STATE OF TENNESSEE

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Reply to:
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February 18, 2003

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

Re: Consumer Advocate Brief in Support of Adoption of Regulations for Special Contracts and 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 Brief in Support of Adoption of Regulations for Special Contracts and Term Arrangements for Telecommunications Services in the Rulemaking Proceeding, Docket No. 00-00702. Copies are being furnished to counsel of record for interested parties.

Sincerely,

Vance Broemel

VANCE BROEMEL,
Assistant Attorney General

cc: Counsel of Record
52476

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE
February 18, 2003

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

CONSUMER ADVOCATE BRIEF IN SUPPORT OF ADOPTION OF REGULATIONS FOR SPECIAL CONTRACTS AND TERM ARRANGEMENTS FOR TELECOMMUNICATIONS SERVICES

Comes now Paul G. Summers, Attorney General for the State of Tennessee, through the Consumer Advocate and Protection Division ("Consumer Advocate"), pursuant to the Tennessee Regulatory Authority ("TRA") directive at the Authority Conference held on January 27, 2003, and hereby files this *Consumer Advocate Brief in Support of Adoption of Regulations for Special Contracts and Term Arrangements for Telecommunications Services.*

I. INTRODUCTION

In the above-styled docket, the TRA has recognized the need to examine the industry-wide use of special contracts and term arrangements for the delivery of telecommunications services to select Tennessee consumers.[1] The Consumer Advocate recommends that the agency continue on

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[1] In some cases, special contracts and term arrangements are used to provision telecommunications services to select customers in lieu of the telecommunications carrier's general tariff offerings that are available to the consuming public. In August 2000, the TRA adopted proposed rules to regulate the use of special contracts and term arrangements, which are filed in this docket. In his letter of May 31, 2002, the Attorney General rejected the TRA's proposed rules for their failure to adequately recognize certain laws and public policies. The Attorney General's letter is also filed in this docket.

this course in an effort to address the presently existing misalignment between industry practices and public policies, which we hereinafter set out for the TRA's consideration.[2] The Consumer Advocate respectfully submits that the TRA has a duty to ensure that appropriate regulations for administering the use of special contracts and term arrangements are currently in place before any decision is made to abandon this rulemaking proceeding.

II. TOPICS

In light of the questions from the Directors and statements by the Industry Members[3] at the Authority Conference held on January 27, 2003, the Consumer Advocate will address the following:

A. The TRA has previously recognized, pursuant to the authority of *Tennessee Cable*, that new rules should be examined for the proper regulation of special contracts;

B. The TRA's current rules and procedures permit industry practices that are inconsistent with public policy objectives regarding the use of special contracts;

C. That *Tennessee Cable* requires the TRA to conduct a rulemaking under the circumstances of this docket;

D. The TRA Staff's current case-by-case review of special contracts is inadequate and demonstrates the need for new rules;

E. The TRA has previously recognized the benefits of a rulemaking for special contracts, which still should be pursued; and

F. The Consumer Advocate's prior comments in other dockets favor a rulemaking in this instance.

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[2] It is not the Consumer Advocate's goal to catalog herein all industry practices that we consider to be inconsistent with the state's public policy objectives, nor is it our intent to develop a comprehensive list of particular cases that concern us in this regard. Due to the lack of discovery in a rulemaking, and due to our lack of discovery in special contract cases where our petitions are currently pending, the Consumer Advocate has used information that is available to us generally or through other dockets so that we may present at least some relevant facts that are critical to our argument.

[3] The Industry Members include: BellSouth Telecommunications, Inc.; United Telephone-Southeast, Inc. and Sprint Communications Co., L.P.; Citizens Telecommunications Co. of Tennessee, L.L.C.; Southeastern Competitive Carriers Association; Time Warner Telecom of the Mid-South, L.P.; and XO Tennessee, Inc.

III. ARGUMENT

A. THE TRA HAS PREVIOUSLY RECOGNIZED THE AUTHORITY OF *TENNESSEE CABLE* WITHIN THE CONTEXT OF THE INSTANT RULEMAKING AND SHOULD NOT DEPART FROM ITS GUIDANCE WITHOUT CAREFUL CONSIDERATION OF CURRENT RULES AND PROCEDURES

The TRA has already recognized that a new rulemaking is necessary to properly examine the use of special contracts. Thus, in 2000 the agency held as follows:

> In the Fourth Report and Recommendation, the Pre-Hearing Officer made the following three (3) recommendations: 1. That the Authority open a rulemaking docket to examine the use of CSAs [contract service arrangements] on an industry-wide level. This recommendation recognized that any administrative agency must enter into rulemaking when "the agency's action is concerned with broad policy issues that affect a large segment of the regulated industry or general public." *Tennessee Cable TV v. Public Serv. Comm'n*, 844 S.W.2d 151, 162 (Tenn. App. 1992) . . . After reviewing the Fourth Report and Recommendation, and after considering the comments of the parties and the Pre-Hearing Officer, as well as the objections submitted by BellSouth, the Directors voted unanimously to approve recommendations numbers one (1) [regarding the opening of a rulemaking] . . . .

Order Approving and Adopting Fourth Report and Recommendation of the Pre-Hearing Officer, TRA Docket No. 98-00559, pp. 3-4 (February 3, 2000).

The TRA has further stated in this regard:

> In addition, the Authority concluded that an approval of the *Proposed Settlement* [regarding the liquidated damages provisions of one carrier] could be interpreted as the adoption of a rule of general applicability relating to termination provisions in the context of an adjudicatory proceeding . . . which would not be the proper proceeding within which to establish such a rule.

Order Rejecting Proposed Settlement Agreement and Dismissing Show Cause Petition, TRA Docket No. 00-00170, p. 4 (October 4, 2000) (*citing Tennessee Cable Television Assn. v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151 (Tenn. Ct. App. 1992) as support for the TRA's conclusion).

The TRA should not easily depart from the course that it has plotted. Any decision to reverse

course should carefully consider the adequacy of currently existing rules and procedures for addressing the industry's use of special contracts. The failure to establish and maintain a guiding framework for the application of broad legal and regulatory policies is likely to lead to special contract decisions that are arbitrary, inconsistent, discriminatory, and legally-suspect.

B. THE TRA'S CURRENT RULES AND PROCEDURES PERMIT INDUSTRY PRACTICES THAT ARE INCONSISTENT WITH PUBLIC POLICY OBJECTIVES

Current TRA regulation of special contracts does not adequately protect the interests of Tennessee consumers. In particular, current TRA practices fail to provide objective, transparent standards that ensure the achievement of the following requirements under Tennessee law: (1) there should be no unjust discrimination among customers, and similarly-situated customers should be treated similarly; (2) all special contracts should be open to the public and should provide the public with sufficient information to make an informed choice; and (3) termination liability provisions should be reasonable and not constitute a penalty.

1. UNJUST DISCRIMINATION

a. Public Policy: Emergence of Competition Has Not Rendered the Policy Against Unjust Discrimination Moot

The policy against unjust discrimination among telecommunications customers is well established in both state and federal law. The federal policy is set out in 47 U.S.C. § 202(a):

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service . . . .

