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December 19, 2002

Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: RULEMAKING PROCEEDING REGULATIONS FOR TERM ARRANGEMENTS FOR TELECOMMUNICATIONS SERVICES, Docket No. 00-00702

Dear Chairman Kyle:

Enclosed is an original and fourteen copies of the Consumer Advocate and Protection Division's Reply to Comments Filed by Industry Members on December 5, 2002, in the above-referenced matter. Copies are being furnished to counsel of record for interested parties.

Sincerely,

VANCE BROEMEL,
Assistant Attorney General

cc: Counsel of Record
52476

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE
December 19, 2002

IN RE:	)	
RULEMAKING PROCEEDING - REGULATIONS FOR TERM ARRANGEMENTS FOR TELECOMMUNICATIONS SERVICES	)	**DOCKET NO. 00-00702**

CAPD REPLY TO COMMENTS FILED BY INDUSTRY MEMBERS ON DECEMBER 5, 2002

Comes now the Attorney General for the State of Tennessee, through the Consumer Advocate and Protection Division ("CAPD"), pursuant to the Tennessee Regulatory Authority ("TRA") Notice of November 27, 2002, and hereby replies to the *Comments in Response to November 27, 2002 Notice of Filing* (hereinafter "Industry Comments") filed in this docket on December 5, 2002, by BellSouth Telecommunications, Inc.; United Telephone-Southeast, Inc. and Sprint Communications Company, L.P.; Citizens Telecommunications Company of Tennessee, L.L.C.; Southeastern Communications Carriers Association; Time Warner Telecom of the Mid-South, L.P.; and the Association of Communications Enterprises (jointly the "Industry Members").

The Industry Members conclude that no new rules for the administration, review and approval of Contract Service Arrangements ("CSAs") are needed.[1] The law favors, however, promulgation of new rules.

The Industry Members claim that current rules serve as sufficient basis for the review and

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[1] *See Comments in Response to November 27, 2002 Notice of Filing*, Docket No. 00-00702, p. 1 (December 5, 2002) (hereinafter "Industry Comments").

approval of CSAs, and that "the TRA reviews to ensure that the CSAs are non-discriminatory and made available to similarly-situated customers."[2] Additionally, the Industry Members suggest that the discussion contained in the Attorney General's May 31, 2002, letter filed in this proceeding is no longer relevant should the TRA determine that no new or amended rules are warranted.[3] Finally, the Industry Members state that their efforts to negotiate amended rules did not result in any proposal that is superior to the existing rules, and that the current procedures for review and approval of CSAs should continue, except for the elimination of placing each CSA on the Conference Agenda for approval by the TRA.[4] For the reasons discussed hereinafter, the CAPD respectfully disagrees with the Industry Members' position on these issues as articulated in their Industry Comments.

A. The current rules are not sufficient because they: (1) do not adequately describe the legal and regulatory standards that are required for CSA review and approval; (2) do not adequately set out the administrative policy of the TRA with respect to its review and approval of CSAs; and (3) do not adequately reflect the material and significant change from the past regulatory treatment of CSAs.

First, the current rules do not adequately describe the legal and regulatory standards for review and approval of CSAs. All the parties involved in this rulemaking proceeding ostensibly agree that Tennessee law requires that CSAs, among other things, be non-discriminatory and made available to customers who are similarly situated. One of the problems that the TRA, the telecommunications industry, and Tennessee consumers have been facing since the proliferation of CSAs is that the "non-discriminatory" and "similarly situated" standards for approval of these special contracts are so broad that they cannot be effectively and consistently applied. As expressed in the

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[2]Industry Comments at 2.

[3]*See Id.* at 3.

[4]*See Id.* at 4-5.

CAPD's comments in this proceeding, there is no body of knowledge that is generally available that will permit consumers and regulators to determine whether particular customers are similarly situated with regard to a CSA.[5] As noted on page 2 of the Industry Comments, TRA Rule 1220-4-8-.07(3) governing the CSAs of competing carriers merely restates the "non-discriminatory" and "similarly situated" standards found in pertinent Tennessee statutes[6] and, additionally, TRA Rule 1220-4-1-.07 governing the CSAs of incumbent carriers contains no discussion whatsoever of any standards for review and approval. While the CAPD understands the need for a flexible regulatory approach toward competition in the telecommunications marketplace, this lack of meaningful standards and criteria for the review and approval of special contracts opens the process up for potential misuse and abuse. The CAPD stands ready to contribute to the development of substantive criteria that will help assure that CSAs are administered in accordance with applicable law and assist consumers in their evaluation of special contract offerings.[7]

