BELLSOUTH

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

guy.hicks@bellsouth.com

Guy M. Hicks
General Counsel

615 214-6301
Fax 615 214-7406

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VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Generic Docket Addressing Rural Universal Service*
Docket No. 00-00523

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of the Initial Brief of BellSouth Telecommunications, Inc. on Legal Issues. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

IN RE: *Generic Docket Addressing Rural Universal Service*

Docket No. 00-00523

INITIAL BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC. ON LEGAL ISSUES

BellSouth Telecommunications, Inc. ("BellSouth"), hereby respectfully files its Initial Brief to address the legal issues identified during the Pre-Hearing conference held October 30, 2000 and states the following:

Issue 1: Does the TRA have jurisdiction over the toll settlement agreements between BellSouth and the Rural Local Exchange Carriers?

BellSouth Position: The contracts at issue between numerous independent companies and BellSouth for the exchange of intraLATA toll traffic have never been the subject of direct oversight by the TRA. These agreements were entered into between the parties outside of the context of any regulatory proceeding, and they are not governed by any specific standards or rules set by the Authority. Further, the agreements (all of which pre-date the 1996 Telecommunications Act) have not been submitted in the past to the Authority for approval, either pursuant to the Act or otherwise.[1] Although the TRA may have jurisdiction over the parties, it has

[1] It is noteworthy that a past decision by the TRA not to review these contracts was made after many of these same companies argued for precisely this result (See, Final Order on Independent Companies and Cooperative's Motion For Clarification of Arbitration Order And Petition For Declaratory Judgment, July 11, 1997, Docket Nos. 96-01152, 96-01271).

no statutory authority to alter pre-existing toll settlement agreements between BellSouth and the Rural Carriers.

Pursuant to Section 65-4-104, Tennessee Statutes, the Tennessee Regulatory Authority ("TRA" or "Authority") has broad "general supervisory and regulatory power, jurisdiction and control over all public utilities . . . for the purpose of carrying out the provisions of this chapter." Given this language, the Authority would appear generally to have jurisdiction over both BellSouth and local rural carriers in matters relating to their respective provisioning of telecommunications service. The real question, however, does not relate to the Authority's jurisdiction per se, but rather to whether the Authority has the legal power to alter contracts between BellSouth and the rural carriers. In other words, the question is whether the action that the Rural Independent Coalition ("Coalition") has requested– i.e., ordering that the toll settlement agreements cannot be terminated or modified except in the context of the universal service proceeding—can be taken by the Authority without exceeding the statutory powers granted to it by the General Assembly. Clearly, the Authority lacks this statutory power, and, for this reason, the Coalition's request must be rejected.

As stated above, the Authority has never exercised direct oversight of these agreements, either in regard to their termination, or otherwise. Further, the agreements are drafted to reflect clearly the fact that the parties

never contemplated the TRA having any role in this respect. The standard termination language in the agreements states the following:

> This Annex will become effective on the date specified and will continue in force thereafter, until terminated upon thirty (30) days prior written notice with or without cause by either party.
>
> (Standard Agreement, § X1).

Thus, the agreements provide on their face that they can be terminated by either party on thirty days notice for any reason. Given this, the action that the Coalition has requested the Authority to take in this case is extraordinary. The Coalition has asked the TRA to (1) prohibit BellSouth (at least for the time being) from exercising its legal right to terminate the agreements, and (2) use the Rural Universal Service proceeding as a mechanism to place restrictions on BellSouth's exercise of its contractual rights. This request is, of course, directly contrary to the clear and unequivocal termination provisions of the Agreements. In effect, the Coalition is requesting that the Authority abrogate the contractual rights of BellSouth, which arise from agreements over which the TRA has never in the past exercised any oversight. There is simply no legal justification for the Coalition's position.

Again, the Coalition requests that the Authority intervene in this contractual relationship to alter private contracts between BellSouth and independent local carriers. However, Title 65 does not confer to the Authority the power to take this action. As an administrative agency, the

Authority is vested only with the power given to it by the Legislature. *See, Pharr v. Nashville,* C & St. L. Ry., 186 Tenn. 154, 208 S.W.2d 1013, 1016 (1948). As the Tennessee Supreme Court held in *Tennessee-Carolina Transportation, Inc. v. Pentecost*, 206 Tenn. 551, 334 S.W.2d 950, 953 (1960), "The powers of the Commission [and, necessarily, its successor] must be found in the statutes. If they are not there, they are non-existent." As the Tennessee Supreme Court has noted, any authority exercised by the agency must be the result of an express grant of authority by statute or arise by necessary implication from an express statutory grant of power. In either case, according to the Court, "a grant of power to the Commission is strictly construed." *Tennessee Public Service Comm'n v. Southern Ry. Co.,* 675 S.W.2d 718 (Tenn. Ct. App. 1984) ("Tennessee authorities support a strict construction of the statutory powers of a utilities board").

