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April 30, 1999

 **BELLSOUTH**
REC'D TN
REGULATORY AUTH.

'99 APR 30 PM 1:45
Guy M. Hicks
General Counsel

OFFICE OF THE
EXECUTIVE SECRETARY

VIA HAND DELIVERY

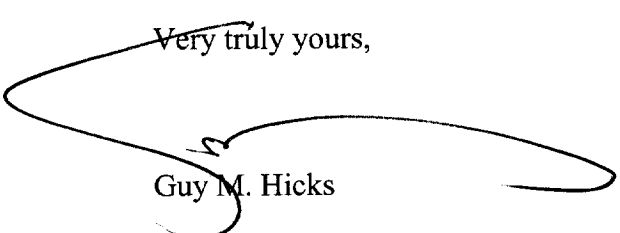
David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Tariff to Offer Contract Service Arrangement KY98-4958-00*
Docket No. 99-00244

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Opposition to "Petitions to Intervene". Copies of the enclosed are being provided to counsel filing petitions to intervene.

Very truly yours,



Guy M. Hicks

GMH:ch
Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: ***Tariff to Offer Contract Service Arrangement KY98-4958-00***

Docket No. 99-00244

BELLSOUTH TELECOMMUNICATIONS, INC.'S
OPPOSITION TO "PETITIONS TO INTERVENE"

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully opposes the "petitions to intervene" filed by NEXTLINK Tennessee, Inc. ("NEXTLINK"), the Southeastern Competitive Carriers Association ("SECCA"), and Time Warner Telecom of the Mid-South, L.P. ("Time Warner") (collectively "Petitioners"). Because this is not a contested case, there is nothing for Petitioners to "intervene" in. Furthermore, while attempting to overcome this obstacle by requesting in conclusory fashion that the Authority convene a contested case to consider the Contract Service Arrangement ("CSA") at issue, Petitioners do not set forth the factual or legal basis for the Authority's doing so, as required by the Authority's rules. To the extent any competitor believes that a particular CSA is "illegal" or that BellSouth is violating Tennessee law by offering the CSA, they can file a petition or complaint setting forth the factual and legal basis for such allegations in accordance with the Authority's rules. Accordingly, consistent with the Supreme Court's decision in *Consumer Advocate Division v. Greer*, 967 S.W.2d 759 (1998), the "petitions to intervene" must be denied.

II. DISCUSSION

A. Petitioners' Request For Intervention Must Be Denied Because This Is Not A Contested Case.

Tenn. Code Ann. § 4-5-310, which is the statute relied upon by Petitioners, governs intervention in contested cases. This is not a contested case. Rather, it is a tariff filing embodying a CSA that the Authority can consider and approve without conducting a hearing. *See, e.g., Consumer Advocate Division v. Bissell*, 1996 Tenn. App. LEXIS 528, *12 (Tenn. Ct. App. Aug. 28, 1996). The Authority did not convene a contested case to consider this CSA, and there has been no request by any party that the Authority do so prior to Petitioners' requests for "intervention" filed less than one week before the Authority is scheduled to act on the CSA. Thus, the "petitions to intervene" should be denied because they presuppose the existence of a contested case, which is not the case here.¹

¹ Even assuming the Authority had convened a contested case, which it did not, Petitioners have not satisfied the legal requirements for intervention. First, none of the Petitioners states any facts demonstrating that their "legal rights duties, privileges, immunities, or other legal interests may be determined" as a result of the Authority's approval of this CSA, as would be required under Tenn. Code Ann. § 4-5-310(a)(2). Although NEXTLINK and SECCA express a general concern "that special contracts entered into by BellSouth may illegally impede [competing carriers'] ability to compete in Tennessee," the Authority is addressing this "general concern" in Docket 98-00559. Petitioners have not alleged and cannot allege any facts demonstrating that the particular CSA at issue here impacts NEXTLINK's, or any other competing carrier's ability to compete in Tennessee. Second, none of the Petitioners makes any attempt to demonstrate how their intervention would be "in the interests of justice" and would not "impair the orderly and prompt conduct of the proceedings," as would be required under Tenn. Code Ann. § 4-5-310(a)(3). NEXTLINK, Time Warner, and the other carriers that SECCA purports to represent are competitors of BellSouth that stand to benefit directly if they are permitted to manipulate the regulatory process so as to hamstring BellSouth. Allowing any competitor to delay a CSA simply by filing a petition to intervene could effectively deny BellSouth the ability to serve that CSA customer to the detriment of the customer, BellSouth and its shareholders. Such a result would hardly be "in the interests of justice."

