IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 3, 1999 Session

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION v. TENNESSEE REGULATORY AUTHORITY, ET AL.

Appeal from the Tennessee Regulatory Authority
No. 96-01692 & No. 98-00654

No. M1998-0987-COA-R12-CV & M1998-01012-COA-R12-CV
Filed February 16, 2001

PATRICIA J. COTTRELL, J., dissenting.

The majority opinion, that written by Judge Cain, defines the question in this case as whether the TRA has jurisdiction to compel BAPCO to display the name and commercial logo of AT&T on the cover of its "White Pages" directory. Judge Cain concludes that the TRA has no such authority because (1) the branding of the cover of the incumbent service provider's directory is not a "network element" under federal law; (2) such branding is not an "essential public service," apparently incorporating a state law standard; and (3) BAPCO is not a utility and is not subject to regulation by the TRA in its "non-utility" endeavors. Judge Koch concludes that the directory cover is not a network element and that the TRA rule regarding listing of the telephone service provider on the directory cover cannot be interpreted to apply in a competitive provider environment. Both conclude that the TRA's order violates BAPCO's First Amendment rights.

First, I disagree with the majority's definition of the question. I would frame the issue as whether the TRA has the authority to require the incumbent local exchange carrier, BST, to cause its legally-mandated directory to be published in a nondiscriminatory and competitively neutral manner.[1] Having re-defined the question, not surprisingly, I reach a different conclusion from that of my colleagues.

My conclusion is based on my analysis of state law, as set out later in this opinion, and the reasoning behind it can be summarized as follows. The TRA has "practically plenary authority" over the utility companies it regulates, including the providers of local telephone service. It has been

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[1] The TRA ruled that "in the publication of these directory listings on behalf of BellSouth which contain the listings of local customers of AT&T and other competing local exchange providers, BAPCO must provide the opportunity to AT&T to contract with BAPCO for the appearance of AT&T's name and logo on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract. Likewise, BAPCO must offer the same conditions to AT&T in a just and reasonable manner."

clearly authorized by the legislature to "fix just and reasonable . . . practices" to be followed by utility companies. In addition, the TRA has been specifically directed to make competition among local telephone service providers fair. Among its duties is to enforce the statutory requirement that all local telephone service providers be able to obtain, from all other telecommunications providers, desired services on a non-discriminatory basis. Non-discriminatory means, among other things, that the provider cannot provide the services to itself or an affiliate on a more favorable basis than to competitors.

The provision of a white pages directory has long been considered an integral part of local telephone service, and no one would seriously question the TRA's authority to regulate it in the public interest. Because BST is required by state and federal law to publish a directory and to include in that directory the names and numbers of competitors' customers, the TRA, in my opinion, clearly has authority to ensure that the directory is published in a manner that complies with all legal requirements. I would include in that the requirement that such services be provided in a non-discriminatory manner.

Second, I am puzzled by the conclusion of both my colleagues that the rule in question "cannot be stretched" to apply in a competitive environment. The subsection in question simply required that the name of the telephone utility shall appear on the front cover. The only "stretch" performed by the TRA was to interpret "the telephone utility" to have meant the utility whose customers are included in the directory.[2] Then, by extending the logic to the competitive environment, the TRA concluded that "if more than one utility's customers are inside the directory, then more than one utility's name would be on the cover."

The TRA's interpretation of the rule, in existence since 1968, is reasonable and based on the language of the rule. Its application of that interpretation to the current environment is not a "stretch" and is, instead, consistent with the rule's language and intent. It is also an interpretation that is well within the TRA's authority and expertise. In fact, my colleagues do not specifically object to that interpretation. Instead, they appear troubled by the TRA's ultimate decision, of which this rule interpretation is only a part, that requires the names and logos of competing service providers be placed on the cover in the same way that BST's name and logo appears. That holding by the TRA is based on its interpretation of its responsibilities to promote competition and, in my opinion, is consistent with its statutory mandate and with regulatory actions by the FCC under federal law. For that reason, this opinion examines that regulatory environment in the aftermath of federal directives on competition.

My colleagues' reference to the requirement being placed on the publishing affiliate of BST does not imply a determinative distinction. As explained later in this opinion, there really is no publishing affiliate issue because BST is the entity required to publish a directory that includes its

[2] Judge Cain similarly interprets the rule in the monopoly environment: "there was only one telephone utility; that utility was the only local service provider, and thus, it was the only telephone utility locally serving the customers listed in the directory."

competitors customers. The TRA simply ordered BST to perform its directory publishing obligation in a competitively neutral manner. While requiring a company to list its competitors in the same manner it lists itself may seem unusual in other contexts, both the federal and state legislative bodies have determined that the only way to achieve the benefits of real competition is to authorize otherwise extraordinary regulatory measures in order to lessen the incumbent's control over factors affecting the ability of others to enter the market.

Finally, while I agree with Judge Koch that this is entirely a question of state law, I nonetheless feel compelled to address the conclusion reached by both my colleagues that directory covers or the branding of directory covers are not "network elements" under the federal Telecommunications Act of 1996. Similarly, I feel compelled to address the TRA's decision not to arbitrate the cover issue simply because both my colleagues attach some importance to that decision and because I disagree with them on the nature and effect of the TRA's action.

I. Background

This case involves only issues of state law; however, those issues must be analyzed in the context of recent dramatic alterations in telecommunications regulation at both state and federal levels. Of particular relevance to the issues in this case, including the majority's discussion of the definition of "network element," is the federal Telecommunications Act of 1996, Pub.L. 104-104, 110 Stat. 56. For background purposes, the following explanation of the Act and its intended impact on the industry is helpful:

> The breakup of AT&T in the early 1980's brought competition to the long distance telephone market. The local market, however, has been a different story. Until the passage of the 1996 Act, state utility commissions continued to regulate local telephone service as a natural monopoly. Commissions typically granted a single company, called a local exchange carrier (LEC), an exclusive franchise to provide telephone service in a designated area. Under this protection the LEC built a local network–made up of elements such as loops (wires), switches, and transmission facilities–that connects telephones in the local calling area to each other and to long distance carriers.
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> The 1996 Act brought sweeping changes. It ended the monopolies that incumbent LECs held over local telephone service by preempting state laws that had protected the LECs from competition. *See* 47 U.S.C. § 253. Congress recognized, however, that removing the legal barriers to entry would not be enough, given current technology, to make local telephone markets competitive. In other words, it is economically impractical to duplicate the incumbent LEC's local network infrastructure. To get around this problem, the Act allows potential competitors, called competing local exchange carriers (CLECs), to enter the local telephone market by using the incumbent LEC's network or services in three ways. First, a CLEC may build its own network and "interconnect" with the network of an

> incumbent. *See id.* § 251(c)(2). Second, a CLEC may lease elements (loops, switches, etc.) of an incumbent LEC's network "on an unbundled basis." *See id.* § 251(c)(3). Third, a CLEC may buy an incumbent LEC's retail services "at wholesale rates" and then resell those services to customers under its (the CLEC's) brand. *See id.* § 251(c)(4).
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> The Act details procedures for allowing a CLEC access to the incumbent LEC's facilities and services. The CLEC first makes a request to the incumbent for interconnection or for access to its network or services. Thereafter, both parties must negotiate in good faith in an effort to reach agreement on terms and conditions (including price) of access. *See id.* §§ 251(c)(1), 252(a)(1). If negotiations fail–it is hard to see how they would not–either party may petition the state utility commission to arbitrate open issues. *See id.* § 252(b). The terms imposed by the state commission in arbitration must "meet the requirements of section 251 ... including the regulations prescribed by the [FCC] pursuant to section 251." *Id.* § 252(c)(1). The Act includes general standards for a state commission to use in arbitrating open price (or rate) issues. *See id.* §§ 251(c), 252(d). Finally, the Act authorizes any party aggrieved by the arbitration decision of a state commission to bring an action in federal district court to determine whether the arbitration decision "meets the requirements of" §§ 251 and 252. *See id.* § 252(e)(6).

GTE South, Inc. v. Morrison, 199 F.3d 733, 737 (4th Cir. 1999).

The parties herein entered into negotiations regarding their interconnection agreement, and the TRA was subsequently called upon to arbitrate open issues, applying federal law. The TRA declined to arbitrate the content of directory covers. Whether the TRA's refusal to arbitrate that issue, on whatever basis the decision was made, was proper under the Telecommunications Act is not before us. That question would properly be appealed to a federal district court. *See* 47 U.S.C. § 252(e)(6);[3] *see also U.S. West Communications, Inc. v. Hix*, 986 F. Supp. 13, 17 (D. Colo. 1997) (state court review of issues of whether the interconnection agreement meets the requirements of the Act is precluded); *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1178 n. 16 (D. Or. 1999) (exclusive jurisdiction to determine compliance with the Act is conferred to federal courts).

Similarly, whether directory covers are "network elements," as the majority concludes they are not, or are otherwise subject to the nondiscriminatory access requirements of the Telecommunications Act is also not a question before us; such a question is outside our charge, being exclusively vested in federal courts. *See id.*

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[3] That provision of the Telecommunications Act provides, "In any case in which a State commission makes a determination under [the Act], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of the [the Act]."

That is not to say, however, that discussion of the Act and its interpretations is irrelevant to our analysis. To the contrary, such discussion is necessary in order to understand the context of the TRA's order and the regulatory environment in which incumbent and competing providers of telephone services now operate. In addition, it will make clear the breadth of areas deemed appropriate for regulation, the universal treatment of directories as subject to regulation, and the degree of regulator intrusion into practices by incumbents authorized in order to foster real competitive opportunity in the local services market. Because I consider the majority's holding to be based on their view of the TRA's interpretation of its responsibilities to promote competition, rather than on the TRA's interpretation of "the telephone utility" in Rule 1220-4-2-.15(3), this background is essential.

II. Nondiscriminatory Access Obligations of Incumbent Providers

The Telecommunications Act of 1996 imposes a number of duties upon an incumbent local exchange carrier that are intended to facilitate market entry by competing carriers. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 119 S.Ct. 721, 726 (1999). A nondiscriminatory access requirement appears in various separate provisions of the Act, at least two of which are related to the discussion of the issues herein. Section 251(c) imposes on the incumbent LEC "the duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory . . ." 47 USC § 251(c)(3). Section 251(b) imposes upon an ILEC "the duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays." 47 U.S.C. § 251(b)(3).

