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May 30, 2003

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VIA HAND DELIVERY

Hon. Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *BellSouth Telecommunications, Inc. Tariff Filing for Contract Service Arrangements*
Docket Nos. 02-00534, 02-00536 through 02-00545, 02-00550 through 02-00561, 02-00571 through 02-00580, 02-00598 through 02-00607, 02-00614, 02-00615, 02-00627 through 02-00632, 02-00656 through 02-00662, 02-00669 through 02-00680

Dear Chairman Kyle:

Enclosed are the original and fourteen copies of BellSouth's Response to Consumer Advocate Division's Motion for Leave to File Supplemental Complaint and Petition to Intervene. Copies of the enclosed are being provided to counsel for the Consumer Advocate.

Cordially,

Joelle Phillips

JJP:ch

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth Telecommunications, Inc. Tariff Filing for Contract Service Arrangements*

Docket Nos. 02-00534, 02-00536 through 02-00545, 02-00550 through 02-00561, 02-00571 through 02-00580, 02-00598 through 02-00607, 02-00614, 02-00615, 02-00627 through 02-00632, 02-00656 through 02-00662, 02-00669 through 02-00680

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO THE CONSUMER ADVOCATE DIVISION'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT AND PETITION TO INTERVENE

BellSouth Telecommunications, Inc. ("BellSouth") files this response to the Consumer Advocate Division's ("Consumer Advocate" or "CAD") *Motion for Leave to File Supplemental Complaint and Petition to Intervene*[1] and respectfully shows the Tennessee Regulatory Authority ("Authority" or "TRA") as follows:

INTRODUCTION

As a practical matter, the Consumer Advocate's petition identifies only one[2] complaint about CSAs, which the CAD characterizes as "unresolved" – the so-called potential anticompetitive effect of termination liability. This issue clearly has been

[1] TRA Rule 1220-1-2-22(2) provides that the Authority may allow amendment or permit additional claims "to further the just, efficient and economical disposition of cases, consistent with the statutory policies governing the Authority."

[2] The CAD's Petition concedes that other issues have been rendered moot by the enactment of Public Chapter 41. The CAD's petition makes various factual allegations that are confusing. Among those is the contention that certain information (such as identity of customers or the terms of their CSAs) have not been identified. This is simply not the case. All 70 of the CSAs to which the petition pertains have been filed with no information regarding rates and terms redacted. While those CSAs originally were filed with names redacted, BellSouth has, subsequent to the original filing, provided the TRA with the customers' names and addresses. In addition, BellSouth has reiterated to the TRA Staff that the CSA contracts may be published, posted to the TRA website, or made public in any way the TRA deems efficient in order to ensure this information is available to the public.

resolved. BellSouth has identified at least 17 dockets[3], 14 pleadings by the CAD, and 61 pleadings by BellSouth that have addressed precisely this same contention. This complaint raises nothing new regarding termination liability, and its restatement of issues that have been fully litigated constitutes an ongoing and needless waste of resources by both the parties and the State. It is difficult to understand what conceivable purpose could be served by duplicating the previous efforts of the Authority and parties on the question of termination liability.

Nevertheless, BellSouth will attempt to succinctly respond, once again, to these familiar assertions.[4]

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[3] *Tariff Filings by BellSouth Telecommunications, Inc. to Offer Contract Service Arrangements* (Tariff Nos. 97-134, 97-135, 97-135, 97-137, 97-138, 97-144, 97-145, 97-146, 97-148, 97-149, 97-152, 97-153, 97-154, 97-163, 97-164, 97-167, 97-169, 97-170, 97-171, 97-172, 97-173, 97-174, 97-186), Docket No. 97-01105; *BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Agreement AL98-2463-00,* Docket No. 98-00430; *BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Agreement SE98-3082-00,* Docket No. 98-00485; *BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Agreement TN98-1491-00,* Docket No. 98-00513; *Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Agreements Filed by BellSouth Telecommunications, Inc. in Tennessee*, Docket No. 98-00559; *BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Agreement TN98-2766-00 for Maximum 13% Discount of Various Services,* Docket No. 99-00210; *BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Agreement TN98-6726-00;* Docket No. 99-00230; *BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Agreement KY98-4958-00 for an 11% Discount of Various Services,* Docket No. 99-00244; *Consumer Advocate Division v. BellSouth Telecommunications, Inc.,* Docket No. 99-00246; *BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Agreement TN98-6303-01,* Docket No. 99-00262; *Petition to Require BellSouth to Appear and Show Cause that Certain Sections of Its General Subscriber Services Tariff and Private Line Services Tariff Do Not Violate Current State and Federal Law*, Docket No. 00-00170; *Proposed Rules for the Provisioning of Tariff Term Plans and Special Contracts,* Docket No. 00-00702; *Complaint of Lexus of Nashville v. BellSouth Telecommunications, Inc.*, Docket No. 00-00814; *BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Agreement TN00-5669-00,* Docket No. 00-00942; *BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Agreement TN00-6830-00,* Docket No. 00-00945; *BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Agreement TN00-7176-00,* Docket No. 00-00946; *BellSouth Telecommunications, Inc.'s Tariff to Offer Contract Service Agreement TN00-8592-00,* Docket No. 00-01015.

[4] Given that much of the CAD's petition covers well-traveled ground, BellSouth has not responded to each numbered paragraph. To the extent any substantive contention in the petition is not specifically addressed here, BellSouth denies such contentions, just as it has denied those contentions in the past.

DISCUSSION AND LEGAL AUTHORITY

I. Contrary to the Position Advanced by the CAD, Termination Liability Clauses Are Legal, and the Authority Need Not Provide a Declaratory Ruling Regarding the Enforceability of Such Clauses as Part of its Regulatory Function.

The Consumer Advocate has, through the 5-year-long process of evaluating CSAs in Tennessee, continually relied upon an inaccurate description of Tennessee law governing contracts that contain liquidated damages clauses. Once again, in this pleading, the CAD ignores ***both*** the teachings of the Tennessee Supreme Court on liquidated damages clauses generally ***and*** the decisions of the TRA on termination liability provisions in the specific context of CSAs. As Bellsouth has explained before, the Consumer Advocate's "concerns" regarding termination liability provisions (specifically, whether such provisions are unenforceable "penalties") are not supported by Tennessee law.

The Supreme Court of Tennessee has answered the question of what constitutes an unenforceable penalty under Tennessee law. In *Guiliano v. Cleo, Inc.*, 995 S.W.2d 88, 1999 WL 439399 (July 28, 1999)(copy attached), the Supreme Court held as a matter of law that a termination liability provision is an unenforceable penalty only "if the provision and the circumstances indicate that the parties intended ***merely*** to penalize for a breach of contract." *Cleo* at *11 (emphasis added). On the other hand, if a termination liability provision "is a reasonable estimate of the damages that would occur from a breach [of the contract], then the provision is normally construed as an enforceable stipulation of liquidated damages."[5] *Cleo* at *9. More specifically, the

[5] The term "liquidated damages" is a legal term which refers to a "sum stipulated and agreed upon by the parties at the time they enter their contract, to be paid to compensate for injuries should a breach occur." *Cleo* at *8.

Supreme Court determined as a matter of law that a termination liability provision that required a party terminating a contract to pay the rate of pay established in the contract for the remaining term of the contract was ***not*** a penalty.

In deciding this controlling rule of law, the Supreme Court recognized that in reviewing termination liability provisions,

> there are two important interests at issue: the freedom of parties to bargain for and agree upon terms such as liquidated damages and the limitations set by public policy. Generally, the parties to a contract are free to agree upon liquidated damages and upon other terms that may not seem desirable or pleasant to outside observers. In that respect, courts should carry out the intention of the parties and the terms bargained for in the contract, unless those terms violate public policy.

Cleo at *10. The Supreme Court acknowledged that parties who agree to termination liability provisions are presumed to have "considered the certainty of liquidated damages to be preferable to the risk of proving actual damages in the event of a breach." *Cleo* at *11. The Supreme Court also acknowledged that termination liability provisions

> permit the parties to allocate business and litigation risks and often serve as part of the contractual bargain. In addition, they lend certainty to the contractual agreement and allow the parties to resolve defaults and other related disputes efficiently, when actual damages are impossible or difficult to measure.

Cleo at *11. The *Cleo* decision, therefore, is firmly grounded in sound public policy as determined by the highest Court in the State of Tennessee. Its holding is even more compelling and logical when applied in the context of CSAs negotiated with ***businesses*** as opposed to individual consumers.

In *Cleo*, the Supreme Court considered an employment contract in which the employer agreed to hire the employee at an annual salary of $103,000 for a three-year term beginning November 1, 1992 and ending October 31, 1995. *Cleo* at *5. The contract provided that if the employer terminated the contract without cause prior to October 31, 1995, it would pay the employee his "then current salary from the date of termination through October 31, 1995."[6] *Cleo* at *5. The employer terminated the contract without cause in December 1994, and during that same month, the employee accepted a job with another company at an annual salary of $110,000 -- $7,000 per year more than the employee earned under the contract the employer had terminated. Consequently, the non-breaching employee faced no significant financial loss as a result of the breach.

The employee sought the damages set forth in the contract (his salary from December 1994 until October 31, 1995), but the employer argued that the termination liability provision was an unenforceable penalty. The employer claimed that the provision had to be construed as a penalty because it required the employer to pay the employee $90,125 plus prejudgment interest even though the employee's actual damages were far less than that amount. Notwithstanding the fact that the non-breaching party's actual loss was substantially smaller than the stipulated amount, the Supreme Court rejected the employer's argument, ruled that the provision was not a penalty, and enforced the provision.

[6]This provision is similar to termination liability provisions requiring a customer who signs a tariffed term contract to pay the monthly rate for the service times the number of months remaining in the term if it terminates the service early. These provisions, commonly known as "total buy outs" require, of course, the payment of much higher termination charges than those provided in BellSouth's tariff and contained in the 70 CSAs now at issue. Accordingly, the finding that these more onerous termination provisions did not violate the law necessarily indicates that the newer, less onerous, provisions are also appropriate under Tennessee law.

In reaching this decision, the Supreme Court made several important observations that are instructive on the issues relating to CSAs. First, the Court explained that under Tennessee law,

> Courts must focus on the intentions of the parties based upon the language in the contract and the circumstances that existed at the time of contract formation. Those circumstances include: whether the liquidated sum was a reasonable estimation of potential damages and whether actual damages were indeterminable or difficult to measure at the time the parties entered into the contract. If the provision satisfies these factors and reflects the parties' intentions to compensate in the event of a breach, then the provision will be upheld as a reasonable agreement for liquidated damages.

Cleo at *11. The Supreme Court then held that the termination provision that required the employer to pay the monthly salary times the number of months remaining in the contract satisfied each of these factors, explaining that:

> Neither the [employee] nor [the employer] had certain knowledge, when forming the contract, that the [employee] would be able to secure other employment in the event that [the employer] terminated his employment without cause. It was within the fair contemplation of the parties that the [employee] might not be able to find a similar professional position at the same salary and that he might suffer damages that would be difficult to prove, including loss of professional status, prestige, and advancement opportunities. The language of [the termination liability provision in the contract] reflects the parties' intentions to compensate and to protect the [employee] against these potential losses in the event of a breach by [the employer].

Cleo at *11. The Supreme Court further held that "the extent of actual damages has no bearing on the [employee's] recovery of liquidated damages under [the termination liability provision]," and it acknowledged that

> the parties themselves were in the best position to know what considerations influenced their bargaining at the time they entered into the contract. While "[t]he bargain may be an unfortunate one for the delinquent party, . . . it is not the duty of the courts of common law to relieve parties from the consequences of their own improvidence."

