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VIA HAND DELIVERY

Hon Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Tariff to Reclassify Rate Grouping of Certain BellSouth Exchanges*
Docket No 04-00015

Dear Chairman Tate

Enclosed are the original and fourteen copies of BellSouth's *Response to Consumer Advocate Division's Motion for Summary Judgment.* Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Tariff to Reclassify Rate Grouping of Certain BellSouth Exchanges*

Docket No 04-00015

RESPONSE OF BELLSOUTH TO CONSUMER ADVOCATE DIVISION'S MOTION FOR SUMMARY JUDGMENT

BellSouth Telecommunications, Inc ("BellSouth") files this *Response* in opposition to the *Motion for Summary Judgment* of the Consumer Advocate Division ("Consumer Advocate" or "CAD"). BellSouth respectfully shows the Tennessee Regulatory Authority ("Authority" or "TRA") as follows:

I. The Parties Agree That The Sole Legal Issue Presented In This Matter Is Whether, As A Matter Of Law, BellSouth's Tariff Constitutes A Rate Increase Covered By T.C.A. § 65-5-209(f).

Following a Status Conference held on February 20, 2004, BellSouth and the Consumer Advocate agreed to file cross motions for summary judgment on March 3, 2004, and responses to those motions on March 9, 2004.[1] The CAD *Motion for Summary Judgment* states unambiguously that it rests solely on a legal issue "As grounds for this Motion, the Consumer Advocate would show that there is no genuine issue as to any material fact in this matter and that the Consumer Advocate is entitled to judgment as a matter of law."[2] BellSouth

[1] The parties reserved the right to request discovery if discovery is necessary for a party to respond to a fact-based argument or issue raised in the motions for summary judgment *See Order Re-Suspending Tariff and Setting Procedural Schedule* entered February 24, 2004

[2] *See* p 1 of CAD *Motion for Summary Judgment*

agrees that the CAD's opposition to the proposed tariff raises a legal issue only.[3] The legal issue presented is straightforward: *Does BellSouth's tariff constitute a rate increase covered by T.C.A. § 65-5-209(f)?* The answer is "no." The CAD's claim that the price regulation statute somehow prohibits rate grouping fails as a matter of law

II. In Support Of Its *Motion for Summary Judgment*, The CAD Raises The Same Flawed Legal Argument Raised In Its Petition To Intervene.

Just as it did in its *Petition to Intervene*, the CAD attempts to argue that BellSouth's tariff establishes a rate increase which is not permitted under the price regulation statutes. To the contrary, conforming customers into their proper rate classifications in accordance with the A3.4 Tariff is not a rate increase. The A3.4 Tariff provides that:

> **A3.4 Regrouping**
> When the number of main station lines and private branch exchange trunks in the local service area of an exchange increases or decreases to the extent that such exchange moves into a different rate group, the Company shall file a revised tariff in accordance with the statutory provisions and the rules and regulations of the Commission, making effective the rates for the appropriate higher or lower group after a waiting period of six months from the last day of the month in which the exchange moved into the different group.

The BellSouth tariff simply corrects rate groups, such that all locations meeting the rate group definitions as set out in the existing tariff, are included in the correct rate groups This correction is necessary because the A3.4 Tariff defines rate groups based on the number of locations that can be dialed as a local call. Due to development in some areas during the recent years, this local calling

[3] The Hearing Officer's preliminary view, expressed very early in the proceeding, that this case turned on a single issue of law has proven correct

ability has changed. As a result of those changes, some areas no longer fit within the rate group classification in which they are currently assigned.

As explained below in more detail, BellSouth's tariff provides that customers will be charged rates already established under price regulation for rate groups in Tennessee These rates were specifically determined to be just and affordable pursuant to both the Court of Appeals' decision and the TRA's approval of BellSouth's price regulation plan Consequently, all customers who obtain service pursuant to the tariff will pay rates that have already been determined to be just and affordable under Tennessee law. The CAD's own *Petition to Intervene*, at paragraph 13, recognizes this, noting that:

> [u]tilitizing the procedure outlined in the statute, the TRA established just, reasonable and affordable initial rates when the agency approved BellSouth's application for a price regulation plan. *See Price Regulation Order* at pp. 18-, 20-22; *See also*, T C.A §§ 65-5-209(a) and 65-5-209(c) (Supp 2003); *BellSouth Telecom. Inc v. Greer*, 972 S W.2d 663, 674-675 (Tenn. Ct. App. 1997).

