BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	**May 6, 2004**)	
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.	)	**DOCKET NO.**
TARIFF FILING TO MODIFY LANGUAGE	)	**03-00366**
REGARDING SPECIAL CONTRACTS	)	

DECLARATORY ORDER

This matter came before Chairman Deborah Taylor Tate, Director Sara Kyle and Director Ron Jones of the Tennessee Regulatory Authority (the "Authority" or "TRA"), the voting panel assigned to this docket, during a specially scheduled Authority Conference held on August 4, 2003, at which time the Directors issued a decision interpreting Chapter 41 of the Tennessee 2003 Public Acts ("Chapter 41") as providing that special contracts be effective upon being filed with the Authority. As a part of that decision, the panel also determined that this action was properly converted from a tariff filing to a declaratory judgment action based upon the filings of the parties.

BACKGROUND

Chapter 41

On April 23, 2003, Chapter 41 was signed into law Chapter 41 amends Tenn. Code Ann. § 65-5-201[1] by adding the following language:

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[1] Prior to the amendment, Tenn. Code Ann § 65-5-201 read as follows

> The Tennessee regulatory authority has the power after hearing upon notice, by order in writing, to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof, as well as commutation, mileage, and other special rates which shall be imposed, observed, and followed thereafter by any public utility as defined in § 65-4-101, whenever the authority shall determine any existing individual rate, joint rate, toll, fare, charge, or schedule thereof or commutation, mileage, or other special rates to be unjust, unreasonable, excessive, insufficient, or unjustly discriminatory or preferential, howsoever the same may have heretofore been fixed or established In fixing such rates, joint rates, tolls, fares, charges or schedules, or commutation, mileage or other special rates, the authority shall take into account the safety, adequacy and efficiency or lack thereof of the service or services furnished by the public utility.

> 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.[2]

The General Assembly determined that Chapter 41 shall "take effect upon becoming a law, the public welfare requiring it."[3]

This amendment to Tenn. Code Ann § 65-5-201 establishes that special rates and terms negotiated between telecommunications providers and business customers shall not constitute price discrimination. Chapter 41 maintains the requirement that rates and terms be filed with the Authority,[4] however, it creates a presumption that such rates and terms are valid and cannot be "set aside except by substantial evidence showing that such rates and terms violate legal requirements other than the prohibition against price discrimination."[5]

BellSouth's Tariff

On May 23, 2003, BellSouth submitted a tariff filing for the purpose of changing the language in its tariffs regarding special contracts (the "Tariff").[6] The Tariff modifies language in BellSouth's General Subscriber Services Tariff ("GSST") and the Private Line Services Tariff ("PLST") regarding special contracts negotiated between BellSouth and business customers. These special contracts are referred to as special service arrangements in the GSST and PLST and are also commonly referred to as contract service arrangements or "CSAs." The Tariff modifies the GSST and PLST so that CSAs shall be effective immediately upon filing with the TRA.[7] BellSouth's

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[2] 2003 Tenn. Pub Acts, Ch 41.
[3] *Id*
[4] *See* TRA Rule 1220-4-1- 07.
[5] 2003 Tenn. Pub Acts, Ch. 41
[6] BellSouth's *Tariff to Modify Language Regarding Special Contracts* was filed in this docket on May 28, 2003 (hereinafter *BellSouth's Tariff*)
[7] *BellSouth's Tariff* at 3.

practice under the existing GSST has been to seek approval of each CSA as a separately-filed tariff and to file each CSA at least thirty days before its effective date.

The Tariff provides further that, effective May 23, 2003, BellSouth would no longer include summaries of CSAs as a part of a tariff filing but would instead provide a copy of each CSA to the TRA.[8] BellSouth based these modifications to the GSST and PLST on its interpretation of Chapter 41, as set forth in its filing, *Legal Issues Relating to T.C.A. § 65-5-201 as amended by Public Chapter No. 41*, referred to as BellSouth's "White Paper." The "White Paper" was submitted to the TRA on May 23, 2003 and was filed in this docket on May 28, 2003. BellSouth's "White Paper" asserts the position that under Chapter 41, CSAs become effective immediately upon filing with the TRA.[9]