Thus, a "network element" finding is not the only basis upon which nondiscriminatory access obligations can be imposed. As detailed below, the FCC has considered the nondiscriminatory access requirement of subsection (b) in the context of various directory issues. In addition, BST is subject to other provisions of the Act not necessarily applicable to all incumbent LECs. As a Bell operating company,[4] BST is authorized by the Telecommunications Act to provide long distance services only if BST meets certain requirements in its interconnection agreements with competing providers of telephone exchange services. *See* 47 U.S.C. § 271 (special provisions

[4]It is undisputed that BST meets the statutory definition of a Bell operating company, *see* 47 U.S.C. § 153(4); the TRA stated that the Act provides that "any Bell operating company, such as BellSouth, that seeks to enter the long distance market must list customers of competing local exchange carriers, such as AT&T, in its White pages directory listings;" the record includes BellSouth Corporation's description of its history which demonstrates its status as a Bell operating company; and the record includes evidence BST or BellSouth Corporation intends to enter the long distance market.

concerning Bell operating companies).[5] Included in those requirements is a competitive checklist

[5] In a dissent in *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S.Ct. 721 (1999), Justice Breyer discussed the background for these requirements, beginning with the effect of the consent decree in the antitrust case against AT&T:

> At the same time, the decree forbade most such local service suppliers from entering long-distance markets, *United States v. American Tel. & Tel. Co.*, *supra*, at 186-188. That prohibition, by preventing entry by local firms willing and able to supply long-distance service, risked less long-distance competition. *Cf.* P. MacAvoy, The Failure of Antitrust and Regulation to Establish Competition in Long-Distance Telephone Services 179-183 (1996). But the decree reflected a countervailing concern. Local firms might enjoy special long-distance advantages not available to purely long-distance companies. *See United States v. American Tel. & Tel.*, *supra*, at 186-188. Perhaps a local service company would find it unusually easy to attract local customers to its long-distance service; perhaps it could use its control of local service to place its long-distance competitors at a disadvantage. *See* T. Krattenmaker, Telecommunications Law and Policy 411-412 (2d ed. 1998) (explaining rationale of the decree). And though some argued that any such special advantages were innocent, rather like those enjoyed by a transcontinental airline that dominates a local hub, others claimed they were unfair, like those that had once helped AT&T (through its control of local service) maintain long-distance dominance. *See United States v. American Tel. & Tel. supra*, at 165; *see generally* A. Kahn, Letting Go: Deregulating the Process of Deregulation, or: Temptation of the Kleptocrats and the Political Economy of Regulatory Disingenuousness 37-38 and n. 53 (1998) (discussing the debate). Whether the decree's trade-off made sense– *i.e.*, whether the existence of some such local-firm/long-distance-service advantage warranted the decree's prohibition limiting the number of potential long-distance competitors–became a fertile source for later argument. *See, e.g.*, MacAvoy, *supra*, at 171-177 (arguing that oligopolistic conditions in long-distance markets have produced supranormal profits that would not be sustainable with increased competition); Robinson, *The Titanic Remembered*: *AT&T and the Changing World of Telecommunications*, 5 Yale J. Reg. 517, 537 (1988) (arguing that the rationale for the decree's restrictions on local service companies was "just as persuasive" as that underlying the decree).
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> The Act before us [the 1996 Telecommunications Act] responds to this argument by changing the post-decree status quo in two important ways. First, it creates a legal method through which local telephone service companies may enter long-distance markets, thereby providing additional long-distance competition. *See* 47 U.S.C. § 271(c)(2)(B) (1994 ed., Supp. II) (listing 14 conditions that, if met, permit incumbent local firms to enter long-distance market). Second, it conditions that long-distance entry upon either (1) the introduction of competition into local markets, or (2) the failure of a competing carrier to request access to or interconnection with the local service supplier (or the competing carrier's failure to engage in "good faith" negotiations). §§ 271(c)(1)(A), (B). The existence of these two alternatives is important. In setting forth the first alternative, actual local competition, the statute recognizes that local service competition would diminish any special long-distance advantages that the local firm has, thereby lessening the need for the decree's long-distance-market entry prohibition. *See supra*, at 747; Krattenmaker, *The Telecommunications Act of 1996*, 49 Fed. Comm. L.J. 1, 15-16 (1996). In setting forth the second alternative, the Act recognizes that actual local competition might not prove practical; in some places, to some extent, local markets may not support more than a single firm, at least not without wasteful duplication of resources. *See* Note, *The FCC and the Telecom Act of 1996; Necessary Steps to Achieve Substantial Deregulation*, 11 Harv. J.L. & Tech. 797, 810, n. 57 (1998).

Iowa Utils. Bd., 525 U.S. at 414-16, 119 S. Ct. at 746-47 (Breyer, J., dissenting).

which, among other things, requires BST to provide "white pages directory listings for customers of the other carrier's telephone exchange service." 47 U.S.C. § 271(c)(2)(B)(viii).[6]

Thus, federal law requires BST to include AT&T's customers, as well as customers of other CLECs, in the "White Pages" directories it is otherwise required to publish. State statute also requires all telecommunications services providers who offer basic local exchange service to "provide each customer a basic White Pages directory listing." Tenn. Code Ann. § 65-4-124(c). If nothing else, these specific statutory requirements establish that directories are part of telephone services and subject to regulation.

A. FCC Interpretations of the Act's Obligations

A 1938 amendment to the Communications Act of 1934 provided that the FCC "may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this [Act]." 47 U.S.C. § 201(b). After the FCC issued rules and orders to implement the local competition provisions of the Telecommunications Act of 1996, various incumbent LECs and state utility commissions brought lawsuits challenging the FCC's authority to regulate intrastate telecommunications, long a province of the states. *See Iowa Utils. Bd.*, 525 U.S. at 374, 119 S.Ct. at 728. The Supreme Court held that, by specifically directing that the Telecommunications Act of 1996 be inserted into the Communications Act of 1934, Congress had given the FCC authority to implement the 1996 Act. "We think that the grant in § 201(b) means what it says: The FCC has rulemaking authority to carry out the 'provisions of this Act,' which include §§ 251 and 252, added by the Telecommunications Act of 1996." *Id.*, 525 U.S. at 378, 119 S.Ct. at 730. The Court also described Congress's passage of the Telecommunications Act of 1996 as ending "the longstanding regime of state-sanctioned monopolies" in the provision of local telephone service and stated, "States may no longer enforce laws that impede competition . . ." *Id.*, 525 U.S. at 371, 119 S. Ct. at 726.

Having found that the FCC had authority to regulate local competition, the Court considered the incumbent LECs' complaint that in its First Report and Order the FCC had "included within the features and services that must be provided to competitors . . . items that do not (as they must) meet the statutory definition of 'network element' - namely, operator services and directory assistance, operational support systems (OSS), and vertical switching functions . . ." *Id.*, 525 U.S. at 386, 119 S. Ct. at 734. Essentially, the incumbent LECs argued that the FCC had no authority to interpret the 1996 Telecommunications Act's term "network element" to include functions that are not part of the physical facilities and equipment used to provide local telephone service. The Supreme Court found it impossible to credit this argument in view of the statute's broad definition and held, "Operator

[6]Some of the other items on the competitive checklist are (1)interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1), 47 U.S.C. § 271(c)(2)(B)(i); (2) nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) [of the Act], 47 U.S.C. § 271(c)(2)(B)(ii); (3)nondiscriminatory access to . . . directory assistance services to allow the other carrier's customers to obtain telephone numbers, 47 U.S.C. § 271(c)(2)(B)(vii); (4)nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) [of the Act], 47 U.S.C. § 271(c)(2)(B)(xii). *See* 47 U.S.C. § 271(c)(2)(B).

services and directory assistance, whether they involve live operators or automation, are 'features, functions, and capabilities . . . provided by means of the network equipment.'" *Id.*, 525 U.S. at 387, 119 S. Ct. at 734.

Pursuant to its responsibilities under the Telecommunications Act, on August 8, 1996, the FCC released its First Report and Order[7] and its Second Report and Order.[8] The FCC has described the First Report and Order as eliminating legal and technical barriers to competition in local exchange service and the Second Report and Order as interpreting and implementing various subsections of § 251 of the Act which related to operational barriers to competition. *See* Second Report and Order ¶¶ 2, 3. As reflected in these orders, the FCC early recognized the separate sources for obligations of the incumbent LEC to provide to competitors nondiscriminatory access to various components involved in the provision of local exchange service.

The FCC has recognized the pro-competitive policy directives of the Act and has performed its implementation and interpretation duties accordingly. Significantly, the TRA has based its order herein on the state legislative directive that the TRA foster competition. The FCC's treatment of the federal Act's nondiscriminatory access provisions is relevant for comparison with the TRA's treatment of state law requirements for the provision of services to other providers on a nondiscriminatory basis. Also significant to our case is the FCC's unquestioned recognition that directory publication is subject to regulation and subject to examination for noncompetitive implications.

The Third Report and Order,[9] released September 9, 1999, included an order on reconsideration of the FCC's prior local competition orders and addressed nondiscriminatory access obligations imposed on incumbent local exchange carriers under Section 251(b)(3) of the Act. *See id.* As a background to its September 1999 orders, the FCC explained:

> In the *Local Competition Second Report and Order*, the Commission promulgated rules and policies to require incumbent LECs to provide competitors with access to the incumbent LECs' networks sufficient to **create a competitively neutral playing field** for new entrants consistent with section 251(b)(3). Among these rules, the Commission required incumbent LECs to provide nondiscriminatory access to directory assistance and directory listings to ensure that customers of all LECs would have access to accurate directory assistance information. As the Commission stated

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[7] *In Re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order (rel. Aug. 8, 1996).

[8] *In Re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98, Second Report and Order and Memorandum Opinion and Order (rel. Aug. 8, 1996) ("Second Report and Order")

[9] *In Re implementation of the Telecommunications Act of 1996, Third Report and Order in CC Docket No. 96-115, Second Order on Reconsideration of the Second Report and Order in CC Docket No. 96-98, and Notice of Proposed Rulemaking in CC Docket No. 99-273* (rel. Sept. 9, 1999) ("Third Report and Order").

> in the *Local Competition Second Report and Order*, dialing parity, nondiscriminatory access, network disclosure, and numbering administration issues are critical issues for the development of local competition. **The Commission noted that potential competitors in the local and long distance markets face numerous operational barriers to entry notwithstanding their legal right under the Act to enter such markets.** In the *Local Competition Second Report and Order*, the Commission adopted rules to implement the dialing parity, nondiscriminatory access, numbering administration, and network disclosure requirements of the 1996 Act to benefit consumers by making some of the strongest aspects of LEC incumbency – the local dialing, telephone numbers, operator services, directory assistance, and directory listing – **available to all competitors on an equal basis**.

Id. at ¶ 6 (emphasis added).

Although the FCC's Third Report and Order did not deal with directory covers, a number of specific findings made therein demonstrate the breadth of the obligations place upon incumbent LECs, the authority delegated to the FCC to implement local competition, and the FCC's approach to analyzing nondiscriminatory access and competitive disadvantage issues. Described below are a few of those findings:

1. The FCC reaffirmed, despite arguments to the contrary, its interpretation of the term **"nondiscriminatory access" to mean that a providing LEC must offer access equal to that which it provides to itself.** *See id.* at ¶¶ 125-130. In addition, it refused to shift the burden of proof it had established in previously-issued rules to apply to disputes about nondiscriminatory access under § 251(b)(3) and reaffirmed that the providing LEC bears the burden of demonstrating that it is permitting nondiscriminatory access and that any disparity in access is not caused by factors within the providing LEC's control. *See id.* at ¶¶ 131-135. In a consistent ruling, the FCC concluded an LEC with a directory publishing affiliate cannot treat that affiliate differently from any other directory publisher in the terms upon which it supplies customer listing information for publication, under § 222(e) of the Act. *See id.* ¶ 8.

