BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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TN REGULATORY AUTHORITY
DOCKET ROOM

IN RE: PETITION OF US LEC TENNESSEE, INC. FOR DECLARATORY ORDER	)	DOCKET NO. 02-00890

AIRSTREAM WIRELESS'S MEMORANDUM IN SUPPORT OF ITS AFFIRMATIVE DEFENSE THAT THE TENNESSEE REGULATORY AUTHORITY LACKS SUBJECT MATTER JURISDICTION OVER THIS CAUSE

In support of its asserted affirmative defense that the Tennessee Regulatory Authority (hereafter "TRA") lacks subject matter jurisdiction over this cause, Airstream Wiresless Services, Inc. (hereafter "Airstream"), by and through counsel, would respectfully state as follows:

INTRODUCTION

This petition arises out of a case originally filed in Shelby County Chancery Court by Airstream. The suit alleges that US LEC terminated long distance telecommunications services in violation of the parties' Advantage Customer Service Agreement ("Customer Service Agreement"). The case before the Chancery Court was stayed pending decision of US LEC's Petition for Declaratory Order filed with the TRA. US LEC asserts in its petition that "Airstream's lawsuit to the contrary, this is not a private contract dispute but a question of the proper interpretation and application of US LEC's tariffs and the rules of the TRA. Such matters are within the exclusive jurisdiction of the TRA." (emphasis added).

Airstream asserts that the only connection this case has with the TRA is that US LEC is a public utility regulated by the TRA and that tariffs on file with the TRA are incorporated in the parties' Customer Service Agreement. However, neither of these facts invokes the jurisdiction of

the TRA. Thus, the TRA lacks jurisdiction over this matter and, therefore, U.S. LEC's petition should be dismissed and the case referred back to the Shelby County Chancery Court.

LAW AND ARGUMENT

A. THE TENNESSEE REGULATORY AUTHORITY LACKS EITHER EXCLUSIVE OR PRIMARY JURISDICTION TO INTERPRET THE PARTIES' CUSTOMER SERVICE AGREEMENT AND, THEREFORE, PROPER JURISDICTION RESIDES WITH THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE, WHERE THIS CAUSE WAS INITIALLY FILED

A regulatory agency, such as the TRA, may be committed with two types of jurisdiction over matters traditionally within the jurisdiction of courts; exclusive and primary. Exclusive jurisdiction exists where it is clear that the legislature intended to deprive courts of their traditional and inherent judicial powers in favor of administrative agency expertise. On the other hand, primary jurisdiction is applied where both the court and the administrative agency have jurisdiction over a particular matter, but the matter is particularly within the competence of the agency such that the court may refer the matter for initial determination by the agency. In the instant case, it is clear that the jurisdictional statutes relied upon by US LEC do not give the TRA exclusive jurisdiction over this matter nor does resolution of this case require the experience and expertise of the TRA such that primary jurisdiction arises.

(1) Nothing in the jurisdictional statutes cited by US LEC indicates that the legislature intended the TRA to have exclusive jurisdiction to interpret contracts between a regulated utility and its customers.

US LEC asserts that the broad regulatory power of the TRA gives it exclusive jurisdiction to interpret the parties' Customer Service Agreement and tariffs of file with the TRA; however US LEC is incorrect since nothing in the statutes granting TCA regulatory authority deprives courts of their traditional common law jurisdiction over contract disputes.

T.C.A. § 65-1-213 (2001 Supp.) provides the general authority of the TRA to regulate public utilities.[1] That section provides:

> It is the duty of the Tennessee regulatory authority to ensure that the provisions of Acts 1995, ch. 305 and all laws of this state over which they have jurisdiction are enforced and obeyed, that violations thereof are promptly prosecuted, and all penalties due the state are collected.

Moreover, T.C.A. § 65-4-104 (2002 Supp.) provides the TRA with general supervisory and regulatory authority over public utilities.

> The authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter.

