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June 13, 2003

VIA HAND DELIVERY

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

Re: *Tariff Filing to Modify Lanugage Regarding Special Contracts*
Docket No. 03-00366

Dear Chairman Kyle:

Enclosed are the original and fourteen copies of BellSouth's Response to AT&T's Petition to Intervene. Copies of the enclosed are being provided to counsel for AT&T.

Cordially,

Joelle Phillips

JJP:ch

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Tariff Filing to Modify Language Regarding Special Contracts*

Docket No. 03-00366

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC.'S PETITION TO INTERVENE

BellSouth Telecommunications, Inc. ("BellSouth") files this response to the Petition to Intervene of AT&T Communications of the South Central States, Inc. and respectfully shows the Tennessee Regulatory Authority ("Authority" or "TRA") as follows:

INTRODUCTION

As an initial matter, BellSouth notes that it was informed by counsel for AT&T that AT&T would be filing its Petition, and provided with a copy of AT&T's Petition to Intervene objecting to BellSouth's tariff by facsimile, at 3:06 p.m. on Friday afternoon prior to the Agenda Conference scheduled for Monday, June 16. AT&T's filing on the eve of the Agenda Conference is difficult to understand. BellSouth's tariff was filed on May 23, 2003, and noted on the Agenda Conference schedule issued June 6, 2003. Accordingly, AT&T was aware of BellSouth's tariff in ample time to present any concerns in a more timely fashion. Because AT&T chose to wait until Friday afternoon to raise these issues, BellSouth must file this abbreviated response.

Clearly, the interest of judicial economy and fairness is undermined by this type of last-minute filing and gamesmanship. Parties should not reap an advantage by

laying in wait for weeks and filing at a time that provides their adversaries with inadequate time for response.

In this case, the bottom line is simple: the legislature has enacted a new statute. AT&T's interpretation of the statute is inconsistent with both the legislative history and with the Chairman's motion at the June 2 Agenda Conference (unanimously accepted by the Panel) that future CSAs would be effective upon filing.[1] The TRA should not be led down a path that is inconsistent with the legislature's action. AT&T's argument is a last-minute attempt to divert the TRA onto just such a path.

DISCUSSION

I. 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

[1] On June 2, Chairman Kyle moved that "all future CSAs negotiated between telecommunications providers and business customers shall become effective upon filing with the Authority ..." Transcript at p. 62, lines 20-25. Neither AT&T nor any other party has sought reconsideration or appeal of this unanimous panel decision.

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[2] 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,[3] 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

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[2] 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 to impose additional substantive or procedural requirements as a condition of implementing these rates and terms.

[3] Had the legislature merely intended to resolve the lingering debate at the TRA about price discrimination – or merely intended to "bless" the existing level 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.

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 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 AT&T

is wrong to suggest that 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. Thus, AT&T's argument that the immediate effectiveness undermines the ability of parties to present evidence of an illegal CSA is simply wrong – the statute clearly states that CSAs would be "set aside" in such an event. The legislature clearly intended the CSAs to be effective unless and until "set aside."

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. Moreover, Senator Trail's written reasons for his

vote expressly state his understanding that the statute would bring about "immediate effectiveness" of negotiated rates with incumbent carriers. *See* Trail Letter, attached as Exhibit A.

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-.07.4 Accordingly, there is no applicable existing procedure requiring any waiting period prior to effectiveness. The TRA procedure 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 II, 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

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[4] 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.

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. AT&T's self-serving request for the TRA to impose such a waiting period should be rejected.

II. CSAs Need Not Be Tariffed Pursuant to the New Statute.

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".[5] 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

[5] BellSouth has identified no TRA rule requiring that every rate charged to any customer must be contained within a tariff. 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.

effectuating federal resale requirements. The lack of "tariffed" CSAs in other states has resulted in no resale issues elsewhere in BellSouth's region. Notably, AT&T has identified no problem engaging in resale in those other states within BellSouth's region, where no tariff filing is made.

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-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.[6] Since enactment of the statute, Bellsouth has filed the actual

[6] 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. Notably, AT&T, the complaining party does not file CSAs with the TRA.

unredacted CSA contract, a letter identifying cost-support materials applicable to CSAs, and a summary of the CSA, which may be used by the TRA for notice.

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.

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.

AT&T now urges the TRA reverse its June 2 unanimous decision, ignore the clear legislative history and be diverted by previously-resolved concerns regarding CSAs. Instead, 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 the old issues surrounding CSAs and on to the many new issues presented by our ever-changing, always-developing market.

Instead, AT&T has taken the position that it is not using contracts for negotiated non-tariffed rates with its customers in Tennessee.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

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SENATOR LARRY TRAIL
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Senate Chamber
State of Tennessee
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COMMITTEES

COMMERCE, LABOR AND AGRICULTURE

EDUCATION

JUDICIARY

SELECT COMMITTEE ON CHILDREN AND YOUTH
CHAIR

May 29, 2003

Russell Humphreys
Chief of Staff
1 Legislative Plaza
Nashville, TN 37243

Dear Russell,

Pursuant to Senate Rule 61, I am supplying to the Clerk these statements explaining my reasons for my vote on Senate Bill 523 for entry into the record.

This bill provides an important benefit to business customers in Tennessee. Pursuant to the terms of this bill, these customers will be able to enjoy immediate effectiveness of discounted telephone rates, which they negotiate with any telephone utility, whether competitive local exchange carrier or incumbent.

The Tennessee Regulatory Authority has, prior to enactment of this law, overseen contract service arrangements implementing negotiated discount rates. This regulatory process has been different for competitive local exchange carriers as compared to incumbent local exchange carriers. In light of the significant developments in the competitive market in Tennessee for business telephone services, these differences are no longer warranted. Specifically, the delays associated with this review process as applied to CSAs with incumbent carriers are bad for Tennessee business and must be stopped. Under this new legislation, these CSAs will be presumed valid and go into effect upon filing with the TRA.

These changes are warranted by the significant competitive landscape in Tennessee, and they are needed in order to assist Tennessee business in getting the benefit of the rates they negotiate. The practical reality is that businesses, particularly in the current economy, should not face regulatory obstacles that slow the implementation of discounts. Rather, these businesses need and deserve to reap the benefit of discounts immediately. For all of these reasons, I believe Senate Bill 523 is an important and necessary step in continuing the move toward a more competitive telecommunications market in Tennessee. Both Chairman Head in the House and I have chosen to sponsor and support this important legislation to accomplish these important goals.

Very Truly Yours,

Larry Trail

Senator Larry Trail

Exhibit A

CERTIFICATE OF SERVICE

I hereby certify that on June 13, 2003, a copy of the foregoing document was served on the parties of record, via the method indicated:

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

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