IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	)	
	)	
PETITION FOR EXEMPTION OF	)	
CERTAIN SERVICES	)	**DOCKET NO. 03-00391**
	)	
	)	

BRIEF OF CONSUMER ADVOCATE AND PROTECTION DIVISION

INTRODUCTION

Paul G. Summers, Attorney General and Reporter for the State of Tennessee, through the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"), respectfully submits its brief in the above-captioned docket.

ARGUMENT

I. THE RELIEF REQUESTED BY THE INCUMBENT COMPANIES SHOULD BE DENIED BECAUSE THEY HAVE NOT DEMONSTRATED THROUGH ANY CREDIBLE PROOF THAT EXEMPTION OF PRI SERVICE WOULD BE IN THE PUBLIC INTEREST OR THAT, IF EXEMPTED, POTENTIAL AND EXISTING COMPETITION WOULD BE AN EFFECTIVE REGULATOR OF PRICE.

BellSouth Telecommunications, Inc. ("BellSouth"), Citizens Telecommunications of Tennessee, LLC ("Citizens"), and United Telephone-Southeast, Inc. ("Sprint-United") (collectively, the "Incumbents") have requested the TRA to enter an order exempting PRI service from certain regulatory requirements pursuant to Tenn. Code Ann. § 65-5-208(b). In particular, the Incumbents allege that the price of PRI service "is effectively regulated by substantial competitive activity in Tennessee." Petition for Exemption at 2. Accordingly, the Incumbents argue that Tenn. Code Ann. § 65-5-208(b) requires the TRA to grant the Incumbent's requested relief. *Id* at 1-2.

The law that the Incumbents rely upon specifically provides:

> The authority, after notice and opportunity for hearing, may find that the public interest and the policies set forth herein are served by exempting a service or group of services from all or a portion of the requirements of this part. Upon making such a finding, the authority may exempt telecommunications service providers from such requirements as appropriate. The authority shall in any event exempt a telecommunications service for which existing and potential competition is an effective regulator of the price of those services.

Tenn. Code Ann. § 65-5-208(b) (emphasis added).

Thus, the Incumbents endeavor to prove that PRI service must be exempted from regulation because existing and potential competition is an effective regulator of price. When the Consumer Advocate asked BellSouth to set forth in detail all facts upon which the company would rely to support the proposition that the price of PRI is effectively regulated by competition, BellSouth stated: "BellSouth believes that there are numerous CLECs that offer PRI ISDN service and other comparable services to retail customers in BellSouth's service area at competitive prices." BellSouth's Response to CAD's First Discovery Request, Item No. 6. Consistent with this position, the Incumbents entered the following testimony in this record:

1. There are a number of companies currently providing PRI services in Tennessee that compete with the Incumbents for customers. BellSouth claims that there are at least twelve such companies. Blake Direct at 4-5; BellSouth's Response to CAD's First Discovery Request, Item No. 5. Sprint-United identifies seven companies that it contends offer competitive PRI services. Marshall Direct at 2. It is the Incumbents' position that the mere existence of these competitors is compelling evidence that the PRI market in Tennessee is "vigorously competitive" and that competition would be an effective regulator of PRI service prices. Blake Direct at 4-5, 7-8; Marshall Direct at 2-3.

2. There are alternatives to PRI service that business customers can use to satisfy their communications needs. BellSouth specifically identifies broadband connections, such as T1 and DSL, as service options that customers may choose if they become unsatisfied with the price of PRI services. Blake Direct at 6; BellSouth's Response to CAD's First Discovery Request, Item No. 14. BellSouth goes on to state that even wireless service could replace a customer's PRI service assuming, of course, that the customer subscribed to PRI for voice-only capabilities. Blake Direct at 6.

Thus, in BellSouth's 8½ pages of direct testimony and Sprint-United's 3 ½ pages, the Incumbents make their best case for exempting millions of dollars in service revenues from regulation – averring that the mere existence of competitors and comparable services require the TRA to grant their PRI exemption request.[1] The Consumer Advocate submits, however, that the Incumbents' proffered testimony is wholly inadequate to prove what must be proven – that exemption of PRI service would serve the public interest and regulatory policies or that potential and existing competition would be an effective regulator of PRI service prices. *See* Tenn. Code Ann. § 65-5-208(b).

