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VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Proposed Rules for the Provisioning of Tariff Term Plans and Special Contracts*
Docket No. 00-00702

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Response to Time Warner's Motion for Reconsideration. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

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

Docket No. 00-00702

RESPONSE OF BELLSOUTH TELECOMMUNICATIONS, INC. TO TIME WARNER'S PETITION FOR RECONSIDERATION

BellSouth cannot argue with most of the factual assertions set forth by Time Warner Telecom of the Mid-South, L.P. ("Time Warner") in its Petition for Reconsideration. For instance:

> Nobody knows better than BellSouth that filing a special contract or a detailed summary of that contract with the Tennessee Regulatory Authority ("TRA") "necessarily discloses extremely competitively sensitive information which is available for public inspection," *see* Petition at ¶1, because BellSouth has been having its competitively sensitive information disclosed to its competitors in this manner for many months;
>
> Nobody knows better than BellSouth that such a filing requirement provides "an information source to [a public utility's] competitors which represents a competitive disadvantage," *see* Petition at ¶3, because BellSouth has been struggling against this competitive disadvantage for months;
>
> Nobody knows better than BellSouth that depending upon how they are implemented, the rules could "delay the benefits of competition to consumers," *see* Petition at ¶3, because many of BellSouth's customers have complained about the time it takes for them to realize the benefits of the competitive contracts the have negotiated with BellSouth;
>
> Nobody knows better than BellSouth that "the local exchange markets in which [Time Warner and other CLECs have chosen to] compete are becoming more competitive," *see* Petition at ¶4, because BellSouth's competitors have spent the last several years winning a large share of the business market; and

> Nobody knows better than BellSouth that "customers pursuant to special contracts are sophisticated business customers quite capable of analyzing contract provisions before agreeing to become obligated" and that customers want their contracts implemented as quickly as possible, *see* Petition at ¶4, because customers and their lawyers say this when they ask BellSouth why it is taking so long for them to enjoy the benefits of the bargains they have negotiated with BellSouth.

BellSouth cannot argue with these factual assertions, because it is faced with them every day. Nor can BellSouth argue with the suggestion that "the local exchange markets in which [Time Warner and other public utilities] compete are becoming more competitive and less regulation should be required as these markets become more competitive." *See* Petition at ¶4.

BellSouth, however, cannot agree with Time Warner's suggestion that the TRA "consider adopting a substitute rule applicable to [CLECs and CLECs alone] which is not unduly burdensome . . . ." *See* Petition at p. 3. In an effort to extricate themselves from "burdensome" regulation, the CLECs should not be allowed to argue that rules differ by party. Any relief given or burden imposed must be the same. Self interest should not be allowed to replace the principle of fairness.

Although long argued by the CLECs, the CLECs are simply not entitled to such preferential treatment – not even under the pretense of promoting competition. After all, the antitrust laws themselves "are designed for 'the protection of competition, not competitors.'" (emphasis added.) *See Foundation for Interior Design Education Research v. Savannah College of Art & Design*, ___ F.3d ___, 2001 WL 290178 (6th Cir. March 27, 2001).

As BellSouth said six months ago,[1] the TRA could easily decide to eliminate any filing requirements and/or to impose no artificial limits on termination charges. If the TRA determined that there was no need for the Proposed Rules, then they should not have been imposed upon the CLECs, the incumbents, or any other public utility. If the TRA determined, as it did, that some sort of rules are necessary, those same rules should apply to the CLECs, the incumbents, and any other public utility. Neither common sense nor state law, however, permit the CLECs to be governed by one set of standards on this matter and the incumbents another.

A. State statutes treat incumbents differently than they treat CLECs only in a few distinct and plainly specified areas.

State statutes require that any rules adopted in this proceeding be applied to all public utilities alike. With very few exceptions, none of which apply to the Proposed Rules, Tennessee statutes apply equally to all public utilities and to all telecommunications service providers. When the General Assembly passed the 1995 Act, it adopted an explicit definition of the term "incumbent local exchange telephone company." *See* T.C.A. §65-4-101(d). When the General Assembly intended for a statutory provision to apply specifically to incumbents, therefore, it explicitly used this new definition it had just created in the language of the provision. As it turns out, there are only a handful of statutory provisions in Chapters 4 and 5 of Title 65 which apply only to incumbents. Moreover, when such a provision places a restriction upon

[1] *See* Comments of BellSouth Telecommunications, Inc., filed in this docket on November 15, 2000. BellSouth incorporates these comments herein by reference.

incumbents, the restriction is directly related to the rates incumbents may charge for their services.

