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**IN THE TENNESSEE REGULATORY AUTHORITY**
**NASHVILLE, TENNESSEE**

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| **IN RE:** | ) | |
| | ) | |
| **SPRINT UNITED TARIFF 2003-710 TO INTRODUCE SAFE AND SOUND II SOLUTION** | ) | **DOCKET NO. 03-00442** |

## CONSUMER ADVOCATE'S RESPONSE IN OPPOSITION TO MOTIONS TO CLARIFY ORDER DENYING TARIFF AS FILED

Comes now Paul G. Summers, the 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 "), and hereby responds to the Motion to Clarify Order Denying Tariff as Filed of BellSouth Telecommunications, Inc. ("BellSouth") and the Motion for Clarification of United-Telephone-Southeast, Inc. ("UTSE " or "Sprint-United"). These motions for clarification should be denied because:

1. Even though these motions are styled as motions for "clarification" they are actually motions for reconsideration because they seek to change a ruling of the TRA and, therefore, are subject to the TRA rules governing motions for reconsideration which have not been met in this case.

2. The Order Denying Tariff as Filed accurately reflects the TRA's December 15, 2003, ruling and subsequent withdrawal of the tariff after it was denied cannot operate retroactively to vacate the TRA's ruling.

3. The Order Denying Tariff as Filed could not be clearer and is not in need of any so-called "clarification" especially when that "clarification" is actually an attempt to re-write the Order to the liking of the companies.

## ARGUMENT

### I. THE MOTIONS FOR CLARIFICATION ARE ACTUALLY SEEKING RECONSIDERATION OF THE TRA ORDER BUT HAVE NOT MET THE TRA RULES FOR RECONSIDERATION

The Order Denying Tariff as Filed did just that — it denied the tariff as filed because it violated federal resale obligations but allowed UTSE two weeks to try to modify the tariff to meet those resale obligations. Order at page 3. Instead of attempting to modify the tariff, however, UTSE chose to withdraw it. Now UTSE wants to rewrite the Order Denying Tariff as Filed, which is what the TRA in fact did, so that it becomes an Order Recognizing UTSE's Withdrawal of Tariff No. 2003-710. UTSE *Motion* at page 3 (pages are unnumbered). Similarly, BellSouth asks the TRA to change the Order so that it becomes an Order Mooting Docket By the Withdrawal of Tariff and Noting Comments Made on January 5, 2004 (Some Three Weeks After Ruling on Tariff Made on December 15, 2003). BellSouth *Motion* at page 4. Thus, what both UTSE and BellSouth want is for the TRA to reconsider its decision on December 15, 2003 and change the result of that decision, not just modify it.

Significantly, the heart of BellSouth's Motion to clarify is a two-page quotation from Director Kyle made on January 5, 2004, three weeks after the oral decision on the tariff made on December 15, 2003, in which Director Kyle refers to a motion filed by BellSouth to reconsider the TRA's denial of the UTSE Safe and Sound tariff as written. Thus, what BellSouth wanted then and what it wants now, is a reconsideration of the decision denying the tariff as written, not a mere "clarification." Moreover, Director Kyle's own words make crystal clear the meaning of the decision of December 15, 2003 — the tariff was denied as written and the only way to get around that denial is reconsideration:

> Previously the Authority ruled that the telecommunications services contained in the Safe and Sound bundled offering proposed by Sprint must be made available for resale pursuant to the Federal Telecommunications Act. In that same docket we have received a motion to reconsider, and I wanted to let the other Directors know that when we get to that docket I plan to grant the motion for reconsideration and hear further discussion on the issues raised in that docket.

Cited in BellSouth Motion at page 1 (emphasis added).

BellSouth knew then and it knows now that the ruling in the Safe and Sound docket was contrary to its position on the resale of bundled offerings. That is why it filed then and it has filed now a motion for reconsideration, even though it now calls it a Motion to Clarify. Because, however, BellSouth and UTSE have not followed proper procedure for motions for reconsideration[1] and because BellSouth's and UTSE's proposed "clarification" is actually a change in the Order, the TRA should deny their motions to clarify.

## II. THE EFFECT OF THE TARIFF'S WITHDRAWAL IS WHOLLY PROSPECTIVE AND SUCH WITHDRAWAL CANNOT OPERATE RETROACTIVELY TO VACATE THE TRA'S DENIAL OF THE TARIFF

The withdrawal of the tariff after the TRA's decision to deny the tariff for noncompliance with federal law did not operate retroactively to vacate the TRA's ruling. The only way around the decision in this matter is through further and additional rulings, which is really what UTSE and BellSouth seek through their motions for "clarification."[2]

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[1] See TRA Rule 1220-1-2-.20.

