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October 16, 2000

VIA HAND DELIVERY

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

Re: *Proposed Rules for the Provisioning of Tariff Term Plans and Special Contracts*
Docket No. 00-00702

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of the Comments of AT&T Communications of the South Central States, Inc. with respect to the above-proposed rules. Copies are being served on counsel for all known interested parties.

Yours very truly,

Val Sanford

VS/kw
Enclosures

cc: James P. Lamoureux, Esq.
Garry Sharp

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POSTED 10/17/00

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: PROPOSED RULES FOR THE PROVISIONING OF TARIFF TERM PLANS AND SPECIAL CONTRACTS

Docket No. 00-00702

COMMENTS OF AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC.

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PRELIMINARY STATEMENT – THE DEFICIENT NOTICE – THE STATUTORY BASIS FOR ANY POLICY

AT&T Communications of the South Central States, Inc. ("AT&T") urges the rejection of the proposed rules, as a matter of law.

The first part of T.C.A. §65-5-208(b) provides:

> The authority, after notice and opportunity for hearing, may find that the public interest and the policies set forth herein are served by exempting a service or group of services from all or a portion of the requirements of this part. Upon making such a finding, the authority may exempt telecommunications service providers from such requirements as appropriate.

As a matter of policy, in the best interest of customers for competitive business services of local exchange carriers in Tennessee, AT&T recommends the development of a new rule pursuant to the above quoted statute.

In considering the regulation of the provisioning of tariff term plans and special contracts, the Tennessee Regulatory Authority ("TRA") is faced with difficult, complex issues for which there is no ready solution. Such difficulties are perhaps to be expected as the role of the TRA changes with the changes in the telecommunications industry. The Legislature, however, has given the TRA the policy to follow, T.C.A. §65-4-123, and the tools to implement that policy. Thus, in analyzing the issues raised by tariff term plans and special contracts, the first emphasis must be on those tools, the specific statues relevant to the task. Unfortunately, however, the proposed rules do not refer to, or appear to be based on, those statutes.

T.C.A. §4-5-203(c)(3) requires the notice of a rulemaking hearing to state: "Insofar as practicable, a reference to the statutory authority pursuant to which the agency proposed to adopt the rule." The only statutory authority cited in the notice in this matter is T.C.A. §65-2-102.

T.C.A. §65-2-102, however, is a procedural statute that confers no substantive powers on the TRA. It authorizes the TRA to adopt rules of practice and procedure and "to adopt rules implementing, interpreting or making specific the various laws which it enforces or administers." Thus, that statute in and of itself is not a sufficient basis for the adoption of any rule, other than a mere rule of procedure.

It has long since been well settled that the TRA, or any Tennessee administrative agency, has only the powers conferred upon it by statute, either expressly or by necessary implication: Tennessee-Carolina Transportation, Inc. v. Pentecost, 206 Tenn. 551, 556, 334 S.W.2d 950 (1960) and Tennessee Cable TV v. TPSC, 884 S.W.2d 151, 159 (Tenn.App. 1992). Thus, the TRA has no power to adopt substantive rules, such as the proposed rules, except rules interpreting, implementing or making specific some statute which it is authorized to enforce or administer. The TRA has no power to legislate in the guise of adopting rules.

The failure of the notice to specify an appropriate statutory basis leaves the Directors and the parties without any firm, precise basis for considering either the validity or the proper interpretation of the proposed rules. Nevertheless, in an effort to further the process leading to an appropriate policy, AT&T will offer comments as to the statutes which provide the tools for addressing the relevant issues and which may serve as a basis for an appropriate policy: (i) T.C.A. §65-5-208(c) including both the price floor and the anti-competitive practices provisions; (ii) T.C.A. §§65-4-122 and 65-5-204 prohibiting unjustly discriminatory or unduly preferential rates; (iii) T.C.A. §65-4-115 prohibiting unjust, unreasonable, unduly preferential or discriminatory practices; and (iv) T.C.A. §65-5-208(b) empowering the TRA to exempt services from the requirements of Part 2 of Chapter 5 of Title 65, and requiring such exemption when actual or potential competition is an effective regulator of rates or prices.