The state's corresponding policy against unjust discrimination is enunciated in Tenn. Code

Ann. §§ 65-5-204(a) and 65-4-122. Thus, Tenn. Code Ann. § 65-5-204(a) provides:

> No public utility shall: (1) Make, impose, or exact any unreasonable, unjustly discriminatory or unduly preferential individual or joint rate, or special rate, toll, fare, charge, or schedule for any product, or service supplied or rendered by it within this state; (2) Adopt or impose any unjust or unreasonable classification in the making or as the basis of any rate, toll, charge, fare, or schedule for any product or service rendered by it within this state.

Tenn. Code Ann. § 65-4-122 further provides in part:

> If any common carrier or public service company, directly or indirectly, by any special rate, rebate, drawback, or other device, charges, demands, collects, or receives from any person a greater or less compensation for any service within this state than it charges, demands, collects, or receives from any other person for service of a like kind under substantially like circumstances and conditions, and if such common carrier or such other public service company makes any preference between the parties aforementioned such common carrier or other public service company commits unjust discrimination, which is prohibited and declared unlawful.

The emergence of some measure of competition in the telecommunications marketplace has not rendered the policy against unjust discrimination moot. In particular, the Federal Communications Commission ("FCC") has explicitly noted that the "bedrock" principles of prohibiting unjust discrimination are still in place:

> Sections 201 and 202, codifying the bedrock consumer protection obligations of a common carrier, have represented the core concepts of federal common carrier regulation dating back over a hundred years. Although these provisions were enacted in a context in which virtually all telecommunications services were provided by monopolists, they have remained in the law over two decades during which numerous common carriers have provided service on a competitive basis . . . [S]ections 201 and 202 lie at the heart of consumer protection under the Act. Congress recognized the core nature of sections 201 and 202 when it excluded them from the scope of the Commission's forbearance authority under section 332(c)(1)(A). Although section 10 now gives the Commission the authority to forbear from enforcing sections 201 and 202 if certain conditions are satisfied, the history of the forbearance provisions confirms that this would be a particularly momentous step . . . Consistent with the centrality of sections 201 and 202 to consumer protection, the Commission has never previously refrained from enforcing sections 201 and 202 against common carriers, even when competition exists in a market . . . Based on the record before us, we

> decline to forbear from enforcing the core common carrier obligations of sections 201 and 202 at this time.

Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-134, 13 FCC Rcd. 16,857, ¶¶15-18 (July 2, 1998) (*citations omitted*).

Moreover, in passing the 1995 Tennessee Telecommunications Act, the General Assembly did not repeal Tenn. Code Ann. §§ 65-5-204(a) or 65-4-122, nor did the General Assembly exempt telecommunications carriers that participate in competitive markets from complying with these sections of Title 65. *See* Tenn. Code Ann. § 65-5-208(c). Therefore, Tenn. Code Ann. §§ 65-5-204(a) and 65-4-122 remain the law today, and these laws coexist with the General Assembly's declaration that Tennessee's telecommunications markets must be opened to competition. *See* Tenn. Code Ann. § 65-4-123. Moreover, in pronouncing this pro-competition policy, the General Assembly explicitly stated that "the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers . . . ." *Id.* Thus, competition is not an ideal to be followed blindly while ignoring the interests of consumers, or the General Assembly's clear expression of public policy.

Today's competitive marketplace notwithstanding, there can be no question about a telecommunications carrier's responsibility to comply with the federal and state policies against unjust discrimination. Accordingly, the existence of competition alone is not sufficient justification for telecommunications carriers to engage in discriminatory practices that would otherwise violate the policy against unjust discrimination. That is, the word "competition" cannot be wielded as a magic word to license discrimination among similarly-situated customers who have substantially the same competitive alternatives available to them.

b. Current TRA Regulation Has Failed to Adequately Prevent Unjust Discrimination

Current TRA regulation permits telecommunications carriers to offer special discounts to customers based solely upon a showing that the customer has a "competitive alternative" available. This approach, however, has led to numerous situations where similar customers are not treated similarly, i.e., where there is unjust discrimination in violation of Tennessee law.

For example, TRA Docket Nos. 02-00628 and 02-00672 involve two customers of one carrier that have: (1) affirmed that they have competitive alternatives; (2) purchased the same service; (3) purchased the same service elements; (4) purchased the same quantities of each service element; and (5) committed to the same term of service. Nevertheless, one of these customers is charged $1,100 more for its service arrangement than the other customer is charged.

Additionally, customers that appear to have only inconsequential differences in service are charged radically different prices through contract service arrangements. For instance, TRA Docket Nos. 02-00979 and 02-01111 involve two customers of one carrier that have: (1) affirmed that they have competitive alternatives; (2) purchased the same service; (3) purchased the same service elements; (4) purchased the same quantities of each major service element; and (5) committed to the same term of service. On its face, the only notable difference between these two customers is that one customer purchased a slightly higher quantity of one, low-cost service element. This difference is so inconsequential that if both customers had purchased their service arrangements through the carrier's tariff rather than special contracts, the price differential between the two customers would have been only $91 over the life of the term commitment. However, because the services were provisioned through two, separate special contract arrangements rather than the tariff, one customer will pay over $6,100 more for its service than the other customer.

Moreover, through case-by-case review, the special contracts of some carriers executed within the last year have expanded into areas that would, on their face, appear to have been prohibited a short time ago. The TRA's original justification for allowing the use of special contracts to deliver discounted rates to select customers can be stated as follows: Where competitive alternatives exist, the delivery of telecommunications services to a large, sophisticated business customer justifies the use of a special contract that does not exceed a term of three years. *See, e.g.,* Authority Conference Transcript at pp. 39-40 (August 10, 1999); Authority Conference Transcript at pp. 30-40 (September 14, 1999); Authority Conference Transcript at pp. 42-52, 68-69 (September 28, 1999); Authority Conference Transcript at pp. 9-10 (December 5, 2000). Some industry representatives labor under the mistaken belief that these standards are still in place. *See* Authority Conference Transcript at pp. 62-63 (January 27, 2003). However, any precedents established in earlier decisions concerning the type and size of business, or term of service, apparently have been abandoned without adequate explanation, the rule of *stare decisis* notwithstanding. *See Barnes v. Walker,* 191 Tenn. 364, 234 S.W.2d 648 (1950).

For example, there exists today a number of special contracts for the provisioning of basic business local service to customers. Some of these contracts provide special rates for as few as three or four business lines. *See, e.g.,* TRA Docket Nos. 02-00996 and 02-01059. The Consumer Advocate submits that such contracts are not tailored to the large, sophisticated business customer. Additionally, there are many special contracts that are executed with contract terms exceeding three years. *See, e.g.*, TRA Docket Nos. 02-00630 (four years); 02-01230 (five years); and 02-00675 (six years).

The only discernible justification that remains for the offering of special contracts to select

customers is that they have competitive alternatives available to them. The Consumer Advocate submits that the existence of competitive alternatives alone is not sufficient justification to permit telecommunications carriers to engage in price discrimination among customers who are similarly situated otherwise. In other words, the existence of competitive alternatives cannot rationalize discriminatory treatment among customers who have competitive alternatives available to them.

2. PUBLIC RECORDS

a. Public Policy: Public Records Should Be Open and Consumers Should Have Access to Sufficient Information to Enable Them to Make Informed Choices

The state has a policy against conducting its business in secret.[4] This policy goal is furthered by the requirements of Tenn. Code Ann. § 10-7-503(a):

> [A]ll state, county and municipal records . . . shall at all times, during business hours, be open for personal inspection by any citizen of Tennessee, and those in charge of such records shall not refuse such right of inspection to any citizen, unless otherwise provided by state law.