Cleo at *11.

Accordingly, pursuant to the Tennessee Supreme Court's most recent teaching, a termination liability provision is enforceable if: (1) the actual damages are indeterminable or difficult to measure at the time the contract was formed; and (2) the liquidated sum was a <u>reasonable</u> estimate of the <u>potential</u> damages that could occur upon early termination of the contract. *Cleo* at *11. As the Court of Appeals has noted, "[t]he purpose of assessing damages in a breach of contract suit is to place the plaintiff, as nearly as possible, in the same position he would have had if the contract had been performed. *Wilhite v. Brownsville Concrete Co.*, 798 S.W.2d 772, 775 (Tenn. Ct. App. 1990). Thus when an employer breaches an employment contract, the employee generally is entitled to the rate of pay set forth in the contract for the remaining term of the contract. *See, e.g., Cleo.* In addition to these damages, the party terminating the contract is generally responsible for any costs the non-breaching party incurs as a result of the breach. *See Wilhite*, 798 S.W.2d at 775 (Tenn. Ct. App. 1990)("If the defects in workmanship are so substantial that the performance of the contract made by the defendant is worthless, the contractor must pay the other party the cost of having the job redone."). Thus a termination liability provision that is reasonably related to both the costs and the damages the parties might reasonably anticipate would arise from an early termination of the contract is an enforceable liquidated damage provision, not a penalty. The recovery of discounts provided to the breaching party is clearly related to the rates due under the contract and is clearly a reasonable figure for the parties to use for estimation of damages. Moreover, the amount of damages for breach of contract that would be due upon a business customer's early termination of its CSA also is difficult to measure because it is not known when the breach may occur during the life of the CSA or whether a revenue commitment may have been met at such time.

These very arguments were presented to the TRA in response to the Consumer Advocate's allegations in combined dockets 98-00210 and 98-00244, known to those who follow the continuing CSA-saga as "the Bank and the Store" case. In that case, the CAD raised these very same issues, but did not prevail in its contention that the CSAs at issue had either any anticompetitive effect or contained illegal, invalid liquidated damages provisions. In fact, the TRA considered extensive legal argument relating to Tennessee law on liquidated damages and explicitly held that the CSAs satisfied the requirements of Tennessee law.

While the CAD asserts in its petition that the damages for early termination, without cause, are not difficult to measure at the time of formation of a CSA, ***the TRA explicitly held otherwise when this matter was actually tried***. Specifically, the TRA concluded in Docket Nos. 99-00210, 99-00244, and 98-00559, that the CSAs at issue were valid and the termination liability provision was consistent with *Cleo* "given that the actual damages were difficult to measure at the time the parties entered into the CSA." November 13, 2002 *Order Granting Approval of BellSouth CSA* ("Order") at 10. (Copy attached.)

The fact is that the "concerns" expressed by the Consumer Advocate about termination liability were flatly rejected after a full and fair contested case proceeding. At the conclusion of that process, the TRA entered an order disposing of the same arguments now raised again by the Consumer Advocate. Given the argument in the present petition, it is truly perplexing that the Consumer Advocate failed to appeal that earlier Order. Instead of raising its dissatisfaction with the TRA's conclusion through timely appellate review, the CAD simply continues to raise these same arguments as if the TRA had never ruled on those arguments.

As for Bellsouth, in particular, the TRA has addressed termination liability. Specifically, the TRA has allowed BellSouth's tariff setting forth termination liability provisions to become effective, without opposition or intervention from any party. The fact that this termination liability provision has been tariffed and permitted by the TRA imbues it with unique legal significance – different than the effect of a mere commercial contract that has been neither reviewed nor approved by an agency or a court. Unlike the contract discussed in *Cleo*, BellSouth's tariff has been approved by the TRA, and, as the Court of Appeals has noted,

> [t]he published tariffs of a common carrier are binding upon the carrier and its customers and have the <u>effect of law</u>. The provisions of the tariffs should govern the parties.

GBM Communications, Inc. v. United Inter-Mountain Tel. Co., 723 S.W.2d 109, 112 (Tenn. Ct. App. 1986) (emphasis added). Unless and until they are amended, therefore, BellSouth's tariffed early termination penalties are lawful, and they are not penalties. Had the CAD or any party legitimately believed that the termination liability tariff was inconsistent with Tennessee law, surely such an argument would have been made during the 30-day period prior to effectiveness.

In short, the TRA has resolved the issues raised regarding termination liability. As time passes, and the TRA continues to note the progress of competition in Tennessee, these old contentions (which have never swayed the TRA) become even less persuasive.

II. In its Latest Attack on CSAs, the CAD Fails to Give Due Deference to the Unanimous Vote of Tennessee Legislators Who Enacted Public Chapter 41 in Order to Resolve Questions About CSAs and Speed Delivery of Special Negotiated Discounts to Business Customers.

The CAD's petition complains that BellSouth has failed "to show" that its CSAs do not contain anticompetitive, "invalid" provisions with respect to termination liability. The CAD misses the mark for several reasons.

First, as noted above, as a result of the CAD's continuing anti-CSA campaign, BellSouth has been forced to show the validity of its termination liability clauses through a steady stream of legal briefs for roughly half a decade now. In fact, in the Bank and the Store case, BellSouth prevailed and specifically carried its burden of demonstrating that the termination liability clauses contained in those CSAs "should be upheld as reasonable agreements between the parties." *Order* at 10. Moreover, the TRA expressly held that the CAD and CLECs had failed to provide evidence establishing that the provisions of the CSAs were anticompetitive.

Second, there can be no question that BellSouth's CSAs at issue contain termination provisions that are squarely consistent with BellSouth's tariff, which was subjected to review by the Authority and became effective more than two years ago– with no opposition.

Third, the CAD's crusade against termination liability provisions is marked by its waffling on the issue of such provisions when used by CLECs. Under the CAD's reasoning, new entrants to the market are presumably just as dissuaded by the term commitment to another, more established, CLEC as they are by term commitments to an ILEC. In fact, because there is no sanctioning of (and no tariff governing) these provisions in CLEC CSAs, the risk is far greater. CLECs can, and some currently do, use total "buy out" provisions in their term agreements.

Finally, the CAD's insistence that BellSouth must "show" the validity of the terms contained in its CSAs is inconsistent with the new statute and its requirement that CSAs be "presumed" to be valid.

Under Tennessee law, Tennessee Court have consistently recognized the requirement that statutes must be construed to give the ordinary and natural meaning to words contained in the statute. "When approaching statutory text, courts must also presume that the legislature says in a statute what it means and means in a statute what it says there." *BellSouth Telecommunications v. Greer*, 972 S.W.2d 663,674 (Tenn. App. 1997) (holding that the TRA erred and exceeded its statutory authority when it failed to approve BellSouth's application for a price regulation plan as required by the terms of T.C.A. § 65-5-209(c)). The lesson provided by the overwhelming Tennessee authority regarding statutory construction in the context of regulatory agencies is clear: where statutes plainly direct an action or resolve an issue, an agency errs and will be reversed when it ignores that legislative directive.

The term "presumption" is ordinarily defined as the act of supposing something to be true without proof. Specifically, in the legal context, the term "presumption" means "a legal device which operates in the absence of other proof to require that certain inferences be drawn." *Black's Law Dictionary*, Sixth Edition. Applied in this statute, the term means that the special rates and terms, by operation of the statute, shall[7] be

[7] Tennessee, like most states, has long recognizes the significance of terms like "shall" or "must" appearing in statutes These terms indicate the imposition of a mandatory requirement rather than a merely permissible option. *Stiner v. Powells Valley Hardware Co.,* 75 S.W.2d 406, 408 (Tenn. 1934) (noting that the word "shall" appearing in a statute denotes an imperative).

presumed valid – in other words, the statute establishes the mandatory inference of validity without proof or other process by the TRA.

By urging the TRA to require BellSouth to provide some sort of "showing" or evidence to persuade the TRA that its CSAs are valid, the CAD fails to give due regard for the legislature's direction that CSAs now enjoy a ***presumption*** of validity. Rather than offering an argument consistent with the new law, the CAD's petition is consistent only with the CAD's lack of support for, and policy-based opposition to, the new law. The CAD actively lobbied against this legislation, raising the same concerns to the legislators that it now presents to the TRA, in the form of letters to the committees considering the legislation in both houses. Notwithstanding the letters and one-on-one lobbying, presented on behalf of the CAD, the legislators chose to proceed with the new law and, in fact, passed the bill on unanimous votes in both houses. In short, the General Assembly was not persuaded that CSAs in general, or termination liability provisions specifically, represent any threat to competition in Tennessee. Thus, irrespective of the CAD's "concerns" in this regard, the CAD failed to present sufficient evidence to support its complaints in the Bank and the Store case and also failed to convince even a single member of the General Assembly of its position.[8]

III. <u>There Is No Retroactivity Issue to be Resolved.</u>

The CAD requests in its petition that the TRA explain how approval of BellSouth's CSAs may raise any issue of retroactive application of the statute. Obviously, the TRA is under no obligation to respond to a request for a legal

[8] The CAD's petition goes so far as to characterize the new law as inconsistent with federal law and even permitting "unjust" and "unfair" conduct prohibited by federal law. The General Assembly disagreed, and the CAD's characterization is nothing more than its own unsupported opinion, expressed in a tone that lacks respect for the decision of the legislators.

explanation from the CAD, and the CAD's request for such an advisory opinion should be rejected. If the CAD believes that a legal issue is presented, then the CAD should explain the basis for its concerns rather than simply assigning the task of that explanation and exposition of the matter to the TRA.

The fact is that no improper retroactive application is implicated in this case. The CAD itself agreed to have these very CSAs made effective subject to the "retroactive" application of any rule promulgated in the TRA's rulemaking docket. Applying the new statute to the CSAs presents no issue that would not have been equally presented by the application of a rule promulgated after the CSAs were negotiated.[9]

IV. __The CAD Has Presented No Argument Sufficient to Justify Further Proceedings on this Matter.__

Reams of paper and countless hours of work by both regulators and parties have been devoted to the issues surrounding CSAs. The TRA has given all parties concerned about this issue ample chance to make their cases in support of their contentions. It is important to note that, while the theory of potential discrimination or anti-competitive effects of CSAs has been repeatedly raised by the Consumer Advocate, there has ***never*** been a case at the TRA in which any ***actual*** discrimination, anti-competitive effect, or, for that matter, any injury of any kind relating to a CSA, has been demonstrated. This has not been for a lack of a willing forum. The TRA has literally devoted years of time and immeasurable effort to give any party the opportunity to demonstrate that these theoretical concerns were actually having any real effect. No party has ever been able to meet that burden. There has been no showing that any

[9] Alternatively, the TRA has the authority to approve the CSAs that have been allowed to go into effect under the Authority's existing rule governing special contracts.

party in Tennessee has ever been the victim of price discrimination or other injury related to a CSA.

The Consumer Advocate's petition raises the obvious question – What more would the CAD have the TRA do to resolve these concerns? Must the parties have the Bank and Store case again? Must parties invest their resources to propound and respond to discovery on these same issues all over again? The fact is that the Consumer Advocate has never proven that the concerns described yet again in this petition can be supported by any actual fact (notwithstanding the opportunity to do so in at least 17 dockets). At some point this process just must stop.

Even the "relief" apparently sought in the petition is nonspecific. The CAD urges the TRA to "investigate" CSAs. Obviously, the CAD does not have the authority to direct the Authority to "investigate" any area. Moreover, the Authority has already exhaustively investigated this area for years. The fact is that the CAD simply doesn't like the TRA's conclusions (or, for that matter, the conclusions of the General Assembly).

