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

joelle.phillips@bellsouth.com

Joelle J. Phillips
Attorney
615 214 6311
Fax 615 214 7406

December 19, 2002

VIA HAND DELIVERY

Hon. Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

00-00702

Dear Chairman Kyle:

Enclosed are the original and fourteen copies of Reply Comments filed jointly on behalf of BellSouth, United Telephone-Southeast, Inc., Sprint Communications Company L.P., Citizens Telecommunications Company of Tennessee, LLC, Southeastern Communications Carriers Association, Association of Communications Enterprises and Time Warner Telecom of the Mid-South, LP. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Joelle Phillips

JJP:ch
cc: Hon. Deborah Taylor Tate, Hearing Officer

474053

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Proposed Rules for the Provisioning of Tariff Term Plans and Special Contracts*

Docket No. 00-00702

REPLY COMMENTS

BellSouth Telecommunications, Inc. ("BellSouth"), United Telephone-Southeast, Inc. and Sprint Communications Company, LP; Citizens Telecommunications Company of Tennessee, LLC, Southeastern Communications Carriers Association*, Association of Communications Enterprises*, and Time Warner Telecom of the Mid-South, LP (jointly the "Industry Members") file these joint comments in response to both the Comments filed on December 5 and the proposed rule filed subsequently on December 10 by the Consumer Advocate Division of the Attorney General's Office ("Consumer Advocate" or "CAD") as follows:

INTRODUCTION

The comments filed by the CAD urge the Tennessee Regulatory Authority ("TRA") to adopt a needlessly burdensome and onerous procedure related to Contract Service Arrangements ("CSAs"). The procedure described in the CAD's Comments and in the subsequently-filed proposed rule would represent a

*The Southeastern Communications Carriers Association and the Association of Communications Enterprises join in the conclusions presented herein, but these parties do not necessarily join in each argument presented in support of those conclusions.

dramatically-increased regulatory burden in this area, drastically departing from current procedure. Importantly, that increased burden, which is unlike the regulatory process for CSAs in place in any other state in the nation, would not result in any real benefits to Tennessee business customers. This is the wrong direction in which to move Tennessee.

In support of its proposed rules, the Consumer Advocate raises arguments based on faulty presumptions about the market for business services in Tennessee, raises many of the same allegations that it failed to prove in "the Bank" and "the Store" cases before the TRA, and makes illogical and unsupported conclusions regarding the fundamentals of contract law. Moreover, the CAD proposes a system that would require a vast amount of administrative resources to be invested without any legitimate hope of accomplishing the CAD's purported goal of protecting Tennessee business customers from undue discrimination. Rather, this additional burden would serve only to make the CSA process so complex and out of step with other states, that customers would, in all likelihood, prefer to forego the discounts resulting from competition in order to avoid involvement in the regulatory scheme proposed by the CAD.

In contrast to the Comments filed by the Consumer Advocate, the Industry approach urging the TRA to operate under its existing rules presents a workable process for ensuring the appropriate review of special contracts. Under that current process, the TRA individually scrutinizes each ILEC CSA, as well as CLEC

summaries. Using this process, the TRA requires the filing of information justifying the CSAs and seeks additional information on a case-by-case basis if needed.

Today, the Tennessee CSA process, combined with the TRA's complaint procedures, enable any customer denied the opportunity to obtain a CSA on the same terms as another similarly-situated customer to have his complaint evaluated on a case-by-case basis. This process focuses on reviewing proposed CSAs, making information regarding those CSAs publicly available, and then of evaluating any actual claims regarding discrimination. The process mirrors the procedure used by courts, state agencies, and federal agencies when considering such issues in other contexts. It also mirrors the current process used by the TRA to review ILEC tariffs. The Consumer Advocate's focus on developing a list of criteria in advance of such a specific live controversy, which would prejudge and resolve that controversy, has simply not been demonstrated to be either possible or even helpful by experience or precedent.

