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Chairman Sara Kyle
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

RE: TCA §65-5-201 as amended by Public Chapter No. 41 03-00366

Dear Chairman Kyle:

Enclosed is a copy of a "White Paper" prepared by BellSouth with regards to the recently enacted legislation referenced above.

If you have any questions or would like to discuss the matter further, we would be more than happy to do so.

Very truly yours,

Charlie

Cc: Shirley Frierson

Legal Issues Relating to T.C.A. § 65-5-201 as amended by Public Chapter No. 41

Brief Overview of Issues

BellSouth has received inquiries regarding the proper construction of newly-amended T.C.A. § 65-5-201 relating to the following areas:

1. Whether, pursuant to the newly-amended statute, CSA discounted pricing is effective immediately to Tennessee businesses upon filing of the CSA by BellSouth;
2. Whether there is a need for the preparation and submission of a tariff page for each CSA;
3. Whether there is any continuing need for the "Tennessee Addendum", which currently contains statements regarding the customer's awareness of the existence of a competitive alternative as well as termination liability;
4. Whether there is any need for materials justifying BellSouth's assertion that the CSA does not contain below-cost pricing; and
5. Whether the "proprietary" marking of CSAs creates any issue.

Analysis of these issues and a general discussions of the law relating to these issues follows.

I. Newly Amended T.C.A. § 65-5-201 Governs Special Rates and Terms Negotiated Between BellSouth and Business Customers

On April 10, 2003, the General Assembly unanimously passed Senate Bill 5231, which provides as follows:

> AN ACT to amend Tennessee Code Annotated Section 65-5-201, to establish that special rates and terms are valid when reached through negotiation between a public utility and a business customer.
>
> BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:

[1] The Senate vote of 25-0 occurred on April 8, 2003, and the House vote of 95-0 occurred on April 10, 2003. Moreover, despite the Consumer Advocate's expressed opposition to the bill, no committee member in either house opposed the bill or took steps to delay passage of the bill. The General Assembly's support for the bill can only be characterized as overwhelming.

SECTION 1. Tennessee Code Annotated, Section 65-5-201, is amended by adding the following language at the end of the section:

Notwithstanding any other provision of state law, special rates and terms negotiated between public utilities that are telecommunications providers and business customers shall not constitute price discrimination. Such rates and terms shall be presumed valid. The presumption of validity of such special rates and terms shall not be set aside except by complaint or by action of the TRA directors, which TRA action or complaint is supported by substantial evidence showing that such rates and terms violate applicable legal requirements other than the prohibition against price discrimination. Such special rates and terms shall be filed with the authority.

SECTION 2. This act shall take effect upon becoming a law, the public welfare requiring it.

This new statute provides the definitive source of Tennessee law governing the use of special contracts, also known as and referred to as contract service arrangements (CSAs), which are special contracts containing special rates and terms negotiated by telephone utilities and business customers for regulated telecommunications services. Pursuant to the terms of the new statute, Tennessee law relating to CSAs negotiated between public utilities and business customers has now been changed and clarified.

Prior to enactment of this statute, Tennessee law concerning special contracts was different in two pivotal ways. First, special rates were permitted, but only subject to TRA's power to fix such rates after hearing and notice.2 Second, the general prohibition against unjust price discrimination in utility rates was applicable to special contract rates negotiated with business customers – meaning that some justification was required demonstrating that the unique rate was not being denied to truly similarly-situated customers.

In contrast, the new statute provides instead for a presumption of validity of special rates and terms negotiated with business customers (eliminating the need for the proponent of the CSA to demonstrate proactively that the rates are valid before these rates can be implemented and substituting that presumption for the TRA rate-fixing process formerly provided by law), and the statute prescribes that such negotiated rates shall not constitute price discrimination as a matter of law (eliminating the concept

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[2] Prior to amendment, TCA § 65-5-201 provided that "[t]he Tennessee regulatory authority has the power after hearing upon notice, by order in writing, to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof, as well as commutation, mileage ***and other special rates*** which shall be imposed, observed, and followed thereafter by any public utility..." TCA § 65-5-201(emphasis added).

of price discrimination as a relevant consideration). Under the new law, the General Assembly explicitly limits the legal bases upon which a complaint or action of the TRA could be founded to set aside such special rates and terms. Specifically, pursuant to the new statute, special rates and terms, as a matter of law, cannot be deemed price discrimination under any circumstance. The statute further clarifies that any action to set aside such presumptively valid special rates and terms must be based on some legal requirement other than the prohibition against price discrimination (clearly limiting the scope of issues to those required by applicable law, rather than permitting policy-driven rate review). These two significant changes in the law dramatically alter the context in which CSAs must be viewed and mandate stark changes in the handling of CSAs at the TRA.

This new legislation represents a significant change in Tennessee law. Even a cursory review of the legal arguments, raised during the TRA's various dockets relating to CSAs over the past five years, evidence the significance of these developments in the law. Specifically, during the most recent TRA rulemaking docket, the parties' arguments centered nearly exclusively on the issues of price discrimination and procedure to ensure adequate review under the former law. Given the deletion of price discrimination as an issue, and the presumption of validity, these issues no longer present controversies for the TRA to resolve. Instead, the TRA must heed the clear direction of the statute, which has eliminated those legal issues that have been raised in the past regarding CSAs.

Under even the former law, BellSouth and other industry members believed that CSAs did not violate the prohibition against price discrimination because they were justified by competitive necessity. Stated simply, the CSA customers were special in that they had available competitive choices, and this justified departure from the generally-available tariff rates. Under the new statute, however, the validity of CSAs has been plainly established irrespective of these potential discrimination issues.[3]

In amended § 65-5-201, the General Assembly has prescribed that – as a matter of law – special rates and terms negotiated with business customers "shall not constitute price discrimination". Consequently, the legislature has acted to provide that price discrimination issues simply are no longer applicable to CSAs. In light of this change in law, BellSouth believes that many of the materials that were formerly submitted and reviewed with BellSouth's CSAs in the past are no longer relevant to any area regarding which the TRA is authorized to inquire and, consequently, need not be provided with CSA filings. Moreover, now that the law has changed, any attempt to

[3] 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. The TRA has conducted both a contested case proceeding and two separate rulemakings and yet, each time there has been no showing that any party in Tennessee has ever been the victim of price discrimination or other injury related to a CSA.

impose any burdens on telephone utilities that would require those utilities to demonstrate a justification for the departure from generally available tariff rates would be an ultra vires action, not permitted by state law. See, for example, BellSouth v. Greer, 972 S.W.2d 663, 681 (Tenn. App. 1997) (holding that PSC exceeded its statutory authority by adjusting figures in BellSouth's 3.01 Form, wrongly failed to approve BellSouth's price regulation plan, and its actions were inconsistent with and unauthorized by statute and thus subject to reversal.) See also BellSouth v. Bissell, 1996 Tenn. App. LEXIS 623 (copy attached) (holding that PSC was not authorized to continue to engage in an earnings investigation once new legislation rendered the investigation an act that "no longer had any purpose" and finding continuation of such purposeless process an arbitrary act subject to reversal).

In addition to the change in law relating to price discrimination, the statute also changes the law relating to the implementation of special rates and terms for business customers. While, under the former law, all rates were subject to some form of TRA rate review process, the new law provides instead for a mandatory presumption of validity. Any waiting period before effectiveness for these rates and terms would be flatly inconsistent with the notion of presumptive validity. The new law has changed the entire context of CSAs from an area in which CSAs were permissible in the discretion of the Authority after review to an area in which they are valid until shown by substantial evidence to violate the law. Only then can the Authority take action to "set aside" the CSA, which is otherwise made valid by operation of the statute.

