BELLSOUTH

BellSouth Telecommunications, Inc.
2101
333 Commerce Street
Nashville, Tennessee 37201-3300

615 214-6311
Fax 615 214-7406

Patrick Turner
Attorney

June 19, 2000

VIA HAND DELIVERY

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

Re: *Petition to Require BellSouth Telecommunications, Inc. to Appear and Show Cause that Certain Sections of its General Subscriber Services Tariff and Private Line Services Tariff Do Not Violate Current State and Federal Law, with (Proposed) Order to Show Cause*
Docket No. 00-00170

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Memorandum in Opposition to NEXTLINK's "Petition to Intervene;" SECCA's "Petition to Intervene;" and the CAD's "Petition to Intervene, Object to the Proposed Settlement Agreement and to Consolidate With Docket 99-00246." Copies of the enclosed are being provided to counsel of record for all parties.

Sincerely,

Patrick Turner

Patrick W. Turner

PWT/jem

217159

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: ***PETITION TO REQUIRE BELLSOUTH TELECOMMUNICATIONS, INC. TO APPEAR AND SHOW CAUSE THAT CERTAIN SECTIONS OF ITS GENERAL SUBSCRIBER SERVICES TARIFF AND PRIVATE LINE SERVICES TARIFF DO NOT VIOLATE CURRENT STATE AND FEDERAL LAW***

Docket No. 00-00170

BELLSOUTH'S MEMORANDUM IN OPPOSITION TO NEXTLINK'S "PETITION TO INTERVENE;" SECCA'S "PETITION TO INTERVENE;" AND THE CAD'S "PETITION TO INTERVENE, OBJECT TO THE PROPOSED SETTLEMENT AGREEMENT AND TO CONSOLIDATE WITH DOCKET 99-00246"

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this memorandum in opposition to the Petitions filed by the Consumer Advocate Division ("CAD"), NEXTLINK, and the Southeastern Competitive Carriers Association ("SECCA"). As explained below, the Tennessee Regulatory Authority ("TRA") should deny these Petitions and approve the Proposed Settlement Agreement filed by the Staff Petitioners and BellSouth because:

1. The termination liability limitations set forth in the Proposed Settlement Agreement are lawful and reasonable;

2. Approving the Proposed Settlement Agreement will not prejudice the rights of any person because:

   A. Any service provider who does not agree to its termination liability limitations will have the opportunity, during the ensuing show cause proceeding against it, to argue its position and present evidence to prove that it should not be required to live by these limitations; and

B. The CAD or any other person who has concerns with the application of these termination liability limitations to the industry as a whole can present those concerns during the rulemaking proceeding contemplated by the Proposed Settlement Agreement.

3. The Petitions to Intervene filed by NEXTLINK, SECCA, and the CAD are not properly before the TRA because there is no contested case proceeding in which these entities may intervene.

4. The CAD's Petition should be denied because:

A. Its attacks on BellSouth's existing termination liability provisions are both invalid as a matter of law and moot;

B. Its attacks on BellSouth's CSAs are improper attempts to re-hash arguments the CAD has already presented and lost during the CSA Proceedings; and

C. Its attacks on the Proposed Settlement Agreement are invalid as a matter of law.

BellSouth, therefore, respectfully requests that the TRA deny the Petitions filed by the CAD, NEXTLINK, and SECCA.

I. THE TERMINATION LIABILITY LIMITATIONS SET FORTH IN THE PROPOSED SETTLEMENT AGREEMENT ARE LAWFUL AND REASONABLE.

Upon the filing of the Show Cause Petition in this docket, the Staff Petitioners and BellSouth had two choices: they could engage in months of contentious and adversarial litigation, or they could work in a spirit of cooperation to reach a resolution which addressed their respective concerns. The parties chose the latter course. In a few short weeks, the parties reached a mutually-acceptable Proposed Settlement Agreement and filed it with the TRA for approval.

