

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 2, 2005

IN RE:	)	
	)	
TARIFF FILING 04-01434 BY	)	DOCKET NO.
BELLSOUTH TO REDUCE THE	)	04-00416
NUMBER OF CALL ALLOWANCES FOR	)	
DIRECTORY ASSISTANCE AND TO	)	
EXTEND EXEMPTIONS TO	)	
DIRECTORY ASSISTANCE CALL	)	
COMPLETION SERVICE	)	

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**CONCURRENCE AND DISSENT OF DIRECTOR RON JONES TO THE ORDER  
DECLINING TO CONVENE CONTESTED CASE AS TO BELLSOUTH TARIFF NO. 2004-  
1434 AND DENYING CONSUMER ADVOCATE'S COMPLAINT  
AND PETITION TO INTERVENE**

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The above-styled docket came before a panel of the Tennessee Regulatory Authority during Authority Conferences on January 10, 2005 and March 14, 2005. At the January 10th Conference, the panel unanimously voted to allow Tariff No. 04-01434 filed by BellSouth Telecommunications, Inc. ("BellSouth") to go into effect and to afford BellSouth an opportunity to respond to the *Complaint and Petition to Intervene* ("Complaint") filed by the Consumer Advocate and Protection Division of the Office of the Attorney General ("Consumer Advocate"). During the March 14th Conference, Directors Deborah Taylor Tate and Sara Kyle voted to decline to convene a contested case and deny the *Complaint*. The Majority filed its *Order Declining to Convene Contested Case as to BellSouth Tariff No. 2004-1434 and Denying Consumer Advocate's Complaint and Petition to Intervene* ("Majority's Order") memorializing these two decisions on September 2, 2005. For the reasons stated herein, I concur with the

decision of the Majority with regard to the January 10th determination and respectfully dissent from the Majority's March 14th decision.

## **I. RELEVANT PROCEDURAL HISTORY**

On December 1, 2004, BellSouth filed Tariff No. 04-01434 modifying BellSouth's terms and conditions for the provisioning of Directory Assistance ("DA") and Directory Assistance Call Completion ("DACC"). In part, the tariff reduces the number of free DA calls from six (6) to three (3) and provides free DACC service to disabled subscribers. At the December 13th Authority Conference, the panel unanimously voted to suspend the proposed effective date of this tariff from December 31, 2004 to January 11, 2005 in order to obtain additional information.

The Consumer Advocate filed its *Complaint* on December 28, 2004. The Consumer Advocate alleged that the tariff was contrary to Authority policy established in Docket Nos. 96-01423<sup>1</sup> and 99-00391<sup>2</sup> and that free DACC should be extended to subscribers who are age sixty-five (65) or older. The Consumer Advocate requested the Authority convene a contested case to evaluate the allegations, but did not seek suspension of the tariff.

## **II. DISCUSSION**

### **A. JANUARY 10, 2005 DECISION**

On page 4 of the *Majority's Order*, the Majority sets forth the bases for the unanimous decision to allow the tariff to go into effect and to afford BellSouth an opportunity to respond to the *Complaint* in advance of the panel determining whether to convene a contested case. I concur with this decision and generally agree with the bases therefore set forth on page 4 of the *Majority's Order*. I write separately for two reasons.

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<sup>1</sup> See *In re United Telephone-Southeast, Inc. Tariff No. 96-201 to Reflect Annual Price Cap Adjustment*, Docket No. 96-01423, *Order Approving in Part and Denying in Part Tariff No. 96-201* (Sept. 4, 1997).

<sup>2</sup> See *In re BellSouth Telecommunications, Inc. Tariff to Implement a \$0.29 Directory Assistance Charge*, Docket No. 99-00391, *Order Approving Tariff and Denying Consumer Advocate's Petition* (July 29, 1999).