It is undisputed that federal and state law place special duties and obligations upon incumbent companies in order to assure that local telecommunications markets are opened to sustainable competition for the benefit of consumers. *See, e g.*, 47 U.S.C.A. §§ 251 & 252; Tenn. Code Ann. §§ 65-5-208 & 65-5-209. The reason for these special duties and obligations is that these incumbents were the prior monopoly service providers of local telecommunications services and, until viable competition in such markets flourishes, the incumbents could use their dominant position and market

[1] Citizens did not find it necessary to submit any testimony.

power to hinder the development of competition. In this case, the Incumbents essentially claim that viable competition has taken hold in the PRI service market; accordingly, this service should be exempted from as much regulation as permitted under the statute (with a few stated exceptions) because they are no longer in a position to exercise dominance and control in the marketplace. It is within this context that the TRA should evaluate the Incumbents' requested relief.

Until credible information is presented which demonstrates that PRI services are sufficiently competitive, it would be premature for the TRA to exempt such services from regulations that promote and advance competition. For the reasons discussed below, the Consumer Advocate submits that the Incumbents have not shown that viable competition has taken hold in the PRI service market and, therefore, their requested relief should be denied.

A. The Incumbents' Proof of the Mere Existence of Competitors Is Not a Reasonable Basis to Exempt PRI Service from Regulation.

In responding to the Consumer Advocate's inquiry about pricing PRI services in a competitive market – which is, after all, a prime concern in this proceeding – BellSouth responded as follows:

> In a competitive market, many forces may influence the increase or decrease of prices for services in that market . . . . Among the potential market forces that could affect pricing would be customer demand, costs for services . . ., pricing of competitors, and development of customer preferences . . . . BellSouth believes the most important market force affecting pricing for PRI service is the force of competitors who advertise and market their services to the same customers BellSouth hopes to win.

BellSouth's Response to CAD's Second Discovery Request, Item No. 1. BellSouth also stated, "Market-based pricing turns on market conditions." BellSouth's Response to CAD's Second Discovery Request, Item No. 2. The Consumer Advocate agrees with BellSouth's statements. Market-based pricing will depend on market forces and conditions, including customer demand,

costs for services, pricing of competitors, customer preferences and, perhaps most importantly, the market strength or force of competitors that market their services to the same customers that the Incumbents hope to win. The Consumer Advocate would note, however, that this critical information is not in this record. For when it came time to present the proof, BellSouth set aside its own thinking about market strength, force and power and, instead, merely listed a dozen or so potential providers of PRI services and identified a few other services that it claims would be a substitute for PRI.

With respect to the force of the Incumbents' competitors (the most important factor according to BellSouth), the Consumer Advocate attempted to ascertain the comparable power and capacity of providers in the Incumbents' PRI service markets. The Consumer Advocate's approach to this inquiry was to define the relevant PRI service market for each Incumbent, identify each provider's share of that market, and determine the expected rate at which the Incumbent's competitors could expand their PRI capacities in response to the Incumbent's PRI pricing. *See* Brown Direct at 9-11.

This type of market data is particularly important in determining whether competitors possess enough influence to affect the marketplace. "Market share" is defined as the percentage of a market that is controlled by a firm — usually expressed in actual sales. *See* Black's Law Dictionary (6th ed.) page 670. A firm that possesses sufficient "market power" has the ability to raise prices above those which would be charged in a competitive marketplace. *See Id* Thus, for example, no one would seriously contend that children who operate lemonade stands at the end of their driveways compete with Coca-Cola for customers in the soft drink market, even though such lemonade stands do provide some customers with an alternative. Pepsi Cola, on the other hand, presents a serious competitive threat.

The Incumbents' bare listing of potential PRI competitors says nothing about the competitors' market share, market power or, in BellSouth's words, "the force of competitors." It is unknown whether the dozen or so potential PRI competitors identified by BellSouth have one PRI customer, 100 customers, or 1,000 customers. Indeed, BellSouth claims that it does not even know its own market strength, stating that "BellSouth is unable to determine its market share of the PRI service market." BellSouth's Response to CAD's First Discovery Request, Item No. 18.