The concerns of the Staff Petitioners were set forth in the Show Cause Petition, and the termination liability limitations embodied in the Proposed Settlement Agreement address those concerns. Under the Proposed Settlement Agreement, the maximum amount a service provider may charge upon a customer's early termination of a contract or a tariffed service arrangement generally is limited to the lesser of (1) the discounts received during the previous 12 months of the service; or (2) six percent of the total tariffed service agreement amount or contract amount. *See* Proposed Settlement Agreement at ¶¶2-3. Any service provider, of course, may adopt termination liability charges that are less than these maximum amounts. A service provider, however, may not adopt termination liability charges that exceed these maximum amounts unless it can show the TRA that "the customer specific costs incurred to provide such service exceeds [these maximum amounts] in the event of early termination." Proposed Settlement Agreement at ¶5.

These termination liability limitations clearly are lawful. As discussed at length during the CSA Proceedings, the Tennessee Supreme Court's *Cleo* decision provides that even "full buyout" termination liability provisions are lawful because they are reasonably related to the damages the parties reasonably could anticipate might result from a breach of the contract. *See Guiliano v. Cleo, Inc.*, 995 S.W.2d 88 (Tenn. 1999); BellSouth's Post-Hearing Brief in Docket No. 98-00559 at 5-16. The termination liability limitations in the Proposed Settlement Agreement, therefore, are much lower than the "full buyout" provisions allowed by law.

Instead of being based on how much a customer would have paid had it not terminated the contract or tariffed service agreement early, the termination liability limitations in the Proposed Settlement Agreement are based on the benefits the customer actually received as a result of the contractual commitment the customer is breaching. Instead of paying an amount equal to the monthly rate multiplied by the remaining term of the contract or tariffed service agreement, for example, a customer will pay back no more than the discounts it has received as a result of having entered the contract that it is breaching. Repayment of the benefits a customer received as a result of the contract being breached is reasonable, logical, and entirely lawful.

The Proposed Settlement Agreement, however, does not even require the customer to repay all of the discounts it has received as a result of having entered the contract that it is breaching. Instead, the customer only pays the discounts it received over the last twelve months. Clearly, this amount is reasonable in relation to the actual damages the customer and the carrier reasonably might expect as a result of the breach -- in fact, the actual legal damages likely would be much higher. *See Cleo,* 995 S.W.2d 88 (Tenn. 1999). The termination liability limitations set forth in the Proposed Settlement Agreement, therefore, clearly are reasonable and lawful.

In addition to the actual terms of these termination liability limitations, BellSouth also was quite concerned about competitive fairness. If BellSouth voluntarily implemented these limitations and its competitors refused to do so -- as

NEXTLINK and SECCA may be doing, based on their letter and their Petitions -- BellSouth would be in an unfair competitive situation. For example, a BellSouth customer could accept an offer from a competitor and pay BellSouth a relatively nominal termination liability charge. If a Time Warner customer wanted to accept a competitive offer from BellSouth (or from another CLEC), however, a "full buyout" termination liability charge could stand in that customer's way. *See* Transcript of Hearing in Docket Nos. 98-00559, 99-00210, and 99-00244, Vol. II.A at 62 (Testimony of Time Warner witness David Darrohn)("Q: Now, the termination liability from the tariff that you referred to earlier -- and I think the example you gave was if you have a five-year contract and you cancel after one year, you pay the remaining four years; is that correct? A. Yes.").

In that event, disparate regulatory treatment (rather than competitive forces) would create an unreasonable prejudice or disadvantage against BellSouth by making it more difficult for BellSouth to win customers from its competitors than for competitors to win customers from BellSouth.[1] While BellSouth certainly hoped that its competitors would agree to the same termination liability limitations that BellSouth and the Staff Petitioners have accepted, NEXTLINK's apparent objection to these limits shows that BellSouth's desire to plan for the worst was well-founded. Thus, the remaining provisions in the Proposed Settlement Agreement were born.