Supplementary to this grant of "general supervisory and regulatory power" are the specific regulatory powers granted to the TRA under T.C.A. § 65-4-117 which provides in pertinent part:

> The authority has the power to:
>
> (1) Investigate, upon its own initiative or upon complaint in writing, any matter concerning any public utility as defined in § 65-4-101;
>
> . . .
>
> (3) After hearing, by order in writing, fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility;

Additionally, Chapter 5 of Title 65 provides the TRA with regulatory authority over rates charged by public utilities.

> In addition to any other jurisdiction conferred, the authority shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408.

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[1] In response to the TRA's inquiries, Airstream asserts that it is not a public utility and therefore is not, itself, subject to regulation by the TRA since the telecommunications services it provides are not "affected by and dedicated to the public use, under privileges, franchises, licenses, or agreements, granted by the state or [a political subdivision]." *See* T.C.A. § 65-4-101(a) (2002 Supp.). Moreover, Airstream did not purchase "intrastate access service" from US LEC under the Customer Service Agreement.

T.C.A. § 65-5-201 (2002 Supp.). US LEC asserts that these statutes give the TRA exclusive jurisdiction to interpret the parties' Customer Service Agreement and tariffs on file with the TRA. However, while these statutes obviously "vest in the Commission [now TRA] practically plenary authority over the utilities within its jurisdiction," *Tenn. Cable Television, Ass'n v. Tenn. Pub. Serv. Comm'n*, 844 S.W.2d 151, 159 (Tenn. Ct. App. 1992), they do not indicate a legislative intent to deprive courts of their common law jurisdiction over contract disputes.

The legislature may of course grant exclusive jurisdiction over a particular subject matter to an administrative agency charged with its oversight. *See Stewart Title Guar. Co. v. McReynolds*, 886 S.W.2d 233, 235 (Tenn. Ct. App. 1994). However, exclusive jurisdiction placed in an administrative agency which deprives a court of its traditional and inherent judicial powers will not be inferred absent a "clear showing of legislative intent to do so." *Freels v. Northrup*, 678 S.W.2d 55, 58 (Tenn. 1984). For instance, the statute in *Freels*, T.C.A. § 60-1-202, provided in pertinent part:

> (a) The [Oil and Gas] Board shall have jurisdiction and authority:
>
> . . .
>
> (4) To make rules, regulations, and orders for the following purposes:
>
> * * *
>
> (I) To identify ownership of oil and gas wells, producing leases, refineries, tanks, structures, and all storage and transportation equipment and facilities; . . .
>
> (M) To provide for the forced integration of separately owned tracts and other property ownership into drilling and production units. . . .

Id. at 57. While the Court found that the statute clearly gave jurisdiction to the Oil and Gas Board to determine the mineral rights of the two adjacent land owners, it nevertheless found that such jurisdiction was not exclusive. *Id.* In so holding the Court found

> no indication in T.C.A. § 60-1-202 of an intention by the legislature to divest the chancery court of its jurisdiction over boundary disputes. In the absence of a clear showing of legislative intent to do so, courts will not infer that the enactment of a particular statute has the effect of withdrawing from the courts their traditional equitable powers. *Repeals of jurisdiction of the courts by implication are disfavored in the law*.

Id. at 58 (emphasis added). Similarly, in this case US LEC cites several regulatory statutes for the broad proposition that the legislature also intended to vest exclusive jurisdiction in the TRA to interpret agreements entered into by public utilities and their customers. However, those statutes fail to establish any legislative intent to repeal the jurisdiction of the courts to decide contract disputes. Therefore, it is clear that the courts retained their jurisdiction over civil actions notwithstanding the broad regulatory powers of the TRA over public utilities. This is further buttressed by T.C.A. § 65-4-106 which provides that, while the regulatory powers of the TRA shall be liberally construed, such powers "shall not be construed as being in derogation of the common law." Interpreting the regulatory jurisdiction of the TRA so broadly as to deprive the courts of their traditional jurisdiction to decide contract disputes would clearly be in derogation of the common law.