First, however, it should be noted that the proposed rules focus on termination charges and that there has been much emphasis in the various proceedings involving CSAs on the judicially declared public policy concerning contractual provisions for liquidated damages as definitively stated in Guiliano v. Cleo, Inc., 995 S.W.2d 88 (Tenn. 1999). No statute, however, expressly confers upon the TRA the power to enforce that policy. Thus, that policy is relevant only as its consideration may enter into the implementation of one or more of the statutes cited above.

Second, the TRA should be mindful of the effect of approved tariff provisions under the filed rate doctrine. By the adoption of a rule and the approval of tariff filings, the TRA may be cutting off remedies which a carrier's customers might otherwise have under the general law. Under the filed rate doctrine, designed to present undue preference or unjust discrimination, an approved tariff has the force and effect of law, and neither the carrier, nor the customer may depart from it; GBM Communications, Inc. v. United Inter-Mountain Tel. Co., 723 S.W.2d 109 (Tenn.App. 1986). Thus, any rule in this regard should not leave customers worse off than they would be under the general law.

Third, by virtue of the approval of numerous tariff provisions and CSAs, the enforcement of any new general policy limiting such tariffs or CSAs has been made much more difficult. The adoption of such a new limitation if made to apply only to future tariffs or contracts would create two distinct classes of tariffs and contracts, raising issues of fairness as well as of proper enforcement. If the rules are made to apply to existing tariffs or contracts, the actual implementation may be difficult.[1]

Fourth, the development of any policy in this regard must involve the weighing of the rights of parties, particularly business entities, to contract as they see fit, a right which is a fundamental premise of our law, against considerations of equality of treatment, inherent in the concept of uniform tariffs and the prohibition against unjust discrimination and undue preference; the policy to protect markets from competitive abuses; and policies of fairness and equality of treatment inherent in the prohibition against unjust and unreasonable practices. The proper balancing of liberty and equality is a continuing task in the development of policies in our legal system, always requiring a thorough and careful analysis of the issues at stake.

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[1] The exercise of the power to alter the terms of existing arrangements would not result in an impairment of the obligation of contracts. The TRA cannot waive or otherwise surrender the express statutory power to regulate the rates and practices of the carriers under its jurisdiction. The TRA, as the State's agency, retains the power to adapt its regulations to changing circumstances, and that power must be recognized as a part of every contract subject to the TRA's jurisdiction. See, e.g., New River Lumber Co. v. Tennessee Railway Co., 145 Tenn. 266, 238 S.W. 867 (1922).

With these preliminary comments in mind, AT&T will consider each of the statutes which could provide a basis for a policy to be adopted by the TRA in this regard. To provide a basis for any such policy, any factual or opinion testimony must be related to and consistent with the pertinent governing law.

I. T.C.A. §65-5-208(c)–PRICE FLOORS AND ANTI-COMPETITIVE PRACTICES

A. Price Floors

There are two aspects of this statute. First, it requires incumbent local exchange telephone companies ("ILECs") under price regulation, such as BellSouth Telecommunications ("BellSouth"), United Telephone-Southeast ("UTSE") and Citizens Telecommunications Company of Tennessee, L.L.C. ("Citizens") to adhere to a price floor for competitive services. Thus any ILEC rate for a competitive service must meet this requirement. Such determinations must be made on a case-by-case basis. In adopting any rule with respect to such ILEC services, the TRA should make it clear that compliance with the rule does not obviate the necessity for compliance with this requirement; see subsection (5)(a)(1)(i) of proposed rules.

B. Anti-Competitive Practices

More complex issues are raised by basing a rule on the last sentence of T.C.A. §65-5-208(c), which provides:

> The authority shall, as appropriate, also adopt other rules or issue orders to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices.

The general concept of "anti-competitive practices" as well as the specific examples stated, with the exception of "cross-subsidization" and "preferences to competitive services or affiliated entities" are taken directly from federal anti-trust law. They are legal terms of art having well defined characteristics as developed and enunciated by the federal courts in applying the federal anti-trust statutes. The Tennessee Legislature in adopting these terms is presumed to have known the state of the law in that regard; Hathaway v. First Family Financial Services, Inc., 1 S.W.3d 634 (Tenn. 1999). In borrowing that terminology, the Legislature is presumed to have intended to borrow the judicial construction of these terms; State ex rel. Williams v. Jones, 179 Tenn. 206, 164 S.W.2d 823 (1942). Thus, the task of the TRA in construing the anti-competitive practices prohibition in T.C.A. §65-5-208(c) is to adapt and apply the well established principles of federal anti-trust law to the practices of telecommunications service providers in Tennessee.

