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June 13, 2002

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

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 Comments Regarding Application of Contract Service Arrangement Rules to Competitive Local Exchange Carriers. A copy of the enclosed is being provided to counsel of record for all parties.

Cordially,

Joelle Phillips

JP/jej

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

BELLSOUTH TELECOMMUNICATIONS, INC.'S COMMENTS REGARDING APPLICATION OF CONTRACT SERVICE ARRANGEMENT RULES TO COMPETITIVE LOCAL EXCHANGE CARRIERS

BellSouth Telecommunications, Inc. ("BellSouth") files these Comments as permitted by the Directors at the Agenda Conference on June 11, 2002.[1] As discussed below, BellSouth believes that the Public Records Act issue raised by the Attorney General, as well as the "vagueness" of two definitions in the proposed rule raised by the Attorney General can be addressed through appropriate modification of the proposed rules. Moreover, it is clear that the Public Records Act issue and the more general legal issues discussed in the Attorney General's letter apply equally to competitive local exchange carriers and incumbents alike. Neither the Attorney General's opinion nor Tennessee law permit the Tennessee Regulatory Authority ("TRA" or "Authority") to apply a policy that allows special contracts by CLECs but disallows special contracts by ILECs. The Authority's June 11, 2002 motion to reject BellSouth's special contracts, while apparently

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[1] The Directors required that comments be filed by noon on Thursday, June 13, 2002. Although BellSouth sought an expedited transcript of the proceedings, the transcript was not made available to BellSouth until after noon on Wednesday, June 12, 2002. Accordingly, BellSouth has prepared these comments

permitting CLECs to continue entering into new CSAs, creates an unnecessary, arbitrary and illegal distinction between parties.

BellSouth believes that competition is best served by allowing both BellSouth and CLECs to have minimum filing standards for CSAs; however, if the TRA is to continue on its June 11th path, it will be fostering an illegal and inequitable market discrimination between BellSouth and its competitors.

Tennessee law regarding price discrimination applies equally to ***all*** public utilities. Accordingly, the Authority cannot, consistent with Tennessee law, respond to the legal issues raised in the Attorney General's opinion by prohibiting BellSouth from entering into special contracts while permitting BellSouth's competitors to do so. Moreover, the Attorney General's comments questioned whether the TRA's procedure provides sufficient review to permit special rates under Tennessee law. It is arbitrary, and nonsensical, that, in response to that concern, the TRA would ***discontinue*** its practice of permitting BellSouth to enter into such contracts upon filing of the contract for TRA review -- yet ***continue*** its practice of permitting CLECs to enter into such contracts with virtually no review whatsoever.

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under extremely tight time constraints, and BellSouth should be afforded the opportunity to supplement these comments at a future date.

I. THE PROPOSED RULES CAN BE MODIFIED TO ADDRESS THE TWO ISSUES ON WHICH THE ATTORNEY GENERAL'S REFUSAL TO APPROVE THE RULES WAS BASED.

The Attorney General's letter dated May 31, 2002 relies on only two bases for declining approval absent modification of the proposed rules. The first is the Attorney General's determination that the rules as proposed violate the Public Records Act. The second is the Attorney General's determination that two definitions require modification to address problems of vagueness. Each of these issues can easily be addressed through appropriate modification.

With respect to the Public Records Act, the Attorney General's opinion concludes that, under the Public Records Act, contract service arrangements on file with the Authority must include customer names in order to comply with the Public Records Act. The Attorney General's opinion expressly notes that T.C.A. § 65-3-109 permits the Authority to maintain the confidentiality of contracts under certain circumstances. The Attorney General goes on to opine, however, that the rule as proposed does not provide sufficient case-by-case analysis for a finding that the disclosure of customer names would injure the companies involved. BellSouth suggests that the rule could be modified to permit disclosure of customer name when the customer does not submit with the contract service arrangement an affidavit explaining that revelation of the contents of the contract would be injurious to the customer.[2] Contract service arrangements, however, filed with

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[2] The Attorney General's letter gives short shrift to the federal requirement that CPNI be kept confidential. To say the least, the federal requirement is a

such an affidavit, could be filed with the names redacted absent a showing by an objecting party that the affidavit is insufficient to demonstrate the need for confidentiality.[3]

As to the second objection by the Attorney General[4], BellSouth suggests the definitions at issue be modified as follows:

> Affiliate - means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, "owns," is owned" and "ownership" mean ownership of an equity interest, or the equivalent thereof, or ten percent (10%) or more, and "person" means an individual, partnership, committee, association, corporation or any other organization or group of persons.[5]
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> Revenue Price-Out - The revenue obtained by multiplying the unit rate for a service element by the quantity of units for that service element.