The Tennessee Legislature has clearly articulated its telecommunications policy to embrace telecommunications competition and the TRA must be mindful of that policy as it promulgates rules. Competition is not an end in itself. Rather, competition is the means to create, for customers in Tennessee, a competitive market place for telecommunications services. Unlike a monopolistic system, a competitive marketplace for telecommunications provides for customers all of the benefits customers expect to enjoy in any marketplace. Specifically, it provides customers with choices for products and services. Moreover, in a lively market,

those choices are constantly improved (and added to) in order to catch the eye of the customer browsing through the marketplace. Throughout its comments, the Consumer Advocate acknowledges that CSAs are a response to competition for business customers. The Consumer Advocate seems unwilling, however, to embrace the idea that competition brings about choices – rather than a "one-size-fits-all" system for all customers.

The fact that business customers choose their own unique CSAs does not indicate discrimination. Even under the various ILEC and CLEC tariffs, numerous choices exist for customers – enabling them to choose from among services, mixes of services, and various tariffed pricing plans. The fact that one customer chooses one tariffed offering, while another chooses a different offering, is not an indication of discrimination. The same is true for CSAs. Instead, the negotiation of special contracts is an indication that business customers are taking advantage of the array of unique and different choices created through the process of negotiating in the marketplace.[1]

The Consumer Advocate's proposal undermines the marketplace. By imposing undue limitations on the customer's ability to provide an enforceable promise of a term commitment, for example, the Consumer Advocate devalues the customer's "currency" in the marketplace, undermining its ability to negotiate for its best possible deal. Those customers interested in term agreements understand

[1] The Authority has on more than one occasion referred to CSAs in its report of accomplishments to the General Assembly, noting that CSAs are responsive to local competition. *See Annual Report for the Period July 1, 1999 to June 30, 2000*, at 33, 37; *Annual Report for the Period July 1, 2000 to June 30, 2001,* at 38.

that they can bargain for something in exchange for this currency---additional discounts and favorable terms in exchange for their commitment to enter into a term contract. The CAD's proposed rule imposes requirements that customers and sellers in that marketplace must gather and provide to the Authority sensitive and proprietary information about the attributes of that customer, just on the chance that the TRA might someday in the future perform a similarly situated analysis comparing the customer with another customer who has yet to arrive at the marketplace. Consequently, the Consumer Advocate would make shopping in the marketplace too burdensome and risky for business customers to shop there. Moreover, these regulatory burdens would be time consuming, unreasonably lengthening the time required to "complete a sale." While purportedly designed to protect customers, the CAD's proposals would smother these business customers with regulatory requirements at odds with competition – all without any evidence to suggest that these business customers are facing any risk at all in that marketplace today.

As evidenced by the TRA's reports to the legislature, as well as findings in the 271 docket, Tennessee is seeing the fruits of the legislative policy to bring competition to Tennessee. Under the existing rules, the TRA already performs the scrutiny required to ensure that this marketplace activity does not stray into an area prohibited by Tennessee law, such as undue price discrimination. The Consumer Advocate has presented no valid argument, nor any example involving an actual business customer, suggesting this system is inadequate. The Consumer

Advocate's hypothetical concerns have no basis in market reality, legal precedent, or this Authority's experience.

For these reasons the Industry Members urge the TRA to reject the position of the Consumer Advocate, which would harm the Tennessee telecommunications marketplace, and to maintain instead the existing rules governing the use of contract service arrangements in Tennessee, which have helped to bring that marketplace into being.

I. The Consumer Advocate's Discussion of Similarly-Situated Customers is Flawed.

A. The Filed Tariff Doctrine is Consistent with the TRA's Existing Procedure.

In response to Question 1, the Consumer Advocate cites the alleged "tension between the Filed Tariff Doctrine and the CSAs in the arena of telecommunications where the 'similarly-situated' standard is used to restrict the availability of CSAs." As an initial matter, it is important to note that there is no such tension between the Filed Tariff Doctrine and CSAs in Tennessee, because, in Tennessee, ILEC CSAs are made public through filing, and CLEC CSAs are made public by the filing of summaries. The entire point of the Filed Tariff Doctrine is to avoid secret rates for telecommunications services for certain rate payers. The filing requirements of the TRA ensure that no such secret rate is possible.

