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September 15, 2006

Chairman Sara Kyle
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

FILED ELECTRONICALLY

in docket office on 09/15/06

Re: Generic Docket to Develop Policy for the Submission and Review of CLEC-to-CLEC Interconnection Agreements, Docket No. 05-00327.

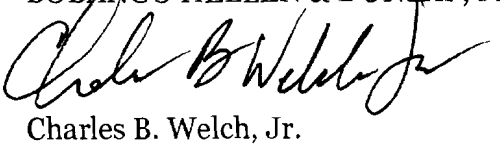
Dear Chairman Kyle:

Please find enclosed, an original and 5 copies of the referenced comments of Time Warner Telecom of the Mid-South, LLC and Level 3 Communications, Inc. Please date stamp a copy for my records and return to me in the enclosed self-addressed, stamped envelope.

Thank you for your assistance regarding this matter. If we can be of further assistance, please do not hesitate to contact us.

Very truly yours,

FARRIS MATHEWS BRANAN
BOBANGO HELLEN & DUNLAP, PLC



Charles B. Welch, Jr.

CBW/jrh
Enclosures
Cc: Carolyn Marek

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

September 15, 2006

IN RE:	)	
	)	
GENERIC DOCKET TO DEVELOP	)	
POLICY FOR THE SUBMISSION	)	**DOCKET NO. 05-00327**
AND REVIEW OF CLEC-TO-CLEC	)	
INTERCONNECTION AGREEMENTS	)	

COMMENTS OF TIME WARNER TELECOM OF THE MID-SOUTH, LLC AND LEVEL 3 COMMUNICATIONS, INC.

Time Warner Telecom of the Mid-South, LLC and Level 3 Communications, Inc. ("collectively, the Commentors") provide the following comments to be considered by the Tennessee Regulatory Authority ("Authority") in considering development of guidelines for the submission and review of CLEC-to-CLEC interconnection agreements.

I. REGULATORY REVIEW OF CLEC-TO-CLEC INTERCONNECTION AGREEMENTS SHOULD NOT BE MANDATORY

In the current environment of deregulation, recent legislation passed by the Tennessee General Assembly, and rules of the Federal Communications Commission, the Commentors contend that maintenance of the status quo as it relates to mandatory review of CLEC-to-CLEC interconnection agreements is essential to the competitive marketplace. CLECs have been satisfactorily negotiating interconnection agreements for over 10 years without the necessity of regulatory intervention, and the added costs of unnecessary regulation would further impair the smaller competitors' ability to compete against the virtually deregulated incumbents.

The Commentors acknowledge, pursuant to Tenn. Code Ann. § 65-4-124(a), certain jurisdiction granted to ensure that interconnection agreements, in general, are nondiscriminatory and contain reasonable terms and conditions and the provisions of Section 251(d)(3) of the Telecommunications Act of 1996 ("Act"). The intent of the Act is to provide a vehicle to assist competitive entry into an embedded monopoly market, not to design unnecessary regulation to the detriment of the competitors the legislation was intended to benefit. Compliance with any additional, compulsory regulatory scheme in an increasingly competitive environment will result in unnecessary out-of-pocket costs to CLEC providers and absorb valuable resources which would otherwise be available to develop and deliver services to Tennessee consumers.

II. APPLICABLE FEDERAL AND STATE LAW DOES NOT MANDATE STATE COMMISSION REVIEW AND APPROVAL OF CLEC-TO-CLEC INTERCONNECTION AGREEMENTS

The Commentors are not aware of any law or rule, state or federal, which would require filing, review, and approval by the Authority of CLEC-to-CLEC interconnection agreements. In its Order entered in Docket No. 04-00128, *In Re: Petition For Approval of the Interconnection Agreement Between Jackson Energy Authority and Aeneas Communications, LLC*, which precipitated this proceeding, the Authority cites and relies, in part, upon Section 252(e)(1) of the Act as a grant of jurisdiction to state commissions to review all interconnection agreements "adopted by negotiation or arbitration." This reliance is misplaced. While this section would appear to require any interconnection agreement adopted by negotiation or arbitration to be submitted to the State commission for approval, the section is preceded by Sections 252(a)(1) and 252(b)(1), both of which describe such negotiated and arbitrated agreements as those wherein an incumbent local

exchange carrier is a party. The mere omission of or reference to the term **incumbent local exchange carrier** in Section 252(e)(1) could not reasonably be construed to require State commission review and approval of any and all such agreements. It is obvious all of the provisions of Section 252 entitled *Procedures for Negotiation, Arbitration, and Approval of Agreements* are intended to be read *in pari materia.*

The environment existing at the time the state telecommunications legislation and the Act were adopted in 1995 and 1996 respectively, must be considered. Although there was great anticipation and much speculation regarding the development of competition, there were no CLECs providing service in the state of Tennessee. The objective of the legislation being debated at the Tennessee General Assembly and before Congress was to provide rules permitting the operation of competing network facilities in a market totally dominated by the incumbent monopoly. These rules contemplate the possibility of the unwillingness of a large and powerful incumbent to contract with a small, start-up competitor; not the need for regulatory intervention in the contractual relations and arms length negotiations between similarly situated competitors.