---

[1] Such an unreasonable prejudice or disadvantage would run counter to Tennessee's explicit telecommunications policy of protecting consumer interests

II. APPROVING THE PROPOSED SETTLEMENT AGREEMENT WILL NOT PREJUDICE THE RIGHTS OF ANY PERSON.

NEXTLINK's decision to file its Petition certainly is curious. During the CSA Proceedings, NEXTLINK touted the fact that while Time Warner and other competitors used "full buyout" termination liability provisions, NEXTLINK's termination liability provisions were limited to two months of charges. *See* Tr. of September 2, 1999 Arguments in Docket Nos. 98-00559, 99-00210, and 99-00244 at 109.[2] During closing arguments in that proceeding, NEXTLINK even suggested that CLECs as a whole may have to revamp their termination liability provisions:

> The principle should be it allows customers to move freely among competitors without unreasonable restrictions. And I think that applies to everybody. And if that means that some of these CSAs entered into by CLECs have to be changed, then I think let's do it.

Id. at 100. Limiting termination liability charges to no more than the discounts received over the past twelve months is hardly so great a change from the approach championed by NEXTLINK during the CSA Proceedings that an objection by NEXTLINK would be anticipated. In fact, it would not be surprising to discover that NEXTLINK's objections have less to do with the actual limitations set forth in the Proposed Settlement Agreement and more to do with retaining the differences

---

"without unreasonable prejudice or disadvantage to any telecommunications services provider . . . ." *See* T.C.A. §65-4-123.

[2] NEXTLINK's counsel argued, "NEXTLINK's termination provision was you just have to pay the next two months, not the rest of the year. So they have different termination provisions. But as I tried to explain earlier, what's good for the goose is good for the gander. What we're trying to do is help the customer

between the regulatory treatment of BellSouth and the regulatory treatment of CLECs.

A. Any service provider who does not agree to the termination liability limitations set forth in the Proposed Settlement Agreement will have the opportunity, during the ensuing show cause proceeding against it, to argue its position and present evidence to prove that it should not be required to live by these limitations.

Regardless of NEXTLINK's actual motives in filing its Petition, if NEXTLINK or any other member of SECCA does not wish to abide by the termination liability limitations set forth in the Proposed Settlement Agreement, it can simply decline to file tariffs implementing these limits. In that event, the Staff Petitioners will seek to initiate a show cause proceeding against that service provider. *See* Proposed Settlement Agreement at ¶9. During that show cause proceeding, that service provider will have ample opportunity to argue its position and present evidence to prove that it should not be required to live by these limitations. Thus none of its rights are harmed or prejudiced by having the TRA approve the Proposed Settlement Agreement presented by the Staff Petitioners and BellSouth.

B. The CAD or any other person who has concerns with the application of these termination liability limitations to the industry as a whole can present those concerns during the rulemaking proceeding contemplated by the Proposed Settlement Agreement.

Consistent with the Fourth Report and Order of the Hearing Officer in the CSA Proceedings, the Proposed Settlement Agreement petitions the TRA to

---

move from NEXTLINK to Time Warner to BellSouth to NEXTLINK, and to do it on reasonable terms and conditions."

convene a rulemaking proceeding to adopt the termination liability limitations set forth in the Proposed Settlement Agreement as industry-wide rules. *See* Fourth Report and Recommendation of Pre-Hearing Officer in Docket No. 99-00559 at 10-13[3]; Proposed Settlement Agreement at ¶13. Thus if the CAD, NEXTLINK, or another member of SECCA has concerns with the application of the Proposed Settlement Agreement's termination liability limitations to any competitor's tariffs or contracts, it can raise those concerns in the rulemaking proceeding contemplated by the Proposed Settlement Agreement. Again, no person's rights are prejudiced by having the TRA approve the Proposed Settlement Agreement presented by the Staff Petitioners and BellSouth.