Moreover, while Airstream denies that this claim arises under the regulatory provisions of the TRA (discussed more fully below) and denies that any such provisions are at issue in this case, T.C.A. § 65-3-201(a) makes clear that jurisdiction over civil claims brought under these provisions are within the jurisdiction of the court and not the TRA. That section provides:

> The circuit, chancery courts and courts of general sessions have jurisdiction of all suits of a civil nature arising under the provisions of this chapter and chapter 5 of this title, according to the nature of the suit and the amount involved, and the circuit and criminal courts have jurisdiction of all criminal proceedings so arising.

T.C.A. § 65-3-120(a) (2002 Supp.) (emphasis added). Thus, even if US LEC is correct in asserting that Airstream's claim arises under the TRA's regulatory provisions, such a claim would

still be cognizant in Tennessee courts. The Court would obviously be empowered to interpret and enforce contracts including any tariffs on file with the TRA.

US LEC's assertion that the TRA has original and exclusive jurisdiction to interpret the Customer Service Agreement is without merit since there is nothing within the regulatory provisions which indicates any legislative intent to deprive the courts of their jurisdiction to decide common law causes of action for breach of contract. Moreover, US LEC's assertion stands in complete contradiction to the jurisdictional provisions of T.C.A. § 65-3-120(a) which expressly grants courts jurisdiction over civil claims arising under Chapter 5 of Title 65. US LEC's petition for declaratory judgment should therefore be denied and the case referred back to the Chancery Court.

(2) This case does not involve complex issues of regulatory matters particularly within the expertise of the TRA and, therefore, the Chancery Court is not required to defer to the TRA under the doctrine of primary jurisdiction

The TRA also lacks primary jurisdiction over this case since proper resolution does not require the experience and expertise of the TRA. Significantly, Airstream does not base its claim on any alleged statutory violations or violations of TRA rules. Furthermore, contrary to US LEC's assertion, interpretation of TRA rules is not required to resolve the issues in this case. Rather, this case involves a strait-forward contract dispute, specifically, whether Airstream fraudulently used US LEC's network thereby permitting US LEC to terminate the contract. Thus, resolution of this case simply requires normal and everyday rules of contract construction completely within the expertise of the Chancery Court.

The doctrine of primary jurisdiction "generally requires that parties resort first to an administrative agency before they seek judicial action involving a question within the

competence of that agency." *Freels*, 678 S.W.2d at 57. In discussing the doctrine, the Tennessee Supreme Court has held that

> [t]he doctrine applies where a claim is originally cognizable in the courts and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body. In deciding whether to defer to the administrative agency, courts generally make two inquiries: (1) will deferral be conducive toward uniformity of decisions between courts and the agency, and (2) will deferral make possible the utilization of pertinent agency expertise.

Id. (citations omitted). The appellant in *Freels* argued that the doctrine of primary jurisdiction required the trial court to defer a case involving mineral rights of adjacent property owners to the Oil and Gas Board. *Id.* In affirming the decision of the trial court not to defer the case, the Court held that the doctrine of primary jurisdiction did not apply since the case involved the determination of simple boundary disputes "peculiarly within the jurisdiction of the Chancery Court." *Id.* at 58. Thus, there were no issues in the case which required the Oil and Gas Board's expertise and, consequently, the Board lacked primary jurisdiction. *Id.*

The doctrine of primary jurisdiction has long been recognized by federal courts in defining the jurisdiction of federal regulatory agencies. The doctrine applies "to cases involving technical and intricate questions of fact and policy that Congress has assigned to a specific agency." *Nat'l Communications Ass'n, Inc. v. Am. Telephone and Telegraph, Co.*, 46 F.3d 220, 223 (2d Cir. 1995). The U.S. Supreme Court has held that under the doctrine,

> it may be appropriate to refer specific issues to an agency for initial determination where that procedure would secure '[u]niformity and consistency in the regulation of business entrusted to a particular agency' or where
>
> > the limited functions of review by the judiciary [would be] more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Nader v. Allegheny Airlines, Inc., 426 U.S. 290, 303-304 (1978) (quoting *Far East Conference v. U.S.*, 343 U.S. 570, 574-575 (1952)).

