STATE OF TENNESSEE

Office of the Attorney General

PAUL G. SUMMERS
ATTORNEY GENERAL AND REPORTER

MAILING ADDRESS
P.O. BOX 20207
NASHVILLE, TN 37202

ANDY D. BENNETT
CHIEF DEPUTY ATTORNEY GENERAL

LUCY HONEY HAYNES
ASSOCIATE CHIEF DEPUTY
ATTORNEY GENERAL

MICHAEL E. MOORE
SOLICITOR GENERAL

CORDELL HULL AND JOHN SEVIER
STATE OFFICE BUILDINGS
TELEPHONE 615-741-3491
FACSIMILE 615-741-2009

Reply to:
Consumer Advocate and Protection Division
Attorney General's Office
P.O. Box 20207
Nashville, TN 37202

March 5, 2003

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

Re: Consumer Advocate Rebuttal to Reply Comments of Industry Members in the Rulemaking Preceeding - Regulations for Term Arrangements for Telecommunications Services
Docket No. 00-00702

Dear Chairman Kyle:

Enclosed is an original and fourteen copies of the Consumer Advocate and Protection Division's Rebuttal to Reply Comments of Industry Members in the 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,

JOE SHIRLEY,
Assistant Attorney General

cc: Counsel of Record
52476

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE
March 5, 2003

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

CONSUMER ADVOCATE REBUTTAL TO REPLY COMMENTS OF INDUSTRY MEMBERS

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 Rebuttal to Reply Comments of Industry Members.*

I. INTRODUCTION

On February 28, 2003, BellSouth Telecommunications, Inc.; United Telephone-Southeast, Inc. and Sprint Communications Company, LP; Citizens Telecommunications Company of Tennessee, LLC; Southeastern Competitive Carriers Association; and Time Warner Telecom of the Mid-South, LP (collectively, the "Industry Members") jointly filed their *Reply Comments of Industry Members* ("Industry Reply") in response to the *Consumer Advocate Brief in Support of Adoption of Regulations for Special Contracts and Term Arrangements for Telecommunications Services* ("Consumer Advocate Brief"), which was filed in the above-styled docket on February 18, 2003. Because several points made in the Industry Reply are either inaccurate or misleading, the Consumer

Advocate is compelled to make the following rebuttal.

II. REBUTTAL

A. THE CONSUMER ADVOCATE'S POSITION IS NOT MERELY ACADEMIC OR THEORETICAL, AND CONSUMERS WILL BE HARMED UNLESS SOME MEASURE IS TAKEN TO ENFORCE PRO-CONSUMER POLICIES AND LAWS

The Industry Members claim that the Consumer Advocate has offered only hypothetical, academic arguments which are completely out of touch with practical reality. *See* Industry Reply at p. 2. To the contrary, the public policies discussed in the Consumer Advocate Brief are not theory, **they are the law**. And the industry practices discussed in the brief are not hypotheticals, **they are the facts.** Moreover, the misalignment between facts and law identified in our brief is not the product of a "disjointed academic, theoretical exercise"; rather, it is the product of the practical realities existing in the current special contract environment for telecommunications services.

The Industry Members also suggest that the Consumer Advocate has not identified any concerns that would result in harm to consumers. *See* Industry Reply at p. 4. It is difficult to fathom how the Industry Members could overlook the fact that our entire brief, from beginning to end, does nothing less than address the potential harm to consumers under the TRA's current regulatory scheme for special contracts. The point is made time and again that current industry practices run afoul of pro-consumer policies and laws, and that the TRA should enforce these pro-consumer mandates through rules and regulations. The TRA's failure to do so will indeed harm the interests of consumers.

Thus, the Industry Members' implication that this whole docket swirls around an academic exercise with no real consequences to consumers is erroneous.

B. THE TRA DOES NOT HAVE ABSOLUTE DISCRETION TO APPLY LEGAL REQUIREMENTS IN SPECIAL CONTRACT CASES

The Industry Members state that the TRA is well within its authority to conclude that no new rules are warranted in this instance. *See* Industry Reply at p. 3. While it is true that administrative agencies have broad discretion as to matters under its jurisdiction, such discretion is not absolute. An agency abuses its discretion when it makes decisions that are arbitrary or capricious, or when it applies legal requirements arbitrarily or capriciously. *See CF Indus. v. Tennessee Pub. Serv. Comm'n*, 599 S.W.2d 536, 539 (Tenn. 1980); *BellSouth BSE, Inc. v. Tennessee Regulatory Auth.*, No. M2000-00868-COA-R12-CV, 2003 WL 354466 at *7 (Tenn. Ct. App. Feb. 18, 2003).