The Attorney General has concluded that only when information is filed within the context of a contested case hearing may the TRA order the non-disclosure of information to the public, and only then if such information is of a proprietary nature. *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) (hereinafter "Attorney General's Letter").

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[4] There are notable exceptions which have no application in this instance, e.g., governmental deliberative process immunity, attorney-client privilege, etc.

The public records policy is particularly important in this case because it dovetails with the policy against unjust discrimination discussed hereinabove. *See* Section III.B.1.a., *supra.* Tennessee consumers should have access to the information that is needed for them to assess whether or not they are similarly situated to other customers who have received special rates for telecommunications services. Only through the disclosure of the existence of special contracts, and the terms and conditions that consumers must satisfy to qualify for the discounted rates offered through such contracts, will the policy against unjust discrimination have any meaning. The TRA has recognized that it has the authority and responsibility under its enabling legislation and the Public Records Act to assure that, through the agency's public records, consumers have access to sufficient information regarding the special rates, terms, and conditions of telecommunications services. *See* Authority Conference Transcript at pp. 47-48 (September 14, 1999) ("Our public records have to reflect if some other customer who wants to be treated similarly comes in and looks at this CSA, it's got to contain everything affecting that CSA . . . ."). Such access to public records will provide consumers with the information needed for them to assure that they are accorded fair and just treatment by telecommunications carriers through informed decisions.

b. Current TRA Regulation Has Failed to Require Disclosure of Necessary Information

Some carriers, primarily incumbent LECs, submit their special contracts to the TRA. Presumably, a Tennessee consumer can identify and access the special contracts of incumbent carriers by contacting the TRA. However, most of these contracts do not contain publicly-available information regarding the quantities of service provisioned through the contract. Such information continues to be filed under proprietary seal. On the other hand, competing carriers do not file their

special contracts with the TRA. Presumably, a consumer must contact competing carriers individually to identify and access the special contracts of these carriers. It is unknown how competing carriers would treat such requests from consumers. The TRA has not established any specific guidelines for carriers to follow in response to a consumer's request for information relating to special contracts and discounts.

Incumbent carriers file summaries of their special contracts. These summaries contain a general description of the services, service terms, and discounted rates offered through such contracts. Such summaries are filed in the tariffs of the carrier and are made available for inspection by consumers via the carrier's Internet website. The TRA's Internet website provides a link to these voluminous tariffs; however, no link is provided directly to the incumbent's tariff summaries of special contracts.

Competing carriers also file summaries of their special contracts. The type and amount of information provided by these summaries vary, as the summary format is left to the individual carriers. It is unknown whether the contract summaries of competing carriers are made readily available to consumers via the carriers' Internet websites. The TRA's Internet website does not provide a link to any of the contract summaries filed by competing carriers.

No contract summary provided by **any carrier** contains a complete description that affirmatively confirms to consumers the terms and conditions that a customer must meet in order to qualify for the special discounts offered through the related contract. Nor do all contract summaries provide: (1) special rates for services offered by the related contract; (2) quantities or volumes of service that are being purchased under the related contract; or (3) the particular service area or locations where the services are provisioned.

Consumers should be granted access to enough information to determine if they have been subjected to unjustly discriminatory practices by a telecommunications carrier. *See* Authority Conference Transcript at pp. 8-11 (April 3, 2001) (Directors' discussion concerning the information needed for customers to conduct a similarly-situated analysis). If it were otherwise, the policy against unjust discrimination would be rendered ineffective and meaningless.

A key determination in deciding whether the policy against unjust discrimination has been violated is whether similarly-situated customers have been treated differently without just cause. To have any realistic hope of conducting such a similarly-situated analysis for themselves, consumers should be given access to the following, minimum amount of information: (1) the existence of special contracts; (2) an adequate description of the services provisioned through any such contract; (3) the service area or locations where such services are provisioned; (4) the quantities or volumes of services purchased through the contract; (5) the contract's term of service; and (6) the special rates that are offered through the contract. *See Consumer Advocate Responses to Tennessee Regulatory Authority Questions*, TRA Docket No. 00-00702, pp. 16-17 (December 5, 2002).

The Consumer Advocate submits that current industry practices are inconsistent with any policy objective to publicly disclose sufficient information to consumers. There is no program in place today to effectively and coherently deliver to consumers all the information that they need to conduct their own similarly-situated analysis, or to determine if they have been treated unfairly with respect to the state's policy against unjust discrimination. The Consumer Advocate supports a filing requirement that would direct all carriers to affirmatively disclose in some manner the terms and conditions that customers must satisfy to qualify for their special contracts and discounts. Presently,

there is no such requirement.[5]

3. TERMINATION LIABILITIES

a. Public Policy: Consumers Should Be Free to Change Providers Without Paying a Penalty

The TRA has recognized that the liquidated sums in contracts executed by telecommunications carriers must comply with the common law liquidated damages rule. This rule provides that liquidated damages are enforceable only if: (1) the liquidated sum is a reasonable estimate of compensatory damages in case of breach; and (2) actual damages for contractual breach are indeterminable or difficult to ascertain at the time the contract was formed. *See V.L. Nicholson Co. v. Transcon Inv. and Fin., Ltd., Inc.*, 595 S.W.2d 474, 484 (Tenn. 1980). The Supreme Court has clarified that the prospective approach should be utilized when evaluating liquidated damages clauses. *See Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 100 (Tenn. 1999). The prospective approach requires examination of the circumstances at the time of contract formation, as opposed to the time of actual breach. *See Id.*

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[5] The TRA has recognized that requiring such information would be useful when it drafted the TRA's proposed rules that are filed in this docket. Proposed Rule 1220-4-2-.59(5)(a) provides in part:

> Each telecommunications carrier shall file . . . a final, signed copy of all special contracts . . . All special contracts shall be accompanied by the following , . . 2. A tariff which sets forth a summary of each special contract entered into between the telecommunications carrier and the customer. At a minimum, such tariff summaries of special contracts shall include: (i) Customer name and address; (ii) A full and complete description of the services provided or available to the customer; (iii) All individual rates for services provided or otherwise available; (iv) The term of service(s); (v) Volume or quantity of services; (vi) A detailed description of all applicable termination charges . . . (vii) Term requirements that the customer must fulfill to qualify for the special contract; (viii) Volume or quantity requirements that the customer must satisfy to qualify for the special contract; **and (ix) Any and all other particular requirements or conditions that the customer must meet to qualify for the special contract**. (*emphasis supplied*).

See also Authority Conference Transcript at pp. 8-11 (April 3, 2001). The Attorney General did not raise any concerns with respect to the TRA's proposed filing requirements for summaries of special contracts. *See* Attorney General's Letter.

The public policy rationale behind the liquidated damages rule is straightforward. Because breach of contract is not viewed as criminal or tortuous behavior in our society, the liquidated damages rule is in place to protect the breaching party from being impermissibly penalized by the non-breaching party. In other words, a liquidated damages clause that penalizes rather than compensates is against public policy and, therefore, is unenforceable. *See Cleo,* 995 S.W.2d at p. 98; *Testerman v. Home Beneficial Life Ins. Co.*, 524 S.W.2d 664, 668 (Tenn. Ct. App. 1974).