In short, the law has changed. While BellSouth and other industry members believe that CSAs should have been permitted under the old law, and while other parties may have opposed that position, those arguments and positions are no longer the issue. The new law now governs these questions. The new law mandates that CSAs be presumed valid, rather than subjecting CSAs to review and approval prior to implementation. The new law puts to rest any question regarding price discrimination.

II. The Clear Intent Of The Legislature Was To Change The Law To Ensure Immediate Effectiveness For CSAs.

The introduction of presumptive validity for CSAs represents a significant change in Tennessee. The TRA must not undermine the intended practical effect of this new concept by imposing time-consuming regulatory hurdles where a presumption is required by law.

Under Tennessee law, words in statutes are to be given their ordinary meaning. Tennessee Court have consistently recognized the requirement that statutes be construed to give the ordinary and natural meaning to terms 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, shall4 be presumed valid – in other words, the statute establishes the mandatory inference of validity without proof or other process by the TRA. The only requirement imposed by the statute is filing of the rates and terms with the Authority.

The statute provides for no waiting period prior to effectiveness of these negotiated special rates,5 and the statute clearly establishes that there can be no regulatory rate-fixing action required by the TRA, because such rates are instead to be presumed valid. As noted above, given its ordinary meaning, a presumption is a legal device that operates without proof or action by a proponent. Given that no action should be taken, it logically follows that no waiting period is warranted before the special rates and terms are effective. Imposition of a waiting period before parties can obtain the benefit of a mandatory statutory presumption is simply an arbitrary regulatory action.

Notably, in contrast to the Tennessee statute, some other states have enacted statutes in which a presumption of validity is qualified or limited by the explicit creation of a waiting or notice period that must elapse before the presumption of validity is effectuated. For example, the Florida statute provides that utilities may set or change the rate for nonbasic services and the rate shall be presumptively valid "on 15 days notice." See Section 364.051(6), Florida Statutes. In stark contrast to the Florida legislation, however, the Tennessee statute imposes no notice or waiting period. Without such an explicit reference to a delay, it is illogical to construe the statute to permit any such delay before effectuation of a statutorily-presumed, valid rate. Clearly

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[4] Tennessee, like most states, has long recognized 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). The language in the statute directing that the negotiated rates "shall be presumed valid" imposes a mandatory requirement with no room for the exercise of discretion, by the TRA or its Staff, to impose additional substantive or procedural requirements as a condition of implementing these rates and terms.

[5] Had the legislature merely intended to resolve the lingering debate at the TRA about price discrimination – or merely intended to "bless" the existing level of review and process at the TRA – it would not have needed to create a presumption. The fact that the General Assembly created a presumption, rather than merely authorizing the TRA to accept such rates in its discretion without the price discrimination concern, demonstrates that the statute is designed to streamline the CSA process and obviate the need for the existing level of scrutiny of CSAs. To conclude that the TRA should continue to subject CSAs to a 30-day waiting window before recognizing the validity of such rates would be the equivalent of turning a blind eye to the legislature's action. The General Assembly created a new presumption, and that effort must be recognized rather than ignored.

the Tennessee General Assembly knows how to qualify a presumption by requiring that the presumption only arises after some act is done or not done. See, for example, TCA § 50-6-235 (establishing presumption of "reasonable effort" to arise only if physician takes certain steps); T.C.A. § 66-29-135 (establishing presumption of abandonment of gift certificate to arise only if it remains unclaimed for 5 years after it becomes payable). These examples demonstrate that the General Assembly knows perfectly well how to draft a statute that qualifies or limits the operation of a legal presumption. In this case, however, the legislature chose to impose no such limitations or qualifications, and the TRA may not impose any such limitation on the operation of the presumption created by law.

In addition, the use of the term "set aside" is also instructive. Rather than stating that the Authority may "deny" or "reject" a CSA after a showing of illegality, the statute instead directs that the rate may be "set aside" in that situation. The term "set aside" is used in the legal context to mean "to reverse, vacate, cancel, annul or revoke a judgment, order, etc." Blacks Law Dictionary, Sixth Ed. This choice of words is therefore consistent with the notion that the rates have already gone into effect because the term is used to describe an action to "undo" something such as an order or judgment already in place. This supports the conclusion that the statute requires immediate effectuation of CSAs because, otherwise, there would be nothing in place to "set aside" in the event review were required by complaint or action by the Directors.

The legislative history relating to the statute further supports immediate implementation of CSAs and notes that "[t]his bill reduces the current delay of and implementation of those rates, and the special contracts are presumed valid and after they are taken to the TRA ...." It is clear from this legislative history that the intent of the legislature was to reduce any period of delay after negotiation of the special rate and term and before implementation of such rates by replacing the need for review of such rates with a presumption of validity.

There is no TRA rule addressing a waiting period for effectuation of special contracts. In fact, CSAs have always been considered to be a unique matter governed by the specific rule, for special contracts, rather than the rules applicable to tariffs. Consistent with this interpretation, CLECs have not filed their CSAs as tariffs. The existing TRA special contracts rule merely provides that special rates must be submitted to the Authority. See Rule 1220-4-1-.07.6 Accordingly, there is no applicable existing procedure requiring any waiting period prior to effectiveness. The TRA procedure

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[6] TRA Rule 1220-4-1-.07 provides as follows:

> Special contracts between public utilities and certain customers prescribing and providing rates, services and practices not covered by or permitted in the general tariffs, schedules or rules filed by such utilities are subject to supervision, regulation and control by the Commission. A copy of such special agreements shall be filed, subject to review and approval.

Obviously, this rule must be construed in light of the statute, and the statement that special contract rates are "subject to supervision, regulation, and control" has been rendered void as applied to those special contract rates and terms negotiated with business customers for telecommunications services, by the clear operation of the new statute.

relating to the period before tariffs are effective is inapplicable as no law requires the special contracts to be tariffed. As discussed below in Section III(1), pursuant to the new statute, it is clear that the rates and terms need not be contained in a tariff in order to be valid. That requirement would be an additional requirement inconsistent with the presumption of validity.

This issue is one with real and particularly serious practical consequences for business customers. Under the previous practice, BellSouth's customers had no way of knowing when or if the special rates they negotiated could be implemented. That sort of uncertainty is annoying to customers and simply not manageable for businesses. A discount that may or may not be realized – at some uncertain date in the future – is simply not valuable to businesses. BellSouth has, for example, one particular large business customer who will not entertain and sign BellSouth CSAs because it believes the price contained in the CSA is not firm and cannot be counted upon until approved by the TRA – yet BellSouth cannot obtain approval without a signed contract. Because of this customer's recognition of delay and uncertainty regarding implementation for the special contract rates with BellSouth, BellSouth has not been able to negotiate a CSA for this customer. That same customer, in contrast, could entertain a CLEC CSA, because no delay in implementation would occur. In fact, under the long-standing practice of the TRA, that CLEC CSA would be treated as effective when signed, and the actual contract would never be filed. Clearly, the legislature intended a more level playing field in this respect; that negotiated rates should be implemented just as quickly for BellSouth's customers as they are realized by CLEC customers.