V. The CAD Relies Upon Misleading, Inaccurate Information, Which the CAD Knows or Should Know is Outdated and Incorrect.

In an attempt to underplay the significant competition for business customers in Tennessee and create an argument relating to "market dominance", the CAD relies upon an article, which appeared in the trade publication *Telephony*,[10] for the proposition that competing carriers' market share in Tennessee is 7% as of June 2002. *See* Petition at 7, footnote 3. This assertion is simply bewildering.

[10] *Telephony* is a trade publication, produced by PRIMEDIA Business Magazines & Media, located in Overland Park, KS. This publication, which contains news articles and advertising, is not a scholarly journal or academic treatise.

As the CAD well knows, the market share enjoyed by CLECs for ***business*** customers (the only customers at issue regarding CSAs) is much higher that the 7% figure it cites. (The article does not distinguish between business and residential numbers.) Moreover, one need not resort to trade publication articles to quantify this competition. In its October 2002 *Evaluation of BellSouth's Application for 271 Relief,* the United States Department of Justice discussed the actual CLEC market presence in Tennessee. As the Department of Justice noted in that evaluation, CLECs enjoyed, as of July 2002, 11.6% of total lines – but more importantly, ***those CLECs had obtained 30.1% of business lines***. *See Evaluation of the United States Department of Justice*, Oct. 25, 2002 at 5. Moreover, BellSouth's contentions regarding CLEC market share for business customers were not seriously contested in the FCC 271 proceedings by any party, including the CAD.

The CAD's choice to resort to a pre-271-relief trade publication article that does not distinguish between business and residential markets in order to describe the CLEC share of the business market in Tennessee, at best, creates an inaccurate and misleading picture. The CAD should be well aware that the TRA and FCC have recognized a far higher level of competition for Tennessee business customers. In fact, the 7% figure is less than one-fourth of the business market share recognized by the Department of Justice.

Given the CAD's participation in the 271 case, it is difficult to understand how this assertion could find its way into the CAD's pleading.

CONCLUSION

CSAs have always been a proper method of delivering the benefits of competition to customers. Even when the law formerly required advance approval of CSAs and applied the prohibition against unjust discrimination in this context, CSAs were proper because the competitive realities of competition justified those CSAs. The new law, which provides for presumptive validity of CSAs and which removes any requirement relating to price discrimination, is a positive step toward a less regulated and even more competitive market in Tennessee. The CAD urges the TRA to continue to entertain old previously-resolved concerns regarding CSAs, but the TRA should view the new statute as a clear statement from the General Assembly to keep moving down the road to a more and more competitive market and to turn its attention away from this issue and on to the many new issues presented by our ever-changing, always-developing market. The CAD's arguments encourage the TRA to proceed without due regard for the decision of the legislature. This is simply the wrong encouragement. The TRA must be prepared to listen to the General Assembly when it tells us to move on to another of the many issues ahead of us and must be ready to devote its resources to those challenges before it without becoming mired down in issues that the legislature has chosen to resolve.

With respect to these familiar complaints about potential "anticompetitive impact" of CSAs, the CAD has had its day before the TRA in the Bank and the Store case and other TRA proceedings and had its opportunity to convince legislators of its view. It failed to prevail in either forum.

As Director Tate observed during the May 12, 2003 Agenda Conference, "we now have the opportunity to move forward with a clean slate and a new law." The failure to take advantage of that opportunity to set a new course, consistent with the new law, would be a wasteful failure to act with due regard for the General Assembly.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By:____________________________

Guy M. Hicks
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615/214-6301

Anthony P. GUILIANO, Plaintiff/Appellant,
v.
CLEO, INC., Defendant/Appellee.

Supreme Court of Tennessee,
at Jackson.

June 28, 1999.

Executive employee of greeting card company brought action against company for breach of employment contract, alleging that company had constructively terminated his employment without cause and that he was entitled to the remainder of his salary. The Circuit Court, Shelby County, James E. Swearengen, J., granted summary judgment in favor of employee, awarding him $90,125 in salary remaining under contract, plus prejudgment interest. Company appealed. The Court of Appeals reversed damages award. Employee appealed. The Supreme Court, Barker, J., held that: (1) evidence established that employer constructively terminated marketing executive's employment without cause, thereby breaching the employment contract; (2) contract provision, stating that if employer terminated employment without cause, employee would be paid at his current salary through expiration of contract, contemplated payment of "liquidated damages" and not severance pay; (3) Tennessee adopts a prospective approach for addressing the recovery of liquidated damages, under which courts must focus on the intentions of the parties based upon the language in the contract and the circumstances that existed at the time of contract formation; overruling Kimbrough & Co., 939 S.W.2d 105; Beasley v. Horrell, 864 S.W.2d 45; Kendrick v. Alexander, 844 S.W.2d 187; Harmon v. Eggers, 699 S.W.2d 159; Eller Bros. v. Home Fed. Sav. & Loan Assoc., 623 S.W.2d 624; and (4) liquidated damages provision was a reasonable estimation of potential damages at the time the parties entered into the contract, and thus was enforceable.

Court of Appeals reversed and trial court affirmed.

[1] JUDGMENT ⚿181(2)
228k181(2)
Summary judgment is appropriate only where the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. Rules Civ.Proc., Rule 56.03.

[2] APPEAL AND ERROR ⚿893(1)
30k893(1)
The Supreme Court reviews a summary judgment motion as a question of law in which its inquiry is de novo without a presumption of correctness. Rules Civ.Proc., Rule 56.03.

[3] APPEAL AND ERROR ⚿934(2)
30k934(2)
In reviewing a summary judgment motion, the Supreme Court must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Rules Civ.Proc., Rule 56.03.

[4] JUDGMENT ⚿181(2)
228k181(2)
If both the facts and conclusions to be drawn therefrom permit a reasonable person to reach only one conclusion, then summary judgment is appropriate. Rules Civ.Proc., Rule 56.03.

[5] MASTER AND SERVANT ⚿31(2)
255k31(2)
Evidence established that employer constructively terminated marketing executive's employment without cause, thereby breaching the employment contract, even though employer had right to change executive's duties, where, without showing cause to justify termination, employer demoted employee from his position as Vice President of Marketing, ordered him to stay home and wait for any future assignments, provided no such assignments, reclaimed credit cards, refused to answer telephone calls, and rescinded his authority to act on behalf of company.

[6] APPEAL AND ERROR ⚿893(1)
30k893(1)
The interpretation of a contract is a matter of law that requires a de novo review on appeal.

[7] CONTRACTS ⚿147(2)
95k147(2)
When resolving disputes concerning contract interpretation, the Supreme Court's task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language.

[8] CONTRACTS ⚿143.5
95k143.5

All provisions in a contract should be construed in harmony with each other, if possible, to promote consistency and to avoid repugnancy between the various provisions of a single contract.

[9] DAMAGES 🔑78(1)
115k78(1)
Provision of employment contract, stating that if employer terminated agreement and employment without cause, employee would be paid at his current salary from date of termination through expiration of contract, contemplated payment of "liquidated damages" conditioned upon employer's breach of contract, and not severance pay, even though provision did not state that sums payable were based on an estimation of damages in the event of breach.
See publication Words and Phrases for other judicial constructions and definitions.

[9] MASTER AND SERVANT 🔑80(11)
255k80(11)
Provision of employment contract, stating that if employer terminated agreement and employment without cause, employee would be paid at his current salary from date of termination through expiration of contract, contemplated payment of "liquidated damages" conditioned upon employer's breach of contract, and not severance pay, even though provision did not state that sums payable were based on an estimation of damages in the event of breach.
See publication Words and Phrases for other judicial constructions and definitions.

[10] DAMAGES 🔑74
115k74
The term "liquidated damages" is defined by case law as a sum stipulated and agreed upon by the parties at the time they enter their contract, to be paid to compensate for injuries should a breach occur.

[11] DAMAGES 🔑74
115k74
The stipulated amount of liquidated damages represents an estimate of potential damages in the event of a contractual breach where damages are likely to be uncertain and not easily proven.

[12] MASTER AND SERVANT 🔑72
255k72
In contrast to a liquidated damages provision in an employment contract, the recovery of severance pay is not conditioned upon a breach of contract or a reasonable estimation of damages.

[13] DAMAGES 🔑78(1)
115k78(1)
A contractual provision does not have to specify a set dollar amount to constitute liquidated damages.

[14] DAMAGES 🔑78(2)
115k78(2)
A contractual provision need not explicitly include the term "liquidated damages" to constitute a liquidated damages provision.

[15] DAMAGES 🔑78(1)
115k78(1)
When a contractual provision entitles one party to a stipulated recovery following an event that constitutes a breach of contract, courts must look to the substance of the provision and the intentions of the parties to determine whether the provision calls for liquidated damages.

[16] DAMAGES 🔑78(1)
115k78(1)
If the parties agree in the contract on the amount of damages to be recovered for compensation, upon the occurrence of a particular defaulting event, then the damages are liquidated unless the contract states otherwise.

[16] DAMAGES 🔑78(2)
115k78(2)
If the parties agree in the contract on the amount of damages to be recovered for compensation, upon the occurrence of a particular defaulting event, then the damages are liquidated unless the contract states otherwise.

[17] DAMAGES 🔑76
115k76
State law disfavors the enforcement of a liquidated damages provision when the provision serves only to penalize the defaulting party for a breach of contract.

[18] DAMAGES 🔑74
115k74
As distinguished from liquidated damages, which may be enforceable, a penalty, which is not

enforceable, is a sum inserted in a contract, not as the measure of compensation for its breach, but rather as a punishment for default, or by way of security for actual damages which may be sustained by reason of nonperformance, and it involves the idea of punishment.

[19] DAMAGES 74
115k74
The fundamental purpose of liquidated damages is to provide a means of compensation in the event of a breach where damages would be indeterminable or otherwise difficult to prove.

[20] DAMAGES 80(1)
115k80(1)
If a contract provision is a reasonable estimate of the damages that would occur from a breach, then the provision is normally construed as an enforceable stipulation for liquidated damages; however, if the stipulated amount is unreasonable in relation to those potential or estimated damages, then it will be treated as a penalty. Restatement (Second) Contracts § 356.

[21] DAMAGES 76
115k76
Generally, the parties to a contract are free to agree upon liquidated damages and upon other terms that may not seem desirable or pleasant to outside observers.

[22] CONTRACTS 1
95k1
Courts should not interfere in a contract, but should carry out the intentions of the parties and the terms bargained for in the contract, unless those terms violate public policy.

[22] CONTRACTS 108(1)
95k108(1)
Courts should not interfere in a contract, but should carry out the intentions of the parties and the terms bargained for in the contract, unless those terms violate public policy.

[23] DAMAGES 76
115k76
Tennessee adopts a prospective approach for addressing the recovery of liquidated damages, under which courts must focus on the intentions of the parties based upon the language in the contract and the circumstances that existed at the time of contract formation; overruling Kimbrough & Co., 939 S.W.2d 105; Beasley v. Horrell, 864 S.W.2d 45; Kendrick v. Alexander, 844 S.W.2d 187; Harmon, 699 S.W.2d 159; Eller Bros., Inc. v. Home Fed. Sav. & Loan Assoc., 623 S.W.2d 624.

[24] DAMAGES 79(1)
115k79(1)
Circumstances considered by the court in determining the right to recover liquidated damages include whether the liquidated sum was a reasonable estimate of potential damages and whether actual damages were indeterminable or difficult to measure at the time the parties entered into the contract.

[24] DAMAGES 80(1)
115k80(1)
Circumstances considered by the court in determining the right to recover liquidated damages include whether the liquidated sum was a reasonable estimate of potential damages and whether actual damages were indeterminable or difficult to measure at the time the parties entered into the contract.

