Corp. v. Public Communications Corp. v. Public. Util. Comm'n, at 214.

The MFJ allowed the RBOCs to retain a monopoly over local telephone services, but precluded the RBOC's from providing any long distance services. United States v. American Tel. & Tel. Co., at 227-8. Thus, the RBOCs can carry intraLATA traffic (local), but not interLATA traffic (long distance). The MFJ divided the original AT&T territory into 163 LATA's nationally, 5 of which are in Tennessee. **[*15]**

A state's power to regulate extends to all LATAs within its boundaries. *GTE Sprint Communications Corp. v. Public Util. Comm'n, 753 P.2d at 214.* The Tennessee Public Service Commission has regu-

latory authority over the telephone companies of this state. Tennessee *Cable Television Ass'n v. Tennessee Public Service Com'n, 844 S.W.2d 151, 155 (Tenn.App. 1992)*. The Commission exercises co-mingled legislative, executive, and judicial functions. *Id. at 158;* citing *Blue Ridge Transp. Co. v. Pentecost, 208 Tenn. 94, 343 S.W.2d 903, 904 (Tenn. 1961)*. Like other administrative agencies, the PSC must base the exercise of its rulemaking or adjudicatory authority on state law. *Id. at 161*.

At divestiture some state public utility commissions, including Tennessee's, initially barred interexchange carriers, n6 (IXCs) from providing intraLATA services. Nevertheless, technological advances in the 1980's brought new service capabilities to the IXCs. The knowledge of these capabilities prompted the IXCs to approach the PSC and request permission to provide some intraLATA services. On July 27, 1991, the PSC responded to the IXC's request and denied them intraLATA certificates which **[*16]** would have permitted them to compete freely in the intraLATA market. However, in an unprecedented step, the Commission agreed to allow the IXCs to provide some intraLATA communications services in 4 specific instances. These instances were exceptions to the PSC rule prohibiting intraLATA competition. Each exception involved access arrangements for the termination and/or origination of calls in local telephone exchanges. The four exceptions to the Commission's policy prohibiting intraLATA communication include:

(1) intraLATA calls made by customers subscribing to interLATA special access (Megacom-like) services;

(2) calls made over private lines that complete the intraLATA portion of an interLATA private line service;

(3) intraLATA "800" calls which are part of an interLATA offering; and

(4) calls prefixed by 10-XXX, 950-XXXX, or some other type of access code which users dial to reach the subscriber's interLATA carrier.

n6 Interexchange carriers are facilities based providers of intrastate, interLATA telecommunications services. In Tennessee these providers include AT&T, MCI and Sprint.

**[*17]**

In its Order the Commission stated:

Tennesseans may enjoy the benefits of "one-stop shopping" using a single carrier to handle both intra- and interLATA toll calls -- without opening the LATA's to competition and without [the] threatening value of service pricing. . . .

The Commission approves the parties' proposal in this proceeding to "unblock" certain types of intraLATA toll calls. The Commission finds that the reasons for LEC blocking are no longer sufficient to outweigh the benefit of making these IXC services available on a statewide basis.

In a footnote on page 5 of the June 27, 1991 Order the PSC stated:

Since the IXC's applications for intraLATA authority are denied, the carriers' tariff shall continue to describe only interLATA services. The applicants may, however, advertise that the carriers are able to provide statewide service to certain types of customers.

Later in the Order the Commission added:

The Commission approves the parties proposal in this proceeding to "unblock" certain types of intraLATA toll calls. The Commission finds that the reasons for LEC blocking are no longer sufficient to outweigh the benefit of making **[*18]** these IXC services available on a statewide basis.

As previously discussed, the purpose of this Order is not to promote intraLATA competition between the applicants and the LEC's (local exchange carriers like BellSouth) but to give certain IXC customers the convenience of using one carrier for all intrastate and interstate toll calls.

The Commission added a footnote which provides in part:

The Commission has consistently followed a policy of protecting local exchange carriers from IXC competition in the intraLATA toll market.