Section 65-4-101(g), for example, defines an incumbent's "current authorized fair rate of return," which is then used in establishing the initial parameters of an incumbent's price regulation plan. *See* T.C.A. §65-5-209(c),(j). The first three sentences of section 65-5-208(c) establish the minimum rates an incumbent may charge for its competitive services, and section 65-5-208(d) establishes the maximum rates an incumbent may charge for new non-basic services offered after June of 1995. Section 65-5-208(a) classifies an incumbent's services as either basic or non-basic services for the purposes of determining the timing and magnitude of permissible rate increases under a price regulation plan. Section 65-5-209 allows incumbents to operate under a price regulation plan and establishes guidelines for the rates that may be charged pursuant to a price regulation plan. Section 65-5-209(d) provides a method for establishing the initial rates for new interconnection services provided by incumbents. Section 65-5-209(i) allows incumbents to establish depreciation rates without TRA approval, and section 65-5-209(k) provides the conditions under which incumbents operating under price regulation are required to maintain their commitment to the FYI Tennessee master plan.[2]

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[2] In addition to these provisions, the term "incumbent" appears in six other statutes in Chapters 4 and 5 of Title 65: section 65-4-101(c) defines "telecommunications service provider" as including incumbents; section 65-4-124(d) provides that the adoption of a price regulation plan for an incumbent is not dependent upon the promulgation of administrative rules; section 65-4-201(c) requires that the incumbent receive notice of a CLEC's request for a certificate of convenience and necessity; section 65-4-201(d) insulates small incumbents from competition in certain circumstances; section 65-5-207(c)(2) requires the TRA to consider provision of universal service by incumbents as well as other service providers if it creates an

These are the only statutory provisions that apply specifically to incumbents. For the most part, the Proposed Rules do not address the implementation of price regulation plans or the rates that can be charged for telecommunications services. Instead, they address the terms and conditions under which service is offered and the information a telecommunications service provider must supply to the TRA when it files a special contract or a tariff term plan. As explained below, the statutes addressing these matters do not differentiate between incumbents and CLECs. Instead, the statutes addressing these matters apply generally to all public utilities or to all telecommunications service providers. With regard to these matters, therefore, the TRA has the same powers, duties, and responsibilities with regard to CLECs as it has with regard to incumbents and must treat both entities alike.

B. With the few specific exceptions discussed above, Tennessee statutes grant the TRA the same powers and impose upon it the same responsibilities with regard to CLECs as with regard to incumbents.

With the exception of the specific statutes discussed above, the statutes governing the regulation of telecommunications in Tennessee apply to incumbent local exchange telephone companies, competing telecommunications service providers, interexchange carriers, and any other person or entity offering telecommunications services to the public. Most of the statutes in Chapters 4 and 5 of Title 65, for example, apply to each and every "public utility" operating in the

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alternative universal support mechanism; and section 65-5-213(a)(2) exempts small incumbents from contributing to the small and minority telecommunications business assistance program fund in certain circumstances. None of these statutory provisions impose any restrictions on incumbents.

State. As used in these statutes, the term "public utility" is defined as including "every individual, copartnership, association, corporation, or joint stock company, . . . that own, operate, manage or control, within the state, any . . . telephone, telegraph, telecommunications services, or any other like system, plant, or equipment . . . ." *See* T.C.A. §65-4-101(a)(emphasis added). In light of this broad and inclusive definition, it is clear that statutes applicable to "public utilities" are as applicable to CLECs as they are to incumbents. Clearly, the 1995 legislation did nothing to alter the fact that among other things, incumbents and CLECs alike are required to offer services under rates, terms, and conditions that are just, reasonable, and non-discriminatory.

C. Because the TRA has the same duties and responsibilities to ensure that all telecommunications service providers offer services under rates, terms, and conditions that are just, reasonable, and non-discriminatory, the TRA must employ the same method of carrying out these duties and responsibilities with regard to all telecommunications service providers.