There are three categories of anti-competitive practices recognized under the federal anti-trust laws which are relevant here: (i) attempts to monopolize, Section 2 of the Sherman Act; (ii) impermissible tying arrangements, Section 1 of the Sherman Act; and (iii) unreasonable exclusive dealing contracts, Section 3 of the Clayton Act.

First, however, it should be noted that both the Tennessee and federal statutes are aimed at "anti-competitive" practices, i.e., practices which harm competition, not competitors; Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962). The distinction is often crucial, especially in distinguishing the effect of the practices of companies with market power and those without. Any competitive practice by one company may take business away from and thereby harm another. Such conduct is not prohibited. Only when the practice harms the competitive market does it become "anti-competitive." Thus, the fact that particular favored customers may get lower rates pursuant to particular contracts does not foster competition where the effect of such favoritism is to lessen competition in the market for such services. The focus in this regard must always be on the market.

1. Attempted Monopolization

Prior to 1995, the ILECs had an effective monopoly on the provision of local telephone service in their authorized service areas in Tennessee. With the passage of Chapter 408 of the Public Acts of 1995, the Legislature adopted a policy favoring the development of competition in telecommunications markets; T.C.A. §65-4-123. Pursuant to that policy, T.C.A. §65-5-209 was adopted authorizing ILECs to elect to come under price regulation plans, and T.C.A. §65-4-201(c) was adopted authorizing the granting of Certificates of Convenience and Necessity to competing telecommunications service providers ("CLECs") in the territory served by ILECs under price regulation. BellSouth, UTSE and Citizens have elected to come under price regulation plans. Each of those companies was, and is, in a position by virtue of its former monopoly status to engage in anti-competitive practices in an attempt to preserve that monopoly status and its monopoly power in its respective service area. Thus, the prohibition against anti-competitive practices is particularly relevant in evaluating the effect of the practices adopted by each such company.

The case of U.S. Anchor Mfg., Inc. v. Rule Industries, Inc., 7 F.3d 986 (11th Cir. 1993) illustrates the pattern of analysis to be followed in determining the anti-competitive effect of attempts to monopolize. There are three essential elements to such a claim: (i) a specific intent to achieve, or retain, monopoly power by predatory or exclusionary conduct; (ii) the actual commitment of such anti-competitive conduct; and (iii) a dangerous probability of success in the attempt; 7 F.3d at 993.

Defining the market is a necessary first step in any analysis of market power and an indispensable element in considering any attempt to monopolize; 7 F.3d at 994. Defining a market is primarily a process of describing those groups of purchasers of a product or service which have the ability, actual or potential, of taking a significant amount of business away from each other; 7 F.3d at 995. Thus a market will have both a product or service and a geographic dimension.

Next, it is necessary to consider the degree of market power of the particular company. The principal measure of market power is market share, and the primary measure of the probability of acquiring, or retaining, market power, is the probability of a company's acquiring, or retaining, a monopoly share of the particular market; 7 F.3d at 999.

On the basis of the analysis of these three essential elements, the anti-competitive effect of the company's practices is to be considered.

The Staff's Petition to Require BellSouth to Appear and Show Cause that Certain Sections of its General Subscriber Service Tariff and Private Line Service Tariff do not Violate Current State and Federal Law, Docket no. 00-00170, at least provided a vehicle for undertaking an analysis as to whether BellSouth's practices constituted an anti-competitive attempt to monopolize. That Petition, however, has been dismissed by Order entered October 4, 2000.

No provision of the proposed rules is in any way consistent with the criteria for determining the anti-competitive effect of attempts to monopolize. Therefore, the proposed rules cannot be based on that factor. Indeed, the adoption of the proposed rules may serve to insulate the ILECs from claims that their practices constitute anti-competitive attempts to monopolize, without there ever having been a full hearing on the merits of that issue as would have been provided under the dismissed show cause proceeding.