On appeal, BellSouth seeks review of the Commission's orders of March 24, 1995, and May 12, 1995, approving MCI and Sprint tariffs. BellSouth argues that the tariffs violate the Tennessee Public Service Commission's orders and its policy on intraLATA competition. Specifically BellSouth claims that the tariffs "promote," "describe," and "solicit" the use of interexchange services for calls which are not incidental to interLATA service. Stated differently, BellSouth argues the tariffs approved in 1995 permits the interexchange carriers to impermissibly compete in

the intraLATA services market.

Analysis

I. Whether the tariffs at issue [*19] in this proceeding violate the Commission's prior orders and policy on intraLATA competition.

BellSouth asserts the 1995 PSC ruling contradicts the Commission's 1991 Order and earlier rulings. However, this Court believes that the June 27, 1991 Order is dispositive as to the issues in this appeal. The PSC historically has made its intent to prevent intraLATA competition clear. However, the June 1991 Order created four exceptions which permit interexchange carriers to carry intraLATA calls. As the Commission stated:

The Commission approves the parties proposal in this proceeding to "unblock" certain types of intraLATA toll calls. The Commission finds that the reasons for LEC blocking are no longer sufficient to outweigh the benefit of making these IXC services.

As previously discussed, the purpose of this Order is not to promote intraLATA competition between the applicants and the LEC's (local exchange carriers like BellSouth) but to give certain IXC customers the convenience of using one carrier for all intrastate and interstate toll calls.

MCI and Sprint argue that the tariffs they filed simply represent an application of the permissible intraLATA exceptions created [*20] in 1991. They submit that the tariffs subject to this appeal do not wrongfully promote intraLATA services, but involve interexchange activity consistent with the Commission's current policy.

To properly determine the controversy between the parties we consider each tariff separately.

MCI 94-247

MCI filed Tariff 94-247 on October 28, 1994. The tariff allegedly offers credits to customers of "MCI Metered Use Service Option J" (MCI Vision) if their "incremental intraLATA usage" exceeds $ 100.00. For those customers accessing the service via a "PBX," the tariff offers a credit of up to $ 250.00 if their intraLATA usage exceeds certain amounts.

The text of the tariff states in part:

MCI Vision IntraLATA Usage Promotion

Beginning on November 27, 1994, and ending April 14, 1995, MCI will provide the following promotion to new and existing customers of Metered Use Service Option J (MCI Vision) who enroll in the promotion.

An MCI tariff filed with the PSC describes "MCI Vision" as:

An outbound customized telecommunications service which may include an inbound 800 service option using Business Line, WATS Access Line, or Dedicated Access Line Termination. It provides [*21] a unified service for single or multi-location companies using switched, dedicated, and card origination, and switched and dedicated termination.

MCI claims the tariff only contemplates the completion of intraLATA calls in exception category one (special access), exception category three (800 calls part of an interLATA offering), or exception category four (10-XXX prefixed or other dialing code calling). This Court cannot verify with certainty that a category one or category four exception applies. However, it does appear that MCI tariff 94-247 involves intraLATA "800" calls which are a part of an interLATA offering (category three). Thus, this Court cannot assert that "the administrative agency has made a clear error in judgment." Jackson Mobilphone Co., Inc., v. Tennessee Public Service Com'n, at 110-11. We agree with the Commission that the tariff is "consistent with previous orders and rulings of this Commission and should be approved."

SPRINT 94-269

The Commission's Final Order on this tariff contains the following statement:

The Commission considered these tariffs at its regularly scheduled April 18, 1995 Commission Conference. It was concluded after careful [*22] consideration of the entire docket constituting the record in this matter, the Commission's prior decisions in Docket Nos. 89-11065 and 94-02610, the provisions of all applicable rules and statutes, particularly the provisions of TCA 65-5-203; that these tariffs were not in violation of the Commission's policy on IntraLATA competition as established in prior Commission Orders and should be allowed to remain in effect.