The geographic markets in which these potential PRI competitors operate is also unknown. It is known, however, that the PRI competitors identified by BellSouth could not possibly be serving Tennesseans who live in more than half of the State's zip codes. In fact, the most recent FCC data indicates that consumers living in one-fifth of the State's zip codes have no competitive telecommunications alternatives, and that consumers living in 54% of the State's zip codes have three or fewer competing companies from which to choose service. *See* Buckner Rebuttal at 3.

Until such basic information as market strength and location is known, there is no way to determine whether the statutory requirements for exemption are met. The Incumbents' listing of a dozen or so certificated providers that have filed PRI tariffs and created marketing web sites does not say anything about the state of competition. As Mr. Buckner has testified, "Relative market share strength of competitors is a critical threshold consideration for PRI ISDN service to be exempted from regulation. Price can be effectively regulated by competition only if there is a viable and sustainable competitive marketplace that consists of independent market entrants. While such competition can be a good and desired result, competitive rhetoric should not supplant just and reasonable evidence as the basis of the TRA's decision in this docket." Buckner Rebuttal at 2.

The record also contains no information on the competitors' costs for services, which is

another market-based pricing factor that BellSouth identified as relevant. Of course, BellSouth identified costs as a pricing consideration in this proceeding because it understands this basic economic concept: In a competitive market, a company cannot stay in business if it prices its goods and services below its long-term costs. Thus, the cost structures of the providers in the marketplace will affect the competitive pricing policies pursued by these providers. When the Consumer Advocate asked BellSouth for data related to this consideration, however, the company stated, "BellSouth has no information regarding its competitors' costs." BellSouth's Response to CAD's Second Discovery Request, Item No. 4.

Not only is this record devoid of market share and cost data, but it also has no information concerning customer demand or customer preferences – which are additional factors identified by BellSouth as affecting market-based pricing. For instance, while BellSouth claims that there are service substitutes for PRI service, the company never provides any evidence that the various services cited by Ms. Blake are reasonably interchangeable from a customer-preference point of view. *See* Brown Rebuttal at 11. Rather than providing such pertinent data, the Incumbents argue that the mere existence of about a dozen PRI service competitors supports their position that competition would be an effective regulator of PRI prices. Curiously, the Incumbents now take the position that the "many forces" that "may influence the increase or decrease of prices for services" in a competitive market need not be examined at all.

The Consumer Advocate submits, however, that the Incumbents' claim that such market data is not relevant is belied by the Incumbents' own rebuttal testimony. In attempting to discredit the interveners discussion and analysis of market data, the Incumbents take incredible positions and make incredible statements. For instance, while BellSouth claims that the data discussed by the

interveners is irrelevant, it offers no other data that would be useful in determining whether there is sufficient competition to effectively regulate the price of service. *See, e.g.,* Blake Rebuttal at 14-15. Rather, the Incumbents take the position that no real market data is required at all, providing only a listing of those companies that may compete for PRI customers and that may, or may not, currently serve PRI customers.

Moreover, Sprint-United's rebuttal witness makes incredible statements like "Tenn. Code Ann. § 65-5-208(b) makes no mention of market share analysis as any type of criterion or threshold to be examined before granting pricing flexibility." Staihr Rebuttal at 4. The Consumer Advocate would point out, however, that the statute makes no mention of presenting any data, and it especially does not mention the presentation of a mere listing of potential competitors as the requisite standard. On the issue of whether competition would be an effective regulator of price, however, the Consumer Advocate maintains that market share data is much more probative than the Incumbents' mere listing of potential competitors.