2. Section 222(e) of the Act requires providers of local exchange services to provide to directory publishers various pieces of information about their customers, including specifically "primary advertising classifications (as such classifications are assigned at the time of the establishment of such service) . . . that the carrier or an affiliate has published, caused to be published, or accepted for publication in any directory format." 47 U.S.C. § 222(h)(3) (formerly 47 U.S.C. § 222(f)(3)). The FCC adopted the industry usage of "primary business classifications," defining it as the principal business heading under which a business subscriber chooses to be listed in the "Yellow Pages." *See* Third Report and Order ¶ 30. The FCC was called upon to decide whether a primary advertising classification fell within the statutory definition when a carrier's directory publishing affiliate, rather than the carrier itself, assigned the "Yellow Pages" heading. The FCC found that the statute did not require a carrier to provide independent directory publishers with primary advertising classifications assigned by the carrier's affiliate **unless a tariff or state**

requirement obligates the carrier to provide "Yellow Pages" listings as part of telephone exchange service to businesses. *See id.* ¶¶ 29-36.

> We need not determine that we have jurisdiction over LECs' directory publishing affiliates . . . in order to require carriers to provide to requesting directory publishers primary advertising classifications in the limited circumstances described in the preceding paragraph. Instead, we conclude that **where a tariff or State requirement obligates the carrier** to provide yellow pages listings **as part of telephone exchange service** to businesses, the carrier must provide that classification to requesting directory publishers. In these circumstances, the assignment of a primary advertising classification is a necessary step in the establishment of telephone exchange service to businesses. The carrier's decision to have an affiliate or third party perform that step **does not absolve the carrier of its obligation** to provide those classifications to requesting directory publishers in accordance with section 222(e).

Id. at ¶ 35 (emphasis added).

This finding is important to our analysis of the issues in the case before us. First, it demonstrates how the FCC dealt with a challenge to its authority over a directory publishing affiliate of an LEC, an issue similar to the one raised by BAPCO in the case before us. Essentially, the FCC determined that the requirement in question applied to the telephone services provider, regardless of how that provider decides to perform its directory publishing obligation. Second, the FCC made it clear that state law can trigger additional requirements. The ruling also declared that where a particular service is required by law, state or federal, as part of the provision of telephone services, the provider is subject to other legal restrictions in how it performs that service.

3. In examining an issue related to access to adjunct features (*e.g.*, rating tables or customer information databases), the FCC found that while some such features may not be "telecommunications services" as defined in the Act, they must be supplied to competing providers **in order to allow them to use other services** specifically included in the Act (*e.g.*, operator services and directory assistance) **at a level equal to that of the providing LEC**. *See id.* at ¶ 136. The FCC also precluded LECs from negotiating exclusive contracts with third party vendors of such adjunct features that would prevent competing providers from negotiating licensing agreements with the vendors for access to their services. *See id.* at ¶¶ 137-140.

4. The FCC considered the issue of "rebranding" operator services and directory assistance services. "Call branding" was described as "the process by which an operator services or directory assistance provider identifies itself audibly and distinctly to the consumer at the beginning of a telephone call, before the consumer incurs any charge for the call." *Id.* at ¶ 9 n.24. The FCC's consideration of the issue of rebranding of operator services and directory assistance services closely resembles the TRA's consideration of the issue presented this appeal, *i.e.*, the branding or rebranding of directory covers. *See id.* at ¶ 141. The issue before the FCC can be described as follows.

Section 251(b)(3) of the Act imposes on an incumbent LEC the duty to permit all competing providers of telephone exchange service nondiscriminatory access to, among other things, operator services and directory assistance. Thus, a competing LEC may arrange for its customers to use the operator services and directory assistance services of the incumbent LEC without having to establish its own such operations. Where a competitor purchases these services from the incumbent and provides them to its customers, the question becomes whose "brand" should be used in identifying the provider of the services to the customer. May the incumbent continue to identify itself to a competitor's customer, "call branding," or must the incumbent use the competitor's name in answering calls from the competitor's customers, or "rebrand" the services? In initially considering this issue, the FCC had stated:

> **Continued use of the providing LEC's brand with a competing provider's customers clearly advantages the providing LEC.** Consistent with the requirements that we imposed on incumbent LECs in the First Report and Order, we conclude that a providing LEC's failure to comply with the reasonable, technically feasible request of a competing provider for the providing LEC to rebrand operator services in the competing provider's name, or to remove the providing LEC's brand name, **creates a presumption that the providing LEC is unlawfully restricting access to these services by competing providers.** This presumption can be rebutted by the providing LEC if it demonstrates that it lacks the capability to comply with the competing provider's request. We note also that the Illinois Commission recently ordered rebranding of operator services as those of the reseller "[t]o the extent that it is technically feasible," and **we do not preempt its intrastate branding requirements, nor any similar requirements that other states may have enacted.**

Second Report and Order at ¶ 125 (emphasis added).

Responding to requests to reconsider this position, the FCC affirmed its rule that "a providing LEC's failure to comply with a reasonable, technically feasible request to rebrand operator or directory assistance services in the competing provider's name, or to remove the providing LEC's brand name from the service provided to the competing provider, creates a presumption that the providing LEC is unlawfully restricting access to these services." Third Report and Order at ¶ 146. Clarifying that its rule does not require the providing LEC to strip its own brand where it is not technically feasible to rebrand the services of the competing LEC, the FCC nonetheless held that where the providing LEC claims that it cannot rebrand because of the structure of its network architecture, such failure to rebrand is presumptively discriminatory.[10] *See id.*

The implications of this finding are clear. Where a competitive disadvantage exists because of the practices of the incumbent LEC in how it fulfills its access obligations, the FCC will require the incumbent to change its practice. I do not perceive a significant or qualitative difference between

[10] The FCC was concerned that any other resolution would encourage incumbent LECs to arrange their architecture to achieve an anticompetitive result. *See* Third Report and Order at ¶ 146.

the FCC's interpretation of the federal statute's local competition and nondiscriminatory access requirements as applied to the "branding" of directory assistance services by incumbent carriers and the TRA's interpretation of state statutory requirements regarding local competition to the "branding" of the covers of directories published, or caused to be published, by incumbents. Both agencies have required competitively neutral branding: either rebrand for all or brand for none, including the incumbent who is actually providing the services. The FCC's only exception, technical infeasibility, has no application to the printing of directory covers.

This FCC finding is significant in an additional way because it clearly recognizes that state regulatory agencies are not preempted by the Act or the FCC from imposing additional or more stringent requirements on telephone service providers.

B. Federal Court Interpretations

A few federal courts have considered appeals from state regulatory agency arbitration decisions to "determine whether the agreement or statement meets the requirements of section 251 of [the Act]." 47 U.S.C. § 252(e)(6). We have found no decision which deals with the issue of the content of directory covers. Some, however, deal with the definition of "network element," and some deal with the nondiscriminatory access provisions found elsewhere in the Act. While the case before us does not require us to interpret or apply federal law, *i.e.*, to determine whether a directory cover is a "network element," part of "directory listing" services, or otherwise covered by the Telecommunications Act, interpretations of the Telecommunications Act are nonetheless not unrelated to the issues in this case. The federal courts' treatment of the FCC's interpretation and implementation of the local competition provisions of the Act provide guidance in our review of the TRA's interpretation of its responsibilities and authority under state statutory directives.

The following discussion of some federal court opinions in appeals from arbitrations involving interconnection agreements is intended to demonstrate that: (1) when considering issues relating to directories, whether applying § 251(c)(3)'s "network element" test or § 251(b)(3)'s directory listing test, courts have interpreted the Act's nondiscriminatory access provisions as applying broadly; (2) courts have analyzed the nondiscriminatory access requirements of both sections by examining the competitive advantage or disadvantage of a particular practice at issue; (3) courts have interpreted the Telecommunications Act as authorizing otherwise unwarranted intrusion into operations and practices of local exchange service carriers where local competition issues are involved; and (4) courts have largely adopted, followed, or approved the FCC's approach and rulings in implementing the Act.

To begin with the majority opinion herein, the majority's conclusion that a directory cover is not a "network element" under § 251(c)(3) of the Act relies on language in *MCI Telecommunications Corp. v. GTE Northwest,* 41 F. Supp.2d at 1180-81 to the effect that a particular service may be too remote to justify inclusion as a network element and that "the unbundling requirement ordinarily should not extend to general business services that can be replicated by competitors." *GTE Northwest,* 41 F. Supp. 2d at 1181. The issue in the *GTE Northwest* case

involved whether § 251(c)'s unbundling requirement applied to directory listing, billing, and collection services.

The district court recognized that the Supreme Court's decision in *Iowa Utils. Bd.* makes it clear that "operator services and directory listings, along with the software to manage billing and ordering, can be classified as a network element even though those elements are not directly utilized to provide a dial tone or carry communication traffic." *Id.* at 1180. Consequently, the district court's reference to general business services (in the language relied on by the majority) relates only to collection services. In addition, the court also stated that the unbundling requirement "is aimed at making available to CLECs those network features, which a CLEC needs to provide competitive local telephone service, that [the incumbent LEC] either has exclusive access to by virtue of its longstanding monopoly over local telephone service, or which the competitors could not otherwise duplicate in a timely manner or at a reasonable cost." *Id.* at 1180-81. Thus, *GTE Northwest* could be read just as easily to support a finding that directories are network elements.

The Fourth Circuit has considered claims regarding access to directory publishing services in the context of obligations surrounding "network elements." In *AT&T Communications of Virginia, Inc. v. Bell Atlantic-Virginia, Inc.*, 197 F.3d 663 (4th Cir. 1999), the CLEC (AT&T) asserted that it was entitled to certain directory publishing services provided by the incumbent LEC (Bell Atlantic) at cost-based rates, on the basis that they were "network elements." Reciting the Telecommunications Act's requirement that the ILEC provide "access to network elements on an unbundled basis . . . on rates, terms and conditions that are just, reasonable and nondiscriminatory," 47 U.S.C. § 251(c)(3), the court used the FCC's definition of "nondiscriminatory" as meaning "access on the same terms and conditions that Bell Atlantic itself enjoys." *Id.*, 197 F.3d at 670. The court analyzed the directory services issue as follows:

> The Act says that the term "network element" "includes features ... that are provided by means of [a] facility or equipment, including subscriber numbers [and] data bases ... used in the ... provision of a telecommunications service." 47 U.S.C. § 153(29). This is a broad definition. The FCC's implementing rules provide that network elements encompass the "features, functions, and capabilities of the switch," which provide customers with "a telephone number, directory listing, dial tone, signaling, and access to 911, operator services and directory assistance." First Report and Order at ¶ 412. The Supreme Court has recognized that the Act's definition of "network element" is broad and that a network element need not be "part of the physical facilities and equipment used to provide local phone service." *Iowa Utils. Bd.*, 525 U.S. at ___, 119 S.Ct. at 734 (upholding FCC's determination that operator services and directory assistance are network elements).
>
> The one free listing in the white pages is indisputably a "directory listing" and therefore a network element. **It is a network element because it is a feature used in providing (through the company's facilities) telephone service.** If the basic directory listing is a network element, it stands to reason that the other directory

> services–additional listings and the non listing and non-publication of numbers–must also be network elements. As the SCC points out, additional white pages listings are necessary to local telephone service because many customers (spouses with different surnames, for example) require additional listings. In addition, some customers prefer non-listed or non-published numbers for reasons of privacy or security. A CLEC that had to acquire these features at tariff rates before providing them to customers would be at a competitive disadvantage in the local market. The Act's definition and the FCC's interpretation of the term "network element" are broad enough to include the additional directory services. The SCC and the district court were therefore correct to count these services as network elements that Bell Atlantic must provide to AT&T at cost-based prices.

Bell Atlantic-Virginia, 197 F.2d at 674-75 (emphasis added).