We have reviewed the text of Sprint Tariff 94-269, the PSC's order, and the briefs filed by the parties. Although neither BellSouth nor Sprint has adequately described the rationale for their positions as to this tariff, we cannot affirmatively say that the Commission's "findings, inferences, conclusions or decisions" are so arbitrary as to require reversal. This Court will defer to the decisions of administrative agencies when they are acting within their area of specialized knowledge, experience,

and expertise. *Wayne County v. Tennessee Solid Waste Disposal Control Bd., 756 S.W.2d 274 (Tenn.Ct.App. 1988).* As the Circuit Court of Appeals for the District of Columbia recently stated:

Where, as here the issue is the Commission's interpretation of a tariff, **[*23]** we defer to its reading if it is "reasonable [and] based upon factors within the Commission's expertise."

*American Message Centers v. F.C.C., 311 U.S. App. D.C. 64, 50 F.3rd 35, 39 (D.C. Cir. 1995);* quoting *Diamond Int'l Corp. v. FCC, 201 U.S. App. D.C. 30, 627 F.2d 489, 492 (D.C. Cir. 1980).*

MCI 95-003

This tariff involves a reduction to MCI's per-minute usage rates for its basic long distance service, Dial One/Direct Dial. It also revises the Time of Day chart to reflect accurate times. The tariff for Dial One/Direct Dial, also known as "Option A" describes the service as:

[A] one-way, dial in - dial out multipoint service allowing the customer to originate and terminate calls via MCI-provided local business telephone lines. Subscribers to Dial One/Direct Dial Service may originate calls only from telephones which are served by end offices that have been converted to equal access. Customers served by end offices that have been converted to equal access may originate call by dialing 10222.

Thus, it seems the tariff comports with the limitations imposed by the June 27, 1991 Order. The tariff only describes interLATA services, and users complete intraLATA **[*24]** calls via exception category four (10XXX prefixed or other dialing code calling).

The Commission's May 12, 1995 Order declared that MCI 95-003 "allowed consumers one-stop shopping" for telecommunications services and found no violation of any prior Commission Order.

This Court affirms the Commission's decision to uphold MCI Tariff 95-003, since the services contemplated fall squarely within an exception category. Thus, we do not consider the Commission to have been "arbitrary and capricious" in arriving at their conclusions as to this tariff.

MCI 95-009

MCI 95-009 involves the introduction of a service plan known as "Friends & Family Option B" and the introduction of a new Personal 800 option, "Personal 800 Plan R." Personal 800 Plan R describes the service as:

Personal 800 Plan R provides a telephone number at which calls may be received from any location within the state of Tennessee for a monthly subscription fee and one-time installation fee as identified in MCI'S F.C.C. Tariff No.1. MCI will provide to the customer and 800 telephone number, a 4-digit Security Code, and a 6 digit Rerouting Code which will allow the customer to use the "Follow-Me" Routing feature. The **[*25]** customer will be charged the per minute usage rates as described in MCI's F.C.C. Tariff No. 1.

This service plan comports with the 1991 Commission Order as it involves the use of "800" calls as a part of an interLATA offering (Category 3). The tariff for Friends and Family Option B is a variant of Option A or "Dial One/Direct Dial." The tariff for Option A describes the service as:

[A] one-way, dial in-dial out multipoint service allowing the customer to originate and terminate calls via MCI-provided local business telephone lines. Subscribers to Dial One/Direct Dial Service may originate calls only from telephones which are served by end offices that have been converted to equal access. Customers who prescribe to MCI may originate calls by dialing 1. All customers served by end offices that have been converted to equal access may originate calls by dialing 10222.

This plan uses exception category four of the 1991 PSC order (10XXX prefixed or other dialing code calling). Thus, MCI Tariff 95-009 complies with current Commission orders. We find that the approval of this tariff by the Commission was not "arbitrary and capricious" pursuant to Tenn. Code Ann. § 4-5-322(h)(4). **[*26]**

SPRINT 95-008

The Commission considered this tariff in a docket with MCI 95-003 and MCI 95-009. The Commission, as it had done in every tariff except MCI 94-247, refused to suspend the tariff as BellSouth had requested, finding "no basis on which to suspend the tariff." After reviewing Sprint Tariff 95-008 we too find no provision which violates the Commission's 1991 Order governing intraLATA competition. Thus, we affirm the Commission's conclusion as to this tariff.

