BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: Rulemaking Hearing
Docket No. 00-00702

COMMENTS OF THE COMPETITIVE CARRIER INDUSTRY ON THE PROPOSED CSA RULES

The Southeastern Competitive Carriers Association ("SECCA"), joined by each of the individual competitive carriers who have participated in this rulemaking proceeding, (hereafter, the "Coalition"), submit the following comments concerning the TRA's proposed rules on contract service arrangements ("CSAs") and tariff term plans.

I. Jurisdiction

Pursuant to T.C.A. § 65-4-115, the TRA has authority to prohibit any utility "practice" or "measurement" which the Authority finds to be "unjust" or "unreasonable." Since both tariff term plans and special contracts — which are, in reality, tariffs designed for an individual customer --- are subject to the Authority's jurisdiction,[1] The Authority may therefore promulgate rules which prohibit "unjust" and "unreasonable" provisions in those contracts and tariff term plans.

Under Tennessee contact law, the determination of whether or not a provision for liquidated damages is enforceable depends upon the circumstances of each case. *Guiliano v. Cleo*,

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[1] *See New River Lumber Co. v. Tenn. Railway Co.*, 145 Tenn. 266 (1921).

995 S.W. 2d 88 (Tenn. 1999). For that reason, the Coalition proposes that the TRA's rules on termination provisions be "presumptive," not absolute. Absent proof to the contrary, termination charges in excess of the proposed formula would be presumptively unreasonable. Charges less than the proposed cap would be presumptively reasonable. Under this proposal, either party to a contract may challenge that presumption by presenting evidence to the Authority.

Although this proposal would not entirely eliminate disputes over termination charges, it should substantially reduce the likelihood of such disputes. Moreover, the rule provides guidance to the parties without denying them the right to challenge the application the presumption to a specific contract.

II. No Rules Plus

The Coalition unanimously supports the "no-rules-plus" approach articulated by Time Warner Telecom, Inc. ("Time Warner") at the rulemaking hearing on October 18, 2000. Under this approach, there would be no specific rules regarding the CSAs of competitive local exchange carriers. For incumbent local exchange carriers ("ILECs"), the only rules would be the termination liability language as proposed by the TRA and a three-year limit on contract terms. Under this approach, neither CLECs nor ILECs would be required to obtain approval of CSAs or to file CSAs, except upon request of the Authority. Compliance with the rules and with the statutory "price floor" found in T.C.A. § 65-5-208(c) would be accomplished through the complaint process and periodic staff review. The Coalition further suggests that the TRA re-examine these requirements when BellSouth obtains relief under Section 271 or after three years, whichever occurs first.

III. BellSouth's Market Power

This proposal imposes the minimum requirements on BellSouth necessary to prevent anti-competitive conduct. At this time, BellSouth unquestionably has market power; CLECS do not. As new entrants, CLECs are at a competitive disadvantage in the first place because they are forced to attempt to persuade BellSouth customers to leave a known entity, the incumbent company who has been providing their service since they started in business. The fact of the matter is that a potential CLEC customer is forced to put its trust in an unknown entity over an established and familiar business. Moreover, BellSouth still has the ability to control the success or failure of CLECs in a number of ways. For example, CLECs must purchase network components from BellSouth to supplement their networks in order to provide finished services to end users. After attracting customers away from BellSouth, a CLEC is forced to rely on BellSouth to meet the due dates for the CLEC's portion of the service. If BellSouth does not meet its due dates, a CLEC cannot meet the due dates to the CLEC end-users. A CLEC then loses service on new orders because of poor performance on the part of BellSouth. Additionally, once the service is implemented, a CLEC is affected by BellSouth's maintenance issues. If BellSouth's portion of service fails, then the CLEC must rely on BellSouth to repair service in a timely way. A CLEC is, in every sense of the term, a captive customer of BellSouth.

By imposing identical restraints on both ILECs and CLECs, the TRA's proposed rules fail to take these market realities into account. In fact, the TRA's proposed rules impose more regulations on the CLECs than the agency's current rules. Increased regulation will not foster

competition, but impede it. If the choice is between increased regulation or no regulation at all for either ILECs or CLECs, then the Coalition reluctantly chooses the latter.

