BOULT
CUMMINGS
CONNERS
& BERRY PLC

LAW OFFICES
414 UNION STREET, SUITE 1600
POST OFFICE BOX 198062
NASHVILLE, TENNESSEE 37219

Henry Walker
(615) 252-2363
Fax: (615) 252-6363
Email: hwalker@bccb.com

TELEPHONE (615) 244-2582
FACSIMILE (615) 252-2380
INTERNET WEB http://www.bccb.com/

June 15, 1999

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

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 David:

Please find enclosed the original and thirteen copies of a brief filed on behalf of Southeastern Competitive Carriers Association, NEXTLINK Tennessee, Inc., and e.spire Communications, Inc. in response to the Notice of the Tennessee Regulatory Authority dated June 8, 1999, in the above-captioned proceeding.

Sincerely,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

Henry Walker

By:
Henry Walker

HW/nl
c: Parties

0569499.01
010183-003 06/15/1999

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

BRIEF OF SECCA, NEXTLINK, and e.spire

This brief is submitted on behalf of Southeastern Competitive Carriers Association ("SECCA"), Nextlink Tennessee, Inc. ("NEXTLINK"), and e.spire Communications, Inc. ("e.spire") in response to the June 8 Notice of the Tennessee Regulatory Authority ("TRA") requesting that the parties address the four issues listed below.

Issue I. The burden of proof in this docket

In the TRA's own words, this contested case proceeding was initiated *sua sponte*, by the Authority "for the purpose of addressing competitive effects of contract service arrangements filed by BellSouth Telecommunications, Inc."

By definition, an agency initiated, contested case (as opposed to a rulemaking or other generic inquiry) is a "show cause" proceeding as described in T.C.A. § 65-2-106. In such a proceeding, the burden of proof falls on the respondent, BellSouth.

In order to meet the procedural requirements of § 106, however, the Authority must issue a "show cause" order requiring BST to demonstrate why the TRA should not abrogate or modify some or all of BellSouth's CSAs as being unjust or unreasonable, or anti-competitive, or otherwise inconsistent with the public interest.

There is more than ample evidence to initiate such an investigation. The sheer volume of BellSouth's CSAs, coupled with the evidence introduced by SECCA concerning BST's secret "Premier Customer Program,"[1] demonstrate BST's intention to lock out competition before it gets started. That is why the TRA must require BellSouth to demonstrate that the CSAs are in the public interest.

Since this contested case was initiated by the TRA, there is simply no legal basis to impose the burden of proof on anyone except BST.

Issue II. The nature of relief available

a. Whether that relief should be only prospective

Except in unusual circumstances not applicable here, the TRA has no authority to order retroactive adjustments to a legally approved rate. *See South Central Bell v. T.P.S.C.*, 675 S.W. 2d 718 (Tenn. Ct. App., 1984). That applies, of course, just as much to TRA-approved contracts as to tariffs.[2]

Unless some of BST's contracts are shown to be below cost, the relief most likely to be granted in this case would be a modification of the termination penalties and/or the offering of comparable rates to other similarly situated customers.

---

[1] *See* "Supplement to Petitions to Intervene," filed by SECCA and NEXTLINK in TRA dockets 99-00262, 99-00210, and 99-00230 describing BST's Premier Customer Program. Because that information was filed under seal it will not be repeated here.

[2] Hypothetically, the TRA could order retroactive relief on the grounds of fraud or misrepresentation, but there is no evidence yet developed in this case suggesting such conduct.

b. Whether that relief will apply to BellSouth and its affiliates and assigns

For regulatory purposes, the TRA may treat any BST affiliate which also provides utility services as part of BST itself. *See T.P.S.C. v. Nashville Gas*, 551 S.W. 2d 315 (Tenn. 1977). For example, the TRA and its predecessor, the Tennessee Public Service Commission, have always treated BellSouth Advertising and Publishing Company as part of BST for reporting and ratemaking purposes.

In this case, the Authority has jurisdiction over any contract for utility services offered by BST or by any BST affiliate.[3]

Issue III. Whether proceeding with this docket as a contested case is consistent with the Court of Appeals decision in the case of *Tennessee Cable Television Association v. Tennessee Public Service Commission*, 844 S.W. 2d 155 (Tenn. App. 1992)

The *Tennessee Cable* case focuses, *inter alia,* on how to determine whether an agency should proceed with a one-company contested case or a multi-company rulemaking. Here, the "Third Report and Recommendation of the Pre-Hearing Officer" issued June 1, 1999, and adopted by the TRA on June 8, 1999, has rendered this question moot.

The list of issues originally proposed by the parties in this docket included both BST-specific questions and industry-wide matters. For example, whether some or all of BellSouth's own CSAs are anti-competitive is clearly a "contested case" under *Tennessee Cable*. Conversely, the determination of what "similarly situated" means should more appropriately be considered in an industry-wide rulemaking.