As to ILEC CSAs, those CSAs are filed as tariffs and become part of the tariff applicable to that carrier. Accordingly, each is a filed tariff, and there can be no tension between the Filed Tariff Doctrine and a filed tariff. As to the CLEC

CSAs, the summaries of such CSAs are also filed documents that are not secret, but rather are subject to review by the agency and the public. Accordingly, the fundamental premise of the Consumer Advocate's assertions in this docket is simply inherently flawed. The terms of Tennessee CSAs are fully available to the public, pursuant to a system requiring as much, or more, disclosure and review than any other state in the nation.

The TRA's system of filing CSAs and summaries provides ample public notice of the rates and terms of CSAs. This system provides the same type of openness applicable to tariffs in general.

B. The Fact that Customers Make Different Choices Does Not Indicate Undue Discrimination by Carriers.

In an attempt to find support for it's erroneous conclusion that CSAs are at odds with the filed tariff doctrine because of their availability to similarly situated customers, the Consumer Advocate lists, in a time-line form, an unrelated hodge-podge of various regulatory and legislative events. Notably, among these various unrelated events listed in the Consumer Advocate's "similarly-situated time line", the Consumer Advocate fails to include any reference to any complaint involving any actual customer maintaining that he was denied a CSA even though he was similarly-situated to another customer. The reason there is no such reference is because there has not been such complaint in Tennessee.[2]

[2] Notably, the CAD also fails to list the TRA's ruling in the Bank and the Store cases (Docket Nos. 99-00210 and 99-00244) in which the CAD failed to prove its allegations that these CSAs were discriminatory or anti-competitive.

Customers can, when they choose, review the CSAs just as they review their choices available under any other tariff. Customers can certainly choose from among tariffed plans, and, predictably, they do not all make the same choices. Similarly, customers can certainly browse the terms of CSAs fashioned for particular customers and seek to enter into a contract, under a similarly-situated case, that adopts those terms and obligations. Reviewing the CSA terms of other customers is no different than reviewing tariffed options and selecting one. Far from secret, these terms are just as publicly available as any other tariff plan.

In the experience of the Industry, however, customers customarily choose not to "shop" in this fashion. The market reality is that when Tennessee business customers act in the competitive marketplace, they often spend their efforts negotiating their own contracts, not taking one designed especially for someone else. In the Tennessee marketplace, carriers conduct themselves as merchants do in any other market, meaning that they design their products to attract customers. Often this results in contractual arrangements that are not one-size-fits-all. Not surprisingly, customers may choose to invest their efforts with respect to obtaining telecommunications services in negotiating their own deals, rather than scouring existing Contract Service Arrangements in order to, first, find one in which they are interested and then, next, determine whether they are similarly-situated to the customer for whom that Contract Service Arrangement was designed.

C. The Consumer Advocate Provides No Compelling Example of a Workable Model to Define "Similarly Situated".

In an attempt to suggest to the TRA that the Authority could easily promulgate criteria defining similarly situated in some generally applicable rule, the Consumer Advocate looks to other agencies or contracts to find the term, "similarly situated". The "examples" cited by the Consumer Advocate appear to be nothing more than the results of a word search throughout the documents associated in any way with either telecommunications or government in general. Having found a few examples of the use of that term, the Consumer Advocate wrongly concludes that, if other agencies use the term "similarly situated", then someone must have determined a way to reduce into a written rule, a formula for the identification of "similarly situated" customers. The fact is, however, there is no such formula for evaluating complex entities like customers. Certainly, the CAD has identified nothing to indicate that such a formula has been created for use by the FCC or any state Public Service Commission in the country.