II. NOTHING IN THE ATTORNEY GENERAL'S OPINION NOR ELSEWHERE IN TENNESSEE LAW COULD SUSTAIN A TRA POLICY ALLOWING SPECIAL RATES TO BE PROVIDED BY THE CLECs BUT NOT PERMITTING SPECIAL RATES TO BE PROVIDED TO CUSTOMERS BY BELLSOUTH.

The TRA's decision to reject BellSouth's CSAs was based on further concerns raised in the Attorney General's letter regarding whether special contracts violate the requirement under Tennessee law that uniform rates be available to all customers who are similarly situated. As noted by the Attorney General, this

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weighty factor to be considered in determining whether this information can be made public.

[3] BellSouth also remains willing to disclose the names under either of the alternatives set forth in its letter of June 10, 2002.

[4] BellSouth has attempted to suggest revised definitions, however the Attorney General's opinion gives no guidance whatsoever on why the definitions proposed are inadequate.

[5] This definition is identical to the definition in T.C.A. § 47-31-102(2).

prohibition against departures from the tariffed rates derives from T.C.A. § 65-4-122 (applicable to any common carrier company or any public service company including CLECs) and 65-5-204 (applicable to all public utilities, including CLECs). Accordingly, if the Authority deems it necessary to suspend the practice of special contracts in light of the Attorney General's opinion, it must apply that suspension equally to all parties covered by the relevant statutes, including CLECs.

While the CLECs may argue that policy rationales may support disparate treatment of BellSouth as the incumbent as compared with CLECs, no such social policy rationales empower the TRA to act in a fashion that is inconsistent with Tennessee law. Tennessee law prohibits the departure from uniform public rates by any public utility except under the limited circumstances provided by special contracts. If the TRA believes, as opined by the Attorney General, that special contracts should not be uniformly approved, then it cannot, consistent with Tennessee law, apply that decision solely to BellSouth. The TRA does not have the discretion to apply the prohibition on price discrimination only to BellSouth when the statute applies to BellSouth and CLECs alike. The statutes and doctrine on which the Attorney General's opinion is based are statutes and doctrine that apply equally to BellSouth and the CLECs. If the TRA applies those statutes and doctrine only to BellSouth (to its detriment), and not to the CLECs, (to their benefit), such action would be illegal, unfair, and arbitrary.

The Tennessee Attorney General's opinion cites two statutes for the proposition that the TRA has the statutory duty to ensure that special contracts are

allowed only when special circumstances justify departure from the generally available rates contained in the tariffs approved by the TRA. First, the opinion relies upon T.C.A. § 65-4-122, which prohibits price discrimination by any common carrier or public utility. Likewise, the second of the statutes cited by the Attorney General, T.C.A. § 65-5-204, prohibits special rates by any public utility. A public utility is defined in T.C.A. § 65-4-101 as:

> 65-4-101. Definitions. - (a) "Public utility" includes every individual, copartnership, association, corporation, or joint stock company, its lessees, trustees, or receivers, appointed by any court whatsoever, that own, operate, manage or control, within the state, any interurban electric railway, traction company, all other common carriers, express, gas, electric light, heat, power, water, telephone, telegraph, telecommunications services, or any other like system, plant or equipment, affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or by any political subdivision thereof . . . .

Clearly this definition encompasses both incumbent and competitive local exchange carriers alike. The statute contains no exception to the public utilities definition carving out competitive local exchange carriers. Accordingly, the same prohibition on departure from filed rates under Tennessee law applies to the CLEC that applies to the ILEC or to a price-regulated company. The clear language of the Tennessee statutes cited by the Attorney General and the definitions of the terms used in those statutes, indicate that competitive local exchange carriers are required, to the same extent as incumbent local exchange carriers, to adhere to the tariffed rates for their services.[6]

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[6] T.C.A. § 65-4-122 and 65-5-204 are not unique in their application and are only two of the many Tennessee statutes that apply to both BellSouth and CLECs