As one legislator commented during meetings relating to this statute, in response to suggestions that, at most, a BellSouth CSA would be subject to a 30-day delay, even one day of delay before a business reaps the benefit of negotiating in the competitive Tennessee marketplace is simply too much delay. It is this business reality that is at the heart of this issue, and this business reality was, in large part, the motivation driving the General Assembly when it enacted this law. No legislator reading the bill could have suspected that the TRA would attempt to impose any waiting period before CSAs "presumed valid" under law could be effectuated and enjoyed by customers.

III. Several Specific Items Are No Longer Needed Or Appropriate For Filing With CSAs.

1. Tariff Pages

In the past, BellSouth has chosen to seek approval of each CSA as a tariff applicable to the one customer with whom the CSA was negotiated, but also available to all similarly-situated customers. Consistent with this approach, BellSouth filed a tariff page for each CSA, so that the special rates provided to the CSA business customer actually became part of the tariffed rates for BellSouth when approved by the Authority.

BellSouth was never ordered to treat CSAs as tariffs, and TRA rules do not require a tariff for a CSA or "special contract".7 Certainly no CLEC submits its CSAs as tariffs or subjects its CSAs to the rules governing tariffs.

For its part, BellSouth had chosen, prior to the enactment of the statute, to file tariffs for its CSAs solely in order to ensure that the special rates contained in those CSAs would not be held to constitute a discriminatory departure from BellSouth's tariffed rate for those services. Because the CSA rates were submitted and became part of the tariff approved by the Authority, it was clear that the negotiated rate was available to similarly situated customers. Similarly, submission as a tariff ensured that the special rate had been submitted for TRA review. BellSouth adopted the practice of tariffing its CSAs, not out of any legal obligation, but, instead, because the tariff process provided a logical mechanism to address all of the price discrimination issues that had been raised regarding CSAs.

While BellSouth filed a tariff for CSAs in Tennessee, BellSouth never made such filing on any of its other states. Clearly then, tariffing is not necessary for purposes of effectuating federal resale requirements. The lack of "tariffed" CSAs in other states has resulted in no resale issues elsewhere in BellSouth's region.

Notwithstanding BellSouth's decision to proceed using tariff filings under the prior law, there has never been any specific statutory requirement that "special rates" be tariffed, and there is no such law today. Instead, the law, in the past, simply empowered the Authority to approve "special rates" just as it was empowered to fix rates under its general rate-making authority. The law today has been amended to mandate instead that such special rates will no longer be fixed by the Authority, but, instead, shall be "presumed valid."

Pursuant to the language of the new statute, the TRA is now limited in the reasons it may consider to set aside CSA rates. While the TRA's general rate-making authority permitted it to consider policy goals in setting rates, the statute provides that these special rates and terms may only be set aside upon complaint or TRA action supported by substantial evidence showing that the rates and terms violate legal requirements other than the prohibition against price discrimination. Clearly, the new law establishes an area of pricing, namely negotiated pricing for business customers, which is inherently distinct and excepted from the regulated rates encompassed by the TRA's power to set rates. This negotiated pricing is clearly a distinct, statutorily-

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[7] BellSouth has identified no TRA rule requiring that every rate charged to any customer must be contained within its tariffs. Nonetheless, during meetings with the TRA Staff, the Staff has indicated this to be a requirement of TRA rules. BellSouth has asked the Legal Division for a specific citation to the rule upon which the Staff's contention is based but has not yet received a response to that inquiry. The only rule BellSouth has identified as a potential source of this position is TRA Rule 1220-4-1-.03(1), *Tariff Contents*, which provides in part that "[t]ariffs must explicitly state the rates and charges for each class of service rendered." This rule, of course, speaks only to the requirement that each class of service be covered in a tariff. CSAs are a type of negotiated agreement – not an independent "class of service." Accordingly, this rule creates no general requirement that each rate – in each CSA – be tariffed.

sanctioned process of reaching a price that does not permit the TRA to engage in traditional policy-driven rate-making.

There is no legal requirement that special contracts incorporating special rates and terms must be "tariffed" (and there never has been), and there is now no logical reason for tariffing CSAs, which are now exempt from any assertion of price discrimination. Because the General Assembly has directed that such rates are to be "presumed valid", the TRA would exceed its statutory grant of authority if it required BellSouth to include such special rates and terms in its tariff as a condition of validity. Even if any general tariffing requirements could have arguably been deemed applicable to CSAs in the past, such requirements clearly were abrogated by the newly-amended statute, which specifically states that its provisions are applicable "notwithstanding any other provision of state law".

In many ways, the issue of whether "to tariff or not to tariff" is an example of form over substance. Submission of tariffs serve two purposes: (1) review by the Authority to determine validity and (2) public notice. Cases discussed repeatedly in the CSA Rulemaking docket, including, for example, New River Lumber Co. v. Tennessee Railroad Co., 283 S.W. 867, 873-74 (Tenn. 1921), specifically focus upon the need to avoid secret discriminatory departures from rates set by an agency that the legislature has authorized to make rates. In the case of CSAs, under the new law, no review is required in order to determine validity because it is presumed by the statute, and discrimination is no longer any issue. Additionally, public notice is satisfied by filing an unredacted copy with the Authority, which contract becomes an open record, just as any tariff would be.8

With the change in law, there no longer exists any reason – procedural, practical or legal – to submit tariff filings for the purpose of effectuating CSAs. To the contrary, the General Assembly has spoken clearly in establishing that such rates are valid by mandatory statutory presumption without review. Adopting a new requirement of tariffing will necessarily involve a procedural hurdle, and this would undermine the legislative creation of the presumption.

2. The Tennessee Addendum

The "Tennessee Addendum" is a document, which BellSouth attaches to each CSA negotiated in Tennessee, that has evolved over time to contain various items required or sought in the past by the TRA related to CSAs. Stated simply, it is the product of a long history, during which BellSouth learned, from experience, what information the TRA Staff would find persuasive in support of CSA approval. It is several pages long, having been changed and developed over time by BellSouth in an attempt to provide information the company anticipated that the TRA Staff would need in order to recommend approval. No rule or order has ever defined or specified the

[8] Arguably, something less than filing of the contract itself would suffice to satisfy the statute, such as the summary of rates and terms of the style used by CLECs. Nonetheless, BellSouth is willing to continue filing the contract.

particular wording of statements to be included in this document or, for that matter, ever required the Addendum at all. This process has developed, over time, a document full of statements, which customers struggle to understand and which create more questions than answers, about issues that are now moot – either because of the new statute, market development, actions by the TRA, FCC rulings or because of the development of BellSouth's tariff regarding termination liability. Particularly in light of the new statute, the time has come to discard this outdated laundry list of items, no longer relevant to any exercise of Authority discretion.

Since the Tennessee Addendum was developed, much has changed in Tennessee. The TRA's own website provides numerous examples of competitive developments for business customers in Tennessee, including its reference to CLECs providing service in 75 of Tennessee's 95 counties with most of those CLEC lines serving business customers. See, TRA Website "Fast Facts of Telecommunications in Tennessee." In addition to these statistics, the TRA website also references BellSouth's successful petition for 271 relief – a process in which the competitive landscape in Tennessee was closely scrutinized. At the close of that careful and close review, the TRA recommended and the FCC granted 271 relief after concluding that BellSouth's market was open to competition. Any continuing need for the "Tennessee Addendum" must be considered in light of these truly significant developments.