Accordingly, customers who desire to terminate their telecommunications contracts prior to expiration cannot be penalized for their decision to breach the contract. Moreover, penalizing a customer for deciding to cancel a service arrangement in favor of a competing service could unreasonably impede the development of competitive telecommunications markets in Tennessee. Finally, in a regulated industry such as public utilities, situations could exist where a "breach" may be justified by other circumstances which should be examined before an artificial assessment of liquidated damages is made.

b. Current TRA Regulation Has Failed to Ensure that Customers Do Not Pay a Penalty

The TRA has permitted wide-ranging measures of liquidated damages to evolve. Moreover, there has been no specific determination as to whether it is appropriate, in general, to permit telecommunications carriers to include liquidated damages provisions in their special contracts and term arrangements.

The Consumer Advocate submits that current industry practices are inconsistent with both prongs of the liquidated damages rule. Regarding the first part of the rule, the liquidated sum must be a reasonable estimate of the telecommunications carrier's potential compensatory damages in case

of the customer's breach. *See V.L. Nicholson*, 595 S.W.2d at p. 484. Currently, a telecommunications customer may be required to pay "liquidated sums" ranging as follows: (1) repayment of discounts off tariffed rates; (2) six percent (6%) of total contract revenues; and (3) the full amount (or 100%) of the contract revenues for the remaining term of the contract or term arrangement (i.e., take-or-pay clauses).

Such wide variances in the liquidated sums sanctioned by the TRA call into question the reasonableness of the estimate of potential damages. This is best illustrated by considering a scenario that is based on plausible assumptions. For example, a customer that terminates a service arrangement may have to pay one carrier every single dollar that remains due under the contract as liquidated damages, whereas that same customer may have had to repay only the discounts received if the service was purchased from another carrier. The difference in these termination standards translates into a remarkable difference in the liquidated sums that are due upon the customer's termination of the contract.

For instance, assume that the customer executed a 36-month contract for a 20% discount off an ISDN service consisting of: one access line at the monthly tariffed rate of $130; one voice/data interface at the monthly tariffed rate of $375; and 23 voice/data B-channels at the monthly tariffed rate of $52.25 each. Further assume that the customer terminated the contract after six months of service.

Under this scenario, the customer's termination liability will be $2,048, if the customer selected a carrier whose liquidated damages clause requires the customer to repay discounts. On the other hand, if the customer selected a carrier whose liquidated damages clause requires the payment of the remaining amount due under the contract, the customer's termination liability will be $40,962.

Thus, these different termination standards result in a difference of $38,914 in the amount of liquidated damages that are due from the customer upon early termination. This difference represents a twenty-fold difference in the amount of liquidated damages, which constitutes a 95% swing for the customer. *See* EXHIBIT 1 attached hereto. It is difficult to conclude that both of these liquidated sums could represent a reasonable estimate of potential damages. Nonetheless, both of these measures are used as a deterrent to breach under current industry practices.

Moreover, each of the three liquidated sums described hereinabove face individual problems as a reasonable estimate of potential damages. A termination provision that requires repayment of discounts given off the tariffed rate is problematic because the tariffed rate is not the market rate in such instances. Accordingly, the customer's liquidated damages are indexed to a price list that the customer was not willing to pay. In other words, a special contract, which contains a discount off of tariffed rates, is given in order to retain the customer. Presumably, if the special contract and related discounts are not given, the customer will move service to a competitor that is offering a lower rate. Thus, a liquidated damages provision in such a contract that computes the liquidated sum based upon the tariffed rate cannot represent a reasonable estimate of potential damages. This is so because the carrier seeks compensation predicated upon a figure that the customer was never willing to pay, and that the carrier never expected to collect from the outset of the contract.

With respect to the 6% of contract revenues figure, the Consumer Advocate is unaware of any data or information that has been developed that connects this liquidated sum to a reasonable estimate of potential damages. Moreover, the proposed TRA rule contained both repayment of discounts as well as 6% of contract revenues as allowable liquidated sums, and the Attorney General concluded that the TRA's "proposed rule does not appear to limit termination charges to actual

damages from breach of contract . . . [and there] is insufficient factual information to determine whether the courts would construe these limits as a reasonable quantification of liquidated damages, rather than an impermissible penalty." Attorney General's Letter at pp. 5-6. Thus, the problems associated with these two measures as liquidated sums are on the record and remain unresolved.

Regarding the onerous take-or-pay termination clauses that are currently allowed for many carriers, it is unlikely that such liquidated sums could represent a reasonable estimate of potential damages because there is no offset for the cost of future performance that the carrier avoids due to the customer's early termination. The special contracts at issue here involve the provisioning of a service to a customer who has committed to purchase a minimum amount from a provider that incurs certain costs to perform the service. Indeed, the TRA and other commissions have conducted generic proceedings which have identified costs of providing telecommunications services. *See, e.g.,* TRA Docket Nos. 96-01331 (Avoidable Cost Docket); and 97-01262 (Permanent Prices Docket).

Any reasonable estimate of potential damages to the carrier resulting from the customer's breach would surely take into account such costs of performance that are avoided due to the breach. This is so because recovery of costs that are never incurred is not legitimately within the carrier's expectancy at the time of contract formation. *See BVT Lebanon Shopping Ctr., Ltd. v. Wal-Mart Stores, Inc.*, 48 S.W.3d 132, 136 (Tenn. 2001); *Cleo,* 995 S.W.2d at p. 100. Because the carrier's cost of performing the remaining portion of the contract is not taken into account, payment of take-or-pay liquidated sums likely results in a windfall to the carrier and a penalty to the customer. An impermissible penalty sustained by the customer renders the liquidated damages provision invalid as against public policy. *See Cleo,* 995 S.W.2d at p. 98; *Testerman,* 524 S.W.2d at p. 668.

With respect to the second prong of the liquidated damages rule, there has yet to be any

determination that actual damages are generally indeterminable or difficult to measure, which is a condition that must be satisfied before a liquidated damages clause is enforceable. *See V.L. Nicholson,* 595 S.W.2d at p. 484. It is well settled that, in a breach of contract case, the non-breaching party is entitled to recover its expectancy damages, or "benefit of the bargain". *See BVT Lebanon Shopping Ctr.,* 48 S.W.3d at p. 136. Expectancy damages are usually expressed as: (1) the value of the contract that the non-breaching party has lost by reason of the other party's breach; plus (2) incidental or consequential losses, such as the costs to the non-breaching party in carrying out its own performance; less (3) any costs or other losses that the non-breaching party has avoided by not having to perform. *See Id.* (*quoting* Restatement (Second) of Contracts § 347 (1979)). In other words, the general contract remedy in Tennessee is to place the non-breaching party in as nearly as possible the same position had the contract been performed, but not a better one. *See Id.* Accordingly, where the contract price and cost of performance over a fixed period of performance are known or reasonably ascertainable when the contract is formed, a liquidated damages clause in the contract is inappropriate and unenforceable because the non-breaching party's expectancy, or actual damages, are reasonably determinable from the outset of the contract.