On June 6, 2003, the Authority issued its Agenda for the June 16, 2003 Authority Conference. That Agenda contained BellSouth's Tariff as a matter to be considered by the Authority during the June 16 Conference. On June 13, 2003, AT&T Communications of the South Central States, LLC ("AT&T") filed a *Petition to Intervene* in this docket. In its Petition, AT&T argued that while Chapter 41 has shifted the burden of proof regarding the validity of CSAs, it has not removed the requirement that each CSA be filed with the TRA thirty days prior to the effective date of the CSA.[10]

BellSouth filed a response to AT&T's petition on June 13, 2003. In its response BellSouth asserted that the clear intent of the General Assembly was to change the law applicable to CSAs such that CSAs become effective immediately upon filing with the TRA.[11] BellSouth's Tariff came before the voting panel at the June 16, 2003 Authority Conference Because of the closeness in time

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[8] *BellSouth's Tariff* at 3

[9] *Legal Issues Relating to T C A § 65-5-201 as Amended by Public Chapter No 41*, pp 4-7, (May 28, 2003) This document is denoted as "White Paper" on the TRA's web site

[10] *Petition to Intervene*, pp 3-5 (June 13, 2003)

[11] *BellSouth Telecommunications, Inc 's Response to AT&T Communications of the South Central States, Inc 's Petition to Intervene*, p 2 (June 13, 2003).

of AT&T's filing to the day of the Conference, consideration of this docket was deferred to a Special Authority Conference already scheduled for June 23, 2003

On June 19, 2003, the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate") filed a petition to intervene asserting the position that CSAs must be filed with the TRA with at least thirty days notice.[12] Time Warner Telecom of the Mid-South, LLC ("Time Warner") also filed a petition to intervene on June 19, 2003 but did not assert a position regarding the effectiveness of CSAs under Chapter 41 in its filing. On June 20, 2003, AT&T replied to BellSouth's response of June 13, 2003 and stated that the issues raised by Chapter 41 could best be resolved through a declaratory action or an Attorney General's opinion.[13]

June 23, 2003 Special Authority Conference

The Tariff and the various petitions for intervention filed in this docket were considered at the Special Authority Conference held on June 23, 2003. The Directors heard oral argument from the parties who were represented as follows: Joelle Phillips, Esq. appeared for BellSouth; Henry Walker, Esq. of Boult, Cummings, Conners & Berry, PLC appeared for AT&T; Assistant Attorney General Vance Broemel appeared for the Consumer Advocate; and Charles Welch, Esq. of Farris, Mathews, Branan, Bobango & Hellen, PLC appeared for Time Warner. At that Conference, in light of the comments of the parties, the Directors considered a proposal that the petitions to intervene seeking a contested case on the interpretation of Chapter 41 be treated by the Authority as requests for a declaratory order interpreting Chapter 41.[14] Counsel for AT&T stated that such action would be appropriate.[15] BellSouth's counsel offered no objection to commencing a declaratory action but did raise a concern that, in so doing, other parties might seek something more than an opportunity to file legal briefs, e.g., seek to file discovery requests.[16] AT&T's counsel responded to that concern,

[12] *Petition to Intervene*, pp. 2-3 (June 19, 2003)
[13] *Reply to BellSouth's Response in Opposition to AT&T's Petition to Intervene*, p 2 (June 20, 2003)
[14] Transcript, p 61 (June 23, 2003)
[15] *Id* at 61, 63
[16] *Id* at 62

stating that the impact of Chapter 41 is an issue of law and that nothing more than the submission of legal briefs on the issue would be required.[17] Counsel for Time Warner offered no objection to commencing a declaratory action.[18] The Consumer Advocate inquired and received confirmation that he would have the ability to file briefs in such a proceeding.[19]

At the conclusion of the discussion during the June 23, 2003 Conference, the panel voted unanimously to approve the BellSouth Tariff and to consider the petitions for intervention filed in this docket as requests for a declaratory order interpreting Chapter 41.[20] The issue to be determined in the context of a declaratory ruling was articulated by the Directors as the time when CSAs filed with the Authority become effective under Chapter 41.

The Directors determined that initial briefs on the issue would be filed not later than 12:00 Noon on June 30, 2003, with rebuttal briefs due on July 7, 2003 at 12:00 Noon. The Directors also determined to give notice to all interested parties to file briefs on the issue of the effectiveness of CSAs under Chapter 41. A Notice of Filing to all interested parties setting forth the dates to file briefs and reply briefs was sent out by the Authority on June 24, 2003.