US LEC asserts that the facts of this case require an interpretation of the Customer Service Agreement and, specifically, Section 2.5.5(E) of US LEC's tariff which states:

> In the event of fraudulent use of the Company's network, the Company will discontinue service without notice and/or seek legal recourse to recover all costs involved in enforcement of this provision.

US LEC alleges that this provision authorizes it "to discontinue service, without notice, to any customer if the company reasonably believes that the service is being used for a fraudulent purpose." (US LEC's Petition for Declaratory Order ¶ 2). While Airstream certainly disputes this interpretation of the tariff, for purposes of primary jurisdiction the determinative issue is whether an initial ruling by the TRA would (1) "be conducive toward uniformity of decision between courts and the agency" and (2) "make possible the utilization of pertinent agency expertise." *Freels*, 678 S.W.2d at 57. Airstream submits that the interpretation of the tariff does not arise out of matters particularly within the expertise of the TRA; rather, it is a matter of simple contract interpretation entirely within the bailiwick of courts and applied on a routine basis. *See Redding v. MCI Telecommunications Corp.*, 1987 WL 486960 * 3 (N.D. Cal. 1987) (holding that the plaintiff's breach of contract claim was "traditionally within the competence of courts to decide").

While US LEC argues that interpretation of the tariff filed with the TRA is within the jurisdiction of the TRA, "primary jurisdiction is not implicated simply because a case presents a question, over which the [agency] could have jurisdiction, regarding the interpretation of a single tariff. Rather, primary jurisdiction is properly invoked when a case presents a far-reaching question that 'requires expertise or uniformity in administration.'" *See Brown v. MCI Worldcom Network Servs., Inc.*, 277 F.3d 1166, 1172 (9th Cir. 2002) (quoting *U.S. v. Gen. Dynamics Corp.*,

828 F.2d 1356, 1362 (9th Cir. 1987)). In a case similar to this one, the Second Circuit Court of Appeals found that the doctrine of primary jurisdiction did not apply. *Nat'l Communications Ass'n, Inc.*, 46 F.3d 220. Like Airstream, the plaintiff in *National Communications* was involved in purchasing long-distance telecommunications services from the defendant for resell to its own customers. *Id.* at 221. The defendant had filed a tariff with the Federal Communications Commission ("FCC") which allowed its customers to purchase services at a discount rate not available through the defendant's general tariff; however, the tariff also provided for a substantial deposit if the customer had made late payments during the previous year or was not current at the time of order. *Id.* at 221-222. The plaintiff refused to pay the deposit asserting that it had no history of late payments with the defendant. *Id.* at 223. When the defendant rejected the plaintiff's application, the plaintiff filed suit against the defendant for violations of the Federal Communications Act of 1934, 47 U.S.C. § 151, et seq., arising out of the defendant's failure to honor the tariff. *Id.* at 222. The district court granted the defendant's motion to defer the case to the FCC upon finding that "the validity of a billing practice is at issue" and, thus, that the matter was within the expertise of the FCC. *Id.* On appeal, the Second Circuit Court of Appeals reversed finding that "the record does not present any issues involving intricate interpretations or applications of tariffs that might need the FCC's technical or policy expertise." *Id.* at 223. Importantly, the court noted that "primary jurisdiction does not apply to cases involving the enforcement of a tariff, as opposed to a challenge to the reasonableness of a tariff." *Id.* While the reasonableness of the defendant's tariff was committed to the expertise of the FCC, whether the tariff had been violated by the defendant was a matter within the competence of the district court. *Id.*

Similarly, in this case the issue is not whether US LEC's tariff is either valid or reasonable, a matter certainly committed to the TRA, but rather whether Airstream has violated that tariff, thereby relieving US LEC of its contractual obligations. Thus, the Chancery Court "is not called upon to substitute its judgment for the agency's on the reasonableness of a rate or, indeed, on the reasonableness of any carrier practice." *Nader* 426 U.S. at 299-300. Rather, the Chancery Court must simply decide whether or not Airstream fraudulently used US LEC's network, a matter clearly within the competence of the Court. *See Brown*, 277 F.3d at 1173 ("If resolution of [the plaintiff's] claim involves a straightforward interpretation of [the defendant's] tariff, the district court will be competent to resolve the claim without resort to the FCC.").