2. Tying Arrangements

A characteristic of many CSAs has been the tying together of a bundle of otherwise distinct services as part of a package of services for which the customer contracts. A tying arrangement is an agreement by a party to sell one product or service only on the condition that the buyer also purchase a different, or tied, product or service, or at least agrees that he will not purchase that product or service from another supplier; PSI Repair Services, Inc. v. Honeywell, Inc., 104 F.3d 811, 815 (6th Cir. 1997). Such an arrangement is impermissible if the seller has appreciable market power in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market; 104 F.3d at 815. Thus, a key factor is the market power of the seller; 104 F.3d at 817. Again, it is clear that the proposed rule is in no way based on an analysis of the anti-competitive effect of any tying arrangement, or, for that matter, on any analysis of market power.

3. Exclusive Dealing Arrangements

The essential purpose of BellSouth's tariff term plans and CSAs is to lock customers in to use BellSouth's designated services for a specific term. Typically, the CSA accomplishes this purpose by the carrot of discounts for meeting the volumes specified in the minimum annual revenue base; and by the imposition of two sticks, the imposition of a requirement to pay any shortfall for failing to meet the minimum annual revenue base and the imposition of substantial liability if the CSA is terminated by the customer. In short, BellSouth's CSAs constitute classic forms of exclusive dealing arrangements. The testimony of BellSouth's witness in Docket No. 98-00559 on August 17, 1999, clearly and conclusively demonstrated that BellSouth had the specific intent in adopting its CSA and related programs to maintain its market share and hence its monopoly market power; (Witness Frame, Tr., Vol. I–C, pages. 160-161).

The leading case on exclusive dealing arrangements is still Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 81 S.Ct. 623, 5 L.Ed.2d 580 (1961). That case involved a contract between the electric company and the coal company covering all coal to be used by the electric company at a specified station for twenty years. The Court held, first, that even though a contract is found to be an exclusive dealing arrangement, it is not illegal unless it is probable that performance of the contract will foreclose competition in a substantial share of the line of commerce, or market, affected; 81 S.Ct. 628. In making that determination, the following guidelines are to be considered: (i) the line of commerce, the product or service, must be determined – the product or service dimension of the market; (ii) the core of effective competition in that line of commerce must be charted by selection of the market area in which the seller operates and to which the producer can practically turn for such product or service – the geographic dimension of the market; and (iii) the competition foreclosed by the contract must constitute a "substantial" share of the relevant market; 81 S.Ct. 628.

To determine substantiality, it is necessary to weigh the probable effect of the contract on the relevant area of effective competition, taking into account: (i) the relative strength of the parties; (ii) the proportionate volume of commerce involved in relation to the total volume of commerce in the relevant market; and (iii) the probable, immediate and future effects which the pre-emption of that share of the market might have on effective competition therein; 81 S.Ct. 629.

Obviously, the CSAs and tariff term plans implemented by BellSouth in its program to preserve its revenue stream and its market share constitute exclusive dealing arrangements. Therefore, it would be appropriate to consider the anti-competitive effect of these programs pursuant to the test enunciated in Tampa Electric and subsequent federal cases. These cases provide the legal framework for determining whether such practices are "anti-competitive."[2]

The proposed rule, however, is obviously not based on a consideration of these legal principles.

As a matter of law, the proposed rules cannot be justified pursuant to the provisions of T.C.A. §65-5-208(c) prohibiting anti-competitive practices.

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2 CLECs clearly have no such market power as to justify treating their special contracts as "anti-competitive," even if such contracts are exclusive dealing arrangements.

II. T.C.A. §§ 65-5-204 and 65-4-122 – UNJUST DISCRIMINATION AND UNDUE PREFERENCE

These statues prohibit any public utility, common carrier or public service company, i.e., any company subject to regulation by the TRA including companies under price regulation plans pursuant to T.C.A. §65-5-209, from charging unjustly discriminatory or unduly preferential rates.

