BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

IN RE: TARIFF FILING TO MODIFY LANGUAGE REGARDING SPECIAL CONTRACTS	))))	DOCKET NO. 03-00366

REPLY TO BELLSOUTH'S RESPONSE IN OPPOSITION TO AT&T'S PETITION TO INTERVENE

AT&T Communications of the South Central States, LLC ("AT&T) filed a Petition to Intervene in this matter on June 13, 2003. Less than ninety minutes later, BellSouth Telecommunications, Inc. ("BellSouth") filed an eleven-page "abbreviated" response to AT&T's Petition.[1] Nothing in the Response states that BellSouth is opposed to AT&T's request to intervene. What BellSouth wants, apparently, is immediate approval of the above-captioned tariff filing without any kind of formal proceeding.[2]

Introduction

As noted in AT&T's Petition to Intervene, this proceeding is highly unusual. BellSouth is attempting to use the tariffing process to override the agency's current rules and establish new agency policies regarding the handling of contract service arrangements ("CSAs") for all telecommunications carriers.

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[1] BellSouth's "abbreviated" Response is actually an edited version of an unsigned, seventeen-page "White Paper" which the company distributed at the TRA on May 28, 2003, the day the tariff was filed.

[2] BellSouth's insistence that the TRA rush to judgment on this matter raises, once again, the concern that the practice of resolving complex, disputed issues without convening a contested case proceeding is a violation of state law and deprives other parties of the due process of law. See Office of the Attorney General v. Tenn. Regulatory Authority, pending before the Tennessee Court of Appeals, docket no. M2003-01363-COA-R12-CV.

AT&T does not dispute that the enactment of Public Chapter 41 has changed state law concerning the Authority's review of CSAs. But a tariff filed by one carrier is hardly the proper venue in which to consider the impact of a new statute on the agency's handling of CSAs for an entire industry. Clearly, the more appropriate way for the agency to proceed is to either (1) open a declaratory judgment proceeding to consider the TRA's rules and policies on CSAs in light of Chapter 41 or (2) ask for an opinion from the Attorney General concerning the application of Chapter 41 and then revise the agency's rules and policies accordingly.

Summary of Argument

BellSouth's proposed tariff is inconsistent with the TRA's rules and should be rejected. Under the agency's rules, a CSA is treated as a tariff and is subject to review and approval by the Authority. A BellSouth CSA, like a BellSouth tariff, must be filed thirty days before its effective date to give the Authority and other parties time to review the CSA to determine whether it complies with state and federal law and the agency's guidelines on CSAs.

Under BellSouth's proposed tariff, all CSAs will become effective immediately upon filing. BellSouth argues that the language of Chapter 41, which declares that CSAs are "presumed valid," requires that CSAs become effective when filed.

BellSouth's argument that "presumed valid" means "effective upon filing" is wrong. "Presumed valid" means that, absent action by agency, the tariff becomes effective automatically on the date scheduled. That date is determined by the agency's rules and typically allows for a period of agency review.

BellSouth itself knows that the term "presumed valid" does not mean that a tariff must become effective upon filing. Seven other states presently allow BellSouth to file "presumptively valid" tariffs. In each one, the tariff becomes valid after the period of review

ranging from seven to thirty days. In not one state does "presumed valid" mean "effective upon filing."

In Tennessee, BellSouth and the TRA staff negotiated new, proposed rules on CSAs under which a contract would automatically become effective, absent intervention by the agency, ten days after filing. (The proposed rules were eventually rejected by the Attorney General for other reasons.) Six months ago, BellSouth characterized the proposed rules as providing for the "presumptive validity" of CSAs, demonstrating that the company's own attorneys understand that "presumptive validity" is not inconsistent with allowing for a period of agency review. See p. 5, infra.

It is up to the Authority to determine when a presumptively valid CSA takes effect. Under the agency's current rules, that period is thirty days after filing. The review period is necessary for the Authority to exercise its statutory responsibility to insure that the CSAs comply with state and federal law. Nothing in Chapter 41 changes that.

