BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

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

INITIAL BRIEF OF AT&T

AT&T Communications of the South Central States, LLC submits the following initial brief concerning the issue of whether Chapter 41 of the Public Acts of 2003 permits the Tennessee Regulatory Authority to review contract service arrangements between telephone companies and business customers before those contracts become effective or whether Chapter 41 requires that such contracts become effective upon filing with the agency.

Summary

The purpose of this declaratory judgment proceeding is to address the impact of Chapter 41 on the rules and procedures of the Authority for handling contract service arrangements ("CSAs"). The new statute declares that CSAs negotiated between regulated telecommunications carriers and business customers must be filed with the Tennessee Regulatory Authority and are "presumed valid." This presumption of validity may only be set aside upon the presentation of "substantial evidence" that the CSA violates "applicable legal requirements other than the prohibition against price discrimination."

BellSouth Telecommunications, Inc. ("BellSouth") has filed a tariff and a "White Paper" setting forth BellSouth's interpretation of the impact of the new statute. According to BellSouth, the language in Chapter 41 which states that CSAs are "presumed valid" also means that the

TRA must allow every CSA to become effective automatically at the moment the CSA is filed with the Authority. According to BellSouth, Chapter 41 prohibits the TRA from conducting a preliminary review of the CSA to determine whether, in fact, it complies with "applicable legal requirements." According to BellSouth, "presumed valid" is – as a matter of law – synonymous with "effective upon filing."

BellSouth's position is inconsistent with the plain language of the statute. "Presumed valid" is not synonymous with "effective upon filing." Under Tennessee law, a presumption is a legal fiction and can be rebutted by evidence to the contrary. See pp. 6-7, *infra*. Chapter 41 explicitly recognizes that the TRA may "set aside" the statutory presumption of validity if presented with evidence that the CSA violates "applicable legal requirements." Chapter 41 thus implies that there must be at least some period of review during which the TRA staff or other parties will have the opportunity to present such evidence before the CSA goes into effect.

As explained below (at pp. 7-8), BellSouth's interpretation of the meaning of "presumed valid" as used in Chapter 41 is also inconsistent with BellSouth's understanding of that term in every other state in the BellSouth region. In other states, BellSouth has been given the power to make presumptively valid tariff filings. In each state, however, the state commission has a period of time to review the tariff before it becomes effective.

Under the TRA's rules, as consistently applied by the Authority and as understood by BellSouth for the last thirty years, a CSA is a tariff and subject to the same filing requirements as any other tariff. Therefore, under the agency's rules, a BellSouth CSA must be filed at least thirty days before it becomes effective. Under Chapter 41, a BellSouth CSA will become effective thirty days after it is filed unless the TRA is presented with sufficient evidence to persuade the agency to suspend or disapprove the contract.

This case requires the TRA to decide how best to promote competition while, at the same time, how to effectuate the language and intent of Chapter 41. On the one hand, the TRA has been directed by the General Assembly to promote the development of competition among telephone carriers. On the other hand, the agency has also been directed to treat CSAs as "presumed valid," which means that the TRA is no longer required to approve each CSA. In balancing those statutory obligations, the TRA may decide that the thirty-day review period for CSAs should be shortened. The agency may also decide to leave the existing rule unchanged. In any event, the determination of an appropriate review period is a matter for the discretion of the agency. Nothing in Chapter 41 requires the TRA to treat CSAs as effective upon filing or otherwise precludes a period of review before the TRA allows the CSA to go into effect.

Statement of Facts

Under the TRA's rules, BellSouth's CSAs are "subject to supervision, regulation and control" by the Authority. Rule 1220-4-1-.07. Since the rules define "tariffs" to include all rates, charges, rules and regulations of the utility "that in any manner affects the rates charged," Rule 1220-4-1-.03, CSAs fall under the definition of tariffs and must be filed "at least thirty days before the date upon which they are to become effective." Rule 1220-4-1-.06. During that thirty-day period, the Authority staff reviews the CSA to determine if the CSA is consistent with federal and state law and with the criteria established by the Authority. Those statutory and administrative criteria were recently spelled out in an Order issued by Director Tate in Docket No. 00-00702[1]. She wrote, at page 7:

[1] The Order was later orally affirmed by the Authority, but the written order of affirmance has not yet been issued.

