BELLSOUTH

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November 16, 2000

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 BellSouth's Reply Brief. 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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DOCKETED
11-20-00

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

IN RE: *Generic Docket Addressing Rural Universal Service*

Docket No. 00-00523

BELLSOUTH TELECOMMUNICATIONS, INC.'S REPLY BRIEF

BellSouth Telecommunications, Inc. ("BellSouth"), hereby respectfully files its Reply Brief, in response to the Initial Briefs filed November 9, 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?

As BellSouth stated in its Initial Brief, the real question that must be answered does not involve the jurisdiction of the Tennessee Regulatory Authority ("Authority" or "TRA"). Instead, the question is whether the TRA has the legal (i.e., statutory) authority to abrogate the rights of telecommunications carriers that arise from private contracts that have not previously been subjected to oversight or regulation by the TRA. For the reasons set forth in BellSouth's Initial Brief, the answer to this question is clearly in the negative. Not surprisingly, the Rural Independent Coalition ("Coalition") contends to the contrary.[1] However, the Initial Brief filed by the

[1] Although this point does not relate directly to the arguments in its brief, the Rural Coalition ("Coalition"), nevertheless, took the opportunity to make the gratuitous attack on BellSouth's termination of the agreements as "arbitrary and isolated." (Coalition Brief, p. 2). As stated in BellSouth's Initial Brief, however, BellSouth has good reason to terminate the contracts, even though no justification is required

Coalition, and the arguments it makes, simply demonstrates the total lack of legal support for its position. The Coalition's Brief is filled with a variety of desperate and implausible attempts to take statutory provisions that have nothing to do with toll settlement agreements and use these provisions to support the idea that the TRA has the legal ability to keep these agreements in effect, despite the contractual terms that provide for termination at the will of either party. These attempts must fail.

First, the Coalition contends that the TRA has jurisdiction/authority over toll settlement agreements because the language of Section 65-5-201, provides that the TRA has the ability to fix "individual rates, joint rates, tolls, fares, charges or schedules . . .." Given the context of this language, however, the term "rate" is obviously intended to be used as this term commonly is used, as a reference to the price that a carrier charges an end user/customer for a service provided to that customer. There is nothing in the quoted language that evenly vaguely suggests that it can be used in the way that the Coalition construes, as a reference to a reciprocal arrangement between carriers for the exchange of traffic. This confusion on the part of the Coalition is further manifested by its reference to the toll settlement agreements as involving "jointly provided service" (Coalition Brief, p. 4). Under any commonly accepted definition of "jointly provided service," this phrase refers to a situation in which two or more carriers act together to

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under the contracts. Further, BellSouth's action is in no way isolated, but rather is consistent with the

provide service to an end user. The toll settlement agreements in question are not for the provision of "jointly provided services," nor do the compensation provisions of the agreements constitute "rates." The Coalition's argument to the contrary ignores the plain (and commonly-accepted) meaning of these terms.

The Coalition next searches vainly for support for its position in the statutory provisions that relate directly to universal service, but its efforts in this regard are no more successful. The Coalition notes that the TRA has the ability to determine "current sources of support for universal service" (Coalition Brief, p. 4, quoting 65-5-207(b)). There is nothing in the statutory authorization to consider current sources of support, however, that creates the ability to abrogate the clear contractual right to terminate an agreement just because the agreement may provide a source of subsidy. Put differently, "considering" currently available support does not mean taking otherwise unlawful action to perpetuate the source of support.

Next, the Coalition turns to the language of § 65-5-207(c), which provides that in considering any alternative universal service support mechanism the TRA should act to "prevent the unwarranted subsidization of any telecommunications service providers rates by consumers or by another telecommunications service provider." The Coalition contends that this provision, standing alone, supports the conclusion that the toll settlement

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actions that it is taking throughout its nine-state region.

agreements cannot be terminated until the TRA has the opportunity to consider them in the context of universal service proceeding. This argument is wrong for two reasons. First, the Coalition contends that this prohibition of unwarranted subsidization was drafted by the legislation specifically with inter-carrier arrangements in mind. The above-quoted language of the statute, however, also prohibits the unwarranted subsidization of a carrier by consumers. Thus, it is clear that this language is not intended to apply specifically to toll settlement agreements.

Moreover, even if the general language prohibiting unwarranted subsidization can be read to apply to toll settlement agreements, this still does not support the result urged by the Coalition. Again, the agreements between BellSouth and the Independent Carriers provide that they may be terminated by either party on thirty days notice for any reason whatsoever. Thus, BellSouth has a clear right to terminate the contracts. The Coalition argues that BellSouth may not invoke this right because the contracts must stay in effect to allow the TRA to "consider them" in order to apply the provisions of Section (c) that prohibit unwarranted subsidization.

The argument that the toll settlement agreements should be scrutinized to determine whether they violate the prohibition of unwarranted subsidization would make sense if the parties otherwise had no legal ability to terminate the contracts. If BellSouth (or for that matter any carrier) were otherwise legally bound to continue a contract that constitutes unwarranted

subsidization, then Section (c) would provide the TRA with the power to consider whether the agreement should be terminated . However, given the fact that BellSouth clearly has an independent right to terminate the agreements, the Coalition's argument is totally nonsensical. The Coalition position amounts to an argument that BellSouth's legal right to terminate the agreements must be denied (at least temporarily), so that the TRA can consider the agreements in order to make a determination as to whether they should be terminated on the independent legal basis set forth in Section (c). Again, the language of the statute could be read to allow for the termination of a contract that violates subsection (c), but that is not otherwise terminable. There is nothing in this section, however, that could be read to justify the forced continuation of an agreement (i.e., by abridging a party's termination rights) in order to determine whether the agreement should be terminated for some other reason.

