FARRIS
MATHEWS
BRANAN
& HELLEN
PLC
Attorneys at Law

Suite 2400
511 Union Street
Nashville, TN 37219
Phone 615 726-1200
Fax 615 726-1776

Attorneys
William W. Farris
Harlan Mathews
Homer Boyd Branan, III
Tim Wade Hellen
Edwin Dean White, III
Charles B. Welch, Jr.
G. Ray Bratton
John Michael Farris
O. Douglas Shipman
D. Edward Harvey
Rebecca Pearson Tuttle
Eugene Stone Forrester, Jr.
Dedrick Brittenum, Jr.
Barry E. White
Robert E. Miller
Robert A. McLean
Anita I. Lotz
Gregory W. O'Neal
Steven C. Brammer
Harold W. Fonville, II
Fred D. (Tony) Thompson, Jr.
Richard D. Click
Jeffrey M. Clark
Pamela Haddock Klavon

Of Counsel
Henry H. Hancock

MEMPHIS DOWNTOWN
Suite 2000
One Commerce Square
Memphis, TN 38103
Phone 901 259-7100
Fax 901 259-7150

MEMPHIS EAST
Suite 400
5384 Poplar Avenue
Memphis, TN 38119
Phone 901 763-4000
Fax 901 763-4095

June 15, 1999

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

HAND DELIVERY

RE: Proceeding for the Purpose of Addressing Competitive Effects of Contract Service Arrangements Filed by BellSouth Telecommunications, Inc. in Tennessee
Docket No. 98-00559

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of Time Warner Telecom of the Mid-South, L.P. and New South Communications, L.P.'s Pre-Hearing Brief. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

FARRIS, MATHEWS, BRANAN & HELLEN, P.L.C.

Charles B. Welch, Jr.

CBW;kms

Enclosure

cc: Carolyn Marek
Lori Reese

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE:	**PROCEEDING FOR THE PURPOSE OF ADDRESSING COMPETITIVE EFFECTS OF CONTRACT SERVICE ARRANGEMENTS FILED BY BELLSOUTH TELECOMMUNICATIONS, INC. IN TENNESSEE**	**) Docket No. 98-00559**

PRE-HEARING BRIEF FILED ON BEHALF OF TIME WARNER TELECOM OF THE MID-SOUTH, L.P. AND NEW SOUTH COMMUNICATIONS, L.P.

This Pre-Hearing Brief is filed on behalf of Time Warner Telecom of the Mid-South, L.P. and New South Communications, L.P. to address four specific issues listed below pursuant to the request of the Directors of the Tennessee Regulatory Authority ("Authority") at its regularly scheduled conference held on June 8, 1999.

A. THE BURDEN OF PROOF.

In most all civil actions, the party seeking relief, the complainant, is assigned the burden of proving its case, by a preponderance or a greater weight of the evidence. This docket, however, was created and opened at the initiative of the Directors. Thus, there is no formal complainant, although a number of the members of the industry have intervened and encouraged the Authority to enter an order or adopt a rule designed to provide relief from the anti-competitive effects of BellSouth's Contract Service Arrangements ("CSAs").

Since the instant docket was initiated by the Directors, it is analogous to a show cause proceeding pursuant to Tennessee Code Annotated §65-2-106, however, a show cause order has not been issued by the Authority as contemplated by this Section. Since

this case involves the propriety of BellSouth CSAs, the vast majority of which have already been approved by the Tennessee Regulatory Authority, there must be some initial showing that the CSAs, individually or collectively, are in violation of statute or rule. In a show cause proceeding, this initial offer of proof is accomplished by the show cause order issued by the Authority which must "fully and specifically state the grounds and the basis thereof, and the respondents named therein shall be given an opportunity to fully reply thereto". T.C.A. §65-2-106. The burden of proof is and remains on the parties directed to show cause throughout the proceeding pursuant to T.C.A. §65-2-109(5).

In all other contested cases, the burden is on the "party or parties asserting the affirmative of an issue." T.C.A. §65-2-109(5). The intervenors in this case contend that BellSouth CSAs violate applicable law and are anti-competitive. In the absence of a show cause order, these parties would logically be required to make the initial offer of proof. After sufficient evidence has been admitted to support this prima facie case, the burden of going forward necessarily shifts to BellSouth to deny or rebut such evidence. Although the burden of proof never shifts, the burden of going forward shifts to BellSouth upon the admission of evidence sufficient to support a prima facie case that BellSouth CSAs are violative of a state or federal statute or rule. Categorical examples include, without limitation, CSAs which:

i. provide discounted prices below the mandatory statutory limitation pursuant to T.C.A. §65-5-208(c);

ii. are not offered to similarly situated customers as prohibited by T.C.A. §65-4-122 and Rule 1220-4-1-.07; and

iii. violate fundamental anti-trust principles and are designed and executed for the sole purpose of frustrating development of a competitive market as may be prohibited by order of the Authority pursuant to T.C.A. 65-5-208(c).

