LAW OFFICES

GULLETT, SANFORD, ROBINSON & MARTIN, PLLC

230 FOURTH AVENUE, NORTH, 3RD FLOOR
POST OFFICE BOX 198888
NASHVILLE, TENNESSEE 37219-8888

TELEPHONE (615) 244-4994
FACSIMILE (615) 256-6339

GARETH S. ADEN
LAWRENCE R. AHERN III
G. RHEA BUCY
GEORGE V. CRAWFORD, JR.
GEORGE V. CRAWFORD III
A. SCOTT DERRICK
THOMAS H. FORRESTER
MARCY S. HARDEE
M. TAYLOR HARRIS, JR.
DAN HASKELL
ANDRA J. HEDRICK
DAVID W. HOUSTON IV
LINDA W. KNIGHT
JOEL M. LEEMAN
ALLEN D. LENTZ
JOSEPH MARTIN, JR.
JEFFREY MOBLEY

KATHRYN H. PENNINGTON
WM. ROBERT POPE, JR.
WAYNE L. ROBBINS, JR.
JACK W. ROBINSON, JR.
JACK W. ROBINSON, SR.
VALERIUS SANFORD
MARTY S. TURNER
WESLEY D. TURNER
PHILLIP P. WELTY

JOHN D. LENTZ
OF COUNSEL

B. B. GULLETT
1905-1992

November 16, 2000

VIA HAND DELIVERY

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37201

Re: *Generic Docket Addressing Rural Universal Service*
Docket No: 00-00523

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of the Reply Brief of AT&T Communications of the South Central States, Inc. as to Legal Issues with respect to the above-referenced matter. Copies are being served on counsel for all known parties.

Yours very truly,

Val Sanford

VS/ghc
Enclosures

cc: Counsel of record
James P. Lamoureux, Esq.
Garry Sharp

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P 11-20-00

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re: ***Generic Docket Addressing Rural Universal Service***
Docket No: 00-00523

REPLY BRIEF OF AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC. AS TO LEGAL ISSUES

AT&T Communications of the South Central States, Inc. ("AT&T") files this reply as to the three "Legal Issues" listed in the report of the Pre-hearing Officer:

1. **DOES THE TRA HAVE JURISDICTION OVER THE TOLL SETTLEMENT AGREEMENTS BETWEEN BELLSOUTH AND THE RURAL LOCAL EXCHANGE CARRIERS?**

AT&T has stated the basis for the TRA's jurisdiction in its initial brief and will not repeat that here. As to this issue, AT&T will address BellSouth's contentions that the TRA does not have jurisdiction. BellSouth's contentions are based on unwarranted assumptions as to the prohibition against the impairment of the obligation of contracts as provided in Article I, Section 20 of the Tennessee Constitution and Article I, Section 10 of the United States Constitution.[1] The governing principles are settled:

> For it is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the state to establish all regulations that are reasonably necessary to secure the

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[1] Note that the Tennessee Supreme Court has held that these two provisions are identical so that decisions of the United States Supreme Court are controlling; Lake County, *ex rel* v. Morris, 160 Tenn. 619, 628-629, 28 S.W.2d 351 (1930).

> health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away, and is inalienable even by express grant; and that all contract and property rights are held subject to its fair exercise.
> Atlantic Coastline R.Co. v. Goldsboro, 232 U.S. 548, 558, 34 S.Ct. 364, 58 L.Ed. 721, 726 (1914).
>
> Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end "has the result of modifying or abrogating contracts already in effect." *Stephenson v. Binford,* 287 U.S. 251, 276, 77 L.ed. 288, 301, 53 S.Ct. 181, 87 A.L.R. 721. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. (Footnotes omitted)
> Home Building & Loan Asso. V. Blaisdell, 290 U.S. 398, 434-435, 54 S.Ct. 231, 78 L.Ed. 413, 426-427 (1934). *See also,* Keystone Bituminous Coal Association v. DeBenedictis, 480 U.S. 470, 107 S.Ct. 1232, 1251, 94 L.Ed.2d 472 (1987).

Thus, utilities cannot by contract preclude states from regulating their rates and practices; Midland Realty Co. v. Kansas City Power & Light Co., 300 U.S. 109, 57 S.Ct. 345, 347, 81 L.Ed. 540 (1937); Veix v. Sixth Ward Building & Loan Association of Newark, 310 U.S. 32, 39, 60 S.Ct. 792, 795, 84 L.Ed. 1061 (1940).

