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May 16, 2002

VIA OVERNIGHT DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

RE: Amendments to Chapter 1220-4-2; Regulations for Telephone Telecommunications Service Providers, Docket No. 00-00873

Dear Mr. Waddell:

Enclosed for filing in the above-referenced proceeding are an original and six copies of the Legal Brief of the Tennessee Rural Independent Group and Frontier Communications. A receipt copy is also enclosed. Please mark the receipt copy as received and return it in the enclosed postage-paid envelope.

Thank you for your assistance in this matter.

Sincerely,

John B. Adams

John B. Adams, Esq.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
AMENDMENTS TO CHAPTER 1220-4-2	)	
	)	Docket No. 00-00873
REGULATIONS FOR TELEPHONE TELECOMMUNICATIONS SERVICE PROVIDERS	)	

LEGAL BRIEF OF THE TENNESSEE RURAL INDEPENDENT GROUP AND FRONTIER COMMUNICATIONS

Ardmore Telephone Company, CenturyTel of Adamsville, CenturyTel of Claiborne, CenturyTel of Ooltewah-Collegedale, Crockett Telephone Company, Loretto Telephone Company, Peoples Telephone Company, United Telephone Company, and West Tennessee Telephone Company (collectively, the "Rural Independent Group" or the "Rural Independents"), and Citizens Telecommunications Company of Tennessee and Citizens Telecommunications Company of the Volunteer State (together "Frontier" or "Frontier Communications") by their counsel, submit this Legal Brief addressing certain legal infirmities in the proposed Amendments to Chapter 1220-4-2 of the Authority's rules.

This legal brief is in response to the Notice of Filing issued on May 9, 2002 in which the Authority invited briefing, "confined to the issues raised at the May 7, 2002 Authority Conference and any additional issues not discussed at that time relating to the most recent revisions to the proposed rules as contained in the draft of those rules distributed on May 2, 2002." Without waiving any of their earlier argued legal and factual arguments, the Rural Independents and Frontier show as follows:

There Is No Statutory Basis For The Proposed § 1220-4-2-.17, Quality of Service Mechanisms (QSMs) for ETCs

In their earlier filed comments and in presentations made in Authority workshops, the Rural Independents and Frontier addressed the reasonableness, or lack thereof, of material parts of the substantive rule proposals. By not rearguing its positions on the reasonableness of the proposed rules in this brief, the Rural Independents and Frontier are in no way waiving their positions, raised both in comments and in workshops, that critical parts of the proposed service standards and other parts of the rules are unreasonable and that there is simply no factual basis in the record or otherwise to demonstrate a need to revise the existing rules. Instead, the issue specifically addressed in this filing is whether the Authority has the power to prescribe, by rule, penalties automatically payable by an ETC to an ETC's customers for violation of those service obligations. The Authority has no such power, expressly or by implication.

The Authority cites multiple provisions of *Tennessee Code Annotated* in support of the provisions of proposed § 1220-4-2-.17, Quality of Service Mechanisms (QSMs) for ETCs that assess self-executing, carrier-to-consumer penalties for carrier failure to meet the service standards of proposed § 1220-4-2-.16. These provisions include: T.C.A. §§ 65-2-102, 65-4-104, 65-4-106, 65-4-117, 65-4-119, 65-4-120, 65-4-123, 65-4-124, 65-5-207, and 65-21-114. As will be shown, several statutory provisions not cited by the Authority actually undermine the legal basis for the proposed rule.

The Authority's general powers to promulgate rules (T.C.A. §65-2-102) and to regulate public utilities (T.C.A. §§ 65-4-104 and 65-4-117) are not controversial. However, these general powers, without more, cannot be stretched sufficiently far to support the claim that the Authority

is authorized to promulgate a self-executing, carrier-to-consumer penalty regime for QSMs.[1] Reliance upon a liberal construction of T.C.A. §65-4-106 is insufficient to salvage the proposed rule for the simplest of reasons – Tennessee's statutory regime, under even the most radical construction, does not allow creation of the proposed self-executing, carrier-to-consumer penalty regime for QSMs.

T.C.A. Section 65 affords two basic routes to enforcement of Authority regulations and orders. The first is initiation of a show cause or an investigation proceeding under T.C.A. §§ 65-2-106 and 65-4-117(1), and the second is upon a complaint, in writing, from a party other than the Authority. Both routes trigger procedural due process rights applicable to contested proceedings, *i.e.*, notice and hearing, under T.C.A. § 65-2-108. These procedures follow well-known and time honored standards of procedural due process before administrative agencies, a conclusion that could not be reached if the proposed self-executing carrier-to-consumer QSM penalty regime becomes effective.