CSAs made a part of this proceeding which have not been previously approved by the Authority must be treated differently than those already approved. Clearly, in these instances, BellSouth must be assigned the burden of proving that these unapproved CSAs are compliant with all applicable law, rules and regulations.

B. NATURE OF RELIEF TO BE GRANTED.

The nature of this proceeding and its direction to date demands that the Authority make a determination as to the validity of the BellSouth CSAs subject to this proceeding and enter a declaratory order. The Authority's order should reflect a clear determination as to whether each CSA is compliant with all applicable law and is enforceable. This type of declaratory order is similar, if not identical, to judicial review and determination of rights, privileges, duties and obligations of parties in the application of contractual or statutory provisions. TRA authority to issue such declaratory rulings is expressly authorized by Tennessee Code Annotated §65-2-104.

C. WHETHER THE RELIEF SHOULD BE ONLY PROSPECTIVE.

The prospective or retrospective application of the relief ordered by the Tennessee Regulatory Authority in this proceeding will depend upon the findings of fact and conclusions of law applicable to each BellSouth contract. If the Authority finds a contract violated federal or state law at the time of its execution, the contract is ***void*** ab initio and unenforceable by either party. Remedial action will not work to cure this pre-existing defect and the parties must, except as to that portion of the contract which has been executed, resume a position as if the contract had never been executed. If the contract was not violative of applicable law at the time of its execution but has over a period of time, and in

conjunction with other circumstances, become violative of law or public policy in application, the contract might be ***voidable*** by one of the parties or by the Authority. For example, a contract service arrangement not offered to all similarly situated customers is violative of state law and authority as noted above. Obviously, although there might not have been any illegality at the time of its execution, the continued failure to offer the services in a non-discriminatory manner becomes the violation. In these type circumstances, the contract should be voidable, subject to certain conditions; i.e. successful implementation of a plan of compliance. Similarly, if the Authority finds a CSA was executed as part of a scheme of anti-competitive practices, the contract is not violative of applicable law on its face but rather in application as part of the unlawful scheme. In this instance, the Authority should deem the contract voidable at the election of the innocent purchaser/customer who has been denied a competitive choice and, arguably, the benefit of lower prices and better quality services.

This is consistent with the holdings of the Tennessee Supreme Court in Biggs v. Reliance Insurance Company, 137 Tenn. 598, 195 S.W. 174 (Tenn. 1970) and the more recent appellate decision of Steadman v. Bailey, 1984 Tenn. App. LEXIS 3179. In Biggs, supra, an agent for an insurance company took a note for the premium on a life insurance policy he sold to an insured. Upon the death of the insured the company denied coverage because the contract was purchased in violation of a statute which prohibited rebates by an agent to an insured. In determining whether the contract was void as a violation of a statute in effect at that time, the Supreme Court noted there is open for consideration the objects and reach of the statute, its subject matter, the mischiefs aimed to be corrected,

the class of persons sought to be controlled and whether the legislative intention will be subserved by holding the policy contract valid or invalid. The Court went on to state it was observed that the statute regulates a particular branch of a business and the course of conduct to be pursued by corporations and agents of corporations of that class. There was no affirmative prescription as to the course of conduct of the insurants and therefore the policy contract was not declared in terms to be void in the hands of the one claiming to be insured. In Steadman v. Bailey, supra, the Eastern Section Court of Appeals dealt with a situation wherein a land owner had sold property to the plaintiff by reference to a plat of a subdivision which plat had not been submitted or approved by the proper planning commission as required by statute. In holding that the underlying sale contract was not void ab initio the Court of Appeals looked to the legislative intent of the statute. The Court first noted the statute places the duty of compliance only upon the vendor or his agent and no duty was required of the vendee. The statute also placed a penalty only on the vendor or his agent and likewise no penalty was prescribed for the vendee. The Court noted that should the statute be interpreted to render void all sales made without compliance with its terms, the result could be to inflict a penalty upon the vendee equal to or in excess of that imposed upon the vendor, when the vendee had no duty to perform or penalty prescribed against him. LEXIS 3197 at *14. The Court of Appeals in Steadman went on to determine whether the contracts were voidable. Citing Restatement of the Law, Contracts, 2nd §7, the Court noted that a voidable contract is one where one or more of the parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance. Typical instances of voidable contracts are those where one party is an infant or where the contract

was induced by fraud, mistake or duress, or where breach of warranty or the promise justifies the aggrieved party in putting an end to the contract. The Court went on to hold the contracts for the sale of the lots were voidable if the purchasers could show that they fall within the perimeter of that type of transaction. LEXIS 3179 at *17.