The CAD states in its *Memorandum* that BellSouth "acknowledges" that approval of its proposed tariff would generate an increase in its revenue based on present demand. This is no revelation. Rate groupings obviously impact revenues.[4] Implicit in the CAD's argument is the unsupported notion that rate grouping under the A3.4 Tariff is lawful only it if has no impact on revenues. This makes no sense whatsoever What the CAD is actually arguing, without explicitly saying so, is that the A3.4 Tariff should be ignored and that rate regrouping no longer exists after a company elects price regulation. The CAD's legal argument,

[4] BellSouth's estimates as to revenue impacts flowing from the tariff are clearly set forth in its response to the Staff's data requests dated January 27, 2004

when stripped bare of its hyperbole, is that the price regulation statutes and the A3.4 Tariff are somehow irreversibly in conflict and cannot both stand

The Consumer Advocate ignores three key points. First, in Tennessee, as in most jurisdictions, tariffs have the force of law The A3.4 Tariff was approved by the appropriate regulatory agency (the Public Service Commission), and as the Court Appeals has stated,

> [t]he published tariffs of a common carrier are binding upon the carrier and its customers and have the effect of law....

GBM Communications, Inc. v. United Inter-Mountain Tel. Co., 723 S.W.2d 109, 112 (Tenn. Ct. App. 1986) (emphasis added). Accordingly, the CAD cannot simply ignore the A3.4 Tariff.

Second, there is nothing in the price regulation statute suggesting that the General Assembly intended to do away with rate groups or the A3.4 Tariff when it enacted the price regulation statute. Nor was there anything in the Authority-approved BellSouth price regulation plan suggesting that the Authority intended to do away with the A3.4 Tariff or rate groups. The CAD does not provide any justification for ignoring the A3.4 Tariff or make any argument that the A3.4 Tariff is illegal, invalid, or has been pre-empted. It is revealing that the CAD's *Memorandum* does not devote a single sentence to the A3.4 Tariff.[5]

[5] The closest the Consumer Advocate comes to addressing the A3 4 Tariff is the statement at page 11 of its *Memorandum* that "[o]nce BellSouth elected to have its rates governed by a price regulation plan, the slate was wiped clean and the company started anew under this alternative form of regulation "

The A3.4 Tariff requires that when the number of locations in the local service area of an exchange increases or decreases to the extent that such exchange moves into a different rate group, the Company shall file a revised tariff correcting the rate groups. The CAD does not address the A3.4 Tariff's mandatory "shall" language and invites the Authority to err by reading "shall not" into the Tariff.

Third, the price regulation statute must "be construed with reference to pre-existing law, and it does not change pre-existing law further than it expressly declares or necessarily implies." *Plough, Inc. v. Premier Pneumatics, Inc.*, 660 S.W.2d 495, 498 (Tenn. Ct. App. 1983); *In re Estate of Deskins*, 381 S.W.2d 921, 922 (Tenn. 1964); *Harmon v. Moore's Quality Snack Foods, Inc.*, 815 S.W.2d 519, 523 (Tenn. Ct. App. 1991). In Tennessee, tariffs have the effect of law, and thus, the A3 4 Tariff is pre-existing law to the price regulation statute. *See GBM Communications, Inc v. United Inter-Mountain Tel. Co.*, 723 S.W.2d 109, 112 (Tenn Ct. App. 1986); *see also Cronin v. Howe*, 906 S.W.2d 910, 912 (Tenn 1995) (The General Assembly is presumed to have knowledge of pre-existing law.). While the price regulation statute defines how rates are to be adjusted, it does not "expressly declare" that it alters the existing A3.4 Tariff in any manner.