As explained above, the TRA is charged with the same responsibility of ensuring that the rates, terms, and conditions of all telecommunications offerings in the State of Tennessee -- including the offerings of CLECs and incumbents alike -- are just, reasonable, and non-discriminatory. If the TRA decided that a combination of competitive forces and the ability of aggrieved customers to file complaints with the TRA was a sufficient method of carrying out these responsibilities, then all telecommunications service providers should have been allowed to enter special contracts without filing the contracts or submitting them to the TRA for approval. If the TRA decides that it must review special contracts or summaries of special contracts in

order to carry out these duties and responsibilities, then all telecommunications services providers should be required to file such contracts or summaries with the TRA. This is true both as a matter of common sense and as a matter of law.

For instance, if the state decides that each homebuyer should be responsible for determining the safety of the home's electrical wiring, then no seller should be required to submit his or her home to a wiring inspection by a state official. If, on the other hand, the state decides that homes that are sold must pass a state wiring inspection, then the same inspection standards should apply to all homes that are sold. Moreover, each buyer should expect the inspection of the house he or she is buying to be as thorough as the inspection of the house any other person is buying. Clearly, no buyer should expect to hear that his or her house burned because the same inspection that detected (and resulted in the correction of) faulty wiring in the house his neighbor bought was not performed on the house he bought.[3] Similarly, all Tennessee customers should have the same protection from any rules that the TRA may decide to adopt, regardless of which company provides the service.

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[3] Similarly, if the TRA decides to review certain information regarding an incumbent's special contracts, the customers of a CLEC should expect the TRA to review the same information regarding the CLEC's special contracts. Assume, for example, that an incumbent files a special contract with the TRA and that the TRA approves the contract on the condition that the incumbent modify a specific provision in the contract. If a CLEC later places the identical provision in one of its special contracts, the CLEC's customer (or the public) has every reason to expect that the TRA will require the CLEC to make the same modification for the benefit of its customer (or the public) as the incumbent was required to make for the benefit its customer (or the public). It would be quite difficult to explain to the CLEC's customer (or the public) that the TRA did not order the modification of the provision because it never even looked at the CLEC's contract in the first place.

Time Warner complains in its motion that it should not even have to file summaries of its special contracts disclosing the termination liability provisions in such contracts. Although not necessarily disagreeing with Time Warner's position, the critical point here is that, in such an event, neither should the incumbent.

While it is true that BellSouth has agreed to be bound by certain restrictions that are not imposed upon the CLECs, (i.e., termination liability provisions), BellSouth has not agreed to other disparate treatment. An agreement and an imposed requirement are totally different matters. When this happens, however, certain consequences flow. This is but one example of how disparate treatment can lead to perverse results, and therefore, should be avoided.

The CLEC rule has no limitation whatsoever with respect to termination liability. An amendment to the proposed rule adopted on April 3, 2001, requires that price-regulated incumbents entering into a special contract or tariff term plan include in their contracts numerical estimates of the total termination charges due from the customer in the event of early termination of service at the end of each six month interval of service thereafter. This requirement, which is presumably intended to protect end-user customers, unaccountably does not apply to special contracts or tariffed term plans entered into by CLECs. CLEC customers, therefore, will not receive any benefit derived from these mandated disclosures. Not applying the disclosure requirement to CLECs is particularly perplexing given that it is widely known that BellSouth has previously agreed to limit its termination to the lesser of (1) the amount negotiated, (2) the repayment of discounts received during the previous twelve months of service, or (3) six percent of

the total tariff term plan. This agreement has been a matter of public record for months. In contrast, the rule, as applied to CLECs, has made no provision to limit or cap the termination liability in its special contracts. It would seem, at least from the end-user's perspective, that any such disclosure requirements should apply, if at all, to telecommunications service providers that have not disclosed their termination liability provisions or agreed to limitations or caps on termination liability.

Tennessee law recognizes this common-sense notion that agencies must apply a statute even-handedly to all persons or entities that are subject to the statute. In *Sanifil of Tennessee, Inc. v. Solid Waste Disposal Control Board*, 907 S.W.2d 807, 811 (Tenn. 1995), for example, the Supreme Court of Tennessee held that "[w]hile having the power to act does not mandate action, we find that in the case of regulations affecting private business, every effort must be made to apply regulations consistently and fairly." Tennessee's public policy on telecommunications affirms this concept by stating that "the regulation of telecommunications service providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider . . . ." *See* T.C.A. §65-4-123 (emphasis added).