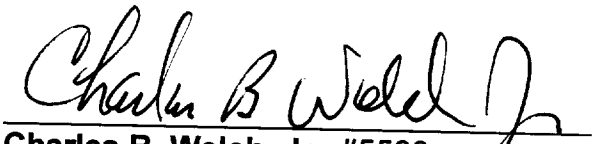
D. IS THE CONDUCT OF THESE PROCEEDINGS CONSISTENT WITH THE HOLDING OF THE TENNESSEE COURT OF APPEALS DECISION IN Tennessee Cable Television Association, et al. v. Tennessee Public Service Commission, et al.:

In Tennessee Cable Television Association, et al. v. Tennessee Public Service Commission, et al., 894 S.W.2d 151 (Tenn. App. 1992), the Tennessee Court of Appeals carefully distinguished the judicial and legislative authority of the regulatory agency. In this case the Court considered the review of a decision the Public Service Commission in a rate making proceeding, a contested case. Simultaneously with its decision making process in the rate making proceeding, the Public Service Commission developed two plans for accelerating the provision of advance services to Tennessee consumers through the development and construction of network facilities to be funded by excess earnings. Although the rate making proceeding was unique to South Central Bell, the Commission proposed to make the long range development plans applicable to another local exchange carrier by way of a proposed rule which was adopted subject to public comment. The rule therefore became dispositive of the excess earning issues in the South Central Bell rate making proceeding. Simply stated, the Court held the regulatory agency acted arbitrarily and capriciously by disposing of the issues in the rate making proceeding, a judicial function, with the promulgation of a rule of general application, a legislative function, developed during the contested case proceeding.

The subject docket is a contested case proceeding. Only the contractual service arrangements of BellSouth are before the Authority for consideration. The disposition of the issues in this proceeding will only effect BellSouth CSAs. Since BellSouth has been a monopoly provider of telecommunications services in its service areas in Tennessee and currently provides services to customers representing a market share in excess of 95%, this is appropriate. Contractual service arrangements or special contracts of other competing providers are irrelevant in that these contracts have no competitive effect. The Authority is not actually engaged in a rule making proceeding to regulate special contracts of all service providers, thus, it is simply not postured, at this point, to take action inconsistent with the Tennessee Cable decision. The order in this case will only apply to BellSouth and that order will only be issued after a full and impartial hearing. Rules of general application governing contracts of all service providers should only be adopted in conjunction with a separate rule making proceeding. Certainly, the Authority could initiate such a rule making proceeding to promulgate rules of general application governing contract arrangements of all service providers, at anytime, if it determines rules are necessary and appropriate.

Respectfully submitted,

FARRIS, MATHEWS, BRANAN & HELLEN, P.L.C.

By: 

Charles B. Welch, Jr., #5593
Attorney for Time Warner Communications Of the Mid-South, L.P. and New South Communications, L.P.
511 Union Street
Suite 2400
Nashville, TN 37219
(615) 726-1200

CERTIFICATE OF SERVICE

I, Charles B. Welch, Jr., hereby certify that I have served a copy of the foregoing Brief on the parties of record, by depositing a copy of same in the U.S. Mail, postage prepaid this the 15th day of June, 1999.

Richard Collier, Esquire
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0500

Jon Hastings, Esquire
Boult, Cummings, et al.
414 Union Avenue, #1600
P.O. Box 198062
Nashville, TN 37219-8062

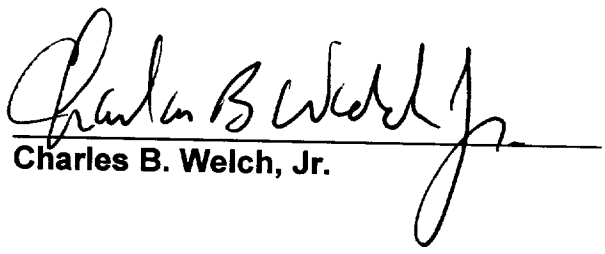
James Lamoureux, Esquire
AT&T
1200 Peachtree Street, NE
Atlanta, GA 30309

Carolyn Tatum Roddy, Esquire
Sprint Communications Co., L.P.
3100 Cumberland Circle, N0802
Atlanta, GA 30339

Henry Walker, Esquire
Boult, Cummings, et al.
414 Union Avenue, #1600
P.O. Box 198062
Nashville, TN 37219-8062

Guy Hicks, Esquire
BellSouth Telecommunications, Inc.
333 Commerce Street, #2101
Nashville, TN 37201-3300

Vance Broemel, Esquire
Consumer Advocate Division
426 5th Avenue N., 2nd Floor
Nashville, TN 37243



Charles B. Welch, Jr.

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