[25] DAMAGES 76
115k76
If a contractual provision demonstrates a reasonable estimate of potential damages, if actual damages were indeterminable or difficult to measure at the time the parties entered into the contract, and if the provision reflects the parties' intentions to compensate in the event of a breach, then the provision will be upheld as a reasonable agreement for liquidated damages; however, if the provision and circumstances indicate that the parties intended merely to penalize for a breach of contract, then the provision is unenforceable as against public policy.

[25] DAMAGES 79(1)
115k79(1)
If a contractual provision demonstrates a reasonable estimate of potential damages, if actual damages were indeterminable or difficult to measure at the time the parties entered into the contract, and if the provision reflects the parties' intentions to compensate in the event of a breach, then the provision will be upheld as a reasonable agreement for liquidated damages; however, if the provision and circumstances indicate that the parties intended merely to penalize for a breach of contract, then the provision is unenforceable as against public policy.

[25] DAMAGES 80(1)
115k80(1)
If a contractual provision demonstrates a reasonable estimate of potential damages, if actual damages were indeterminable or difficult to measure at the time the parties entered into the contract, and if the provision reflects the parties' intentions to compensate in the event of a breach, then the provision will be upheld as a reasonable agreement for liquidated damages; however, if the provision and circumstances indicate that the parties intended merely to penalize for a breach of contract, then the provision is unenforceable as against public policy.

[26] DAMAGES 80(1)
115k80(1)
Liquidated damages provision of employment contract, providing that employee would be paid at his current salary from date of termination through expiration of contract, was a reasonable estimation of potential damages at the time the parties entered into the contract, and thus was enforceable, even though employee secured new employment at a higher salary just after termination; it was within the fair contemplation of the parties that the employee might not be able to find a similar professional position at the same salary and that he might suffer damages that would be difficult to prove, including loss of professional status, prestige, and advancement opportunities.

[27] CONTRACTS 1
95k1
While a bargain may be an unfortunate one for the delinquent party, it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence.

Frank L. Watson, Waring Cox, P.L.C., Memphis, for Petitioner.

James H. Stock, Jr., Christopher E. Moore, Weintraub, Stock, Bennett, Grisham & Underwood, P.C., Memphis, for Respondent.

OPINION

BARKER, J.

***1** We granted this appeal to address the recovery of liquidated damages where a plaintiff/employee alleges that he has been constructively terminated from his employment. The trial court in this case granted summary judgment in favor of the appellant, Anthony P. Guiliano, based upon a finding that he had been constructively terminated from his employment and that he was entitled to recover the remainder of his salary under Paragraph 9 of his employment contract. [FN1] The Court of Appeals agreed that the appellant had been constructively terminated from his employment, but concluded that he was not entitled to any recovery. The intermediate court held that Paragraph 9 of the contract was a liquidated damages provision that imposed a penalty on the appellee, Cleo, Inc., (Cleo).

Both parties request this Court to determine whether Paragraph 9 of the employment contract contemplates the payment of severance pay or liquidated damages. For the reasons that follow, we conclude that the sums payable pursuant to Paragraph 9 are liquidated damages in the event that Cleo terminated appellant's employment without cause, effectively breaching the contract.

We affirm the trial court's grant of summary judgment for the appellant on the issue of constructive termination. In addition, because we find that the liquidated damages provision was a reasonable estimation of employee damages at the time the parties entered into the contract, we conclude that the appellant is entitled to recover the full amount stipulated in that provision. The judgment of the Court of Appeals is reversed, and the trial court's grant of summary judgment for the appellant is affirmed.

BACKGROUND

The essential facts in this case are undisputed. The appellant had been employed as a director of marketing at Cleo [FN2] for approximately one year when he entered into a written employment contract with the company. The contract was in the form of a letter sent by Michael Pietrangelo who was then the President and Chief Executive Officer of Cleo. The letter agreement stated in pertinent part:

> Cleo Inc. and I are very pleased that you have agreed to serve as Vice President, Marketing of Cleo Inc. (the "Company"), a wholly owned subsidiary of Gibson Greetings, Inc. As Vice President, Marketing you will report to the President, and perform those functions currently assigned, which functions and responsibilities can

be changed at the discretion of the Company. The following terms and conditions will govern your service to the Company:

1. You will serve the Company on a full-time basis as a senior executive employee, and the company will employ you as such, for a period of three years commencing November 1, 1992 and ending October 31, 1995 unless you are terminated at an earlier date pursuant to Paragraphs 6, 7, or 9 of this Agreement. Your annual salary will be $103, 000, which amount will be reviewed every fifteen months and which may be adjusted from time to time by the Company throughout the term of this Agreement in accordance with the Company's salary administration program. No later than six months prior to expiration of the original term, or any renewal term, of this Agreement, it will be reviewed by the Company for the purpose of deciding whether or not it will be renewed upon its expiration. You will be notified of a decision not to renew. If you are not notified of a decision not to renew, the Agreement will automatically renew from year to year.

*2 ....

6. In the event you are unable to perform your duties hereunder due to illness or other incapacity, which incapacity continues for more than six consecutive or nonconsecutive months in any twelve-month period, the Company shall have the right, on not less than 30 days written notice to you, to terminate this Agreement....

7. In the event you voluntarily terminate your employment during the term of this Agreement, or if the Company terminates this Agreement and your employment for cause, your right to all compensation hereunder shall cease as of the date of termination. As used in this Agreement, "cause" shall mean dishonesty, gross negligence, or willful misconduct in the performance of your duties or a willful or material breach of this Agreement. Termination of employment shall terminate this Agreement with the exception of the provisions of Paragraphs 8, 9, 10, and 12.

8. Also in the event you voluntarily terminate your employment hereunder, or in the event the Company terminates this Agreement and your employment for cause, you agree that for a period of two years after such termination, you will not compete, directly or indirectly, with the Company or with any division, subsidiary, or affiliate of the Company or participate as a director, officer, employee, consultant, advisor, partner, or joint venturer in any business engaged in the manufacture or sale of greeting cards, gift wrap, or other products produced by the Company, or any division, subsidiary, or affiliate of the Company, without the Company's prior written consent.

9. In the event the Company terminates this Agreement and your employment without cause, you shall continue to be paid your then current salary from the date of termination through October 31, 1995.

In 1994, Cleo experienced several personnel changes in its upper management. Jack Rohrbach replaced Mr. Pietrangelo as the company's President and Chief Executive Officer and Marc English was later hired as the Senior Vice President of Marketing and "Creative." Mr. Rohrbach stated in his deposition that he began observing the appellant's work performance when he took over as the company president. Based upon his observations, he opined that the appellant had a poor work relationship with his peers and subordinates and that the appellant was not leading the marketing department in a direction best suited for the company. Mr. Rohrbach stated that he hired Mr. English as the new marketing Vice President because Mr. English had more industry experience and a successful track record.

In the Fall of 1994, the appellant received a series of letters from Mr. Rohrbach and Mr. English that diminished his employment responsibilities at Cleo. The first letter, dated September 13, 1994, informed the appellant that his employment contract would not be renewed after its expiration on October 31, 1995. Approximately two weeks later, the appellant received a second letter signed by Mr. Rohrbach that stated in pertinent part:

*3 Effective today and until October 31, 1995, you are relieved of your duties as Vice President Marketing of Cleo Inc. and shall be responsible for such assignments as may be given to you by the President of the Company. During this period, you will remain an employee of the Company and the Company will continue to honor its obligations to you under your employment agreement. However, you are specifically advised that you shall have no authority to bind, represent or speak for the Company in any manner except as may be stated in writing by the President of the Company. For all future assignments, you shall be based out

of your home.
Should you accept other employment prior to October 31, 1995, all benefits under your employment agreement shall immediately cease. Also, please take note of the confidentiality and non-compete provisions of your employment agreement.
We will be in touch when an appropriate assignment becomes available. In the meantime, should you have any questions or comments, please do not hesitate to contact me.

In November, 1994, the appellant received two additional letters from Cleo informing him that he was no longer authorized to use company credit cards and that he was to return the company cards in his possession. In addition, he was informed that Cleo would no longer answer a telephone line for him. All telephone calls for the appellant were to be screened for personal or business, with the personal calls being directed to appellant's home. Cleo allowed the appellant to retrieve the personal telephone numbers from his office rolodex, but all business numbers were kept exclusively by Cleo as company property.

Following the letter of September 28, 1994, the appellant stayed at his home for three months without receiving a work assignment from Cleo. During that time, Mr. English moved into appellant's old office and assumed the marketing responsibilities previously handled by the appellant. [FN3] On December 12, 1994, the appellant accepted new employment at Wang's International, Inc. with a starting salary of $110,000 per year. Cleo kept the appellant on the company payroll at $103,000 per year until he began his new employment.

The appellant filed suit against Cleo on January 26, 1995, claiming that the company had constructively terminated his employment without cause and that he was entitled to the remainder of his salary under Paragraph 9 of the employment contract. Cleo responded that its treatment of the appellant did not constitute a termination of his employment, but that even if it did, the provision in Paragraph 9 was an unenforceable penalty. Both parties filed motions for summary judgment. After a hearing, the trial court granted summary judgment to the appellant, awarding him $90,125 in salary remaining under his employment contract plus $14,296.54 in prejudgment interest.

On appeal by Cleo, the Court of Appeals affirmed the trial court's conclusion that the appellant was constructively terminated from his employment, but reversed the award of damages. The intermediate court interpreted Paragraph 9 of the employment contract as a provision for liquidated damages because it called "for payment of a sum certain in the event of a certain occasion." Finding no evidence in the record of actual damages suffered by appellant, the court concluded that enforcement of the liquidated damages provision would impose an unlawful penalty against Cleo.

***4** The appellant requests this Court to reverse the Court of Appeals and to reinstate the judgment of the trial court. His contention in this appeal is that Cleo constructively terminated his employment when it removed his title of Vice President of Marketing and sent him home for three months without any further assignments. However, in contrast to his argument in the courts below, the appellant now claims that Cleo had a right to terminate his employment, as it did in this case, without breaching the contract. He contends that, regardless of the issue of breach, he is entitled to recover severance pay under Paragraph 9 of the employment contract.

STANDARD OF REVIEW

[1][2][3][4] The standards governing an appellate court's review of a motion for summary judgment are well settled. Summary judgment is appropriate only where the moving party demonstrates that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. Byrd v. Hall, 847 S.W.2d 208, 210 (Tenn.1993); Tenn. R. Civ. P. 56.03. We review the summary judgment motion as a question of law in which our inquiry is de novo without a presumption of correctness. Finister v. Humboldt Gen. Hosp., Inc., 970 S.W.2d 435, 437 (Tenn.1998); Robinson v. Omer, 952 S.W.2d 423, 426 (Tenn.1997). We must view the evidence and all reasonable inferences in the light most favorable to the nonmoving party. Byrd, 847 S.W.2d at 210- 11. If both the facts and conclusions to be drawn therefrom permit a reasonable person to reach only one conclusion, then summary judgment is appropriate. Robinson, 952 S.W.2d at 426; Bain v. Wells, 936 S.W.2d 618, 622 (Tenn.1997).

DISCUSSION

I.

[5] We shall first address whether summary judgment was appropriate on the question of constructive termination. Initially, we note that the issue of constructive termination in this case is distinguishable from cases where an at-will employee claims constructive discharge based upon a hostile work environment, discrimination, or some non-feasance on the part of the employer. See Phillips v. Interstate Hotels Corp., 974 S.W.2d 680 (Tenn.1998); Campbell v. Florida Steel Corp., 919 S.W.2d 26 (Tenn.1996). The appellant contends that Cleo removed his job title and all work responsibilities, effectively terminating his employment, without officially or formally ending the employment agreement. We view this issue strictly as one of breach of contract and conclude that the evidence clearly establishes that Cleo effectively terminated appellant's employment without cause, thereby breaching the contract.

