BEFORE THE TENNESSEE REGULATORY AUTHORITY

Nashville, Tennessee

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

REPLY BRIEF OF AT&T

AT&T Communications of the South Central States, LLC ("AT&T") submits the following Reply Brief to the Initial Brief submitted by BellSouth Telecommunications, Inc. ("BellSouth") on June 30, 2003.

Argument

BellSouth has apparently had a change of heart. After filing dozens of pages of argument in which the company insisted that Chapter 41 requires that CSAs become effective immediately upon filing, BellSouth now argues that the issue before the agency is whether the Authority "may . . . permit CSAs to be effective immediately upon filing, consistent with its current rules and the new statute." BellSouth Brief, at 1 (emphasis added). That is quite a different issue.[1]

Under the agency's current rules, the Tennessee Regulatory Authority ("TRA") has thirty days in which to review a CSA filed by an incumbent local exchange carrier. But as AT&T noted in its Initial Brief, the Authority has the discretion to amend its rules so as to reduce that time period and, in fact, has proposed rules (with BellSouth's agreement) which would have shortened the review period for BellSouth's CSAs to only ten days.[2] While any review period

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[1] BellSouth could hardly continue to argue that a "presumptively valid" rate necessarily means that it is "effective when filed" after AT&T pointed out that BellSouth has "presumptively valid" tariffs throughout the region and all allow for a period of agency review before the rates become effective.

[2] The proposed rules are disapproved by the Attorney General and never became effective. In explaining his reasons for not approving the rules, the Attorney General also noted his "concerns" that, among other things, the "very brief time" allowed for agency review might not be sufficient for the agency to exercise its statutory duty to review each

(footnote continued on following page ...)

shorter than ten days would probably not withstand judicial review (see footnote 2, supra), it is clear that, within those limits, the agency has "considerable discretion" in how to fulfill its broad statutory mandate. Letter from Attorney General Paul Summers, at page 4.

As even BellSouth now acknowledges, however, the issue is one of agency discretion, not statutory mandate. There is simply nothing in Chapter 41 which dictates that CSAs must become effective when filed. That is a matter for the agency to address through its rules. The statute does require that CSAs be "presumed valid" by the Authority but also states that this "presumption of validity" may be "set aside" if the agency determines that the CSA violates "applicable legal requirements." Therefore, to the extent Chapter 41 speaks at all to the issue of when CSAs become effective, the statute clearly implies that there must be at least some period of time before the CSA becomes effective during which the TRA staff or a complaining party may attempt to "set aside" the "presumption of validity." What that period should be is left to the discretion of the TRA.

The TRA's Current Rules

Rather than have the agency conduct a rulemaking process to address the CSA review period, BellSouth argues that the agency's current rules do not mandate any review period for CSAs and, therefore, that the agency has the discretion to allow CSAs to become effective upon filing. This, of course, is contrary to how the TRA and the industry have understood and applied

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CSA. While the Authority need no longer consider whether a CSA violates the laws prohibiting price discrimination, the Authority still has a statutory obligation to insure that each CSA complies with all other state and federal requirements. Therefore, some minimum period of review is still necessary for the agency to exercise its statutory obligations.

the TRA's rules for the last thirty years and contrary to how BellSouth itself described the rules just six months ago.[3]

The TRA Staff has stated on the record to the agency and repeated in meetings with BellSouth that the TRA's current rules require "a 30-day notice" period. On January 27, 2003, Mr. Joe Werner, Chief of the Telecommunications Division, told the Authority during an agenda conference that the Staff reviews each CSA to determine, among other things, "whether a 30-day notice consistent with TRA rules is present." See Transcript of Authority Conference, pp. 107-108, emphasis added. Mr. Werner's description of the Staff's review process was recently quoted with approval in an Order issued by Director Tate, acting as Hearing Officer in docket 00-00702. That Order was unanimously affirmed by the Authority, on June 2, 2003. Mr. Werner apparently repeated this information to the company in discussions with BellSouth. In a BellSouth "White Paper" filed by the company regarding the impact of Chapter 41, the company wrote, "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." White Paper, at p. 8, footnote 7.[4]

Mr. Werner, of course, is correct. The TRA's rules are intended to reflect the agency's broad, statutory jurisdiction over every rate, including "special rates," charged to any customer for regulated utility service in Tennessee. See T.C.A. § 65-5-201. Therefore, the TRA rules

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[3] Last December, BellSouth's attorney wrote, "Pursuant to the current rule, these CSAs are publicly filed as tariffs." See Docket 00-00702. Emphasis added. In BellSouth's Initial Brief, the author of that statement now says she was merely describing BellSouth's practice of filing CSAs as tariffs and was not describing what the TRA rules require. If that is the case, then why did she write, "Pursuant to the current rule..."? To what "rule" was she referring? This kind of advocacy is not helpful or appropriate.