Further, the fact that the Authority may have the jurisdictional oversight of public utilities set forth in § 65-4-104 does nothing to create the ability to abrogate the requirements of (or rights arising from) pre-existing contracts. If the General Assembly had intended for the TRA to become involved in the operation of private contracts in the obtrusive manner advocated by the Coalition, the General Assembly would have made a specific grant of authority to the TRA for this purpose. Applying general rules of statutory construction, it is clear that the General Assembly did not

grant—and the TRA, therefore, does not have—the statutory authority to conduct the Draconian interference requested by the Coalition.

That the Authority lacks the statutory power to abrogate the terms of the toll settlement agreements is underscored by T.C.A. § 65-4-105, which spells out the extent of the TRA's authority over "existing contracts." That authority is expressly limited to contracts between a public utility and a municipality. T.C.A. § 65-4-105(b) & (c). Even with respect to the contractual relationship between utilities and municipalities, however, the General Assembly made clear that the TRA lacks the authority to "alter or impair" any such contract. T.C.A. § 65-4-105(c). Thus, it defies logic for the Coalition to suggest that the Legislature has empowered the TRA to alter or impair existing contracts between its members and BellSouth.

Moreover, even if the Authority had the statutory authority to abrogate clearly established contractual rights, to do so would be in violation of the principles that underlie the Telecommunications Act. Previous Federal Court decisions have addressed a related issue that arises from toll settlement agreements. Specifically, the FCC promulgated a rule (47 C.F.R. 51.303(a)) that required that "all interconnection agreements between an incumbent LEC and a telecommunications carrier, including those negotiated before February 8, 1996, shall be submitted by the parties to the appropriate state commission for approval . . . ". (47 C.F.R. § 51.303(a)). Thus, under the literal terms of this FCC rule, contracts of the type at issue (i.e.,

contracts between local carriers for the exchange of toll traffic) would be subject to state commission review and approval, even though the agreements pre-date the Act (and were obviously not negotiated as a result of the passage of the Act). The Eighth Circuit declined to endorse this result, and struck down the FCC rule (*Iowa Utilities Board v. FCC*, Case No. 96-3321 filed July 18, 2000).

In finding that the FCC's interpretation of the requirements of the Federal Act was unreasonable, the Court stated the following:

> Across the country there were thousands of interconnection agreements existing between and among ILECs before the Act was passed . . .. Many of those agreements were between neighboring noncompeting ILECs for the exchange of features of functions. There is no indication that Congress intended the state commissions to go back through years of agreements and approve or disapprove them.

For this reason, the Eighth Circuit refused to accept the FCC's interpretation of the Act and its rule that these agreements for the exchange of traffic should be subject to state commission approval. Moreover, the Court also stated that the FCC's interpretation conflicted with "the recognized presumption against retroactive legislation." Specifically:

> We further find it difficult to square the FCC's interpretation with the recognized presumption against retroactive legislation. By construing the word "negotiated" in the third sentence to mean "negotiated and entered into," the FCC's rule reaches back and requires something that the parties to the pre-existing agreement had no reason to expect—required state commission approval under new and different standards which affect the rights the parties had at the time they entered

into their agreement. . . .. Absent clear congressional intent for retroactive effect, there should be none. (Id.).

The Coalition's request that the TRA limit BellSouth's contractual rights is clearly contrary to the logic of the Eighth Circuit decision for two reasons. First, as the Eighth Circuit noted, there is no indication that Congress intended for (pre-Act) contracts of the sort at issue to come under state commission review. As discussed previously, there is also nothing in state law that would prompt the conclusion that the General Assembly intended for these contracts to be reviewed by the TRA. Second, and perhaps more compellingly, the Eighth Circuit noted that bringing these contracts under state commission review as a result of applying the 1996 Act would amount to "retroactive legislation" by requiring now a review and approval process that the parties never contemplated at the time the agreements were executed. The same rationale applies even more so in our case. The Eighth Circuit was concerned with the retroactive effect of merely having state commissions review agreements to ensure compliance with the Act. In our case, the Coalition urges the TRA not just to review the settlement agreements, but to alter the terms of the agreements to prevent BellSouth from exercising the termination rights clearly set out in the agreements. Again, this request is not supported by either federal or state law.

Issue 2: **Should the withdrawal of toll settlement agreements between BellSouth and the Rural Local Exchange Carriers be considered in the Rural Universal Service proceeding? If so, how should they be considered?**

The toll settlement agreements between BellSouth and rural local exchange carriers should not be considered, except to the extent that the termination of these agreements and any resulting loss of revenue, effects a properly structured universal service plan.

On the basis of the analysis set forth in above in response to Issue 1, it is clear that the TRA cannot accept the invitation of the Coalition to use the universal service proceeding as a pre-text to abrogate contractual rights to which the parties have voluntarily agreed. In other words, as a matter of law, the TRA cannot prevent, or even restrict, the ability of either party to terminate the agreements in keeping with their terms.