The TRA's Current Rules on CSAs

Here is how BellSouth's own attorney recently described the TRA's current rules on CSAs:[3] "Pursuant to the current rule, [BellSouth's] CSAs are publicly filed as tariffs." During the thirty day period before the CSA tariff becomes effective, the CSAs "receive the same case-by-case scrutiny from the TRA as any other tariff filing, focusing on such issues as termination liability, above-cost pricing and the existence of competitive alternatives justifying departure from tariffed rates." Under the current rules, "the TRA has the discretion to seek additional information in the event that its initial review raises questions regarding any aspects of the CSA

[3] This description of the TRA's current rules on CSAs comes from "Comments in Response to November 27, 2002 Notice of Filing," submitted in Docket 00-00702 on December 5, 2002, at p. 2. It was written by Joelle Phillips.

proposed for approval by the TRA." Furthermore, "should the TRA require additional time for its review, it may suspend the CSA tariff filing for an appropriate period of time." Other parties may file a petition to intervene in the CSA filing, "as with any other tariff filing."

Although BellSouth has stated that the TRA's rules are overly restrictive, BellSouth has never indicated that compliance with these rules has caused harm to the company, To the contrary, just four months ago, BellSouth characterized the TRA's current procedures for handling CSAs as a "workable system." "Reply Comments of Industry Members" in Dockets 00-00702, at p. 4. BellSouth emphasized that "no party had identified any fashion in which the TRA's existing procedure results in injury to any party" and reiterated that there is not "any legitimate basis to conclude that the existing rule is flawed." Id. at fn. 7.

Impact of Chapter 41

AT&T does not dispute that Chapter 41 has changed the law regarding CSAs and made it more difficult for the TRA to disapprove a contract. With the enactment of Chapter 41, CSAs are now "presumed valid" and the presumption may be set aside only upon the presentation of "substantial evidence" that a CSA is illegal or anti-competitive. But nothing in Chapter 41 requires that CSAs become effective upon filing or otherwise eliminates the current thirty-day review period. As the term is understood in Tennessee and in every other BellSouth state, "presumptive validity" simply means that, absent the introduction of evidence to the contrary, a CSA automatically goes into effect on the effective date. No further action by the Authority is required. But it is still up to the Authority to determine the "effective date" of the CSA. Under the agency's current rules, the "effective date" of what BellSouth itself has described as a "CSA tariff" is thirty days after filing. Therefore, read in conjunction with the TRA's rules, Chapter 41 means that, unless the TRA acts to suspend a CSA, the contract will automatically become effective thirty days after filing.

"Presumptive validity" does not mean that the opportunity for agency review is eliminated. BellSouth enjoys the right to file "presumptively valid" tariffs in seven of the other eight BellSouth states. In every one of those seven states, the agency has a review period of seven to thirty days, depending upon the kind of tariff, before the filing becomes effective. In not one state does "presumptively validity" mean effective upon filing.[4]

Nor does "presumed valid" mean "effective upon filing" in Tennessee. In May, 2001, the TRA proposed revised CSA rules in which CSAs had to be filed "at least ten days before the effective date of such contracts." Proposed Rule 1220-4-2-.59(6)(a). Under the proposed rules, a CSA "shall be deemed approved ten (10) days after the date of the proper filing ... unless otherwise notified by the Authority." Regardless of the ten-day review period, BellSouth described these proposed rules as "specifically provid[ing] for presumptive validity and a shortened timetable for review." "Comments in Responses to November 27, 2002, Notice of Filing," Docket 00-00702, at p.3.

In other words, BellSouth is well aware that "presumptive validity" does not mean "effective upon filing." It means that, absent regulatory intervention, the CSA becomes effective on whatever date the state regulators determine is appropriate as set forth in the agency's rules. As BellSouth itself recently wrote, the TRA current rules treat BellSouth's CSAs as tariffs and require a thirty day period of review. Nothing in Chapter 41 changes that rule or requires that CSAs become effective upon filing.

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[4] See attached chart on the rules regarding "presumptively valid" tariffs in the other BellSouth states. The chart was prepared by BellSouth and filed with the Kentucky Commission in Docket 2002-00276. ("PV" stands for presumptive validity.) In Kentucky, BellSouth may file presumptively valid access tariffs on one day's notice if the proposed tariffs mirror BellSouth's interstate access rates. BellSouth's recent proposal to the Kentucky Commission to apply a presumption of validity to other kinds of tariffs has been rejected, although the Commission is continuing to study the matter.

