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May 17, 2002

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

RE: In re: Rulemaking Amendments of Regulations for Telephone Service Providers
Docket No. 00-00873

Dear Mr. Waddell:

Enclosed is an original and thirteen copies of our Brief in Support of Approval of the May 2, 2002 Draft of the Proposed Regulations for Telephone Service Providers Submitted by the Office of the Attorney General of the State of Tennessee in the above-referenced matter. We request that you file this document in the above-referenced docket. We have served copies on all parties of record. If you have any questions, please feel free to contact me at (615) 532-3382. Thank you.

Sincerely,

Shilina B. Chatterjee

Shilina B. Chatterjee
Assistant Attorney General

SBC:sc
Enclosure

Before the

TENNESSEE REGULATORY AUTHORITY

IN RE: RULEMAKING AMENDMENTS OF REGULATIONS FOR TELEPHONE SERVICE PROVIDERS

DOCKET NO. 00-00873

BRIEF IN SUPPORT OF APPROVAL OF THE MAY 2, 2002 DRAFT OF THE PROPOSED REGULATIONS FOR TELEPHONE SERVICE PROVIDERS SUBMITTED BY THE OFFICE OF THE ATTORNEY GENERAL OF THE STATE OF TENNESSEE

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May 17, 2002

BEFORE THE TENNESSEE REGULATORY AUTHORITY

In Re: Rulemaking Amendments of Regulations for Telephone Service Providers	))	**Docket No. 00-00873**

BRIEF IN SUPPORT OF APPROVAL OF THE MAY 2, 2002 DRAFT OF THE PROPOSED REGULATIONS FOR TELEPHONE SERVICE PROVIDERS

Paul G. Summers, Attorney General and Reporter for the State of Tennessee respectfully submits the following comments in response to the Tennessee Regulatory Authority's ("TRA") rulemaking proceeding regarding regulations for telephone service providers ("Service Standards"). Pursuant to the Notice of Filing issued on May 9, 2002, the Attorney General hereby submits comments concerning issues raised at the May 7, 2002 Authority Conference and other issues concerning the recent revisions to the proposed rules as contained in the draft of those rules that were publicly distributed on May 2, 2002. The Attorney General makes these comments in his public interest role as protector of consumers both through his prosecution and investigatory powers under the Tennessee Consumer Protection Act and the Consumer Advocate statutes.

INTRODUCTION

The Attorney General would like to take this opportunity to thank the Tennessee Regulatory Authority ("TRA") for promulgating the regulations for telephone service providers and take special recognition of the hard work and continuing efforts of the TRA staff in this docket. We support the efforts of the TRA staff to improve protections for consumers in the State of Tennessee concerning their telephone service provider. This rulemaking is of great importance since the regulations for telephone service providers have not been revised in over twenty-five (25) years and these rules are necessary because of changing technology and the significant changes that have occurred in the telephone industry.

Over the past few years, consumer complaints against telecommunication service providers have increased. On September 29, 2000, the TRA opened a rulemaking proceeding to revise the regulations for telephone service providers. Over the course of several months, oral and written comments were filed in this matter, revisions were made and presented for review to the industry, additional comments were allowed and another revised draft was published on May 2, 2002. The Consumer Advocate and Protection Division of the Office of the Attorney General urges the TRA Directors to approve the most recent draft of the proposed rules dated May 2, 2002.

Throughout the process, the Attorney General has participated and wholeheartedly supported the TRA's efforts to revise the service standards. As the telecommunications marketplace becomes more competitive, these service standards will ensure that consumers can rely on receiving quality telephone service in Tennessee.

A. Adequate Opportunities Were Afforded to the Parties To Convey Their Concerns in This Rulemaking and the Statements Made by the Industry That the Rulemaking Has Been a Moving Target Are Erroneous

Since the beginning of the docket in September 2000, the TRA has granted interested parties numerous opportunities to comment. The numerous filings in the docket indicate the many opportunities the parties were given to provide feedback and suggestions. This rulemaking proceeding has not only been extensive, but protracted as well.