POSITIONS OF THE PARTIES

Pursuant to the Authority's directives and the Notice of Filing, BellSouth, AT&T and the Consumer Advocate filed initial briefs on June 30, 2003, and reply briefs on July 7, 2003. United Telephone-Southeast, Inc. and Sprint Communications Company (jointly "Sprint") and Citizens Telecommunications Company of Tennessee, LLC ("Citizens") filed letters on June 30, 2003,

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[17] *Id* at 62-63

[18] *Id* at 65

[19] *Id* at 63 Mr Broemel's question was answered in the affirmative by Chairman Kyle—she stated on the record that interested parties would have the opportunity to submit legal briefs on the issues pertaining to the effective date of CSAs [Note: Director Sara Kyle's term as Chairman of the TRA ended on June 30, 2003. Director Deborah Taylor Tate assumed the role of Chairman of the TRA on July 1, 2003]

[20] Director Jones moved to grant the petitions to intervene and convene a contested case based on Authority Rule 1220-1-2- 02(4). After this motion did not receive a second, Director Jones voted in favor of the prevailing motion because it provided the intervenors an opportunity to assert their respective positions in a proceeding recognized as a contested case, pursuant to Tenn. Code Ann §§ 4-5-102 and 4-5-223

endorsing and adopting BellSouth's position as set forth in the White Paper. Time Warner also filed brief comments on June 30, 2003

BellSouth

BellSouth supports its position that CSAs are effective as of the date filed with the Authority by arguing that under prior law "special rates" were never required to be tariffed. Instead, the Authority was empowered to approve CSAs under its general rate-making authority.[21] Further, BellSouth states that the current TRA rule governing incumbent local exchange carrier ("ILEC") CSAs[22] does not preclude the immediate effectiveness of CSAs.[23] BellSouth points out that TRA Rule 1220-4-1-.07[24] does not require special contracts to be filed as tariffs.[25] BellSouth asserts that the Authority has never ordered BellSouth to treat CSAs as tariffs.[26]

BellSouth argues that under Chapter 41, Authority approval of CSAs is no longer required and negotiated pricing for business customers is exempted from the regulated rates subject to the TRA's general rate-making power.[27] BellSouth states,

> Even if any general tariffing requirements arguably could have been deemed applicable 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 law."[28]

Further, BellSouth contends that review of CSAs prior to their effectiveness is not required "to determine validity because it is presumed by the statute, and discrimination is no longer an issue. [The] review process only becomes necessary when a party presents a complaint supported by

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[21] *BellSouth Telecommunications, Inc 's Brief Regarding Time for CSAs to Become Effective Pursuant to Chapter 41 of the Tennessee 2003 Public Acts*, p. 4 (June 30, 2003) (hereinafter *BellSouth 's Brief*).

[22] The rule governing special contracts filed by ILECS is found at TRA Rule 1220-4-1-.07 Competitive Local Exchange Carriers' special contracts are subject to different filing requirements found at TRA Rule 1220-4-8-.07(3).

[23] *BellSouth 's Brief* at 1

[24] TRA Rule 1220-4-1-.07 currently in place for regulating Special Contracts provides:

> 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

[25] *BellSouth 's Brief* at 2

[26] *Id* at 3.

[27] *Id* at 4-5.

[28] *Id* at 5

substantive evidence."[29] According to BellSouth, the plain language of Chapter 41 supports BellSouth's interpretations of Chapter 41 [30]

AT&T

AT&T relies on TRA Rule 1220-4-1-.03 for the proposition that TRA rules "define 'tariffs' to include all rates, charges, rules and regulations of the utility that in any manner affects the rates charged."[31] Accordingly, AT&T argues that "[u]nder 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"[32] AT&T then states that because CSAs are subject to the same filing requirements as the general tariffs, CSAs must be filed thirty days prior to their effective date.[33]

Also relying on "the plain language of the statute," AT&T states that the words "presumed valid" found in Chapter 41 should not to be read to mean "effective upon filing"[34] AT&T argues that the words "presumed valid" mean that the burden of proof of establishing the validity of a CSA has shifted to the challenger of the CSA and nothing more.[35] According to AT&T, "presumptive validity" does not remove the notice requirements which it argues apply to CSAs.[36] AT&T argues that the use of the words "set aside" in Chapter 41 further demonstrates that Chapter 41 establishes that the statutory presumption of validity may be overcome.[37] Thus, AT&T concludes,

> 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 period that should be is left to the discretion of the TRA.[38]