Second, the current rules do not adequately set out the TRA's administrative policies regarding CSAs. The Industry Members state that CSAs receive case-by-case scrutiny from the TRA during which the TRA ensures that CSAs are non-discriminatory and made available to similarly-situated customers.[8] Except for the declaration of the existence of a competitive alternative, the CAPD and Tennessee consumers are unaware of the internal administrative policies and procedures that the TRA utilizes to ensure that special contract offerings are non-discriminatory and made

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[5] *See Consumer Advocate Responses to Tennessee Regulatory Authority Questions,* Docket No. 00-00702, pp. 8-9 (December 5, 2002) (hereinafter "CAPD Comments").

[6] *See, e.g.,* Tenn. Code Ann. §§ 65-4-115, 65-4-122, 65-5-204, and 65-5-208(c).

[7] *See* CAPD Comments at 16-17.

[8] *See* Industry Comments at 2.

available to all similarly-situated customers. If the existence of a competitive alternative is the only criterion that is required for consumers to become similarly situated with respect to competitive offerings, then this standard should be codified in the rules so that all similarly-situated customers can readily take advantage of the various special deals for services where competitive alternatives exist. If the TRA requires additional criteria for consumers to become similarly situated with respect to such offerings, then these criteria should likewise be codified in the rules. As previously stated, it is the CAPD's position that no two customers in Tennessee presently possess the capability to identify themselves as being similarly situated with regard to a CSA.[9] Accordingly, rules should be developed and published to inform Tennessee consumers of the internal administrative policies that the TRA uses to review and approve CSAs so that customers can assess for themselves whether or not they are eligible to receive the special discounts to which they may be entitled under the law.

Finally, the current rules are inadequate in light of the regulatory shift in the treatment of CSAs. TRA Rule 1220-4-1-.07 is the rule under which most CSAs appearing on the Conference Agenda are evaluated. This rule became certified in 1974, during an era when the filing of a CSA for review and approval was a rarity. Not surprisingly in this past regulatory environment, the rule amounted essentially to a filing requirement on the part of the utility so that the Public Service Commission was made aware of the unusual and infrequent circumstances surrounding the utility's occasional request to depart from its publicly-filed general tariff. Since passage of the federal Telecommunications Act of 1996, however, CSA requests from telecommunications carriers come quite frequently, with several requests to depart from general tariffs scheduled on every Conference

[9] *See* CAPD Comments at 9.

Agenda. As evidenced by the several proceedings concerning CSAs,[10] the proliferation of CSAs presents a special set of challenges and problems, especially with regard to the appropriate standards for industry-wide use of special contracts as a response to competitive threats. Today, comparatively large numbers of CSAs are routinely approved or allowed to go into effect and, despite the continued grappling for appropriate standards, the predominant CSA rule for incumbent carriers remains essentially unchanged since 1974 - a mere filing requirement. Accordingly, the significant and material changes in regulatory stance, purpose, and use of CSAs over the last six years require the adoption of amended rules to ensure that a telecommunications carrier's individual CSAs as well as its entire system of CSAs, are operated to the full benefit of all eligible consumers and in compliance with applicable public utility laws.

B. Tennessee law favors the promulgation of rules under the circumstances of this rulemaking docket.

The Industry Members propose that the current rules, which contain no useful standards for review and approval of CSAs, should remain in place, and that the TRA should continue its *ad hoc* analysis of individual CSAs, apparently basing its review and approval of the special contracts and discounts on internal policies and information.[11] The Industry Members further propose that contested case proceedings could be invoked as necessary to resolve any disputed issues surrounding

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[10]*See, e.g.,* Docket No. 98-00559, *Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements filed by BellSouth Telecommunications, Inc.*; Docket No. 99-00210, *Tariff to Offer Contract Service Arrangement TN98-2766-00 for Maximum 13% Discount on Eligible Tariffed Services* (the "Bank"); Docket No. 99-00244, *Tariff to Offer Contract Service Arrangement KY98-4958-00 for an 11% Discount on Various Services* (the "Store"); Docket No. 99-00683, *BellSouth Telecommunications, Inc. Tariff to Introduce Toll Free Dialing Service*; Docket No. 00-00170, *Petition to Require BellSouth to Appear and Show Cause that Certain Sections of the General Subscriber Services Tariff and Private Line Services Tariff Do Not Violate Current State and Federal Law*; and this rulemaking proceeding.

