



STATE OF NEW JERSEY
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VIA ELECTRONIC FILING

Marlene Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: Emergency Petition of BellSouth for Declaratory Ruling and
Preemption of State Action
WC Docket No. 04-245**

Dear Secretary Dortch:

The New Jersey Division of the Ratepayer Advocate (Ratepayer Advocate) hereby submits this letter in lieu of more formal comments in the above-captioned proceeding.

The Ratepayer Advocate is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Ratepayer Advocate participates actively in relevant Federal and state administrative and judicial proceedings. The above-captioned proceeding is germane to the Ratepayer Advocate's continued participation and interest in implementation of the Telecommunications Act of 1996.¹ The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will promote efficiency, reduce regulatory

^{1/} Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as the 1996 Act, and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

delay, and foster productivity and innovation” and “produce a wider selection of services at competitive market-based prices.”² The Ratepayer Advocate supports the customer benefits that will be realized through the introduction and expansion of competition in New Jersey and the Nation’s telecommunications markets. Competition should result in lower prices, greater consumer choices, and more rapid technological innovation and deployment.

The Ratepayer Advocate respectfully submits that the Federal Communications Commission (FCC) should deny and dismiss the petition filed by the BellSouth Telecommunications, Inc. (BellSouth) for the following reasons. BellSouth has failed to exhaust its administrative remedies by appealing the state commission decision in accordance with Section 252e)(6) of the Act. In addition, BellSouth’s legal arguments regarding Section 271(c)(2)(B) raised in support of the petition are flawed, and do not represent Commission’s policies as to the role of state commissions under Section 271(c)(2)(B) of the Act. The Commission should exercise its discretion and proceed by rulemaking if it wants to clarify what role state commissions have under Section 271(c)(2)(B) of the Act so that a full and complete record is developed. The Commission should defer consideration of the petition until it otherwise rules on the pending petition for forbearance filed by the Verizon Telephone Companies (Verizon) in CC Docket 01-338 wherein Verizon asks that the Commission forbear from applying items four through six and ten of the competitive checklist contained in Section 271 of the Act.³

BellSouth argues that the Commission should declare that state commissions have no jurisdiction over elements provided pursuant to Section 271 of the Act and the exclusive jurisdiction lies with the Commission for determining the rates applicable to such 271 elements which in turn are governed by Section 201 and 202 of the Act.⁴ Additionally, BellSouth asks that the Commission preempt the order of the Tennessee Regulatory Authority (TRA) asserting jurisdiction under Section 271 of the Act.⁵

The Ratepayer Advocate notes that BellSouth is essentially requesting the Commission to weigh in on what the role of state commissions are under Section 271 of the Act because the TRA issued an order in a context of a 252 Arbitration BellSouth disagrees with. BellSouth is asking the Commission in effect to short circuit the processes established by Sections 251 and 252 of the Act prior to completion of the scheme authorized by the Act. Specifically, before the matter is appealed and BellSouth has exhausted its

²/ N.J.S.A. 48:2-21.16(a)(4) and 48:2-21.16(b)(1) and (3).

³/ 47 U.S.C. § 271(c)(2)(B). On July 16, 2004, the United States Court of Appeals for the District of Columbia Circuit issued an order which remanded Verizon’s petition to the Commission with directions to either grant the petition or provide a reasoned explanation for denying it. See *Verizon Telephone Companies v. FCC*, ___ F.3d ___ (D.C. Cir. 2004) (Docket No. 03-1396).

⁴/ See *Emergency Petition for Declaratory Ruling and Preemption of State Action*, WC Docket No. 04-245, filed by BellSouth Telecommunications, Inc. at pages 1, 5-8 (hereinafter *APetition*).

⁵/ Id at 11-14.

administrative remedies. The concerns raised by BellSouth (assuming you accept BellSouth's characterization of the issues) are pure question of law which are subject to *de novo* review by appellate courts.⁶ Prudence and past practice suggests that the Commission should allow the appeal process to continue so that a final decision on the merits can be rendered. At that time, the Commission, if necessary, can assess whether rule changes are necessary or required. This is especially so in view of the fact that the Commission has no rule in place which provides that it has the exclusive right and authority to price elements under Section 271 of the Act.

BellSouth's claim that the Commission has held that "it retains exclusive jurisdiction to regulate Section 271 elements under Section 201 and 202" is simply misleading, otherwise misinterprets, and exaggerates what the Commission said. The fundamental flaw in BellSouth's arguments is that they rely upon the exclusivity limitations of Section 271 which pertain to approval of in-region long distance authority and extrapolate that it applies to all of Section 271. BellSouth ignores the fact that Section 271 has to be read in the context of Section 2(b) of the Act. The Supreme Court has clearly articulated the relationship that Sections 251/252 have with Section 2(b) of the Act and the appropriate role of state commission in setting rates. See *AT&T Corp. v. Iowa Utilities Bd*, 525 U. S. 366 (1999). However, the Supreme Court made no determination regarding Section 271 and the interplay with Section 2(b) of the Act.

The Ratepayer Advocate submits that the historical jurisdictional distinctions governing intrastate and interstate services apply fully to pricing of elements under Section 271 of the Act. By way of example, the Commission has eliminated operator services and directory assistance as network elements that must be unbundled under Section 251 of the Act. However, the Commission still regulates interstate operator services and directory assistance and states continue to regulate intrastate operator and directory assistance. These two services are elements identified in Section 271.⁷ The Commission's conduct undercuts the arguments raised by BellSouth seeking both an emergency declaration and preemption of the TRA order.

^{6/} The TRA was within its rights to resolve issues presented in an arbitration on the appropriate rate for non-252 switching once raised by the parties. The TRA's action in approving the interconnection agreement is governed by the requirements of Sections 252(e)(1) and (2) of the Act. Whether TRA's actions were consistent with Sections 252(e)(1) and (2) of the Act, is a question of law to be reviewed *de novo* on appeal to the appropriate United States District Court. BellSouth's arguments concerning Section 271 also involve a question of law which again is subject to *de novo* review. Generally, the Commission has declined to disrupt the 251/252 process and left parties to exhaust their remedies. Since only questions of law are involved, the Commission should not change its practice in this regard.

^{7/} See Section 271(c)(2)(B)(vii) of the Act.

The Ratepayer Advocate submits that to the extent the Commission wants to address or reconsider the role of state commission under Section 271, the more appropriate vehicle is through a rulemaking and not through a declaratory ruling. This is especially so since the Commission has never stated that it has exclusive jurisdiction over the pricing of 271 elements.

The above analysis disposes of any need to discuss preemption at this time, since BellSouth's preemption arguments are based solely on its erroneous jurisdiction arguments. Lastly, the Commission should defer any action on BellSouth's petition until it first resolves the remand involving Verizon and Section 271. Depending upon the results of that proceeding, the Commission may not need to address the issues raised by BellSouth.

In conclusion, the Ratepayer Advocate recommends that the Commission deny and dismiss the petition, or in the alternative, defer consideration until the Verizon 271 forbearance petition is resolved.

Respectfully submitted,

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RATEPAYER ADVOCATE

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