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VIA HAND DELIVERY

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

Re: Request for Information Concerning Interconnection Agreements

Approval of the Interconnection Agreement and Amendment Thereto Negotiated by BellSouth Telecommunications, Inc. and Powertel, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (Docket No. 01-00975)

Petition for Approval of Resale Agreement Negotiated by BellSouth Telecommunications, Inc. and Appliance & TV Rentals, Inc. d/b/a Fones-4-U Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (Docket No. 01-01057)

Petition for Approval of Resale Agreement Negotiated by BellSouth Telecommunications, Inc. and Annox, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (Docket No. 01-01027)

Approval of the Amendment to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and Memphis Networx Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996 (Docket No. 01-00806)

Dear Mr. Waddell:

As you know, the Tennessee Regulatory Authority ("TRA" or "Authority") has recently communicated to BellSouth, in the context of its approval of various interconnection agreements, its request that the parties to those agreements identify certain issues in those agreements that are "inconsistent" with the agency's rulings in other proceedings and that "the parties to such agreements begin providing such information upon filing interconnection and/or resale

agreements for approval."[1] BellSouth respectfully urges the Authority to reconsider this request for the reasons discussed below.

BellSouth understands the Authority to be directing that parties to interconnection agreements document each provision in those agreements that is inconsistent with any order ever entered by the TRA and provide the information to the TRA when the agreements are submitted for approval. This requirement constitutes an agency statement of general applicability implementing policy, procedures, or practice requirements. Accordingly, the requirement is a "rule" pursuant to both T.C.A. § 4-5-102 and § 65-2-102 and must be promulgated pursuant to rulemaking procedures prescribed by Tennessee law. In the context of a rulemaking procedure, BellSouth would urge that no such rule be adopted given that any such rule goes beyond the criteria established by the Telecommunications Act for approval of interconnection agreements, would be inconsistent with the Act's preference for negotiated agreements, would be unduly burdensome, and would delay the submission and approval of interconnection agreements in Tennessee.

It is well recognized that, while administrative agencies function in both a judicial and legislative role, all agency action must constitute either rulemaking or adjudication. This division underlies the structure of the federal Administrative Procedures Act. *See* 51 U.S.C. 553, 554. Consistent with this concept, the Tennessee enactment of the Uniform Administrative Procedures Act is also divided into two categories, rulemaking and contested cases. *See* T.C.A. § 4-5-101, *et seq.* In the case of *Tennessee Cable Television Association, et al. v. Tennessee Public Service Commission, et al.*, 844 S.W.2d 151 (Tenn. App. 1992), the Tennessee Court of Appeals described and distinguished the powers of an administrative agency under Tennessee law to engage in either rulemaking or adjudicatory authority. The court explained that rulemaking is essentially a legislative function, and it is the "process by which an agency lays down new prescriptions to govern the future conduct of those subject to its authority." *Id.* at 161. The Tennessee Court of Appeals contrasted this power with adjudication, which "on the other hand involves individual rights or duties and the determination of disputed factual issues in a particular case." *Id.* In evaluating whether the agency should utilize its power through rulemaking rather than through adjudication, the Tennessee Court of Appeals considered both federal and state court authority and held that "an agency must proceed by rulemaking if its seeks

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[1] BellSouth received virtually identical letters with respect to Powertel, Annox and Appliance & TV Rentals d/b/a Fones-4-U. BellSouth did not receive such a letter with respect to the Memphis Networx Interconnection Agreement. The Authority's instruction came in the form of an oral statement during the course of a Directors' Conference on Wednesday, December 5, 2001. BellSouth understands the instructions to mirror that instruction which was later communicated to BellSouth by letters from the Executive Secretary requesting the same information.

to change the law and establish rules of widespread application." *Id.* at 162 (citing *Ford Motor Company v. FTC*, 673 F.2d 1008, 1009 (9th Cir. 1981), *cert. denied* 459 U.S. 999 (1982)). Consistent with this holding, the Court of Appeals went on to cite several state court opinions that "deemed rulemaking to be mandatory when the agency's action is concerned with broad issues that affect a large segment of a regulated industry or the general public." *Id.* (citing *Homebuilders Association of Metro Denver v. Public Utilities Commission*, 720 P.2d 552, 561-62 (Col. 1986); *Aluli v. Lewen*, 828 P.2d 802, 804 (Hawaii 1992); *CBS, Inc. v. Comptroller of the Treasury*, 575 A.2d 324, 328 (Md. 1990); *Southwestern Bell Telephone Company v. Public Utilities Commission*, 745 S.W.2d 918, 927 (Tex. Ct. App. 1988)). The Court went on to cite factors indicting that agency action was in the nature of rulemaking established by the Supreme Court of New Jersey in the case of *Metromedia, Inc. v. Director, Division of Taxation*, 478 A.2d 742, 751 (N.J. 1984), including actions "intended to have wide coverage encompassing a large segment of the regulated or general public, rather than an individual or a narrow select group" and actions reflecting "an administrative policy that (i) was not previously expressed in any official and explicit agency determination, adjudication or rule, or (ii) constitutes a material and significant change from a clear past agency position on the identical subject matter." *Id.* at 163. Applying these cases to Tennessee law, the Tennessee Court of Appeals noted "the statutory rulemaking procedures are mandatory with regard to the commission's policy statements that are not specifically exempted in Tennessee Code Annotated §§ 4-5-102(10), 65-2-101(2), and 65-2-102. Thus, the Commission must substantially comply with the Uniform Administrative Procedure Act's requirements when it promulgates a rule." *Id.* at 163. Based on the statutory definition, both in the Uniform Administrative Procedure Act and in T.C.A. Title 65, Chapter 2, *Procedure Before the Tennessee Regulatory Authority,* the definition of "rule" clearly encompasses the requirement at issue in this case that parties to interconnection agreements must submit a statement documenting the fashion in which that interconnection agreement varies from every order ever entered by the TRA.

