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August 18, 2000

VIA HAND DELIVERY

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

Re: Petition of the Tennessee Small Local Exchange Company Coalition for Temporary Suspension of 47 U.S.C. § 251(b) and § 251(c) Pursuant to 47 U.S.C. § 251(f) and 47 U.S.C. § 253(b).
Docket No. 99-00613

Dear Mr. Waddell:

Enclosed please find the original and thirteen (13) copies of Comments of Tennessee Small Local Exchange Company Coalition Regarding Impact on this Proceeding of Decision of the Eighth Circuit Court of Appeals in *Iowa Utilities Board v. Federal Communications Commission* on behalf of Petitioner.

Thank you for your consideration in this matter. If you have any questions, please do not hesitate to call me.

Very truly yours,

R. Dale Grimes

RDG/cp
Enclosures
cc: Richard Collier, Esq. (w/encls.)
Henry M. Walker, Esq. (w/encls.)
Kemal M. Hawa, Esq.(w/encls.)
Mr. Bruce Mottern (w/encls.)

#2134420

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:

PETITION OF THE TENNESSEE SMALL LOCAL EXCHANGE COMPANY COALITION FOR TEMPORARY SUSPENSION OF 47 U.S.C. § 251(b) AND 251(c) PURSUANT TO 47 U.S.C. § 251(f) AND 47 U.S.C. § 253(b).	)))))	**DOCKET NO. 99-00613**

COMMENTS OF TENNESSEE SMALL LOCAL EXCHANGE COMPANY COALITION REGARDING IMPACT ON THIS PROCEEDING OF DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS IN *IOWA UTILITIES BOARD v. FEDERAL COMMUNICATIONS COMMISSION*

On July 18, 2000, on remand from the United States Supreme Court, the United States Court of Appeals for the Eighth Circuit issued an opinion in Iowa Utilities Board v. Federal Communications Commission, 2000 WL 979117 (8th Cir., July 18, 2000), which, inter alia, vacated portions of an FCC rule, 47 C.F.R.§ 51.405, applicable to small and rural LEC's exemptions and requests for suspensions and modifications under 47 U.S.C. § 251(f). On August 10, 2000, the Authority noticed a pre-hearing conference for August 22, 2000, and directed the parties to file comments regarding the impact of this decision on the issues, burden of proof, and presentation of evidence in this proceeding.

The Coalition respectfully submits that the Iowa Utilities decision affects this docket in the following ways: (1) establishes that the standard for determining whether compliance with § 251(b) or (c) will result in imposing a requirement that is unduly economically burdensome includes "the full economic burden on the ILEC of meeting the request," and not just that which is "beyond the economic burden that is typically associated with efficient competitive entry"; (2) recognizes a presumption that it is economically burdensome on a small or rural ILEC to comply with the obligations of § 251(b) or (c); (3) emphasizes that "undue economic burden" is just one of three

alternative bases on which suspension or modification may be granted under § 251(f)(2); and (4) exacerbates the regulatory uncertainty which, when added to the already existing uncertainty about universal service funding mechanisms and access charge reform, particularly justifies the relief requested by the Coalition in this case. The Coalition anticipates the need to supplement some of its pre-filed testimony in accordance with these points.

UNDUE ECONOMIC BURDEN

The Eighth Circuit opinion specifically vacated 47 C.F.R. § 51.405(d), which provided:

> In order to justify a suspension or modification under section 251(f)(2) of the Act, a LEC must offer evidence that the application of section 251(b) or section 251(c) of the Act would be likely to cause undue economic burden beyond the economic burden that is typically associated with efficient competitive entry.

According to the Court, "By limiting the phrase 'unduly economically burdensome' to exclude economic burdens ordinarily associated with competitive entry, the FCC has impermissibly weakened the broad protection Congress granted to small and rural telephone companies." Iowa Utilities, 2000 WL 979117 at *15. Instead, state commissions must assess "the full economic burden on the ILEC." Id.

As a result, item 3(b) of the Amended List of Issues in this docket must again be changed to eliminate the language: "(beyond the economic burden that is typically associated with efficient competitive entry)."