Referencing the statute, Dr. Staihr further opines, "A market share analysis, by definition, suggests that it is the *quantity* of competitive activity, rather than the *existence* of competitive activity, that is of importance. The Tennessee statute ignores the issue of quantity altogether." Staihr Rebuttal at 5 (emphasis in original). This statement is likewise incredible. The statute does not ignore quantity, for competition could not exist without some quantity of competition. What Dr. Staihr invites the TRA to do is to find that there is no difference between a competitor's serving one PRI customer or 1,000 PRI customers. Such an analysis is severely flawed, however, because the relative market strength of competitors is a prime consideration in determining whether workable and sustainable competition really exists. *See* Brown Direct at 8-11; Brown Rebuttal at 12-13

This case presents the TRA's first opportunity to fully address the requirements of Tenn. Code Ann. § 65-5-208(b). It is the Consumer Advocate's position that the market data discussed above, none of which exists in this record, is critical to any reasonable inquiry into whether the statute's exemption standards have been met. Although there are no Tennessee cases on this point, the Consumer Advocate would refer the TRA to a Missouri decision that supports the Consumer Advocate's position. In *Coffman v. Public Serv. Comm'n,* 2004 WL 2157225, a Missouri appeals court considered whether the Missouri commission properly exempted SWB's services from regulation under a state price-cap statute that provided for such exemption upon a finding of "effective competition." To determine whether the statute's "effective competition" standard was met, the commission considered evidence concerning: (1) the number of carriers certified to provide service in each exchange; (2) the number of carriers actually providing both resale and facilities-based service in the exchanges; (3) the relative longevity of those alternative carriers; (4) the presence of CLEC-owned facilities; (5) SWB's loss of market share in the various exchanges; and (6) the degree to which competitors had utilized pricing strategies to obtain substantial market share. *Coffman* at *4. In rejecting public counsel's claim that the commission took insufficient evidence, the appellate court stated:

> If SWB is losing market share on specific services in specific exchanges, that fact is evidence that those services are extensively available from alternative providers in those exchanges, that the alternative companies' services are functionally equivalent or substitutable, and that economic or regulatory barriers to entry are not preventing the alternatives from competing.

Coffman at *5. While the Missouri commission's decision was overturned, the reversal was based on other grounds.

Accordingly, the Consumer Advocate is of the opinion that the TRA should require

something more than the Incumbents' naked assertion of sufficient competition before PRI service is exempted from regulation.

B. The Incumbents' Reliance on Alternative Services as a Reason to Exempt PRI Service from Regulation is Misplaced.

The Incumbents' position that DS1 and DSL offerings provide viable alternatives to PRI service is not well founded. AT&T witness Mark Argenbright testified that neither DS1 nor DSL provides the same capabilities and functionality as PRI service. *See* Argenbright Direct at 5-8. Mr. Argenbright further testified that PRI is uniquely suited to serve as a platform for VoIP services. *See* Argenbright Direct at 5-6. Consumer Advocate witness Steve Brown also testified that PRI services are not interchangeable with DSL and wireless services. *See* Brown Rebuttal at 9-11. In Dr. Brown's testimony, he referenced recent industry literature that supports his and Mr. Argenbright's conclusions that PRI is not only technically dis-similar from DSL, but that pricing considerations and reliability factors also further distinguish DSL from ISDN-based technologies. *See* Schedule 2 of Exhibit to Brown Rebuttal. Even BellSouth admitted that PRI and DS1 are not interchangeable, noting differences in service capabilities and costs that prevent DS1 service from being a "direct and equal substitute for Primary Rate ISDN service." BellSouth's Response to AT&T's First Discovery Request, Item No. 2.

Accordingly, BellSouth (nor any other Incumbent) has identified an adequate substitute for PRI services. To support BellSouth's comparable service argument, the company asserts only generalizations – which most lay persons already know – such as wireless services can serve to transmit voice as opposed to voice-only PRI services, or DS1 and DSL services can serve to transmit data through high-speed connections much like PRI services. When one digs below the surface of

these generalizations, however, it becomes apparent that PRI services offer incomparable advantages and benefits that certain PRI customers may find necessary for their communication needs.

This is especially true in the case of customers that are interested in using PRI service as a platform for VoIP. As the TRA is aware, VoIP is a burgeoning technology that some believe represents the best hope for alternatives to the POTS service of telecommunications providers. Non-facilities based VoIP providers generally must use PRI to deliver VoIP service. *See* Argenbright Direct at 5-6. Accordingly, incumbent companies such as those in this proceeding will continue to receive PRI payments from VoIP providers for local connectivity. *See* Exhibit to Brown Direct. As Dr. Brown testified, this situation puts the Incumbents in a position to leverage their PRI services in order to minimize VoIP's impact on their bread-and-butter service – POTS. *See* Brown Direct at 3-7. Thus, Dr. Brown concludes that reasonable and nondiscriminatory access to PRI is crucial to the development of VoIP as a competitive alternative to traditional telephone service. *See Id.* at 6-7. The TRA, therefore, should be concerned about exempting PRI service from regulatory oversight, given that PRI is likely to play a critical role in the advancement of VoIP.

