Sprint

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September 12, 2003

Chairman Deborah Taylor Tate
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

RE: Docket No. 03-00442; *United Telephone-Southeast, Inc. Tariff 2003-710 to Introduce Safe and Sound II Solution*
UTSE Response to CAPD Intervention

Dear Chairman Tate:

Enclosed please find an original and thirteen copies of the United Telephone-Southeast, Inc. Response to the Consumer Advocate and Protection Division's Petition to Intervene in the above-referenced docket.

A copy of this Response is being served on counsel for CAPD. Please contact me if you have any questions regarding this matter.

Sincerely,

James B. Wright

James B. Wright

Enclosures

cc: Vance L. Broemel (with enclosure)
Laura Sykora
Kaye Odum

BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE: UNITED TELEPHONE-SOUTHEAST, INC.) TARIFF 2003-710 TO INTRODUCE SAFE AND SOUND II SOLUTIONS	))	DOCKET NO. 03-00442

UNITED TELEPHONE-SOUTHEAST, INC.
RESPONSE TO
CAPD'S PETITION TO INTERVENE

COMES NOW United Telephone-Southeast, Inc. ("Sprint"), and files this Response to the Consumer Advocate and Protection Division's ("CAPD") September 5, 2003 Petition to Intervene ("Petition") regarding Sprint's Safe and Sound II Solution tariff ("Tariff"). The CAPD asserts that the services in the Tariff are required to be resold under the Federal Telecommunications Act of 1996 ('Federal Act").

The Tariff is an offering of discounted regulated services consisting of an access line and caller ID. In order to obtain the discounted services from the tariff, the customer must also purchase from Sprint non-regulated services consisting of a maintenance plan for customer premises equipment ("CPE") and for inside wire. In other words, the customer must purchase the entire bundle of services in order to obtain the services offered under the Tariff at a discount. For the reasons set forth below, Sprint does not believe the bundle of services is required to be resold as telecommunications services under the Federal Act

of 1996 as asserted by the CAPD in its Petition. Sprint's position is that neither customer premises equipment nor inside wire are telecommunications services under the Federal Act, and thus are not subject to the resale requirements.

The Federal Act, 47 USC Section 151 et. seq, at Section 251(c)(4)(A), imposes on incumbent local exchange carriers such as Sprint the duty "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers". In 47 USC Section 153(43), telecommunications is stated to mean "the **transmission**, between or among points specified by the user, of information of the user's choosing...". In the same Section, at subsection (46), telecommunications equipment is stated to be "equipment, **other than customer premises equipment**, used by a carrier to provide telecommunications services..."(emphasis added).

A literal reading of the Federal Act makes it clear that telecommunications requires, among other things, a transmission of information. The use of CPE can no more be considered a transmission of information than the use of a microwave oven could be considered a distribution of electricity. The Federal Act emphasizes this point by expressly excluding CPE from the definition of telecommunications equipment. This conclusion is further supported by language used by the Federal Communications Commission ("FCC") when deciding that CPE was to be

deregulated. For example, in the FCC's Final Decision in Docket No. 20828, Order released April 7, 1980, the FCC states in paragraph 35 as follows:

> "35. **We found that the provision of CPE was not a common carrier activity and that CPE need not be provided as part and parcel of a common carrier communications service.** Conditions were set forth under which various types of equipment could be marketed. We concluded that carriers owning transmission facilities could market only BMC devices as part of a "voice" of "basic non-voice" service. As to that class of equipment which performs more than a BMC function, we concluded that there should be **no requirement** that such equipment be **offered as part of a tariffed communications service**. Moreover, if a carrier desired to tariff such equipment as part of a communications offering, it could only be tariffed in conjunction with an "enhanced non-voice" communications service at the resale level. Under this structure the marketing of CPE which performed more than a BMC function was to **be separated from the carrier's basic transmission services**; such equipment, if tariffed, would be offered only in conjunction with competitive enhanced services. This arrangement essentially reflected the dynamics of the CPE market and the desirability of having such equipment provided on a competitive basis. It and the possibility of deregulating terminal equipment supply through a separate subsidiary were advanced as alternative approaches to achieving an enduring, consumer-oriented solution to the problems raised by the increasing intelligence of CPE." (Emphasis added).