[11]*See* Industry Comments at 2 and 5.

particular CSAs.[12] Because the approval of CSAs and their special discounts face a common set of issues and concerns that have yet to be resolved and codified into the CSA rules, the CAPD does not support the approach recommended by the Industry Members.

Tennessee law requires rulemaking rather than contested case proceedings when agency determinations are made under the following circumstances:

1. The agency decision is intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group;

2. The agency decision is intended to be applied generally and uniformly to all similarly situated persons;

3. The agency decision is designed to operate only in future cases;

4. The agency decision prescribes a legal standard or directive that is not otherwise expressly provided by or clearly and obviously inferable from the enabling statutory authorization;

5. The agency decision reflects an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear, past agency position on the identical subject matter; and

6. The agency decision reflects a decision on administrative regulatory policy in the nature of the interpretation of law or general policy.

See Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n, 844 S.W.2d 151, 162-163 (Tenn. Ct. App. 1992) (hereinafter "*Tennessee Cable*").

Each and every factor requiring a rulemaking that is cited in *Tennessee Cable* is directly related to the circumstances surrounding this rulemaking proceeding on CSAs. The TRA's decisions regarding CSAs are or should be: (1) intended to apply consistently to the members and contracts

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[12] *See Id.*

of the telecommunications industry as a whole rather than a select few carriers or contracts; (2) intended to apply to all similarly-situated persons, including application of the same standards for review and approval of CSAs to all similarly-situated telecommunications carriers, and extension of CSA benefits to all similarly-situated customers; (3) intended to operate prospectively with regard to the individual contracts that are presented for review and approval; and (4) intended to prescribe legal standards, such as "non-discrimination" and "similarly situated", that are not clearly and obviously inferable from the relevant statutes.

Additionally, the TRA meets criteria five and six of the six-part *Tennessee Cable* test because the CSA determinations: (1) reflect an internal administrative policy for review and approval of special contracts that is not clearly and explicitly addressed in prior TRA orders or rules; (2) reflect a significant change in the use and regulatory treatment of special contracts since passage of the federal Telecommunications Act of 1996; and (3) reflect a decision on regulatory policy that involves the interpretation of law and general policy. Accordingly, the CAPD submits that this rulemaking is the appropriate procedural vehicle to handle the issues surrounding the review and approval of CSAs rather than the contested case approach that is seemingly favored by the Industry Members.

C. The discussion and analysis contained in the Attorney General's May 31, 2002, letter are relevant to the future regulation and administration of CSAs.

The Industry Members suggest that the Attorney General's letter of May 31, 2002, that is filed in this docket, is no longer relevant or applicable should the TRA determine that no new or amended rules are warranted.[13] To the contrary, the CAPD maintains that the discussion and analysis contained in the Attorney General's letter constitute appropriate guiding principles and

[13] *See* Industry Comments at 3.

advice that should be considered in the future regulation and administration of CSAs.

While the Attorney General's analysis was conducted against the backdrop of the TRA's proposed rules, much of the discussion regarding issues such as the Public Records Act, the TRA's statutory duties, and termination charges are generally applicable to the regulation of CSAs under any set of rules. For instance, the Attorney General concluded that the TRA, as a general practice, cannot place the identity of participants in special contracts under seal without running afoul of the Public Records Act.[14] The Attorney General further concluded that, pursuant to Tenn. Code Ann. §§ 65-4-122 and 65-5-204, "[t]he TRA has the statutory duty to ensure that special contracts are allowed only when special circumstances justify a departure from the general tariffs. And it must also ensure that any special rate is realistically and in practice made available to all customers who are similarly situated."[15] Further, the Attorney General pointed out that the liquidated damages provisions in special contracts that are approved by the TRA should be limited to actual damages from breach of contract and be otherwise consistent with Tennessee law.[16] At the present time, however, the TRA has no explicit statements in rule form of the filing requirements necessary to comply with the Public Records Act, the criteria required for consumers to become similarly situated, or the damages allowable under a CSA or term plan. Thus, to the extent that ***existing*** rules either promote, fail to address, or permit CSA practices that are contrary to these guidelines, the Attorney General's letter constitutes a basis to replace or modify the rules.