Finally, moving away from the language of the universal service provisions of the statute, the Coalition contends that the TRA also has the ability to take the requested action because the agreements involve "interconnection services" as defined in § 65-5-101. However, Section 65-5-209(g) provides specific standards that apply to the rates to be charged for these interconnection agreements. This section further provides that a complaint that this provision has been violated may be brought by "a competing telecommunications service provider." Obviously, independent

local telephone exchange companies are not competing carriers, as defined by the statute (See, § 65-4-101(e)). Thus, the existence of § 209(g) strongly suggests that it was the intention of the legislature to define the term "interconnection services" as it has been construed under the Federal Telecommunications Act, that is, services provided by incumbents to CLECs, not arrangements between two or more incumbents that pre-date the Act. As BellSouth noted in its Initial Brief, the Coalition has argued vehemently, and successfully, that these toll settlement agreements should not be treated the same as interconnection agreements between ILECs and competitive carriers. The Coalition should not be allowed to take a diametrically opposed position now that it is in its interest to do so.

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?**

In Section II of its Brief, the Coalition specifically requests three actions from the TRA. The first is to determine whether toll settlement agreements provide a source of universal service support. The third is to determine whether the termination of these agreements should factor into the creation of any alternative mechanism for universal service support. BellSouth does not disagree with these two requests. BellSouth, however, is strongly opposed to the Coalition's second request, that the TRA should

determine "whether, and to what extent, continuation of [the] toll settlement agreements as a form of Universal Service cost recovery is warranted." (Coalition Brief, p. 7). In essence, the Coalition is requesting that the statutory prohibition of unwarranted subsidies should be somehow twisted to consider whether BellSouth's clear contractual rights to terminate the agreements should be permanently abrogated. This result would clearly be contrary to Tennessee law for the reasons set forth in BellSouth's Initial Brief. BellSouth will not reiterate these reasons now, but it is important to take note of what the Coalition is requesting in the language quoted above, a misuse of the universal statute that the legislature could not possibly have intended.

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 initially took no position on this issue. Upon reading the briefs of the Coalition and of AT&T, however, BellSouth is persuaded by the argument of AT&T that rural carriers do not necessarily have an entitlement to universal service support. First, the Coalition is correct in its statement that the universal service provisions of the statute apply "on its face to all carriers." However, as AT&T noted (AT&T Brief, p. 11) the statute does state expressly that universal service "must be maintained after the local telecommunications markets are opened to competition." (Section 65-5-

207). Thus, it follows logically from this provision that, to the extent a market is not legally open to competition, there is no basis to create a universal service fund. As AT&T also noted, Section 65-4-201(d), allows small carriers (with fewer than 100,000 total access lines) to decline to enter into interconnection agreements with competing carriers. (Id.). If a carrier that falls into this category declines to enter into an interconnection agreement, and further refrains from providing service outside of its service area, then the provisions of Section 65-4-201(c) do not apply. The provisions of § 65-4-201(c) are those that allow the Authority to grant a certificate of convenience and necessity to competing telecommunications service providers under certain circumstances. Put simply, a carrier covered by Section 65-4-201(d) may, under the statute, effectively prohibit competition in its service area.

The entire need for universal service arises from the fact that, in a competitive environment, the implicit subsidies that have historically supported universal service cannot be sustained. The Act, of course, contains no competitive threshold, and it is perfectly appropriate (in fact, from a policy standpoint, preferable) to establish a universal service fund when competition begins, rather than waiting for competition to develop to a point at which there is an eminent threat to the provision of universal service. There is a difference, however, in a market that is open to emerging competition and one in which competition is legally prohibited. In the latter

instance, competition cannot occur, implicit subsidies cannot be eroded through competition, and there is simply no need for universal service.

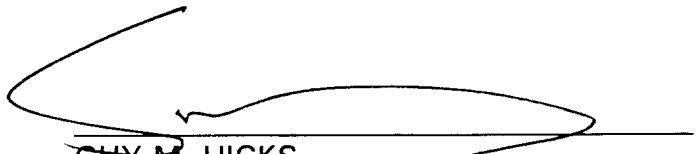
Thus, for considering participation in a universal service fund, the determinative division is not between rural and non-rural carriers, but instead between carriers that are legally subject to competition and those that are not. Any carrier that has the ability, pursuant to Section 25-4-201(d), to prohibit competition in its service area, and has done so (or does so in the future), has no entitlement to receive universal service support.

CONCLUSION

For the reasons BellSouth set forth in its Initial Brief, the TRA has no statutory authority to abrogate the clear legal right to terminate an existing contract. The Coalition's citation to a variety of statutory provisions in an attempt to argue to the contrary must fail for the simply reason that the statute does not support the Coalition's position. The TRA cannot legally prohibit BellSouth from exercising its right to terminate the agreements. If the TRA elects to go forward with a rural universal service proceeding, then it may consider the effect of the termination of the agreements in the limited ways described previously. However, the TRA should not allow any carrier that has elected to prohibit competition in its service area from drawing from any universal service fund.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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CERTIFICATE OF SERVICE

I hereby certify that on November 16, 2000, a copy of the foregoing document was served on the parties of record, via the method indicated:

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