We believe that BellSouth has not demonstrated that the MCI and Sprint tariffs were so inconsistent as to warrant this Court's finding the 1995 Commission Orders arbitrary and capricious. Additionally, we agree with MCI's position that the determinative issue in these cases was whether or not the tariff filings were consistent with

the 1991 Commission Order. As this determination involves a review of the Commission's orders, the issues in this case were legal in nature. Thus, we need not decide whether "substantial and material evidence" supports the Commission's decision as required by Tenn. Code Ann. § 4-5-322(h)(5).

II. Whether the Tariffs violate the 1995 Tennessee Telecommunications Act?

As previously [*27] discussed, the Telecommunications Reform Act of 1995 ("the Act") amended Tennessee Code Annotated section 65-4-201 by adding the following subsection:

(b) Except as exempted by provisions of state or federal law, no individual or entity shall offer or provide any individual or group of telecommunications services, or extend its territorial areas of operations without first obtaining from the commission a certificate of convenience and necessity for such service or territory; provided, that no telecommunications services provider offering and providing a telecommunications service under the authority of the commission on June 6, 1995, is required to obtain additional authority in order to continue to offer and provide such telecommunications services as it offers and provides as of June 6, 1995.

Relying on this amendment, BellSouth argued that MCI and Sprint lacked the authority to offer the services proposed in their tariffs because they failed to obtain the necessary certificates of public convenience. Despite its arguments, BellSouth must fail as to this issue because it is not properly before this court.

Tennessee Code Annotated section § 4-5-322 defines this court's [*28] scope of review. Pursuant to that section, "[a] person who is aggrieved by a final decision in a contested case is entitled to judicial review . . . ." Tenn. Code Ann. § 4-5-322(a)(1) (1991) (emphasis added). Upon review, this court "may affirm the decision of the agency or remand the case for further proceedings." Id. § 4-5-322(h) (emphasis added). When appealing a decision of the Public Service Commission, an aggrieved person shall file their petition for review in this court. Id. § 4-5-322(b)(1). Thereafter, this court must confine its review to the record and decide the issues without a jury. Id. § 4-5-322(g). This limited standard of review prohibits this court from reviewing an issue which the Commission did not decide.

In this case, the Commission did not decide if the tariffs violated the Act. BellSouth never raised the issue before the Commission. The Commission never addressed the issue in any of its orders relating to the five tariffs, and the record does not contain any evidence as to the issue. The only issue decided by the Commission was whether their approval of the tariffs was consistent with their Order from 1991. It is only on appeal [*29] to this court, that BellSouth raises the issue of a violation of the Act. Because there was neither a decision nor a record for this court to review, this court lacks the authority to address the issue on appeal. Moreover, it is not the role of this court to delve into the complicated issues facing administrative agencies unless called on to do so. This court is to give deference to the decisions of an administrative agency which has acted within its area of specialized knowledge. *Wayne County v. Tennessee Solid Waste Disposal Control Bd., 756 S.W.2d 274, 279 (Tenn. App. 1988)*. We are not to substitute our judgment for that of the agency on highly technical matters. *Id. at 280.*

The Federal Telecommunications Act of 1996

On February 16, 1996, the U.S. Congress passed the Telecommunications Act of 1996. This Act does not provide for the wholesale preemption of state regulation of telecommunications services. Instead, the Act permits states to retain authority if the state regulation is consistent with it. In examining the provisions of the Federal Telecommunications Act of 1996, we find nothing which would alter our decision in this appeal. We believe the Commission's Orders [*30] governing the services of MCI and Sprint to be consistent with the 1996 Federal Act. n7

n7 The Court considered the following provisions of the 1996 Federal Telecommunications Act:

The caption of the Act:

An Act to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.