As discussed below, the examples found by the Consumer Advocate do not provide any appropriate guidance to this agency in defining, in the abstract, the concept of "similarly situated". There is no practicable way in which the TRA could develop such a definition and use it in a generally-applicable rule, rather than performing a case-by-case analysis when a complaint is presented and a live controversy arises involving actual, not hypothetical, customers.

As a threshold matter, it is important to note the uselessness of creating a "similarly-situated" profile. Just because Customer B may, in fact, appear to be similarly situated to Customer A, does not mean that Customer B would necessarily choose to enter into Customer A's contract. The term "CSA" stands for ***Contract*** Service Arrangements. The term "contract" is the operative word. Consequently, the terms provided to Customer A through its CSA are provided to Customer A in exchange for the consideration provided by Customer A. In all cases, that consideration includes a commitment to enter into a term contract. Accordingly, one of Consumer Advocate's goals through its proposed rules, which is to force the telecommunications carrier to "make available" the same terms to a similarly-situated customer, ignores the fact that before that could happen, the similarly-situated customer would have to be identified ***and*** agree to provide the same consideration that Customer A had provided. There is no need for the TRA to spend its limited, valuable resources developing profiles of similarly-situated customers who may not even be interested in the CSA.

It is also important to notice that when a CSA is offered for approval to the TRA, only Customer A is known to the Authority. No matter how much information is provided to the Authority about Customer A, it will be impossible for a strict "similarly-situated" analysis to be performed beforehand. Obviously, it is not possible to determine whether Customer A is similarly situated unless Customer B is there to compare. At bottom, the Consumer Advocate's plan for gathering information for the purpose of a similarly-situated analysis is nothing more than an

attempt to compare two customers when only one is present. It is foolish and wasteful to engage in a burdensome regulatory process designed for comparison when the agency does not have two items before it to compare. Moreover, the CAD proposed that the TRA gather information for this purpose that customers will be reluctant to provide, given its competitive and proprietary nature – particularly given that this information would be available to the public. This proposal, purportedly designed to protect customers, would force them to divulge information which could be used by their competitors to their detriment.

Turning to the examples provided by the Consumer Advocate of the analysis of similarly-situated objects or entities in other contexts, not one of those examples is remotely analogous to the situation involving CSAs. One example offered by the Consumer Advocate involves dialing parity between carriers. In that instance, the similarly-situated analysis for purposes of that decision has to do solely with geographic location of the customer. Therefore, no one could reasonably assert that this analysis provides a model applicable to evaluation of similarly-situated business customers.

The Consumer Advocate's assertion that interconnection agreements dealing with repair time for similarly-situated loops has any persuasive weight is equally flawed. Determining whether one loop is similarly situated to another loop again involves a determination of the location and length of the loop and the technical attributes of the loop. Suggesting that the ability to determine whether two

inanimate technical objects are similarly situated is somehow akin to comparison of dynamic business customers is illogical to say the least.

In addition, all of the references to federal agencies evaluating similarly-situated complaints cited by the CAD are examples of agencies determining whether a particular person or entity was similarly situated ***upon resolution of a specific complaint***. None of these are examples of an agency who has promulgated rules containing criteria, which would predetermine whether someone was similarly situated for purposes of a particular issue.

The Consumer Advocate makes much of the FCC's order relating to resale of CSAs to similarly-situated customers, wrongly suggesting that the FCC has developed standards in this area that could be adopted and applied by the TRA. The Consumer Advocate's discussion of the FCC's order regarding resale of CSAs simply misses the point. The FCC decided that it was, in fact, appropriate for resale to be limited to similarly-situated customers and recognized that customer characteristics could be relevant in determining whether a particular customer was similarly situated for purposes of resale. The FCC ***did not say*** that the TRA or any other state agency is required to promulgate criteria in advance of a complaint regarding resale in order to determine who would be considered, hypothetically, to be similarly situated. Rather, state agencies are free to resolve such issues on a case-by-case basis when there is a live case or controversy involving such a customer.