Both the appellant and Cleo have agreed on the facts leading up to appellant's change of employment. Cleo contends, however, that it had a right to alter the appellant's work responsibilities under the employment contract, as it did in this case, without causing a termination. In support of that contention, Cleo relies on evidence that it allowed the appellant to stay on the company payroll as a senior executive employee until he obtained new employment.

*5 The resolution of this dispute centers on the construction of the employment contract. Cleo refers to that portion of the contract which states:

> Cleo Inc. and I are very pleased that you have agreed to serve as Vice President, Marketing of Cleo Inc.... As Vice President, Marketing you will report to the President, and perform those functions currently assigned, which functions and responsibilities can be changed at the discretion of the Company. The following terms and conditions will govern your service to the Company:
>
> 1. You will serve the Company on a full-time basis as a senior executive employee, and the Company will employ you as such, for a period of three years....

The appellant relies on the same contractual language to argue that he was employed as the Vice President of Marketing for the company. According to appellant, once Cleo removed his title and work responsibilities, it effectively ended his employment.

[6][7][8] The interpretation of a contract is a matter of law that requires a de novo review on appeal. See Hamblen County v. City of Morristown, 656 S.W.2d 331, 335-336 (Tenn.1983). When resolving disputes concerning contract interpretation, our task is to ascertain the intention of the parties based upon the usual, natural, and ordinary meaning of the contractual language. Id. at 333-34; Bob Pearsall Motors, Inc. v. Regal Chrysler-Plymouth, Inc., 521 S.W.2d 578, 580 (Tenn.1975). All provisions in the contract should be construed in harmony with each other, if possible, to promote consistency and to avoid repugnancy between the various provisions of a single contract. Rainey v. Stansell, 836 S.W.2d 117, 118-19 (Tenn.App.1992), perm. app. denied (Tenn.1992).

In this case, the contract refers to appellant's position of employment in two separate provisions. The opening provision states that he will "serve as Vice President of Marketing for Cleo, Inc.," reporting to the company president and conducting work functions that were currently assigned. The subsequent provision under Paragraph 1 describes his position as a full-time senior executive employee. We read those provisions together to mean that as Vice President of Marketing, the appellant was to be a full-time senior executive employee in the company. [FN4] Cleo promoted the appellant to that position with the condition that it could change his job functions and responsibilities during the course of the three-year contract. Those changes may have included altering his official job title. However, Cleo was contractually obligated to maintain appellant's employment as a full-time senior executive employee unless there was a cause for termination. [FN5] Cleo's contractual right to change the appellant's work duties did not include the right to remove all of his duties.

Cleo contends that it fulfilled its contractual obligation by keeping the appellant on the company payroll at his then current salary, even though it altered and effectively ended his work responsibilities. Cleo relies on the Court of Appeal's decision in Canady v. Meharry Med. College, 811 S.W.2d 902 (Tenn.App.1991), perm. app. denied (Tenn.1991). In Canady, the defendant/employer restricted the plaintiff's work duties and decided not to renew his employment contract as a hospital resident physician after the plaintiff received unsatisfactory job-performance ratings. Id. at 904. The court concluded, in part, that the restriction of plaintiff's work duties did not constitute a breach of the contract because the contract contained no express or implied assurance that the plaintiff would be given continuous, uninterrupted work assignments. Id. at 906.

*6 The circumstances in Canady are clearly distinguishable from the appellant's case. Here, we are not dealing exclusively with a change or restriction of appellant's work responsibilities. The facts are undisputed that Cleo not only demoted the appellant from his position as Vice President of Marketing, but also ordered him to stay at his home and wait for any future assignments. During the three months that the appellant stayed at home, he received no work assignments and apparently did not perform any functions on behalf of the company. In addition, Cleo reclaimed appellant's company credit cards and informed him that the company would no longer answer telephone calls for him. All business contacts for Cleo and authority to act on behalf of the company were taken away from the appellant.

The undisputed facts in this case support the lower courts' holding that the appellant was constructively terminated from his employment. Moreover, Cleo has not shown cause to justify the termination. We, therefore, conclude that summary judgment for the appellant was appropriate on that issue.

II.

[9] We shall next address whether Paragraph 9 of the employment contract provides for severance pay or liquidated damages. The appellant contends that Paragraph 9 contemplates severance pay because its payment is not specifically conditioned upon a breach of contract. Cleo argues to the contrary that the sums under Paragraph 9 are liquidated damages because that paragraph calls for the payment of a set amount in the event of a certain occasion. Cleo contends, however, that no matter what label is given to the provision, it is unenforceable because the appellant suffered no actual monetary damages.

The Court of Appeals interpreted Paragraph 9 of the employment contract as a liquidated damages provision because it contemplates the "payment of a sum certain in the event of a certain occasion." We agree that Paragraph 9 provides for liquidated damages, not severance pay. However, our interpretation of Paragraph 9 is based upon the specific contract language that recovery is due in the event that Cleo "terminates this agreement and [appellant's] employment without cause," resulting in a breach of the contract.

The distinction between liquidated damages and severance pay is important in this case. If Paragraph 9 provides for liquidated damages, then recovery is conditioned upon a showing that Cleo breached the contract and that the amount of recovery was a reasonable estimation of damages. However, if the provision calls for severance pay, then recovery by the appellant is absolute in the event of his termination, regardless of whether Cleo breached the contract or whether the amount was a reasonable damage assessment.

[10][11] The term "liquidated damages" is defined by case law as a "sum stipulated and agreed upon by the parties at the time they enter their contract, to be paid to compensate for injuries should a breach occur." V.L. Nicholson Co. v. Transcon Inv. & Fin. Ltd., Inc., 595 S.W.2d 474, 484 (Tenn.1980); Kimbrough & Co. v. Schmitt, 939 S.W.2d 105, 108 (Tenn.App.1996), perm. app. denied (Tenn.1996). The stipulated amount represents an estimate of potential damages in the event of a contractual breach where damages are likely to be uncertain and not easily proven. V.L. Nicholson, 595 S.W.2d at 484.

*7 [12] In contrast, the recovery of severance pay is not conditioned upon a breach of contract or a reasonable estimation of damages. Generally, severance pay is a form of compensation paid by an employer to an employee at a time when the employment relationship is terminated through no fault of the employee. Black's Law Dictionary 1374 (6th ed. 1990). The reason for severance pay is to offset the employee's monetary losses attributable to the dismissal from employment [FN6] and to recompense the employee for any period of time when he or she is out of work. Bradwell v. GAF Corp., 954 F.2d 798, 800 (2nd Cir.1992); 27 Am.Jur.2d Employment Relationship § 70 (1996). The amount of payment is generally based upon the types of services and the number of service years performed by the employee on behalf of the employer. See Balding v. Tennessee Dep't of Employment Sec., 212 Tenn. 517, 370 S.W.2d 546, 548 (1963).

[13] With these principles in mind, we focus on the language in Paragraph 9 to determine whether liquidated damages or severance pay was contemplated. Paragraph 9 provides that if Cleo terminates the contract and appellant's employment without cause, the appellant shall continue to receive his then current salary from the date of termination until October 31, 1995, the contract expiration date. Paragraph 9 does not state that sums payable are based upon an estimation of damages in the event of a breach of contract. However, it is clear that the provision affords the appellant a set amount of compensation in the event that Cleo terminates the agreement and appellant's employment, without cause, before the end of the contract. [FN7] Relying on the plain meaning of the language in Paragraph 9, we conclude that recovery therein is conditioned upon Cleo's breach of contract.

[14][15][16] A contractual provision need not explicitly include the term "liquidated damages" to constitute a liquidated damages provision. In cases as here, where a provision entitles one party to a stipulated recovery following an event that constitutes a breach of contract, courts must look to the substance of the provision and the intentions of the parties to determine whether the provision calls for liquidated damages. If the parties agree in the contract on the amount of damages to be recovered for compensation, upon the occurrence of a particular defaulting event, then the damages are liquidated unless the contract states otherwise. See V.L. Nicholson, 595 S.W.2d at 484.

The language in Paragraph 9 reflects the parties' intentions to compensate the appellant with a set monetary amount in the event that Cleo terminated the contract and the employment relationship without cause, before the end of the three-year term. Having further determined that the termination in this case was a breach of contract, we interpret Paragraph 9 as contemplating the payment of liquidated damages.

III.

***8** The remaining question is whether the appellant may recover any or all of the damages set forth in Paragraph 9. Under that paragraph, the sum payable is the remainder of appellant's then current salary from the date of termination until the end of the contract term on October 31, 1995. The appellant's salary as of December 1994, was $103,000. Based upon that amount and the formula provided in Paragraph 9, the trial court determined that the remainder of salary owed under the three-year contract was $90,125. [FN8]

Cleo does not dispute the calculation of damages in this case, but instead contends that the $90,125 amount plus prejudgment interest is grossly disproportional to any actual damages suffered by the appellant. Since the appellant obtained new employment on December 12, 1994, with an annual salary of $110,000, Cleo argues that appellant's recovery of liquidated damages under Paragraph 9 would constitute an unlawful penalty.

[17][18] The basis of Cleo's contention is that if the appellant suffered no actual damages from the termination of his employment, then his recovery under Paragraph 9 would have no compensatory function, but would instead simply punish Cleo for the termination. Both parties acknowledge that Tennessee law disfavors the enforcement of a liquidated damages provision when the provision serves only to penalize the defaulting party for a breach of contract. See Testerman v. Home Beneficial Life Ins. Co., 524 S.W.2d 664, 668 (Tenn.App.1974), perm. app. denied (Tenn.1975). [FN9]

[19][20] The fundamental purpose of liquidated damages is to provide a means of compensation in the event of a breach where damages would be indeterminable or otherwise difficult to prove. V.L. Nicholson, 595 S.W.2d at 484; 22 Am.Jur.2d Damages § 683 (1988); Restatement (Second) of Contracts § 356 cmt. (1979). By stipulating in the contract to the damages that might reasonably arise from a breach, the parties essentially estimate the amount of potential damages likely to be sustained by the nonbreaching party. "If the [contract] provision is a reasonable estimate of the damages that would occur from a breach, then the provision is normally construed as an enforceable stipulation for liquidated damages." V.L. Nicholson, 595 S.W.2d at 484 (citing City of Bristol v. Bostwick, 146 Tenn. 205, 240 S.W. 774 (1922); 22 Am.Jur. Damages § 227 (1965)). However, if the stipulated amount is unreasonable in relation to those potential

or estimated damages, then it will be treated as a penalty. 22 Am.Jur.2d Damages § 686 (1988); Restatement (Second) of Contracts § 356 (1979).

Although most jurisdictions disfavor the enforcement of penalties under contract law, there is a split in authority on the proper method for determining whether a liquidated damages provision constitutes a penalty. One method, commonly referred to as the "prospective approach," focuses on the estimation of potential damages and the circumstances that existed at the time of contract formation. [FN10] Under this approach, the amount of actual damages at the time of breach is of little or no significance to the recovery of liquidated damages. 22 Am.Jur.2d Damages § 723 (1988). If the liquidated sum is a reasonable prediction of potential damages and the damages are indeterminable or difficult to ascertain at the time of contract formation, then courts following the prospective approach will generally enforce the liquidated damages provision. See e.g. Gaines v. Jones, 486 F.2d 39, 46 (8th Cir.1973) (applying Missouri law); Brazen v. Bell Atl. Corp., 695 A.2d 43, 48 (Del.1997).