The exception to this prohibition on departure from the tariffed rates is the provision under state law that the TRA is empowered to approve the offering of special rates. As the Attorney General's opinion notes, there is ample case law construing the Tennessee statutes holding that special rates are legal when approved by the Tennessee Regulatory Authority. None of these cases, and none of these statutes, suggest that special rates are legal if not approved by the TRA when entered into or offered by competitive local exchange carriers. In short, the rules are the same for everyone in Tennessee on this topic. Moreover, the CLECs

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alike. In addition, the following provisions of Tennessee law likewise apply with equal force to the CLECs:

1. No public utility may adopt, maintain, or enforce any regulation, practice, or measurement that is unjust, unreasonable, unduly preferential, or unduly discriminatory (§65-4-115);

2. The TRA may investigate any matter concerning any public utility (§65-4-117(1));

3. The TRA may fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed by any public utility (§65-4-117(3));

4. The TRA may assign employees to investigate, hear, and adjust individual or general complaints against any public utility (§65-4-119);

5. The TRA may impose $50 penalties on any public utility for noncompliance with orders, judgments, findings, rules, or requirements of the TRA (§65-4-120);

6. The TRA has the power to fix the just and reasonable rates to be charged by any public utility (§65-5-201); and

have no special statutory or constitutional immunity regarding the other issues raised in the Attorney General's letter regarding public records.

Contract service arrangements are a strong indication of the competitive environment in Tennessee. Competition in Tennessee benefits customers to the extent that it encourages telecommunications providers to work to find special combinations of services and prices appropriate to the needs of a particular customer. As discussed above, this practice is specifically permitted by Tennessee statutes referencing special rates. It would be a perplexing departure from the Tennessee Regulatory Authority's practice of fostering competition to take away this product of competition, which benefits customers so significantly. The CSA is uniquely important to business customers whose business often renders them too unique to take advantage of a one-size-fits-all tariff.

While the contract service arrangement is an important tool to be used by telecommunications providers in meeting the demands of the competitive market in Tennessee, such arrangements represent only a small fraction of BellSouth's business in Tennessee. Contrary to the suggestion at the June 11 Agenda Conference that BellSouth relies on contract service arrangements heavily that their use could be the exception swallowing the rule, BellSouth has submitted testimony in Dockets 98-00559, 99-00210, and 98-00244 demonstrating that, through the end of 1998, all contract service arrangements approved by the TRA involved less

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7. The TRA has the power to require filing of tariffs by all public utilities (§65-5-202).

than one percent of BellSouth's business customers in Tennessee. BellSouth believes that this continues to be the case today. Notably, during the June 11 Agenda Conference, as well as during the hearing on proposed service standards rules, counsel for Time Warner in Tennessee characterized special contracts as a vital part of the Tennessee CLEC business constituting the vast majority of CLEC business (specifically noting that CSAs could constitute 100% of CLEC business). Accordingly, it appears from these comments that the percentage of CLEC business undertaken through special contracts far exceeds the percentage of BellSouth's business transacted in this fashion. This further indicates the error in exempting CLECs from any regulatory oversight of these contracts and continuing to permit CLECs to enter into such contracts while prohibiting BellSouth from entering into special contracts. In addition, the TRA should be just as concerned about scrutiny to protect the interests of Tennessee customers with CLEC contracts as it is with protecting the interests of Tennessee customers with BellSouth contracts.

During the June 11 Directors' Conference, several comments or questions were made regarding the fact that the existing rule, which has not been rejected or attacked by the Attorney General, treats CLEC special contracts differently than BellSouth's special contracts. This cannot serve as a sufficient legal basis on which to determine that the Authority may now treat BellSouth and the CLECs differently by allowing special contracts by the CLECs and not allowing special contracts by BellSouth. BellSouth believes that the Authority has discretion to approve special contracts under the existing rules, and under the proposed rules as

BellSouth has suggested they be modified. If the Authority however believes that the rationale described in the Attorney General's opinion calls into question the legality of special contracts, then it must consider apply that same treatment to CLEC special contracts. The existing rules for CLEC special contracts are an affront to the principles relied upon by the Attorney General.