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[14] *See* Letter from Paul G. Summers, Attorney General, Office of the Attorney General, *Re: Proposed Rulemaking Hearing Rules, Chap. 1220-4-2, Regulations for Telephone Companies*, to K. David Waddell, Executive Secretary, Tennessee Regulatory Authority, p. 2 (May 31, 2002).

[15] *Id.* at 4.

[16] *See Id.* at 5-6.

D. The fact that the parties could not agree on a complete set of rules should not be used as a basis to find that no new or amended rules are needed.

The CAPD appreciates the Industry Members' willingness and efforts to discuss proposed rules for the administration of CSAs. It should come as no surprise, however, that the varying interests of the parties involved preclude the development of a comprehensive set of rules that satisfy the concerns of all. Not only do the interests of one company differ from another, but the interests of Tennessee consumers often diverge from those of the Industry Members. Despite the parties' inability to agree on the best approach for administering CSAs, it is nevertheless the responsibility of the TRA to develop proper rules and procedures to ensure that the industry's CSA practices comply with applicable law, are in the best interest of Tennessee consumers, and advance the telecommunications policies of Tennessee. The point of the parties' negotiation and discussion of rules is simply to provide the TRA with input and feedback as it endeavors to carry out its duties in this regard.

The CAPD has no interest in the development of unnecessary and burdensome regulations that stamp out the potential benefits of competition. However, with respect to CSAs, the CAPD is interested in assuring that Tennessee consumers garner the full benefits of competition through the ability to participate in a regulatory program of contracts and discounts that is operated in a non-discriminatory fashion and in compliance with applicable public utility laws. For the reasons discussed in the CAPD Comments filed on December 5, 2002, the CAPD is concerned that the current CSA rules and regulations do not promote adequately the interests of Tennessee consumers. The lack of agreement on this point by the Industry Members should not dissuade the TRA from promulgating sufficient rules to properly administer CSAs and protect the interests of consumers.

E. *Ad hoc* reviews of individual CSAs as the basis for approval of contracts should not be adopted without first establishing a suitable framework for conducting such reviews.

The Industry Members state that the TRA's case-by-case analysis of individual CSAs should continue to be the basis for approval of these contracts, and that CSAs should not be placed on the Conference Agenda for consideration by the Directors at public meetings.[17] The CAPD does not believe that future CSAs should be addressed in this manner.

Neither TRA Rule 1220-4-1-.07 concerning special contracts for incumbent carriers nor TRA Rule 1220-4-8-.07(3) concerning special contracts for competing carriers establishes any meaningful regulations, policies, guidelines, procedures, or practices for the review and approval of such contracts. The former rule is merely a filing requirement that subjects the special contracts of incumbents to the TRA's regulation, and the latter merely repeats the "similarly situated" statutory standard for use of special contracts. Because no clear and comprehensive set of standards has ever been articulated for dealing with issues that are common to all CSAs,[18] it is inappropriate to rely on *ad hoc* determinations for approval of CSAs. Such a process is more likely to result in arbitrary, inconsistent, discriminatory, and legally-suspect CSA decisions. Accordingly, the TRA should not rely on case-by-case analysis of CSAs without placing the contracts on the Conference Agenda for the Directors' deliberation, unless and until appropriate rules and standards have been adopted that establish a suitable framework for conducting such reviews.

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[17] *See* Industry Comments at 4-5.

[18] For example, all CSAs approved by the TRA: (1) should be "non-discriminatory"; (2) should be made available to "similarly-situated" customers; (3) should not include termination charges that exact "impermissible penalties"; (4) should not result in "undue preferences"; (5) should not be "anti-competitive"; and (6) should be consistent with the Public Records Act.

CONCLUSION

For the foregoing reasons, and the reasons discussed in the CAPD Comments filed in this docket on December 5, 2002, the CAPD respectfully disagrees with the Industry Members' conclusion that no new or amended CSA rules are warranted under the circumstances of this rulemaking proceeding. The CAPD recommends that the TRA move forward in its effort to establish a meaningful set of rules for the proper administration and regulation of CSAs and CSA practices. The CAPD remains willing and available to assist the TRA and the Industry Members in the development of rules that attempt to strike the appropriate balance between the interests of telecommunications carriers and Tennessee consumers.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2002, a copy of the foregoing document was served on the parties of record, via U.S. Mail:

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