Thus, the TRA may not capriciously declare that all is well in light of a contradictory record. Nor may the TRA make arbitrary decisions that do not reconcile with facts and applicable law. We therefore trust that the TRA will meticulously consider the entire record, including the positions expressed in the Consumer Advocate's filings, before any decision is made in this docket or related special contract cases where our petitions are pending. We respectfully submit that the TRA must provide reasoned explanations for its findings and conclusions in this regard. Accordingly, the TRA should not follow the Industry Members' suggestion to base its decisions on conclusory statements, such as the agency is "well within its discretion" to do whatever it decides to do.

C. THE TRA MAY NOT RELY ON THE BANK AND THE STORE CASE TO RATIONALIZE ITS DECISION IN THIS DOCKET

The Industry Members claim that the Consumer Advocate is merely rehashing the same legal arguments which were rejected in the Bank and the Store case, TRA Docket Nos. 99-00210 and 99-00244, respectively. *See* Industry Reply at p. 4. The Bank and the Store case involved a hearing on

two **volume and term contracts** offered to two large business customers of BellSouth Telecommunications, Inc. ("BellSouth"). Unlike the **specific service contracts** discussed in the Consumer Advocate Brief, these volume and term contracts provided BellSouth's customers a discount on their overall bill if a certain volume of billing was maintained over a certain term — hence, the term "volume and term contract". In other words, if the customer purchased enough volume from a large basket of tariffed services, the customer would receive on its bill a general discount that corresponded to the amount purchased. Thus, the volume and term contracts addressed in the Bank and the Store were essentially general billing arrangements, and neither contract addressed the particular rates, terms, and conditions of provisioning specific telecommunications services. Accordingly, the Bank and the Store contracts are not relevant to the issues raised in the Consumer Advocate Brief regarding contracts for specific telecommunications services.

Moreover, the Bank and the Store hearing was held in August of 1999, when the TRA had a more defined rationale for approving special contracts. This hearing was also held **prior to** the opening of a show cause proceeding against BellSouth concerning special contracts (TRA Docket No. 00-00170), and **prior to** the opening of this rulemaking docket. Thus, there has been an evolutionary process for addressing the special contract issues that are now before the TRA. During this time the issues have only become more focused and refined. This is illustrated by our very reference to Docket Nos. 99-00210 and 99-00244 as the "Bank" and the "Store" because, at that time, many considered it appropriate to hold in secret the customer names of special contract participants. Clearly, the situation and issues that exist in today's docket are very different than that of August, 1999.

Accordingly, the Industry Members' suggestion that a hearing conducted over three years ago

concerning the general billing arrangements between BellSouth and two of its customers somehow resolves the special contract issues that face today's telecommunications industry is simply without merit.

D. THE INDUSTRY MEMBERS' COMMENTS CONCERNING THE SPECIAL CONTRACTS DISCUSSED IN THE CONSUMER ADVOCATE BRIEF ENTIRELY MISS THE POINT

The Industry Members make three misleading points concerning the special contracts discussed in the Consumer Advocate Brief, which we must set straight. First, the Industry Members claim that the distinctions among the competitive offers to the particular customers receiving these special contracts justify treating them differently. Second, the Industry Members assert that the TRA's standard of approving special contracts for large, sophisticated customers is still in place because the customers that received basic business local services through these special contracts are large, sophisticated customers. And third, the Industry Members state that the three-year limitation on special contracts is no longer applicable because term limitations are not scrutinized by TRA Staff, and because such term restrictions are directly related to the amount of termination charges, which have been reduced. *See* Industry Reply at pp. 4-7. As discussed hereinafter, these points are inaccurate and irrelevant.

1. **Competitive Alternatives.** The Consumer Advocate's discussion of competitive alternatives relates to the TRA's standard of review for justifying special contracts that give discounted rates to select customers. In his recitation of TRA Staff's analysis in this regard, Mr. Werner stated, "We make sure that the filing contains the acknowledgment that the CSA is necessary to respond to **competitive alternatives or competing offers**." Authority Conference Transcript at p. 108 (Jan.

27, 2003) (*emphasis supplied*). The acknowledgment that Mr. Werner references is a Tennessee addendum to BellSouth's special contracts, all of which contain the following boiler-plate language:

> Customer and BellSouth **acknowledge that various competitive alternatives are available** to Customer in the State of Tennessee, including competitive alternatives to services provided herein, **as evidenced by one** or more **of the following**:
>
> A. Customer has received offers for comparable services from one or more other service providers. [Insert name of provider(s)].
>
> B. **Customer is purchasing or has purchased** comparable services from one or more other service providers. [Insert name of provider(s)].
>
> C. **Customer has been contacted** by one or more other service providers of comparable services. [Insert name of provider(s)].
>
> D. **Customer is aware** of one or more other service providers from whom it can currently obtain comparable services. [Insert name of provider(s)].