B. Petitioners' Request For Intervention Must Be Denied Because The Petitions Do Not Set Forth Any Basis For Convening A Contested Case As Required By The Authority's Rules.

There is no requirement that the Authority convene a contested case prior to approving a CSA, and Petitioners do not contend otherwise. Under Tenn. Code Ann. § 4-5-102(3), a contested case is defined as any proceeding “in which the legal rights, duties or privileges of a party are required by any statute or constitutional provision to be determined by an agency after an opportunity for a hearing.” Here, there is no statute or constitutional provision that requires the Authority to give BellSouth’s competitors the opportunity for a hearing prior to approving a CSA. This is clear from the numerous CSAs which have been approved by the Authority to date without a hearing.

While it has the discretion to “commence a contested case at any time with respect to a matter within the Authority's jurisdiction,” Tenn. Code Ann. § 4-5-102(3), a petition or complaint requesting a hearing must satisfy certain requirements before the Authority can decide whether to exercise that discretion. Those requirements are set forth in Rule 1220-1-1-.05(1), which provides as follows:

Petitions, applications or formal complaints to the [Authority], whereby the originator of same desires a hearing and/or a formal order from the [Authority]:
a) must be in writing; b) signed by the petitioner, applicant, complainant, or by their duly authorized representative or attorney; c) *must contain in clear and logical form the allegations, statements of facts relied upon, the fact or thing done or order or rules and regulations of this [Authority];* d) *must conclude with the prayer specifying the particular relief or action sought from the [Authority];* e) name and address of complainant or petitioner and their attorney; and f) if applicable, the name and address of the defendant or respondent, and may be in the following form:

Rule 1220-1-1-.05(1), Rules of Tennessee Regulatory Authority (emphasis added). The rule is then followed by a form complaint or petition, which, in one section, advises a petitioner or complainant to:

state in this and subsequent paragraphs the matter or matters intended to be complained of, naming every rate, fare, charge, classification, regulation or practice the lawfulness of which is challenged, and also, if practicable, the points between which the rates, etc. complained of are applied and other acts or things done or omitted, as may be necessary to fully acquaint the [Authority] with the details of the alleged complaint or petition, etc.

Here, Petitioners have filed petitions requesting a hearing on BellSouth's CSA. However, other than being in writing and signed by an attorney, none of the "petitions to intervene" complies with the requirements of the rule governing such filings.

The "petitions to intervene" at issue here are indistinguishable from that in *Consumer Advocate Division v. Greer*, 967 S.W. 2d 759 (1998). In that case, BellSouth filed a tariff introducing three new optional local exchange service packages for residential customers. After the tariff was placed on the former Tennessee Public Service Commission's agenda, the Consumer Advocate Division filed a petition to intervene. The petition did not include specific allegations of fact as to why the tariff was unjust or unreasonable, but rather simply stated the tariff "may prejudice Tennessee consumers." In reversing the Court of Appeals' decision that the petition to intervene constituted a "written complaint" under Tenn. Code Ann. § 65-5-2(a), the Supreme Court observed that the Court of Appeals erroneously failed to consider the Authority's rules governing the required form and contents of petitions and complaints.

According to the Court:

An examination of the petition to intervene reveals that it does not specifically challenge the justness of the rates contained in the BellSouth tariff. The opening paragraph of the petition refers only to the need to convene a contested case to 'determine the justness and reasonableness of the filing' because the tariff 'may prejudice Tennessee consumers.' It does not contain a specific allegation as to

how or why Tennessee consumers may be prejudiced by the tariff. The Advocate's petition prayed for leave to intervene and participate as a party and that the court conform to a stay issued in another appellate court proceeding in which BellSouth was a party. The petition clearly does not conform to the measure of specificity required of formal complaints by the TRA rules.