Rule 1220-4-2-.17(1)(a), if effective, would automatically assess QSM penalties payable to affected customers from carriers not meeting service standards for a prescribed period of time. Ironically, Rule 1220-4-2-.17(7) is entitled "Due Process Protections" and would allow ETCs to seek waivers of automatic assessment of QSM penalties. Even if the Authority had the right to award penalty amounts to ETC customers for service quality violations, which it does not, the automaticity of Rule 1220-4-2-.17(1)(a) and the post-trigger "right" of the ETC to seek a waiver represents deprivation of procedural due process rights guaranteed by Tennessee law. *See, also,* T.C.A. § 65-4-120, which provides that penalties can be assessed only after complaint and

[1] References to QSMs in this brief include both the provisions of proposed rule 1220-4-2-.17 and other provisions that would create self-executing, carrier-to-consumer penalty payments or rate element abatements.

hearing. The theoretical availability of a post-trigger waiver does not cure the fundamental flaw in the proposed rule.

Tennessee law allows for only two basic routes, both of which feature a full array of procedural due process rights, to address allegations of carrier violations of regulatory requirements – a show cause/investigatory proceeding or a complaint proceeding. The authority may not, by regulation, circumvent the carefully crafted enforcement regime and associated procedural protections contemplated by governing statutes in promulgating the subject rules.

Eliminating the automaticity and post-trigger waiver procedures of Rule 1220-4-2-.17, however, will be insufficient to salvage the balance of the Rule. Stripped of the objectionable procedural due process issues, the issue of penalty application for violation of service standards, however, taints the proposed Rule. The proposed rule is fundamentally flawed because it attempts to do something not authorized by State law – make ETCs liable, according to a prescribed penalty schedule, to customers for violations of service standards. In fact, T.C.A. § 65-4-120 prescribes the singular "penalty for noncompliance with authority:"

> Any public utility which violates or fails to comply with any lawful order, judgment, finding, rule, or requirement of the authority, shall in the discretion of the authority be subject to a penalty of fifty dollars ($50.00) for each day of any such violation or failure, which may be declared due and payable by the authority, upon complaint, and after hearing, and when paid, either voluntarily, or after suit, which may be brought by the authority, shall be placed to the credit of the public utility account.

Nothing in T.C.A. Title 65 allows for the Authority to assess penalties on ETCs that are payable to customers. Indeed, the language of T.C.A. § 65-4-120 specifies that there is only a single possible recipient of such penalties – the State of Tennessee. *See, also,* T.C.A. § 65-1-213, where the enforcement obligations of the Authority are described, *inter alia*, as including the duty to collect "all penalties due the state." This is so because the clear intent of such

penalties is to penalize the carrier for violating the regulatory regime, not to assess actual damages caused to the public for such violations.

Even in a complaint proceeding, nothing in the Tennessee Code suggests that the Authority has the power to determine the amount of or to award damages to a customer. Instead, it has long been the case that common carriers enjoy limited liability, which is reflected in their tariffs in the form of limitation of liability provisions and in the lack of any authority in Title 65 for the Authority to award damages to customers. In exchange, common carriers bear the yoke of regulation. It is regulation, rather than potential liability for damages, that ensures the reasonableness of carrier actions. The limitation of liability helps to keep the rates of common carriers reasonable and to better enable them to serve all.

The QSMs, Even If Lawful, Bear No Relationship To Actual Damages Incurred By ETC Customers

Even if the Authority's proposed QSM regime had any statutory basis, those QSMs are, as a practicable matter, suspect because they bear no relationship to their espoused purpose. In proposed Rule 1220-4-2-.17(1)(a), it is stated that, "QSMs require ETCs to compensate their customers within the affected exchange(s) for failing to provide an established level of service quality within a reasonable time." A close reading of the QSMs themselves suggest that the proposed regime is of dubious value in compensating customers for ETC violations of service standards and may, in some instances, provide wind falls to customers. That same close reading and analysis also adds additional support to the proposition that that the QSM proposal is fatally flawed as beyond the statutory power of the Authority.

Proposed Rule 1220-4-2-.17(2)(a) and (b), which reads as follows, demonstrates this point:

> (2) Installation of Primary Service Orders
>
> (a) Where facilities are available, an ETC shall waive 100% of the cost of installing primary service if the service order is not completed within three (3) business days, unless the customer requests a later installation date.
>
> (b) An ETC shall credit the affected customer an amount equal to $5.00 per day for every day over three (3) business days the customer's primary service order is not completed up to a maximum of forty (40) days or $200.00.

With all due respect to the Authority, there is nothing in the record before it that suggests the relationship between an ETC's failure to meet the underlying service quality standards for a 90 day period and the forced waiver of installation charges or the $5.00 per day (after the third day) assessment for failing to install primary service where facilities are available. These amounts cannot be actual damages because there is no determination of the actual harm suffered by the customer. Alternatively, they could be intended to be liquidated damages. But even liquidated damages must bear some relationship to the reasonably foreseeable harm that would flow from a violation. *See generally* Black's Law Dictionary 391 (6th ed. 1990). Yet, there is nothing in the record on this point. These and other important questions are left unanswered, both in relation to proposed Rule 1220-4-2-.17(2)(a) and (b), but also in relation to all other proposed QSMs.