At all times, interested parties have had ample opportunity to present their suggestions and comments. In order to allow the parties to be heard, the TRA held three (3) workshop sessions to discuss the rules and interested parties presented their concerns and quandaries to the TRA staff. Additionally, the parties were allowed to file written comments on more than one occasion. The telecommunications industry has been well-represented and have stated their objections and raised issues as to the provisions of the proposed service standards. As a result of all oral and written comments and suggestions, the TRA staff significantly revised the proposed rules. The most recent draft

of the proposed rules issued on May 2, 2002 were the product of the lengthy workshops and written comments. For over one year, the TRA staff has considered and made revisions suggested by the industry. The draft dated May 2, 2002 of the proposed service standards incorporated numerous suggestions and revisions proposed by and which favor the industry. At each juncture, the TRA staff gave the industry ample opportunity to be heard.

B. The General Assembly Has Given the Tennessee Regulatory Authority Statutory Authority to Regulate Telephone Service Providers

The TRA has not deviated from their statutory mandate by establishing this rulemaking for new service standards for telephone service providers. TENN. CODE ANN. § 65-2-102(a)(2) authorizes the TRA to "adopt rules implementing, interpreting or making specific various laws which it enforces or administers." Further, the Tennessee courts have indicated that rulemaking is a preferable way to formulate new policies, rules and standards. *Tennessee Cable Assn. v. Public Serv. Comm'n*, 844 S.W. 2d 151, 159 (Tenn. Ct. App. 1992).

The TRA has the authority to fine utilities for any violation of a rule or an order and may demand payment upon complaint. The statute gives the option of demanding payment before due process. TENN. CODE ANN. § 65-4-120 states that when there is any violation of a rule, order, finding, judgment, the TRA can penalize in the amount of $50 for each day of any such violation which may be declared due and payable to the authority upon complaint.

TENN. CODE ANN. § 65-4-120 states:

> 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.

The General Assembly envisioned that assessing penalties would be part and parcel of the regulatory function of the TRA and provided for the ability to assess penalties. Therefore, any regulations that

assess penalties for violations of their rules are in congruence with the authority that the TRA has been granted by the General Assembly.

The TRA is statutorily authorized to assess credits to consumers for violations. TENN. CODE ANN. § 65-4-117(3) states that the TRA has the authority to implement not only service standards, but also any practices to be imposed on the utilities.[1] Therefore, the requirement for a credit or refund to consumers for violation of the rules or the Quality Service Mechanisms (hereinafter "QSMs") is permissible under the plain language of the statute.

Lastly, the General Assembly has also stated that the statutes shall be liberally construed. TENN. CODE ANN. § 65-4-106 states that when there is an issue concerning the existence or extent of authority and jurisdiction of the TRA, it shall be construed in favor of the TRA. As a result, the TRA's regulatory authority that was granted by the General Assembly is to be liberally construed.

C. Adequate Due Process Has Been Afforded to All Parties in this Rulemaking Proceeding

The parties have been afforded abundant due process of law in this rulemaking. The industry has not been denied due process. Moreover, the proposed service standards and the penalties are constitutional since due process was given to all interested parties. *Wadley Southern Railway Co. v. State of Georgia*, 235 U.S. 651, 666 (1915). In *Wadley Southern Railway*, the Supreme Court held that a penalty of $5,000 per day for violations of state railroad commission orders was constitutional if due process was available. Also, in this matter the fines are nominal and the parties have been afforded due process not only throughout the rulemaking, but through specific provisions in the proposed rules.

The requirements concerning a party being granted procedural due process have been adequately

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[1] TENN. CODE ANN. § 65-4-117(3) provides:

> After hearing, by order in writing, fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility;

satisfied. The Due Process Clause of the Fourteenth Amendment requires that a State use fair procedures in the administration and enforcement of all kinds of regulations. *Williamson County Regional Planning Commission, et al v. Hamilton Bank of Johnson City*, 473 U.S. 172, 205 (1985). The TRA has granted workshops, opportunities to file comments, allowed the parties to discuss the regulations and included provisions in the regulations that specifically address due process requirements. The rulemaking and regulations concerning telephone service providers adequately satisfy due process.