When self interest dictates, even the CLECs recognize that the general provisions discussed above apply to incumbents and CLECs alike. The CLECs participating in the Memphis Networx hearing, for instance, vehemently argued that the last sentence of section 65-5-208(c), which allows the TRA to adopt rules or issue orders to prohibit various anti-competitive practices, is not limited in its application to incumbents. During

those proceedings, a dispute arose regarding the wording of Issue No. 3. Memphis Networx proposed the following language for that issue:

> Whether the (sic) MLGW and Memphis Networx have complied with the provisions of T.C.A. 7-52-401 through 405, to the extent applicable for TRA review, and what conditions or reporting requirements, if any, are necessary to ensure compliance.

See Tr. of February 22, 2000 Pre-Hearing Conference at 17. Time Warner and XO wanted to add the word "rules" between "conditions" and "or reporting requirements," and Memphis Networx opposed the addition. *See Id.* In explaining why Time Warner and XO wanted to add the word "rules," XO's counsel, speaking on behalf of both XO and Time Warner, stated:

> [W]e reserve the right to be able to suggest to the agency that rather than handling these applications from municipal electrics on a case-by-case basis and in each one trying to negotiate the applicable accounting safeguards and reporting requirements, that the agency, pursuant to [T.C.A. §65-5-] 208(c), adopt rules concerning cross-subsidization relationships to affiliated entities and other anticompetitive practices, that such rules would be applicable to all municipal electrics who apply to get into the telecommunications business.

Tr. at 18-19. (emphasis added.) Time Warner and XO, therefore, have publicly taken the position that the TRA's authority to adopt rules and issue orders prohibiting specific and general anti-competitive practices extends not only to incumbent local exchange companies, but also to competing telecommunications services providers.

Like Time Warner and XO, the TRA itself has acknowledged that this provision is not limited to incumbents. The brief the TRA filed with the Court of Appeals in the BSE docket, for instance, states that "Tenn. Code Ann. §65-5-208(c) authorizes the TRA to take action to protect against various forms of anti-competitive behavior on the part of

the public utilities subject to TRA regulation . . . ." Brief at 27 (emphasis added). As noted above, the term "public utilities" includes all providers of telecommunications services.

Tennessee law, therefore, clearly does not allow rules which would require incumbents to submit their special contracts for review while allowing CLECs to enter special contracts without so much as filing them with the TRA. Such a rule would violate both the common law requirement that "in the case of regulations affecting private business, every effort must be made to apply regulations consistently and fairly," *see Sanifil of Tennessee, Inc. v. Solid Waste Disposal Control Board*, 907 S.W.2d 807, 811 (Tenn. 1995), as well as the statutory requirement that "the regulation of telecommunications service providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider . . . ." *See* T.C.A. §65-4-123 (T.C.A. §65-4-123)(emphasis added). If the TRA decides that certain information is necessary to ensure that an incumbent is offering services under rates, terms, and conditions that are just, reasonable, and non-discriminatory, the same information also is necessary to determine whether a CLEC is offering services under rates, terms, and conditions that are just, reasonable, and non-discriminatory under the exact same statutes. Any filing requirements incorporated into the new rules, therefore, must apply equally to all telecommunications service providers.

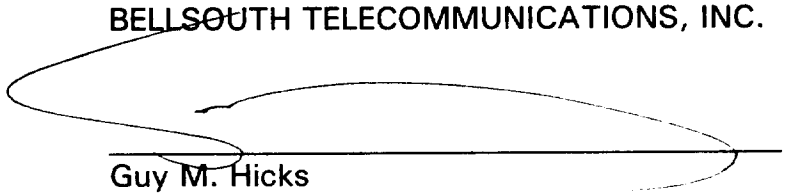
CONCLUSION

If the TRA decides that a combination of competitive forces and the ability of aggrieved customers to file complaints with the TRA is a sufficient method of carrying

out its statutory responsibilities regarding telecommunications service providers, then all telecommunications service providers should be allowed to enter into special contracts without filing the contracts or submitting them to the TRA for approval. BellSouth would support such a result. If the TRA decides that it must review special contracts in order to carry out these responsibilities, then all telecommunications services providers should be required to file such contracts with the TRA. While we sympathize with and share the CLEC's concerns about regulatory burdens, these burdens should apply, or not apply as the case may be, equally. The Authority has fashioned a rule that attempts to balance agency concerns with the desires of all parties for less regulation. Regardless of the way the decision turned out, in the end, the same rules must apply to all. It is the legal, proper and fair result. This was achieved in the Authority's decision, and it should be maintained.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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CERTIFICATE OF SERVICE

I hereby certify that on April 24, 2001, a copy of the foregoing document was served on the parties of record, via the method indicated:

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