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Reply to:
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June 30, 2003

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

RE: Brief on Interpretation of Chapter No. 41 of the 2003 Tennessee Public Acts In Re: Tariff Filing to Modify Language Regarding Special Contracts, Docket No. 03-00366

Dear Chairman Kyle:

Enclosed is an original and thirteen copies of the Brief on Interpretation of Chapter No. 41 of the 2003 Public Acts from the Consumer Advocate and Protection Division of the Office of the Attorney General in the above noted docket. Kindly file same in this docket. We are forwarding copies of same to all parties of record. If you have any questions, please feel free to contact me at (615) 532-3382. Thank you.

Sincerely,

Vance Broemel

VANCE BROEMEL
Assistant Attorney General

Enclosures
cc: All Parties of Record

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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**
	)	
	)	

BRIEF ON INTERPRETATION OF CHAPTER NO. 41 OF THE 2003 TENNESSEE PUBLIC ACTS

Comes now Paul G. Summers, the Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of Attorney General (hereinafter "Consumer Advocate"), pursuant to the *Notice of Filing* issued by the Tennessee Regulatory Authority (hereinafter "TRA") on June 24, 2003, and hereby files this *Brief on Interpretation of Chapter No. 41 of the 2003 Tennessee Public Acts*.

I. INTRODUCTION

On May 23, 2003, BellSouth Telecommunications, Inc. (hereinafter "BellSouth") filed a tariff in the above-styled docket to modify its practices with respect to special contracts and Contract Service Arrangements (hereinafter "CSAs") negotiated between the company and business customers. BellSouth's tariff provides, *inter alia*, that CSAs shall become effective immediately upon filing with the TRA, and it further provides that BellSouth will no longer include summaries of the rates and terms of CSAs in its general tariffs.

BellSouth proposed these modifications in order to reflect its interpretation of legislation

recently enacted by Chapter No. 41 of the 2003 Tennessee Public Acts, which states in pertinent part:

> 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.

2003 Tenn. Pub. Acts 41.

For the reasons stated hereinafter, the Consumer Advocate submits that BellSouth's interpretation of Public Chapter No. 41 is incorrect in that it does not support the proposed modifications to existing, pre-legislation procedures[1] for CSAs. Moreover, the Consumer Advocate will demonstrate that approval of BellSouth's tariff would be inconsistent with current TRA rules and procedures that govern the CSA practices of incumbent telecommunications carriers.

II. ISSUES

The TRA should consider the following two issues before it grants final approval to BellSouth's tariff proposal:

1. Whether CSAs are required to be tariffed and, if so, whether enactment of Public Chapter No. 41 repeals or abrogates this requirement; and

2. Whether CSAs are required to be filed upon 30 days notice before they are to become effective and, if so, whether enactment of Public Chapter No. 41 repeals or abrogates this requirement.

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[1] Prior to the enactment of Public Chapter No. 41, BellSouth's CSAs were filed at least 30 days before their effective date, and summaries of the rates and terms of each CSA were submitted for inclusion in BellSouth's general tariffs.

III. ARGUMENT

A. CSAs ARE REQUIRED TO BE FILED AS TARIFFS AND ENACTMENT OF PUBLIC CHAPTER NO. 41 DOES NOT REPEAL OR ABROGATE THIS REQUIREMENT

1. CSAs are required to be filed as tariffs.

Under its statutory grant of authority, the TRA has the power to require the tariffing of the special rates and terms for telecommunications services which are contained in CSAs. In particular, Tenn. Code Ann. § 65-5-202 states:

> The authority has the power to require every such public utility to file with it complete schedules of every classification employed and of every individual or joint rate, toll, fare, or charge made or exacted by it for any product supplied or service rendered within this state as specified in such requirement.

Tenn. Code Ann. § 65-5-202 (Supp. 2002) (*emphasis added*).

Additionally, TRA Rule 1220-4-1-.03 specifies the contents of public utility tariffs as follows:

> (1) Tariffs must explicitly state the rates and charges for each class of service rendered, designating the area or district to which they apply. (2) Rules and regulations of the utility that in any manner affects the rates charged or to be charged or that define the extent or character of service to be given shall be included with each tariff.

Unless and until it is expressly or impliedly repealed, this rule, having been properly adopted, will remain in full force and effect.

TRA rules define "class of service" as "[t]he various categories of service available to customers, such as business or residence." TRA Rule 1220-4-2-.03(f). BellSouth defines "class of service" as "[a] description of telephone service furnished a subscriber . . . ." BellSouth's General Subscriber Services Tariff § A1. "Customer or Subscriber" means "[a]ny person, firm partnership,

corporation, municipality, cooperative organization, governmental agency, etc., provided with telephone service by any telephone utility." TRA Rule 1220-4-2-.03(i). Thus, the "class of service" whose rates and charges must be tariffed pursuant to TRA regulations is a reference to the particular category or description of service that BellSouth or other public utilities provide to any customer or subscriber.