III. THE PETITIONS TO INTERVENE FILED BY NEXTLINK, SECCA, AND THE CAD ARE NOT PROPERLY BEFORE THE TRA BECAUSE THERE IS NO CONTESTED CASE PROCEEDING IN WHICH THESE ENTITIES MAY INTERVENE.

NEXTLINK and SECCA each have filed an identical, one-page "Petition to Intervene." These bare-bones Petitions merely allege that NEXTLINK and SECCA have "an interest in the outcome of this proceeding." Although the Proposed Settlement Agreement has been on file with the TRA as a public document since May 9, 2000, these Petitions do not challenge any aspect of the Proposed Settlement Agreement and they do not claim that the Proposed Settlement

---

[3] This Report states that the TRA "should open a Rulemaking docket to address industry-wide CSAs" to, among other things, provide guidelines to "control the usage of term requirements or termination charges in CSAs . . . ." *See* Report at 10, 12.

Agreement is good, bad, or indifferent. These Petitions merely ask that NEXTLINK and SECCA be allowed to become "a party."

NEXTLINK and SECCA, however, candidly acknowledge that there is nothing to which they can become a party:

> NEXTLINK and SECCA intend to participate in docket 00-00170 should the TRA grant the Staff's Petition and issue the proposed show cause order opening that proceeding. At this time, however, the Authority has still not taken any official action regarding the Staff's Petition. No show cause proceeding has yet to be opened . . . .

See NEXTLINK/SECCA letter dated June 14, 2000 at 2 (emphasis added). Because no contested case proceeding exists, the Petitions for intervention filed by NEXTLINK, SECCA, and the CAD are premature.[4] Moreover, as described throughout this memorandum, the TRA should exercise its discretion not to convene a contested case proceeding in this docket. If the TRA does not convene a contested case proceeding, these Petitions are moot and should be denied.

IV. THE TRA SHOULD DENY THE CAD'S PETITION BECAUSE EACH OF THE ALLEGATIONS IN THE PETITION LACKS MERIT.

The CAD's Petition basically does three things. First, it attacks BellSouth's existing tariffed termination liability provisions on various grounds. (*See* Petition at ¶¶ 6, 11, 12, 13, 14, 15, 16, 17, 18, 19, 23, 24, 25, 26). Second, it attacks BellSouth's CSAs on grounds it raised during the CSA proceedings. (*Id.* at ¶¶ 7, 19, 20, and 31). Third, it attacks the Proposed Settlement Agreement on various

---

[4] While the CAD's Petition is more voluminous than the ones filed by NEXTLINK and SECCA, it also merely asks the TRA to allow the CAD to intervene, and it asks the TRA to "consolidate this proceeding with 99-00246." Accordingly, it is as premature as the Petitions filed by NEXTLINK and SECCA.

grounds. (*Id.* at ¶¶ 9, 10, 27, 28, 29, 32, 33, 34). BellSouth will address each of these attacks in turn.

A. The CAD's attacks on BellSouth's existing termination liability provisions are both invalid as a matter of law and moot.

To the extent that the CAD seeks to attack BellSouth's existing tariffed termination liability provisions on a retroactive basis, its attacks are without merit. BellSouth's existing tariffed termination liability provisions have been filed with and approved by either the PSC or the TRA. They bind both BellSouth and its customers, and they have the effect of law. *GBM Communications, Inc. v. United Inter-Mountain Tel. Co.*, 723 S.W.2d 109, 112 (Tenn. Ct. App. 1986). Existing tariffed service arrangements, therefore, are lawful and binding contracts between BellSouth and its customers, and the constitution prohibits the state or any agency of the state from impairing those contracts.

To the extent that the CAD's Petition attacks BellSouth's tariffed termination liability provisions on a prospective basis, its attacks are moot. Approval of the Proposed Settlement Agreement likely will have the effect of modifying each and every existing tariffed termination liability provision. The TRA, therefore, should not convene a contested case to hear arguments regarding tariffed termination liability provisions which are clearly intended to be modified by the Proposed Settlement Agreement.