Similarly, nothing in Chapter 41 repeals the TRA's other obligations under state and federal law to insure that BellSouth's CSAs are: (1) priced above the statutory cost floor; (2) available for resale; and (3) consistent with the pro-competitive guidelines issued by the Authority. It is important to remember that these requirements reflect statutory mandates and, unless explicitly overruled, remain in full force and effect. The Authority's rules state that CSAs "are subject to supervision, regulation, and control" by the Authority and that copies of CSAs shall be filed "subject to review and approval." Rule 1220-4-1-.07. This language reflects the statutory powers granted the Authority by T.C.A. § 65-5-201, which explicitly gives the Authority jurisdiction to fix "just and reasonable individual rates ... and other special rates" charged by every public utility in Tennessee. T.C.A. § 65-5-201. Emphasis added. The TRA may similarly require that every utility file with the agency "complete schedules of ... every individual rate ... for any product or service rendered within this state." T.C.A. § 65-5-202. That statue provides the basis for the TRA's rules on tariff filings which broadly define "tariffs" to include all charges for utility service in Tennessee. That definition includes CSAs and has always been so understood by the Authority and by BellSouth.

CSAs are Tariffs

In its "White Paper," BellSouth acknowledges that the TRA Staff has informed BellSouth that the agency's rules require that CSAs be filed as tariffs. White Paper, at footnote 7. That interpretation was recently affirmed in the "Second Report and Recommendation of Hearing Officer," issued May 5, 2003 by Director Tate in Docket 00-00702. Her decision was ratified by the Authority on June 2, 2003.

Contrary to the Staff's understanding, Director Tate's recent decision, and BellSouth's statement just six months ago that "pursuant to the current rule, CSAs are publicly filed as tariffs, BellSouth now insists that CSAs are not tariffs." Once again, BellSouth is wrong. The TRA's

rules define tariffs, to include "any change in rates, tolls, charges or rules and regulations." Rule 1220-4-1-.04. Similarly, the tariffing rules refer to "all tariffs and supplements affecting Tennessee intrastate business." Rule 1220-4-1-.06(4). Both of these rules require that all such charges be filed thirty days in advance.[5]

Although Chapter 41 exempts CSAs from the prohibition against price discrimination, the TRA is still required, as previously discussed, to review CSAs to determine whether the contracts comply with other state and federal requirements and the Authority's prior decisions and guidelines. BellSouth simply ignores those other requirements, declaring that the new statute requires that CSAs "are valid by mandatory statutory presumption without review." BellSouth Response, at 11, emphasis added. But "without review," how can the CSA be "subject to review and approval," as the agency's rules and T.C.A. §65-5-201 require? "Without review," how can the TRA determine whether there is "substantial evidence showing that such rates and terms violate applicable legal requirements," as required by Chapter 41 itself?

None of this makes any sense. Chapter 41 does not require that CSAs become effective "without review." It merely creates a statutory presumption that the terms and conditions of the contract are "presumed valid." Under Tennessee law, a legal presumption disappears upon the introduction of proof to the contrary. BellSouth's Response did not dispute, or even address, the meaning of a presumption under Tennessee law as set forth in AT&T's Petition. There is no legal or logical basis for BellSouth's leap from a statutory presumption that CSAs are valid to a statutory mandate for that CSAs must become effective "without review." The proposed tariff is

[5] If CSAs are not tariffs, it is not clear what they are. If they are not tariffs, it is not clear what jurisdiction the TRA has over such "non-tariffs." In any event, if CSAs were tariffs before the passage of Chapter 41, they remain tariffs today. Nothing in the new law addresses this issue one way or the other.

inconsistent with the TRA's rules and the agency's statutory obligation to promote and protect competition by setting aside an illegal CSA before it becomes effective.

Other Issues

Lacking any support for its position in the language of Chapter 41, BellSouth makes three additional arguments that merit a brief response.

First, BellSouth relies on a letter from State Senator Larry Trail (see BellSouth Response, Exhibit A) stating that he thought SB523 (which became Chapter 41) meant that CSAs would "go into effect upon filing with the TRA." According to BellSouth this "legislative history" reflects the intent of the General Assembly in passing Chapter 41.

