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August 24, 1999

98-00559 TRADD
99-00210 TRADD
244 TRADD

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

Re: ~~Petition by ICG Telecom Group, Inc. for Atbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996~~
~~Docket No. 99-00377~~

Dear David:

Please find enclosed an original and thirteen (13) copies of the post-hearing brief filed on behalf of SECCA and NEXTLINK in the above proceeding.

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Henry Walker

HW/nl
c: Parties of record
Attachment

FILE

FILE

0586500.01
046885-000 08/24/1999

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE



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| 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 |
| BELLSOUTH TELECOMMUNICATIONS, INC. TARIFF TO OFFER CONTRACT SERVICE ARRANGEMENT TN 98-6766-00 FOR MAXIMUM 13% DISCOUNT ON ELIGIBLE TARIFFED SERVICES | ) DOCKET NO. 99-00210 |
| BELLSOUTH TELECOMMUNICATIONS, INC. TARIFF TO OFFER CONTRACT SERVICE ARRANGEMENT KY 98-4958-00 FOR AN 11% DISCOUNT ON VARIOUS SERVICES | ) DOCKET NO. 99-00244 |

**Post Hearing Brief of NEXTLINK and SECCA**

NEXTLINK Tennessee LLC ("NEXTLINK") and the Southeastern Competitive Carriers Association ("SECCA") submit the following, post-hearing brief.

NEXTLINK and SECCA join in the brief submitted by AT&T on the legal issues of whether the two Contract Service Arrangements ("CSAs") submitted by BellSouth Telecommunications, Inc., are anti-competitive and discriminatory in violation of state law, and whether the termination provisions in those CSAs are legally enforceable under Tennessee contract law.

Based on those arguments and the testimony presented at the hearing, SECCA and NEXTLINK recommend that the Authority take the following course of action:

I. First, BellSouth must be directed to rewrite the two CSAs at issue to conform to the statements of BellSouth witness Frame who testified that the contracts don't mean what they say. Specifically, each contract obligates the customer to purchase from BellSouth those particular "volume and term eligible services" which are listed in the contract.[1] Mr. Frame testified, however, that BellSouth interprets the contracts only to require the customer to purchase a minimum, annual dollar amount of services, not any particular service. Since that is BellSouth's interpretation, the contracts must be rewritten aaccordingly.

II. Second, the Authority should declare that the termination and shortfall (*i.e.*, take or pay) provisions in the two CSAs at issue are "unjust and unreasonable" and will not be approved.

As in any tariff proceeding, the Authority can either rewrite the terms of a proposed tariff or direct BellSouth to file a revised tariff within certain Authority-fixed parameters.

Here, the Authority may approve the CSAs (revised to conform with Mr. Frame's testimony) except for the termination and shortfall revisions which are clearly illegal under Tennessee contract law. As the testimony made clear, the penalty and shortfall provisions in the contracts bear no relation whatever to BellSouth's reasonably anticipated damages. Since these provisions are unenforcable under Tennessee contract law, they are, by definition, neither "just" nor "reasonable" under Tennessee regulatory law. If those provisions are struck from the contracts, the customer will still be bound by the applicable termination penalties in BellSouth's

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[1] See Section I-J and Section II-A of the "Bank" contract. See Section II-A and Section IX-C of the "Store" contract.

tariffs. Should BellSouth wish to renegotiate and submit revised termination and shortfall penalties the utility may do so, but the Authority should not approve those provisions unless:

A. BellSouth can demonstrate that the termination penalties are reasonably related to BellSouth's estimated damages from breach of the contract; and

B. If there is a shortfall provision, it should be tied to the volume discount which the customer receives. In other words, if the customer's usage falls below the minimum annual revenue amount, the customer --- instead of being required to pay the difference ---would simply receive whatever discount applied to the customer's actual usage.

If BellSouth is unwilling to enter into a contract that conforms to these legal and policy parameters, BellSouth is free to ask to withdraw the proposed CSAs.

III. Based on the record developed in this proceeding, the TRA should proceed with both a "show cause" and a rulemaking proceeding.

A. The Authority has already approved a recommendation of the Hearing Officer that the agency initiate a show cause proceeding to examine the reasonableness of the termination penalties contained in BellSouth's tariffs. Those proceedings should be expanded to include an investigation of the termination and shortfall provisions contained in BellSouth's previously approved CSAs.

The volume and term agreements described at the hearing are not unusual. BellSouth has dozens of "V&T" agreements now in effect containing similar termination and shortfall penalties. Those provisions are anticompetitive, unenforcable, and neither "just" nor "reasonable" for the same reasons discussed above. Therefore, those provisions must be amended on a going forward basis. The proper way to do that is through a show cause proceeding.

As in any other proceeding to examine whether an existing tariff is "just and reasonable," the TRA initiates the case by issuing a show cause order. Based on the record developed in these dockets, the Authority's order would state that the agency has made an initial determination that shortfall and termination provisions contained in BellSouths volume and term contracts are not "just and reasonable" in view of current market conditions, expert testimony that such provisions unreasonably deter customers from switching to other carriers, and the Authority's policy of promoting competition in the local exchange markets.

Furthermore, BellSouth's failure to prove any plausible relationship between the termination and shortfall penalties found in a CSA and BellSouth's reasonably anticipated damages provides additional justification for the prospective amendment of the termination and shortfall provisions in BellSouth's existing CSAs.

B. Either as part of that show cause proceeding or in a separate docket, the Authority should also require BellSouth to show cause why the utility's multi-year "Key Customer" agreements and similar term offerings which may exist should not be submitted to the Authority for approval under the CSA rule. By purporting to label these two-and-three-year agreements as ninety day "promotions," BellSouth is clearly attempting to evade both the CSA rule as well as federal and state requirements that any special offer of more than ninety days duration must be made available for resale.

C. Finally, the TRA should begin a rulemaking proceeding to address the problem of discrimination among CSA customers. BellSouth readily admitted at the hearing that each contract ultimately depends on the bargaining skills of the customer and not on whether that customer is "similarly situated" to another. Offering utility service on that basis is clearly a

violation of state law. Based on the record developed in this hearing, the Authority should promulgate rules requiring that any volume and term discount offered by a regulated, local exchange carrier must be spelled out in the carrier's tariffs and offered to all customers who meet the relevant term and volume requirements.

As the testimony of NEXTLINK demonstrated, it is both practical and consistent with Tennessee law to make volume and term discounts generally available to customers primarily through tariffs rather than CSAs. If there are special circumstances justifying the use of a CSA, such as a "build-out" situation, where the carrier must install significant additional plant in order to serve a particular customer, the carrer should be required to demonstrate those circumstances on a case-by-case basis.

## CONCLUSION

There is no doubt that BellSouth's volume and term agreements unreasonably prevent customers from switching to other carriers. After all, that was-- and is-- the purpose of those agreements and BellSouth's various plans to get customers to sign them. By striking the unreasonable termination and shortfall provisions from these CSAs, as well as from BellSouth's tariffs, and substituting reasonable, cost-based penalties the TRA can take a giant step toward unlocking the local exchange market.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

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## CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 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:

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