***9** In contrast, a second approach has developed in which courts not only analyze the estimation of damages at the time of contract formation, but also address whether the stipulated sum reasonably relates to the amount of actual damages caused by the breach. [FN11] Under this retrospective approach, the estimation of potential damages and the difficulty in measuring damages remain integral factors for the courts' review. See e.g. Lake Ridge Academy v. Carney, 66 Ohio St.3d 376, 613 N.E.2d 183, 188-89 (1993); Highgate Assoc., Ltd. v. Merryfield, 157 Vt. 313, 597 A.2d 1280, 1282 (1991). However, as part of that review, the actual damages at the time of breach are also relevant in determining whether the original estimation of damages was reasonable. See Kelly v. Marx, 44 Mass.App.Ct. 825, 694 N.E.2d 869, 871 (1998); Wassenaar v. Panos, 111 Wis.2d 518, 331 N.W.2d 357, 361-62 (1983). If the liquidated sum greatly exceeds the amount of actual damages, then courts following this latter approach will treat the estimated sum as a penalty and will limit recovery to the actual damages. Kelly, 694 N.E.2d at 871; Shallow Brook Assoc. v. Dube, 135 N.H. 40, 599 A.2d 132, 137 (1991).

While this Court has not previously addressed the issue, we note that the Court of Appeals has followed the latter approach using both a prospective review of the circumstances at the time of contract formation and a review of the actual damages at the time of breach. See Kimbrough & Co., 939 S.W.2d at 108; Beasley v. Horrell, 864 S.W.2d 45, 50 (Tenn.App.1993), perm. app. denied (Tenn.1993); Kendrick v. Alexander, 844 S.W.2d 187, 190-91 (Tenn.App.1992), perm. app. denied (Tenn.1992) (following a prospective approach for assessing the reasonableness of a liquidated damages provision); Harmon, 699 S.W.2d at 163; Eller Bros., Inc. v. Home Fed. Sav. & Loan Assoc., 623 S.W.2d 624, 628 (Tenn.App.1981), perm. app. denied (Tenn.1981). After careful consideration, we find that there are inherent problems with the retrospective analysis and are persuaded that a prospective approach is the better rule. Therefore, to the extent that the Court of Appeals has adopted a retrospective approach, as reflected in Eller Bros., Harmon, Beasley, and Kimbrough & Co., that approach is overruled.

[21][22] From our review of the law on liquidated damages, we recognize that there are two important interests at issue: the freedom of parties to bargain for and to agree upon terms such as liquidated damages and the limitations set by public policy. Generally, the parties to a contract are free to agree upon liquidated damages and upon other terms that may not seem desirable or pleasant to outside observers. See Chapman Drug Co. v. Chapman, 207 Tenn. 502, 341 S.W.2d 392, 398 (1960); 22 Am.Jur.2d Damages § 686 (1988). In that respect, courts should not interfere in the contract, but should carry out the intentions of the parties and the terms bargained for in the contract, unless those terms violate public policy. See McKay v. Louisville & N.R. Co., 133 Tenn. 590, 182 S.W. 874, 875 (1916) (citing Baltimore & Ohio S.W. Ry. Co. v. Voight, 176 U.S. 498, 505, 20 S.Ct. 385, 387, 44 L.Ed. 560 (1900)).

***10** Both the prospective and the retrospective approaches allow courts to review liquidated damages provisions together with the limitations set by public policy. However, we conclude that the prospective approach is the better rule based upon the consideration it affords to the intentions of the parties and to the freedom to contract.

When parties agree to a liquidated damages provision, it is generally presumed that they considered the certainty of liquidated damages to be preferable to the risk of proving actual damages in the event of a breach. 22 Am.Jur.2d Damages § 726.

Liquidated damages permit the parties to allocate business and litigation risks and often serve as part of the contractual bargain. In addition, they lend certainty to the contractual agreement and allow the parties to resolve defaults and other related disputes efficiently, when actual damages are impossible or difficult to measure. C.T. McCormick, Handbook on the Law of Damages § 157 (1935).

The retrospective approach, however, undermines the certainty and other benefits afforded by liquidated damages. Under that approach, the parties are allowed to fully litigate actual damages following a breach of contract. If the nonbreaching party fails to prove actual damages, then he or she is barred from recovering the liquidated sum originally agreed upon in the contract. We find that it is unfair to require the nonbreaching party to prove actual damages in cases where the parties agreed in advance to a liquidated damages provision. Such a requirement ignores the original intentions of the parties and defeats the purposes of stipulating in advance to potential damages.

[23][24][25] We, therefore, adopt a prospective approach for addressing the recovery of liquidated damages. Under this approach, courts must focus on the intentions of the parties based upon the language in the contract and the circumstances that existed at the time of contract formation. [FN12] Those circumstances include: whether the liquidated sum was a reasonable estimate of potential damages and whether actual damages were indeterminable or difficult to measure at the time the parties entered into the contract. See V.L. Nicholson, 595 S.W.2d at 484. If the provision satisfies those factors and reflects the parties' intentions to compensate in the event of a breach, then the provision will be upheld as a reasonable agreement for liquidated damages. However, if the provision and circumstances indicate that the parties intended merely to penalize for a breach of contract, then the provision is unenforceable as against public policy.

IV.

[26] We now turn to the liquidated damages provision in this case. The Court of Appeals found that the liquidated sum was a reasonable estimation of potential damages at the time the parties entered into the contract. We agree. Neither the appellant nor Cleo had certain knowledge, when forming the contract, that the appellant would be able to secure other employment in the event that Cleo terminated his employment without cause. It was within the fair contemplation of the parties that the appellant might not be able to find a similar professional position at the same salary and that he might suffer damages that would be difficult to prove, including loss of professional status, prestige, and advancement opportunities. The language in Paragraph 9 reflects the parties' intentions to compensate and to protect the appellant against those potential losses in the event of a breach by Cleo.

***11** The Court of Appeals, however, went further in addressing whether the stipulated sum reasonably related to the appellant's actual damages. Cleo insists that the intermediate court's analysis was both proper and fair based upon the fact that the appellant obtained new employment at a higher salary after the termination. While we question whether the record is sufficient on the issue of actual damages, [FN13] we conclude that the extent of actual damages has no bearing on the appellant's recovery of liquidated damages under Paragraph 9. The liquidated sum is recoverable based upon our conclusion that it was reasonable at the time the parties entered into the contract and that it reflects the parties' original intentions to compensate for a termination of employment.

[27] The parties themselves were in the best position to know what considerations influenced their bargaining at the time they entered into the contract. While " '[t]he bargain may be an unfortunate one for the delinquent party, ... it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence.' " Watson v. Ingram, 124 Wash.2d 845, 881 P.2d 247, 250 (1994) (quoting Dwinel v. Brown, 54 Me. 468, 470 (1867)). See also McKay, 182 S.W. at 875; Whaley v. Underwood, 922 S.W.2d 110, 112 (Tenn.App.1995). Accordingly, to the extent the Court of Appeals based its decision upon a review of actual damages, that decision is overruled.

CONCLUSION

Based upon the foregoing, we conclude that summary judgment for the appellant was appropriate on the issue of constructive termination. Moreover, because Paragraph 9 was a reasonable estimation of damages at the time the parties entered into the contract, we conclude that the appellant is entitled to recover the full amount stipulated in that provision. The judgment of the Court of Appeals is reversed and the trial court's award of summary judgment for the appellant is reinstated. Costs of this appeal are taxed to the appellee, Cleo.

ANDERSON, C.J., and DROWOTA, BIRCH, HOLDER, JJ.

FN1. The trial court awarded $90,125 in back salary plus $14,296.54 in prejudgment interest, for a total award of $104,421.54. The record is unclear whether the trial court treated that recovery as severance pay or liquidated damages.

FN2. At all times relevant to this case, Cleo was a wholly owned subsidiary of Gibson Greetings, Inc.

FN3. Mr. Rohrbach stated in his deposition that Mr. English took on other responsibilities at Cleo in addition to those previously handled by the appellant.

FN4. The Court of Appeals determined that the appellant was employed exclusively as the Vice President of Marketing based upon the opening provision of the employment contract. The court held that to the extent the subsequent provisions described the appellant as a senior executive employee, those latter provisions were unenforceable as being in conflict with the preceding "Vice President of Marketing" provision. We hold to the contrary that the provisions can be read congruently without having to redact any portion of the contract.

FN5. As previously mentioned, "cause" was defined in the contract as "dishonesty, gross negligence, or willful misconduct in the performance of work duties or a willful or material breach of [the employment] Agreement." Cleo also had a right to terminate the contract under certain conditions of illness or incapacity as defined in Paragraph 6 of the contract.

FN6. Those losses may include seniority rights, pension recovery, and re- training costs or other burdens associated with obtaining new employment.

FN7. The appellant argues, in part, that the dollar amount established in Paragraph 9 cannot be construed as liquidated damages because it is not sufficiently definite to constitute a "sum certain." We afford no merit to this contention. Under Tennessee law, a contractual provision does not have to specify a set dollar amount to constitute liquidated damages. See Vanderbilt Univ. v. DiNardo, 974 F.Supp. 638, 640 (M.D.Tenn.1997) (applying Tennessee law), rev'd in part, 174 F.3d 751(6th Cir. 1999) (upholding the liquidated damages provision, but remanding for trial on a contract addendum); Harmon v. Eggers, 699 S.W.2d 159, 160 (Tenn.Ct.App.1985), perm. app. denied (Tenn.1985).

FN8. The record does not reflect the exact date found by the trial court as the date when appellant was terminated from his employment. However, based upon the $90,125 amount, it is apparent that the trial court treated December 15, 1994, as the approximate date of termination. That date coincides with a letter sent by Cleo to the appellant on December 22, 1994, stating that the appellant had been paid his employment wages through December 15, 1994.

FN9. As distinguished from liquidated damages, a penalty is "a sum inserted in a contract, not as the measure of compensation for its breach, but rather as a punishment for default, or by way of security for actual damages which may be sustained by reason of nonperformance, and it involves the idea of punishment." 22 Am.Jur.2d Damages § 684 (1988).

FN10. See United States v. Bethlehem Steel Co., 205 U.S. 105, 119, 27 S.Ct. 450, 455, 51 L.Ed. 731 (1907); Gaines v. Jones, 486 F.2d 39, 44- 45 (8th Cir.1973); United States v. Le Roy Dyal Co., 186 F.2d 460, 462 (3rd Cir.1950); Williwaw Lodge v. Locke, 601 P.2d 236, 239 (Alaska 1979); Omohundro v. Ottenheimer, 198 Ark. 137, 127 S.W.2d 642, 645 (1939); McCarthy v. Tally, 46 Cal.2d 577, 297 P.2d 981, 986-87 (1956) (in banc); Rohauer v. Little, 736 P.2d 403, 410 (Colo.1987); Hanson Dev. Co. v. East Great Plains Shopping Ctr., Inc., 195 Conn. 60, 485 A.2d 1296, 1300 (1985); Brazen v. Bell Atl. Corp., 695 A.2d 43, 48 (Del.1997); Lefemine v. Baron, 573 So.2d 326, 328 (Fla.1991); Fickling & Walker Co. v. Giddens Constr. Co., 258 Ga. 891, 376 S.E.2d 655, 659-60 (1989); Anne Arundel County v. Norair Engr. Corp., 275 Md. 480, 341

A.2d 287, 294 (1975); Frank v. Jansen, 303 Minn. 86, 226 N.W.2d 739 (1975); Board of Trustees of State Inst. of Higher Learning v. Johnson, 507 So.2d 887, 890 (Miss.1987); Knutton v. Cofield, 273 N.C. 355, 160 S.E.2d 29, 35-36 (1968); Fisher v. Schmeling, 520 N.W.2d 820, 822 (N.D.1994); Safari, Inc. v. Verdoorn, 446 N.W.2d 44, 46 (S.D.1989); Woodhaven Apartments v. Washington, 942 P.2d 918, 921 (Utah 1997).