Furthermore, the rulemaking satisfies substantive due process. For state action to be a violation of the requirements of substantive due process, there must be a gross abuse of governmental authority because the conduct by the governmental authority was "arbitrary" and "outrageous". . . *Natale v. Town of Ridgefield*, 170 F.3d 258, 262-63 (2d Cir. 1999). In *Natale*, the Court was obligated to charge the jury that the plaintiffs could not prevail unless the jury was persuaded that the conduct of the defendants in denying the permits was so outrageously arbitrary as to constitute a gross abuse of governmental authority. In this case, the proposed rules promulgated by the TRA do not constitute a gross abuse of governmental authority because they are not outrageously arbitrary.

Any arguments concerning due process are unfounded since there is substantial evidence warranting a rulemaking by the Tennessee Regulatory Authority. The established principle in reviewing the findings of administrative boards is whether there is substantial evidence to sustain the action undertaken by the administrative agency. *Ohio Valley Water Co. v. Ben Avon Borough*, 253 U.S. 287, 297 (1920). In *Ohio Valley*, the Court rejected the notion that the valuation of their property was so low that the rate based on that valuation would deprive them of property without due process of law because there was substantial evidence to sustain the order. In this matter, a review of the Federal Communications Commission's ARMIS data, as well as the TRA's own service standard records on Tennessee telephone providers indicates there is substantial evidence that the overall quality of

telephone service has decreased.[2] Also, the current rules have been in effect for over twenty-five (25) years and the industry has not complied with the current rules in effect. The rulemaking docket is proper and can be sustained based on the decline in service quality and insufficiency of the current rules. Therefore, the rules are necessary based on substantial evidence.

D. The TRA Has the Statutory Authority to Control All Property and Property Rights of Telephone Service Providers and the Provisions of this Rulemaking Are Not Confiscatory

The General Assembly granted the TRA the authority to control the property and property rights of all public utilities. The TRA has the authority under the statute to **"control"** all public utilities, including their property and property rights. TENN. CODE ANN. § 65-4-104. Further, the Authority has the power to effectively govern and control the public utilities placed under its jurisdiction and any doubt as to whether these service standards exceed the minimum shall be resolved in favor of the existence of the power that has been confirmed by the General Assembly upon the TRA. *Consumer Advocate v. Greer*, 967 S.W. 2d 759, 761-62 (1998). The service standards do not raise confiscatory concerns because the exercise of control of property or property rights by the TRA is permissible under the statutory mandate.

In addition, the rules cannot be deemed confiscatory because telephone service providers have a fair opportunity to present the issues to a judicial tribunal for a determination as to both law and facts and have been afforded due process. In order to demonstrate that a practice is confiscatory, the party must present the issues to a judicial tribunal for a determination as to both law and facts and that there is no conflict with the due process clause. *Ohio Valley Water Co. V. Ben Avon Borough*, 253 U.S. at 289 (1920). The parties can seek recourse concerning actions of the against them by the TRA under the Administrative Procedures Act ("APA").

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[2] The industry was aware of this data. BellSouth's comments dated October 26, 2001 reflect the ARMIS data. The Comments filed by the Office of the Attorney General dealt with ARMIS data in depth.

Even if the due process protections provided in the QSMs are construed as insufficient, an aggrieved party can still obtain adequate due process protection and judicial review under the APA. Tennessee law provides that the relief available subsequent to the administrative agency appeal is review by the Court of Appeals. An administrative agency's decision can be subject to judicial review through a writ of certiori from a state appellate court. *Wax 'N Works v. City of St. Paul*, 213 F.3d 1016, 1020 (8th Cir. 2000).

The APA provides an adequate remedy at law. TENN. CODE ANN. § 4-5-322(h) allows judicial review to the Court of Appeals. The Tennessee Court of Appeals may decide the following as related to a state agency:

> The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of the statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
> (5) Unsupported by evidence which is both substantial and material in the light of the entire record.

Further, the Supreme Court has stated that in the event there are post-deprivation remedies, they are deemed to satisfy due process. *Hudson v Palmer*, 468 U.S. 517, 530 (1984).