Section 253:

(a) IN GENERAL - No state or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect or prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

(b) STATE REGULATORY AUTHORITY - Nothing in this section shall affect the ability of a state to

impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

(c) STATE AND LOCAL GOVERNMENT AUTHORITY - Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

(d) PREEMPTION - If, after notice and an opportunity for public comment, the Commission determines that a State or local government permitted or imposed any statute, regulation, or legal requirement that violate subsection (a) or (b), the Commission shall preempt the enforcement of such statute, regulation, or legal requirement to the extent necessary to correct such violation or inconsistency.

Section 261 (b):

EXISTING STATE REGULATIONS - Nothing in this part shall be construed to prohibit any State Commission from enforcing regulations prescribed prior to the date of enactment of the Telecommunications of 1996 in fulfilling the requirements of this part, to the extent that such regulations are not inconsistent with the provision of this part.

Section 261(c):

Nothing in this part precludes a State from imposing requirements on a telecommunications carrier for intrastate services that are necessary to further competition in the provision of telephone exchange service or exchange access, as long as the State's requirements are not inconsistent with this part or the Commission's regulations to implement this part.

[*31]

For the foregoing reasons we affirm the judgment of the Tennessee Public Service Commission. We tax costs on appeal to the Appellants, BellSouth.

SAMUEL L. LEWIS, JUDGE

CONCUR:

BEN H. CANTRELL, JUDGE

WILLIAM C. KOCH, Jr., JUDGE

SWIDLER & BERLIN
CHARTERED

October 13, 1997

**VIA OVERNIGHT MAIL**

Mr. Mike Hicks, Director
TDS Telecom
P.O. Box 22995
Knoxville, TN 37933-0995

Re: Request that TDS Telecom (Tennessee) Engage in Interconnection Negotiations With Hyperion Telecommunications of Tennessee, L.P. Pursuant to Section 251(c)(1) of the Telecommunications Act of 1996.

Dear Mr. Hicks:

This letter is to formally inform you that AVR, L.P. d/b/a Hyperion Telecommunications of Tennessee, L.P. ("Hyperion") intends to initiate negotiations with TDS Telecom to establish a comprehensive interconnection agreement between the parties in the state of Tennessee, addressing the areas of interconnection, access to unbundled elements, resale of telecommunications services, and transport and termination of traffic. In accordance with the provisions of the Telecommunications Act of 1996 ("the 1996 Act"), Hyperion hereby invokes its right to formally commence good faith negotiations with TDS Telecom to fulfill the interconnection duties described in paragraphs (1) through (5) of Section 251(b) and paragraphs (2) through (6) of Section 251(c) of the 1996 Act.

In order to move the negotiating process along, given that Section 252(b) allots only 135 days for voluntary negotiations, Hyperion requests that TDS Telecom respond to this letter, in writing, within the next week. Please forward us a copy of any completed interconnection agreements affecting TDS Telecom in Tennessee, as well as any arbitration decisions that will impact these negotiations. Please also confirm whether TDS Telecom is prepared to offer Hyperion the same rates and terms found in any other TDS Telecom interconnection agreement with another party.

In order to facilitate future discussions between Hyperion and TDS Telecom, we request that, at a minimum, topics of negotiation should include:

3000 K Street, N.W. ▪ Suite 300
Washington, D.C. 20007-5116
(202)424-7500 ▪ Telex 701131 ▪ Facsimile (202)424-7645

1. Interconnection Arrangements (Sections 251(c)(2), 271(c)(2)(B)(i), and 251(c)(6))

Hyperion and TDS Telecom should arrive at efficient and mutually agreeable interconnection arrangements that include non-discriminatory, real-time access to databases, at cost-based rates pursuant to Section 252(d)(1), and associated signaling necessary for call routing and completion.

TDS Telecom should also provide Hyperion with physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, to the extent that space is available at such locations.

2. Meet-Point Billing Arrangements (Sections 251(c)(2)(D) and 271(c)(2)(B)(i))

Hyperion would like to establish meet-point billing arrangements with TDS Telecom so that it may timely offer a common transport option to parties purchasing originating and terminating switched access services from Hyperion's end office switches used to provide local exchange services.