FN11. See Thanksgiving Tower Partners v. Anros Thanksgiving Partners, 64 F.3d 227, 232 (5th Cir.1995) (applying Texas law); Southpace Properties, Inc. v. Acquisition Group, 5 F.3d 500, 505 (11th Cir.1993) (applying Alabama law); Kelly v. Marx, 44 Mass.App.Ct. 825, 694 N.E.2d 869, 871-72 (1998); Hawkins v. Foster, 897 S.W.2d 80, 85 (Mo.Ct.App.1995); Browning Ferris Indus. of Nebraska, Inc. v. Eating Establishment 90th & Fort, Inc., 6 Neb.App. 608, 575 N.W.2d 885, 888-89 (1998); Shallow Brook Assoc. v. Dube, 135 N.H. 40, 599 A.2d 132, 137 (1991); Boyle v. Petrie Stores Corp., 136 Misc.2d 380, 518 N.Y.S.2d 854, 861 (N.Y.Sup.Ct.1985), supp. decision (May 29, 1987); Lake Ridge Academy v. Carney, 66 Ohio St.3d 376, 613 N.E.2d 183, 189 (Ohio 1993); Highgate Assoc., Ltd. v. Merryfield, 157 Vt. 313, 597 A.2d 1280, 1282 (1991) (reviewing the totality of the circumstances); Wheeling Clinic v. Van Pelt, 192 W.Va. 620, 453 S.E.2d 603, 609 (1994); Wassenaar v. Panos, 111 Wis.2d 518, 331 N.W.2d 357, 361-62 (1983) (reviewing the totality of the circumstances, including actual damages).

FN12. This prospective approach incorporates the cardinal rule of contract interpretation, requiring courts to ascertain the intentions of the parties based upon the language in the contract. See Bob Pearsall Motors, Inc., 521 S.W.2d at 580; Nunnelly v. Warner Iron Co., 94 Tenn. 282, 29 S.W. 124 (1895).

FN13. The trial court awarded summary judgment to the appellant without making a finding on actual damages or whether the recovery constituted severance pay or liquidated damages. Nevertheless, because we hold that actual damages are immaterial in this case, we need not address the sufficiency of the record in that respect.

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BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

November 13, 2000

IN RE:	)	
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.'S TARIFF TO OFFER CONTRACT SERVICE AGREEMENT TN98-2766-00 FOR MAXIMUM 13% DISCOUNT ON ELIGIBLE TARIFFED SERVICES	))))	**DOCKET NO. 99-00210**
BELLSOUTH TELECOMMUNICATIONS, INC.'S TARIFF TO OFFER CONTRACT SERVICE AGREEMENT KY98-4958-00 FOR AN 11% DISCOUNT OF VARIOUS SERVICES	))))	**DOCKET NO. 99-00244**
PROCEEDING FOR THE PURPOSE OF ADDRESSING COMPETITIVE EFFECTS OF CONTRACT SERVICE ARRANGEMENTS FILED BY BELLSOUTH TELECOMMUNICATIONS, INC. IN TENNESSEE	)))))	**DOCKET NO. 98-00559**

ORDER GRANTING APPROVAL OF BELLSOUTH CONTRACT SERVICE ARRANGEMENT (TN 98-2766-00) IN DOCKET NO. 99-00210

This matter came before the Tennessee Regulatory Authority ("Authority") on September 2, 1999 for consideration of the tariff filing of BellSouth Telecommunications, Inc. ("BellSouth") for approval to offer Contract Service Arrangement No. TN 98-2766-00 ("CSA").[1] BellSouth filed Tariff No. 99-00210 on March 31, 1999, with a proposed effective date of April 30, 1999.

[1] The customer contracting with BellSouth pursuant to this CSA will hereinafter be referred to as "the Bank" or "the customer."

I. Procedural History

The Directors first considered this matter at the regularly scheduled Authority Conference held on April 20, 1999 and unanimously suspended the tariff for five (5) days until May 5, 1999. Time Warner Telecom of the Mid-South, L.P. ("Time Warner") filed a Petition to Intervene and Complaint for Contested Case Proceeding on April 27, 1999. NEXTLINK Tennessee, Inc. ("NEXTLINK") and the Southeastern Competitive Carriers Association ("SECCA") filed Petitions to Intervene on April 28, 1999. The Directors considered the tariff again at a regularly scheduled Authority Conference on May 4, 1999 and unanimously suspended the tariff for thirty (30) days. In addition, the Directors expressed concern over the specificity of the Petitions to Intervene and allowed Time Warner, NEXTLINK, and SECCA until May 7, 1999 to file amendments to their Petitions to Intervene. Time Warner filed an Amended Petition to Intervene and Complaint for Contested Case Proceeding on May 7, 1999. NEXTLINK and SECCA filed a supplement to their Petitions to Intervene on May 13, 1999 after discovering that their filing of same on May 7, 1999 contained docket number errors.

The Authority notified the parties that it would consider the tariff and Petitions to Intervene at the June 8, 1999 Authority Conference. Due to the unavailability of counsel, NEXTLINK and SECCA filed a Motion for Continuance on June 4, 1999. At the June 8th Authority Conference, the Directors unanimously granted the Petitions to Intervene in this docket and consolidated this docket with Docket Nos. 98-00559 and 99-00244.[2]

[2] The action of the Authority granting the Petitions to Intervene rendered the Motion for Continuance moot. The Authority issued a written order granting the Petitions to Intervene and Consolidating 99-00210 and 99-00244 with 98-00559 on August 24, 1999. The Authority consolidated 99-00210 and 99-00244 with 98-00559 for the purposes of allowing all intervenors in 98-00559 to participate in 99-00210 and 99-00244; allowing access to previously filed discovery in 98-00559; and resolving issues common to all three dockets.

The Authority held a hearing in Docket Nos. 99-00210 and 99-00244 on August 17 and 18, 1999.[3] In attendance at the hearing were the following parties:

BellSouth Telecommunications, Inc. ("BellSouth") - **Guy M. Hicks,** Esquire and **Patrick Turner,** Esquire, 333 Commerce Street, Suite 2101, Nashville, TN 37201;

NEXTLINK Tennessee, Inc. ("NEXTLINK") and Southeastern Competitive Carriers Association ("SECCA") - **Henry Walker,** Esquire, Boult, Cummings, Conners & Berry, 414 Union St., #1600, P. O. Box 198062, Nashville, TN 37219-8062. In addition, **Dana Shaffer,** Esquire, 105 Molloy Street, Suite 300 Nashville, TN 37201-2315, appeared on behalf of NEXTLINK;

Time Warner Communications of the MidSouth, L.P. ("Time Warner") and New South Communications, LLC ("New South") - **Charles B. Welch, Jr.,** Esquire, 511 Union Street, Suite 2400, Nashville, TN 37219;

AT&T Communications of the South Central States, Inc. ("AT&T") - **Val Sanford,** Esquire, Gullett, Sanford, Robinson & Martin, 230 Fourth Avenue North, 3rd Floor, P.O. Box 198888, Nashville, TN 37219-8888;

MCI WorldCom ("MCI") - **Jon E. Hastings,** Esquire, Boult, Cummings, Conners & Berry, 414 Union St., 1600, P. O. Box 198062, Nashville, TN 37219-8062 and **Susan Berlin,** Esquire, 6 Concourse Pkwy, Atlanta, GA 30328; and

Consumer Advocate Division, Office of the Attorney General ("Consumer Advocate") - **Vance Broemel,** Esquire, 426 5th Avenue, N., 2nd Floor, Nashville, TN 37243.

During the hearing, BellSouth presented Randall L. Frame, Sales Manager for BellSouth Business Systems, as its only witness. AT&T, NEXTLINK, SECCA, Time Warner, New South, MCI, and the Consumer Advocate cross-examined Mr. Frame after which BellSouth asked questions on re-direct examination. The Directors also questioned Mr. Frame. Time Warner presented David Darrohn, General Manager for Time Warner Telecom in

[3] As a result of the consolidation, the intervenors in Docket No. 98-00559 were now parties in Docket Nos. 99-00210 and 99-00244 and the record in Docket No. 98-00559 was now a part of the record in Docket Nos. 99-00210 and 99-00244. Nevertheless, because Docket No. 98-00559 involved issues beyond the scope of Docket Nos. 99-00210 and 99-00244, the resolution of the issues in Docket Nos. 99-00210 and 99-00244 do not conclude the proceedings in Docket No. 98-00559. The non-common, unresolved issues in 98-00559 remain.

Memphis, Tennessee, as a witness. Mr. Darrohn was subject to cross-examination, re-direct examination, and questioning by the Directors. NEXTLINK presented Jennifer West, Sales Representative for NEXTLINK in Memphis, Tennessee, and Margaret Brown, Regional Account Manager for Major Accounts in Nashville and the Southeast, as its witnesses. Both witnesses underwent cross-examination and re-direct examination, and Jennifer West also answered questions from the Directors. The Consumer Advocate presented as witnesses Robert T. Buckner, Senior Regulatory Analyst for the Consumer Advocate, and Stephen N. Brown, Economist for the Consumer Advocate. Both witnesses underwent cross-examination and re-direct examination.

On August 24, 1999, BellSouth, the Consumer Advocate, AT&T, SECCA, NEXTLINK, Time Warner, and NewSouth submitted post-hearing briefs. On that same day, MCI submitted a letter to the Executive Secretary stating that MCI adopted the post-hearing brief of NEXTLINK and SECCA. The Authority permitted the parties to present oral argument on September 2, 1999.

II. Burden of Proof

Because this docket addresses a CSA that is awaiting approval by the Authority, BellSouth has the burden to prove the validity of the CSA. Upon a showing of a prima facie case by BellSouth, those parties challenging the CSA have the burden of persuading the Authority that the CSA violates state and/or federal law.

III. Positions of the Parties

A. Discrimination

BellSouth claims that the CSA is not unlawfully discriminatory for two reasons. First, BellSouth makes them available to any similarly situated customer. Second, the other parties did not or could not determine whether any customers similarly situated to the Bank were or were not offered or denied similar CSAs.

AT&T, MCI, SECCA, and NEXTLINK contend that BellSouth's failure to demonstrate a neutral, rational basis for the rate differences in the CSA makes it impossible to determine whether any customers are similarly situated. Consequently, BellSouth's offer to make the CSA available to similarly situated customers is meaningless, and the CSA is unlawfully discriminatory. Time Warner and New South claim that BellSouth's lack of a process or procedure for identifying customers similarly situated to the Bank makes this CSA unlawfully discriminatory.

The Consumer Advocate draws an analogy between BellSouth and transportation companies that cannot lawfully discriminate in rates when there is no difference in costs. BellSouth's policy that a customer without a "competitive offer" is not considered similarly situated is therefore improper according to the Consumer Advocate. Further, the Consumer Advocate claims that Mr. Frame's concession that no customer can discover another's product mix or contribution level makes it impossible for a customer to determine whether it is similarly situated to other BellSouth customers.