CSAs, which are subject to the supervision and control of the TRA[2], provide for individual rates and charges for a class of service and, moreover, CSAs contain specific terms and conditions that affect the rates charged or to be charged and that define the extent or character of the service to be given. Accordingly, prior to the enactment of Public Chapter No. 41, Tennessee law required the tariffing of the special rates and terms of service contained in and provisioned through CSAs.[3] As discussed below, this tariffing requirement remains unchanged by the new CSA law.

2. Enactment of Public Chapter No. 41 does not repeal or abrogate the requirement that CSAs must be filed as tariffs.

It is a long-standing rule that "a general later law does not abrogate an earlier special one by mere implication." *Burnett v. Maloney*, 97 Tenn. 697, 37 S.W. 689, 691 (1896). Thus, a subsequent act treating the subject in general terms, and not specifically addressing or expressly interdicting the provisions of the earlier law, is not considered as intended to affect the more particular and specific provisions of the earlier law. *See Id.* Tennessee courts also hold that "repeals by implication are not

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[2] *See* TRA Rule 1220-4-1-.07.

[3] Members of the telecommunications industry recognize that, "[p]ursuant to the current [TRA] rule, CSAs are publicly filed as tariffs and receive the same case-by-case scrutiny from the TRA as any other tariff filing . . . ." *Comments in Response to November 27, 2002 Notice of Filing*, TRA Docket No. 00-00702 at p. 2 (Dec. 5, 2002) (submitted by BellSouth on behalf of participating Industry Members).

favored." *Nichols v. Benco Plastics, Inc.*, 225 Tenn. 334, 469 S.W.2d 135, 137 (1971). A necessary corollary of this rule is that a repeal by implication will not be found except in cases of complete irreconcilability between the earlier and later laws. *See Id.*

Additionally, an administrative rule or regulation, valid when promulgated, becomes invalid upon the enactment of a statute in conflict with the regulation. However, an administrative regulation will not be considered as having been impliedly annulled by a subsequent act of the legislature unless the two are irreconcilable, clearly repugnant, and so inconsistent that they cannot have concurrent operation. 2 Am. Jur. 2d *Administrative Law* § 227 (2003). If a regulation has been in existence for a substantial period of time and the legislature has not sought to override the regulation, this fact, although not determinative, provides persuasive evidence of the continued validity of the regulation. *Id.*

In the instant case, it is clear that Public Chapter No. 41 does not specifically address or expressly repeal or abrogate the provisions of Tenn. Code Ann. § 65-5-202 or TRA Rule 1220-4-1-.03. Indeed, the new legislation's requirement that "special rates and terms shall be filed with the authority" is entirely consistent with these earlier laws regarding the long-standing tariffing requirements of the agency.

Neither have the provisions of Tenn. Code Ann. § 65-5-202 and TRA Rule 1220-4-1-.03 been impliedly repealed or abrogated by the enactment of Public Chapter No. 41. The purpose and effect of this new legislation are to: (a) create a presumption of validity of the rates and terms negotiated between telecommunications providers and business customers; (b) place the burden of rebutting the presumption upon the TRA or the complainant; and (c) remove price discrimination as a basis for rebutting the presumption of validity or challenging the legality of CSAs. These

provisions of Public Chapter No. 41 are not completely irreconcilable, clearly repugnant, and so inconsistent that they cannot have concurrent operation with the provisions of Tenn. Code Ann. § 65-5-202 and TRA Rule 1220-4-1-.03.

Accordingly, having been neither expressly nor impliedly repealed or abrogated by the enactment of Public Chapter No. 41, the TRA's tariffing requirements for CSAs remain in full force and effect.

B. CSAs ARE REQUIRED TO BE FILED UPON 30 DAYS NOTICE BEFORE THEY BECOME EFFECTIVE AND ENACTMENT OF PUBLIC CHAPTER NO. 41 DOES NOT REPEAL OR ABROGATE THIS REQUIREMENT

1. CSAs are required to be filed upon 30 days notice before they become effective.

As discussed above, the rates and terms of service contained in CSAs must be filed as tariffs. TRA Rules 1220-4-1-.04 and 1220-4-1-.06(4) explicitly provide that tariffs must be filed with the TRA at least 30 days before their effective date. Specifically, TRA Rule 1220-4-1-.04 states:

> Except as hereinafter provided all tariffs, rate schedules or supplements thereto containing any change in rates, tolls, charges or rules and regulations must be filed with the [TRA] at least thirty (30) days before the effective date of such changes, unless upon application and for good cause shown the [TRA] may waive the thirty day time limit or any portion thereof.

TRA Rule 1220-4-1-.06(4) further states:

> All tariffs and supplements affecting Tennessee intrastate business shall be filed with the [TRA] at least thirty days before the date upon which they are to become effective, unless upon application and for good cause shown the [TRA] may waive the thirty days time limit or any portion thereof.