In reviewing this and other issues presented in the *Bell Atlantic-Virginia* appeal, the Fourth Circuit frequently analyzed the issue by first determining whether a competitive disadvantage existed and, if so, then determining whether the Act or the FCC's rules required elimination of that disadvantage. This approach is not unlike the TRA's analysis herein, where it determined that inclusion of the name and logo of only the incumbent LEC on the cover of the comprehensive directory did not promote competition. It is also similar to the FCC's analysis of the "rebranding" of operator assistance services, wherein the FCC determined that "call branding" by the incumbent clearly favored the incumbent.

In an issue relevant to the question before us of whether the TRA can mandate BST to restructure its printing contract with BAPCO so as to require nondiscriminatory identification of providers on the cover of the directory, the Fourth Circuit considered whether the incumbent LEC could be required to negotiate its intellectual property licensing agreements to include use by the CLECs. The *Bell Atlantic-Virginia* court first found that the incumbent's use of hardware and software in its network which was licensed from third-party patent and copyright holders was protected by licensing agreements, while the CLEC's use was not. *See id.* at 670-71. The court then found that although the interconnection agreement granted access to the incumbent's network, it discriminated because it did not provide the CLEC equal license to use the intellectual property embedded in the network. This situation left the CLEC with the options of risking lawsuits if it used the network without a licensing agreement, attempting to negotiate for licensing when only the incumbent knew which licensing agreements might be implicated and when the lease rate paid by the CLEC already included licensing fees paid by the incumbent, or using only those network elements not subject to third party license agreements. Any of these options put the competing LEC at a competitive disadvantage and, according to the Fourth Circuit, was not nondiscriminatory under the meaning of the Act. Applying the "access on the same terms and conditions" interpretation, the court concluded that the Act required the incumbent LEC to attempt to renegotiate its existing intellectual property licenses to allow use by the CLECs. *Id.*

In considering an arbitration appeal that involved a number of local competition issues, the U. S. District Court for Colorado applied the nondiscriminatory access requirements of § 251(b)(3) to disputes over the incumbent LEC's obligations regarding publication of directories. The court relied on the FCC's Third Report and Order (referred to as "the Directories Order" in the opinion) and found:

> In light of the Directories Order, I reject [the incumbent LEC's] contention that the directory listings provisions of the Act and FCC regulations do not require [the incumbent LEC] to act as a directory publisher for the various CLECs. It is now clear that [the incumbent LEC] does not just have to provide access to the information contained in its directories. Instead, it must actually place a customer's listing information in its directories. Directories Order, ¶ 160. **Further, it must place the listing information in its directories in a nondiscriminatory manner,** meaning that [the incumbent LEC] must place this information on terms and conditions that are equal to those provided to [the incumbent LEC's] own customers. See 47 C.F.R. § 51.217(a)(2)(i)-(ii).
>
> ***
>
> The FCC's conclusion that nondiscriminatory access applies to the actual act of placing a customer's listing information in a directory assistance database satisfied the spirit of the Act in the sense that **another of [the incumbent LEC's] monopolistic advantages is eliminated and the telecommunications playing field is made more level. Indeed, as a result of the monopolistic history of the telecommunications industry, consumers are accustomed to having one phone book containing all telephone numbers.**

U. S. West Communications, Inc. v. Hix, 93 F. Supp. 2d at 1132 (emphasis added).

These cases indicate that a directory, or at least a directory listing, is part of providing telephone service. They further indicate that the FCC and the courts will consider the competitive advantage or disadvantage inherent in an incumbent's practices in providing telephone services.

III. Directory Publishing Affiliates; Directories as Telephone Service

Before the TRA and before us, BAPCO and BST have taken the position that the TRA has no jurisdiction over BAPCO, which is characterized as a non-regulated publishing affiliate. This argument is not new and has been raised in other contexts.

In its filings, BST has stated, "Although state law grants the TRA authority to regulate certain aspects of white pages directory listings, it does not grant the TRA the general authority to regulate the publication of telephone directories. To the extent that state statutes, regulations, rules, orders, and tariffs address white pages directory listings, **BST complies with these authorities by**

contracting with BAPCO, an affiliated company which is not a public utility, for the publication of white pages directory listings in telephone directories." Thus, BST has agreed that it fulfills its legal obligations to publish directories by causing the "White Pages" directory to be published by its affiliate, BAPCO. It is upon BST that the legal obligation is placed to publish a "White Pages" directory which includes listings for customers of AT&T and other competing providers of local telephone service. It is BST's obligation to so publish in accordance with all other applicable legal requirements, and none of those requirements can be avoided by contracting the actual publication out to another entity.

That conclusion comports with the reasoning expressed in the opinions of various courts and the FCC on directory affiliate issues, as set out below. Inextricably intertwined with the directory affiliate issue is the issue of whether directories are part of the provision of telephone services.

A. State Court Decisions Under State Law

The argument that a state regulatory agency has no authority over directory publishing affiliates of the local service provider has been made in various contexts across the country, even prior to the Telecommunications Act and the issues raised by its implementation. Before the court-ordered breakup of AT&T, all telephone-related services were provided by that company. As part of the divestiture, local telephone services were transferred to seven regional companies. These regional companies, at the time the divestiture order became effective, transferred, or attempted to transfer the directory publishing assets and services to related entities.

> In the AT&T divestiture case, *United States v. American Tel. & Tel. Co.*, 552 F.Supp. 131, the court rejected a proposal that directory publishing assets should be transferred from the Bell operating companies such as Mountain Bell to AT&T. The court determined that the assets should remain with the operating companies, in part because profits from Yellow Pages revenues were used to subsidize rates charged to local telephone customers as a means of furthering the goal of universal telephone service. *United States v. American Tel. & Tel. Co.*, 552 F.Supp. at 194. Indeed, as many as thirty states use Yellow Pages profits for this purpose. *State ex rel. Util. Comm'n v. Southern Bell Tel. & Tel. Co.*, 307 N.C. 541, 299 S.E.2d 763, 765 (1983). When the divestiture court again addressed this issue in 1984, it observed with dismay that the intent of its 1982 order had been circumvented by the acts of regional holding companies (such as U.S. West, Inc.) transferring publishing assets from the local operating companies to unregulated subsidiaries. *United States v. Western Elec. Co., Inc.*, 592 F. Supp. at 866.

Mountain States Tel. and Tel. Co. v. Public Utils. Comm'n of Colorado, 763 P.2d 1020, 1031-32 (Colo. 1988).

Litigation ensued regarding state regulatory agency authority over directory publishing services. In *Mountain States Tel. and Tel. Co.,* 763 P.2d at 1020, the Supreme Court of Colorado

affirmed the state regulatory commission's order requiring the local telephone company to reacquire directory publishing assets which it had transferred to an affiliate without prior commission approval. In that case, the court noted:

> Moreover, this case illustrates that the private business and public utility functions are not easily separated. Nor are the "essential" utility assets easily separated from the "non-essential." Historically, both the PUC and Mountain Bell considered the publishing assets to be public utilities assets. The assets were recorded in the regulated book of accounts and were depreciated according to PUC and Federal Communications Commission schedules. The depreciated assets were included in Mountain Bell's base for rate making purposes and the Yellow Pages revenues were used to subsidize rates for telephone customers. White and Yellow Pages were published as a single integrated product. A free alphanumeric listing was offered to residential customers in the White Pages and to business customers in the Yellow Pages, and a free copy of the directory was provided to all customers as part of Mountain Bell's service. The commission notes that Mountain Bell previously stipulated that directory service was "essential" to the provision of telephone service. *Corporation Comm'n v. Mountain States Tel. & Tel. Co.*, 84 N.M. 298, 502 P.2d 401 (1972), overruled on other grounds, *Matter of Rates and Charges of Mountain States Tel. & Tel. Co.*, 99 N.M. 1, 653 P.2d 501, 504-505 (1982). A telephone directory "has been called an indispensable element of telephone service." Annotation, Liability of Telephone Company for Mistakes in or Omissions from Its Directory, 47 A.L.R.4th 882, 897 (1986).

Id. at 1026-27.

In a recent case, the Supreme Court of Utah also determined that the directory publishing operations of an affiliate of a former Bell operating company were utility operations over which the state utility commission had authority. *See U.S. West Communications, Inc. v. Public Serv. Comm'n of Utah*, 998 P.2d 247 (Utah 2000). In that case, U.S. West had transferred its directory publishing operations to an affiliate, Dex. The state utility commission had not approved the transfer nor had it taken steps to invalidate the transfer. Instead, the commission had continued to treat the directory publishing business as part of the telephone service provider's operations for purposes of setting rates. Profits from directory publishing were applied to offset the telephone service provider's revenue requirements and thereby lower rates.

In reaching its conclusion that the directory publishing operations of the affiliate were utility operations, the court found that the ratepayers had an investment or proprietary interest in the publishing operations due to the historical union of telecommunications and directory publishing services. The court traced the reorganization of AT&T, which had, as a monopoly, "provided telephone directories in conjunction with its telecommunications services" through the transfer of the directory publishing operations from the regional holding company for telephone services (U.S.

West). *Id.* at 250. Finding that the assets were utility assets, the court affirmed the commission's authority to continue to regulate the directory publishing business. *See id.* at 251-52.

> Before the transfer, these operations [directory publishing] were an integral part of telecommunications services. . . . Directory publishing inevitably increased accessibility to, and the usefulness of, telecommunications services which, in turn, increased the usage and circulation of telephone directories, making advertising therein more marketable. **Telecommunications services and directory publishing operations each helped expand and develop the other.**

Id. at 250-51 (emphasis added).

In a number of other jurisdictions,[11] state utility commissions have imputed income from a directory publishing affiliate to the telephone service affiliate in determining the telephone service provider's revenue when computing its allowable rate of return. In one case, the directory publishing affiliate argued that profits from directory publishing should not be imputed to its telephone service affiliate because the directory publisher should be free from regulation like other directory publishing companies. *See U.S. West Communications, Inc. v. Washington Utils. & Transp. Comm'n*, 134 Wash. 2d 74, 949 P.2d 1337 (1997). The Washington Supreme Court decided otherwise, stating:

> The fact is that the Company is different from other [directory publishing] companies competing for the business. The record shows that U.S. West did not develop this lucrative business by its initiative, skill, investment or risk-taking in a competitive market. Rather, it did so because it was the sole provider of local telephone service, and as such owned the underlying customer databases and had established business relationships with virtually all of the potential advertisers in the yellow pages. ... The record also indicates that in contrast with potential publishing competitors, **[the directory publishing affiliate] enjoys a unique and direct benefit by being associated with the Company's regulated telecommunications services.**

U.S. West Communications, Inc. v. Washington Utils. & Transp. Comm'n, 134 Wash.2d at 99-100, 949 P.2d at 1350; *see also Mountain States Tel. & Tel. Co.*, 763 P.2d at 1027 (directory publishing business of the telephone company had been developed over the previous fifty years "within the

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[11] The Washington Supreme Court also noted, "the record indicates that U.S. West, Inc. (the parent of U.S. West and of U.S. West Direct) has organized and operates U.S. West Direct as a nonregulated business in many states. Thirteen of fifteen of U.S. West's state regulatory jurisdictions impute U.S. West Direct income into telephone company operations in setting rate levels." *U.S. West Communications, Inc. v. Washington Utils. & Transp. Comm'n*, 134 Wash.2d at 99, 49 P.2d at 1350 n.8. The North Carolina Supreme Court found that more than thirty states include directory advertising revenues in rate making for telephone service providers, *see State Utilities Comm'n v. Southern Bell*, 307 N.C. 541, 545, 299 S.E.2d 763, 765 (1983), a statement which has been repeated by other courts in similar cases. *See U.S. West Communications, Inc. v. Public Serv. Comm'n of Utah*, 998 P.2d at 254; *Mountain States Tel. and Tel.*, 763 P.2d at 1031.

protective shelter of" the company's monopoly over telephone service and "the public interest in those assets" is beyond dispute).