First, the subject statutes are both derived from statues enacted with respect to the TRA's predecessor, the Railroad and Public Utilities Commission. It has long been settled that the statutes creating and defining the duties and powers of the Railroad and Public Utilities Commission were modeled on the Federal Interstate Commerce Act. Therefore, "practically all the decisions upon the construction of the federal statutes are authoritative upon the construction of ours"; New River Lumber Co. v. Tennessee Railway Co., 145 Tenn. 266, 284, 238 S.W. 867 (1922); Tennessee Cartage Co., Inc. v. Pharr, 184 Tenn. 414, 420, 199 S.W.2d 119 (1947). The provisions of the Federal Communications Act prohibiting unjustly discriminatory or unduly preferential rates were also derived from the Interstate Commerce Act. Thus, decisions under the federal statutes are persuasive authority for the construction of comparable provisions of the Tennessee statutes, including the statutes with respect to unjust discrimination and undue preference.

Second, the "great purpose" of these statutes was to assure equality of rates as to all and to destroy favoritism, by requiring the publication of tariffs and prohibiting secret departures from such tariffs, and forbidding rebates, preferences and all other forms of discrimination; N.Y., N. H. & H.R. Co. v. ICC, 200 U.S. 361, 26 S.Ct. 272, 50 L.Ed. 515

(1906), quoted in New River Lumber Co., 145 Tenn. at 289. Special contracts are not excepted from the prohibitions of the law; Armour Packing Co. v. U.S. 209 U.S. 56, 28 S.Ct. 428, 52 L.Ed. 681 (1908), quoted in New River Lumber Co., 145 Tenn. at 288-289. The uniform tariff filing requirement was the heart of the regulation of telephone companies as common carriers, the means of preventing discrimination in charges, essential to preventing all forms of price discrimination; MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 114 S.Ct. 2223, 2231, 129 L.Ed.2d 182 (1994).

The Tennessee General Assembly has not seen fit to change these basic rules for the prevention of unjust discrimination and undue preference in the rates of public utilities, common carriers and public service companies, including telecommunications service providers.[3]

Third, the opinion of the Court in Competitive Telecommunications Association v. FCC, 998 F.2d 1058 (D.C. Cir. 1993) sets forth definitively the pattern of analysis to be followed with respect to issues of unjust discrimination under these statutes. At issue there was the lawfulness of four of AT&T's Tariff 12 offerings. As the Court explained at page 1060:

> Under Tariff 12 AT&T provides each commercial customer with a customized package of integrated telecommunication services at a negotiated price. The package price is less than the sum of the rates that the customer would pay if it purchased each service individually from AT&T, but the customer forfeits the flexibility of determining the precise way in which AT&T will provide the services.

[3] See, however, the provisions of T.C.A. §65-5-208(b) discussed below.

The Court began its analysis at page 1061:

> An inquiry into whether a carrier is discriminating in violation of § 202(a) involves a three-step inquiry: (1) whether the services are "like"; (2) if they are, whether there is a price difference between them; and (3) if there is, whether that difference is reasonable.

The Court then considered the test for "likeness," at page 1061:

> Likeness, as we said, depends upon "functional equivalence." See *Ad Hoc Telecommunications Users Comm. V. FCC,* 680 F.2d 790, 795 (D.C. Cir. 1982) (likeness inquiry "focuses on whether the services in question are different in any material functional aspect"). In applying this test, the FCC must "look to the nature of the services offered" and ascertain whether customers view them as performing the same functions. *MCI,* 917 F.2d at 39. If a user perceives the service "as the same with cost considerations being the sole determining criterion," then the services are "like." *Id.*

The third test is whether those differences are "reasonable." Disparate charges are reasonable and lawful only if "there is a neutral, rational basis underlying [the disparity]"; MCI Telecommunications Corp. v. FCC, 917 F.2d, 30, 41 (D.C. Cir. 1990), quoting National Ass'n of Reg. Util. Comm'rs v. FCC, 737 F.2d 1095, 1133 (D.C. Cir. 1984).

In upholding the FCC's decision that the Tariff 12 options 1 – 4 were functionally different from each other, the Court stated, at page 1064:

> Section 202(a) is designed to prevent a carrier from granting a discount to one (usually large) user that it would not grant were the same or a "like" service purchased by another (usually small) customer. By its nature, §202(a) is not concerned with the price differentials between qualitatively different services or service packages. In other words, so far as "unreasonable discrimination" is concerned, an apple does not have to be priced the same as an orange. (Emphasis added).