Accepting that BellSouth has the right to alter or terminate these agreements, the question that follows is whether the result of any such termination or alteration can be considered in this proceeding. As BellSouth set forth in its Reply Comments, the appropriate method to size any universal service fund (for rural companies or otherwise) is to compare revenues from local service to the costs of providing local service. To the extent that a rural company takes the position that the termination or alteration of

settlement agreements reduces the revenues available to support universal service, then this position could properly be considered in this proceeding.

However, the fact that this is an appropriate topic does not mean that the approach that the Coalition apparently advocates is appropriate. The Coalition set forth in its Initial Comments a proposal that amounts to a "make whole" mechanism. In other words, the proposal is that rural companies would reduce their rates from the levels currently charged, and the fund would be used to replace the reduced revenues. If the Coalition takes a consistent approach with regard to any reduction in the monies it receives from toll agreements, it presumably will argue that rural companies are entitled to receive through the universal service fund a dollar-for-dollar replacement of any such reduction. Again, as BellSouth stated in its earlier Comments, the fund must be sized according to a comparison of revenue and cost. Thus, an analysis based on current revenue as compared to future (reduced) revenue is not appropriate. Applying the Coalition's approach to any revenue reduction resulting from the termination of toll settlement agreements is inappropriate for the same reasons that this approach is more generally inappropriate.

Further, such an approach would be directly contrary to Tennessee law concerning universal service. Section 65-5-207(c) states that the Authority shall create an alternative universal support mechanism "only if it determines that the alternative will preserve universal service, protect

consumer welfare, be fair to all telecommunications service providers, and prevent the unwarranted subsidization of any telecommunications service providers rates by consumers or by another telecommunications service provider." (emphasis added).

As set forth in BellSouth's Reply Comments, the circumstances that relate to toll settlements have changed dramatically since the time at which these agreements were originally created. For this reason, BellSouth has undertaken to change the current arrangement. The Coalition proposal would have the effect of misusing the concept of universal service to create a subsidy from BellSouth that corresponds to any reduction in what rural companies currently receive for toll settlements. This approach violates the two portions of § 65-5-207(c) emphasized above.

First, under the current arrangement (i.e., prior to termination of the agreements), BellSouth is providing a subsidy to the independent companies that is no longer justified by current circumstances. If the rural carriers are allowed to replace any reduction in toll settlements with universal service support, then this would result in these carriers being subsidized by "another telecommunications service provider" (i.e., BellSouth) in a way that is specifically prohibited by the Statute. Second, this unwarranted, continued subsidization would be patently unfair.

Again, if the termination of toll agreements has an impact on an appropriate revenue-to-cost comparison used to size the fund, this can be

considered in the context of the universal service proceeding. Otherwise, there should be no consideration of these agreements in this proceeding.

Legal Issue 3: **Is the state Universal Service statute, as enacted, intended to apply to rate of return regulated rural companies, as such companies are defined under state law?**

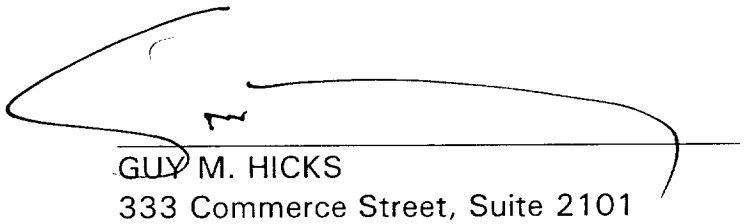
BellSouth's Position: BellSouth takes no position on this issue at this time.

CONCLUSION

The Authority should reject the invitation of the Rural Coalition to misuse the universal service proceeding to abrogate BellSouth's right to terminate the toll settlement agreements. This action is contrary to both state and federal law. If the termination of these agreements results in a reduction in revenue to rural companies, this can be considered only in the context of a properly constructed universal service mechanism.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



GUY M. HICKS
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301

R. DOUGLAS LACKEY
J. PHILLIP CARVER
Suite 4300
675 W. Peachtree Street
Atlanta, Georgia 30375

CERTIFICATE OF SERVICE

I hereby certify that on November 9, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

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

Richard Tettelbaum
Citizens Telecommunications
6905 Rockledge Dr., #600
Bethesda, MD 20817

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

Charles B. Welch, Esquire
Farris, Mathews, et al.
205 Capitol Blvd, #303
Nashville, TN 37219

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

Mr. David Espinoza
Millington Telephone Company
4880 Navy Road
Millington, TN 38053

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

Jon E. Hastings, Esquire
Boult, Cummings, et al.
P. O. Box 198062
Nashville, TN 37219-8062

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

Henry Walker, Esquire
Boult, Cummings, et al.
P. O. Box 198062
Nashville, TN 37219-8062

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

James Wright, Esq.
United Telephone - Southeast
14111 Capitol Blvd.
Wake Forest, NC 27587

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

Dan Elrod, Esquire
Miller & Martin
150 4th Avenue, #1200
Nashville, TN 37219

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

James Lamoureux, Esquire
AT&T
1200 Peachtree St., NE
Atlanta, GA 30309