The record herein indicates that the TRA has continued to impute the profits from BAPCO's directory publishing to BST when using a rate of return method for fixing BST's rates.

In areas related to income imputation, courts have made rulings generally upholding state regulatory commission authority over affiliates of telephone companies. For example, in *General Tel. Co. of the Northwest, Inc. v. Idaho Pub. Utils. Comm'n*, 109 Idaho 942, 712 P.2d 643 (1986), the Idaho Supreme Court approved a decision by that state's utility regulatory commission limiting the rate of return which could be earned by the publishing affiliate to the same rate established for the telephone provider. *See General Tel. Co. of the Northwest, Inc.*, 109 Idaho at 950, 712 P.2d at 651.

In *Pacific Northwest Bell Tel. Co. v. Katz*, 121 Or. App. 48, 853 P.2d 1346 (1993), the telephone company had requested permission from the state regulatory commission to cease producing reverse directories and business and customer lists (telephone customer information sorted by zip code, area code, etc.). The commission refused, reasoning that the telephone company merely wanted to shift production of those income-producing lists to an unregulated affiliate, which would have an adverse impact on rates charged to telephone customers. The court held that the commission had jurisdiction over these services because they were "necessary or useful" to the telephone company's performance of its duty to charge only "reasonable and just rates." *Katz*, 121 Or. App. at 52-53, 853 P.2d at 1349.

In some of these cases, the courts' specific findings about the relationship between the telephone company and the directory publisher are relevant to the case now before us. In *Rochester Tel. Corp. v. Public Serv. Comm'n of New York*, 87 N.Y.2d 17, 660 N.E.2d 1112, 637 N.Y.S.2d 333 (N.Y. Ct. App. 1995), the state utility commission reduced the telephone company's rates by imputing to it a 2% royalty from its directory publishing affiliate for the affiliate's use of the telephone company's name and logo. The commission determined that the telephone company had allowed its affiliate to use valuable intangible assets of the company (its name, reputation, and logo) without compensation and had allowed improper cost shifting from unregulated subsidiaries and affiliates to the regulated utility. Both of these actions, the commission determined, improperly resulted in higher rates for ratepayers. The reviewing court found that the commission was charged with the duty to ensure that a utility charges just and reasonable rates and may evaluate the economic consequences of a utility's actions so as to protect ratepayers from the utility's imprudent acts and upheld the commission's action, finding that the telephone company's name and reputation have value and that **the telephone company "sought to exploit these intangible assets by closely associating itself with its affiliates in various advertising campaigns**." *Rochester Tel. Corp. v. Public Serv. Comm'n of New York*, 87 N.Y.2d at 29, 660 N.E.2d at 1117, 637 N.Y.S.2d at 338 (emphasis added). The

court held, "Insofar as the ratepayers have borne the costs for creating value in [the telephone company's] name and reputation, the ratepayers are entitled to a prudent use of those assets." *Id.*[12]

In examining the propriety of the commission's blanket order regarding imputation of royalties to all utilities from dealings with the affiliates, the court noted that the circumstances involving the particular telephone company were not unique, specifically referencing the relationship between NYNEX (the directory publishing affiliate) and its local telephone service provider affiliate, New York Telephone.

> In [an opinion in other proceedings], the [state commission] found that NYNEX and its affiliates relied heavily on the reputation of New York Telephone . . . in establishing itself and that New York Telephone **"has certainly conveyed to the joint operation the good will and reputation that were developed with ratepayer funding**." Moreover, PSC noted that full page advertisements appeared in major newspapers associating NYNEX with New York Telephone and the former Bell system.

Id. 87 N.Y.2d at 32-33, 660 N.E.2d at 1118, 637 N.Y.S.2d at 339 (emphasis added).

A state regulatory agency's authority over a directory affiliate of a telephone service provider has been challenged in contexts totally unrelated to rates or the financial implications of the relationship. In *State Utils. Comm'n v. Southern Bell Tel. and Tel. Co.*, 326 N.C. 522, 391 S.E.2d 487 (1990), the North Carolina Supreme Court considered that state's regulatory agency's authority to hear complaints of inaccurate directory listings in a "Yellow Pages" directory. In that case, the directory publishing affiliate, BAPCO, maintained that the agency had no jurisdiction to hear complaints against it because the statutes provided only for complaints against a public utility and that BAPCO was not a public utility.

The court noted that it had considered a similar argument regarding the restrictive definition of public utility function in *State ex rel. Utils. Comm'n v. Southern Bell*, 307 N.C. 541, 299 S.E.2d 763 (1983), a case involving whether the commission could include profits from "Yellow Pages" advertising for purposes of ratemaking. The court, in holding that the telephone company's utility function was to provide adequate service to its subscribers, stated that "[to] suggest that the mere transmission of messages across telephone lines is adequate telephone service is ludicrous." *Southern Bell*, 307 N.C. at 544, 299 S.E.2d at 765.

The court recognized that the telephone company was required by tariff to publish a directory and held that a telephone company's decision to include "Yellow Pages" advertising in its directory

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[12] "As noted in PSC opinion . . . , ratepayers have funded the salaries, training, advertising, and other activities that generate goodwill. Ratepayers have also paid for capital investments which have contributed positively to [the telephone company's] name and reputation. Moreover, a utility is able to establish widespread name recognition because the monopoly nature of the utility industry provides a widespread, captive ratepayer base in which to instill the name recognition." *Id.*, 87 N.Y.2d at 30, 660 N.E.2d at 1117, 637 N.Y.S.2d at 338 n. 2.

makes correct listings in its advertisements a part of the utility's function of providing adequate service.

> While Southern Bell, the regulated public utility, is the entity which is required by tariff to publish the telephone directory, it has contracted with BAPCO to take over this duty and publish the directory. As noted earlier, BAPCO contends that it is not subject to the complaint jurisdiction of the Commission because BAPCO is not a "public utility" as defined by the statute. We have already concluded that **publishing the directory, which must include proper telephone listings in both the white pages and the yellow pages, is a utility function** which comes under the jurisdiction of the Commission. Since publishing the directory with correct listings is a public utility function, and since BAPCO is performing this function for Southern Bell, the Commission has jurisdiction over BAPCO to handle any complaints which arise from BAPCO's performance of this function without regard to whether BAPCO itself is a public utility. . . .
>
> The real issue in this case is whether the Commission has complaint jurisdiction over a company publishing, on behalf of a regulated telephone utility, a telephone directory which also contains paid advertising. Without deciding whether the Commission has general regulatory jurisdiction over yellow pages advertising, we conclude that the Commission has jurisdiction over complaints concerning incorrect telephone number listings in the telephone directory **even when the regulated utility has delegated to another company the public utility function of publishing its directory** which also includes paid advertising. Providing a correct telephone listing is part of providing "reasonably adequate service" as required by N.C.G.S. § 62-42(a)(5).

Id., 391 S.E.2d at 491 (emphasis added).

B. Decisions Under the Telecommunications Act of 1996

At least with regard to "directory listings," the FCC has unequivocally answered the question of its authority to apply the Act's requirements to directories published by affiliates of the local services provider. *See* 47 C.F.R. § 51.5 (directory listing includes information that the carrier or an affiliate has published or caused to be published); FCC Third Report and Order ¶¶ 29-36. (See Section IIIC, *infra*.)

Similarly, federal courts addressing the application of the requirements of the Telecommunications Act of 1996 or the FCC's rules implementing the Act to directory publishing affiliates have generally focused on the obligations placed on the telephone service provider. In *U.S. West Communications, Inc. v. Hix*, 93 F. Supp.2d at 1115, the court determined that the incumbent local exchange carrier could be required to include competing carriers' customers on a nondiscriminatory basis in directories or directory listings published by the incumbent carrier or its affiliate. In that case, the incumbent local exchange carrier argued that the state regulatory

commission had no authority to impose conditions on a directory-publishing affiliate because that entity was not a telecommunications carrier subject to regulation and because publishing is a deregulated service. The court flatly rejected that argument, upholding the FCC's interpretation that the Act's nondiscriminatory access requirements applied to directories that the telephone company or an affiliate published or caused to be published as provided in 47 C.F.R. § 51.5. *See id.* at 1133.

The court in *Hix* specifically declined to follow cases holding that a state commission lacked authority to impose directory listing requirements on a directory publishing affiliate of the ILEC, on the basis those decisions were issued prior to the FCC Third Report and Order and/or failed to consider the obligations of § 251(b). *See id.* at 1133-34. The court, instead, followed *MCI Telecommunications Corp. v. Michigan Bell Tel. Co.*, 79 F. Supp.2d 768 (E.D. Mich. 1999).

In *Michigan Bell,* the court amended its previously entered order which had held that the incumbent local exchange carrier (Ameritech) was not required to list a competing carrier's (MCI) customers in its "Yellow Pages." The court amended the earlier order because of the FCC's clarification of nondiscriminatory access requirements of the Telecommunications Act regarding directory services, as reflected in the Third Report and Order released in September 1999. [13]

> Ameritech [the incumbent LEC] further argues that it cannot be required to publish MCI's [the CLEC] customers in its yellow pages because Ameritech does not publish a yellow pages directory. The Ameritech Pages Plus Yellow Pages, which lists Ameritech's business customers, are published by a separate company called Ameritech Publishing, Inc., also known as Ameritech Advertising Services. Ameritech points out that paragraph 158 of the Directories Order provides that "a LEC publishing a telephone directory has a duty to incorporate a listing supplied by its competitor." Further, Ameritech relies on *U.S. West Communications, Inc. v. Garvey,* No. 98-1295 (D. Minn. Mar. 30, 1999) (JA 70), which held that the state commission had no authority to regulate the publisher of a phone directory, which was a wholly owned subsidiary of the ILEC, where there was no evidence that ILEC controlled the publisher. Ameritech reasons that because it does not publish a yellow pages directory, it has no duty to publish MCI's listings in such a directory.

MCI Telecommunications Corp. v. Michigan Bell Tel. Co., 79 F. Supp.2d at 801.

Finding this argument "specious," the court relied on the FCC's interpretation and clarification in its Third Report and Order and held that "the duty to publish competitors' business customers in a yellow pages directory on a nondiscriminatory basis extends to incumbent carriers who have caused their own customer listings to be published in a yellow pages directory." *Id.* In response to the argument that the directory publisher was an independent company which provided directory listings

[13] The court stated, "At the time it issued its Opinion, the Court was not aware that the FCC had just clarified the meaning of 'directory listing' in section 251(b)(3)." *Michigan Bell*, 79 F. Supp. 2d at 800-01.

by contract to Ameritech and to other carriers and thus was not an affiliate governed by the Telecommunications Act and its regulations, the court found there was evidence to the contrary.[14]

> Moreover, the issue of whether Ameritech Publishing is an affiliate of Ameritech is not relevant because the regulation is drafted more broadly. "Directory listings" include those that an incumbent carrier has "caused to be published." 47 C.F.R. § 51.5. Ameritech causes its own customers to be published in the Ameritech PagesPlus Yellow Pages. Therefore, Ameritech has the duty to provide nondiscriminatory access to such yellow pages publication to MCI's customers.