---

[3] The TRA has asked the parties to comment on CSAs of BST, its affiliates, and assigns. The discussion above addresses BST and its affiliates. There is no reason, in theory, why a BST contract assigned to an unaffiliated carrier should not also be subject to modification or abrogation in this proceeding. The intervenors are not, however, aware of any such assignment.

The Hearing Officer's Report resolves this issue by proposing both a contested case and a simultaneous rulemaking proceeding. He recommends that the contested case proceeding against BellSouth continue and that a new rulemaking "be initiated through the opening of another docket . . . for the purpose of promulgating rules that will address industry-wide practices of offering [CSAs]." Report, at 3.

After splitting off the industry-wide issues from this docket, there is no longer any doubt that those issues which involve only BST should remain in a contested case proceeding.

Issue IV. Whether Contract Service Arrangements may be approved by the Authority contingent upon the conclusion of this docket and subject to abrogation or modification based upon the decision of the Authority in this docket

The TRA's plenary jurisdiction over utility rates — which includes the ability to approve, alter, or abrogate special contracts — has been established by statute and case law for 75 years.

By statute, the TRA has "general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises." T.C.A. § 65-4-104. That authority includes, of course, the power to monitor and adjust all utility "rates, charges, and regulations." T.C.A. § 65-5-101.[4]

The agency's jurisdiction over rates supersedes rates established by private contracts between utilities and their customers. Otherwise, the agency's power to fix rates would be

---

[4]Like this section, several of the statutes governing the TRA's jurisdiction over rates were enacted in 1897 when the TRA's predecessor, the Tennessee Railroad Commission, was created. Those statutes refer to railroad rates. But when the Commission's jurisdiction was enlarged in 1919 to include utilities, the Legislature ensured that the agency "shall possess with reference to public utilities . . . all the powers conferred on the commission with reference to railroads." T.C.A. § 65-4-105.

meaningless. No such contract is valid unless approved by the agency. Once approved, the agency may also change the contract at any time, following appropriate statutory procedures, in the exercise of the agency's continuing jurisdiction over the rates and terms of utility service.

These principles, now long settled, were first articulated by the Tennessee Supreme Court in 1921 in *New River Lumber Co. v. Tennessee Railway Co.*, 145 Tenn. 266.

"Railroad transportation charges," the Court wrote "have been by statutes, State and federal, virtually removed from the domain of contract and have become matters to be regulated alone by the law." *Id.* at 283.

That case involved a private contract between a railroad and a shipper. The court held the contract invalid and unenforceable because it had not been approved by the Commission. The Court also made clear that a contract rate is no different from a tariffed rate, that both are subject to the agency's supervision and control, and that a special contract, once approved, may be thereafter changed by the agency as circumstances warrant. *Id.* at 288.

> Although a contract for a fixed period be entered into between a carrier and shipper for a freight rate, which is the legal rate at the time of the contract, yet, if thereafter the carrier establishes a higher rate in accordance with the provisions of the law, the contract is ineffectual. Indeed both carrier and shipper would be indictable if they adhered to the contract.

In its conclusion, the Court again emphasized the agency's continuing jurisdiction and control over all rates, including those set by contract (*id.* at 295-296):

> Of transportation charges of railroad companies within the State the Railroad Commission has complete jurisdiction. The Commission may fix and alter these charges within its discretion, short of confiscation or extortion. Even though a contract for freight rates should stipulate the legal rate, such a rate would be subject to change, as we have

> heretofore seen, at the order of the Commission.

The Court's logic is inescapable: given the agency's complete jurisdiction over ratemaking and its authority to change rates as needed, there is no difference between a rate fixed by a contract and a rate fixed by tariff. What may be "just and reasonable" at the time approved may later become unreasonable and, therefore, subject to change.

Today, the TRA's regulation of special contracts is governed by Rule 1220-4-1-.07, enacted in 1974. The rule states that such contracts are "subject to supervision, regulation, and control" by the agency and must be filed, reviewed, and approved by the TRA. That rule reflects the court's decision in *New River Lumber Co.*

Simply because there is no state statute explicitly giving the TRA the power to abrogate contracts, that does not imply that the Authority lacks such power.

To the contrary, unless there is a statute *exempting* special contracts from the agency's jurisdiction over rates and terms of service, the agency also controls such contracts. As the *New River* court said, "There is no provision for exempting special contracts from the operation of law." *Id.*, at 288.

Pursuant to T.C.A. § 65-5-106, the TRA has a continuing, legal duty to "exercise a careful and watchful supervision over every such tariff of charges . . . as justice to the public may require," and to fix rates that are "just," "reasonable," "non-discriminatory," and not "unduly preferential" (*see* T.C.A. §§ 65-4-115, 65-5-203, and 65-5-204). Numerous court decisions emphasize the TRA's duty to monitor and adjust rates in the public interest. *See, e.g, CF Industries v. T.P.E.C.,* 599 S.W. 2d 536 (Tenn. 1980).