In summary, the proof presented in this proceeding for the TRA's consideration is a listing of up to a dozen or so companies that may offer PRI-type services and identification of a few services that provide some, but not all, of the same functionality of PRI service. Based on this scant evidence, the Incumbents take a giant leap and conclude that the PRI market is "vigorously competitive" and that the TRA must exempt PRI from regulation under Tenn. Code Ann. § 65-5-208(b) because competition would be an effective regulator of price. If such a low bar is established for exempting services under the statute, however, the TRA may as well go ahead and exempt all telecommunications services from regulation because a listing of competitors and alternative services

that provide some of the same functionality as the service at issue can be identified for most, if not all, of the retail telecommunications services provided by the Incumbents. The Consumer Advocate is of the opinion that such a result would be contrary to law, however, because the statute does not grant broad authority to exempt services from regulation without credible proof that competitive forces would be equally effective as regulation in controlling price. The Consumer Advocate, therefore, maintains that the Incumbents have not made a case for exemption of services under the statute. Accordingly, it would be premature for the TRA to grant the Incumbents' exemption request without additional proof that PRI service is truly competitive within the meaning of the law.

II. PRI SERVICE SHOULD NOT BE EXEMPTED FROM TARIFFING REQUIREMENTS BECAUSE INCUMBENT COMPANIES CURRENTLY HAVE THE FLEXIBILITY TO PRICE ACCORDING TO MARKET CONDITIONS AND THE TRA'S OVERSIGHT RESPONSIBILITIES COULD BE UNDERMINED IF SUCH EXEMPTION IS GRANTED.

The Incumbents request the TRA to exempt present tariffing requirements governing PRI service, apparently out of concern that they do not have enough flexibility to price services according to market conditions. The Incumbents' position is without merit, however, because it is well known that these Incumbents can (and do) enter into any number of contracts for PRI service that provide for prices and terms of service on an individual case basis. Through such contracts, the Incumbents are fully capable of meeting (if not thwarting) any competitive offering.

Indeed, BellSouth has entered in this record a list of nearly 600 such contracts for PRI services. *See* BellSouth's Response to CAD's First Discovery Request, Item No. 10. Analysis of BellSouth's contract information demonstrates that the company is free to give selected customers wide-ranging discounts – from 5% to 74% – off the regular tariffed price for PRI service. *See* Buckner Direct at 4-5 One only has to examine the pricing points for BellSouth's PRI contracts,

which are shown in Schedule 5 of Mr. Buckner's Non-Proprietary Exhibits to Direct Testimony, to realize that BellSouth presently has the capability to price PRI services as the company deems fit.

BellSouth suggests that these contracts indicate that the company must give ever-increasing discounts to remain competitive and that such activity is a sign of competition. *See* Blake Rebuttal at 5. However, BellSouth's PRI service contracts do not, in and of themselves, prove the point that competition would be an effective regulator of PRI service prices. Indeed, the Consumer Advocate maintains that BellSouth's contracting activities are indicative of BellSouth's continued dominance in the PRI service market.

In particular, one factor which logically explains the increased use of PRI service contracts is BellSouth's reduction in the cost of this service. In this very record, BellSouth has reported a reduction of over 65% in the cost of the same PRI service elements. *See* Buckner Supplemental at 2; BellSouth's Response to CAD's Second Discovery Request, Request for Production Nos. 1 and 3. So, while BellSouth has not reduced the tariffed price for PRI service, it has drastically decreased the reported cost of this service. Such cost reductions could result from a variety of reasons; however, the basis of BellSouth's PRI cost reduction is unknown. This action, of course, did create a significantly larger calculated gross margin which, consequently, gave BellSouth much greater flexibility to offer deeper discounts.[2] Thus, BellSouth has demonstrated the uncanny ability to drastically reduce the reported cost of PRI service while maintaining the tariffed price of PRI at