With respect to the telecommunications contracts and term arrangements regulated by the TRA, the price and fixed term of the special contract or arrangement are ordinarily known from the outset. Moreover, as noted hereinabove, the costs of providing many telecommunications services have been determined through generic proceedings. Cost studies for numerous, individual services are also conducted. Indeed, the costs of services provided by price-regulated carriers must be maintained and made available to the TRA in order for the carrier to comply with the statutory price floor established in Tenn. Code Ann. § 65-5-208(c). In fact, costs are routinely provided in the

special contract filings of these carriers. Because the contract price, cost of service, and fixed period of performance, which are the ordinary functions of actual damages, are known in many instances at the time of contract formation, there is a serious question as to whether liquidated damages provisions of any sort should be generally allowed in the special contracts and term arrangements for telecommunications services.

4. OTHER AREAS

The foregoing public policy issues do not constitute a comprehensive list of areas that could be evaluated and considered within the context of this rulemaking. For instance, Tenn. Code Ann. § 65-5-208(c) makes reference to impermissible, anti-competitive practices. The Consumer Advocate submits that it would be appropriate to address the advancement of competition through rules that are designed to foster pro-competitive, carrier-to-carrier relationships.

Because federal and state policymakers have declared that the development of competitive telecommunications markets is beneficial to consumers, the Consumer Advocate would welcome the opportunity to participate in the development of any such rules. Thus far, however, the Consumer Advocate has chosen to apply the resources directed toward this proceeding to the foregoing issues and concerns. While we do not intend to diminish the importance of pro-competitive, carrier-to-carrier relationships, we believe that the areas addressed hereinabove are more directly connected to the interests of Tennessee's telecommunications consumers.

C. *TENNESSEE CABLE* REQUIRES THE TRA TO CONDUCT A RULEMAKING PROCEEDING UNDER THE CIRCUMSTANCES OF THIS DOCKET

The foremost authority on the issue of whether an agency should make determinations through contested case proceedings or rulemakings is *Tennessee Cable Television Assn. v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151 (Tenn. Ct. App. 1992) (hereinafter "*Tennessee Cable*"). *Tennessee Cable* 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, 844 S.W.2d at pp. 162-163.

Each of the six factors requiring a rulemaking that is cited in *Tennessee Cable* is directly applicable to the circumstances surrounding this rulemaking proceeding on special contracts.

Factor #1: The TRA's decisions regarding special contracts address a number of common issues that have wide coverage encompassing a large segment of the regulated telecommunications

industry and telecommunications consumers in general. For example, all special contracts executed by all carriers: (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. The TRA's decisions on these issues affect the regulatory responsibilities of all carriers under its jurisdiction and, moreover, these decisions affect the rights of telecommunications consumers as a whole.

Factor #2: The TRA's decisions concerning special contracts should be applied generally and uniformly to all similarly-situated persons. That is, the same standards for review and approval of special contracts should be consistently applied to all similarly-situated telecommunications carriers. Additionally, the TRA's decision to approve a special contract arrangement for a particular customer should recognize Tennessee's policy that all similarly-situated customers should have the opportunity to receive the same, special treatment.

Factor #3: The TRA's special contract decisions are intended to operate prospectively with regard to the individual contracts that are presented for review and approval. These decisions have no retroactive application to other cases, nor do these decisions adjudicated or otherwise interfere with the vested rights of any party.

Factor #4: The TRA's special contract decisions intend to prescribe legal standards contained in the TRA's enabling legislation and elsewhere that are not clearly defined or obviously inferable from the face of such laws. For example, terms such as "unjust discrimination", "undue preference", and "similarly situated" are broad legal and regulatory concepts that are key considerations in all special contract decisions. *See* Tenn. Code Ann. §§ 65-4-122 and 65-5-204(a).

Moreover, given the exact same set of facts, reasonable people could differ on the application of such broad concepts to a particular, special contract situation. Accordingly, these broad standards of review should be more narrowly defined through rules and regulations for the special contract environment. In doing so, the TRA will promote fairness and consistency among its special contract decisions.

In addition, the standard of review with respect to contract termination liabilities, which is not expressly provided by the TRA's enabling legislation, should be refined through rules. The TRA must recognize that it is against public policy to "impermissibly penalize" those who breach their contracts. *See Cleo,* 995 S.W.2d at p. 98; *Testerman,* 524 S.W.2d at p. 668. If the TRA determines that liquidated damages provisions in special contracts are appropriate, it should address the concept of "impermissible penalty" in the special contract environment. Further refining of this broad standard of review will harmonize the gulf between current industry practices and public policy objectives. *See* Section III.B.3., *supra.*

Factor #5: The TRA's special contract decisions reflect administrative policies that are not explicitly expressed in current rules and orders. With respect to rules, as explained in Section III.D., *infra*, the Consumer Advocate is of the opinion that the current rules do not adequately define appropriate standards of review for special contracts. Moreover, the TRA's case-by-case reviews of special contracts result from internal administrative policies that are not expressed in the current rules. *See* Section III.D., *infra.*

With respect to orders, the TRA's orders regarding special contracts do not adequately reflect the special contract policies of the agency. First, these orders, by and large, address the special contracts of a single carrier — BellSouth Telecommunications, Inc. ("BellSouth"). Other carriers

are permitted to engage in special contract practices that are inconsistent with the practices of BellSouth; however, the Consumer Advocate is unaware of any existing orders that adequately express the TRA's special contract policies with respect to these carriers. Second, the TRA decisions regarding the special contracts of BellSouth do not adequately explain the agency's policies. Precedents set in earlier cases appear to be abandoned in later ones without sufficient explanation. *See* Section III.B. *supra.* Accordingly, it is difficult to ascertain the TRA's general policies with respect to special contracts through its orders and decisions.

Moreover, the TRA's general regulatory policy has significantly changed from the agency's past position on special contracts for telecommunications services. Since passage of the federal Telecommunications Act of 1996, there has been a regulatory shift in the treatment of special contracts. Prior to 1996, special contracts were indeed "special" in that they were used only infrequently to provide select services under an unusual set of circumstances. Since 1996, there has been a proliferation in the use of special contracts due to their acceptance by the TRA as a routine business practice of telecommunications carriers. Thus, the TRA's current policy concerning special contracts reflects a significant and material change from the agency's previous position; however, the present regulatory scheme has not been adequately defined by the agency.

Factor #6: The TRA's special contract decisions reflect regulatory policies in the nature of the interpretation of law and general policy. On its way to making individual, special contract determinations, it is plain to see that the TRA must consider the application of broad-ranging policies and legal standards.

In conclusion, *Tennessee Cable* is directly applicable to the instant rulemaking proceeding. The TRA therefore should strongly consider the legal authority of *Tennessee Cable,* and its lesson

about promulgating rules to guide agency decisions concerning the application of broad policies and legal standards in a regulated-industry setting.

D. THE TRA STAFF'S RECENT EXPLANATION OF ITS CASE-BY-CASE REVIEW DEMONSTRATES THE INADEQUACY OF THAT PROCESS AND THE NEED FOR NEW RULES

At a hearing before the TRA on January 27, 2003, the TRA Staff described the process by which it currently reviews special contracts. Far from relieving the concerns of the Consumer Advocate, however, this explanation further demonstrates the inadequacy of the special contract process and the need for new rules.