B. Anticompetitive

BellSouth argues that none of the provisions in the CSA are anticompetitive or exclusive. The Consumer Advocate claimed that BellSouth forces customers to accept terms they do not wish to accept, but both Dr. Brown and Mr. Buckner admitted they had no knowledge of actual negotiations. Dr. Brown admitted that termination charges apply in situations where a customer terminates the contract for reasons having nothing to do with a competitor. While Dr. Brown theorized that an incumbent could bar a competitor's entry into the market by setting a standing offer to beat any credible offer by entrants, he also recognized that such entry has not been barred, as both NEXTLINK and Time Warner have their own contracts with business customers in BellSouth's territory. Mr. Buckner's claim that CSAs amount to tying arrangements was rebutted by Mr. Frame's explanation that this volume and term CSA does not require the customer to order any particular product or mix of products.

AT&T, MCI, SECCA, and NEXTLINK claim that each of these CSAs is anticompetitive by locking in the customer for the term of the contract. The CSAs accomplish this by giving the customer price discounts that increase with the dollar volume of its purchase from BellSouth and by imposing termination charges when the customer terminates the CSA. Further, AT&T, MCI, SECCA, and NEXTLINK argue that CSAs deprive nonCSA customers of the benefits of competition because BellSouth uses CSAs rather than changing the general tariff.

Time Warner and NewSouth contend that the CSA is part of a plan or scheme to frustrate the development of competition, which directly conflicts with both the Tennessee and federal telecommunications acts. Time Warner and New South contend BellSouth has sought to isolate its most profitable customers from its competitors through long-term CSAs. As evidence, Time Warner and New South point to the fact that BellSouth offered CSAs to only 0.085% of its Tennessee customers, but these CSAs account for 10.25% of its Tennessee revenues. Adherence of its customers to the terms of the CSAs is assured by the requirement that customers pay damages in the event of early termination of CSAs, over and above any tariffed termination charges that may apply.

C. Tennessee Contract Law

BellSouth argues that the termination provisions do not violate Tennessee law because the termination provisions result in a payment that is less than the anticipated damages from the breach of the CSA. According to BellSouth, the Authority should determine whether the parties reasonably could anticipate the amount of damages. If the payment resulting from the termination provisions is equal to or less than the anticipated damages, then the payment is not a penalty. If it happens that the payment is more than the actual damages, then, BellSouth simply stated, "that's the way it goes."[4]

AT&T, Time Warner, and New South interpret the Tennessee Supreme Court decision in *Guiliano v. Cleo*, 995 S.W.2d 88 (Tenn. 1999), to allow liquidated damages only when the amount of compensation for breach is indeterminable. AT&T, Time Warner and New South contend that BellSouth's actual damages are readily determinable and certain. They rely on Mr. Frame's testimony that BellSouth's actual damages could be readily determined to support their position.

NEXTLINK, SECCA, and MCI argue that the Authority's duty goes beyond *Guiliano v. Cleo* to determining whether the termination provisions are just, reasonable, and pro-competitive. Further, NEXTLINK, SECCA, and MCI argue that the provisions should be stricken and the question of damages left to the trial courts.

The Consumer Advocate points out that the evidence establishes that BellSouth itself considers the payments resulting from the termination provisions to be penalties. In addition, the Consumer Advocate contends that BellSouth failed to establish that the damages provided by the termination provisions have any relation to BellSouth's costs.

[4] *Transcript of Oral Argument*, September 2, 1999, p. 21.

IV. Findings of Fact and Conclusions of Law

Immediately following oral argument on September 2, 1999, the Directors deliberated the issues and made the following findings:[5]

1. The purpose of this CSA is to provide a Volume and Term Discount to the customer identified in the filing. Through this arrangement, BellSouth is offering a thirteen percent (13%) discount on various eligible local exchange and private line services to a customer who has agreed to a minimum annual revenue commitment and a three (3) year contract term.

2. This CSA contains two termination provisions. The first relates to the termination of the underlying specific service and is linked to the tariff provision applicable to the underlying service. The second applies to the termination of the Volume and Term agreement. This termination provision calls for charges of $350,000 for an early termination occurring at the end of a contract year or $350,000 plus any unmet annual revenue commitment for a termination occurring during a contract year. Because the first termination provision is contained in the underlying, previously approved tariff, it is only the second termination provision that is before the Authority in this docket.[6]

3. The CSA involves a large company with extensive resources entering into a business arrangement that appears to be acceptable to both parties. In fact, the Bank resisted

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[5] The findings included within the body of this Order formed the basis of Director Greer's motion to approve the CSA. Although Director Greer made the prevailing motion, he also made these qualifying comments:

> I do not want to say that I necessarily approve of the termination charge that they have agreed upon. The bank obviously rejected the termination provisions as put forth to them and chose these termination provisions.
>
> As I said, I don't think it is my responsibility to relieve parties from the consequences of their own improvidence. This is different from other termination charges that we have rejected in previous contracts. But the two parties agreed to them, it is obviously agreed to them, they signed the contract."

Transcript of September 2, 1999 Deliberations, p. 169.

[6] Director Kyle stated: "Since the public tariffs are not before the Authority in this proceeding, I do not draw any conclusions or make any decisions about the terms and conditions contained therein at this time." *Transcript of September 2, 1999 Deliberations*, p. 172.

BellSouth's efforts to negotiate termination charges other than the $350,000 termination provision.

4. The burden of proof in demonstrating that this CSA should be approved lay with BellSouth, and BellSouth carried its burden of proof.

5. The evidence put forth in the record fails to establish that the provisions of the CSA before the Authority are anti-competitive[7] or discriminatory.[8]

6. Authority Rule 1220-4-1-.07 permits public utilities and customers to enter into special contracts that prescribe and provide rates and services subject to the Authority's review and approval.

7. The evidence put forth in the record fails to establish that the rates resulting from the application of the Volume and Term discount violate the statutory price floor or force prices below cost.

8. The termination provisions in the CSA related to termination of the Volume and Term discount do not violate *Guiliano v. Cleo*. In *Cleo*, the Supreme Court adopted the "prospective approach" for "determining whether a liquidated damages provision constitutes a penalty." The Court stated:

> [T]he "prospective approach," focuses on the estimation of potential damages and the circumstances that existed at the time of contract formation. Under this approach, the amount of actual damages at the time of breach is of little or no significance to the recovery of liquidated damages. If the liquidated sum is a

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[7] The evidentiary record reveals that during the course of negotiating with customers who have a competing offer in hand, BellSouth requires said customers to enter into an information exchange agreement and/or a nondisclosure form. *See Hearing Transcript, August 17, 1999*, Vol. I D, p. 283-87. Consistent with BellSouth's policy and practice, both the Bank and the Store signed such documents. *Id.* at 284. "[W]hile [the] negotiation process is going on, the customer cannot go to a competitor and say what BellSouth has offered." *Id.* at 285. Mr. Frame testified that competing providers employ nondisclosure practices as well. Chairman Malone is of the opinion that given the potential impact of such agreements in the developing environment, the Authority may later inquire further into such practices.

[8] With respect to the discrimination issue, Director Kyle found that "[n]o evidence was furnished which could support a showing that BellSouth has denied either CSA to similarly situated customers." *Transcript of September 2, 1999 Deliberations*, p. 172.

> reasonable prediction of potential damages and the damages are indeterminable or difficult to ascertain at the time of contract formation, then courts following the prospective approach will generally enforce the liquidated damages provision.
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> . . . .
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> . . . Under this approach, courts must focus on the intentions of the parties based upon the language in the contract and the circumstances that existed at the time of contract formation. Those circumstances include: whether the liquidated sum was a reasonable estimate of potential damages and whether actual damages were indeterminable or difficult to measure at the time the parties entered into the contract. If the provision satisfies those factors and reflects the parties' intentions to compensate in the event of a breach, then the provision will be upheld as a reasonable agreement for liquidated damages.

Guiliano v. Cleo, 995 S.W.2d 88, 98-99, 100-01 (Tenn. 1999) (citations and footnotes omitted).

9. It appears from the record that the liquidated sum was a reasonable estimate of potential damages given that the actual damages were difficult to measure at the time the parties entered into the CSA. The termination provisions reflect the parties' original intentions to compensate for termination of the contract. Further, the parties were in the best position to know what considerations influenced their bargaining at the time they entered into the contract. Given these conclusions, the contract termination provisions should be upheld as reasonable agreements between the parties.[9]

IT IS THEREFORE ORDERED THAT:

1. BellSouth Telecommunications, Inc.'s Tariff No. 99-00210, which seeks approval of Contract Service Arrangement No. TN 98-2766-00, is hereby granted.

2. Any party aggrieved with the Authority's decision in this matter may file a Petition for Reconsideration with the Authority within fifteen (15) days of the filing of this Order.

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[9] Director Kyle stated: "I find that these termination provisions restore to BellSouth benefits that it has conferred upon the [bank] throughout contract performance . . . . I do not find these termination provisions to be unreasonable nor do I believe that such provisions have the effect of unreasonably locking the bank or the store into the respective volume and term agreements." *Transcript of September 2, 1999 Deliberations*, p. 174-750.

3. Any party aggrieved with the Authority's decision in this matter may file a Petition for Review with the Tennessee Court of Appeals, Middle Division, within sixty (60) days of the filing of this Order.

Melvin J. Malone, Chairman[10]

H. Lynn Greer, Jr., Director

Sara Kyle, Director

ATTEST:

K. David Waddell, Executive Secretary

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[10] Prior to the consolidated hearing, Chairman Malone consistently voted against the approval of long term BellSouth CSAs that contain hefty termination provisions. Pursuant to previous action taken by the agency, a hearing was envisioned on each of the common issues then pending in TRA Docket No. 98-00559. Unfortunately, the consolidated hearing held in Docket Nos. 99-00210 and 99-00244 was not such a hearing. Certain compromises, however, have led to some positive, although limited, modifications to BellSouth's CSAs. It is due, in part, to said modifications, coupled with optimism that such amendments will continue, that Chairman Malone is able to support the result reached by his colleagues.

Moreover, one controlling fact cannot be either ignored or understated. According to the testimony, BellSouth was confronted with a bona fide competing offer as concerning both CSAs. *See Hearing Transcript, August 17, 1999, Vol. I A at 54; Pre-filed Testimony of Margaret Brown at 2; and Pre-filed Direct Testimony of Randall Frame at 5-8.* Significantly, the testimony supporting the assertion of a bona fide competing offer was either not challenged by the intervenors or was corroborated by them. Hence, these customers had what the Tennessee General Assembly and the United States Congress have declared that they should have - competitive choice. Notwithstanding the action taken here, Chairman Malone opined that the agency must remain ever mindful that the local telephony market in Tennessee is still in its infancy. During this delicate transitory period, the agency must be careful to employ assiduous reasoning and thoughtful analyses when reviewing BellSouth CSAs.

Chairman Malone emphasized the agency's conclusion that the "secondary" termination provisions related to the underlying tariff services were not at issue. If the agency had determined that the "secondary" termination provisions were, in fact, squarely before it in these consolidated cases, Chairman Malone would have yielded against approval on the grounds that the termination provisions, when taken as a whole, were so potentially anti-competitive as to warrant denial. When the agency reviews these "secondary" provisions, it must exercise care to not overlook or omit the fact that most, if not all, of the "secondary" termination provisions containing harsh buyouts were approved before the passage of both the State's Telecommunications Act of 1995 and the Federal Telecommunications Act of 1996. With few, if any, exceptions, the "secondary" termination provisions were approved during and in support of a rate base/rate of return environment. As is well known, the need to provide BellSouth with the opportunity to earn an authorized rate of return by guaranteeing its revenue streams via the allowance of severe termination provisions passed with the effectiveness of BellSouth's price regulation plan.

CERTIFICATE OF SERVICE

I hereby certify that on May 30, 2003, a copy of the foregoing document was served on the parties of record, via the method indicated:

[ ] Hand
[X] Mail
[/] Facsimile
[ ] Overnight

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