See, e.g., TRA Docket Nos. 02-00628, 02-00672, 02-00979, 02-01111 (*emphasis supplied*).

Contrary to the Industry Members' inference, the customer is not required to receive distinctive competitive offers to qualify for the special deal offered through the contract. Customers are also eligible for customized rates if any one of the following is true: (1) they have purchased services from a competing carrier; (2) they have been contacted by a competing carrier; or (3) they are aware of a competing carrier. Thus, the customer's mere awareness of competition is all that is required. Apparently, some believe that it is now unnecessary for the customer to even identify the name of the particular competing carrier that provides competitive alternatives, since BellSouth has recently submitted a special contract in which the "customer respectfully declines to identify the service providers." *See* Tennessee Addendum in TRA Docket No. 03-00129.

The customers discussed in the Consumer Advocate Brief are located in the Knoxville, Memphis, or Nashville markets. There are certainly a number of competing carriers operating in these markets. A business customer that has had access to television, radio, newspaper, or other media or people within the last few years surely would be "aware" that other competing carriers exist

for services comparable to BellSouth. Moreover, the carrier itself could qualify the customer by providing awareness of competitive alternatives. Thus, the unjust discrimination bar is very low indeed, if not non-existent.

So, while the Industry Members' discussion of how the offer from AT&T was different than the offer from WorldSpice is mildly interesting, it has nothing at all to do with the standards under which these contracts were reviewed. Based on the standard of review that is currently employed, the Consumer Advocate is confident that these contracts would have met with total success, notwithstanding any offer, or lack thereof, from any named or unnamed competing carrier.

2. **Large, Sophisticated Customers.** The Industry Members go to great lengths to prove the irrelevant point that Evergreen Transportation, Inc., and Southern Pipe and Supply Company are indeed large, sophisticated customers. They offer a number of extrinsic facts to prove the matter, and attach Internet print-screens to buttress their position. All of this to obfuscate the Consumer Advocate's point that one of these customers received a special deal for three lines of basic business local service, and the other received a customized rate for four lines. Obviously, special contracts consisting entirely of three or four lines of basic business local service are not tailored to fit the needs of large, sophisticated customers. Many small business owners across Tennessee routinely purchase three or four business lines. Accordingly, these small business customers are similarly situated with respect to the deals made in these contracts, if they are aware that competing carriers exist in their markets. Thus, the TRA's justification for allowing special contract arrangements that are tailored to large, sophisticated business customers is no longer in place.

3. **Three-year Term Limitation.** The Industry Members note that Mr. Werner did not articulate any term limitation in the TRA Staff's review of special contracts, and they further

reference a non-exhaustive list of 32 contracts that exceed a three-year term. Interestingly, all of the contracts referenced by the Industry Members became effective after July 2002, which could signal the time from which the three-year limitation was no longer binding on carriers.

The Industry Members do a much better job of establishing the Consumer Advocate's point than we did initially in our brief. There exists today a large number of special contracts that exceed the term of three years. The TRA established a policy that special contracts exceeding three years would not be approved:

> DIRECTOR GREER: This contract requires that there will be two one-year extensions upon mutual agreement of the parties. I'll move to approve it with the understanding that both of those extensions have to come back before this agency for approval.
> CHAIRMAN KYLE: Agree.
> DIRECTOR MALONE: I'll agree as well. **The only comment I would add is I think that since November '98, the agency has refrained from approving CSA's with a term longer than 36 months.** And the next agreement that is filed that has a term in any manner exceeding 36 months, I will vote against. I think it's bordering on insulting to keep getting agreements that do not comply with the guidelines that the Authority has established for more than a two-year period.

Authority Conference Transcript at pp. 9-10 (Dec. 5, 2000) (*emphasis supplied*). The Consumer Advocate is aware of this three-year limitation policy, but we are unaware of any rational explanation for departing from this "established guideline". Moreover, the Consumer Advocate is unaware of any decision or authority that grants Mr. Werner the discretion to depart from established TRA policies while performing the duties of his office.

Finally, the Industry Members suggest that the three-year term limitation is tied directly to the amount of termination charges, which is incorrect. The purpose behind this term limitation is the TRA's attempt to mitigate the harmful effects that long-term service commitments have on the development of competitive markets, especially when dominant carriers enter into multi-year service

agreements with many higher-margin customers. Termination charges aside, contracts are business commitments which many customers will honor without thought of early cancellation of service. And those that would cancel in favor of a competing service must be able to do so without penalty and without prohibitive switching costs. In the Consumer Advocate Brief, we express a number of concerns about the ineffectiveness of present termination charge regulations in this regard.