All of the statements contained in the Tennessee Addendum address one of two issues: either price discrimination or termination liability. With respect to price discrimination, the arguments discussed above are applicable. In short, the Tennessee Addendum included an explicit statement by the customer that the customer was aware of competitive alternatives (as opposed to merely accepting BellSouth's own representation regarding the customer's competitive alternatives). This demonstrated that the customer was "special" enough to justify departure from ordinary tariffed rates applicable to other customers without violating the prohibition against unjust price discrimination. This affirmation supported BellSouth's argument that the special rate was not discriminatory under State law. Pursuant to the new statute, however, there is no longer any requirement that the rates must be shown to be non-discriminatory. The statute's terms explicitly exempt special rates and terms from any other state law relating to the price discrimination. Consequently, these declarations in the Addendum serve no purpose under the law. Moreover, on this point the Addendum is redundant, as the body of BellSouth's CSA contract always contains a provision that states that the customer is aware that it can obtain telecommunications services from other providers but has chosen BellSouth. See, for example, Paragraph 7(b) of the CSA attached as Exhibit 1. In addition, the Authority has, many times since the development of the Tennessee Addendum, observed and noted the widespread competition for business customers throughout Tennessee. Both in its recommendation for approval of BellSouth's 271 application and in several reports to the legislature, the TRA has noted the extensive competition by CLECs for Tennessee business customers. See, for example, TRA Annual Report for the period July 2000 to June 2001, page 26, which notes the "significant competitive activity in the business segments of the local telecommunications market." In the years since that report heralded the

telecommunications competition for Tennessee's business customers, the TRA has found competition sufficient to conclude that BellSouth's market's are irretrievably open to competition for purposes of 271 relief. The TRA hardly needs to see one customer's9 declaration in a Tennessee Addendum in order to know that competition exists in Tennessee.

With respect to the portion of the Addendum that addresses termination liability, again, this is an issue that has already been resolved. BellSouth has consistently maintained that all of its CSAs will be subject to the applicable tariff for termination liability in term contracts. See, Section A2.4.10.E.1 and B2.4.9.A.4. The statements contained in the Tennessee Addendum with respect to termination liability are redundant, and the CSAs terms, which include a reference to the Tennessee tariff on termination liability, are sufficient to demonstrate that the terms violate no law.

As a practical matter, BellSouth has, through its Termination Liability Tariff, already documented the termination liability provisions for all of its term contracts. That tariff became effective on August 15, 2001, and incorporated the decision of the TRA Staff to resolve the then-existing questions regarding termination liability. Accordingly, it is unnecessary to continue using the lengthy statements on termination liability

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[9] BellSouth has spent years collecting the CSA customers' signatures for the Tennessee Addenda, in order to provide the TRA with "proof" that these business customers are aware of competition in Tennessee. Given the developments of the past year, this requirement is unreasonable. BellSouth successfully attained 271 relief. In addition, as recognized in the Hearing Officer's report, unanimously adopted by all four TRA directors:

> The changed circumstances of the telecommunications industry in Tennessee are readily apparent. Evidence is present in many areas of this industry that the competition contemplated as a public policy goal of this agency by both Congress and the General Assembly is occurring. There are thirty-eight (38) CLECs which have entered the telecommunications market and which are currently providing telecommunications services in Tennessee. CLECs operate over 515,000 of the wired lines in Tennessee with 89% of those wired lines dedicated to business services. Last year the FCC granted BellSouth the opportunity to enter long distance in Tennessee. The FCC's action took place after the TRA submitted to the FCC its recommendation that BellSouth be allowed to enter the long distance market in Tennessee. In developing its recommendation, the TRA examined the record and the facts – including the existence and prevalence of CSAs in Tennessee – and concluded that BellSouth had sufficiently opened its network to competitors supporting the recommendation that BellSouth be allowed to enter the long distance market. By their very nature, CSAs are indicative of competition. In fact, the competition specifically regarding CSAs has been characterized as "fierce". (fn omitted) Thus, rather than evidencing the stifling of competition in the marketplace, CSAs indicate that competition in the marketplace exists. (May 5, 2003 Second Report and Recommendation of Hearing Officer at 6.)

Given this picture of Tennessee's telecommunications market, can it really be necessary to require this type of information from Tennessee businesses? Surely, there can be no legitimate worry that BellSouth could be conspiring to trick the TRA, who itself recognizes competition, into wrongly accepting the idea that CSA customers are also aware of that competition. No other company is burdened with this type of requirement. Customers are not served by it – they are annoyed by it. The requirement of a customer's signed declaration creates an implication that BellSouth has done something to deserve a level of skepticism – yet the picture of competition in Tennessee is so clear that no one should be skeptical of BellSouth's assertion that CSA customers know they have other alternatives. It is clearly time to remove this outdated, and unwarranted, burden.

contained in the Tennessee Addendum, which predates the termination liability tariff. In certain cases, the Tennessee Addendum has also addressed termination charges and the application of charges under a "shortfall" provision, where appropriate. BellSouth has repeatedly stated that charges under a shortfall provision do not apply in the event of early termination, and the Tennessee Addendum has included a statement to that effect where necessary. Although redundant, BellSouth will continue to provide that clarification in its contracts.

Frankly, as a legal matter, the new statute provides for the negotiation of both rates and terms with business customers. Accordingly, a business customer could, under the statute, choose to negotiate termination liability term that is inconsistent with BellSouth's tariff. In the event that such a term were reached through negotiation, that term would not be subject to review by the TRA, except for the limited purpose of considering whether the term violates applicable law. There can be no question that termination liability provisions, which are a form of liquidated damages clause, are legal in Tennessee. Guilliano v. Cleo, Inc., 995 S.W.2d 88 (July 28, 1999) (holding that parties are free to negotiate termination liability provisions and that such provisions lend certainty, provide for efficient dispute resolution, and permit parties to allocate business and litigation risks.) Consequently, such a legal term would be "presumed valid" pursuant to the explicit language of the statute. Moreover, under the new law, even if the TRA concluded that public policy was not well served by termination liability – or even if the TRA concluded that termination liability had a negative effect on competition – these policy considerations are no longer a valid basis on which to set aside a CSA. Pursuant to the plain terms of the new statute, only a complaint showing the CSA to violate legal requirements is sufficient to set aside a CSA. Thus, as a legal matter, there is no legal basis for requiring BellSouth to provide any additional material disclosing or describing termination liability other than the term itself – which is clearly stated in the contract.

3. Cost Support

BellSouth has consistently provided cost support materials with each CSA it filed, prior to enactment of the new statute, in order to provide support for its request that the CSA be approved and permitted by the Authority. The new statute, however, has dramatically altered the context of filing CSAs. Because the statute provides for a "presumption of validity", the TRA no longer reviews CSAs in the context of its traditional rate-making role, in which the proponent of the rate bears a burden to persuade the TRA to accept it. As to CSAs, the proponent is entitled to a presumption that the rate is valid.

As discussed in Section II above, the term "presumption" must be heeded in applying the statute. Consequently, the requirement of "proof" to support the CSA is contrary to the statute. As a practical matter, however, by merely filing the contract itself, BellSouth is supplying substantial information regarding the above-cost nature of the pricing in a CSA. The rate itself is contained in the contract, which BellSouth will continue to file with the Authority. Cost support for all BellSouth tariffed services is

already on file with the Authority. Using these materials, the TRA can easily determine whether there is a sufficient basis to inquire further regarding the cost associated with a particular CSA in an appropriate circumstance. For example, CSAs relating to the same services are filed consistently. In the event that CSAs continue to have similar pricing, there would be no basis for concern regarding below-cost pricing. Nonetheless, any questions could be answered by reference to cost information already on file.

The routine, standing expectation that BellSouth will provide cost support materials in order to effectuate these presumptively valid special rates would be a requirement contravening the statutory establishment of a presumption of validity.