E. The Regulation of Telephone Service Providers by the TRA is Authorized Because the General Assembly Granted the TRA Statutory Authority and the Rulemaking Constitutes a Legitimate Exercise of the States Police Power

The Tennessee Regulatory Authority may promulgate rules under its statutory authority granted by the General Assembly of the State of Tennessee. The General Assembly may mandate to state agencies to effectuate policies, procedures, rules, etc. to carry out the states exercise of their police powers for the welfare of the people as provided in the United States Constitution. The United States Constitution grants to states a general police power for the advancement of health, safety and welfare of

the people. U.S. CONST. amend. X. Through the power conferred upon the State of Tennessee to enact legislation and the federal grant to states of their general police power, the TRA's rulemaking serves as a legitimate exercise of the States police power to advance the welfare of the citizens of the State of Tennessee.

F. The ARMIS Data is Proper to Illustrate Service Quality of the Telephone Service Providers in Tennessee and Directly Corresponds to this Rulemaking Docket

The Consumer Advocate and Protection Division previously filed 18 exhibits in this docket concerning service quality in the State of Tennessee. This data was drawn from the Federal Communications Commission's ("FCC") Automated Management Reporting Information System ("ARMIS") data on telephone service quality.[3] The data provided is reported by the telephone service providers and gives pertinent information concerning service quality. It provides an overview of the industry's performance in Tennessee as an aggregate, as well as how that aggregate performance compares to other states around the country.

The following example illustrates how telephone service quality has declined. In 1994, the average installation period for residential customers was .1 day. In 2000, the average installation time was 1.6 days. In the proposed draft, the requirement of an average installation interval time of three (3) days, allows ample time for installation, especially in view of the ARMIS data. Also, since the proposed service standards allow a margin of 95% of the commitments, the telephone service providers have an opportunity to account for those instances when they are unable to meet their installation dates and gives them sufficient flexibility to satisfy the service standards.

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[3] The Automated Reporting Management Information System (ARMIS) began in 1987 and was used for the collection of financial and operational data from the largest carriers. Several additional ARMIS reports were added in 1991 to collect service quality and network infrastructure information from the local exchange carriers that were subject to price cap regulations in 1992 for collecting the statistics that was previously included in Form M. In 1995, monitoring video dial tone investment, expense and revenue data was added. (The video dial tone reporting requirement was eliminated by the Telecommunications Act of 1996.) Today, ARMIS consists of ten public reports. *See* http://www.fcc.gov/ccb/armis/

G. Establishment of Telephone Service Regulations Do Not Constitute Arbitrary Action by the Tennessee Regulatory Authority

The proposed rules for telephone service providers that have been promulgated by the TRA are not arbitrary. Three primary factors when determining whether an administrative agency's action is arbitrary are (1) whether the agency acted within the constraints of its statutory powers or whether it exceeded them; (2) the agency's procedures concerning whether the party was afforded procedural due process; and (3) a determination of whether the agency's action is supported by substantial evidence. *Natural Resources and Environmental Protection Cabinet v. Kentucky Harlan Coal Co., Inc.*, 870 S.W.2d 421, 427 (1993). In *Natural Resources and Environmental Protection Cabinet*, the court held that a $16,900 penalty for violation of a regulation concerning dumping of waste rock was not arbitrary because it was based upon substantial evidence. Further, there were statutory powers conferred on the administrative agency allowing them to impose the penalty. Similarly in this docket, the TRA has the statutory authority to impose penalties for violations of rules and regulations, the parties have been afforded procedural due process and substantial evidence exists that supports the TRA's action in this rulemaking. Based on these factors, the measures taken in this rulemaking are not arbitrary.

The above analysis concerning arbitrariness can also be appropriately extended to assess whether the QSMs are arbitrary. Based on the test presented in *Natural Resources and Environmental Protection Cabinet* concerning arbitrariness, the QSMs are not arbitrary because (1) the TRA has the statutory authority to promulgate rules and regulations as provided in the statutes; (2) there is substantial evidence that the QSMs are needed because service quality has declined since 1995[4]; and (3) the TRA has provided adequate procedures that have afforded the parties procedural due process throughout the

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[4] The industry's focus on the data from 2001 is significant. However, the industry's conclusion is counterintuitive. The obvious inference to be drawn from improvements in service quality since September 2000 is that the prospect of revised rules has positively affected the industry's performance. The improved service quality in 2001 is a clear marker that the service standards do impact service quality.

rulemaking and through special provisions in the QSMs that allow a party to petition for a waiver or variance.