The Consumer Advocate is simply wrong that additional rules are required in order to enable the TRA to protect against undue discrimination. Clearly, in the case of an actual complaint, the concept of whether the complaining party is similarly situated would be at issue. Case-specific evidence regarding that customer, its characteristics, the telecom services it is seeking, the geographic location, as well as numerous other issues could certainly be relevant to that determination. In the absence of such live case or controversy, it would be inappropriate for the TRA to engage in the burdensome process of gathering such information and simply hold it in the public records of the agency. In addition, requiring carriers to gather such evidence from customers in order to provide them with competition-driven discounts would result in a substantial disincentive for telecom carriers to provide such discounts to customers. Under the Consumer Advocate's proposed process, the customer loses.

II. The Specifics of the CAD's Proposed Rules[3]

Notably, in paragraph 46 of the Consumer Advocate's Comments, the Consumer Advocate seems to concede that its rule is not workable as proposed, noting that the criteria is "less than perfect." That discussion, however, wrongly asserts that the Consumer Advocate has not received a counterproposal from other parties in the course of negotiations. The truth is that the Industry has agreed unanimously that the CAD's rules are unworkable and do not represent an

[3] Although the proposed rule was not originally filed with the Consumer Advocate's comments on December 5, BellSouth understands that the rule being proposed is the rule which was filed on December 10 by the Consumer Advocate.

improvement upon the existing rules in effect today. The Industry has proposed that the TRA continue to operate under its existing rules.

The Consumer Advocate's Comments assert that the rule addresses three concepts: first, the similarly situated concept; second, the existence of a competitive alternative; and third, termination liability. Each is discussed below.

A. Similarly Situated Analysis

As discussed above, a rule requiring the gathering of evidence to be used in the event of a claim of price discrimination would be a waste of administrative resources, a needless burden on (and risk to) customers and a needless burden on the industry. As to ILEC CSAs, customer are already required to wait until approval is obtained before actually receiving the discounts. These added requirements would surely slow that process and delay the delivery of discounts to business customers. Particularly in the present economy, business customers need to realize discounts as soon as practicable.

The CAD's proposed rule also requires that, upon the identification of a customer who is similarly situated, the terms of the CSA must be provided to that customer. The rule makes no accommodation for the customer who does not want the terms of the agreement or the customer who is unwilling to give, in exchange, the obligations of the customer under the CSA. CSAs are not simply a set of terms offered by the carrier. They are contracts. They involve benefits and burdens on both parties. If a party is similarly situated, they certainly are entitled to enter into

the same CSA, but they must actually agree to do so. They cannot simply obtain the benefit without agreeing to the burden of the term commitment under the CSA.

B. Geographic Restriction of Competitive Alternative

The Consumer Advocate's rule borrows from an FCC regulation regarding pricing flexibility in order to geographically restrict CSAs only to certain metropolitan areas. Under the terms of its proposal, the CAD urges a plan that would acknowledge the existence of a competitive alternative justifying a CSA in Nashville, Knoxville, Chattanooga and Memphis. While all the parties agree that competition justifying CSAs exists in those areas, this approach would dramatically underestimate the existence of competitive activity in Tennessee. The FCC has never instructed the states to adopt such limitations on special contracts.

The wireline activity reports submitted to the TRA clearly demonstrate that facilities-based competition exists outside the geographic area in which CSAs would be permitted under the Consumer Advocate's proposed rule. Accordingly, that regulation is a bad fit for this purpose. Importantly, no other state has adopted this process for regulation of CSAs. Under the proposed rule, business customers outside these areas – who are currently enjoying the benefits of CSAs and who have indicated the existence of a competitive alternative available in their location – would no longer be able to contract to receive those discounts.