4. Proprietary Marking

BellSouth has always marked its CSAs "proprietary". This marking refers to restrictions on BellSouth and its customer, other than the filing with the TRA. BellSouth is not planning to file CSAs under seal or in any fashion designed to restrict the ability of the TRA to treat the filing as a public document and open record. This does not represent any change in BellSouth's longstanding process with respect to CSAs. BellSouth began filing these unredacted CSAs, including the proprietary markings, with the Authority nearly two years ago in response to concerns about the Public Records Act, and the Authority has accepted CSAs filed in this manner. BellSouth will happily state in its cover letters that, while the parties to the contract have agreed to treat the contracts as proprietary in all other respects, BellSouth recognizes that the CSAs must be filed with the TRA with no redaction of customer-identifying information in order to address concerns regarding the open records act.

IV. The General Assembly Has Enacted A New Statute That Clearly Dictates A New Criteria And Less Regulatory Review Prior To Effectuation Of CSAs. The TRA Cannot Turn A Blind Eye To Those Changes And Continue To Conduct A Review That Is No Longer Relevant Or Authorized Under The Law.

During the rulemaking docket, several "criteria" were discussed for the handling of BellSouth's CSAs. BellSouth agreed that that process provided a workable and appropriate process under the then-existing law for review of BellSouth's CSAs. Today, however, we have a new law, and many of the areas into which the TRA formerly inquired (and regarding which BellSouth provided materials), are clearly no longer purposeful with respect to the new statute. The Tennessee Court of Appeals has opined in the past regarding the TRA's predecessor's attempts to require BellSouth to provide information that is not relevant under the terms of a new statute. Specifically, in its 1996 decision in BellSouth Telecommunications v. Bissell, 1996 Tenn. App. LEXIS 623 (copy attached), the Tennessee Court of Appeals concluded that the PSC erred when it decided to continue an investigation of the future earnings of BellSouth despite legislative developments that stripped the Commission of its authority to use such an investigation to set telephone rates. Opinion at 2. In its opinion, the Court stated that

while the new statute stated that nothing in the statute affected the authority and duty of the Commission to complete any investigation pending at the time, nonetheless, the legislature did not intend to authorize the PSC to continue an investigation that "no longer had any purpose." Opinion at 4. The opinion is brief and direct, reaching the obvious conclusion that an agency may not continue to follow blindly an outdated process or policy when new legislation has obviated the need for such a practice. Finding the decision to continue down an old path after the legislature has set a new course to be "simply arbitrary", the Court noted that such an arbitrary decision can be reversed – even though the decision is merely "procedural". Opinion at 4.

The PSC's 1996 decision to continue an investigation into an area no longer relevant under a new statute was determined by the Court of Appeals to be an arbitrary decision subject to reversal by that Court. Similarly, requiring BellSouth to provide supporting CSA information (basically the same materials required prior to the changes in law), with respect to CSAs that are to be presumed valid by a new statute, is an action that, likewise, "no longer has any purpose." Additionally the delay of effectuation of rates that are presumed valid by statute also would be flatly purposeless in light of the new statute. In fact, engaging in such a purposeless exercise would be the equivalent of willful disregard of the action by the legislature resolving the issues debated regarding CSAs. Clearly, given the guidance of the BellSouth v. Bissell opinion discussed above, such actions would constitute an arbitrary and reversible decision by the TRA. Moreover, such a course would constitute an extreme waste of the TRA's resources, particularly given the numerous other pressing issues requiring the TRA's attention and resources.

In addition, the statute, as revised, applies to all public utilities that are telecommunications providers, and not simply to BellSouth. It is difficult to fathom how the TRA could require that BellSouth provide an actual contract setting out its special rates and terms, a tariff page, cost support information, a specialized Tennessee Addendum to what may otherwise may be a regional agreement, and wait some period of time before such rates were deemed effective – while the TRA makes no such similar requirements for CLECs. BellSouth has consistently stated during the rulemaking docket and in its continued discussions with various CLECs that BellSouth will not take the position that the new statute requires any additional filing requirements in excess of those already in place with respect to CLEC CSAs. In fact, it is clear from the legislative history that the legislature intended no such additional requirements to be imposed on CLECs. It is also clear, however, that no basis exists for treating BellSouth differently than CLECs under the new law. While BellSouth volunteers to provide the actual contract, there is no justification for additional requirements over and above that filing, which would be imposed only on BellSouth and not on other public utilities that are telecommunications providers. Such a distinction raises serious issues of procedural fairness and equality.

The fact that a practice is long-standing is not a sufficient basis – or even a rational reason – to continue that practice in the face of changed circumstances. Clearly, the legislature is entitled to expect that its efforts to change and develop the law

will not be ignored as an irrelevant technicality when regulators carry out their statutorily-created functions. To continue to engage in obsolete practices, rendered useless by changed circumstances, is wasteful. To continue regulatory procedures rendered purposeless by new legislation is an arbitrary exercise of regulatory power that is contrary to state law.

V. BellSouth Suggests That The Authority Accept A Modified Practice, More Consistent With The New Law, For Future BellSouth CSAs.

While BellSouth believes the statute should be construed consistent with its arguments above, BellSouth is content to volunteer the following information to be provided with CSAs for the convenience of the Authority.

1. An unredacted copy of the contract setting forth the special rates and terms for regulated services. BellSouth will state in its cover letter that this document Is being filed as an open record subject to disclosure by the TRA.

2. A summary of the contract that can be used for the convenience of the Authority in providing notice to interested parties.

3. An affirmative statement from BellSouth that the rates contained in the contract are above cost as demonstrated in cost materials already on file with the Authority. BellSouth will provide a reference to the particular cost studies that are on file.

4. An affirmative statement from BellSouth that BellSouth will continue to construe the termination liability provisions in the contract consistent with its termination liability provisions contained in its tariffs then applicable.

5. Where appropriate, an affirmative statement from BellSouth that any charges under a "shortfall" provision will not apply in the event of early termination of the contract.

BellSouth believes that, with these materials, the Authority will have more than enough material to satisfy the requirement that such special rates and terms shall be filed with the Authority. BellSouth does not concede, however, that such additional materials are required and will explicitly reserve its right to discontinue the practice of volunteering such information in the future. BellSouth would of course provide the TRA with notice of any change in practice. BellSouth recognizes that the Authority may legitimately, from time to time, inquire about cost floor or other legal requirements that may arise in the future. BellSouth will respond to any such legitimate requests from the Authority.

V. Conclusion

CSAs have always been a proper method of delivering the benefits of competition to customers. Even when the law formerly required review 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. Rather than being reluctant to set aside old concerns regarding CSAs, 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 telecommunications market, because of its unique technology-based character, is always dynamic and evolving. 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.

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, which is the architect of Tennessee law, as well as the substantial judicial precedent in Tennessee, which confirms that those who administer the law must follow the mandates of those who author the law.

DATE OF JUDGMENT
SAME AS FILING DATE
OF COURT'S OPINION.
(T.R.A.P. 38)

BELLSOUTH TELECOMMUNICATIONS, INC.,

Petitioner/Appellant,

VS.

KEITH BISSELL, STEVE HEWLETT, SARA KYLE, Constituting the Tennessee Public Service Commission,

Respondents/Appellees.