The Authority has not explicitly stated whether it intends to condition approval of the interconnection agreements on the compliance with this reporting requirement, or whether, instead, the Authority merely seeks to require the information be provided but not to condition approval on the provision of such information. In either instance, the requirement is a "statement of general applicability that implements or prescribes law or policy or describes the procedures or practice requirements of any agency." T.C.A. § 4-5-102(10). Similarly, the requirement is a "regulation or statement of policy or interpretation of general application and future effect" as defined in 65-2-101(3). Moreover, the Authority has already promulgated a rule applying its procedural rules to arbitration proceedings. *See* T.R.A. Rule 1220-1-1-.02. Given that none of the procedural rules currently include this requirement, the imposition of this requirement constitutes an amendment to the existing rules of practice regarding arbitration proceedings. *See* T.C.A. § 65-2-101(3), which specifically references that a rule includes "the amendment or repeal" of another rule.

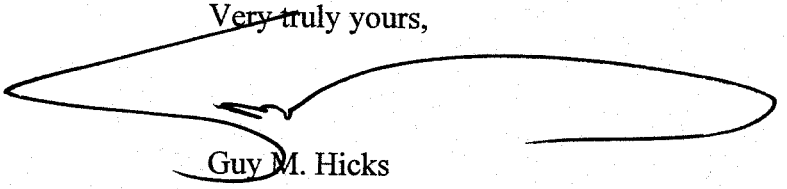
In short, under Tennessee law, an administrative agency must function by either adjudication or rulemaking. The TRA, while vested with the dual role of promulgating rules through rulemaking and then adjudicating the enforcement of such rules, must act at all times in one of these two capacities. In the present case, the TRA appears to be acting in its capacity to prescribe new requirements in order to implement policy, which is a rulemaking process requiring the Authority to comply with rulemaking procedures. In connection with an interconnection agreement, the Authority could also act in its adjudicatory capacity to apply the rules established by the federal Telecommunications Act for approving interconnection agreements. In that capacity, however, the TRA must apply only those standards that have already been promulgated. Pursuant to Section 252 of the Telecommunications Act, the Authority is only permitted to reject an interconnection agreement on the basis of those limited grounds for rejection established in Section 252(e)(2). Accordingly, it is clear that by imposing an additional requirement as a condition of approval for an interconnection agreement, the Authority must be engaging in its rulemaking capacity.

BellSouth does not raise the requirement of rulemaking procedures as a merely technical or legalistic point. Rather, the requirement announced by the Authority in its several letters and communications to BellSouth with respect to the provision of such information on an ongoing and regular basis represents a substantial burden. Absent this requirement, BellSouth would have no business purpose to produce the information requested, which would involve comparison of the interconnection agreement with an always-growing body of hundreds of orders, many of which address issues that may be mooted or altered with changes and developments in technology. Moreover, it is unclear from the several letters discussing the requirement whether the burden of this requirement is intended to fall solely upon BellSouth as opposed to the other party to the interconnection agreement at issue and whether the requirement is intended to be equally applicable to Sprint United and other companies submitting interconnection agreements to the TRA. Compliance with the request for this information on an ongoing basis will require the investment of substantial time to assemble this information, which will in turn inevitably affect the time required to submit, approve and implement a new interconnection agreement. Also, the parties to an interconnection agreement may disagree on whether certain orders are even applicable to the agreement and whether the agreement varies from those orders. This will create a dispute where none presently exists. All of these issues -- both objections and inquiries regarding the intended operation of the rule -- would be raised in the event of a rulemaking procedure. Accordingly, BellSouth does not raise the lack of rulemaking procedure merely as a technical point. Instead, BellSouth would, in the event of a rulemaking procedure to implement this requirement, actively pursue the revision of the rule to address these various issues and such further clarification regarding the intended operation of the rule. In the present case, however, in the absence of a rulemaking procedure, none of these issues have been addressed by the agency. To the extent that the rule is not intended as a

condition of approval of an interconnection agreement, but rather as a procedural requirement, BellSouth would respectfully assert that the rule would impose needless burden on the parties, who are well able to refer to the TRA's website to review TRA orders prior to engaging in negotiations. Moreover, the rule requires the submission of information that appears to be irrelevant to the criteria for rejection of a negotiated agreement.

For the reasons articulated above, BellSouth objects to the requirement that it provide the information sought and requests that, if the Authority intends to impose such a requirement, that it institute a rulemaking procedure in which to promulgate such a rule.

Very truly yours,



Guy M. Hicks

GMH/jej

cc: Jim Wright

CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2001, a copy of the foregoing document was served on the parties of record, via the method indicated:

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