Id. at 802.

Finally, in a recent case, the Colorado Supreme Court considered a similar argument in a case under a new state law providing for local competition. *See U.S.West Communications, Inc. v. Colorado Pub. Utils. Comm'n*, 978 P.2d 671 (Colo. 1999). The incumbent LEC, U.S.W.C., contended that new rules adopted by the state utilities commission requiring the incumbent to offer premium listing services to customers of competitors impermissibly interfered with the existing directory publishing contract between U.S.W.C. and its affiliate, Direct. The court found that U.S.C.W. did not demonstrate how the rules affected the existing contract or explain why it could not enter into another contract to provide services in compliance with the rules. Again, the telephone company made the argument that because it did not publish "White Pages" directories the state commission could not impose on it the requirement to negotiate contracts to provide the required services on behalf of the CLECs. The court found that the rules did not impose any obligation on U.S.W.C. to negotiate, but simply imposed the obligation to offer the features to its competitors. Finding the incumbent's argument unpersuasive, the court stated:

> Regardless of the exact nature of USWC's contract with Direct,[15] a **regulated monopoly may not evade regulatory requirements simply by contracting** a service with a non-regulated third-party and then claiming that future rules concerning the service are invalid if they interfere with the contract.

Id. at 677 (emphasis added).

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[14] Particularly significant was the fact that the Interconnection Agreement provided that "Ameritech shall cause the Publisher to include Primary Customer Listings of MCI's Customers in its White Pages Directories. . . ." Thus, the court found that the telephone company, Ameritech, exercised some control over the publisher, because it agreed to cause Ameritech Publishing to publish both its own customers and MCI's customers in the "White Pages" directory. *Id.* at 802.

[15] In a footnote, the court recounted the history of the commission's actions regarding the transfer of directory publishing assets from the telephone company subsidiary of U.S. West, Inc. to its directory publishing subsidiary, U.S. West Direct, Inc. The commission eventually rescinded its order requiring the telephone company to reacquire those assets and required the publishing affiliate to make annual equity infusions to the telephone company. As part of the settlement which resulted in that order, the directory publishing affiliate agreed to fulfill the telephone company's obligations to publish and distribute directories under existing rules. *See id*., 978 P.2d at 677 n. 11.

C. The Relationship Between BAPCO and BST

As the previous discussion demonstrates, a number of courts have recognized the historical connection between the providing of equipment and dial tone and the providing of directories, all as part of telephone services, as well as the continuing corporate relationships. There is a general recognition that telecommunications services and directory publishing operations have each helped expand and develop the other. *See U.S. West Communications, Inc. v. Public Service Comm'n of Utah*, 998 P.2d at 251. Similarly, courts have recognized that the directory publishing affiliate of the incumbent local telephone company enjoys a unique and direct benefit by being associated with the company's regulated telecommunications services. *See U.S. West Communications, Inc. v. Washington Utils. & Transp. Comm'n*, 134 Wash. 2d at 99, 949 P.2d at 1350. Directory publishing affiliates have generally relied on the reputation of the telephone company, and in many situations, the telephone company and the publishing affiliate have jointly advertised and sought to use the good will and reputation that were developed by the telephone company within the protection of a monopoly. *See Rochester Tel. Corp. v. Public Serv. Comm'n of New York*, 87 N.Y.2d at 33, 660 N.E.2d at 1118, 637 N.Y.S.2d at 339.

The record before the TRA confirms a similar relationship among BAPCO, BST, and their mutual parent, BellSouth Corporation. Included in the record are the financial statement, prospectus, shareholder report, and related documents for BellSouth Corporation. In the prospectus, the following description of the corporation's activities is included:

> BellSouth Corporation, with more than 22 million access lines in nine Southern states, provides local telephone service and long distance access to more customers than any other company in the U.S. We market a full array of telecommunications services to businesses and consumers, . . . BellSouth is one of the world's largest wireless communications companies, serving more than 4.8 million cellular customers in major markets throughout the U.S. and in 12 other countries. BellSouth leads the industry in Yellow Pages advertising and directory publishing.

In its 1996 SEC annual report, BellSouth Corporation reported:

> BellSouth Corporation (BellSouth) is a holding company providing telecommunications services, systems and products primarily through two wholly-owned subsidiaries, BellSouth Telecommunications, Inc. (BellSouth Telecommunications) and BellSouth Enterprises, Inc. (BellSouth Enterprises). BellSouth Telecommunications provides predominantly tariffed wireline telecommunications services to approximately two-thirds of the population and one-half of the territory within Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. BellSouth's other businesses (predominantly wireless and international communications services and advertising and publishing products) are conducted primarily through subsidiaries of BellSouth Enterprises.

Under a heading "Other Telecommunications Business Operations," BellSouth included information regarding directory advertising and publishing:

> BellSouth Enterprises owns a group of companies which publish, print and sell advertising in, and perform related services concerning, alphabetical and classified telephone directories. Directory advertising and publishing revenues represented approximately 9% of BellSouth's total operating revenues for each of the last three years. Two of BellSouth's directory companies also provide publishing and related products and services to other directory publishers. During 1996, such BellSouth companies published approximately 500 directories for BellSouth Telecommunications and contracted with approximately 170 nonaffiliated companies to sell advertising space in approximately 490 of their publications.

In its shareholder report, BellSouth's management addressed its plans for succeeding in the competitive environment created by the Telecommunications Act. Among other things, BellSouth stated, "Being the single source to provide our customers' many telecommunications needs is a key ingredient for success as the dynamics of our marketplace change." Playing a large role in BellSouth's plans was the use of the BellSouth name: "Leveraging the power of our BellSouth brand is a key element of our determination to win." It is clear that BellSouth considered branding and brand identification important to its success in all its endeavors. "The BellSouth brand stands for convenience, reliability and value. We are aggressively communicating that message to customers in the South with a wide variety of innovative advertising campaigns, marketing programs and sports sponsorships."

It is apparent that BellSouth Corporation, the parent of both BST and BAPCO, intended that both subsidiaries benefit from use of the BellSouth name, including its logo. That name eamed its value through providing telephone services.

Following the example of the authorities discussed above, and based on proof in this record of a similar relationship between the entities, I conclude that the TRA's authority over BAPCO is irrelevant because the TRA has authority over the incumbent local telephone company, BST, the entity upon which the law places the obligation to produce a directory that includes the customers of its telephone service provider competitors. Therefore, the real question is the extent of the TRA's authority over BST.

IV. Our Review of TRA Interpretation

A. The Arbitration Proceedings

AT&T and BST participated in arbitration proceedings before the TRA regarding open issues in their interconnection agreement. My colleagues place significance, to differing degrees, on the TRA's declination to determine, in the context of the arbitration, the issue of placement of AT&T's name and logo on the cover of the directory produced by BAPCO for its affiliate BST. All parties

herein agree that this issue was presented in that arbitration. However, there is nothing in the record before us to support the implication that the TRA decided the issue was not arbitrable because directory covers are not "network elements," a conclusion apparently reached by the majority, perhaps on the basis of statements in BST's brief that, "the TRA . . . ruled that the directory cover issue was not arbitrable under the Federal Act," and "[i]mplicit in this ruling was the determination that a directory cover is not a 'network element' meaning 'a facility or equipment used in the provision of telecommunication service.'"[16]

From brief references during the hearing in this matter, the only conclusion I can draw regarding the arbitration proceeding is that the TRA determined that the issue was better left to negotiation.[17] Even BST in its brief states that the TRA stated "[t]hat private negotiations are the preferred method of resolving this issue, and the parties are encouraged to resolve this matter through negotiation." All parties agree that the content of the cover of the directory was not included in the arbitration under the 1996 Telecommunications Act, and I believe we can imply nothing more from its exclusion.

Again, whether the TRA's refusal to arbitrate that issue was proper under the provisions of the Telecommunications Act is not before us. *See* 47 U.S.C. § 252(e)(6). Also not before us is the

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[16] BST also stated that the TRA's ruling in the arbitration proceeding was consistent with the rulings of other states and offered a footnote stating that "a majority of regulatory authorities similarly have held that the directory cover issue is not an arbitrable dispute under the Federal Act. These decisions are largely based on agency determinations that BAPCO is not an 'incumbent local exchange company' ('ILEC') or a 'local exchange company' ('LEC') providing local exchange telecommunication services, but a private company providing telephone directories and directory publication services in a competitive market." In view of the FCC's Third Report and Order, as well as federal court decisions following it, any such determination that the nondiscriminatory access provisions do not apply to directories published by an affiliate in performance of the telephone service provider's legal responsibility would no longer be a correct interpretation of the Telecommunications Act. In any event, the TRA's ruling in the case before us would imply that it had not declined to arbitrate the issue of directory covers on the basis of BAPCO's affiliate status.

[17] In its brief, the TRA describes what happened as follows:

> In that docket, AT&T sought to have the arbitrators rule on the issue under the Federal Telecommunications Act of 1996 as part of its Order and Award in the arbitration proceeding. BST and BAPCO opposed consideration of this issue during the arbitration. All parties addressed the issue before the arbitrators in oral arguments. Subsequently, BAPCO filed a petition for a declaratory ruling in the arbitration proceeding, in which it requested that the arbitrators find that neither BAPCO nor the issues raised by AT&T in the arbitration proceeding that related to telephone directories were subject to the TRA's jurisdiction or to the arbitration provisions of 47 U.S.C. § 252. In response, AT&T filed a motion to dismiss BAPCO's petition. BST supported BAPCO's prayer for relief in its response to AT&T's motion to dismiss. All parties supplemented their filings with orders and transcripts from arbitration proceedings before other state commissions within the BST service territory. After careful consideration of the record concerning this issue, the arbitrators ruled that the issue would not be addressed within the context of the arbitration proceeding and dismissed both BAPCO's petition and AT&T's motion to dismiss. Thereafter, AT&T and BAPCO engaged in negotiations, however, no agreement was reached as to this issue of whether AT&T's name and logo should be placed on the cover of BST directories.

question of whether directory covers are "network elements" under the Act. Even if we found they are not, such a finding would only lead to the conclusion that the Act, or at least one provision of it, did not provide authority to the TRA for its order.

B. Independent State Law Basis

As thoroughly discussed in *BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663 (Tenn. Ct. App. 1997), the 1996 Telecommunications Act does not preempt state regulation as long as that regulation is not inconsistent with the Act or FCC implementation of the Act. *See Greer* at 671-72. "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." *Id.* at 672.

In fact, "[w]ith 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 or exchange access' as long as they are 'not inconsistent' with the Act." *Id.* at 671-72 (citing 47 U.S.C.A. § 261(b), (c)); *see also* 47 U.S.C. § 251(d)(3) (directing the FCC not to promulgate regulations that prevent state commissions from enforcing local policies that establish access and interconnection requirements, are consistent with the Act's requirements, and do not substantially prevent the implementation of § 251 of the Act).