Further, the statute does not "necessarily imply" or repeal the A3 4 Tariff by implication. Repeal by implication is disfavored under Tennessee law and requires a finding of irreconcilable conflict, which is only recognized when no reasonable construction permits the conflicting laws to stand together. *Harmon*, 815 S W.2d at 523; *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 60

S.W.3d 65, 74 (Tenn Ct. App 2001) (holding that "[a]lthough a private act is superseded as far as is necessary to give effect to a general statutory scheme of statewide application, repeals by implication are disfavored and are recognized only when no reasonable construction allows the subject acts to stand together") (citations omitted). However, in this case, the A3.4 Tariff and the statute can be reasonably construed to operate together by allowing rate grouping to proceed using only rates previously approved under the price regulation statute.

Therefore, the price regulation statute cannot be construed to change or alter the pre-existing operation of the A3.4 Tariff because the tariff is pre-existing law and the statute does not "expressly declare or necessarily imply" that the tariff would be revoked or altered in any manner.

The CAD alleges in its *Memorandum* that "failure to deny BellSouth's request in this case would open the door to future such rate increases limited only by BellSouth's desire for additional revenue ..."[6] There is no basis for the CAD's alarmist speculations. First, the A3.4 Tariff establishes the parameters of regrouping and does not permit BellSouth to regroup whenever it "desires additional revenue." Instead, the tariff establishes the process for regrouping when circumstances change such that the exchange moves into another rate group BellSouth has never attempted to regroup in any other circumstances.

Second, as explained above, the rate grouping required by the A3 4 Tariff is not a "rate increase" or "rate adjustment" under T C.A 65-5-209 Rather than being analogous to a rate change, the filing under the A3.4 Tariff is in fact

[6] *See* p 1 of CAD's *Memorandum in Support of its Motion for Summary Judgment*

analogous to the situation in which a customer physically moves from one location to another. If the customer's new location did not meet the definition of the former rate group, then the rate would be applied to that customer consistent with the new rate group to which he now belonged. Likewise, customers affected by the regrouping are customers whose geographic location no longer is consistent with the rate group in which they were formerly included. In neither scenario has a rate increase occurred. Instead, facts have changed, and, as a result, a different (but previously-existing) rate should be applied to that customer in accordance with the A3.4 Tariff.

Third, the A3 4 Tariff has been in effect for decades. BellSouth has not sought regrouping under the A3.4 Tariff since 1991. BellSouth has no intention of filing another rate grouping tariff in the foreseeable future and would not, in any event, file one without a sound justification for doing so The Consumer Advocate provides no support whatsoever for its speculation that BellSouth might attempt future rate groupings without justification. Clearly, the Authority should not render its decision on BellSouth's tariff based on speculative claims of what a party might or might not do at some unspecified point in the future *See Bellsouth BSE, Inc. v. Tennessee Regulatory Authority*, 2003 Westlaw 354466 (Tenn. Ct. App.), at p. 14.

The Consumer Advocate also asserts that it is "undisputed that BellSouth will not offset these annual revenue adjustments against existing headroom for BellSouth's price regulation plan" and that failure to account

for this net increase in annual revenues would violate the price regulation statute.[7] The CAD mischaracterizes BellSouth's position. BellSouth is not seeking to create a new category of revenue not subject to price regulation accounting. While BellSouth has stated that the tariff filing itself neither requires not creates headroom, BellSouth has also made clear in its responses to Staff data requests that the additional revenues resulting from the tariff filing ***will be*** reflected in the local exchange portion of BellSouth's 2004 annual price regulation filing. This portion of BellSouth's 2004 annual price regulation filing will reflect all relevant tariff changes, as has been the case with prior annual filings.[8] Therefore, contrary to the CAD's assertion, BellSouth will account for this tariff in accordance with the price regulation plan.