Under the existing rules, the TRA reviews each of BellSouth's contract service arrangements. They are on file with the Authority and available for review with the names redacted. As the Attorney General has opined, such review would be necessary to establish that the special contracts were warranted and permissible under Tennessee law. Stated simply, the Attorney General has opined that Tennessee law only allows special contracts under limited circumstances and has urged the TRA to consider whether its processes afford enough scrutiny to determine that the CSAs proposed actually represent a special circumstance. If the TRA is persuaded that more than its existing process is required to determine that a particular situation is special enough to justify a special contract, then the TRA's practice for permitting CLEC special contracts, which affords virtually no review, cannot stand. The Attorney General's opinion basically suggests that special contracts are only permitted under Tennessee law in special situations, and the TRA rules may not be sufficient to determine that the situations in which they are currently being used are special enough. If that is true for the treatment of BellSouth's special contracts, which are filed and reviewed by the TRA, then it is

clear that the special contracts, which are not filed with the TRA by the CLECs and never reviewed by the TRA, present a far greater concern.

An example further demonstrates the anomaly in the TRA's action. Based on the TRA's ruling rejecting BellSouth's CSAs as a result of the Attorney General's opinion, a customer who had entered into a CSA due to be considered on June 11, 2002, is now not allowed to enter into that contractual arrangement with BellSouth, even though that contract was consistent with all existing rules regarding termination liability. Because the TRA failed to likewise suspend the ability of CLECs to enter into special contracts, that very same customer could enter into that very same contract service arrangement with a CLEC. Moreover, the CLEC could require that customer to alter the CSA to dramatically increase the severity of the termination liability. Under the current rules left in place by the TRA's action, that CSA will never be reviewed by the TRA. The result of this set of events is this: While BellSouth is prohibited from entering into a CSA compliant with all of the TRA's guidelines for such contracts, a CLEC will be permitted to enter into a CSA that may not be compliant with any of the TRA's guidelines, and the TRA will never be the wiser because it will never review the CSA with the CLEC. The irony is that all of these actions were premised upon an Attorney General's opinion in which he urges that the TRA may not be scrutinizing CSAs sufficiently to ensure that they are only being used only in special situations. In other words, rather than doing as the Attorney General suggests and scrutinizing contracts more closely, the TRA instead appears to be operating under a new

blanket practice of rejecting all of BellSouth's CSAs, with no individualized scrutiny, and accepting all CLEC CSAs, with no individualized scrutiny. Such a result is arbitrary and unlawful.

If it is illegal, which BellSouth believes it is not, to permit BellSouth to enter into special contracts under the proposed rules or the existing rules on the basis that those special contracts were not scrutinized closely enough, then it must surely also be illegal to permit the CLECs to operate under special contracts that receive no scrutiny whatsoever. Notably, counsel for Time Warner acknowledged the obvious, that the TRA has no knowledge regarding the provisions of CLEC CSAs.[7]

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[7] Specifically, Time Warner conceded that the TRA does not know whether the terms and conditions in the CLECs' CSAs are consistent with the concerns raised in the Attorney General's opinion. The colloquy on this subject was as follows:

Director Malone:	Mr. Hicks' last point of contention was that we don't know whether the terms and conditions in the CLECs' CSAs are consistent with the concerns raised in the AG's opinion. How do you respond to that?
Mr. Welch:	I would say that's true. We don't know. Again, I don't --
Director Malone:	You know. We don't know.
Mr. Welch:	No, sir. I --
Director Malone:	I mean, the CLEC knows. Excuse me. The CLEC knows.
Mr. Welch:	The CLEC knows. I can't disagree with that.

There is no basis under Tennessee law to distinguish the prohibition on departure from filed rates for CLECs, and, by the CLECs' own admission, the practice of using special contracts is far more prevalent in CLEC business than in BellSouth's business. Prohibiting BellSouth from entering into special contracts, while allowing the CLECs to do so, violates Tennessee law. Moreover, such a policy would not advance competition in Tennessee and would represent a detriment to customers who currently benefit from such contracts. Permitting use of special contracts by CLECs while prohibiting use of special contracts by the ILEC is tantamount to excusing CLECs from the statutory requirement that public utilities, including competitive local exchange carriers, may deviate from filed rates only when determined to be appropriate by the TRA.

It is important to place the Attorney General's opinion in its proper legal context. The Attorney General's letter simply notifies the TRA of the Attorney General's decision not to approve proposed amendments to existing rules for CSAs. The Attorney General does not state any objection to the existing rule. Moreover, the Attorney General's office has not taken any legal action to assail or stay the existing the contract service arrangement rules. It is inaccurate as a matter of law

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> I mean, this agency, to the best of my knowledge, never reviewed the terms and provisions of the CLEC special contract, and none has been submitted for such a review -- to the best of my knowledge.