No party has alleged that the TRA's interpretation of its rule conflicts with the Telecommunications Act. At most, the argument is that the TRA's interpretation is not mandated by the Telecommunications Act. Even if it were so mandated, the question before us is whether state law provides an independent basis for the interpretation. *See U.S. West Communications, Inc. v. Colorado Pub. Utils. Comm'n*, 978 P.2d at 673 n.4 (noting that the Telecommunications Act had become effective during the rulemaking proceedings for the state agency rules being challenged and that no party had argued preemption by the federal act, the court would not consider whether the federal statute provided an independent justification for the rules).

In *AT&T v. Iowa Utils. Bd.*, the U.S. Supreme Court addressed the Telecommunications Act's effect on state regulatory authority, finding:

> . . . Congress, by extending the Communications Act into local competition, has removed a significant area from the States' exclusive control. Insofar as Congress has remained silent, however, § 152(b)[18] continues to function. The Commission could not, for example, regulate any aspect of intrastate communication not governed by the

[18]The Court refers to 47 U.S.C. §152(b) which reads in part, "Except as provided in [specific provisions] . . . nothing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service."

> 1996 Act on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction.

525 U.S at 381 n.8, 119 S. Ct. at 731 n. 8.

In its policies and regulations, the FCC has acknowledged the ability of states to go beyond the terms of the Telecommunications Act in their regulation of companies which provide telephone services. For example, in its Third Report and Order, the FCC gave effect to a state requirement that a local exchange carrier provide a "Yellow Pages" listing as part of its service to businesses. *See* FCC Third Report and Order ¶¶ 32-35. Similarly, in discussing nondiscriminatory access to certain features in directories, the FCC stated, "Our rules do not require incumbent LECs to provide competitors with access to the customer guides and information pages that appear in the LECs' printed telephone directories, but neither do these rules preclude States from establishing such a requirement, to the extent they have such authority." *Id*. ¶ 163. The FCC also noted that it had adopted certain definitional requirements for directory listings "to accommodate States that may require more stringent requirements as part of nondiscriminatory access to directory listings." *Id.* After giving examples of potential requirements by states, the FCC concluded that "to the extent that a providing LEC is required to list such information in its directory assistance database, the providing LEC must grant a requesting LEC nondiscriminatory access to such information." *Id.* Finally, in its ruling regarding the rebranding of operator services, the FCC specifically stated that "we do not preempt [another state's] intrastate branding requirements, nor any similar requirements that other states may have enacted." Second Report and Order at ¶ 125.

Therefore, the federal Act neither establishes nor limits the TRA's authority to regulate pursuant to state law. The question is whether the TRA's interpretation and application of its existing rule is within its authority under state law.

C. Review Under State Law

In this action, the TRA was asked to issue a declaratory order interpreting its rule and applying that rule to a particular set of facts. *See* Tenn. Code Ann. §§ 4-5-223 and 4-5-224; *see also* Tenn. Code Ann. § 65-2-104. Pursuant to the Administrative Procedures Act, the TRA convened a contested case hearing on the petition. *See* Tenn. Code Ann. § 4-5-223. The standard for reviewing administrative agency decisions in contested case hearings under the APA is set out in Tenn. Code Ann. § 4-5-322. This court has applied that standard to agency declaratory orders. *See Ogrodowczyk v. Tennessee Bd. For Licensing Health Care Facilities*, 886 S.W.2d 246 (Tenn. Ct. App. 1994). That standard has been summarized as follows:

> This is not a broad, *de novo* review; it is restricted to the record; and the agency finding may not be reversed or modified, unless arbitrary or capricious, or characterized by abuse, or clearly unwarranted exercise of discretion, and must stand if supported by substantial and material evidence. T.C.A. § 4-5-322(h)(5), *C.F. Indus. v. Tennessee Pub. Svc. Comm.*, Tenn. 1980, 599 S.W.2d 536.

Id. at 250-51.

Tenn. Code Ann. § 4-5-322 allows a reviewing court to reverse or modify the agency's decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are "in excess of the statutory authority of the agency." Tenn. Code Ann. § 4-5-322(h)(2). That ground forms the basis for the majority opinion herein.

Our Supreme Court has described the general authority of a state agency, stating:

> Every action taken by an agency must be grounded in an express statutory grant of authority or must arise by necessary implication from an express statutory grant of authority. Even though statutes such as the Solid Waste Disposal Act should be construed liberally since they are remedial in nature, the authority they vest in an administrative agency must have its source in the language of the statutes themselves.

Sanifill of Tennessee Inc., v. Tennessee Solid Waste Disposal Control Bd., 907 S.W.2d 807, 810 (Tenn. 1995) (citations omitted).

In determining whether the TRA's interpretation is within its statutory authority, we must review the relevant statutes. In doing so, we are guided by familiar principles of statutory construction.

> The role of this Court in construing statutes is to ascertain and give effect to legislative intent. Whenever possible, legislative intent is to be ascertained from the natural and ordinary meaning of the language used, without forced or subtle construction that would limit or extend the meaning of the language. . . . Instead, we must apply a reasonable construction in light of the purposes and objectives of the statutory provision. Finally, a state agency's interpretation of a statute that the agency is charged to enforce is entitled to great weight in determining legislative intent.

Greer, 967 S.W.2d at 761 (citations omitted).

The statutory grant of authority over public utilities given to the TRA is extensive:

> The authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter.

Tenn. Code Ann. § 65-4-104.

The legislature has also specifically directed how we should interpret the TRA's authority:

> This chapter shall not be construed as being in derogation of the common law, but shall be given a liberal construction, and any doubt as to the existence or extent of a power conferred on the authority by this chapter or chapters 1,3, and 5 of this title shall be resolved in favor of the existence of the power, to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction by this chapter.

Tenn. Code Ann. § 65-4-106. Our Supreme Court has recognized the explicit mandate of this provision and interpreted it as a signal of the General Assembly's "clear intent to vest in the [TRA] practically plenary authority over the utilities within its jurisdiction." *Consumer Advocate Div. v. Greer*, 967 S.W. 2d at 762 (quoting *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 159 (Tenn. Ct. App. 1992)).

In addition, the TRA has specific authority or power to "fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility," Tenn. Code Ann. § 65-4-117(3), and to require every public utility to "furnish safe, adequate, and proper service." Tenn. Code Ann. § 65-4-114(1).

As the majority noted, the state undertook a statutory change in the regulation of telephone services in 1995. Included in the preamble of the bill is the statement that "[c]ompetition among providers should be made fair by requiring that all regulation be applied impartially and without discrimination to each." In addition, the expressed goal of the new statute 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. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

Tenn. Code Ann. §65-4-123.

The State legislation also imposed certain requirements on providers of telephone services:

> All telecommunications services providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions; and **all telecommunications services providers shall**, to the extent that it is technically and financially feasible, **be provided desired features, functions and services** promptly, and on an unbundled and **non-discriminatory** basis from all other telecommunications services providers.

Tenn. Code Ann. § 65-4-124(a). (emphasis added.)

The statute also required all telecommunications services providers who provide basic local exchange service to "provide each customer a basic White Pages directory listing." Tenn. Code Ann. § 65-4-124(c).

D. Application to TRA's Order

The TRA has "practically plenary authority over the utilities within its jurisdiction," and there can be no dispute that BST is a utility within the TRA's jurisdiction. The TRA has specific statutory authority to "fix just and reasonable" standards or practices to be followed by a utility and to require a utility to provide "adequate and proper" service. *Greer*, 967 S.W.2d at 761-62; Tenn. Code Ann. §§ 65-4-114(1), 117(3). In order to be able to compete in providing long distance telephone service, BST is required by law to publish a "White Pages" directory which includes the customers of its local service competitors. It is required by law to provide services to its competitors on a nondiscriminatory basis. In order for the TRA to "effectively govern and control the public utilities placed under its jurisdiction," it must necessarily have authority to regulate how a utility complies with its legally-imposed obligations and to ensure such compliance. Thus, TRA clearly has jurisdiction over BST's publication of its ""White Pages"" directory.

I find no support for singling out one particular element or part of the publication of the directory and subjecting only that element to a jurisdictional analysis, as the majority implies by its finding that the branding of the directory cover is not an essential public service. Nothing in the statutes giving TRA authority over public utilities and their services and practices remotely implies that authority over every separate step in the provision of utility services must be found in separate statutory language. Having given the TRA "almost plenary" jurisdiction over utilities and their practices, the legislature was not required to list in every detail the specific services or practices the TRA could regulate. Given the broad grant of authority, a utility would need to demonstrate that the service being regulated was not part of the company's utility function. That is impossible in this case since the service herein, publication of a "White Pages" directory, is required by law to be provided as part of the provision of telephone services. In fact, the TRA has found the "White pages" directory to be part of the basic services which a local service provider must provide.

It is clear from the earlier discussion of numerous authorities that most jurisdictions have determined that publication of the directory is part of telephone service or, even, part of adequate telephone service. The federal Telecommunications Act of 1996 includes specific requirements for directory publishing and for directory assistance and directory listings, and the FCC has established rules and policies implementing those provisions of the Act. The Tennessee General Assembly has also inserted a requirement that telephone companies provide ""White Pages"" directory listings for their customers.

This court has indirectly addressed the issue of whether "White Pages" directories are part of the telephone company's utility function. In *Smith v. Southern Bell Tel. and Tel. Co.*, 51 Tenn. App.

146, 364 S.W.2d 952 (1962), this court examined whether a telephone company was acting "in the capacity of a public utility" when selling and publishing classified advertisements in the "Yellow Pages" portion of the telephone directory such that the company could not contractually limit its liability to purchasers of such advertising. While quoting with approval opinions from other states generally indicating that selling and publishing advertisements was outside the scope of the public service or public utility functions, the opinion clearly indicated that "White Pages" listings and publication of "White Pages" directories, on the other hand, were part of the public utility functions of the telephone company:

> It may be that a telephone company could not lawfully contract to limit its liability with respect to the actual listing of the name of its subscriber or patron in the alphabetical list of subscribers, together with the correct street address and telephone number, since it is a matter of common knowledge that **telephone companies, in order to increase their business as a public service corporation, or public utility, acting in the capacity as a telephone company, which throughout the years has published the name, street address and the telephone number of its subscribers in a directory** and which service is paid for in the regular rate, charged for the same . . .

Smith, 51 Tenn. at 153-54, 364 S.W.2d at 956 (emphasis added).

The *Smith* case specifically did not deal with the authority of the Public Service Commission and, in fact, noted that the PSC "has never exercised any control whatever over the right of a telephone company rendering this advertising service which will be referred to as ""Yellow Pages"" in the telephone directory, and there are no limitations upon such activity whatever." *Id.*, 51 Tenn. at 159, 364 S.W.2d at 958. However, it clearly indicates that publication of directories is part of the utility's provision of telephone services, which, therefore, would have been subject to regulation by the TRA.