To give a second very obvious example, what, if any, relationship exists between actual damages incurred by a customer and proposed Rule 1220-4-2-.17(3)'s mandatory "credit of $10.00 per trouble report to each customer that reported trouble within the three (3) month applicable time period within the affected exchange that exceeds the standard in 1220-4-2-.16(e),

(f) or (g)?" None is obvious; it is highly unlikely that such a customer would have any measurable and, therefore compensable, damages arising from the filing of a trouble report.

Simply put, the QSMs have no obvious relationship between the violation alleged and the compensation afforded to affected customers and may actually present windfalls to customers who do not, in fact, suffer any damage or who suffer actual damages in amounts less than the prescribed QSMs.

It could be argued that the Authority is attempting to leverage its unquestioned statutory power to assess penalties for carrier violations on behalf of the State to extend to the questionable effort to award penalty amounts or damages to consumers. For example, compare the August 16, 2001 version of proposed Rule 1220-4-2-.17(3) with the May 2, 2002 version. In the August 2001 version, the Authority proposed a $50.00 penalty payable to the agency, which would be consistent with T.C.A. § 65-4-120 if the penalty were assessed following a hearing. However, in the May 2002 version, the automatic payment of $10.00 per trouble report for each affected customer is substituted. In addition to the obvious lack of statutory support for the latter proposal, the question arises of whether and to what extent the Authority will attempt to levy penalties, payable to the State, on the ETC for conduct that would also trigger carrier-to-customer payments under the QSM regime. Clearly, Tennessee law contemplates no such result. Such efforts would, however, obviate any possible argument that the QSMs are authorized by T.C.A § 65-4-120 for the Authority cannot have it both ways.

QSMs Are Not Rate Regulation Rules and Are Not Analogous to Current Rules Requiring Pro-Rata Credits For Service Interruptions

The current version of the rules at issue requires carriers to give customers a pro-rata credit for service outages upon request of the customer. This rule is a legitimate exercise of the Authority's ratemaking power. T.C.A. § 65-5-201 specifically authorizes the Authority to

consider "the safety, adequacy and efficiency or lack thereof of the service or service furnished by the public utility" in setting reasonable rates. The current rule very directly and clearly establishes that a carrier may not charge for services that are not rendered, and thus requires a carrier to adjust its otherwise authorized rates to account for the times when service is not provided. Thus, the current rule results in a rate being charged that is directly proportional to the amount of service provided. The QSMs, however, do not reach or appear to attempt to reach this result and cannot, on this or any other ground, be justified as rate regulations.

As discussed herein, the QSMs are obviously and expressly in the nature of penalties or damages and are not intended as rate regulations. Further, unlike the rule discussed in the preceding paragraph, the QSMs make no effort to adjust rates as necessary to account for service interruptions; instead they establish arbitrary fixed dollar penalties payable under a variety of circumstances. Even the proposed rule dealing with service interruptions makes no effort to be a rate regulation rule by adjusting the rate charged so as to set the rate based on the amount of service provided. That proposed rule follows the course set by the other QSMs in establishing an arbitrary, automatic penalty. The QSMs thus are not rational ratemaking. Further, they fail to comply with established precedents setting limits on the Authority's ratemaking authority.

The QSMs Result in Negative Rates, Which Constitute an Unconstitutional Taking

To the extent that the Authority attempts to leverage its ratemaking authority to extend so far as to include QSMs and thus attempts to justify the QSMs as rate regulations, the QSMs must comply with established precedents regarding ratemaking. The QSMs fail in this regard. It is well settled that a regulator cannot set rates for a regulated carrier that are confiscatory as that constitutes an unconstitutional taking of property without just compensation. The QSMs,

however, result in zero or negative rates in many instances. It is beyond dispute that zero and negative rates are confiscatory and are therefore unconstitutional.

Some of the QSMs require automatic refunds of the entire charge for a service or require credits of a set dollar amount that, in some instances, exceed the monthly rate for the service. For example, United's monthly rates for residential local service are as low as $8.44 per month. Thus, a QSM that reduces that rate by $10.00 per day results in negative rates. Similarly, the requirement that carriers waive the installation charges in full when a carrier misses the installation time frame results in a zero rate for a service.

Conclusion

The proposed QSM regime is, from a legal perspective, fundamentally and fatally flawed. No reasonable construction of Tennessee statutes affords the Authority any basis for attempting to create a self-executing, carrier-to-customer penalty payment scheme for violation of service standards. Permeated as the QSM scheme is with crippling legal problems, the Authority should not attempt to implement it.

Respectfully submitted,

Ardmore Telephone Company, CenturyTel of Adamsville, CenturyTel of Claiborne, CenturyTel of Ooltewah-Collegedale, Crockett Telephone Company, Loretto Telephone Company, Peoples Telephone Company, United Telephone Company, West Tennessee Telephone Company, Frontier Telecommunications Company of Tennessee, and Frontier Telecommunications Company of the Volunteer State

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May 16, 2002

Certificate of Service

I, John B. Adams, Counsel for the Tennessee Rural Independent Group and Frontier Communications, certify that I caused a copy of the foregoing to be served upon the following by first class mail this 16th day of May, 2002.

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