[4] BellSouth now says that it is "inaccurate" to infer from this language that there is any "difference in opinion" between the Staff and BellSouth. initial Brief, at 19. The description in BellSouth's White Paper makes clear that there was, in fact, a disagreement between the staff and BellSouth as to whether the TRA's rules require that CSAs be filed like tariffs. Here again (see footnote 3), this kind of advocacy is neither helpful nor appropriate.

state that all "tariffs and supplements affecting Tennessee business shall be filed at least thirty days before the date upon which they are to become effective." TRA Rule 1220-4-1-.06. A CSA is a "special rate." It is an exception (or a supplement) to the general tariffs. This is how the TRA, its Staff, and every member of the telecommunications industry has always understood and applied the TRA's rules. Nothing has changed except BellSouth's self-interest.[5]

In sum, the parties now seemingly agree that issue before the agency is not what is required by Chapter 41 but what is permitted by Chapter 41 and the agency's rules. Chapter 41 implies that that should be at least some period of time for the agency and other parties to review CSAs before they become effective to determine whether the "presumption of validity" should be "set aside." The agency's rules presently set that period of time at thirty days. By statute, the agency can suspend a CSA for a longer period if necessary to complete the agency's investigation.

If the agency wishes to reduce that review period, it is free to do so by amending its rules. As long as the Authority gives itself sufficient time to exercise its statutory duty to review each CSA, as it is still required to do,[6] the agency has wide discretion in fixing an appropriate review period. Therefore, the TRA should reject BellSouth's proposed tariff, which purports to eliminate altogether the agency's ability to review BellSouth's CSAs before the contracts

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[5] Curiously, BellSouth contends that the only reason it has been filing CSAs as tariffs was to protect the company against a claim of price discrimination. But that argument makes no sense either. First, BellSouth has been treating CSAs like tariffs since the current TRA rules were enacted almost thirty years ago. Second, although often accused of using CSAs to offer discriminatory rates, BellSouth has never, not ever, claimed that a CSA could not be found to be discriminatory because it was filed as a tariff. Third, if BellSouth offers a CSA to a customer but refuses to make the same offer to a "similarly situated" customer or offers the second customer a higher priced CSA, BellSouth could be guilty of price discrimination whether or not the CSAs are filed as tariffs.

[6] As even BellSouth acknowledges (Initial Brief, at p. 11), the TRA staff continues to review each CSA to determine that is (a) above cost, (b) contains appropriate termination provisions, (c) is available for resale and (d) includes language regarding the customer's competitive alternatives. If a CSA failed to meet one of those criteria, the agency would presumably suspend or reject the filing.

become effective. The tariff clearly conflicts with the agency's rules and with the agency's regulatory obligations. If the TRA or any party believes that the current thirty-day review period is too long, the agency may open a rule making proceeding to address that concern.

Other Issues

The opening of this declaratory judgment proceeding and BellSouth's admission that this case is about what Chapter 41 permits, not what it requires, have mooted the remaining issues raised in Bellsouth's Initial Brief. The agency's decision to convene a contested case to address the impact of Chapter 41 obviously means that the agency has not, as BellSouth has contended, already determined this issue. Furthermore, since Bellsouth now acknowledges that Chapter 41 does not require that CSAs be effective upon filing, the after-the-fact letter from the bill's sponsor about his interpretation of Chapter 41 is no longer on point.[7]

Conclusion

For these reasons, BellSouth's tariff should be ejected.

Respectfully submitted,

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[7] BellSouth refers to the letter as "legislative history." But legislative history consists of a contemporaneous record of the deliberative process, not documents generated long after the bill has passed and written for the apparent purpose of influencing agency decisions.

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:

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Vance Broemel
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This 7th day of July, 2003.

Henry Walker