In the same Order, at paragraph 140, the FCC further highlighted the concept that CPE was a non-transmission, non-telecommunications service:

> "140. Having concluded that we should not classify CPE, our attention is focused on the role of the communication common carrier in offering CPE. Specifically we address whether the objectives of the Communications Act would be better served if carriers were required to sell or lease **CPE separate and apart from their regulated transmission** services, and **whether Title II regulation** of carrier provided equipment is **warranted**. Upon review of the record in this proceeding, we believe that our **statutory mandate** can best be fulfilled if all CPE is detariffed and **separated from a carrier's basic transmission services**."(emphasis added).

In fact, in the above paragraph the FCC effectively holds that CPE is not even subject to Title II regulation at all.

Recent Orders of the FCC continue to support their prior determination that CPE is not a telecommunications service. In the FCC's Bundling Report and Order released March 30, 2001, CC Docket No. 96-91 and CC Docket No. 98-183 eliminating the prohibition against bundling of CPE and enhanced services with telecommunications services, the order repeatedly treats CPE and enhanced services as separate from telecommunications services. For example, when discussing how to assess USF allocations on a bundled package of services the FCC states in paragraph 48: "Carriers report revenues from telecommunications services and revenues from non-telecommunications offerings (including CPE and enhanced services revenues) in separate sections of the Commission's revenue worksheet...". In the same order, discussing Computer II, the FCC in paragraph 5 states: "The Commission also deregulated CPE in the Computer II Order. It determined that the CPE market was becoming increasingly competitive and that in order to increase further the options that consumers had in obtaining equipment, it would **require common carriers to separate the provision of CPE from the provision of telecommunications services.**"(emphasis added).

As a consequence of the definitions contained in the Federal Act and as fully reinforced by decisions of the FCC, it is clear that CPE is not a

telecommunications service and not subject to the resale obligations under the Federal Act.

In like manner, the FCC decisions regarding inside wire fully support the conclusion that it is not a telecommunications service for the same reasons that CPE is not. For example, FCC Second Report and Order, CC Docket No. 79-105, released February 24, 1986, *In the Matter of Detariffing the Installation and Maintenance of Inside Wiring,* footnote 3 states that:

> "In the Further Notice we indicated that the legal authority for our detariffing of inside wiring is the same that we relied upon to detariff CPE in Computer II. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry, or Computer II), 77 FCC 2d 384 (1980) (Final Decision) reconsideration, 84 FCC 2d 540 (1981) (Reconsideration Decision), further reconsideration, 88 FCC 2d 512 (1981), aff'd sub nom. Computer and Communications Industry Association v. FCC, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). "

Even the recently released Triennial Review Order ("TRO") of the FCC, *Review of the Section 251Unbundling Obligations of Incumbent Local exchange Carriers,* CC Docket 01-338, released August 21, 2003, when discussing the unbundling obligations of ILECs with respect to subloops, states with respect to residential inside wire that the obligation effectively stops at the Network Interface Device ("NID"). See TRO Paragraph 343, Footnote 1012 and 47 CFR Section 68.105. The basis for this determination was that the ILEC does not own or control the inside wire into the customer premises. That is the case with both residential CPE and inside wire. These items are owned by the customer and are

not under the control or ownership of the incumbent LEC. The above FCC orders make it clear that deregulated services that do not form a part of the public switched network are not telecommunications services.

As an additional point, Sprint would note that the deregulated services included in the Tariff bundle are not the CPE and the inside wire assets themselves. The services included in the bundle are maintenance plans for these items. Even if it were assumed incorrectly that CPE and inside wire were telecommunications services, the services involved in this Tariff would still be beyond the resale requirements of the Federal Act since a different activity is involved in addition to the fact that the CPE and inside wire are not owned by Sprint.

Sprint's position is not only supported by law, but is sound policy. Inside wire and CPE are both deregulated services and both are available from numerous sources. A reseller who purchases an access line from Sprint's tariff at a wholesale rate (or a CLEC who purchases a UNE loop pursuant to an interconnection agreement) is equally able to obtain from a vendor the deregulated services and related maintenance or warranty services and combine their package of services just as Sprint proposes to do. Resellers and CLECs are able to mix and match any combination of these or other services. The lack of a resale purchase of Sprint's bundle will encourage the introduction of competition and varied product and service offerings engaging multiple vendors. Accordingly there is no sound policy reason to object to Sprint's position that bundles

including non-regulated CPE and inside wire maintenance offerings are not subject to resale.

For all of the foregoing reasons, the CAPD's Petition for Intervention is incorrect when it objects to Sprint's Tariff on the grounds that the Tariff is not subject to the resale requirements of the Federal Act. The CAPD's assertions should be disregarded and the Tariff should be allowed to go into effect.

Respectfully submitted,
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