CONCLUSION

Nothing in the jurisdictional statutes relied on by US LEC indicates any legislative intent to give the TRA exclusive jurisdiction over claims brought against public utilities and, in fact, the statutes actually indicate that the courts retain jurisdiction over such cases. Moreover, this case does not involve alleged violations of regulatory provisions nor does it require resolution of complex regulatory issues within the expertise of the TRA. Thus, the TRA lacks either exclusive or primary jurisdiction over this matter and, therefore, the case should be referred back to the Shelby County Chancery Court.

Respectfully submitted,

Thomas F. Barrett by DAH

EUGENE J. PODESTA, JR. (#9831)
THOMAS F. BARNETT (#21380)
Attorneys for Respondent
Airstream Wireless Services

OF COUNSEL:

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165 Madison Avenue, Suite 2000
Memphis, TN 38103
(901) 526-2000

CERTIFICATE OF SERVICE

I, Thomas Barnett, hereby certify that I have served a true and exact copy of this Memorandum of Airstream via U.S. mail, postage prepaid, and facsimile on Henry Walker, Esq., Boult, Cummings, Conners & Berry, PLC, 414 Union Street, Suite 1600, P. O. Box 198062, Nashville, Tennessee, 37219, this the 4th day of March, 2003.

~~THOMAS F. BARNETT~~
Darwin A. Hindman, III
(#16145)

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES,)

Plaintiff,)

VS.) NO. CH-02-1441-3

US LEC OF TENNESSEE, INC.,)

Defendant.)

COMPLAINT FOR INJUNCTIVE RELIEF AND MONEY DAMAGES

Comes now the Plaintiff, Airstream Wireless Services ("Airstream") and for its cause of action against the Defendant would state as follows:

1. Plaintiff, Airstream, is a corporation duly organized and existing under the laws of the State of Delaware and doing business in Tennessee whose principal office is located at 1000 June Road, Memphis, Tennessee, 38119.

2. Defendant, US LEC of Tennessee, Inc., is, on information and belief, a Delaware corporation having its principal place of business at Harpeth on Green V, 105 Westwood Place, Suite 100, Brentwood, Tennessee, 37027.

3. Airstream is a leader in wireless hardware and software development. Airstream writes software for wireless communications in the medical, telecommunications and wireless fields.

4. As one of its operations, Airstream purchases long distance minutes from carriers such as Defendant at a discounted rate and re-sells the long distance service to its customers.

5. Upon entering an agreement with a carrier such as Defendant, Airstream then binds itself to an agreement identical or near identical with its customers. Any breach of the

agreement by a carrier such as Defendant can and does result in irreparable harm and injury to Airstream and may subject Airstream to substantial liability.

6. Airstream has been operating in Tennessee for a short period of time and is currently building its client base and, in order to continue its operations, must continue to be known and respected.

7. The viability, popularity and continued acceptance of Airstream by its customers is directly dependent upon the ability of Airstream to provide long distance service to its customers, as contractually obligated, an operation which is solely dependent upon Defendant as a carrier of long distance service to honor its Agreement with Airstream.

8. On or about April 11, 2002, Airstream and Defendant entered into an Advantage Customer Service Agreement (the "Agreement") which provides that Defendant agrees to provide long distance service to Airstream at the agreed upon prices pursuant to the Agreement. (A true and correct copy of the Customer Service Agreement is attached hereto as Exhibit "A.")

9. Defendant has failed and refused to honor its obligations pursuant to the Agreement by terminating service to Airstream for invalid reasons and has breached the terms of the Agreement in doing so.

10. On or about July 24, 2002, Defendant terminated service to Airstream. Upon learning of the disconnection of service, Mr. Jason Braverman, CEO of Airstream, immediately contacted Rod Baine (Mr. Baine), the Director of Sales and authorized agent of Defendant, regarding the termination of service. Mr. Baine also requested that Mr. Bob Stanton participate in the telephone conference.