Senator Trail's beliefs about what he, as an individual, thought the statute accomplished "can never substitute for what was, in fact, enacted." BellSouth v. Greer, 972 S.W.2d 663, 673 (Tenn. App. 1997). Senator Trail's letter, which was written more than a month after Chapter 41 became law and a day after BellSouth filed this tariff, seemingly falls into that category of legislative history which "frequently consists of self-serving statements favorable to particular interest groups prepared and included in the legislative record solely to influence the court's interpretation of the statute." Id., at 674. Thus, as the Court of Appeals ruled in the Greer case; "when a statute's text and legislative history disagree, the text controls." Id. Contrary to Senator Trail's letter, there is no language in the text of the statute which requires that CSAs must become effective upon filing.

Second, BellSouth contends that the TRA has already decided that all future CSAs shall become effective upon filing with the Authority. This argument is based on oral remarks made by Chairman Kyle during the June 2, 2003 agency conference when she voted to approve a number of previously filed CSAs.

BellSouth's proposed tariff about the impact of Chapter 41 was not on the agenda and, therefore, not before the agency on June 2. Chairman Kyle's motion addressed CSAs which had been filed consistent with the TRA's long established practices. To the extent that she also made comments concerning another pending case, those comments cannot legally bind the Authority or any party since the other case was not before the agency at that time. Any decision on a pending case which is not properly before the agency would violate the Open Meetings statute and would be void. Not even BellSouth believes that Chairman Kyle's language about the treatment of future CSAs moots this controversy. Otherwise, this tariff would not be necessary.

Third, BellSouth contends that AT&T's Petition to Intervene was not timely filed pursuant to TRA Rule 1220-1-2-.02(4). Under that rule, a "complaint opposing a tariff shall be filed no later than seven days prior to the Authority Conference immediately proceeding the effective date of the tariff." As stated in the rule, its purpose is to give the company filing the tariff the opportunity "to respond to such complaint."

The rule does not apply to AT&T's Petition. Under normal circumstances, proposed tariffs do not appear on the TRA's agenda absent the filing of a complaint. Here, the TRA sua sponte opened a docket and placed this matter on the agency's conference agenda for consideration. For that reason, AT&T did not file a "complaint" but a Petition to Intervene in a matter which had already been opened by the Authority.

Even if the rule did apply, the issue is now moot in light of the Authority's decision to consider this matter at a specially set conference on June 23, 2003, which occurs before the effective date of the tariff. Finally, BellSouth has filed both a lengthy "White Paper" at the TRA and two responses to AT&T's Petition. Thus, the company has clearly been granted ample opportunity to present its arguments to the Authority. BellSouth's objection has no merit.

Conclusion

The TRA's power to review CSAs before they become effective is one of the agency's most important regulatory tools. In Docket 03-00017, for example, BellSouth filed a tariff in which customers who agreed to sign one-year contracts received rebates of $100 per line. Although BellSouth stated in the initial filing that the contract was available for resale, it later became apparent that BellSouth did not intend to offer the $100-a-line bonus to resellers, thus creating an illegal price squeeze. After concerns were raised by competitors and by some members of the Authority, BellSouth decided to amend its filing to eliminate the price squeeze. This was accomplished before the initial, illegal tariff became effective and demonstrates the importance of the agency's review period.

In the "Second Report and Recommendation" issued by Director Tate in Docket 00-00702 and affirmed by the Authority, she wrote that Chapter 41 "supports and continues the TRAs discretion to take action when necessary to ensure that CSAs work to improve the competitive marketplace." Second Report, at 5. The TRA's "discretion to take action" is of little value if it is not exercised until months after the illegal, anticompetitive act has occurred, the customer lost, and the damage done. Nothing in Chapter 41 suggests, much less requires, a result so completely at odds with this agency's legislative mandate to promote and protect competition.