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[29] *Id* at 5-6
[30] *Id* at 6-7, 9.
[31] *Initial Brief of AT&T*, p 3 (June 30, 2003) (hereinafter *AT&T's Brief*)
[32] *Id* at 2, *see also Reply Brief of AT&T*, p 1 (July 7, 2003)
[33] *AT&T's Brief* at 2, *see also Reply Brief of AT&T* at 1
[34] *AT&T's Brief* at 2.
[35] *Id* at 5-6
[36] *Id* at 7-8, *see also Reply Brief of AT&T* at 1 n 1
[37] *AT&T's Brief* at 2; *see also Reply Brief of AT&T* at 2
[38] *AT&T's Brief* at 2

The Consumer Advocate

The Consumer Advocate takes the position that CSAs are required to be filed upon thirty days notice before they become effective and that the enactment of Public Chapter 41 does not repeal or abrogate this requirement.[39] The Consumer Advocate argues that "prior to the enactment of Public Chapter 41, Tennessee law required the tariffing of the special rates and terms of service contained in and provisioned through CSAs."[40] According to the Consumer Advocate, when read together, Tenn. Code Ann. § 65-5-202 and TRA Rules 1220-4-1-.03, 1220-4-2-.03(f), 1220-4-2-.03(i), 1220-4-1-.04, 1220-4-1-.06(4) and 1220-4-1-.07 create a requirement that CSAs must be treated as tariffs and must be filed at least thirty days prior to their effective dates.[41]

The Consumer Advocate relies on Tenn Code Ann. § 65-5-202 in asserting that "the TRA has the power to require the tariffing of the special rates and terms for telecommunications services which are contained in CSAs."[42] The Consumer Advocate points out that TRA Rule 1220-4-2-.03(f) defines "class of service" as "[t]he various categories of service available to customers, such as business or residence."[43] The Consumer Advocate also points out that TRA Rule 1220-4-2-.03(i) defines "Customer or Subscriber" as "[a]ny person, firm partnership, corporation, municipality, cooperative organization, governmental agency, etc , provided with telephone service by any telephone utility."[44]

The Consumer Advocate then relies on TRA Rule 1220-4-1-.03 for the proposition that, when read in the context of the definitions found in TRA Rule 1220-4-2-.03, the rates and terms of CSAs must be filed in a company's tariff.[45] TRA Rule 1220-4-1-.03 provides·

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[39] *Brief on Interpretation of Chapter No 41 of the 2003 Tennessee Public Acts*, p. 6 (June 30, 2003) (hereinafter *Brief on Interpretation*) *See also Consumer Advocate's Brief Rebutting Certain Positions Taken by BellSouth in Its Brief Filed on June 31, 2003*, p 2 (July 7, 2003) (hereinafter *Consumer Advocate's Rebuttal Brief*).
[40] *Brief on Interpretation* at 4
[41] *Brief on Interpretation* at 3; *see also Consumer Advocate's Rebuttal Brief* at 2-3.
[42] *Brief on Interpretation* at 3
[43] *Id*
[44] *Id* at 3-4
[45] *Id* , at 3-4, *see also Consumer Advocate's Rebuttal Brief* at 2

(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 the service to be given shall be included with each tariff.

The Consumer Advocate points to the definitions of "Class of Service" and "Customer or Subscriber" in concluding that 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."[46] The Consumer Advocate then equates the term "class of service" with the term "special contract" or "CSA." After the Consumer Advocate links this rule to its argument that CSAs are tariffs, the Consumer Advocate concludes that CSAs must be filed subject to the general rules regarding tariffs. The Consumer Advocate then cites TRA Rules 1220-4-1- 04[47] and 1220-4-1-.06(4)[48] for the proposition that CSAs must be filed with the TRA at least 30 days before their effective date.[49] These rules contain the thirty-day notice requirement which must be met prior to the implementation of changes in tariffs. These rules are found in the same general public utilities rules which contain the TRA Rule 1220-4-1-.07 regarding special contracts for ILECs.

Having concluded that CSAs must be filed subject to the general rules regarding tariffs and that CSAs must be filed upon thirty days notice before they become effective, the Consumer

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[46] *Brief on Interpretation* at 4.