The Consumer Advocate's assertion that some ILEC CSAs may not be responsive to competition but rather taken as an action to prevent another carrier

from entering the market[4] is flatly in conflict with the Tennessee Addendum submitted with BellSouth CSAs, which contains the customer's own declaration that they have a competitive alternative. If a competitive alternative exists, then clearly a CSA cannot be used to "prevent" a CLEC from entering the market. Rather, a CLEC is already there. Moreover, it is hard to imagine what better indication there can be of the existence of competition in that geographic location other than the declaration of the business customer who has been to the marketplace and received or learned of a competitor's offer. It is puzzling that the very entity acting ostensibly on behalf of such customers would prefer to reject the customers' own declarations in exchange for some other measure of competitive activity in the market.

Concerns regarding the use by an incumbent of special contracts with low prices to prevent a CLEC from competing are addressed in Tennessee by the price floor applicable to incumbents.

The Consumer Advocate's assertions related to the potential of raising prices to offset CSA discounts is also not well taken. Price regulated carriers in Tennessee can raise prices for telecommunications services only under the statutory system established by T.C.A. 65-5-209. Provided that any increase in price comports with this statutory formula, then such adjustments are legal. In any event, the Consumer Advocate has not cited a single example of a price increase to offset CSA discounts.

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[4] Again, the CAD failed to prove this same allegation with respect to the Bank and the Store.

C. Termination Liability

Finally, the Consumer Advocate rule addresses the termination liability that can be included as a term in the Contract Service Arrangement. Issues related to termination liability for CSAs have been fully and thoroughly reviewed, litigated and settled before the TRA. For example, in Docket No. 00-00170, the TRA issued a show cause order to which BellSouth responded with respect to termination liability. In addition, BellSouth agreed in resolution of that docket to submit a tariff providing for termination liability. That tariff (Docket No. 01-00681) was accepted by the TRA and allowed to become effective as of August 15, 2001. These issues have been resolved.

The Consumer Advocate's discussion of termination liability contains gross misstatements of the law applicable both to liquidated damages and basic contract damages under Tennessee law. While the Authority is well familiar with these concepts, the Industry Members feel compelled to respond to the Consumer Advocate's flawed discussion of these issues.

"Termination liability" is a provision in a CSA regarding which the parties negotiate to provide in advance for the payment of a specific sum that would be due upon breach (early termination without cause) of the CSA by the customer. Termination liability, consequently, applies only upon a breach of the customer's obligation under the CSA to remain with the telecommunications carrier for a specified period of time. This provision, which stipulates a sum agreed upon by the parties to be paid should a breach occur, is called a "liquidated damages" provision.

In Tennessee, as in most every jurisdiction, parties are free to enter into such contractual provisions, and these liquidated damages provisions will be enforced unless the provision is a "penalty" as defined by law.

In *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 1999 WL 439399 (July 28, 1999)(copy attached), the Supreme Court held as a matter of law that a termination liability provision is a penalty only "if the provision and the circumstances indicate that the parties intended ***merely*** to penalize for a breach of contract." *Cleo* at *11 (emphasis added). On the other hand, if a termination liability provision "is a reasonable estimate of the damages that would occur from a breach, then the provision is normally construed as an ***enforceable*** stipulation of liquidated damages." *Cleo* at *9. More specifically, the Court determined as a matter of law that a termination liability provision that required the party terminating the contract to pay the rate of pay established in the contract for the remaining term of the contract is ***not a penalty.***

In deciding this controlling rule of law, the Supreme Court recognized that in reviewing termination liability provisions,

> there are two important interests at issue: the freedom of parties to bargain for and agree upon terms such as liquidated damages and the limitations set by public policy. Generally, the parties to a contract are free to agree upon liquidated damages and upon other terms that may not seem desirable or pleasant to outside observers. In that respect, courts should carry out the intention of the parties and the terms bargained for in the contract, unless those terms violate public policy.

Cleo at *10. The Supreme Court acknowledged that parties who agree to termination liability provisions are presumed to have "considered the certainty of

liquidated damages to be preferable to the risk of proving actual damages in the event of a breach." *Cleo* at *11. The Supreme Court also acknowledged that termination liability provisions

> permit the parties to allocate business and litigation risks and often serve as part of the contractual bargain. In addition, they lend certainty to the contractual agreement and allow the parties to resolve defaults and other related disputes efficiently, when actual damages are impossible or difficult to measure.