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[2] In this instance, gross margin is computed by subtracting reported cost from the tariffed rate. Thus, if the tariffed rate is $130 and reported cost is $100, the gross margin is $30 ($130 - $100). If the carrier cannot offer services below cost, the maximum discount that can be given is the service's gross margin which, in this example, is $30. If, however, costs are reduced 50% from $100 to $50, the calculated gross margin becomes $80 ($130 - $50). As a result of this reduction in cost, the carrier may now offer discounts of up to $80 rather than up to $30

historic levels, and then enter into hundreds of individual PRI service contracts that give special discounts ranging all over the chart from 5% to 74%. The Consumer Advocate submits that this data shows that BellSouth can price PRI service as it chooses – not that competition would be an effective regulator of price. Current tariffing requirements, therefore, do not prevent BellSouth or any other Incumbent from pursuing competitive pricing policies.

Moreover, tariffs are binding instruments that function in lieu of a contract between a customer and a telecommunications service provider and serve as the official published list of rates, charges, terms and conditions governing the provision of the service or facility. *See* TRA Rule 1220-4-8-.01(bb). Thus, the Consumer Advocate maintains that tariffs define the basic business relationship — the price, terms, and conditions of service — between a telecommunications service provider and its customers. This business relationship is generally the focus of any inquiry into consumer or competition issues, and such relationship is presently subject to the TRA's oversight through the agency's approval, suspension, and revocation of the tariff at issue. This tariffing process is one of the primary mechanisms that the TRA may utilize to protect consumer interests and promote competitive telecommunications policies — both of which are key responsibilities of the agency. *See, e.g*, Tenn. Code Ann. § 65-4-123. The TRA, therefore, should not take any action in this docket that would undermine its accomplishment of these prime objectives. Accordingly, the price, terms, and conditions of PRI service should continue to be subjected to essentially the same tariffing requirements as exist today.

Thus, it is the Consumer Advocate's position that the TRA should not alter any of the current tariffing requirements for PRI service. If the TRA however, is of the mind to grant the Incumbents' request to allow them to change PRI service rates through the filing of price lists, it should require

such price lists to meet all o f the following conditions: (1) the price lists should remain subject to the TRA's approval, suspension, and revocation in order to protect and advance the interests of consumers and competitive telecommunications policies; (2) all terms and conditions of PRI service, with the sole exception of price, should be reflected in the Incumbents' tariffs; (3) the price of PRI service, inclusive of all recurring and non-recurring rates and charges, should be set forth in publicly-filed price lists; (4) the price lists should represent binding instruments that, like tariffs, function in lieu of contracts between the Incumbents and their customers; (5) the price lists should serve as official published lists of all rates and charges for PRI services; (6) the price list of a particular PRI service should be clearly cross-referenced to the service's matching tariff containing the terms and conditions of that service in order to prevent potential confusion and mis-understanding concerning each party's rights, privileges, duties, responsibilities, and obligations.

Finally, the Consumer Advocate submits that it is in the interests of consumers to provide them with advanced notice of any proposed increase in price of PRI service or any other change in terms and conditions of service that would, in effect, result in a costlier service arrangement or reduction in value of service. Sufficient advanced notice will enable consumers to make informed decisions regarding the continuation of service or selection of an alternative service provider prior to being adversely affected by any such increase or change. The Consumer Advocate suggests that a notice equal to one standard billing period is the minimum notice that should be required. Thus, for example, if the provider bills the customer monthly, the customer should be given at least a 30-day advanced notice of any price increase or other change affecting the value of service. The reason for such requirement is basic: as a general matter, consumers of all products and services, including telecommunications services, are entitled to know the purchase price of the good or service and to

understand the terms of the sale prior to making the purchase decision. Accordingly, the TRA should maintain this basic consumer protection.

III. THE SCOPE OF EXEMPTION IN THIS DOCKET MUST BE LIMITED TO ALL OR A PORTION OF THE REQUIREMENTS SET FORTH IN THE SECTIONS OF PART 2 OF CHAPTER 5 OF TITLE 65 OF THE TENNESSEE CODE.