[47] 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 Commission at least thirty (30) days before the effective date of such changes, unless upon application and for good cause shown the Commission may waive the thirty day time limit or any portion thereof

[48] TRA Rule 1220-4-1-.06(4) states

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

[49] *Brief on Interpretation* at 6, *see also Consumer Advocate's Rebuttal Brief* at 3

Advocate argues that Chapter 41 does nothing to repeal or abrogate these requirements.[50] The Consumer Advocate also makes the following statements about Chapter 41, none of which are contradicted by any other party in this docket:

1. The Consumer Advocate is in agreement with BellSouth and AT&T that Chapter 41 "provides that rates and terms negotiated between a telecommunications provider and its business customer are presumed valid,"[51] and that "the presumption of validity [regarding these negotiated rates and terms] may be rebutted and set aside by substantial evidence showing that the negotiated rates and terms violate applicable legal requirements other than the prohibition against price discrimination."[52]

2. The TRA or the complainant bears the "burden of rebutting the presumption."[53]

3. The Consumer Advocate acknowledges that price discrimination is not "a basis for rebutting the presumption of validity or challenging the legality of CSAs."[54]

4. The Consumer Advocate asserts that the negotiated rates and terms "are nonetheless subject to further inspection, review, regulation and legal challenge under the new CSA law."[55]

5. "[T]he TRA's notice rules and the provisions of Public Chapter No. 41 are reconcilable and consistent with one another "[56]

The Consumer Advocate states that "[t]he purpose and effect of Public Chapter No. 41 are clear from the words that are written therein"[57] and concludes that its arguments are supported by

[50] *Brief on Interpretation* at 7; *see also Consumer Advocate's Rebuttal Brief* at 5.
[51] *Brief on Interpretation* at 7, *see also Consumer Advocate's Rebuttal Brief* at 5
[52] *Brief on Interpretation* at 7-8, *see also Consumer Advocate's Rebuttal Brief* at 5
[53] *Consumer Advocate's Rebuttal Brief* at 5
[54] *Id*
[55] *Brief on Interpretation* at 8; *see also Consumer Advocate's Rebuttal Brief* at 6
[56] *Brief on Interpretation* at 8
[57] *Consumer Advocate's Rebuttal Brief* at 5

"the plain and ordinary meaning of the language used" in Chapter 41.[58]

Time Warner

In its comments filed on June 30, 2003, Time Warner makes no conclusive statement on the issue of the effective date of CSAs under Chapter 41. Time Warner does state that "it is clear from the legislative record that the intent of the law is to make current state law and rules less restrictive."[59]

FINDINGS AND CONCLUSIONS

This matter came before the voting panel in this docket at an Authority Conference held on August 4, 2003, at which time the panel unanimously adopted the following findings and conclusions:

1. Tennessee statutes and TRA rules treat tariffs and CSAs separately.

It is important to note from the outset that no party to this docket has taken the position that CSAs need not be filed with the Authority. The dispute between the parties centers on whether CSAs have in the past been subject to the general filing requirements imposed on tariffs and, if so, whether, subsequent to the enactment of Chapter 41, CSAs must continue to be filed subject to the general requirements imposed on tariffs. BellSouth asserts that Chapter 41 prohibits the Authority from requiring that CSAs be filed prior to their effective date. AT&T and the Consumer Advocate argue that CSAs are subject to the same filing requirements as the general tariffs and thus must be filed thirty days prior to their effective dates.

The terms "tariff" and "special contract" are not defined in Title 65 of the Tennessee Code; however, with the enactment of Chapter 41, Tennessee statutes now address special contracts. Authority Rules address tariffs and special contracts as distinct from one another. It therefore follows that the requirements for one are not necessarily requirements for the other Neither AT&T

[58] *Id* at 5, 7
[59] *Comments of Time Warner Telecom of the Mid-South LLC*, p 1 (June 30, 2003)

nor the Consumer Advocate acknowledge the fact that the Authority's rules treat general tariffs and CSAs separately.

A "tariff" has long been understood to be a public document setting forth the services being offered by a carrier, the rates and charges with respect to the services being offered; and the governing rules, regulations and practices relating to those services.[60] Black's Law Dictionary includes a definition for the term "tariff" as a schedule listing the rates charged for services provided by a public utility.[61] Thus, in general usage, a tariff is a document conveying the terms for generally available services offered by a public utility. A CSA, or special contract, on the other hand, is a document conveying the terms for specially available services offered by a public utility—that is, it is a special contract between a public utility and a certain customer or customers, prescribing services and/or terms for those services which are not provided for in the general tariffs.