967 S.W. 2d at 762.

The Supreme Court's analysis applies equally here and is fatal to the Petitioners' request for a contested case. The petitions do not specifically challenge the justness or reasonableness of any provision of the tariff filing in question. Furthermore, the petitions do not contain: (1) any allegations of fact or citations of legal authority upon which Petitioners' complaints are based, or (2) any prayer specifying the relief or action sought from the Authority. As was the case in *Consumer Advocate Division v. Greer*, the "petitions to intervene" in this case fail to conform to the measure of specificity required by the Authority's rules. Accordingly, consistent with the Supreme Court's decision in *Consumer Advocate Division v. Greer*, the Authority must deny the Petitioners' request for a contested case hearing.

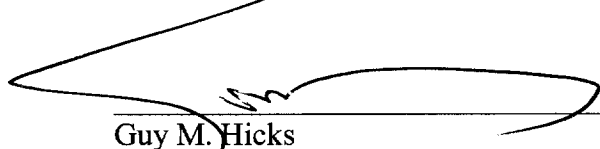
As the Supreme Court made clear in *Consumer Advocate Division v. Greer*, the Authority's rules governing the required form and content of a petition requesting the Authority to conduct a hearing are not optional. 967 S.W.2d at 762-763. They serve a vital interest in protecting the rights of public utilities such as BellSouth. *Id.* This is particularly true when it comes to BellSouth's CSAs. Unless a competitor challenging a CSA complies with the specificity required by the Authority's rules, that competitor could effectively delay BellSouth's ability to serve that CSA customer simply by filing a "petition to intervene." That competitor could then seek to use such delay to try to take the customer from BellSouth, since BellSouth's competitors are not subject to the same level of regulatory scrutiny as BellSouth. The Authority

should not permit competitors to use the regulatory process to disadvantage BellSouth in the marketplace in such a fashion.

The Authority is examining the competitive effects of BellSouth's CSAs in Docket 98-00559. To the extent any competitor believes that a particular CSA is "illegal" or that BellSouth is violating Tennessee law by offering the CSA, they can file a petition or complaint setting forth the factual and legal basis for such allegations in accordance with the Authority's rules. Here, the Petitioners have not done so, which requires that their request for a contested case be denied.²

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

A handwritten signature in black ink, appearing to read "Guy M. Hicks", is written over a horizontal line.

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161570

² In Docket 98-00559, both NEXTLINK and SECCA were asked by BellSouth during discovery whether they contend that BellSouth's CSAs are anticompetitive or discriminatory and, if so, to provide the factual basis for any such contention. NEXTLINK and SECCA responded that they did "not at this time have a position" on these issues. *See* Pre-Hearing Officer's Initial Order on Motions to Compel Outstanding Discovery, at 2 & 6-10. Consistent with their position that they have no "position," it is not terribly surprising that neither NEXTLINK's nor SECCA's "petition to intervene" contains any specific factual or legal allegations about the CSA at issue.

CERTIFICATE OF SERVICE

I hereby certify that on April 30, 1999, a copy of the foregoing document was served on the parties of record, via the method indicated:

☒ Hand
☐ Mail
☐ Facsimile

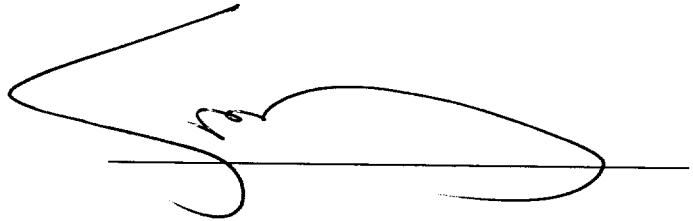
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A handwritten signature in black ink, appearing to be 'R. Collier', is written over a horizontal line.