BellSouth and Citizens submitted a "Petition to exempt certain services from regulatory requirements contained in Tenn. Code Ann. Title 65, Chapter 5, Part II." Petition for Exemption at 1. Petitioners made their request pursuant to Tenn. Code Ann. § 65-5-208(b). *See Id.* BellSouth requests the TRA to issue an order exempting PRI services to the full extent permitted under the statute, with certain exceptions. *See* Blake Direct at 9; BellSouth's Response to CAD's First Discovery Request, Item No. 3. This statute authorizes the TRA to provide regulatory relief from all or a portion of the requirements set forth in the Sections of Part 2 of Chapter 5 of Title 65 of the Tennessee Code:

> The authority, after notice and opportunity for hearing, may find that the public interest and the policies set forth herein are served by exempting a service or group of services from all or a portion of the requirements of this part. Upon making such a finding, the authority may exempt telecommunications service providers from such requirements as appropriate. The authority shall in any event exempt a telecommunications service for which existing and potential competition is an effective regulator of the price of those services.

Tenn. Code Ann. § 65-5-208(b) (emphasis added). "This part" refers to the Sections of Part 2 of Chapter 5 of Title 65.[3] Since all of the Sections of Part 1 of Chapter 5 have been repealed, the statute, in effect, authorizes the TRA to exempt services from all or a portion of the requirements of Chapter 5, which consists of Tenn. Code Ann. §§ 65-5-201 through 65-5-213.

[3] The Tennessee Code has a tiered numbering system, consisting of title, chapter, part and section. For example, Tenn. Code Ann. § 65-5-208(b) is read as Title 65, Chapter 5, Part 2, Section 08, Subsection (b). *See* Tennessee Code User's Guide, Volume 11A, "Numbering System" at xii.

Accordingly, it is beyond the scope of the Incumbents' request, as well as the TRA's authority, to exempt PRI service from the regulatory requirements contained in Chapters 1, 2, and 4 of Title 65. It would be inappropriate, therefore, for the TRA to enter an order exempting PRI service from the requirements set forth in these sections of the Tennessee Code or any of the associated TRA rules and regulations promulgated pursuant to such statutory authority.

IV. CERTAIN INCUMBENT LEC REQUIREMENTS PROHIBITING ANTI-COMPETITIVE PRACTICES SHOULD BE MAINTAINED.

BellSouth recognizes that prohibitions against an incumbent LEC's anti-competitive pricing practices should be maintained. BellSouth witness Blake testified, "unlike its competitors, BellSouth will be prohibited from pricing its PRI services below cost." Blake Direct at 9. Moreover, BellSouth took the following position in the discovery phase of this docket:

> BellSouth shall be prohibited from pricing PRI ISDN service below cost. Upon complaint, or on the Authority's own motion, the Authority may determine whether BellSouth's PRI ISDN service has been offered below cost, which offering would constitute a violation of the relief sought in this docket.

BellSouth's Response to CAD's First Discovery Request, Item No. 3. Thus, BellSouth argues that incumbent LECs should be prohibited from pricing PRI services below cost and that nothing should prevent parties from coming to the TRA to seek relief for such anti-competitive practices.

Presently, a complainant may bring an anti-competitive pricing claim against an incumbent LEC under Tenn. Code Ann. § 65-5-208(c) and associated TRA rules (*see, e.g.,* TRA Rule 1220-4-8-.09). The Consumer Advocate submits that it makes no sense to exempt PRI service from anti-competitive pricing standards known under current law in favor of new, to-be-determined standards established by an agency order, which presumably would attempt to accomplish essentially the same purpose as existing law.