[2] BellSouth's argument that the TRA's decisions in Docket Nos. 03-00554 and 03-00624 somehow change or clarify the TRA's ruling in this docket is without merit. BellSouth Motion at page 4. It is difficult to fathom how BellSouth can aver that in these dockets that the TRA "found," "ordered," and "ruled" that it was not necessary for resale to be based upon a prorated portion of the

As the parties are aware, the issue of whether tariffs such as Safe and Sound are legal or not is currently under appeal.[3] The Safe and Sound docket is an integral part of these appeals and is part of the record on appeal. The Consumer Advocate relied on the TRA's bench decision in Safe and Sound in its appellate brief, which was filed in the Court of Appeals on December 10, 2004. As demonstrated below, the TRA subsequently entered a written order that is, in all respects, consistent with its bench decision. UTSE and BellSouth now seek to undercut the Consumer Advocate's position on appeal by requesting the TRA to re-write the history of Safe and Sound to suit their position under the guise of some need for "clarification."[4]

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bundle discounted, especially since both orders plainly state that the TRA "did not address the resale obligations of incumbent local exchange carriers [because] consideration of the resale issue at this time would be premature since no reseller has expressed an interest in reselling the Tariff." Order Allowing Tariff to Take Effect, TRA Docket No. 03-00554 at pages 2-3; Order Allowing Tariff to Take Effect, TRA Docket No. 03-00624 at pages 2-3.

[3] See Consumer Advocate Division of the Office of the Attorney General v. Tennessee Regulatory Authority, Case No. M2004-01481-COA-R12-CV; Consumer Advocate Division of the Office of the Attorney General v. Tennessee Regulatory Authority, Case No. M2004-01482-COA-R12-CV; and Consumer Advocate Division of the Office of the Attorney General v. Tennessee Regulatory Authority, Case No. M2004-01485-COA-R12-CV.

[4] Neither UTSE nor BellSouth ever sought to "clarify" the TRA's December 15, 2003, bench decision denying the tariff.

## III. THE ORDER DENYING TARIFF AS FILED IS CLEAR AND DOES NOT NEED ANY SO-CALLED "CLARIFICATION"

As set forth above, what BellSouth and UTSE want is a reconsideration of the decision not to approve the Safe and Sound tariff, not a mere clarification. The Order Denying Tariff as Filed, however, clearly reflects the decision made by the TRA on December 15, 2003.

At the TRA Conference on December 15, 2003, Director Kyle made the following motion regarding the Safe and Sound tariff at issue in this case:

> Next I have a motion addressing the statutory obligations for resale. The federal Telecom Act requires incumbent local exchange carriers to make telecommunications services that are provided by the carrier at retail available for resale at wholesale rates. The telecommunications services offered as bundled in this tariff are local exchange service and caller ID, and, therefore, are retail offerings that must be available for resale.
>
> For this reason, the tariff as it exists today cannot be approved. Therefore, I move that Sprint be given two weeks, until December 29th, 2003, to work with the intervenors on modifying the tariff to comply with the resale requirements of the Act. So move.

Transcript of Authority Conference December 15, 2003, at pages 15-16.

Given the explicit nature of this motion, it is not surprising that neither BellSouth nor UTSE quote any material from the conference of December 15, 2003 in their motions to "clarify." Clearly, the TRA did not approve the tariff as it was filed as of December 15, 2003, and the tariff has not been re-filed in any other form. Accordingly, there is nothing to "clarify."

The Order Denying Tariff as Filed accurately reflects Director Kyle's motion of December 15, 2003. The Order provides as follows:

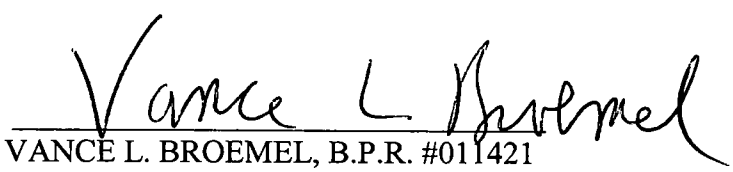
> At the December 15, 2003 Authority Conference, the voting Panel acknowledged that, pursuant to the statutory resale obligations of the Federal Telecommunications Act, ILECs must make available for resale at wholesale rates all telecommunications services that are provided by the carrier to customers at retail. This resale obligation requires ILECs to make available for resale a bundled telecommunications offering. The Panel found that the tariff provides for a bundle of telecommunications services, local exchange service and Caller ID, that are offered at retail and concluded that the bundle must be made available for resale. For this reason, the Panel voted unanimously to deny the Tariff in its current form, pursuant to the representations of UTSE and to allow the Parties until December 29, 2003

> to discuss a way in which the Tariff could be modified to be compliant with federal resale requirements and the Authority's decision. Thereafter, the Panel unanimously granted the petition of AT&T to intervene in this Docket to allow AT&T to participate in the meeting of the parties.

Order at page 3. (emphasis added). Additionally, the Order itself recognizes that UTSE withdrew the Safe and Sound tariff after the TRA denied the tariff as filed. Order at page 4, footnote 3.

Since the Order Denying Tariff as Filed so accurately reflects the decision made by the TRA on December 15, 2003, the motions to clarify by BellSouth and UTSE should be denied.

RESPECTFULLY SUBMITTED,



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Dated: February 1, 2005

## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. mail, postage prepaid, on February 1, 2005, upon:

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