First, the *Majority's Order* states that "the public interest would be promoted by allowing free DACC service to disabled consumers without further delay."<sup>3</sup> It is my position that the tariff "extends benefits to physically disabled individuals."<sup>4</sup> Concluding that a unique group will benefit from an offer of free service is a distinct determination from a decision that the free service offering will promote the public interest. Second, because of language in the *Majority's Order* that could be read to suggest that the Consumer Advocate requested suspension, I further emphasize that the Consumer Advocate did not request suspension and I did not apply the standard set forth in Tenn. Code Ann. § 65-5-101(c)(3)(i), (ii) and (iii)(A) when reaching my decision to allow the tariff to go into effect on January 10, 2005.<sup>5</sup>

**B. MARCH 14, 2005 DECISION**

The Majority bases its decision to decline to convene a contested case and deny the *Complaint* on several conclusions. First, the Majority concludes that "extending free DACC to these disabled consumers, especially those with limited sight, promotes the public interest."<sup>6</sup> Second, the Majority concludes that "three free DA calls per month is reasonable and does not harm the public interest."<sup>7</sup> Third, the Majority concludes that the *Complaint* "does not allege violation of a specific state law" stating, "[i]nstead, the *Complaint* alleges, '[t]he Tariff is contrary to [the TRA's] policy and is contrary to the interests of Tennessee consumers.'"<sup>8</sup> The Majority then concludes its analysis with a determination that the Authority may ground its decision to convene a contested case on a promotion of the public interest and that the Consumer

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<sup>3</sup> *Order Declining to Convene Contested Case as to BellSouth Tariff No 2004-1434 and Denying Consumer Advocate's Complaint and Petition to Intervene*, 4 (Sept 2, 2005).

<sup>4</sup> Transcript of Proceedings, p 46 (January 10, 2005) (Authority Conference deliberations)

<sup>5</sup> *Order Declining to Convene Contested Case as to BellSouth Tariff No 2004-1434 and Denying Consumer Advocate's Complaint and Petition to Intervene*, 5 (Sept 2, 2005) (The Majority states: "In allowing the Tariff to become effective, the Authority made a finding that the Consumer Advocate did not demonstrate a sufficient showing, or otherwise meet the statutory requirements, to warrant suspension of BellSouth's Tariff.")

<sup>6</sup> *Id* at 7

<sup>7</sup> *Id*

<sup>8</sup> *Id* (quoting *Complaint and Petition to Intervene*, p 2 (Dec. 28, 2004)) (first and second alterations added).

Advocate “did not make a sufficient showing to convene a contested case for the purpose of revoking the Tariff or extending the exemptions to classes of consumers beyond those set forth in the Tariff.”<sup>9</sup>

I agree that it is appropriate to ask whether convening a contested case will promote the public interest, but that is where my agreement ends. First, it is my opinion that the Majority’s conclusions regarding free DACC service to disabled consumers and the reasonableness of three (3) free DA calls lack any substantive basis in the administrative record. Second, I take issue with the Majority’s reliance on its conclusion that the Consumer Advocate did not allege a violation of state law. Third, it is my determination that convening a contested case will promote the public interest.

#### **1. SUFFICIENCY OF THE ADMINISTRATIVE RECORD**

In its order, the Majority concludes that “extending free DACC to these disabled consumers, especially those with limited sight, promotes the public interest.”<sup>10</sup> There is simply no evidence in the record to substantiate this claim, and the Majority cites no support for the conclusion in its order. The record as of March 14, 2005 contained only the *Complaint*, BellSouth’s response to the *Complaint*, and BellSouth’s response to a data request sent to BellSouth from the Authority’s Advisory Staff. None of these sources offer sufficient support for the Majority’s conclusion. As a general proposition, although we may assume that providing a service that we determine to be a benefit free of charge to a discreet group of the public promotes the interest of the public as a whole, reliance on such an assumption absent specific support may result in ill-defined policy.

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<sup>9</sup> *Id.* at 8

<sup>10</sup> *Id.* at 7

The Majority also concludes in its order that “three free DA calls per month is reasonable and does not harm the public interest.”<sup>11</sup> In so concluding, the Majority sanctions a reduction of the number of DA calls a consumer can complete each month free of charge from six (6) to three (3). In my opinion, this conclusion is significant because it alters the Authority’s 1997 precedent that required a carrier to provide six (6) free DA calls and rejected the carrier’s proposal to offer three (3) free DA calls per month.<sup>12</sup> Despite the significance of this conclusion, the Majority fails to cite any support for its conclusion in the order, and in my opinion, sufficient support cannot be found in the administrative record.

