Sprint

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October 17, 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 Brief

Dear Chairman Tate:

Enclosed please find an original and thirteen copies of the United Telephone-Southeast, Inc. Brief for filing in the above-referenced docket.

A copy of this Brief is being served on counsel of record. 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)
Guy Hicks (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 ) DOCKET NO. 03-00442
SOUND II SOLUTIONS )

*BRIEF OF*
*UNITED TELEPHONE-SOUTHEAST, INC.*

In response to the request of the Directors' at the October 6, 2003 Conference, United Telephone-Southeast, Inc. ("Sprint"), files this Brief addressing the following question regarding Sprint's Safe and Sound II Solution tariff ("Tariff").

**QUESTION**

Do State and /or Federal statutes, rules, orders or other provisions require that all or any part of an offering which bundles regulated service and non-regulated services be made available for resale? If so, should the wholesale discount apply? If yes, how should it apply?

**BACKGROUND**

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, a 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 or any part thereof is required to be resold as telecommunications services under the Federal Act of 1996 or under any other provision of law. 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.

**LEGAL ANALYSIS**

The legal obligation for an incumbent local exchange carrier to offer a service for resale arises under the Telecommunications Act 1996 (the Federal Act). 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".

The obligation to resell is limited to telecommunications services. If a service is not a telecommunications service, the incumbent local exchange carrier has no resale obligation. If a bundle includes both regulated telecommunications services and non-telecommunications services, there does not exist any legal or logical basis to extend the limited resale obligation to a deregulated non-telecommunications service. The Federal Communications Commission has issued a number of decisions addressing the effect of deregulating services under the Federal Act.

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 result of holding a service to be a 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 essence, the FCC held that a non-regulated service need not be tariffed. In fact, in the above paragraph the FCC effectively holds that CPE is not even subject to Title II regulation at all. In Sprint's Tariff, the non-regulated services are referenced, but not included as a part of the Tariffed offering. Since the non-regulated services are not a part of the tariffed offering, are not telecommunications services, are not regulated by the TRA and are not individually offered at wholesale and only available as a part of the integrated bundled offering, there exists no basis to apply a resale obligation to the non-regulated services.

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 can purchase a regulated service such as an access line that is the subject of this Tariff from Sprint's tariff at a wholesale discounted rate (or a CLEC can purchase a UNE loop pursuant to an interconnection agreement). Such purchaser 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 in this case. 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 offerings are not subject to resale.

Recent Orders of the FCC continue to support this determination. 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 a deregulated non-telecommunications service is not subject to the resale obligations under the Federal Act.

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.[1] 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 its 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.

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[1] Multiunit inside wire may be subject to unbundling. See 47 CFR Section 51.319(b)(2) which states, in part, "...One category of this subloop is inside wire, which is defined for purposes of this section as all loop plant owned or controlled by the incumbent LEC at a multiunit customer premises between the minimum point of entry as defined in Section 68.105 of this chapter and the point of demarcation of the incumbent LEC's network as defined in Section 68.3 of this chapter."

Since there is no resale obligation where a bundle includes a non-regulated, non-telecommunications service, there is no basis to impose a discount and none should apply in any circumstance.

## CONCLUSION

A bundle of services that includes regulated and non-regulated services is not subject to the resale requirements of the Federal Act and is not otherwise required by law to be resold.

Respectfully submitted,
UNITED TELEPHONE-SOUTHEAST, INC.

By James B. Wright

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October 17, 2003

CERTIFICATE

Safe and Sound Tariff (Docket No. 03-00442)

The undersigned hereby certifies that a copy of the foregoing was served on each of the following, by hand delivery, by overnight air express, or placing a copy of the same in the United States Mail postage prepaid and addressed as follows:

Guy M. Hicks
BellSouth Telecommunications, Inc.
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Vance Broemel
Office of the Tennessee Attorney General
PO Box 20207
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This 17th day of October, 2003

James B. Wright

James B. Wright