Appeal No.
01-A-01-9509-BC-00400

Public Service Commission
No. 95-01050

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEALED FROM THE TENNESSEE PUBLIC SERVICE COMMISSION
AT NASHVILLE, TENNESSEE

FOR APPELLANT:

Bennett L. Ross
Nashville, Tennessee

FOR INTERVENOR
AT&T COMMUNICATIONS, INC:

Val Sanford
John Know Walkup
Nashville, Tennessee

FOR APPELLEES:

Dianne F. Neal
Public Service Commission
Nashville, Tennessee

FOR TENNESSEE CONSUMERS:
Charles W. Burson
Attorney General & Reporter

Michael E. Moore
Solicitor General

L. Vincent Williams
Consumer Advocate Division
Nashville, Tennessee

REVERSED AND REMANDED

BEN H. CANTRELL, JUDGE

CONCUR:
LEWIS, J.
KOCH, J.

OPINION

The Tennessee Public Service Commission ordered the completion of a previously authorized investigation of the future earnings of BellSouth Telecommunications, despite legislative developments that stripped the Commission of its authority to use such an investigation to set telephone rates. BellSouth filed a petition with this court for review of the PSC's order, arguing that completion of the investigation was inconsistent with the legislative purpose. We reverse the Commission's order and remand the case for further consideration by the Tennessee Regulatory Commission.

I.

Prompted by a petition filed by the State Consumer Advocate, the Public Service Commission voted on March 28, 1995 to conduct an investigation of the intrastate earnings of South Central Bell (now BellSouth Telecommunications) for a one-year future test period. Under the statute in effect at that time, such an investigation of future earnings was a required preliminary step in the performance of the P.S.C.'s function of establishing "just and reasonable rates" for telephone service.

On May 25, 1995, the Legislature enacted the Teleommunications Reform Act, now codified at Tenn. Code Ann. § 65-5-201 et seq. The new act was expressly designed to encourage competition in the telecommunications services market, and it created an alternative to the traditional method of establishing consumer telephone rates by future rate-of-return analysis.

Under the new procedure, a telephone company could apply for price regulation, and the P.S.C. was required to implement a price regulation plan within 90 days, based on an audit of the rate of return earned by the utility within the most recent reporting period. See Tenn. Code Ann. § 65-5-209(c)and (j). Thus the statute permitted expedited decision-making based on retrospective rather than prospective financial data.

BellSouth applied on June 20, 1995 for price regulation under the new statute. Nonetheless, on July 14, 1995 the Commission voted to complete the earnings investigation, reserving the issue of "whether any use could be made of the results of this investigation under the price regulation scheme set out in the Telecommunications Act . . . ." BellSouth filed a petition under Rule 12, Tenn.R.App.P. to appeal that order. The PSC and intervenor AT&T filed a joint motion to dismiss the petition, on the ground that the order of investigation was not a final order subject to appellate review.

On October 25, 1995, this court dismissed the joint motion on the ground that "interlocutory administrative orders are reviewable where the agency has plainly exceeded its statutory authority or threatens irreparable injury in clear violation of an individual's rights." This court also stayed all proceedings in the Commission related to the earnings investigation, and directed that the appeal proceed.

On July 1, 1996, the PSC was replaced by a new, appointed agency called the Tennessee Regulatory Authority. *See* Tenn. Code Ann. § 65-1-201. On June 11, 1996, this court heard oral arguments on BellSouth's petition for review. Neither in the briefs nor in oral argument did the PSC articulate a reason why the investigation should continue. The parties all acknowledge that the information

gained through the investigation would be irrelevant to BellSouth's rates. The PSC argues only that the investigation might serve some purpose.

We think the PSC's decision to continue the investigation is simply arbitrary, a decision "that is not based on any course of reasoning or exercise of judgment." *See Jackson Mobilphone v. Tennessee PSC*, 876 S.W.2d 106 at 111 (Tenn. App. 1993). An agency's arbitrary decision -- even a preliminary, procedural, or intermediate one -- may be reversed by the reviewing court. Tenn. Code Ann. § 4-5-322(a)(1), (h)(4).

We are aware that in adopting regulatory reform the legislature was careful to say that nothing in the act would "affect the authority and duty of the Commission to complete any investigation pending at the time" the act became effective. *See* Acts 1995, ch. 408. But we do not think the legislature intended to authorize the PSC to continue an investigation that no longer had any purpose.

We, therefore, reverse the PSC's order continuing the earnings investigation and remand the cause to the Tennessee Regulatory Authority for further proceedings consistent with this opinion. Tax the costs on appeal to the PSC.

Ben H. Cantrell
BEN H. CANTRELL, JUDGE

CONCUR:

Samuel L. Lewis
SAMUEL L. LEWIS, JUDGE

William C. Koch, Jr.
WILLIAM C. KOCH, JR., JUDGE

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
Petitioner/Appellant,	)	Appeal No. 01-A-01-9509-BC-00400
VS.	)	
KEITH BISSELL, STEVE HEWLETT, SARA KYLE, Constituting the Tennessee Public Service Commission,	)	Public Service Commission No. 95-01050
Respondents/Appellees.	)	Reversed and Remanded

FILED
OCT - 2 1996
Clerk of the Courts

JUDGMENT

This cause came on to be heard upon the record on appeal from the Tennessee Public Service Commission, and briefs and argument of counsel; upon consideration whereof, this Court is of the opinion that the order should be reversed.

In accordance with the opinion of the Court filed herein, it is, therefore, ordered and decreed by this Court that the order of the Commission should be reversed. The cause is remanded to the Tennessee Regulatory Authority for further proceedings consistent with this opinion.

Costs of this appeal are taxed against the Tennessee Public Service Commission.

ENTER OCT - 2 1996

Samuel L. Lewis
SAMUEL L. LEWIS, JUDGE

Ben H. Cantrell
BEN H. CANTRELL, JUDGE

William C. Koch, Jr.
WILLIAM C. KOCH, JR., JUDGE

CONTRACT SERVICE ARRANGEMENT
AGREEMENT Case Number TN02-L840-00

This Contract Service Arrangement Agreement ("Agreement") is by and between BellSouth Telecommunications, Inc., a Georgia corporation, d/b/a BellSouth, ("Company") and American Conveyor Group ("Customer" or "Subscriber"), and is entered into pursuant to Tariff Section A5 & B5 of the General Subscriber & Private Line Services Tariff. This Agreement is based upon the following terms and conditions as well as any Attachment(s) affixed and the appropriate lawfully filed and approved tariffs which are by this reference incorporated herein.

1. Subscriber requests and Company agrees, subject to the terms and conditions herein, to provide the service described in the Attachment(s) at the monthly and nonrecurring rates, charges, and conditions as described in the Attachment(s) ("Service"). The rates, charges, and conditions described in the Attachment(s) are binding upon Company and Subscriber for the duration of this Agreement. For the purposes of the effectiveness of the terms and conditions contained herein, this Agreement shall become effective upon execution by both parties. For purposes of the determination of any service period stated herein, said service period shall commence the date upon which installation of the service is completed.

2. Subscriber agrees to subscribe to and Company agrees to provide any additional tariffed services required for the installation of the Service. Subscriber agrees to be responsible for all rates, charges, and conditions for such tariffed services.

3. This Agreement is subject to and controlled by the provisions of Company's or any of its affiliated companies' lawfully filed and approved tariffs, including but not limited to Section A2 of the General Subscriber Services Tariff and No. 2 of the Federal Communications Commission Tariff and shall include all changes to said tariffs as may be made from time to time. All appropriate tariff rates and charges shall be included in the provision of this service. The tariff shall supersede any conflicting provisions of this Agreement, with the exception of the rates and charges herein, in the event any part of this Agreement conflicts with terms and conditions of Company's or any of its affiliated companies' lawfully filed and approved tariffs.