## 2. VIOLATION OF STATE LAW

In its order, the Majority finds that the *Complaint* “does not allege violation of a specific state law,”<sup>13</sup> yet the Majority fails to explain the significance of this finding to its analysis. Authority Rule 1220-1-2-.02(4) contains the Authority’s requirements for what information must be contained in a complaint. This rule provides: “A tariff filing does not constitute a contested case; however, any interested person may object to the tariff filing by filing a complaint. Any such complaint shall state the nature of the interest, the grounds for any such objection and the relief sought.”<sup>14</sup> There is no requirement in the rule that the complainant allege a specific violation of state law nor is such a requirement contained in Tenn. Code Ann. § 65-5-

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<sup>11</sup> *Id*

<sup>12</sup> See *In re United Telephone-Southeast, Inc Tariff No 96-201 to Reflect Annual Price Cap Adjustment*, Docket No 96-01423, *Order Approving in Part and Denying in Part Tariff No 96-201*, pp. 15-16 (Sept. 4, 1997).

<sup>13</sup> *Order Declining to Convene Contested Case as to BellSouth Tariff No 2004-1434 and Denying Consumer Advocate’s Complaint and Petition to Intervene*, 7 (Sept 2, 2005) (quoting *Complaint and Petition to Intervene*, p 2 (Dec 28, 2004)).

<sup>14</sup> Tenn. Comp R. & Regs 1220-1-2- 02(4) (Rev July 2003)

101(iii)(C),<sup>15</sup> the statutory provision applicable to the determination of whether to convene a contested case.<sup>16</sup>

I stated in Docket Nos. 03-00554 and 03-00624 that “[i]t is the duty of the Consumer Advocate to protect the interests of Tennessee’s public utility consumers and to pursue its statutorily granted prerogative to request a contested case to represent those interests.”<sup>17</sup> The Consumer Advocate has sought to pursue its statutory charge in this docket and has filed a complaint that meets the requirements of Authority Rule 1220-1-2-.02(4). Furthermore, the Consumer Advocate alleged that the tariff deviated from this agency’s long-standing precedent, an allegation I believe to be as meritorious as is a violation of state law. Based on the foregoing comments, I cannot support the Majority’s reliance on its conclusion that the Consumer Advocate did not allege a violation of state law as a basis for declining to convene a contested case and denying the complaint.

### **3. CONVENING A CONTESTED CASE PROMOTES THE PUBLIC INTEREST**

Having considered the allegations of the *Complaint* along with the facts that this agency has not reviewed its DA policy in nearly eight years and that the telecommunications market has changed significantly, it is my opinion that the public interest would be promoted through a thorough review of our DA policy in a contested case. The telecommunications marketplace has

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<sup>15</sup> As an aside, I note, because this is my first opportunity to speak to this section since it was amended in 2004, that the codification of this section appears to be numbered and lettered incorrectly. To explain, the subject matter of the various paragraphs dictates that (c)(3)(iii)(B) and (C) should be codified as (c)(4) and (5).

<sup>16</sup> The only mention of the standard that the complainant allege a violation of state law is contained in Tenn. Code Ann. § 65-5-101(c)(3)(i), the provision setting forth the standard for reviewing a request for suspension by a complaining party. Such a request is not before the panel and it is my opinion that Tenn. Code Ann. § 65-5-101(c)(3)(i), (ii) and (iii)(A) does not apply to a determination of whether to convene a contested case.

<sup>17</sup> See, e.g., *In re Tariff to Establish the Wireless Answers Promotion – Tariff Number 20031036*, Docket No. 03-00554, *Dissent of Director Ron Jones to Orders Allowing Tariff Numbers 2003-1036 and 2003-1379 to Take Effect*, 8 (Apr. 28, 2004).

changed significantly since 1997. This fact was noted by BellSouth in its response.<sup>18</sup> In my opinion, the panel should have at the very least attempted to develop an informed record including varying perspectives and data on this topic before making findings regarding the public interest and determining to modify the Authority's long-standing precedent.

### III. CONCLUSION

For the foregoing stated reasons, it is my opinion that the panel correctly voted to allow the tariff to go into effect on January 10, 2005. Nevertheless, it is my position as to the March 14th decision that the panel should have convened a contested case and appointed a hearing officer to prepare this matter for a hearing and deliberations by the panel. Therefore, I concur with the January 10, 2005 decision and dissent from the Majority's March 14, 2005 decision.



Ron Jones, Director

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<sup>18</sup> See *BellSouth Telecommunications, Inc.'s Response to Consumer Advocate's Complaint and Petition to Intervene*, 4 (Jan 27, 2005) (BellSouth states "No one could reasonably argue that Tennessee's telecommunications market has not developed dramatically in the past six years since these orders were issued. That development has included increases in wireline and intermodal alternatives for Directory Assistance").