In addition, TRA's rulemaking in this matter is not a gross abuse of governmental authority and therefore, it is not arbitrary. As previously stated, the conduct must be so outrageously arbitrary as to constitute a gross abuse of governmental authority. *Natale v. Town of Ridgefield*, 170 F.3d 258, 262-63 (2d Cir. 1999). The TRA has been granted the statutory authority to establish rules concerning public utilities and the proposed rules are not outrageous and are not a gross abuse of governmental authority.

H. Issuance of Credits to Consumers Under the Quality Service Mechanisms of the Proposed Regulations for Telephone Service Providers Are Not Confiscatory

Any claim that the credits to consumers are confiscatory is without merit because there must be clear and convincing proof that the imposition of credits would yield a lower rate of return for the telephone service provider. First, the burden is on the party claiming that credit is confiscatory to demonstrate that covering the service and awarding credits when a violation occurs will result in a less than reasonable rate of return on the value of the property used, at the time it is being used, for that service. Also, the proof must be clear and convincing that the enforcement measure would result in lower amounts that yield a low rate of return that is reasonable. *American Toll Bridge Co. V. Railroad Commission of California*, 307 U.S. 486, 495-96 (1939). The court stated that merely claiming that enforcement measure will deprive party of their property without due process of law is insufficient. Issuing credits to consumers under the QSMs are not confiscatory and there are no confiscatory issues since no clear and convincing evidence has been provided showing that there will be or has been a deprivation of a reasonable rate of return.

Secondly, issuing a credit to consumers for inadequate or lack of telephone services does not constitute a confiscation. The term simply does not apply to this situation. First, Black's Law Dictionary defines confiscation (adj. - confiscatory) as a seizure of property by an authority without compensation and due process. BLACK'S LAW DICTIONARY 299 (6th ed. 1990).

Since the TRA has the authority to regulate telephone service providers and can impose fines, penalties or refunds, the nominal credits to customers that telephone service providers are required to pay under the QSMs and adequate due process granted to the parties in this rulemaking have established that the proposed rules are not confiscatory. In those cases where courts have ruled in favor of public utilities and held that rates prescribed were confiscatory and unfair have evaluated the amount and intent of the penalty and whether due process was provided. *St. Louis, Iron Mountain & Southern Railway Co. v. Williams*, 251 U.S. 63, 65 (1919). In *St. Louis, Iron Mountain,* the court stated that when a statute has been determined to be valid or has not been challenged concerning authority to regulate an industry, imposition of substantial penalties to enforce adherence to rates is permitted. The credits are not income for the State of Tennessee or the TRA and due process has been satisfied.

I. Incumbent Local Exchange Carriers That Elect to be Regulated Under a Price Regulation Plan Are Statutorily Mandated to Provide Service Quality At the Minimum Level That Was Being Provided on June 6, 1995

The Incumbent Local Exchange Carriers ("ILECs") have not complied with the statutory mandate to provide the minimum level of service quality that was provided on June 6, 1995. The General Assembly stated that ILECs must provide, at a minimum, the same level of service quality that was being provided on June 6, 1995. TENN. CODE ANN. § 65-5-208(a)(1). The plain language of the statute says that service quality by any company electing to be regulated under a price regulation plan must be the minimum level of quality being provided on June 6, 1995.

TENN. CODE ANN. § 65-5-208(a)(1) does not establish merely a standard of the level of service that must be satisfied. If it was merely a standard, it would ignore improvements in quality resulting from advances in technology, economies of scale, and other developments arising subsequent to June 6, 1995. While these improvements may be more common place with regard to "non-basic services" (defined as other than basic services at TENN. CODE ANN. § 65-5-208(a)(2)) in emerging technological areas of telecommunication services it cannot be discounted that usually improvements yield better

quality of service for basic service. The Attorney General submits it is in this context that a minimum was identified so as to not exclude improvements in the quality of basic service due to post-June 6, 1995 developments and allows for further increases in quality that would result. Additionally, the TRA as the regulator of ILECs is conferred the power to make a determination of the level of service quality necessary by implication from the previously-quoted section of the statute.