The proposed rule here does not purport to follow these principles. Indeed, it purports to exclude an entire category, "resellers," from the operation of the rule.[4]

The provisions of subsection (3) of the proposed rules do not resolve the issues as to unjust discrimination and undue preference. That subsection provides:

> Availability. All rates, terms, and conditions of service provided to any customer under a tariff term plan or special contract shall be offered to any other customer for service of a like kind under substantially like circumstances and conditions.

Where there is no neutral, rational basis for the rate disparity between customers, there is no basis for determining whether some other customer is in like circumstances under T.C.A. §65-4-122(a) or, as it is sometimes put, is similarly situated. If there is no rational basis for making that determination, then the offer to make the rates available to other similarly situated customers is meaningless and can have no effect. There will never be any such similarly situated customers. Saying that the answer depends on a case-by-case analysis is likewise meaningless without some standard to govern that analysis. Without some neutral, rational governing standard, any such determination would be purely arbitrary.

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4 It is doubtful to say the least that the TRA has the power since the passage of Chapter 408 of the Public Acts of 1995 to grant certificates to "resellers" as such. T.C.A. §65-4-201(c) limits the granting of certificates to telecommunications service providers to "competing telecommunications service providers." Indeed, the TRA has granted numerous certificates to competing telecommunications service providers authorizing them to function as resellers, or as both resellers and facilities-based carriers.

Indeed, as a practical matter no customer is going to wade through the mass of special contract filings in an effort to find one similar to his circumstances. Any rational customer will simply negotiate his own special deal. Indeed that appears to be what has been done with respect to BellSouth's CSAs.

Thus, the practical effect of the proposed rule is to eliminate the principle of uniform rates for like services for all and to substitute in its stead a regime of special rates, negotiated by each business customer having sufficient interest and bargaining power to demand special treatment. Such a regime is contrary to the basic, long established principles of law as to unjust discrimination and undue preference; see, MCI Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 114 S.Ct. 2223, 129 L.Ed.2d 182 (1994); and Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116, 110 S.Ct. 2759, 111 L.Ed.2d 94 (1990).

The proposed rule, therefore, cannot be justified pursuant to T.C.A. §§65-5-204 and 65-4-122.

III. T.C.A. §65-4-115 – PROHIBITED PRACTICES

This statute prohibits any public utility from adopting, maintaining or enforcing any regulation or practice which is unjust, unreasonable, unduly preferential or discriminatory. Thus, it confers upon the TRA broad powers to regulate the practices of public utilities. Under this statute, the TRA would have the power to enforce the public policy enunciated by the Tennessee Supreme Court as to liquidated damages and penalties as definitively set forth on Guiliano v. Cleo, Inc., 995 S.W.2d 88 (Tenn. 1999).

Under the principles of that case, the first test to be met in evaluating a contract provision for the payment of money on termination is whether it provides for liquidated damages or for some other purpose, e.g., in that case severance pay. That issue is to be decided on the basis of the provisions of the contract, 995 S.W.2d at 96. In that case, recovery was due in the event the agreement was terminated without cause, resulting in a breach of contract, and, hence, was determined to be an effort to liquidate damages.

The Court then distinguished between permissible liquidated damages, which are proper, and penalties, which are against public policy, 995 S.W.2d at 98:

> The fundamental purpose of liquidated damages is to provide a means of compensation in the event of a breach where damages would be indeterminable or otherwise difficult to prove. *V.L. Nicholson,* 595 S.W.2d at 484; 22 Am.Jur.2d *Damages* §683 (1988); Restatement (Second) of Contracts §356 cmt. (1979). By stipulating in the contract to the damages that might reasonably arise from a breach, the parties essentially estimate the amount of potential damages likely to be sustained by the nonbreaching party. "If the [contract] provision is a reasonable estimate of the damages that would occur from a breach, then the provision is normally construed as an enforceable stipulation for liquidated damages." *V.L. Nicholson,* 595 S.W.2d at 484 (citing *City of Bristol v. Bostwick,* 146 Tenn. 205, 240 S.W. 774 (1922); 22 Am.Jur. *Damages* §227 (1965)). However, if the stipulated amount is unreasonable in relation to those potential or estimated damages, then it will be treated as a penalty. 22 Am.Jur.2d *Damages* §686 (1988); Restatement (Second) of Contracts §356 (1979).