From all of the above, I conclude that the TRA clearly has authority to regulate BST's publication of "White Pages" directories (1) because it can regulate the utility, BST; (2) because it can fix just and reasonable practices which BST must follow; (3) because publication of a "White Pages" directory is part of the regulated and required provision of local telephone services; and (4) because it can enforce the state statutory nondiscriminatory provision of services requirement with regard to a mandated service. Further, that authority extends to prescribing the contents of the directory and of the cover. In fact the regulation at the center of this dispute is entitled "Directories - Alphabetical Listing (White Pages)" and includes a number of requirements regarding the content of directories and their covers. For example, the cover must show the area included in the directory and the month and year it was issued. *See* TRA Rule 1220-4-2-.15(3). Further, the rule requires that information regarding emergency (such as police and fire) calls appear conspicuously in the front part of the directory. *See id.* No one has disputed, or reasonably could dispute, the TRA's authority to establish such requirements. In fact, no one has actually challenged that portion of the rule requiring that the name of the telephone utility appear on the front cover. The majority does not find the rule

itself to be beyond the authority of the TRA.[19] What is in dispute is the TRA's interpretation of its existing rule in light of its understanding of the directives given to it by the General Assembly.

Obviously, even though the TRA has authority to regulate the publication of the directory, it must exercise that authority in accordance with legislative limitations, directives and policy. Stated another way, "its actions must be harmonious and consistent with its statutory authority." *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 159 (Tenn. Ct. App. 1992). The General Assembly intended to leave implementation of its broad policies to the technical competence and specialized knowledge of the TRA, and limited its ability to regulate the practices of utilities only by requiring that such practices or standards be "just and reasonable." Tenn. Code Ann § 65-4-117(3). Because of similar language giving broad authority to the PSC (now TRA) to set rates that are "just and reasonable," and in the absence of any other requirement as to the approach to be followed by the Commission, our Supreme Court has characterized ratemaking as "a value judgment made by the Commission in the exercise of its sound regulatory judgment and discretion." *CF Indus. v. Tennessee Pub. Serv. Comm'n.*, 599 S.W.2d 536, 542 (Tenn. 1980). Consistent reasoning would require us to consider the TRA's setting of just and reasonable practices a similar value judgment resting in its discretion.

With specific regard to the local competition provisions of the 1995 state act, the legislature intended that the statute be implemented such that competition among providers was fair and that regulation be applied impartially. *See* 1995 Tenn. Pub. Acts, ch. 408. It specifically directed that regulation of services and/or providers "shall protect the interests of consumers without unreasonable prejudice or disadvantage" to any provider. Tenn. Code Ann § 65-4-123. It also directed that all providers receive desired services on a nondiscriminatory basis. *See* Tenn. Code Ann. § 65-4-124. By giving the TRA these general guidelines, the General Assembly intended that the TRA exercise its specialized knowledge of the telephone services industry in regulating the move to local competition. Thus, the TRA was given broad authority to interpret whether a particular practice was reasonable and just, protected the interests of consumers, and did not unreasonably disadvantage a provider.

In our review of the TRA's order, we must give particular deference to the agency's expertise where the legislature has given the agency broad authority to implement policy goals. The U. S. Supreme Court, in *AT&T v. Iowa Utils. Bd.*, applied such deference when it stated that the question of whether the FCC's approach would impede negotiations toward interconnection agreements "a matter eminently within the expertise of the Commission and eminently beyond our ken." *Iowa Utils. Bd.*, 525 U.S. at 394-396, 119 S.Ct. at 737-38. Similarly, the Court of Appeals of New York deferred to the state utility commission's expertise when stating that the question of whether a given affiliate

[19] BST asserts that the "reference [in the rule] to 'the telephone utility' in subsection (3) can only be to the telephone utility (*e.g.*, BST) which assumed responsibility for the regular publication of white pages telephone directories . . ." Neither the TRA nor this court has approved this interpretation. The TRA specifically found that the "telephone utility" referred to all providers whose customers are included in the directory. Since the majority opinion did not invalidate the rule itself, BST is faced with the dilemma of complying with the rule with no direction from this court even though the majority has vacated the TRA's interpretation.

contract is contrary to the public interest is a matter presenting "technical problems which have been left by the legislature to the expertise of the PSC." *New York Tel. Co. v. Public Serv. Comm'n of New York*, 72 N.Y.2d 419, 429, 530 N.E.2d 843, 849, 534 N.Y.S.2d 136, 141 (N.Y. Ct. App. 1988).

One other state court has recently reviewed a state regulatory agency's implementation of a new state statute mandating competition in local telephone service. *See U.S. West Communications, Inc. v. Colorado Pub. Utils. Comm'n*, 978 P.2d at 675. The Colorado utilities commission had promulgated rules regarding the publication of a single "White Pages" directory by the existing telephone service provider in each local area which included customer information for all telephone customers in the area, regardless of which LEC provided that customer's telephone services. In addition, the commission had required the incumbent LEC to offer premium listings to customers of its competitors and to include customer guide pages for each of its competitors which would include information on how to reach the competitor for repair services, billing information, and related information. The commission, and subsequently the court, based its actions on the legislative direction found in Colorado's 1995 telecommunications deregulation act. That act, among other things, adopted a state policy "to encourage competition in this market and strive to ensure that all consumers benefit from such increased competition." *Id.* at 674. The legislation also directed that "all barriers to entry into the provision of telecommunications services in Colorado be removed as soon as practicable." *Id.*

The Supreme Court of Colorado determined that the commission had acted within its authority, finding that "to the extent that the denial of equal access to premium listings or guide pages constitutes a barrier to entry, the PUC had the authority to promulgate regulations addressing the issue." *Id.* at 675.

> In this regard, we note that some deference to administrative expertise is appropriate where regulations are based on "'judgmental or predictive facts,' which are primarily founded on policy choices rather than factual determinations and which are not capable of definitive proof." Hence, we defer to the PUC's administrative expertise in its predictive finding that access to guide pages and premium listings would eliminate a barrier to entry into the market by CLEC's.

Id. (citations omitted). In making this conclusion, the court relied upon *Federal Communications Comm'n. v. National Citizens Comm.*, 436 U.S. 775, 98 S.Ct. 2096 (1978) (upholding regulations of the FCC in requiring mass media divestiture to support diversity in information viewpoints even though the record failed to conclusively support the FCC's prediction that ownership diversity would result in information diversity).

To apply these principles to the TRA's order, we must examine the specific findings therein as well as the specific legislative directives. First, the TRA found, consistent with statutory language, that it was charged with the duty of promoting telecommunications competition and with the duties of protecting the interests of both the consumers and the utility providers. The TRA adopted a finding

that "the white pages listing is a basic service[20] and an essential tool the customer needs to efficiently and fairly use the network." The TRA also determined that one comprehensive directory served the interest of consumers by reducing customer confusion and also promoted competition.

Regarding Rule 1220-4-2-.15, after acknowledging that the rule was adopted when there was only one provider of local telephone service, the TRA found that the "plain language of the rule envisions the name and utility whose customers are inside the directory. Following the same logic, . . . if more than one utility's customers are inside the directory, then more than one utility's name would be on the cover." One commissioner noted that the TRA did not have the authority to allow a telephone book with no provider's name on the cover.

Recognizing that it must implement state telecommunications statutes in terms of the stated policy to permit competition in the interest of consumers, the TRA found that listing all providers' names on the cover of the directory would meet both policy goals, stating:

> . . . the names of local providers on the cover would be helpful to consumers. This would not only serve as information, but would also promote competition by showing consumers they have a choice in service providers. This method also allows small companies to continue to provide service without the financial burden of having to produce their own directory. They may contract with another carrier or publisher to satisfy their TRA Rule requirements and still have their name on the cover of the directory.

The TRA then concluded that the included carrier should have its name on the directory cover in "like format." If BST includes its name (which it is required to do) on the cover, then it must also include the name of its competitors who provide local telephone service in the area "in like format" or "under the same terms and conditions."

BST is required by Tenn. Code Ann. § 65-4-124(a) to provide to AT&T and all other competing providers features, functions, and services on a nondiscriminatory basis. The FCC and federal courts have interpreted the similar "nondiscriminatory access" requirement of the Telecommunications Act to mean on the same basis as the incumbent provides the service to itself. The ruling by the TRA does no more than require the incumbent provider to provide directory publication services to competitors on the same basis that it provides those services to itself. That ruling is consistent with the TRA's duties and well within its authority.

The order also requires that if BST chooses to place its logo on the cover of the directory it is required to publish, it must also offer to place the logo of the other providers on the cover. It is this

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[20] "Basic local exchange services" are defined in Tenn. Code Ann § 65-5-208 and include those services generally understood as basic telephone services. They are required, at a minimum, to be provided at the same level of quality as those being provided as of the effective date of the 1995 state telecommunications act. Among other things, basic services are subject to different pricing controls than non-basic services under the new price regulation form of ratesetting. *See* Tenn. Code Ann § 65-5-209.

requirement which appears to be most objectionable to BST and BAPCO and to the majority herein. It is, in my opinion, only a reasonable extension of the nondiscriminatory provision of services requirement of the statutes, and it is within BST's control whether any logo appears. Again, the TRA's "rebranding" requirement is, in substance, the equivalent of the FCC's requirement regarding "rebranding" of operator assistance services, although less technically difficult.

BST and BAPCO, however, have also made an argument that the logo on the cover of the directory is actually BAPCO's logo, stating, "AT&T improperly characterizes the use of the 'BellSouth' name on the cover of the books published by BAPCO. BAPCO has the legal right to use the BellSouth name and logo to identify its products." In a footnote, they state that "BellSouth Corporation has granted its subsidiaries, BAPCO and BST the legal right to use the BellSouth name and logo to identify their products and services and of course, use of the 'BellSouth' name and logo on Tennessee directory covers references both the publisher of the book (*e.g.* BAPCO) and the 'telephone utility' meeting the obligation of Rule 1220-4-2-.15 (*e.g.* BST)."

Thus, BST attempts to argue that the BellSouth logo, which belongs to neither BST nor BAPCO, is intended to represent the publisher. However, as the argument admits, and as the earlier excerpts from BellSouth Corporation publications illustrate, the logo is intended to represent all the components of the parent corporation and to be identified by the consumer as representing the telephone company, whose reputation and customer identification will benefit the other affiliates using the logo.

The TRA noted this situation, and referred to testimony by an official of BAPCO.

> I think this is a good place to mention that I am still confused as to whose name is on the cover of the current BellSouth directory. Mr. Baretto . . . claims that the name on the cover is BAPCO and not BellSouth Telecommunications. If this is true, then BellSouth Telecommunications is in violation of Rule 1220-4-2-.15 . . . . I find Mr. Baretto's testimony disturbing in that it appears that BellSouth and BAPCO are using the BellSouth logo to suit their own purposes and not for the purpose specifically stipulated in the Rule.

The TRA made a specific finding that "the name 'BellSouth' and the Bell logo as they appear on the covers of basic White pages directory listings published by BAPCO on behalf of BellSouth [meaning BST] in Tennessee are understood to refer to the local incumbent telephone company, BellSouth." This finding is supported by material evidence in the record and is within the expertise of the TRA, certainly more so than within this court's expertise.

In view of its authority to regulate the practices of BST, including BST's legal obligation to publish a directory including the customers of competing providers, the TRA clearly has exercised its authority consistently with the statutes' policy goals and in an area within its expertise. It has required BST to offer its directory publishing services to other providers of local service on a nondiscriminatory basis, in accordance with Tenn. Code Ann. § 65-4-124. Under well-settled

authority governing our review of administrative agency decisions, and in view of the broad authority given the TRA, I find no basis for setting aside the TRA's declaratory ruling.

Given the concurrence of my colleagues as to the invalidity of the ruling under statutory authority as well as under constitutional principles, I need not address the issue of First Amendment protections against forced commercial speech.

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PATRICIA J. COTTRELL, JUDGE