Prior to the enactment of Chapter 41, CSAs and tariffs were not, in practice, processed by the TRA differently to any significant degree from the general tariffs. This fact is not contested by any party to this docket. Nevertheless, TRA rules have long given separate treatment to CSAs and Tariffs. This fact is most clearly illustrated within the rules regulating local telecommunications providers found in Chapter 1220-4-8 of the TRA's rules.

The term "tariff" is defined in TRA Rule 1220-4-8-.01(bb) as

> The schedule, or a range, of prices and regulations for a particular service which is filed with the Commission and serves as the official published list of charges, terms and conditions governing the provision of the service or facility Tariffs function in lieu of a contract between an end user and a service provider.[62]

A close reading of the above definition of the word "tariff" reveals an express distinction between that which is a tariff, and that which is a "contract between an end user and a service

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[60] *See International Tel & Tel Corp v United Tel Co of Florida*, 433 F Supp 352 (D C Fla 1975)
[61] *See Black's Law Dictionary* (Bryan A. Garner ed , 7th ed , West 1999)
[62] A tariff is also defined in Rule 1220-4-2- 03(1)(s) as "the entire body of rates, tolls, charges, classifications and rules, adopted and filed with the commission by a telephone utility "

provider."[63] The language "in lieu of" indicates that where a contract exists, the contract, and not the tariff, functions as the manifestation of "charges, terms and conditions governing the provision of the service or facility." The language of Rule 1220-4-8-.01 clearly distinguishes a tariff from a contract between a service provider and a customer. Such language also suggests that where a contract between an end user (or business customer) and a service provider (or public utility that is a telecommunications provider) exists, no tariff is necessary.

Both AT&T and the Consumer Advocate refer to the TRA's rule regarding special contracts only for the proposition that CSAs are subject to the supervision and control of the TRA.[64] TRA Rule 1220-4-1-.07 states:

> 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.

The language of Rule 1220-4-1-.07 does not provide support for a requirement that CSAs be treated the same as tariffs. It is this separate treatment of CSAs and the general tariffs, by both the Authority rules and Tennessee law, that leads to the conclusion that the thirty-day notice requirements for the general tariffs do not apply to CSAs.[65]

2. <u>A reasonable interpretation of Chapter 41 leads to the conclusion that CSAs are effective upon filing with the TRA.</u>

Chapter 41 is silent regarding a specific effective date for CSAs. Chapter 41 states that the "special rates and terms negotiated between . . . telecommunications providers and business

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[63] The phrase "contract between an end user and a service provider" is substantially similar to the phrase "special rates and terms negotiated between public utilities that are telecommunications providers and business customers" found in Chapter 41

[64] *Brief on Interpretation* at 4

[65] Director Jones did not vote in favor of this analysis It is his finding that the rules cited in this section are susceptible to more than one reasonable interpretation as to whether CSAs are subject to the thirty-day notice requirement and, therefore, the rules create an ambiguity. This ambiguity is compounded by the fact that despite the majority's reading of the rules in this docket the TRA has systematically treated CSAs as tariffs in the past. Nevertheless, it is further Director Jones's opinion that this finding does not prevent the TRA from proceeding with the declaration of the TRA's interpretation of Chapter 41 and convening a rulemaking as discussed further in this order

customers" are "presumed valid." Further, "the presumption of validity" may be set aside by the institution of a complaint or by action of the TRA which is supported by substantial evidence demonstrating illegality of the rates and terms.

One principle of statutory construction is "to ascertain and give effect to the legislative intent without unduly restricting or expanding a statute's coverage beyond its intended scope."[66] Statutory review is necessarily restricted "to the natural and ordinary meaning of the language used by the legislature in the statute, unless an ambiguity requires resort elsewhere to ascertain legislative intent."[67]

From a definitional perspective, the definition of the word "valid" includes "effective."[68] Nevertheless, the use of the words "presumption" and "presumed" in conjunction with the word "valid" does not necessarily translate into a presumption of effectiveness.

When used in the context of a legal cause of action, a presumption indicates that an evidentiary fact is accorded certain weight. As a rule of evidence, a presumption can have the effect of shifting or changing the burden of proof or the burden of persuasion. Unless a presumption is conclusive or non-rebuttable, it may be overcome even though it establishes a prima facie conclusion. The language of Chapter 41 does not create a non-rebuttable presumption. Instead, Chapter 41 provides that a party opposing a CSA can rebut the presumption of validity by a showing of substantial evidence "that such rates and terms violate applicable legal requirements other than the prohibition against price discrimination." Thus, the presumption of validity can be challenged and refuted by appropriate evidence to the contrary.