BellSouth submits that the quoted language "at a minimum" sets the standard at service quality as of June 6, 1995 and that the general statutory scheme supports its position. However, TENN. CODE ANN. § 65-5-209 looks to the 1995 rate as a premise, and it provides only a limited mechanism - basically inflation - for a price regulated entity to increase those rates. The argument that because there is virtually no room for price increases, there can be no improvement of service is an incorrect assertion.[5] The problem with this argument is that it assumes improvements in quality of service necessarily increase costs and thus, warrant rate increases. Generally, increases in quality that arise through technological advances or through other efficiencies are more likely to result in cost savings to the ILECs. Thus, in certain situations there may be an improvement in the quality of service without the need to increase rates. However, the limit on rate increases should not translate into the lack of a need or a limit on imposing service quality regulations. The statutory framework does not support the proposition that June 6, 1995 service levels are the standard and additional standards or higher levels of service quality cannot be imposed. Rather, the General Assembly, in choosing the phrase "at a minimum," anticipated the ILECs would increase service quality and the minimum requirement would be irrelevant.

If there is ambiguity concerning the statute and the power of the TRA to increase or add additional service quality regulations, the legislature has stated that it shall be resolved in favor of the existence of the power by the TRA. TENN. CODE ANN. § 65-4-106 provides that where there is any

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[5] Page 28 of the Transcript of the May 7, 2002 Directors' Conference.

doubt as to existence or extent of power conferred on the authority it shall be resolved in favor of the existence of the power so that the authority may effectively govern and control the public utilities placed under its jurisdiction by the chapter. Therefore, it is irrelevant whether there are minimum standards imposed by the legislature that are the standard or whether the service quality in effect in 1995 is to be construed as the minimum. Ultimately, the TRA has the delegated power, jurisdiction and authority to establish any rules with respect to telephone service providers.

J. TENN. CODE ANN. § 65-5-208(a)(1) Uses Language "at a minimum" and Does Not Restrict or Prevent the TRA from Imposing a Higher Standard for Service Quality Than in Existence on June 6, 1995

The statute states that service quality shall be "at a minimum" of that existing on June 6, 1995 and empowers the TRA to establish higher standards for service quality for the provision of basic local exchange telephone services provided by an incumbent local exchange telephone company. Essentially, this merely establishes a regulatory floor. The language does not limit or prohibit the TRA from establishing additional standards to increase service quality. The TRA is not barred from increasing service quality through the promulgation of rules. Since the industry failed to comply with the minimum standard of quality established on June 6, 1995, it has become necessary for the promulgation of meaningful regulations that provide for the improvement of service quality.

K. There is No Conflict Between Attorney General's Opinion 01-115 and the Regulations for Telephone Service Providers As Asserted by the Industry at the May 7, 2002 Authority Conference

During the Director's Conference of May 7, 2002, the Industry introduced a theory that Attorney General's Opinion 01-115 (hereinafter "Opinion") and the "soft dial tone" emergency provisions of the proposed draft of the service standards conflict. This conclusion is incorrect because the Opinion discusses the constitutionality of toll-free service for intra-county calls and concluded that the statute was constitutional with the exception of when a county is divided by LATA lines. The issue in the Opinion dealt with whether an intra-county call constituted as a long distance service and billable. The

service standards concern providing a "soft dial tone" for emergency measures to consumers whereas the opinion deals with the intra-county toll-free service. The service standards address a consumer's ability to make a 911 call. A 911 call is a public service and not a billable call. To characterize an emergency service as potentially billable is extravagant.

L. Specific Provisions of the Regulations for Telephone Service Providers Are Imperative In Order to Protect Consumers in the State of Tennessee

The regulations concerning the credits for service outages and delayed installations are necessary and proper. According to the FCC's ARMIS data, the percentage of installation commitments that were not met for the years 1993-2000 have substantially increased in both residential and business installations. Since there has been inconsistent performance by telephone service providers in satisfying installation commitments, it is crucial that the rules address this problem and that there are specific regulations addressing this looming problem. The rules need to provide an effective deterrent to telephone service providers so that they satisfy their installation commitments in a timely manner. It is the consumer who suffers when telephone companies fail to keep their promise to install or repair service by a certain date. By requiring telecommunications service providers to provide reasonable refunds to customers for failure to meet their installation commitments, the proposed rules provide an adequate incentive for the industry, as a whole, to take affirmative and remedial actions to resolve the problem. A customer should be entitled to a refund when he/she is not able to use their telephone when a telephone service provider fails to install service or repair telephone service within a reasonable time. Those industry members that have consistently failed to meet the installation time periods and have had lengthy delays in installation of new service have had several years to correct the deficiency in their operations.