Cleo at *11. The *Cleo* decision, therefore, is firmly grounded in sound public policy as determined by the highest Court in the State of Tennessee.

The *Cleo* case involved an employment contract in which the employer agreed to hire the employee at an annual salary of $103,000 for a three-year term beginning on November 1, 1992 and ending October 31, 1995. *Cleo* at *5. The contract provided that if the employer terminated the contract prior to October 31, 1995 without cause, it would pay the employee his "then current salary from the date of termination through October 31, 1995." *Cleo* at *5. As it turned out, the employer terminated the contract without cause in December 1994, and that same month, the employee accepted a job with another company at an annual salary of $110,000 -- $7,000 per year more than the employee earned under the contract the employer had terminated.

The employee sought the damages set forth in the contract (his salary from December 1994 until October 31, 1995), but the employer argued that the termination liability provision was an unenforceable penalty. The employer claimed it had to be construed as a penalty because it required the employer to pay the

employee $90,125 plus prejudgment interest even though the employee's actual damages were far less than that amount. The Supreme Court rejected the employer's argument and ruled that the provision was lawful and enforceable.

In making this decision, the Supreme Court made several important observations. First, the Court explained that under Tennessee law,

> Courts must focus on the intentions of the parties based upon the language in the contract and the circumstances that existed at the time of contract formation. Those circumstances include: whether the liquidated sum was a reasonable estimation of potential damages and whether actual damages were indeterminable or difficult to measure at the time the parties entered into the contract. If the provision satisfies these factors and reflects the parties' intentions to compensate in the event of a breach, then the provision will be upheld as a reasonable agreement for liquidated damages.

Cleo at *11. The Supreme Court then held that the termination provision requiring the employer to pay the monthly salary times the number of months remaining in the contract satisfied each of these factors, explaining that

> Neither [the employee] nor [the employer] had certain knowledge, when forming the contract, that the employee would be able to secure other employment in the event that the employer terminated his employment without cause. It was within the fair contemplation of the parties that the employee might not be able to find a similar professional position at the same salary and that he might suffer damages that would be difficult to prove, including loss of professional status, prestige, and advancement opportunities. The language of [the termination liability provision] reflects the parties' intentions to compensate and to protect the employer against these potential losses in the event of a breach by the employer.

The Supreme Court further held that "the extent of actual damages has no bearing on the [employee's] recovery of liquidated damages under [the termination liability provision]." *Cleo* at 11, and it acknowledged that

> the parties themselves were in the best position to know what considerations influenced their bargaining at the time they entered into the contract. While "[t]he bargain may be an unfortunate one for the delinquent party, . . . it is not the duty of the courts of common law to relieve parties from the consequences of their own improvidence."

Accordingly, the Supreme Court's most recent decision on the issue of termination liability clearly demonstrates that termination liability provisions are enforceable.

The amount of damages to which a party is entitled when another party to a contract breaches the contract is a matter of law, and non-breaching parties generally are entitled to be placed in the position they would have enjoyed had no breach occurred. *Wilhite v. Brownsville Concrete Co.*, 798 S.W.2d, 772, 775 (Tenn. Ct. App. 1990) This is what is meant by the "benefit of the bargain." The CAD's proposed rule wrongly focuses not on the "benefit of the bargain" expected by the non-breaching party, but instead on benefits expected by the breaching party. The Consumer Advocate turns the law of contracts on its head by suggesting that the TRA should refuse to permit CSAs with termination liability provisions that (1) appear on the face of the contract to be enforceable under *Cleo* ***and*** (2) track a TRA-approved BellSouth tariff. Such an outcome is utterly unsupported by contract law.