The current case-by-case review of special contracts is conducted pursuant to two, extremely general rules. TRA Rule 1220-4-1-.07 governs the special contracts of incumbent carriers, and TRA Rule 1220-4-8-.07(3) governs the special contracts of competing carriers. The Consumer Advocate has previously criticized the current rules on several grounds. *See, e.g., CAPD Reply to Comments Filed by Industry Members on December 5, 2002,* TRA Docket No. 00-00702, pp. 2-5 (December 19, 2002). One prime reason for the Consumer Advocate's criticism is that the current rules do not adequately describe the legal and regulatory standards for review and approval of special contracts. Neither rule contains any substantive discussion concerning the standards for review and approval of special contracts, and both rules amount to a mere filing requirement of either the special contract or a nondescriptive contract summary.

Nonetheless, at the Authority Conference held on January 27, 2003, the Chief of Telecommunications provided an explanation of Staff's "comprehensive review" under existing rules for individual special contract offerings:

> My name is Joe Werner. I'm chief of the TRA's telecommunications division. I'll try and be brief. The Authority staff -- we conduct a comprehensive review of every BellSouth CSA to make sure the filing is consistent with applicable laws and Authority policy. We review each CSA to determine whether the rates comply with the statutory price floor included in TCA 65-5-208(c). BellSouth is required to submit cost support demonstrating such compliance. The customer's name is disclosed in compliance with the Public Records Act consistent with the Attorney General's March [sic] 31st, 2002 letter. The termination liability is consistent with those adopted by the Authority in Docket 01-00681, which was BellSouth's tariff filing to modify the tariff term and liability charge language in its tariff. We make sure that the filing contains the acknowledgment that the CSA is necessary to respond to competitive alternatives or competing offers. We look at the CSA to make sure the contract does not allow for any other terms that are anticompetitive or prohibited by state law or the Federal Telecom Act. We also look to make sure the contract is available for resale as required by the FCC. We make sure that for any volume and term contract the shortfall provisions do not apply in the event of early termination as ordered by the Authority in Docket 99-00244. We make sure that BellSouth has provided a 30-day notice consistent with TRA rules. We make sure that BellSouth has included a summary of the CSA including the rates and services offered in its tariffs. So that's kind of a summary of our review. This policy has evolved over years as a result of the Authority's deliberations in virtually hundreds of BellSouth CSAs.

Authority Conference Transcript at pp. 107-109 (January 27, 2003).

While the Consumer Advocate commends the TRA Staff in its efforts to conduct case-by-case reviews of special contract offerings for telecommunications services, we have identified at least five significant deficiencies with this review as it relates to our concerns.

Deficiency #1: Staff's review is too narrow in scope, in that it is conducted on the special contracts of only one carrier — BellSouth. Staff states, "we conduct a comprehensive review of every **BellSouth** CSA to make sure the filing is consistent with applicable laws and Authority policy." (*emphasis supplied*). It is well established that the Consumer Advocate's concerns in this docket expand beyond the activities of any single carrier. The public policies that we have identified in Section III.B., *supra*, apply equally to all telecommunications carriers under the TRA's

jurisdiction.

Moreover, the Consumer Advocate is of the opinion that, from the consumers' standpoint, all such telecommunications carriers should be treated the same with regard to these policies. For instance, the elements of illegal discrimination towards customers are essentially the same for all carriers; all carriers should make sufficient information available to consumers concerning their special contracts; and an impermissible penalty should not be extracted from customers regardless of which carrier is demanding payment. Accordingly, Staff's case-by-case review of one carrier's special contracts is deficient because it does not examine such aspects of the special contracts of all other carriers.

Deficiency #2: Staff apparently uses an inappropriate standard for recommending approval of special contracts that give select customers discounted rates. Staff states, "We make sure that the filing contains the acknowledgment that the CSA is necessary to respond to competitive alternatives or competing offers." The special contracts reviewed by Staff treat certain customers differently in their purchase of telecommunications services. Apparently, Staff verifies the existence of competitive alternatives to determine if such disparate treatment is justified.

However, as explained in Section III.B.1, *supra*, the existence of competitive alternatives alone is not sufficient justification to treat customers differently. There must be something more than the mere existence of competition to give carriers the discretion to enter into special contracts that give discounted rates to particular customers, and not to other customers who also have competitive alternatives available to them. Staff's review is deficient because there is not an adequate standard of review in this regard.

Deficiency #3: Staff's review does not assure that information critical to performing a

similarly-situated analysis is disclosed in such a manner that consumers may access this information. Staff states, "We make sure that **BellSouth has included a summary** of the CSA **including the rates and services offered in its tariffs**" (*emphasis supplied*). Staff apparently does not review the summaries filed by BellSouth to determine if needed information, such as quantities and location of service, are included in BellSouth's summaries. As discussed in Section III.B.2, *supra*, such information is required if the customer is to have a realistic chance of conducting a similarly-situated analysis.

Moreover, Staff apparently does not review any of the summaries filed by other carriers to determine if sufficient information is supplied about their special contracts. Accordingly, Staff's review is deficient because it does not seek to identify the type of information that is required for customers to perform a similarly-situated analysis, and it does not assure that such information is in fact supplied by all carriers and made generally available to consumers.

Deficiency #4: Staff's review does not assure that the liquidated damages clause in the special contract under examination is a reasonable estimate of potential damages in case of the customer's early termination. Staff determines that "[t]he **termination liability is consistent with those adopted by the Authority in Docket No. 01-00681**, which was **BellSouth's tariff filing** to modify the tariff term and liability charge language in its tariff" (*emphasis supplied*). Two problems arise with respect to this standard of review for termination liabilities. First, the review conducted on BellSouth's contracts is based on a faulty standard. In TRA Docket No. 01-00681, BellSouth made a filing to change the termination liabilities in its tariffs to mirror those that were adopted in the TRA's proposed rules — i.e., repayment of discounts, not to exceed 6% or 24% of contract revenues, depending on the length of the contract. These standards were subsequently rejected by

the Attorney General because, in part, there is presently no sufficient basis to connect these termination standards to the potential damages arising from breach of contracts for telecommunications services. *See* Attorney General's Letter at pp. 5-6. Furthermore, as explained in Section III.B.3., *supra*, the use of these standards for approving liquidated damages is problematic for several reasons. Accordingly, Staff uses an inappropriate standard in its review of the liquidated damages provisions contained in BellSouth's special contracts.

A second problem with Staff's review in this area is that there is no apparent consideration by Staff of the take-or-pay liquidated damages clauses invoked by other carriers, and whether such clauses could exact impermissible penalties from customers. *See* Section III.B.3., *supra*. Accordingly, Staff's liquidated damages review is deficient because it does not consider whether the proposed termination liabilities of all carriers are consistent with public policy.

Deficiency #5: There is no review conducted to determine if customers who appear to be similarly situated are treated differently by the telecommunications carrier without providing sufficient justification for such treatment. The Consumer Advocate notes a lack of any comparisons between the special contract under review, and other special contracts of the carrier that have been previously approved for the same services. Additionally, there is no apparent examination of the situation existing between a select customer that is receiving discounted service pursuant to the special contract under review, and other customers who purchase the same, non-discounted service from the carrier's tariffs.

As noted in Section III.B.1.b, *supra*, there currently exists discriminatory treatment: (1) between customers that receive special contracts and other, similar customers who also receive special contracts for the same or substantially the same service, and (2) between customers who

receive special contracts and other, similar customers who purchase the same or substantially the same service from the general tariffs. Staff's review is deficient because there is no meaningful examination of all the attendant circumstances to determine whether such discriminatory treatment is unjust in violation of public policy.