3. Reciprocal Compensation (Sections 251(b)(5) and 271(c)(2)(B)(xiii))

Hyperion and TDS Telecom should base compensation for traffic exchanged between their networks so as to afford the mutual recovery of costs, as contemplated by Section 252(d)(2)(B)(i) of the 1996 Act.

TDS Telecom should also route traffic to and from Hyperion through its tandem network, at cost-based rates, in order to facilitate efficient interconnection among all service providers.

4. Access to Ancillary Platforms (Sections 271(c)(2)(B)(vii)-(viii))

Hyperion seeks access to all ancillary platform arrangements such as 911/E911, Directory Assistance, Directory Listings and Directory Distribution, Transfer of Service Announcement, Coordinated Repair Calls, and Busy Line Verification and Interrupt. TDS Telecom should provide access to these platforms on non-discriminatory and cost-based terms pursuant to the pricing standards established in Section 252(d)(1).

5. Unbundled Loops (Sections 251(c)(2),(3) and 271(c)(2)(B)(ii),(iv))

TDS Telecom should supply unbundled loops to Hyperion at cost-based rates as required by Section 252(d)(1). Loops should be priced at a fixed, monthly recurring, per-loop rate that is imputable to standard bundled local exchange access line rates.

6. Number Portability (Sections 251(b)(2) and 271(c)(2)(B)(xi))

Until permanent number portability arrangements are available under Section 251(b)(2), Hyperion and TDS Telecom should provide interim number portability ("INP") to each other on a competitively neutral basis, in accordance with the FCC's July, 1996 Number Portability Order. On all calls utilizing INP, the final, terminating carrier should be compensated by the carrier providing the INP arrangement, as if the call had been directly-dialed to the telephone number to which the call had been forwarded. Costs to implement permanent number portability should be spread among all telecommunications carriers, on a competitively neutral basis, pursuant to Section 251(e)(2). For all ported calls from IXCs, in accordance with the FCC's Number Portability Order, TDS Telecom should forward to Hyperion all access charges for functions performed by Hyperion, including the CCL, local switching, the RIC charge, and a portion of the transport charges.

7. Access to Rights-of-Way (Sections 251(b)(4) and 271(c)(2)(B)(iii))

TDS Telecom should afford Hyperion access to its poles, ducts, conduits, and rights-of-way as needed by Hyperion to provide local exchange services.

8. Resale of Local Services (Sections 251(c)(4) and 271(c)(2)(B)(xiv))

TDS Telecom should offer to Hyperion for resale, at wholesale rates as defined in Section 252(d)(3), any telecommunications services currently provided at retail to subscribers who are not telecommunications carriers.

9. Numbering Administration (Sections 251(b)(3) and 271(c)(2)(B)(ix))

Until the FCC has put into place the appropriate numbering administration entity pursuant to Section 251(e), TDS Telecom should provide non-discriminatory access to telephone numbers for assignment to Hyperion's customers.

The suggested topics of negotiations listed above are intended only to assist in establishing an initial framework for interconnection negotiations. Hyperion reserves the right to suggest additional or modified arrangements as negotiations proceed. Hyperion hopes that a legally sufficient and mutually satisfactory negotiated agreement can be reached between the parties. Should such an agreement prove unachievable, however, within 135 days from the date of this letter, either party may request that the Tennessee Regulatory Authority arbitrate any unresolved issues, as it is obligated to do by Section 252(b).

In light of the Act's mandate that interconnection negotiations be concluded promptly, this letter is intended to fulfill Hyperion's notification obligations under the Act, and to clarify Hyperion's intention that an interconnection arrangement be entered into as expeditiously as possible.

We thank you in advance for your prompt attention to this matter and look forward to receiving your response so that we can set about the task of completing negotiations on an interconnection agreement according to the terms of the Telecommunications Act of 1996. Should you have any questions regarding our request, please do not hesitate to call.

Very truly yours,

Kemal M. Hawa

Douglas G. Bonner
Kemal M. Hawa

Counsel for AVR, L.P. d/b/a Hyperion Telecommunications of Tennessee, L.P.

cc: Phil Fraga, Esq.
Bob Wiegand, Esq.
Dana Frix, Esq.