> Each CSA has been evaluated and reviewed by Authority Staff to meet statutory requirements as well as guidelines reflected in settlement agreements and TRA orders.[18]

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[18] The criteria utilized by Authority Staff to review BellSouth CSAs was articulated by Mr. Joe Werner, Chief of the Telecommunications Division, at the January 27, 2003 Authority Conference. There Mr. Werner stated that each CSA is reviewed to determine: whether the rates comply with the statutory price floor included in Tenn. Code Ann. §65-5-208(c); whether the customer's name is disclosed in conformance with the Public Records Act; whether termination liability provisions are consistent with those adopted by the Authority in Docket 01-00681; whether there is an acknowledgement that the CSA is necessary to respond to competitive alternatives or competing offers; whether the CSA contains anti-competitive terms or otherwise illegal terms; whether the contract is available for resale as required by the FCC; for volume and term contracts, whether shortfall provisions do not apply in the event of early termination as ordered in Docket No. 99-00244; whether a 30-day notice consistent with TRA rules is present; and whether a summary of the CSA including rates and services offered in its tariffs is included. *See* Transcript of Authority Conference, pp. 107-108 (January 27, 2003).

Even BellSouth concurs that, under the TRA's rules, CSAs are filed as tariffs. Here is how BellSouth described the agency's procedures for reviewing CSAs:[2]

> The current level of scrutiny applied to proposed CSAs by ILECs is the most stringent in any state of which these industry Members are aware. Pursuant to the current rule, these CSAs are publicly filed as tariffs and 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 the departure from tariffed rates. Like any tariff filing, the TRA reviews to ensure that the CSAs are non-discriminatory and made available to similarly-situated customers. Pursuant to the current rule, the TRA has the discretion to seek additional information in the event that its initial review raises questions regarding any aspects of the CSA proposed for approval by the TRA. Should the TRA require additional time for its review, it may suspend the CSA tariff filing for an appropriate period of time. Any other party may also file a Petition to Intervene on any CSA filing, as with any other tariff filing. For its part, BellSouth's CSAs include an "addendum," which, among other things,

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[2] 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.

provides the customer's own declaration regarding the existence of a competitive alternative.

Chapter 41

This year, the Tennessee General Assembly enacted Public Chapter 41 regarding the CSAs of all telecommunications carriers. The new statute states:

> 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.

The statute makes two significant changes in the manner in which the Authority regulates CSAs.

First, the statute states that the CSAs are "presumed valid." Normally, a utility filing a proposed tariff must, if challenged, demonstrate to the Authority that the proposed change is "just and reasonable" and otherwise consistent with state and federal law. *See* T.C.A. §65-5-203. The utility, in other words, bears the burden of proof. Under the new statute, however, a proposed CSA is presumed valid which means that the burden of proof has shifted. Now, anyone challenging a proposed CSA must demonstrate that the tariff is <u>not</u> just and reasonable or is otherwise inconsistent with state and federal law. Moreover, such a demonstration must be made by "substantial evidence." This is a significant departure from current law and will make it more difficult for a complaining party to persuade the Authority not to approve a CSA.

The second change effectuated by the new statute involves price discrimination. Under T.C.A. §65-4-122, which has not been amended, a regulated utility cannot charge one customer more than another "for service of a like kind under substantially like circumstances and

conditions." Any utility which "makes any preference" between similarly situated parties "commits unjust discrimination."