The Consumer Advocate appreciates and endorses the TRA Staff's review of special contracts. We believe that it is important for the TRA to have such a program of review in place to assure that the agency is carrying out its duties in accordance with the law. For the foregoing reasons, however, Staff's review does not touch on the concerns that the Consumer Advocate has expressed in this docket. We therefore do not perceive this review as properly addressing the current misalignment between industry practices and the state's public policy objectives concerning the delivery of telecommunications services to consumers through special contracts and term arrangements.

E. THE TRA HAS PREVIOUSLY RECOGNIZED THE BENEFITS OF A RULEMAKING PROCEEDING, WHICH STILL SHOULD BE PURSUED

The TRA chose rulemaking as the method to address common issues regarding industry-wide use of special contracts on a going forward basis. *See Order Approving and Adopting Fourth Report and Recommendation of the Pre-Hearing Officer,* TRA Docket No. 98-00559 (February 3, 2000); Authority Conference Transcript at p. 70 (July 13, 1999). One of the benefits that the TRA desired to achieve through the rulemaking was the establishment of a framework of analysis for special contracts. *See* Authority Conference Transcript at pp. 48-49 (September 28, 1999). It was the TRA's desire to use this framework of analysis in its internal review of special contracts. *See Id.* The TRA took the same position as the Consumer Advocate takes now — that the current system

of case-by-case review is unwieldy and unworkable, and that rules are needed to establish an appropriate framework of analysis.

Moreover, the TRA has recognized the benefits that this rulemaking has for telecommunications consumers. The TRA desired to establish through rules a system for consumers to utilize in their own analysis of special contracts. *See* Authority Conference Transcript at pp. 8-11 (April 3, 2001). In particular, the TRA was concerned about providing consumers with sufficient information so that they can assess for themselves whether or not they are similarly situated to other customers receiving special contracts. *See Id.* Of course, establishing this consumer benefit makes giant strides towards accomplishing Tennessee's policy objective against unjust discrimination among telecommunications customers. *See* Tenn. Code Ann. §§ 65-4-122 and 65-5-204(a). The TRA took the same position as the Consumer Advocate takes now — that rules are needed to establish a system for consumers to use in determining whether they are receiving fair and just treatment from telecommunications carriers.

The Consumer Advocate submits that the rulemaking course plotted by the TRA is the proper one. The benefits of this rulemaking on special contracts are many: (1) rules could narrow the gulf between current industry practices and related public policy goals; (2) rules could establish guidelines for telecommunications carriers to follow in order for them to more easily meet the General Assembly and TRA's expectations; (3) rules could establish a suitable framework of review to facilitate the TRA's analysis; and rules could inform consumers of their rights and provide them with sufficient information to exercise those rights through informed decisions. Accordingly, the Consumer Advocate submits that the TRA should stay on the rulemaking course that it has already established to deal with the industry-wide use of special contracts and term arrangements.

F. THE CONSUMER ADVOCATE'S PRIOR COMMENTS FAVOR A RULEMAKING

The Consumer Advocate's previous statements in TRA Docket No. 98-00559 regarding the consideration of whether a customer is similarly situated within the context of a rulemaking is as follows:

> The Consumer Advocate has also thought about this issue of how to divide the — of whether the proceedings should be divided. We believe that the — it should be divided into a contested case and also a rulemaking, and we have discussed it numerous times among ourselves, and it's basically the only way we can see that it can work is by dividing it into a contested case in which the burden is on the interveners, the CLECs, and the Consumer Advocate to prove that BellSouth's CSAs are anticompetitive, and that would be a contested case.
>
> There would be a rulemaking with respect to discrimination, and with respect to discrimination, we do not even see the need for any party's contracts to deal with discrimination issues in a rulemaking. We think, for example, that if you disclose the terms and conditions of — if these contracts are no longer secret, then — not the names — we're not leading to disclosing names, but if the terms and conditions of the contracts and what they give are no longer secret and they are required to be published, then that essentially takes care of the — helps resolve the discriminatory effect and we need not even have anyone's contract to do that.
>
> We don't see a rulemaking in discrimination which tries to adjudicate what is unduly discriminatory, or we do not see the ability of a rulemaking to determine what is similarly situated. We think that that is an impossibility, and it has to be determined essentially on a case-by-case basis. And so going into that extent, we do not see the ability of a rulemaking to do that without potentially creating more harm than its worth. So we don't see a need in a rulemaking on exposing and keeping these CSAs from being secret that requires the production of any of the CSAs. It just requires production of disclosure.
>
> * * *
>
> So we agree with SECCA that the discrimination component is separate, and it is logically separate from the — since we kept the other aspects out and the CAD plans to pursue the other aspects in another case. So we do see it as separate, and we do see the discrimination as being able to be handled by a rulemaking, and that rulemaking through disclosure can help eliminate the discriminatory effects of the CSAs, and that the individual, whether somebody is similarly situated or it's unduly discriminatory would have to be handled on a case-by-case basis, and we don't think the TRA can really figure out how to do that in a rulemaking. So that's what we see.

In re: Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc., TRA Docket No. 98-00559, Transcript at pp. 47-50 (April 8, 1999).

The Consumer Advocate continues to believe now, as we did then, that issues concerning unjust discrimination among similarly-situated customers should be addressed within the context of a rulemaking. The Consumer Advocate continues to believe now, as we did then, that the determination of whether an individual customer is in fact similarly situated to another customer, or whether unjust discrimination has in fact occurred in a particular case, must be handled on a case-by-case basis. As explained hereinafter, these two statements are not inconsistent with one another, nor is either statement inconsistent with our current position in this docket. Additionally, there is an apparent misperception about the Consumer Advocate's position on this issue which we will attempt to correct by the comments that follow.

It is undisputed that Tennessee law requires telecommunications carriers to offer the same rates, terms, and conditions of service to all customers who are "similarly situated." To do otherwise would constitute unjust discrimination, which is unlawful. *See* Tenn. Code Ann. §§ 65-4-122; 65-5-204(a). "Similarly situated" is a statutory term, but its meaning is not clearly expressed or obviously inferable from the face of the relevant statutes. "Similarly situated" is a broad legal and regulatory standard of review that is at the heart of any issue involving unjust discrimination. "Similarly situated" can be given various meanings, under the exact same set of facts, depending on the interpreter's opinion and point of view. Accordingly, due to its broadness and unrefined meaning, the similarly-situated concept does not lend itself to routine application to specific situations or sets of facts. Nonetheless, the similarly-situated concept is at the center of the TRA's routine analysis

concerning whether there is sufficient justification to permit carriers to offer special contracts and discounts to select customers and not to others. The TRA must routinely decide whether such special contracts and discounts should be approved or allowed to take effect — which are very grave and serious determinations with respect to the TRA's duties pursuant to Tenn. Code Ann. §§ 65-4-122 and 65-5-204(a). Accordingly, "similarly situated" and "unjust discrimination" are the exact type of broad, legal standards mentioned in *Tennessee Cable* that should be further defined and refined by the TRA to promote fairness and consistency among its special contract decisions.