In particular, the basis for a prospective party's relief from an anti-competitive pricing claim is better left to statutes and duly promulgated TRA rules as opposed to a specific agency order entered to provide requested relief to individual petitioners. These statutes and rules provide specific grounds for an action and can be construed according to guiding principles. *See, e.g., BellSouth BSE, Inc v. Tennessee Regulatory Auth*, 2003 WL 354466 (Tenn. Ct. App. Feb. 18, 2003) (construing and interpreting Tenn. Code Ann. § 65-5-208(c)). To the contrary, the Consumer Advocate is uncertain what basis a prospective party would have to lodge a claim under the agency's order, what specific standards would apply to an incumbent LEC's pricing practices under the order, how the order may be interpreted to resolve potential disputes involving anti-competitive pricing claims, and how the agency's resolution of the dispute pursuant to its order may be reviewed by the courts. This simply is not the appropriate way to develop new regulations. *See Tennessee Cable T.V. Ass'n v Tennessee Pub. Serv. Comm'n,* 844 S.W.2d 151, 160-162 (Tenn. Ct. App. 1992).

Accordingly, the Consumer Advocate submits that the TRA should not exempt incumbent LECs from the anti-competitive pricing requirements that are well grounded in the law in favor of constructing its own, similar requirements through entry of an agency order in this proceeding. It is one thing to exempt a service from existing regulatory requirements, it is another to change from existing requirements to something new. That decision, if it is to be made at all, is better left for consideration in a more appropriate proceeding than this one.

V. ANY RELIEF GRANTED IN THIS DOCKET SHOULD BE CONSISTENT WITH FEDERAL LAW.

The TRA should not enter an exemption order in this docket that would have the effect of permitting an incumbent local exchange carrier to either circumvent or abridge its obligations under

the federal Telecommunications Act of 1996. For instance, federal law imposes a duty upon incumbent LECs to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to non-carrier customers; and it imposes a further duty to not prohibit or impose unreasonable or discriminatory conditions or limitations on the resale of telecommunications services. *See* 47 U.S.C.A. § 251(c)(4); 47 C.F.R. §§ 51.605(e) & 51.613(b). The TRA, therefore, should not enter an order that exempts an incumbent LEC from regulatory requirements governing its resale of PRI service under federal law.

This concern arises within the context of this docket because the Incumbents are seeking relief from current tariffing requirements pertaining to PRI service. It is commonly understood, however, that telecommunications tariffs are an integral part of the federal resale scheme. *See* Local Competition Order, FCC 96-32, 1996 WL 452885, ¶¶ 872, 939 (Aug. 8, 1996) (¶ 872 concluding that a minimum list of services subject to resale requirements need not be prescribed because state commissions, incumbent LECs, and resellers can determine such services by examining the incumbent LEC's tariffs, and ¶ 939 concluding that resale conditions and restrictions are found in the incumbent LEC's underlying tariffs); *see also* Final Order in Docket No. 96-01331 at 7 (Tenn. Reg. Auth. Jan. 17, 1997) (ordering that the wholesale discount be established as a set percentage off the tariffed rates). BellSouth recognizes that its requested combination of tariffs and price lists for PRI service must not affect an incumbent LEC's federal resale obligations relating to such service. *See* BellSouth's Response to CAD's First Discovery Request, Item No. 3.

Accordingly, any new requirement for the tariffing and price listing of PRI service must

operate as tariffs operate today with respect to an incumbent LEC's federal resale obligations.[4] In particular, any new requirements must provide a transparent basis for a reseller to: (1) identify PRI services available for resale; (2) reference any reasonable and nondiscriminatory conditions or limitations on the resale of such services; and (3) calculate the wholesale price of such services. Unless the TRA sets comprehensive and concrete requirements for each of these areas, problems may arise in the future.

CONCLUSION

For the reasons stated, the Consumer Advocate submits that the TRA should deny the Incumbents' request to exempt PRI services from certain regulatory requirements.

RESPECTFULLY SUBMITTED,

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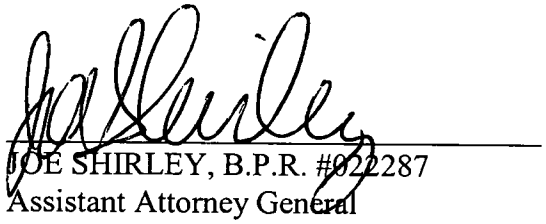

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[4] For the reasons stated in section II, *supra*, the Consumer Advocate maintains that the Incumbents' request to exempt PRI service from present tariffing requirements should be denied.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via facsimile or first-class U.S. Mail, postage prepaid, on November 22, 2004, upon:

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