(Tr. pg. 40, lines 1-17).

to conclude that the discussion of the Attorney General's questions and concerns about the CSA process carries the force of an injunction or other legal determination. The contracts rejected by the TRA on June 11, 2002 not only complied with the proposed new rules, but also comply with the existing CSA rule. Accordingly, they are compliant with rules that were long ago promulgated and properly finalized under Tennessee law and that are not stayed by any court.

It is also important to recognize the context of the amendments to the rules presented to the Attorney General. In the hearings on this matter, there was not adequate evidence to demonstrate that CSAs have an anti-competitive effect.[8] Accordingly, any action by the TRA premised on a conclusion that CSAs have an anti-competitive effect would be arbitrary. Moreover, it is important to recall that the proposed rule resulted from a compromise in this docket. Notably, the rule proposed by the TRA Staff would have treated the CLECs and BellSouth similarly. It was the CLECs, and not BellSouth, who objected to this level of scrutiny for their CSAs.[9] It appears that the Attorney General is of the opinion that more scrutiny,

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[8] In fact, in docket Nos. 99-00210, 99-00244, and 98-00559, the TRA expressly ruled that "[t]he evidence put forth in the record fails to establish that the provisions of the CSA before the Authority are anticompetitive or discriminatory." (footnote omitted). *See* page 9, Order Granting Approval of BellSouth CSA (TN98-2766-00) in docket No. 99-00210, dated November 13, 2000.

[9] Interestingly, when confronted with having to comply with the same standards as BellSouth, the CLECs quickly took the position that they would prefer no rule (neither CLECs nor BellSouth having to file CSAs) than incur the regulatory burden and delay placed on BellSouth. Thus, the issue was not one of anti-competitive effect but of business efficiency. Indeed, despite the concerns expressed by the Attorney General, there has never been a finding that CSAs are anti-competitive and the CLECs abandoned that posture during the hearings on this rule.

not less, is appropriate. Notably, however, the Attorney General did not rely on any of those concerns in declining to pass upon the proposed amendments to the rules. Rather, the Attorney General's letter clearly states that it is unable to approve the rules based on the Public Records Act concern and a vagueness concern regarding two definitions. The remaining discussion in the Attorney General's letter comes in the context of a request that the agency discuss, in the context of resubmitting any revised proposed amendments to the rule, the various issues outlined in the Attorney General's letter. Suspending the operation of the existing rule in this context is an overreaction. Suspending BellSouth's ability to enter into CSAs while continuing to allow the CLECs to enter into CSAs is arbitrary and illegal. Moreover, continuing to allow the CLECs to operate under CSAs with absolutely no scrutiny whatsoever of the terms of the CSAs not only treats the CLECs in a fashion that is not competitively neutral with BellSouth, but it also flies in the face of the very concerns about scrutiny of CSAs raised by the Attorney General.

CONCLUSION

The Tennessee Attorney General's opinion expressly notes that special contracts are legal in Tennessee. The Tennessee Attorney General's opinion further makes no distinction in the application of the legal issues discussed to CLECs as compared with incumbents. In fact, the Attorney General expressly notes his awareness that "incumbent local exchange carriers need to be able to compete in lucrative markets so they could afford to provide service at reasonable rates in the

rural areas where few competitors desire to venture." There is absolutely no legal basis on which the Authority may permit special contracts by CLECs while prohibiting BellSouth from entering into such contracts. Such an action would be arbitrary and illegal. It would slow the cause of competition and deprive customers of the competitive benefits they currently reap.

The only argument to sustain the distinction between CLECs and ILECs with respect to special contracts, would be a policy determination that CLECs simply need this competitive leg-up in order to enter the market. With respect to such policy considerations, no such leg-up is needed in Tennessee where CLECs are robustly competing, especially for business customers who are likely to enter into special contracts. More importantly, however, the TRA is not permitted to act solely on the basis of a particular policy rationale when the statutes do not permit such action. In this case, the statutes prohibit CLECs to the same extent that the statutes prohibit ILECs from departing from tariffed rates and offering special contracts except under appropriate circumstances. Accordingly, the Tennessee Regulatory Authority may not suspend the ability of BellSouth to enter into such special contracts without also suspending to the same extent the ability of the CLECs to enter into such contracts.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2002, a copy of the foregoing document was served on the parties of record, via the method indicated:

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