PRESUMPTION OF ECONOMIC BURDENSOMENESS

The Court decided that in a proceeding to terminate a rural exemption under § 251(f)(1), the burden of proof must be on the CLEC seeking the termination and, therefore, 47 C.F.R. § 51.405(a) was declared invalid. The Court did not address, nor apparently was it asked to address, the validity of 47 C.F.R. § 51.405(b), which discusses the burden of proof under § 251(f)(2). However, the

Court recognized a presumption of economic harm on small and rural LECs in both types of proceedings. The Court stated in no uncertain terms that, "[t]here can be no doubt that it is an economic burden on an ILEC to provide what Congress has directed it to provide to new competitors in § 251(b) or § 251(c)." Id. The Court reasoned that Congress specifically provided exemptions, suspensions, and modifications for small and rural ILECs, "[b]ecause the small and rural ILECs, while they may be entrenched in their markets, have less of a financial capacity than larger and more urban ILECs to meet such a request." Id. Moreover, the statute itself states that the Commission "shall grant" a petition under § 251(f)(2) if any of the conditions set out in the statute are satisfied, and the Eighth Circuit has already determined that § 251(f)(2)(A)(ii) will be satisfied by a petitioning rural ILEC.

Accordingly, the Coalition submits that because there is a presumption of economic harm in this case, items 3 and 4 in the Amended List of Issues must be changed to eliminate the phrase "each member of the Coalition can establish that . . . ." This will more correctly state the issue, especially with respect to the question of economic harm.

ALTERNATIVE BASES FOR GRANTING RELIEF

To the extent any of the Intervenors previously contended that "harm beyond efficient competitive entry" was the touchstone for providing any relief to the Coalition in this docket, it is now crystal clear that is no longer the case. Further, the FCC even conceded this point as it admitted to the Eighth Circuit that it did not have the power to eliminate any of the statutory requirements under § 251(f). Id. at *14. Section 251(f)(2) sets forth a multi-pronged standard, which is satisfied, for example, by a determination that a carrier's customers are likely to suffer a significant economic impact combined with a determination that suspension of the requirements of § 251(b) or (c) is consistent with the public interest, convenience and necessity, even without a determination that the

carrier itself will suffer an undue economic burden. Issues 3 and 4 are consistent with the Iowa Utilities holding in this regard.

INCREASED REGULATORY UNCERTAINTY

The Coalition's petition in this docket rests in part on the premise that compliance with the obligations of § 251(b) and (c) by the Coalition will likely to cause a great deal of economic harm to the rural companies and their customers in this period of regulatory uncertainty. Universal service funding mechanisms have not be formulated or implemented for rural companies; access charge reform remains undetermined; and action has not been taken to resolve the complicated issues presented by proposals to dismantle the historic system of implicit subsidies on which the entire telecommunications industry is built. Now the Eighth Circuit has added new levels of uncertainty. Not only has it upended the rules that had been promulgated by the FCC for § 251(f) proceedings such as the instant case, but it has set the stage for continuing litigation and appeals of the issue. In addition, it has rejected other rules adopted by the FCC that would provide cost models for calculating the costs of some of the services the ILECs would be required to provide competitors under § 251(b) and (c), making it even more unlikely for regulatory certainty to prevail any time soon concerning matters at the very heart of interconnection obligations.

Accordingly, the need to grant the relief requested by the Coalition is intensified by the added uncertainty caused by the issuance of the Eighth Circuit's opinion.

Respectfully submitted,

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Counsel for The Tennessee Small Local Exchange Company Coalition

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing was served on the following counsel of record, via the method checked, on August 18, 2000:

Henry M. Walker Boult, Cummings, Conners & Berry 414 Union Street, #1600 Nashville, TN 37219	[✓] Hand Delivery [ ] First Class Mail [ ] Facsimile
Richard Collier Tennessee Regulatory Authority 460 James Robertson Parkway Nashville, TN 37243-0500	[✓] Hand Delivery [ ] First Class Mail [ ] Facsimile
Kemal M. Hawa Swidler, Berlin, Shereff, Friedman, LLP 3000 K Street, Suite 300 Washington, D.C. 20007-5116	[ ] Hand Delivery [✓] First Class Mail [ ] Facsimile

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