Also, the QSMs are essential and must be included in the regulations presented for approval to the TRA Directors. This section contains appropriate sanctions for telephone service providers that consistently provide inadequate service and violate the regulations. This provides an incentive for

companies to be conscious and aware of the quality of telephone service that they provide and that they provide such service continuously and consistently.

Furthermore, eligibility requirements for Lifeline and Link-up are also necessary in the service standards. It is necessary to have a broad definition concerning qualification for the program. It is not unusual to have such broad provisions and both Kentucky and Florida also have similar broad provisions concerning Lifeline and Link-up. Tennessee's low-income consumers should have the same opportunities for telephone assistance that the citizens of Kentucky and Florida. In addition, customers need to have an adequate opportunity to make alternate arrangements concerning their telephone service when disconnected. Most individuals on Lifeline assistance are at lower income levels and do not have the disposable income to quickly make alternative arrangements for their telephone service and pay the required deposit. As a result, they will not have telephone service because they were not given enough time to make other arrangements. It is also reasonable to require telephone companies to inform new customers at the time of the initial request for telephone service about the availability of telephone assistance programs. It is not uncommon for telephone companies to market additional services when customers initially request basic telephone service. The additional disclosure requirement about Lifeline and Link-up will better inform telephone customers about what options exist for telephone service. This provision will also help address the legislative concern that citizens of Tennessee are unaware of these programs.

M. The TRA Has the Authority to Impose a Series of Credits for Violations of the Quality Service Mechanisms Promulgated in the New Rules and They Are Consistent with Due Process Considerations

First, the TRA and its predecessor, the Public Service Commission, have engaged in a long standing process of allowing customers to be compensated for service problems through credits on their bill. Chapter 1220-4-2-.10(2). This process dates back to 1974 and the particular rule involved was certified having passed the scrutiny of the Office of the Attorney General. Such an approach, through

the QSMs, is consistent with this long-standing process.

Second, any due process concerns are more than adequately addressed. First, the Eligible Telecommunication Companies ("ETCs") are participating in this rulemaking process. Second, the consequences of the QSMs do not begin to apply until sixty days following the third month that the respective ETC fails to meet the standards contained in Chapter 1220-4-2-.16(2)(b), (c), (e), (f), (g), (h), or (i). Consequently, the ETCs have more than three months to get their "house in order."

Finally, 1220-4-2-.17(7) provides due process protections in the form of a procedure whereby the respective ETC can apply for a waiver or variance from the QSMs for good cause prior to the applicability of the QSMs. The application for this process may be filed thirty days after the end of the three month period whereas the QSMs do not become operative until within sixty days after the three month period. Accordingly, not only do ETCs have notice, but also an established procedure to procure a waiver prior to the effectiveness of any of the credit provisions.

CONCLUSION

The Office of the Attorney General wishes to commend the TRA for their earnest efforts in this rulemaking proceeding. The passage of time has made the current standards stale and in dire need of revision. We appreciate the opportunity to participate in this rulemaking. The Tennessee Attorney General's Office supports the establishment of the service standards. It is imperative that consumers receive quality telephone service in the State of Tennessee and the measures undertaken in this rulemaking proceeding serve to protect consumers and ensure that they receive an adequate level of service in the years to come. The proposed draft rules issued provide safeguards that are essential and will be a sound basis for the level of telephone service quality that each consumer is entitled to in the State of Tennessee.

The Attorney General urges the TRA to expeditiously approve and implement the May 2,

2002 proposed rules for telephone service providers.

RESPECTFULLY SUBMITTED,

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Tennessee Attorney General

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May 17, 2002
55003

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2002, a copy of the foregoing document was served on the parties of record, via regular mail:

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