4. This Agreement may be subject to the appropriate regulatory approval prior to commencement of installation. Should such regulatory approval be denied, after a proper request by Company, this Agreement shall be null, void, and of no effect.

5. If Subscriber cancels this Agreement prior to the completed installation of the Service, but after the execution of this Agreement by Subscriber and Company, Subscriber shall pay all reasonable costs incurred in the implementation of this Agreement prior to receipt of written notice of cancellation by Company. Notwithstanding the foregoing, such reasonable costs shall not exceed all costs which would apply if the work in the implementation of this Agreement had been completed by Company.

6. The rates, charges, and conditions described in the Attachment(s) may be based upon information supplied to Company by the Subscriber, including but not limited to forecasts of growth. If so, Subscriber agrees to be bound by the information provided to Company. Should Subscriber fail to meet its forecasted level of service requirements at any time during the term of this Agreement, Subscriber shall pay all reasonable costs associated with its failure to meet its projected service requirements.

Customer Initials _____

Date 10/8/02

CONTRACT SERVICE ARRANGEMENT
AGREEMENT Case Number TN02-L840-00

7. (a) If Subscriber cancels this Agreement at any time prior to the expiration of the service period set forth in this Agreement, Subscriber shall be responsible for all termination charges. Unless otherwise specified by the tariff, termination charges are defined as all reasonable charges due or remaining as a result of the minimum service period agreed to by the Company and Subscriber and set forth in the Attachment(s).

7. (b) Subscriber further acknowledges that it has options for its telecommunications services from providers other than BellSouth and that it has chosen BellSouth to provide the services in this Agreement. Accordingly, if Subscriber assigns this Agreement to a certified reseller of BellSouth local services and the reseller executes a written document agreeing to assume all requirements of this Agreement, Subscriber will not be billed termination charges. However, Subscriber agrees that in the event it fails to meet its obligations under this Agreement or terminates this Agreement or services purchased pursuant to this Agreement in order to obtain services from a facilities based service provider or a service provider that utilizes unbundled network elements, Subscriber will be billed, as appropriate, termination charges as specified in this Agreement.

8. This Agreement shall be construed in accordance with the laws of the State of Tennessee.

9. Except as otherwise provided in this Agreement, notices required to be given pursuant to this Agreement shall be effective when received, and shall be sufficient if given in writing, hand delivered, or United States mail, postage prepaid, addressed to the appropriate party at the address set forth below. Either party hereto may change the name and address to whom all notices or other documents required under this Agreement must be sent at any time by giving written notice to the other party.

Company
BellSouth Telecommunications, Inc.
Assistant Vice President
333 Commerce Street-Floor 23
Nashville, TN 37201

Subscriber
American Conveyor Group
7103 Juniper Rd
Fairview, TN 37062

10. Subscriber may not assign its rights or obligations under this Agreement without the express written consent of Company and only pursuant to the conditions contained in the appropriate tariff.

Customer Initials _____

Date 12/9/02

CONTRACT SERVICE ARRANGEMENT
AGREEMENT Case Number TN02-L840-00

11. In the event that one or more of the provisions contained in this Agreement or incorporated within by reference shall be invalid, illegal, or unenforceable in any respect under any applicable statute, regulatory requirement or rule of law, then such provisions shall be considered inoperative to the extent of such invalidity, illegality, or unenforceability and the remainder of this Agreement shall continue in full force and effect.

Customer Initials DH

Date 10/8/02

CONTRACT SERVICE ARRANGEMENT
AGREEMENT Case Number TN02-L840-00
Option 1 of 1

Offer Expiration: This offer shall expire on: 3/1/2003.

Estimated service interval following acceptance date: Negotiable weeks.

Service description:
This Contract Service Arrangement (CSA) provides for the components of the BellSouth® Integrated Solutions T1 package: Frame Relay service, BellSouth® MegaLink® service provided as a partial channel (link), and BellSouth® MegaLink® Channel service with local exchange service elements.

This Agreement is for thirty-six (36) months.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed by their duly authorized representatives on the dates set forth below.

Accepted by:

Subscriber:
American Conveyor Group

By: Diane Fleet
Authorized Signature

Printed Name: Diane Fleet

Title: Executive Asst

Date: 10/8/02

Company:
BellSouth Telecommunications, Inc.
By: BellSouth Telecommunications, Inc.

By: _____
Authorized Signature

Printed Name: John Anthony

Title: Sales Manager

Date: 11/5/02

Customer Initials DF
Date 10/8/02

CONTRACT SERVICE ARRANGEMENT

AGREEMENT Case Number TN02-L840-00
Option 1 of 1

RATES AND CHARGES

Rate Element	Non-Recurring	Monthly Rate	USOC
1. MegaLink. Channel Service, Combination NAR, each	$.00	$22.65	NQM
2. Hunting, Per line, trunk or NAR	$.00	$.00	HTG
3. Touch-tone central office trunk	$.00	$2.27	TJB
4. MegaLink® service provided under a single CSA rate, partial channel (link), with interoffice up to 75 miles, per link	$.00	$129.11	WBBGS
5. MegaLink® service, Service Establishment Charge, per MegaLink® service channel (for provisioning use only)	$.00	$.00	MGLSE
6. MegaLink® service, Digital Local Channel, each (for provisioning use only)	$.00	$.00	DIGLC
7. Interoffice Channel, each channel 0-8 miles, fixed component (for provisioning use only)	$.00	$.00	ILNO1
8. Interoffice Channel, each channel 0-8 miles, each airline mile or fraction thereof (for provisioning use only)	$.00	$.00	ILNOA
9. Interoffice Channel, each channel 9-25 miles, fixed component (for provisioning use only)	$.00	$.00	ILNO2
10. Interoffice Channel, each channel 9-25 miles, each airline mile or fraction thereof (for provisioning use only)	$.00	$.00	ILNOB
11. Interoffice Channel, each channel >25 miles, fixed component (for provisioning use only)	$.00	$.00	ILNO3
12. Interoffice Channel, each channel >25 miles, each airline mile or fraction thereof (for provisioning use only)	$.00	$.00	ILNOC

Customer Initials _____

Date 10/9/02

CONTRACT SERVICE ARRANGEMENT

AGREEMENT Case Number TN02-L840-00
Option 1 of 1

RATES AND CHARGES

Rate Element	Non-Recurring	Monthly Rate	USOC
13. Clear channel capability, extended superframe format, at initial installation	$.00	$.00	CCOEF

Rate Element	Non-Recurring	Monthly Rate	USOC
14. MegaLink® service, premises visit, per visit	$.00	$.00	MGLPV
15. MegaLink® Channel Service, basic system capacity, central office, 24 voice equivalent channels	$.00	$142.70	VUM24
16. MegaLink® Channel Service feature activation, central office, for analog voice services, per trunk line, per feature activated	$.00	$3.78	1PQWU
17. Feature Activation, Broadband Exchange Line service, 56 Kbps and 64 Kbps data rates, per feature activated	$.00	$6.04	1PQWE
18. Customer Connection to Frame Relay, each Customer Connection includes 1 DLCI, (provisioning USOC:XAFD1), 128 Kbps, each	$.00	$82.89	FRH12
19. Frame Relay Service Feature, Committed Information Rate (CIR), 65-128 Kbps, per DLCI	$.00	$.00	FRVR1
20. Customer Connection to Frame Relay, each Customer Connection includes 1 DLCI, (provisioning USOC:XAFD1), 256 Kbps, each	$.00	$164.98	FRH25
21. Frame Relay Service Feature, Committed Information Rate (CIR), 129-256 Kbps, per DLCI	$.00	$.00	FRVR2
22. Customer Connection to Frame Relay,	$.00	$294.09	FRH38