It is reasonable to conclude that the presumption of validity created by Chapter 41 enures to the benefit of the telecommunications provider and the business customer. In the absence of a challenge to the presumption of validity, the parties to the contract can reasonably assume that the

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[66] *Owens v State*, 908 S.W 2d 923, 926 (Tenn 1995) (citation omitted)
[67] *Browder v Morris*, 975 S W 2d 308, 311 (Tenn 1998) (citing *Austin v Memphis Pub Co* , 655 S.W 2d 146, 148 (Tenn 1983))
[68] *See Webster's New International Dictionary*, 2813 (2d Ed. 1955)

rates and terms are valid and effective. Acting under such a reasonable assumption, the parties can move forward, in reliance upon their agreement. It is readily apparent that by enacting Chapter 41 the General Assembly enacted a measure whereby the parties to these contracts would have the ability to move forward without delay.

The presumption of validity of the rates and terms created by Chapter 41 can only be "set aside" by substantial evidence showing illegality. Chapter 41 contemplates that any challenge to the presumption will be initiated by third persons or by the Authority itself. A showing of substantial evidence contemplates a hearing in which evidence is presented and there is an opportunity for that evidence to be rebutted. In such a hearing the burden of proof will be on the person challenging the legality of the rates and terms of the agreement.

Chapter 41 places importance on the process of negotiation between the telecommunications provider and the business customer. There is no language in Chapter 41 which indicates that the presumption of validity does not or should not attach immediately to the rates and terms negotiated by the parties to the contract. The language of Chapter 41 does indicate that the presumption of validity is in place at some point in time before the presentation of evidence which might be put forth to challenge the rates and terms Because the rates and terms are presumed valid, it is reasonable to conclude that the effective date of the contract is the date contemplated by the parties to the contract. Conceivably, the effective date of the contract could be the date of execution of the contract by the parties. Nevertheless, because Chapter 41 maintains a requirement that the rates and terms be filed with the TRA, the filing date is a reasonable point in time for establishing the effectiveness of the CSA.

Further, even though Chapter 41 provides that "such special rates and terms shall be filed with the authority," the new statute does not require TRA approval of CSAs. Therefore, the language of "presumed valid" in Chapter 41 suggests that the portion of Rule 1220-4-1-.07 which provides that special contracts are subject to prior Authority approval is no longer enforceable.

3. Chapter 41 does not eliminate or diminish the TRA's authority to establish filing requirements.

Chapter 41, in providing that the rates and terms of the CSA "shall be filed with the [A]uthority," does not establish or incorporate any specific filing requirements. The conclusion that Chapter 41 can be interpreted as rendering CSAs effective upon filing does not imply that the Authority cannot impose certain filing requirements. The Authority is empowered to require companies to provide sufficient information in connection with their filings.[69]

Prior to the enactment of Chapter 41, the TRA clearly had the power to promulgate rules establishing filing requirements for CSAs. Tenn. Code Ann. § 65-5-202 provides:

> The authority has the power to require every 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.[70]

Given that Chapter 41 itself requires special rates and terms to be filed with the Authority, there is no conflict between Chapter 41 and Tenn. Code Ann. § 65-5-202 in this regard.

The statutory grant of authority over public utilities given to the TRA is extensive. Under Tenn. Code Ann. § 65-4-104 the TRA has:

> general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter.

Likewise, any doubt as to the existence or extent of a power conferred on the TRA by chapters 1, 3, 4, and 5 is to be resolved in favor of the existence of the power, so that the TRA may effectively govern and control the public utilities placed under its jurisdiction.[71] Specifically, the TRA has authority to "fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility."[72] The

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[69] Tenn Code Ann §§ 65-2-102(a)(1) and (2), 65-5-202 For example, companies must provide sufficient cost support to demonstrate that the rates for competitive services in the contract comply with the statutory price floor in Tenn Code Ann § 65-5-208(c)

[70] Tenn Code Ann. § 65-5-202 (Supp 2002)

[71] Tenn. Code Ann § 65-4-106

[72] Tenn. Code Ann. § 65-4-117(3)

Court of Appeals, in *Tennessee Cable Television Ass'n v. Tennessee Pub. Serv. Comm'n*, 844 S.W.2d 151, 159 (Tenn. Ct. App. 1992), has specifically recognized the General Assembly's intent "to vest in the [TRA] practically plenary authority over the utilities within its jurisdiction."