Similarly, the United States Supreme Court has ruled repeatedly that states may exercise control over regulated industries without violating the Contracts Clause of the Constitution, even when such state action impairs private contracts.[5]

The first step in analyzing whether state action is in violation of the Contracts Clause is to evaluate whether there has been substantial impairment of a contractual relationship. *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411 (1982); *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). In determining the degree of the impairment, the court considers the extent to which the industry in question has been regulated in the past. *Energy Reserves Group*, 459 U.S. at 411, citing *Allied Structural Steel*, 438 U.S. at 242, n. 13. In the *Energy Reserves Group* case, the parties were suppliers of natural gas; the Supreme Court noted "(s)ignificant here is the fact that the parties are operating in a heavily regulated industry." *Id.* at 413. Indeed, Justice Holmes observed that,

> One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them.

Hudson Water Co. v. McCarter, 209 U.S. 349, 357 (1908).

In the context of a heavily regulated industry, the Court has clearly established that state impairment of contracts, when in the exercise of the public interest, does not violate the Contracts Clause:

> It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the state from exercising such powers as are vested in it for the promotion of the common

---

[5] The Contracts Clause provides that "No State shall ... pass any ... Law impairing the Obligation of Contracts..." U. S. Const., Art I, § 10, cl. 1.

> weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the government to protect the lives, health, morals, comfort, and general welfare of the people, and is paramount to any rights under contracts between individuals. *Home Building & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 437, 78 L. Ed. 413 (1934), quoting *Manigault v. Springs*, 199 U.S. 473, 480, 26 S. Ct. 127, 130.

For example, a statute fixing reasonable rates to be charged by a company for supplying electricity was held to supersede lower rates embodied in a contract between the company and a consumer. *Home Bldg. & Loan Ass'n. v. Blaisdell*, 290 U.S. 398, 438 (1934). In another case, the Court found that "the State has power to annul and supersede rates previously established by contract between utilities and their customers." *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109, 113 (1937).

These Supreme Court cases are consistent with the *New River Lumber* decision. There is no difference between a TRA-approved tariff and a TRA-approved CSA. A tariff itself is nothing more than a unilateral offer to provide service upon the terms described therein. The customer accepts the offer by ordering the service. Just as that agreement can be amended at any time, a TRA-approved special contract, which is nothing more than a customer-specific tariff, can also be altered if warranted by a change in circumstances.

BellSouth itself apparently recognizes the TRA's plenary control in this area since apparently every BellSouth CSA includes language explaining to the customer that the contract is subject to change by the TRA.

There is no serious doubt that the TRA may alter or abrogate CSAs as circumstances and the public interest may require or that the agency may approve such contracts, just like any other tariff, subject to the outcome of a contested case hearing.

Respectfully submitted,

Henry Walker

Henry Walker
Boult, Cummings, Conners & Berry, PLC
414 Union Street, Suite 1600
Nashville, TN 37219
(615) 252-2363
Counsel for SECCA, NEXTLINK, and
e.spire

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of June, 1999, a copy of the foregoing document was served on the parties of record, via hand-delivery, overnight delivery or U.S. Mail, postage prepaid, addressed as follows:

Dana Shaffer, Esq.
NEXTLINK
105 Molloy Street, #300
Nashville, TN 37201

H. LaDon Baltimore, Esq.
Farrar & Bates
211 Seventh Ave. No., #320
Nashville, TN 37219-1823

Charles B. Welch, Esq.
Farris, Mathews, et al.
511 Union Street, #2400
Nashville, TN 37219

Jon E. Hastings, Esq.
Boult, Cummings, et al.
P.O. Box 198062
Nashville, TN 37219-8062

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

Val Sanford, Esq.
Gullett, Sanford, et al.
230 Fourth Ave. N., 3d Floor
Nashville, TN 37219-8888

L. Vincent Williams, Esq.
Consumer Advocate Division
426 5th Avenue, N., 2nd Floor
Nashville, TN 37243

Steven T. Brown
Director, State Regulatory Policy
Intermedia Communications
3625 Queen Palm Drive
Tampa, FL 33619

Guilford Thornton, Esq.
Stokes & Bartholomew
424 Church Street
Nashville, TN 37219

D. Billye Sanders, Esq.
Waller, Lansden, Dortch & Davis
511 Union Street, #2100
Nashville, TN 37219-1750

Susan Berlin, Esq.
South East Competitive Carriers Association
MCI Telecommunications Corporation
780 Johnson Ferry Road, Suite 700
Dept./Loc. 0348-943
Atlanta, GA 30342

Carolyn Tatum Roddy, Esq.
Sprint Communications Company, L.T.
3100 Cumberland Circle, N0802
Atlanta, GA 30339

Henry Walker