The Commentors do not contend that regulatory review and approval of CLEC-to-CLEC interconnection agreements are prohibited. Instead, it submits that the authority granted pursuant to Tenn. Code Ann. § 65-4-124(a), and arguably, a review pursuant to the authority of Section 251(d)(3) of the Act, is discretionary. It is imperative such discretion is exercised in such a fashion to avoid unnecessary cost and delay to the CLEC competitors, many of whom are engaged in a constant struggle for market share, if not survival. To ensure against this potential harm, the Commentors suggest the Authority should only review and approve CLEC-to-CLEC interconnection agreements upon the

request of a petitioning CLEC party, as was the case in Docket No. 04-00128 which was initiated upon the petition of Aeneas Communications, LLC.

III. INTERCONNECTION AGREEMENTS SUBMITTED TO THE AUTHORITY FOR REVIEW TO WHICH MUNICIPALLY OWNED CLECS ARE A PARTY SHOULD BE SUBJECT TO STRICTER SCRUTINY

The Authority should continue to recognize, as it has in previous dockets, the differences between a municipally owned CLEC and a traditional, privately owned CLEC. The bargaining strength of a municipal electric company's telecommunications division, in many instances, is much greater than that of the traditional CLEC. This disparity in bargaining power is generally due to the enormous financial resources, existing customer bases, and easier access to public rights-of-way and facilities available to the municipal CLEC. To some extent, these characteristics of the municipally owned CLECs make them comparable to incumbent local exchange carriers. In fact, 47 U.S.C. § 251(h)(2) illustrates a recognition by Congress of the potential for harm represented by entities sharing characteristics similar to those of the incumbents. Pursuant to this section, when a comparable carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by [an incumbent local exchange carrier, they may be treated as an incumbent].[1]

Accordingly, the Authority should consider a different standard of review for interconnection agreements to which a municipally owned CLEC is a party. However, the filing, review, and approval of these agreements should only be required upon the request of one of one of the parties.

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[1] *See generally*, 47 U.S.C. § 251(h)(2).

IV. CONCLUSION

Over the course of approximately the last three years, the incumbent local exchange carriers have mounted an extremely successful legislative effort to deregulate all of their services. For example, contract service arrangements no longer need be filed and certain bundled services and broadband services have been removed from the regulatory arena altogether. While any application of Sections 251 and 252 of the Act to CLEC-to-CLEC interconnection agreements would appear somewhat uncertain, the Act and state law are clear that the Authority has jurisdiction to administer the requirements of state law, specifically, Tenn. Code Ann. § 65-4-124, which includes the obligation of all telecommunications services providers to provide non-discriminatory interconnection of their public networks under reasonable terms and conditions.

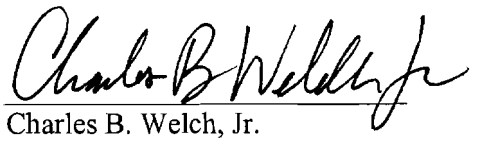
Certainly, it would be inappropriate and impermissible for a State commission to use its review of interconnection agreements as a vehicle to impose Section 251 and 252 obligations of an incumbent on a CLEC provider. However, it seems appropriate and consistent with state and federal law, to permit CLEC parties to avail themselves of the mediation and arbitration procedure of Section 252 upon request of a petitioning party.

Obviously, the Authority is the most appropriate dispute resolution forum for carrier-to-carrier complaints. Indeed, the Authority has the expertise and experience in resolving disputes concerning interconnection agreement provisions and should be available to resolve issues between CLEC parties. However, as the practice has been for the past 10 years, **there is neither any need nor public interest to be served by the filing of voluntarily negotiated agreements.**

For the reasons stated above, the Commentors urge the Authority to permit, but not require, parties to CLEC-to-CLEC interconnection agreements file and mediate or arbitrate such agreements in accordance with the procedure described in Section 252 of the Act and consistent with the substantive requirements of Tenn. Code Ann. § 65-4-124(a) and the Act.

Respectfully submitted,

FARRIS MATHEWS BRANAN BOBANGO HELLEN & DUNLAP, PLC

By: 

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