



## State of New Jersey

DIVISION OF THE RATEPAYER ADVOCATE  
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May 19, 2006

### **VIA ELECTRONIC FILING**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, TWB-204  
Washington, D.C. 20554

**RE: In the Matter of Georgia Public Service Commission Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates, WC Docket No. 06-90**

Dear Secretary Dortch:

The New Jersey Division of the Ratepayer Advocate<sup>1</sup> ("Ratepayer Advocate") submits comments in response to the Public Notice released on April 19, 2006 by the Federal Communications Commission ("FCC" or "Commission") in the above-captioned proceeding.<sup>2</sup> The Georgia Public Service Commission ("GPSC") filed a petition for declaratory ruling asking the FCC to clarify that GPSC is not preempted by federal law from setting just and reasonable rates under Section 271 of the Act for local switching, high capacity loops and transport, and line sharing ("UNEs").<sup>3</sup> In the alternative, if the FCC finds that the GPSC is preempted from setting rates, the GPSC asks the FCC to find that the rates ordered by the GPSC are just and reasonable, and that BellSouth is obligated to abide by those rates in Georgia. If the FCC instead finds that the rates ordered by the GPSC are not just and reasonable, and that the GPSC is preempted from setting rates in this matter, the GPSC asks the FCC to set just and reasonable rates for BellSouth for the above elements based upon the record in the Georgia state proceeding which is attached to the petition.

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<sup>1/</sup> 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.

<sup>2/</sup> See Public Notice, DA 06-903, released on April 19, 2006 announcing the comment cycle for the petition filed by the Georgia Public Service Commission. The petition is entitled "*In the Matter of Georgia Public Service Commission Petition for Declaratory Ruling and Confirmation of Just and Reasonableness of Established Rates*".

<sup>3/</sup> Section 271 is codified at 47 U.S.C. § 271; See Federal Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("the Act").

## Background

The FCC had adequate opportunity to address the relative relationship by and between Sections 251, 252, and 271 of the Act during its *TRRO* proceeding.<sup>4</sup> The FCC declined to address the very issue in the TRRO that the GPSC now raises in its petition. The Ratepayer Advocate notes that five other state commissions have also asserted jurisdiction to set rates for UNEs provided under Section 271 after the issuance of the *TRRO*.<sup>5</sup> The Ratepayer Advocate raised the issue in the *TRRO* proceeding on behalf of New Jersey ratepayers. The Ratepayer Advocate incorporates by reference its *TRRO* comments and *ex parte* filings, as part of its comments in this proceeding.

### **The FCC Should Find That State Commission Have Jurisdiction To Set Intrastate Rates Under Section 271 of the Act.**

The Ratepayer Advocate submits that state commissions have jurisdiction to set intrastate rates under Section 271 of the Act and Section 2(b) of the Act. In *AT&T Corp. v. Iowa Utilities Board*, the Supreme Court addressed the relationship by and between Sections 251, 252, and Section 2(b) of the Act.<sup>6</sup>

The Supreme Court confirmed the dual role of the FCC and state commissions in pricing network elements by stating that:

[Section] 252(c)(2) entrusts the task of establishing rates to the state commissions . . . The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the states that will apply those standards and implement that methodology, determining the concrete results in particular circumstance.<sup>7</sup>

The FCC may not set intrastate rates whether they are wholesale UNE rates or retail rates for consumers with respect to its authority under Sections 251, 252, and 271 of the Act. This authority rests firmly within the control of state commissions under Section 2(b). The Court has approved the setting of intrastate rates by the FCC in very limited circumstances, for example, for payphones based upon the specific provisions of Section 276. *See Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997); *New Eng. Pub. Communs. Council Inc., v. FCC*, 334 F.3d 69 (D.C. Cir. 2003). The Court found that:

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<sup>4</sup>/ See *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313 and CC Docket No. 01-338, Order on Remand, FCC 04-290 (released February 4, 2005 ("*TRRO*").

<sup>5</sup>/ To date, the states of Tennessee, Minnesota, Maine, Missouri, and Colorado have weighed in on this issue.

<sup>6</sup>/ See *AT&T Corp. v. Iowa Utilities Board*, 525 U.S.366, 384 (1999).

<sup>7</sup>/ *Id.*

The Communications Act of 1934 establishes “a system of dual state and federal regulation over telephone service,” under which the Commission has the power to regulate “interstate and foreign commerce in wire and radio communication,” 47 U.S.C. § 151, but is generally forbidden from entering the field of intrastate communications service, which remains the province of the states, *id.* § 152(b).<sup>8</sup>

As a result, the Court found that the FCC could set the intrastate payphone line rates for Bell Operating Companies because of the specific provisions of Section 276, but lacked the authority to set intrastate payphone line rates for local exchange carriers.<sup>9</sup> There is no provision in Section 271 that preempts states from regulating intrastate rates. Without an explicit statement, that Congress intended preemption to apply, preemption can not be presumed. See *Bates v. Dow*,<sup>10</sup> wherein the Supreme Court reconfirmed that without such a clear and manifest intent expressed by Congress, preemption is not appropriate.

There is nothing in Section 271 that evidences that Congress’s intent was to alter Section 2(b) of the Act and otherwise permit FCC to set intrastate rates. The Court recently explained in *Am. Library Ass’n. v. FCC*, 406 F.3d, 689, 698 (D.C. Cir. 2005): “The FCC, like other federal agencies, ‘literally has no power to act . . . unless and until Congress confers powers upon it’ . . .” The Supreme Court has clearly spoken that Section 2(b) fences off intrastate telecommunications matters from FCC regulation. See *Public Louisiana Service Commission v. FCC*, 476 U.S. 355, 374 (1986). Any purported construction of the Act to permit or allow the FCC to regulate intrastate rates is misplaced and exceeds its authority. The Court has overturned FCC action where the FCC’s actions conflict with the plain words of the statute. See *City of Dallas, v. FCC*, 165 F.3d 341, 347-348 (5<sup>th</sup> Cir. 1999) wherein the Court rejected the FCC claim that local franchising authority is limited to Section 621 of the Act.

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<sup>8</sup>/ *New Eng. Pub. Communs. Council Inc.*, 334 F.3d at 75.

<sup>9</sup>/ *Id.* at 75, 78.

<sup>10</sup>/ *Bates v. Dow*, \_\_\_ U.S. \_\_; 161 L.Ed, 2d 687; 125 S. Ct 1788 (2005).

As a result, consistent with Section 2(b) of the Act, state commissions have the jurisdiction and authority to set intrastate rates under Section 271 of the Act. The Federal Court addressed this issue in *Verizon New England Inc. d/b/a Verizon Maine v. Maine Public Utilities Commission*, 403 F. Supp 2d 96 (D. Maine 2005) and concluded that the Federal Act does not grant the FCC exclusive ratemaking authority for Section 271 UNEs. The Court also flatly rejected arguments that state commissions are preempted.

### **Conclusion**

In view of the foregoing, the Ratepayer Advocate asks that the FCC declare that state commissions have authority to set intrastate rates for UNEs under Section 271 of the Act and that state commissions may use any reasonable methodology to set such rates.

Very truly yours,

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RATEPAYER ADVOCATE

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