As discussed in AT&T's initial brief, the Tennessee statutes clearly give the TRA jurisdiction over the terms, conditions and rates of any contracts between BellSouth and rural LECs. There is no constitutional impediment to the exercise of that power with respect to the existing contracts between BellSouth and the rural LECs.

However, it is unnecessary to reach that question here. BellSouth terminated its existing contracts as of January 1, 2001. As of that date, there will be no contracts.[2] BellSouth, however, does not have the power on its own to impose a new basis for interconnection on the rural LECs. That power belongs to the TRA. The TRA has the power to regulate the ongoing relationship between BellSouth and the rural LECs. The TRA could order the adoption of an interim structure governing that relationship based on the provisions of the expired contracts until a final structure is adopted.

2. SHOULD THE WITHDRAWAL OF TOLL SETTLEMENT AGREEMENTS BETWEEN BELLSOUTH AND THE RURAL LOCAL EXCHANGE CARRIERS BE CONSIDERED IN THE RURAL UNIVERSAL SERVICE PROCEEDING? IF SO, HOW SHOULD THEY BE CONSIDERED?

If there is to be a separate rural universal service proceeding, then, as discussed in AT&T's original brief, consideration of the withdrawal of the toll settlement agreements should be considered as part of the overall assessment of the factors governing such a proceeding. However, it should be emphasized that nothing in the law guarantees a particular revenue stream, much less an assurance of profitability, to the rural LECs or to any other carrier. "The Fifth Amendment protects against takings; it does not confer a constitutional right to government-subsidized profits;" Alenco Communications, Inc. v. FCC, 201 F.3d 608, 624 (5th Cir. 2000).

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[2] Since these contracts are not in the public record, it is not feasible for AT&T to take a definitive position with respect to BellSouth's right to terminate them. From the positions taken by the parties, however, it appears that BellSouth has that right.

3. **IS THE STATE UNIVERSAL SERVICE STATUTE, AS ENACTED, INTENDED TO APPLY TO RATE OF RETURN REGULATED RURAL COMPANIES, AS SUCH COMPANIES ARE DEFINED UNDER STATE LAW?**

As discussed in AT&T's initial brief, under the clear, express language of the governing statute, T.C.A. §65-5-207, the Legislature intended for a universal service mechanism to be established only "after the local telecommunications markets are opened to competition." These rural LECs themselves hold the key to their participation in any state universal service mechanism, i.e., they can open their local telecommunications markets to competition. Certainly, such markets are not so opened at this time, and the rural LECs have given every indication of vigorously contesting any such opening. Indeed, some LECs continue to fight to preserve the Tennessee statute that insulates them from competition.

The rural LECs may, or may not, have a need to alter their rate structures, or their expenses, or their excess earnings as a result of BellSouth's termination of its toll settlement agreements. That need, if such it be, is not to be met by attempting to set up a special universal service mechanism, but rather is to be addressed in earnings reviews for each such carrier. If the rural LECs want to keep their monopoly privileges, then they must also keep the rate base rate of return regulatory system and follow that system for addressing the results of BellSouth's termination of its toll settlement agreements.

Respectfully submitted,

Val Sanford, #8316
GULLETT, SANFORD, ROBINSON & MARTIN, PLLC
230 Fourth Avenue North, 3rd Floor
P.O. Box 198888
Nashville, TN 37219-8888
(615) 244-4994

James P. Lamoureux
AT&T
1200 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 810-4196

Attorneys for AT&T Communications
of the South Central States, Inc.

CERTIFICATE OF SERVICE

I, Val Sanford, hereby certify that a copy of the foregoing Reply Brief of AT&T Communications of the South Central States, Inc. as to Legal Issues has been served via United States First Class Mail, postage prepaid, to the following counsel of record, this 16th day of November, 2000.

Val Sanford

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

Jon Hastings
Boult, Cummings, Conners & Berry, PLC
414 Union Street, Suite 1600
Nashville, TN 37219

Charles B. Welch, Jr.
Farris, Mathews, Brannan, Bobango & Hellen PLC
618 Church Street, Suite 300
Nashville, TN 37219

David Espinoza
Millington Telephone Company
4880 Navy Road
Millington, TN 38053

Henry Walker
Boult, Cummings, Conners & Berry, PLC
414 Union Street, Suite 1600
Nashville, TN 37219

Richard Tettelbaum
Citizens Telecommunications
6905 Rockledge Drive, #600
Bethesda, MD 20817

James Wright
United Telephone-Southeast
14111 Capitol Boulevard
Wake Forest, NC 27587

Dan H. Elrod
Miller & Martin, LLP
150 4th Avenue, Suite 1200
Nashville, TN 37219