Moreover, it is necessary to discuss and analyze the similarly-situated concept within the general context of this rulemaking proceeding. The TRA's failure to provide any practical meaning as to how the broad, similarly-situated concept relates to the delivery of telecommunications services under a system of special contracts will essentially leave carriers with wide-open discretion to interpret its meaning. Unless such guidance is given, there evolves industry practices that are inconsistent among carriers, and inconsistent with the law. *See* Section III.B., *supra*. Such a result is contrary to the TRA's duty to ensure that the rates, terms, and conditions offered in special contracts are realistically and in practice made available to all customers who are similarly situated. The Consumer Advocate therefore urges the TRA to consider the issue of unjust discrimination within the context of this rulemaking proceeding.

To say that the Consumer Advocate favors addressing broad legal concepts, such as unjust discrimination, in order to promote fairness and consistency, is not the same as concluding that we favor the development of rigid, unbending rules that would pre-judge individual cases. Indeed, the Consumer Advocate has previously offered its opinion on the development of a flexible rule regarding unjust discrimination. On pages 16 and 17 of the *Consumer Advocate Responses to*

Tennessee Regulatory Authority Questions, filed in this docket on December 5, 2002, we identify the following elements in our interpretation of "similarly situated": (1) the existence of competitors for the service that is sought; (2) the location where the service is to be provided; (3) the likeness of the service that is sought; and (4) the volume of the service that is sought. In other words, these criteria suggest that customers should be considered similarly situated if they seek a telecommunications service where they have competitive alternatives available to them, in substantially the same service locations, for substantially the same type of service, to be provided in substantially the same quantities, over substantially the same time. Thus, the points of analysis proposed by the Consumer Advocate in this area are: (1) status of competition; (2) service area; (3) service type; (4) service quantities; and (5) service period. While the Consumer Advocate recognizes that our proposed analysis could be further adjusted and refined into perhaps a better one, we believe that it demonstrates the direction in which the TRA should move with respect to the unjust discrimination issue.

The Consumer Advocate does recognize that rules can be too rigid and narrowly tailored; however, we do not propose the adoption of such rules. For instance, the Consumer Advocate's above-proposed factors for evaluating issues concerning unjust discrimination are flexible. These criteria must be applied to all the attendant circumstances of each case to determine whether an individual customer is in fact similarly situated, or whether unjust discrimination has in fact occurred. Nothing in the Consumer Advocate's proposal pre-judges the facts, and nothing prevents either the customer or the carrier from filing a complaint or petition before the TRA to determine whether the customer is similarly situated under the particular circumstances of the case. Moreover, if the rule is so drafted, parties could be encouraged in appropriate cases to petition the TRA to

consider additional similarly-situated or unjustly-discriminatory criteria, apart from those specifically enumerated in the rule. In summary, the illusion that the Consumer Advocate favors some unbending rule that would dictate the outcome of every case concerning unjust discrimination is unfounded and inconsistent with the positions that we have taken in this rulemaking as well as prior proceedings.

Finally, if anyone has taken an inconsistent position on the issue of unjust discrimination, it is the Industry Members:[6] "The consensus of the parties was that the issue of discrimination as it relates to the offering of contract service arrangements, by either BellSouth or by CLECs, should be examined in the context of a rulemaking proceeding." *Order Approving and Adopting Third Report and Recommendation of Pre-Hearing Officer*, TRA Docket No. 98-00559, Exhibit 1 at p. 3 (February 2, 2000). The parties referred to in this order are: (1) BellSouth Telecommunications, Inc.; (2) e.spire Communications, Inc.; (3) NEXTLINK Tennessee, Inc. (now XO Tennessee, Inc.); (4) Time Warner Communications of the MidSouth L.P.; (5) New South Communications, L.L.C.; (6) MCImetro Access Transmission Services, Inc.; (7) AT&T Communications of the South Central States, Inc.; (8) Southeastern Competitive Carriers Association; and (9) **the Consumer Advocate.** This decision by the TRA is also illustrative of how the April 8, 1999, comments of the Consumer Advocate were interpreted at the time by the TRA.

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[6] This statement does not extend to United Telephone-Southeast, Inc. and Sprint Communications Co., L.P., or Citizens Telecommunications Co. Of Tennessee, L.L.C.

IV. CONCLUSION

Based on the foregoing, the Consumer Advocate respectfully submits that the TRA has a duty to bring into effect the public policies of this state relative to matters under its jurisdiction. The TRA has recognized the state's policy against unjust discrimination among utility customers; the TRA has recognized the need to publicly disclose sufficient information to consumers in order to effectuate the policy against unjust discrimination; and the TRA has recognized the state's policy against penalizing customers who breach their contracts for public utility services.

For the foregoing reasons, the Consumer Advocate submits that current practices in the telecommunications industry relative to provisioning service through special contracts and term arrangements are wholly inconsistent with the public policy objectives of this state. The Consumer Advocate further submits that the TRA's current regulatory scheme in this area, consisting primarily of two, general rules and case-by-case reviews of individual contracts, is inadequate to address the current misalignment between industry practices and public policy.

The TRA has recognized that a rulemaking proceeding is the appropriate procedural vehicle to establish industry-wide regulations to conform the practices of telecommunications carriers to accommodate broad legal and policy objectives. The TRA has further recognized the benefits of establishing a guiding framework of analysis to promote consistency and fairness among its special contract decisions, and to promote the interests of telecommunications consumers. Accordingly, the goals which should guide the TRA should be the transparent review of special contracts, and the full participation of informed Tennessee consumers.

Therefore, the Consumer Advocate respectfully requests that the TRA continue with this rulemaking proceeding to examine the use of special contracts and term arrangements for

telecommunications services. Finally, the Consumer Advocate respectfully submits that if the TRA nonetheless decides not to promulgate rules in this rulemaking proceeding, this decision alone should not dispose of the Consumer Advocate's pending *Complaint and Petition to Intervene* in the special contract filings in TRA Docket Nos. 02-00534, 02-00536 through 02-00545, 02-00550 through 02-00561, 02-00571 through 02-00580, 02-00598 through 02-00607, 02-00614 and 02-00615, 02-00627 through 02-00632, 02-00656 through 02-00662, and 02-00669 through 02-00680, or other special contracts that the TRA has allowed to become effective pending the outcome of this rulemaking.

RESPECTFULLY SUBMITTED,

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EXHIBIT 1

COMPARISON OF TERMINATION LIABILITY STANDARDS
Repayment of Discounts vs. Remaining Contract Revenues

Line				
1	Service	(Assumption)	ISDN, 23 voice/data channels	
2	Fixed contract term	(Assumption)		3 Years
3	Total tariff amount	(Assumption)	$	61,443
4	Percentage discount	(Assumption)		20%
5	Total discount amount	(L3 * L4)	$	12,289
6	Total contract amount	(L3 - L5)	$	49,154
7	Term in months	(Assumption)		36
8	Monthly tariff rate	(L3 / L7)	$	1,707
9	Monthly contract rate	(L6 / L7)	$	1,365
10	Monthly discount	(L8 - L9)	$	341
11	Month of termination	(Assumption)		6
12	Months remaining	(L7 - L11)		30
13	Repayment of discounts	(L10 * L11)	$	2,048
14	Remaining contract rev.	(L9 * L12)	$	40,962
15	Dollar difference	(L14 - L13)	$	38,914
16	Percentage difference	(L15 / L14)		95%

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2003, a copy of the foregoing document was served on the parties of record, via U.S. Mail:

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