The Court then adopted a "prospective approach" for addressing the recovery of liquidated damages, concluding at pages 100-101:

> Under this approach, courts must focus on the intentions of the parties based upon the language in the contract and the circumstances that existed at the time of contract formation. Those circumstances include: whether the liquidated sum was a reasonable estimate of potential damages and whether actual damages were indeterminable or difficult to measure at

> the time the parties entered into the contract. *See V.L. Nicholson*, 595 S.W.2d at 484. If the provision satisfies those factors and reflects the parties' intentions to compensate in the event of a breach, then the provision will be upheld as a reasonable agreement for liquidated damages. However, if the provision and circumstances indicate that the parties intended merely to penalize for a breach of contract, then the provision is unenforceable as against public policy. (Footnote omitted).

Thus, the first step in this approach is to determine whether the amount of damages for a breach was indeterminable or difficult to measure at the time the parties entered the contract. Next, it is to determine whether the amount stipulated is a reasonable estimate of potential damages.

Generally in measuring damages for breach of contract in a buyer-seller relationship, the test is the net profit the buyer would have received had the contract been performed, with initial investment and other expenses deducted from gross receipts; Lamons v. Chamberlain, 909 S.W.2d 795 (Tenn. App. 1993). No basis in law exists for measuring such damages by the loss of a revenue stream. The nonbreaching party is not entitled to profit by the breach, but is only entitled to be put in the same position he would have been in had the contract been performed; Hennessee v. Wood Group Enterprises, Inc. 816 S.W.2d 35 (Tenn.App. 1991).

The proposed rule, however, does not follow the public policy laid out in Guiliano v. Cleo, Inc., *supra*. Instead, it measures termination charges, first, on the basis of the repayment of discounts, a measure which has no relationship to the actual legal damages which the carrier may have suffered by such a breach; and it imposes what appear to be arbitrary limitations based on percentages of the total amount of the plan or contract.

Under the proposed rule, it is conceivable that some customers would benefit and some would be prejudiced by the implementation of the proposed rules as compared to the enforcement of the public policy adopted by the Tennessee Supreme Court. Regardless of whether the proposed rule would bring a monetary benefit or a detriment to a particular customer under a particular contract, the effect of the proposed rule in all circumstances is to impose a penalty on the customer for breach of that contract. The amount to be paid under the proposed rule is not measured by the legal damages caused by the breach, but rather is an amount having no relation to such legal damages and, is, thus, a penalty imposed for such termination and breach.

In any event, it is clear that the proposed rule would supplant the public policy established by the Tennessee Supreme Court as applied to telecommunications carriers. Even if the TRA has the power to change the public policy of this state as adopted by the Tennessee Supreme Court, which is doubtful to say the least, it should do so only on the basis of clear and convincing proof of the necessity for such a change in order to implement declared legislative policy and the TRA's statutory powers and duties. It is doubtful to say the least that any such proof exists.

In assessing the merits of any rules in this regard, it is important to remember the basis principle of contract law, that parties to a contract have the right to contract as they see fit, except insofar as that right is limited by law or established public policy; 17A Am.Jur.2d 241, Contracts, §238 (1991). Neither the courts nor administrative agencies have the power to rewrite contracts on any basis other than the law or established public policy. Thus, parties to a contract have the right to contract as to the term of that contract. Termination of the contract by one party prior to the end of the agreed term is a breach of that contract in the absence of justifiable cause. For that breach, the other party is entitled to recover damages as measured under the applicable law. Once the TRA adopts a policy of allowing special contacts departing from the policy of uniform tariffed rates, then the TRA must take into account the established law governing breach of such contracts and the damages recoverable for such a breach. The proposed rule fails to do that. Instead, the proposed rule would impose its own penalty for such a breach.

In short, it is difficult, if not impossible, to find any basis under T.C.A. §65-4-115 for the TRA to depart from established public policy as to the measure of damages for a breach of a telecommunications contract by termination of that contract.

IV. T.C.A. §65-5-208(b) – EXEMPTION

This subsection provides:

> The authority, after notice and opportunity for hearing, may find that the public interest and the policies set forth herein are served by exempting a service or group of services from all or a portion of the requirements of this part. Upon making such a finding, the authority may exempt telecommunications service providers from such requirements as appropriate. The authority shall in any event exempt a telecommunications service for which existing and potential competition is an effective regulator of the price of those services.