IV. A Compromise Approach

The Coalition respectfully submits, however, that adopting the "no-rules-plus" approach is a more moderate approach between regulating CLECS the same as ILECs or having no regulation of either group. This compromise approach would impose limited regulation on BellSouth for a period of three years or until BellSouth obtains Section 271 relief. There would be no filing or approval requirements for any carrier. Rule or statutory violations would be triggered by a complaint and handled on a case-by-case basis.

V. Conclusion

The "no-rules-plus" approach moves all carriers to a more streamlined regulatory environment and fosters competition while not disregarding statutes relevant to anti-competitive practices. Accordingly, the Coalition respectfully asks that the TRA adopt this "no rules plus" proposal regarding CSAs.

Respectfully submitted,

By: _____

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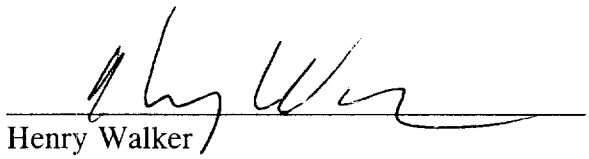
CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing has been hand delivered or mailed to the following persons on the 15th day of November 2000.



Henry Walker

1220-4-2-.59 Regulations For The Provision Of Tariff Term Plans And Special Contracts

(1) Definitions

(a) Special Contract - A service arrangement that is entered into between a telecommunications service provider and certain customers prescribing and providing services, rates, terms, practices, or conditions that are not covered by or permitted in the tariffs or price lists filed by such telecommunications carrier. Special contacts include without limitation all special contract arrangements, contract service arrangements, individual case basis contracts, etc.

(b) Tariff Term Plan - A service arrangement, including special promotions, offered to customers under the telecommunications service provider's carrier's general tariffs for a service term of three (3) months or longer.

(c) Incumbent Local Exchange Telephone Company - Carriers defined in T.C.A. § 65-4-101(d).

(d) Termination Charges - All amounts, including but not limited to amounts resulting from the application of shortfall provisions, charged to the customer by the telecommunications carrier as a result of the cancellation of service prior to the time that the customer's obligations under a tariff term plan or special contract would have otherwise been satisfied.

(2) Availability. All rates, terms and conditions of service provided to any customer under a tariff term plan or special contract shall be offered to any other customer for service of a like kind under substantially like circumstances and conditions.

(3) Term Limits. Following the effective date of these rules, incumbent local exchange telephone companies shall not enter into a special contract or a tariff term plan for a term longer than three (3) years, including any provision for renewal.

(4) Termination Charges.

(a) Termination provisions contained in the special contracts of incumbent local exchange telephone companies are presumptively unreasonable if the provisions impose terminations charges which exceed

(i) the total of the repayment of discounts received during the previous (12) months of service, the repayment of the prorated amount of any waived or discounted non-recurring charges, and the repayment of the prorated amount of any documented contract preparation, implementation and tracking, or similar charges, or

(ii) six percent (6%) of the total amount of the special contract, whichever is less.

(b) Termination provisions contained in the tariff term plans of incumbent local exchange carriers are presumptively unreasonable if the provisions impose terminations charges which exceed

(i) repayment of discounts received during the previous twelve (12) months of service or;

(ii) six percent (6%) of the total amount of the tariff term plan, whichever is less.

(c) Termination provisions that are not presumptively unreasonable under this rule are presumptively reasonable.

(5) Applicability. The presumptions described in Rule 4 do not apply to any special contract approved by the Authority prior to the effective date of these rules.

(6) Filing Requirements. After the effective date of these rules, no telecommunications service provider is required to obtain the approval of the Authority prior to entering into a special contract or to file a copy of the contract with the Authority unless regulated by the Authority.

(7) Amended Tariffs. All incumbent local exchange telephone companies shall file amended tariffs consistent with the provisions of this rule.

Authority: T.C.A. § 65-2-102.