E. TERMINATION LIABILITY ISSUES HAVE NOT BEEN RESOLVED

The Industry Members assert that the termination liability issues facing the industry have long since been resolved pursuant to a negotiated settlement between BellSouth and TRA Staff in May, 2000. *See* Industry Reply at p. 7-8. However, there are fatal flaws with this assertion. First, the purported negotiated settlement that the Industry Members reference was flatly rejected by the TRA in favor of this very rulemaking proceeding. *See Order Rejecting Proposed Settlement Agreement and Dismissing Show Cause Petition*, TRA Docket No. 00-00170 (Oct. 4, 2000). Thus, there is no negotiated settlement. Second, the termination liability standards that the Industry Members discuss have application to only one carrier — BellSouth. Thus, the Industry Members fail to describe the "resolution" of termination issues raised by the Consumer Advocate relative to all other carriers. And third, the Industry Members' "resolution" does not recognize the subsequent rejection of their very standards by the Attorney General in his May 31, 2002, letter, which is filed in this docket. Moreover, the Industry Members do not recognize or address the specific termination liability concerns raised in the Consumer Advocate Brief.

Accordingly, the Industry Members completely ignore present-day afflictions, and choose instead to rely on a purported resolution of long ago that, in reality, does not exist.

F. THE CONSUMER ADVOCATE HAS OFFERED A WORKABLE PROPOSAL FOR PROVIDING TO CONSUMERS NEEDED CONTRACT INFORMATION WHICH IS CURRENTLY UNDISCLOSED

The Industry Members first state that there is "ample disclosure" of special contract information to consumers, and they next aver that the Consumer Advocate has offered no workable proposal for providing additional information. *See* Industry Reply at p. 9. The Industry Members are wrong on both counts.

With respect to ample disclosure, the Industry Members once again fail to face the facts of the matter. As clearly explained in the Consumer Advocate Brief, telecommunications carriers do not publicly disclose all essential terms and conditions of their special contracts, such as discounted rates, quantities of service, and service areas. The Consumer Advocate submits that consumers must have access to such basic information about special contracts in order to determine whether they are similarly situated to customers that receive favorable rates for telecommunications services. Accordingly, disclosure of special contract information is not even adequate, let alone "ample".

In addition, the Consumer Advocate has indeed proposed a workable solution, which is really rather simple and straightforward: The TRA should impose a filing requirement which directs all telecommunications carriers under its jurisdiction to disclose the basic terms and conditions of special contract services, which are outlined in the Consumer Advocate Brief, and to affirmatively disclose any other provision(s) that consumers must satisfy to qualify for the same deals offered to special contract recipients. Such a filing requirement would hardly be burdensome in light of the benefit to consumers, and in light of the fact that all carriers are required today to file their special contracts and/or contract summaries with the TRA.

III. CONCLUSION

Based on the foregoing, the Consumer Advocate submits that the Industry Members' criticisms of our position in this docket, as reflected in the Consumer Advocate Brief filed on February 18, 2003, are without merit. Our brief presents an accurate depiction of current industry practices with regard to special contracts and term arrangements, as well as the adverse relationship between these practices and the public policy goals of this state. Accordingly, for the reasons stated therein and herein, the Consumer Advocate respectfully request that the TRA consider the interests of Tennessee consumers by addressing our concerns through this rulemaking proceeding.

RESPECTFULLY SUBMITTED,

VANCE BROEMEL, B.P.R. #11421
Assistant Attorney General

JOE SHIRLEY, B.P.R. #22287
Assistant Attorney General

Office of the Attorney General
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, Tennessee 37202
(615) 741-8733
(615) 532-2590

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2003, a copy of the foregoing document was served on the parties of record below, via U.S. Mail:

Don Baltimore, Esq.
Farrar & Bates
211 SeventhAvenue, N., #320
Nashville, Tennessee 37219-1823

Guy Hicks, III, Esq.
General Counsel
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300

Dana Schaffer, Esq.
XO Tennessee, Inc.
105 Malloy Street, #100
Nashville, TN 37201

Henry M. Walker, Esq.
P. O. Box 198062
Boult, Cummings, et al.
Nashville, TN 37219-8062

James Wright, Esq.
United Telephone-Southeast
14111 Capitol Blvd.
Wake Forest, NC 27587

Richard Collier, General Counsel
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

Joelle Phillips, Esq.
BellSouth Telecommunications, Inc.
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300

Guilford Thornton, Esq.
Stokes & Bartholomew
424 Church Street
Nashville, TN 37219

Charles B. Welch, Esq.
Farris, Mathews, et al.
618 Church St., #300
Nashville, TN 37219

Joe Shirley

JOE SHIRLEY
Assistant Attorney General

60528