Respectfully submitted,

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Presumptively Valid Tariffs

States	Price Increases	Price Decreases	New Services	Addl Service Options	New Ts & Cs	Suspension
Alabama	No less than 30 days. Tariff effective as filed unless intervention or PSC suspension. Initial 30 days may be extended 30 days by PSC action. If no action by PSC, tariff effective as filed. Effective date may be extended additional 60 days.	No less than 15 days. Tariff effective as filed unless intervention or PSC suspension. Effective date may be extended additional 60 days due to intervention or PSC investigation. **PV**	No less than 30 days. Tariff effective as filed unless intervention or PSC suspension. Initial 30 days may be extended 30 days by PSC action. If no action by PSC, tariff effective as filed. Effective date may be extended additional 60 days.	Not specifically addressed by Price Regulation Plan. Default to 30 days.	Not specifically addressed by Price Regulation Plan. Default to 30 days.	See rules for price increases, new services, promotions, and price decreases. If not specifically addressed by Price Regulation Plan, state law would permit suspension up to 180 days.
Georgia	30 days **PV**	30 days, **PV**	30 days, **PV**	30 days, **PV**	30 days, **PV**	Yes. May suspend and defer effective date 5 <u>months.</u>
Florida	<u>Basic</u>: 30 days, <u>Non-Basic</u>: 15 days on setting or changing rates, **PV** <u>Access</u>: 7 days on rate decrease; 30 days on rate increase, **PV** Investigation w/i 30 days and hold LEC subject to a refund, Commission action w/i 60 days	<u>Basic</u>: 30 days, <u>Non-Basic</u>: 15 days on setting or changing rates, **PV** <u>Access</u>: 7 days on rate decrease; 30 days on rate increase, **PV** Investigation w/i 30 days and hold LEC subject to a refund, Commission action w/i 60 days	<u>Basic</u>: 30 days, <u>Non-Basic</u>: 15 days on setting or changing rates, **PV** <u>Access</u>: 7 days on rate decrease; 30 days on rate increase, **PV** Investigation w/i 30 days and hold LEC subject to a refund, Commission action w/i 60 days	<u>Basic</u>: 30 days, <u>Non-Basic</u>: 15 days on setting or changing rates, **PV** <u>Access</u>: 7 days on rate decrease; 30 days on rate increase, **PV** Investigation w/i 30 days and hold LEC subject to a refund, Commission action w/i 60 days	<u>Basic</u>: 30 days, <u>Non-Basic</u>: 15 days on setting or changing rates, **PV** <u>Access</u>: 7 days on rate decrease; 30 days on rate increase, **PV** Investigation w/i 30 days and hold LEC subject to a refund, Commission action w/i 60 days	There is no suspension of filings. The Commission must address at an agenda to discontinue tariff.
Louisiana	Commission must accept, reject or elect to publish notice of filed tariff within 10 business days. If no action is taken within 10 days, tariff is deemed accepted, **PV**	Commission must accept, reject or elect to publish notice of filed tariff within 10 business days. If no action is taken within 10 days, tariff is deemed accepted, **PV**	Commission must accept, reject or elect to publish notice of filed tariff within 10 business days. If no action is taken within 10 days, tariff is deemed accepted, **PV**	Commission must accept, reject or elect to publish notice of filed tariff within 10 business days. If no action is taken within 10 days, tariff is deemed accepted, **PV**	Commission must accept, reject or elect to publish notice of filed tariff within 10 business days. If no action is taken within 10 days, tariff is deemed accepted, **PV**	Commission has the right to publish notice of a filed tariff and either accept the tariff or delay the acceptance of the tariff (suspend acceptance).
Mississippi	30 days, **PV**	30 days, **PV**	30 days, **PV**	30 days, **PV**	30 days, **PV**	Yes, Commission may suspend tariff. Rates go into effect after 30 days pending Commission action. May order refunds.
North Carolina	14 days, **PV**, Customer Notification is Required.	7 days unless suspended by Commission for 45 days, **PV**	14 days, **PV**	14 Days, **PV**	14 days, **PV**	Within 14 days, Comm may suspended effective <u>date to 45 days.</u>
South Carolina	14 days, **PV**	7 days, **PV**	14 days, **PV**	14 days, **PV**	14 days, **PV**	Suspension of tariff filing is not allowed
Tennessee	30 Days	30 Days	30 Days	30 Days	30 Days	TRA Discretion

CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be served by United States mail a copy of the within and foregoing Petition to Intervene upon the following person, properly addressed as follows:

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300

This 20th day of June, 2003.

Henry Walker