The TRA has specific authority, pursuant to Tenn. Code Ann § 65-5-202, to require the filing of schedules. In light of § 65-5-202 and the statutes cited above, certainly the TRA has authority to continue certain filing requirements in connection with the filing of CSAs. An evidentiary presumption of validity or an interpretation of Chapter 41 which permits the CSAs to be effective upon filing does not abrogate or diminish the Authority's role in reviewing the CSAs or in obtaining necessary information through filing requirements.

4. <u>The TRA properly commenced a Declaratory Action in this docket.</u>

The Consumer Advocate raises in its Reply Brief a question as to whether the Authority acted properly in determining not to convene a contested case and instead to initiate a declaratory action based upon the issue raised in the petitions to intervene. At the June 23 Authority Conference, the panel determined to treat the petitions to intervene as a joint request for the TRA to interpret and apply Chapter 41 to the filing of CSAs with the Authority. Declaratory judgment actions before the Tennessee Regulatory Authority are governed primarily by Tenn. Code Ann § 65-2-104, which states:

> On the petition of any interested person, the authority may issue a declaratory ruling with respect to the applicability to any person, property, or state of facts of any rule or statute enforceable by it or with respect to the meaning and scope of any order of the authority. A declaratory ruling, if issued after argument and stated to be binding, is binding between the authority and the petitioner on the state of facts alleged in the petition, unless it is altered or set aside by a court in a proper proceeding. Such rulings are subject to review in the chancery court of Davidson County in the manner hereinafter provided for the review of decisions in contested cases. The authority shall prescribe by rule the form for such petitions and the procedure for their submission, consideration, and disposition.

A more general statute on declaratory judgment actions is found at Tenn. Code Ann. § 4-5-223 of the Uniform Administrative Procedures Act. Both § 65-2-104 and § 4-5-223 authorize the

TRA to convene a declaratory action to consider the applicability of any statute enforceable by the Authority.[73] A declaratory judgment action is an appropriate procedural vehicle for determining the application of Chapter 41 to the telecommunications industry particularly in light of the fact that the parties' filings in this matter seek a statutory interpretation from the TRA regarding the point in time when CSAs become effective in light of Chapter 41

AT&T's Reply filed on June 20, 2003 argues that "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 a new statute for an entire industry." AT&T then asserts that the more appropriate means to address the issue is through a declaratory judgment action or an Attorney General Opinion. The Authority determined on June 23, 2003 to use a declaratory action to review the impact of Chapter 41. No party present at the June 23 Authority Conference opposed the action of the voting panel.

Not unlike their initial requests, the parties have been given the opportunity to brief their positions. Commencement of this declaratory action to address the application of Chapter 41 assures that the parties receive the process due to them and has provided the parties with a forum for expressing their concerns regarding the new legislation.

AUGUST 4, 2003 AUTHORITY CONFERENCE

During the August 4, 2003 Authority Conference, in addition to deliberating and adopting the foregoing findings and conclusions, the panel discussed the effect of Chapter 41 on the TRA existing rules governing the review of CSAs. The panel voted unanimously to open a rulemaking docket for the purpose of modifying TRA rules to be consistent with and in conformance to Chapter 41.

IT IS THEREFORE ORDERED THAT:

1 Chapter 41 is hereby interpreted as requiring telecommunications service providers to file with the Authority contract service arrangements entered into with business customers.

[73] In fact, Tenn Code Ann § 4-5-102(3) includes declaratory proceedings in its definition of contested case

2 Based upon the language of Chapter 41, contract service arrangements between telecommunications service providers and business customers shall be effective upon being filed with the Authority

3. The Authority will open a rulemaking docket for the purpose of modifying existing TRA rules to conformation with the requirements of Chapter 41.

4. Any party aggrieved by this decision may file a petition for review in the Chancery Court of Davidson County, Tennessee, within sixty (60) days of the date of this Order, pursuant to Tenn. Code Ann. § 65-2-104, § 4-5-223 and § 4-5-322.

Deborah Taylor Tate, Chairman

Sara Kyle, Director

Ron Jones, Director