CSAs constitute service arrangements which are tariffs, rate schedules or supplements[4] that

[4] Even if one took the position that CSAs are not tariffs, they would certainly constitute a supplement to the tariff and/or contain rate schedules, which supplement and/or rate schedules change the rates, tolls, charges, rules and regulations of service.

change the rates, tolls, charges, rules and regulations of a class of service. Moreover, CSAs are tariffs or supplements that affect Tennessee intrastate business. The CSA itself is a business instrument that sets forth specific rates, terms and conditions for the provisioning of intrastate telecommunications service to a particular customer doing business in Tennessee.

Accordingly, just as they have been in the past, CSAs must be filed with the TRA at least 30 days before their effective date. As discussed below, the enactment of Public Chapter No. 41 does not alter this notice requirement.

2. Enactment of Public Chapter No. 41 does not repeal or abrogate the requirement that CSAs must be filed upon 30 days notice before they become effective.

Nothing in Public Chapter No. 41 specifically addresses or expressly repeals or abrogates the TRA's rules with respect to the notice requirements for filing CSAs. Thus, as discussed in section III.A.2., hereinabove, this regulation is impliedly repealed or abrogated only if it is completely irreconcilable, clearly repugnant, and so inconsistent with Public Chapter No. 41 that the two cannot have concurrent operation.

Public Chapter No. 41 provides that the rates and terms negotiated between a telecommunications provider and its business customer are presumed valid. This presumption of validity, however, is not a conclusive presumption which renders the presumed fact of validity irrebuttable.[5] This is obvious from the face of the new legislation itself, which specifically provides that the presumption of validity may be rebutted and set aside by substantial evidence showing that

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[5] A conclusive presumption is really a substantive rule of law that provides the proof of certain basic facts conclusively proves an additional presumed fact which cannot be rebutted. *See* 29 Am. Jur. 2d *Evidence* § 184 (2003). If, for example, Public Chapter No. 41 created a conclusive presumption, the fact that rates and terms were negotiated between a telecommunications provider and a business customer, if proved, would conclusively prove that such negotiated rates and terms are valid.

the negotiated rates and terms violate applicable legal requirements other than the prohibition against price discrimination. Thus, Public Chapter No. 41 creates a rebuttable presumption which "can be overturned upon the showing of sufficient proof." BLACK'S LAW DICTIONARY at p. 822 (6th ed.). Although the presumption of validity created by the new legislation is mandatory in the sense that it must be considered and dealt with appropriately, it may nevertheless be set aside if the TRA or complainant rebuts the presumption with substantial evidence.

Because the presumption of validity created in Public Chapter No. 41 is a rebuttable presumption rather than a conclusive presumption or substantive rule of law, it makes sense for the 30-day notice requirement to remain in place. A rebuttable presumption is not evidence, but merely a procedural device that shifts from one party to another the burden of going forward with evidence to rebut the presumed fact. *See* 29 Am. Jur. 2d *Evidence* § 194. Accordingly, even if BellSouth proves the basic fact that it has negotiated rates and terms of service with a business customer and therefore is entitled to the presumption of validity, such rates and terms are nonetheless subject to further inspection, review, regulation and legal challenge under the new CSA law. The TRA's 30-day notice requirement will afford the TRA or prospective complainant a fair opportunity to come forward and rebut the presumption of validity with substantial evidence that the CSA violates applicable legal requirements. The Consumer Advocate therefore asserts that the TRA's notice rules and the provisions of Public Chapter No. 41 are reconcilable and consistent with one another. Because the rules and the new legislation can operate concurrently and harmoniously, Public Chapter No. 41 did not impliedly repeal or abrogate the TRA's rules.

Accordingly, having been neither expressly nor impliedly repealed or abrogated by the enactment of Public Chapter No. 41, the TRA's rules requiring that CSAs be filed upon 30 days

notice before they are to become effective remain in full force and effect.

CONCLUSION

Based on the foregoing, the Consumer Advocate submits that, pursuant to the TRA's rules, BellSouth must file its CSAs as tariffs and that such filings must be made at least 30 days prior to their effective date. The enactment of Public Chapter No. 41 has neither expressly nor impliedly repealed or abrogated these tariffing and filing regulations. Accordingly, BellSouth's tariff proposal, which seeks to dispense with these tariffing and filing rules for its CSAs, should be denied as it is inappropriate and legally incorrect for the TRA to grant such relief through a tariff filing. If BellSouth wants the TRA to alter the rules that currently govern the CSAs of incumbent carriers, it should, pursuant to Tenn. Code Ann. § 4-5-201, file a petition requesting the TRA to amend or repeal its rules in accordance with the Uniform Administrative Procedures Act.

RESPECTFULLY SUBMITTED,

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Dated: June 30, 2003

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served on parties below via U.S. Mail or facsimile on June 30, 2003.

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