The new statute expressly exempts CSAs from the state prohibition against price discrimination. In other words, a regulated telephone carrier may now use a CSA to offer service to one customer which is more or less expensive than the same service offered to a similarly situated customer without violating state law[3].

Those are the only changes made by the new statute. There is nothing in the statute which:

- changes the Authority's rules regarding the filing of CSAs;
- amends the state and federal requirements that CSAs must be priced above cost and made available for resale; or
- affects the Authority's prior orders and decisions regarding CSA termination provisions, proof of a competitive offer, and other anti-competitive practices.

The new statute still requires that CSAs be filed with the Authority and the Authority still has a mandatory, statutory obligation to insure that each CSA is "just and reasonable" and otherwise consistent with state and federal law. If the Authority is presented with "substantial evidence" of non-compliance, the Authority must disapprove the CSA.

Argument

BellSouth has filed a tariff which purports to interpret Chapter 41. The tariff states that CSAs "shall be effective immediately upon filing." The tariff also states that CSAs are available for resale and that, despite the change in the law on price discrimination, CSAs will continue to be made available to "similarly situated customers." Finally, the tariff states that BellSouth will

[3] Discrimination among similarly situated customers is still prohibited by federal law. To the extent a CSA includes regulated interstate services, the utility must still make such services available on the same terms and conditions to similarly situated customers. *See* 47 U.S.C. §202.

no longer include the CSAs in its tariffs, but that the CSAs will nevertheless be available for public inspection at the TRA.

The proposed tariff is not consistent with the TRA's rules which, as Director Tate noted in her Order, require that BellSouth's CSAs be filed thirty (30) days prior to the effective date. There is nothing in the statute which requires or implies that CSAs become effective on the date filed. To the contrary, the statutory scheme is that the Authority will continue to review CSAs and that other parties will be given the opportunity to contest a CSA before it becomes effective.

The statute states that a CSA is "presumed valid." Under Tennessee law, a presumption is "a rule of law, created by statute or judicial decision, in which a finding of the basic fact of the presumption gives rise to the existence of the presumed fact until the presumption is rebutted and becomes inoperative." Whinery, Manual of Evidence (1973). A legal presumption is a "fiction of law or an assumption for convenience but [the] assumption is waived where contrary proof is introduced." *McMahan v. Tucker*, 216 S.W.2d 356 (Tenn. Ct. App. 1948). "When proofs are present, there is neither foundation nor room for presumption." *Schindler v. Southern Coach Lines*, 217 S.W.2d 775 (Tenn. 1949). *See also, Stone v. City of McMinnville*, 896 S.W.2d 548 (Tenn. 1995).

In other words, a presumption may be overcome by evidence to the contrary. By declaring that CSAs become effective upon filing, BellSouth would deny other parties the opportunity to present such evidence to the Authority and thereby persuade the agency that the CSA should not be approved.

"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." Proposed Rule 1220-4-2-.59(7)(a). 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 "presumed valid" 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.

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

[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.

Authority. It is important to remember that these requirements reflect statutory mandates and, unless explicitly overruled, remain in full force and effect. BellSouth simply ignores those other requirements, arguing 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 agency determine whether the terms of the CSA are "just and reasonable" as required by T.C.A. § 65-5-201? "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?

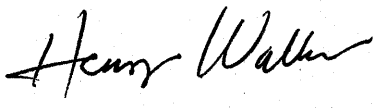
None of this makes any sense. Chapter 41 does not require that CSAs become effective "without review." It merely creates a statutory presumption that the terms and conditions of the contract are "presumed valid." Under Tennessee law, a legal presumption disappears upon the introduction of proof to the contrary. 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 inconsistent with the TRA's rules and the agency's statutory obligation to promote and protect competition.

Conclusion

The TRA's power to review CSAs 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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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 Initial Brief of AT&T upon the following person, properly addressed as follows:

Guy M. Hicks
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This 30th day of June, 2003.

Henry Walker

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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 months.
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 date to 45 days.
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