B. The CAD's attacks on BellSouth's CSAs are improper attempts to re-hash arguments the CAD has already presented and lost during the CSA Proceedings.

The TRA should summarily deny the CAD's Petition to the extent that it attacks BellSouth's CSAs. The CAD was an active participant in every phase of the CSA Proceedings, and it has already litigated and lost its claims regarding BellSouth's CSAs. The TRA, therefore, should not convene a contested case proceeding to allow the CAD to re-hash the same arguments it has already presented and lost.

C. The CAD's attacks on the Proposed Settlement Agreement are invalid as a matter of law.

The CAD claims that the Proposed Settlement Agreement does not "resolve issues raised by staff," Petition at ¶9, but the Staff Petitioners obviously are satisfied with its resolution of the issues they presented. The CAD claims that the termination liability provisions in the Proposed Settlement Agreement are anticompetitive, *id.* at ¶34, but they apply equally to all competitors. The CAD alleges that the termination liability limits in the Proposed Settlement Agreement are not based on "the reasonable expenses of contract termination" and that they result in unlawful penalties, *id.* ¶¶10, 28, 33, but as explained above in Section I, as a matter of law they are not penalties but are, instead, lawful liquidated damages provisions.

The CAD alleges that the Proposed Settlement Agreement "unreasonably seeks to extend provisions to all providers," *id.* ¶29, but as explained above in

Section II, any provider that is unwilling to adopt the termination liability limitations set forth in the Proposed Settlement Agreement will have the opportunity to be heard in a contested case proceeding before the TRA and in the rulemaking proceeding. The CAD alleges that the termination liability provisions in the Proposed Settlement Agreement do not prevent extortion, *id*, ¶32, but they are much lower than many existing CLEC termination liability provisions which have never been challenged as being "extortionate" -- and which have never been the subject of any petition or request for information by the CAD.

Finally, the CAD alleges that the termination liability limitations in the Proposed Settlement Agreement are not the type of provisions a customer would make at arms length without duress. ¶27. Everyday experience and common sense refute this allegation. Volume and term discounts are commonplace in the business world -- the price per tablet is less for a bottle of 100 aspirin than it is for a bottle of 10 aspirin, and the price per issue is less for a three year subscription to *Newsweek* than it is for a one-year subscription to *Newsweek*.[5]

Where but in documents authored by the CAD would it be claimed that it is unjust, unreasonable, unfair, or "extortionate" to require a party that does not live up to its end of a contract to give back a portion of the benefits it received as a result of the contract it breached? If the CAD's reasoning were adopted, every

[5] Additionally, the price per issue is less for a one-year subscription to *Newsweek* than when the magazine is purchased off the rack.

customer would order services under the longest tariffed term contract available in order to get the lowest possible price, knowing that it could terminate the contract at any time with virtually no consequences. Clearly, the approach apparently suggested by the CAD should be rejected because it embodies bad business, bad policy, and bad law.

CONCLUSION

For the reasons stated above, the TRA should approve the Proposed Settlement Agreement and deny the Petitions filed by NEXTLINK, SECCA, and the CAD.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: Patrick Turner

Guy M. Hicks
Patrick W. Turner
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301

CERTIFICATE OF SERVICE

I hereby certify that on June 19, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

[X] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight

Gary Hotvedt, Esquire
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0500

[X] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight

Richard Collier, Esquire
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0500

[ ] Hand
[ ] Mail
[X] Facsimile
[ ] Overnight

Henry Walker, Esquire
Boult, Cummings, Conners & Berry
414 Union Avenue, #1600
Post Office Box 198062
Nashville, Tennessee 37219-8062

[ ] Hand
[ ] Mail
[X] Facsimile
[ ] Overnight

Vince Williams, Esquire
Consumer Advocate Division
426 Fifth Avenue North
Nashville, Tennessee 37243-0500

Patrick Turner

217121