Citing the price regulation statute's use of the term "rate adjustments", the CAD suggests that BellSouth's Rate Grouping Tracking Report, a document attached as Exhibit B to the Staff's Data Requests dated January 16, 2004, somehow bolsters the CAD's case.[9] Specifically, the CAD alleges that "in the very first 'local exchange' listed in the Tracking

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[7] *See* pp 13-14 of the Consumer Advocate's *Memorandum*

[8] *See* BellSouth's Responses to Item No 4 of Staff Data Request dated January 16, 2004, and Item No 2 to Staff Data Request dated January 27, 2004 The CAD's argument is not only wrong, it is premature No one will know the actual headroom impact of this tariff until such time as BellSouth makes it next annual price regulation filing At that time, the CAD may oppose the filing if it believes BellSouth has not properly accounted for the impact of the tariff

[9] *See* pp 4 and 5 of the Consumer Advocate's *Memorandum* ("BellSouth's own documents filed in support of its tariff establish that the tariff 'adjusts its rates for basic local exchange telephone services " " BellSouth sets forth a 'Rate Group Tracking Report' which clearly establish that BellSouth's tariff adjusts its rates "

Report, BellSouth shows that the Athens exchange will be 'adjusted' from 'Tariff RG [Rate Group] 2' to 'Proposed RG [Rate Group] 3' ...".

BellSouth has carefully reviewed Exhibit B, and there is no reference whatsoever to any "rate adjustment". The Rate Group Tracking Report simply sets forth undisputed factual information requested by the Staff that is fully consistent with both the Tariff and Bellsouth's legal argument. Therefore, contrary to the CAD's suggestion, there is nothing in BellSouth's responses to the Staff data requests supporting the CAD's legal theory. Moreover, the "rate adjustment" language in the price regulation statute relied upon by the CAD contemplates the creation of a ***new*** rate. In other words, T.C.A. § 65-5-209(f) limits the "adjustment" of a previously-approved rate to a new "adjusted" rate. T.C.A. § 65-5-209(f) provides that

> an incumbent local exchange telephone company is permitted to adjust annually its rates for basic local exchange telephone services . provided that in no event shall the rate for residential basic local exchange telephone service be increased in any one (1) year by more than the percentage change in inflation....

As previously shown, BellSouth's tariff does not include any new or adjusted rate.

Indeed, the Athens, Tennessee example relied upon by the CAD in its *Memorandum*, supports BellSouth's position, not the CAD's position. The rates for Flat Rate service in Rate Group 2 are $8.62 per month for residential customers and $30.82 for business customers. The rates for Flat Rate service in Rate Group 3 are $9.19 per month for residential customers

and $32.75 for business customers. All of these rates are currently in existence. All have been properly approved by the Authority. All comply with the price regulation statute. There has been no challenge to any of these rates; yet the CAD would have the Authority believe that BellSouth is seeking new "adjusted" rates in connection with its tariff which does not propose any changes to these existing rates.

The CAD further argues that price regulation ushered in a new method of "rate setting". BellSouth agrees. What the CAD ignores, however, is that all of the rates for all five Rate Groups have already been approved in accordance with the price regulation statute. As stated above, BellSouth is not seeking approval of any adjusted or new rate, or any rate for that matter.

Finally, based on T.C.A. § 65-5-209, the CAD claims that the TRA would exceed its statutory authority by approving BellSouth's tariff. To the contrary, the TRA has clear authority to enforce its own tariffs, which, as stated above, have the force of law in Tennessee. This includes the A3.4 Tariff. What the Consumer Advocate is really inviting the Authority to do is to disregard the A3.4 Tariff even though the CAD has provided no legal justification for doing so. The A3.4 Tariff has not been invalidated or preempted. Rate groups and rate grouping remain in effect in Tennessee. Over time, some ratepayers have been retained in rate groups even though their locations no longer meet the rate group definition. Accordingly, these rate payers are being grouped with other ratepayers in a manner that is arbitrary and

inconsistent with the A3.4 tariff. The General Assembly could have decided to eliminate rate grouping when it enacted the price regulation statute in 1995, but it chose not do so. BellSouth's proposed tariff satisfies the requirements of the A3.4 Tariff and should be approved.

III. Conclusion

For the reasons set forth above, BellSouth respectfully urges the Authority to deny the Consumer Advocate's *Motion* and approve BellSouth's tariff.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2004, a copy of the foregoing document was served on the following, via the method indicated:

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