Thus, pursuant to the first sentence of this subsection, the TRA would have the power to exempt a group of services from all or a portion of the requirements of Part 2, Chapter 5, Title 65, on finding that the public interest and the policies of the governing statutes would be served by so ordering. Such an exemption could be adopted by rulemaking satisfying the requirement of notice and an opportunity for hearing. The power to exempt would include the power to impose conditions or limitations on that exemption. Part 2, Chapter 5, Title 65, includes the power to fix just and reasonable rates, T.C.A. §§ 65-5-201 and 203; the power to require the filing of tariffs, T.C.A. §65-5-202; and the prohibition against unjust discrimination and undue preference, T.C.A. §65-5-204.

Thus, the TRA could, under this provision, designate a group of business services, and, on finding that the public interest and the policies declared in T.C.A. §65-4-123 would be served by so doing, adopt a rule exempting that group of business services from the requirements of Part 2, imposing certain conditions and limitations on that exemption.

In short, on the basis of the required findings, the TRA could in effect substantially deregulate the provisioning of the designated business services, subject to stated conditions and limitations.

Obviously, the proposed rule is not based on following this approach, and the proposed rule cannot be justified by a reliance on this statute. However, a different rule, adopted pursuant to a different notice and procedure, could possibly be justified.

The practical effect of the approval of numerous tariff term plans and a multitude of CSAs with respect to business services has been to effect a substantial, if not radical, departure from the principles of uniform rates fixed by published tariffs applicable to all alike as to such business services.

In effect, the TRA has already substantially deregulated the provisioning of business services by local exchange carriers. By considering the proper regulation of the provision of business services under and pursuant to T.C.A. §65-5-208(b) the TRA could develop a coherent policy based on the current and future development of the market for business services, consistent with law and established policy, and avoid the problems inherent in applying a new policy to existing contracts.

AT&T is in no position at this time to recommend any particular proposed rule in this regard. AT&T is in a position to suggest that by this approach, and by reliance on T.C.A. §65-5-208(b) the TRA could develop a far more workable and less troublesome rule that the proposed rule.

V. THE INCLUSION OF IXCs WITHIN THE SCOPE OF THE PROPOSED RULE CANNOT BE JUSTIFIED.

The proposed rule purports to include IXCs within the definition of "telecommunications carrier" and to amend the existing IXC rules to require the filing and approval of special contracts of IXCs.

There is no basis for the inclusion of IXCs. AT&T is aware of no complaints with respect to the practices of IXCs in this regard. More importantly, there has long been pending a proposed rule exempting IXCs from the requirements of Part 2, Chapter 5, Title 65 on the ground that existing and potential competition in that market is now an effective regulator of the prices of IXC services, Docket No. 98-00097. Any changes in the rule with respect to IXCs should be done in the IXC rulemaking proceeding. In any event, the proposed rule should not include IXCs.

CONCLUSION

AT&T appreciates the difficulties confronting the TRA and the telecommunications industry with regard to the regulation of the provisioning of the business services of LECs, particularly with respect to tariff term plans and special contracts. As the foregoing discussion demonstrates, any rule or policy adopted by the TRA must be based, first, on the governing statutes. Only after reaching conclusions as to the pertinent governing law can the TRA properly consider how to deal with current circumstances. The proposed rule cannot be justified under any provision of the statutes governing the powers and duties of the TRA. Indeed, the proposed rule is contrary to those statutes and to the established public policy of this state.

However, there is a means available to deal with the current and future circumstances of the provisioning of competitive business services by LECs, i.e., the provision stated in the first sentence of T.C.A. §65-5-208(b). Accordingly, AT&T recommends that the proposed rule be rejected. Instead, the TRA should issue a notice of inquiry identifying the issues with respect to the provisioning of business services by the LECs, and requesting comments as to those issues. By this means, the TRA staff could then develop a proposed rule, based on the governing law and on the current and future circumstances in the local exchange market for competitive business services.

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CERTIFICATE OF SERVICE

I, Val Sanford, hereby certify that a copy of the foregoing Comments of AT&T Communications of the South Central States, Inc. has been served either by Hand Delivery or U. S. First Class mail, postage paid to the following counsel of record, addressed as follows, on this the 16th day of October, 2000.

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