The issues surrounding termination liability have long since been resolved at the TRA. There is no basis to cite termination liability as an issue requiring the promulgation of new rules. The *Cleo* case notes that courts should respect the parties intent as set forth in their contracts. In the CSA context, those parties are businesses, and there is no reason to expect that business customers will be

unable to negotiate appropriate termination provisions reflecting their intent. Importantly, however, any business customer that finds itself subject to an attempt by any telecommunications carrier to collect termination liability upon breach of a contract would always be free to raise the issues discussed in *Cleo,* or any other defense of breach of contract, in an action in court by the telecommunications carrier to collect that amount. Nothing about the approval of the CSA by the TRA immunizes either party in the event that the enforceability of a provision of the contract is challenged in court. Accordingly, this issue is not one that should stand in the way of the continued use of CSAs to deliver competition-driven discounts in the Tennessee marketplace.

CONCLUSION

The proposed rules from the Consumer Advocate call the TRA to proceed down the wrong road for Tennessee, the road which leads away from the marketplace. The CAD's proposed rule and comments are largely a rehashing of issues that the TRA has already found a way to resolve and arguments that the TRA has already settled or determined.

This docket was initiated in July of 2000. At that time, many of the issues raised by the Consumer Advocate had not yet been resolved. Since that time, however, much work has been done at the TRA to address these issues. The Consumer Advocate Division's proposal ignores this work. The Industry Members urge the TRA not to be persuaded by the Consumer Advocate's invitation to

substitute a new and burdensome regulatory process for the current, more manageable process.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

Guy M. Hicks
Joelle J. Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615-214-6301

UNITED TELEPHONE-SOUTHEAST, INC.
SPRINT COMMUNICATIONS COMPANY L.P.

By: _____ by J Phillips with permission

James Wright, Esq.
14111 Capitol Blvd.
Wake Forest, NC 27587
919-554-7587

CITIZENS TELECOMMUNICATIONS
COMPANY OF TENNESSEE, LLC

By: _____ by J Phillips With permission

Guilford Thornton, Esquire
Stokes & Bartholomew
424 Church Street, #2800
Nashville, TN 37219
615-249-1492
Its Attorney

SOUTHEASTERN COMMUNICATIONS CARRIERS ASSOCIATIONS

By: Henry Walker by J Phillips with permission

Henry Walker, Esquire
Boult, Cummings, et al.
414 Union Street, #1600
Nashville, TN 37219-8062
615-244-2582
Its Attorney

TIME WARNER TELECOM OF THE MID-SOUTH, LP.

By: Charles Welch by J Phillips with permission

Charles B. Welch, Esquire
Farris, Mathews, et al.
618 Church St., #300
Nashville, TN 37219
615-726-1200
Its Attorney

ASSOCIATION OF COMMUNICATIONS ENTERPRISES

By: Andrew Isar by J Phillips with permission

Andrew O. Isar, Esquire
7901 Skansie Ave., #240
Gig Harbor, WA 98335
253-851-6700

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 the method indicated:

[ ] Hand [X] Mail [ ] Facsimile [ ] Overnight	James Lamoureux, Esquire AT&T 1200 Peachtree St., NE Atlanta, GA 30309
[ ] Hand [X] Mail [ ] Facsimile [ ] Overnight	James Wright, Esq. United Telephone - Southeast 14111 Capitol Blvd. Wake Forest, NC 27587
[ ] 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	Don Baltimore, Esquire Farrar & Bates 211 Seventh Ave., N., #320 Nashville, TN 37219-1823
[ ] 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	Charles B. Welch, Esquire Farris, Mathews, et al. 618 Church St., #300 Nashville, TN 37219

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

Timothy Phillips, Esquire
Office of Tennessee Attorney General
P. O. Box 20207
Nashville, TN 37202

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

Deborah A. Verbil, Esquire
SBC Telecom, Inc.
5800 Northwest Pkwy, #125
San Antonio, TX 38249

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

Guilford Thornton, Esquire
Stokes & Bartholomew
424 Church Street, #2800
Nashville, TN 37219