Customer Initials _____
Date 10/8/02

CONTRACT SERVICE ARRANGEMENT

AGREEMENT Case Number TN02-L840-00
Option 1 of 1

RATES AND CHARGES

	Rate Element	Non-Recurring	Monthly Rate	USOC
22.	each Customer Connection includes 1 DLCI, (provisioning USOC:XAFD1), 384 Kbps, each			
23.	Frame Relay Service Feature, Committed Information Rate (CIR), 257-384 Kbps, per DLCI	$.00	$.00	FRVR4

	Rate Element	Non-Recurring	Monthly Rate	USOC
24.	Customer Connection to Frame Relay, each Customer Connection includes 1 DLCI, (provisioning USOC:XAFD1), 512 Kbps, each	$.00	$294.09	FRH51
25.	Frame Relay Service Feature, Committed Information Rate (CIR), 385-512 Kbps, per DLCI	$.00	$.00	FRVR8
26.	Customer Connection to Frame Relay, each Customer Connection includes 1 DLCI, (provisioning USOC:XAFD1), 768 Kbps, each	$.00	$294.09	FRH76
27.	Frame Relay Service Feature, Committed Information Rate (CIR), 513-768 Kbps, per DLCI	$.00	$.00	FRVR7
28.	DLCI, One per Customer Connection (provisioning only)	$.00	$.00	XAFD1
29.	Flat Rate Service, Business, each (limit of 1 per MegaLink)	$.00	$.00	1FB

Customer Initials DT
Date 10/8/02

CONTRACT SERVICE ARRANGEMENT
AGREEMENT Case Number TN02-L840-00
Option 1 of 1

RATES AND CHARGES

NOTES:

Tariff Authority

A. All applicable rates and regulations for this service as set forth in the Private Line Services Tariff and the General Subscriber Service Tariff are in addition to the rates and regulations contained in this CSA.

B. These rates and charges include the rate elements that have been specifically discounted. Other rate elements that are used in the provision of the service may not have been listed but can be found in the appropriate BellSouth tariff.

C. All applicable charges from Section A4 of the General Subscriber Services Tariff are waived via this agreement.

Service Availability

A. The design, maintenance and operation of the services provided herein is intended for communications originating and terminating from customers' premises to the normal serving wire center (SWC).

B. The rates specified herein contemplate the provision of a digital quality facility over existing interoffice carrier equipment and/or exchange cable facilities compatible with this service. If such equipment, new facilities or changes to existing facilities are required for the provision of this service, a special construction charge based on the cost incurred to make the changes will apply in addition to the specified service rates.

Service Commitments

A. Customer agrees to purchase and maintain a minimum of 8 Combination Voice Channels (NARS).

B. Customer agrees to maintain a minimum 128 Kbps Frame Relay connection per MegaLink® Channel.

C. The services included in this CSA are offered on a package basis only. Customer may not purchase MegaLink® service or Frame Relay service on a stand-alone basis under this CSA.

D. Failure to maintain any of these service commitments will result in the services provided under this CSA reverting to current tariff rates.

Customer Initials _____

Date 10/8/02

CONTRACT SERVICE ARRANGEMENT
AGREEMENT Case Number TN02-L840-00
Option 1 of 1

Termination Liability

The following nonrecurring charges will be waived upon initial installation. However, if any of the service is disconnected prior to the expiration of this CSA, then Subscriber will pay the nonrecurring charges that were waived at initial installation as identified below in addition to applicable termination liability as specified in the tariff.

USOC	NONRECURRING CHARGE
WGGVF-Contract Preparation Charge	$469.00
MOLSE	$575.00, each
D1GLC	$105.00, each
1LNO1	$310.00, each
1LNO2	$310.00, each
1LNO3	$310.00, each
MGLPV	$ 30.00, each
VUM24	$240.00, each
1PQWU, first	$ 7.00, each
1PQWU, additional	$ 6.00, each
1PQWE, first	$ 10.00, each
1PQWE, additional	$ 7.50, each
FRH12	$460.00, each
FRH25	$460.00, each
FRH38	$525.00, each
FRH51	$525.00, each
FRH76	$525.00, each

END OF ARRANGEMENT AGREEMENT OPTION 1

Customer Initials _____

Date 10/8/02

CONTRACT SERVICE ARRANGEMENT
AGREEMENT Case Number TN02-L840-00
Option 1 of 1
Attachment 1

1. Customer and BellSouth acknowledge that various competitive alternatives are available to Customer in the State of Tennessee, including competitive alternatives to services provided herein, as evidenced by one or more of the following:

A. Customer has received offers for comparable services from one or more other service providers. Providers include USLEC and ISDN Net.
B. Customer is purchasing or has purchased comparable services from one or more other service providers. Providers include ISDN Net.
C. Customer has been contacted by one or more other service providers of comparable services. Providers include USLEC and ISDN Net.
D. Customer is aware of one or more other service providers from whom it can currently obtain comparable services. Providers include USLEC and ISDN Net.

2. Customer and BellSouth agree that the Customer's early termination of the Agreement without cause will result in damages that are indeterminable or difficult to measure as of this date and will result in the charging of liquidated damages. Customer and BellSouth agree that with regard to services provided within the State of Tennessee, the amount of such liquidated damages shall equal the lesser of (A) the sum of the repayment of discounts received during the previous 12 months of the service, the repayment of any pro-rated waived or discounted non-recurring charges set forth in the Notes section of the Agreement, and the repayment of the pro-rated contract preparation charge set forth in the Notes section of the Agreement; or (B) six percent (6%) of the total Agreement amount, or twenty-four percent (24%) of the average annual revenue for an Agreement with a term longer than four (4) years. Notwithstanding any provisions in the Agreement to the contrary, Customer and BellSouth agree that with regard to services provided within the State of Tennessee, this Paragraph of this Addendum sets forth the total amounts of liquidated damages the Customer must pay upon early termination of the Agreement without cause. Customer and BellSouth agree that these amounts represent a reasonable estimate of the damages BellSouth would suffer as a result of such early termination and that these amounts do not constitute a penalty.

3. In the event that the Customer terminates this Agreement without cause prior to the expiration of this Agreement, the Customer shall pay a termination charge as specified in Attachment 1, Paragraph 2 above of this Agreement. The Customer may request a calculation of the termination charge at any time during the term of this Agreement. Based on the information available at the start of this Agreement, at the end of the first six (6) months of the Agreement period and for each six (6) month period thereafter, the estimated amount of the termination liability charge will be $2,287. In any event, the estimated termination liability charge will not exceed this amount.

Should the Customer elect to terminate this Agreement prior to the expiration date without cause, the actual termination charge will be calculated in accordance with Attachment 1, Paragraph 2 above and based on information available at the time of termination.

4. Except in the case where the Customer assigns this Agreement to a certified reseller in accordance with Paragraph 7.(b), Customer may not assign its rights or obligations under this

Customer Initials _____
Date 10/8/02

CONTRACT SERVICE ARRANGEMENT
AGREEMENT

Case Number TN02-I-840-00
Option 1 of 1
Attachment 1

Agreement without the express written consent of the Company and only pursuant to the conditions contained in the appropriate tariff.

for Initials _____

Date 10/8/02