11. At the conclusion of this telephone conference, Mr. Braverman understood that Defendant would provide a minimum of sixty (60) days notice of any proposed change in rate for service, as required by the Agreement.

12. As of July 26, 2002, neither Airstream nor Mr. Braverman received notice of any proposal rate change as required by the Agreement and service was not restored, thereby resulting in Airstream's inability to perform under its contracts to provide long distance service to its customers.

13. Any prolonged or protracted inability of Airstream to provide service to its customers will cause irreparable harm to its customer relationships.

14. Airstream will suffer immediate and irreparable harm if Defendant is allowed, in flagrant breach of its contractual obligations to refuse to provide service to Airstream. Far greater injury will result from the denial of the injunction than from the granting of any injunctive relief sought herein.

15. It is extremely difficult for Airstream to specify or quantify its money damages with any particularity as a result of Defendant's breach of the Agreement. First, Airstream will undoubtedly lose business as a result of its inability to provide service to its customers. Second, Airstream may incur substantial liability as a result of its inability to perform under its agreements with its customers as well as substantial attorney's fees and legal costs. Third, the primary negative effect is on the integrity and reputation of Airstream, a new company in this market, which affects its future marketability and the good will of Airstream. As Airstream's good will and reputation are intangible in nature, any damage thereto cannot be adequately measured.

16. Airstream has no adequate remedy at law and, unless it obtains immediate equitable relief, it will continue to suffer immediate and irreparable harm.

WHEREFORE, Plaintiff respectfully prays that:

(a) A temporary restraining order be issued prohibiting Defendant from failing or refusing to provide service pursuant to the terms of the Agreement;

(b) A hearing be set for preliminary injunction and that this Court issue a preliminary injunction prohibiting Defendant from refusing to provide service pursuant to the Agreement;

(c) A permanent injunction to that effect be entered upon the final hearing of this cause;

(d) This Court award damages in favor of Airstream and against Defendant to compensate Plaintiff for its lost business and injured goodwill;

(e) This Court award attorney's fees and costs as are provided in the Customer Service Agreement; and

(f) This Court award such other and further relief as the Court may deem necessary and proper.

THIS IS THE FIRST APPLICATION FOR EXTRAORDINARY RELIEF IN THIS CAUSE.

STATE OF TENNESSEE

COUNTY OF _____

I, JASON BRAVERMAN, after having been first duly sworn state that I am the CEO of Airstream Wireless Services, and that the allegations set forth in this Complaint are true to the best of my knowledge, information and belief.

JASON BRAVERMAN

SWORN to and subscribed before me this 29th day of July, 2002.

NOTARY PUBLIC

My Commission Expires:

BRENDA R. JOHNSON NOTARY PUBLIC AT LARGE SHELBY CO. TN MY COMM. EXP. 08-3-05

Respectfully submitted,

EUGENE J. PODESTA, JR. (#9831)
CLINTON J. SIMPSON (#20284)
Attorneys for Plaintiff
Airstream Wireless Services

OF COUNSEL:

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165 Madison Avenue, Suite 2000
Memphis, TN 38103
(901) 526-2000

FIAT

TO THE CLERK & MASTER OF THE CHANCERY COURT: Issue the temporary restraining order prayed for herein upon the posting of a bond in the amount of $ 2500.00 and set a hearing for preliminary injunction in this cause for Wednesday the 14th day of August, 2002, at 9:00 a. m.

A TRUE COPY - ATTEST
Kenny W. Armstrong, Clerk & Master
By R. Arnett D.C. & M.

Alissandratos
CHANCELLOR

DATE: 30 July 2002
9:25 am

M CJS 662661 v1
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"A"

ADVANTAGE
Customer Service Agreement

THIS CUSTOMER SERVICE AGREEMENT (this "Agreement") is made by and between:

US LEC OF TENNESSEE INC., a Delaware corporation ("US LEC"), having its principal place of business at Harpeth on Green V, 105 Westwood Place, Suite 100, Brentwood, Tennessee 37027; and

Customer Name: **AIRSTREAM WIRELESS SVCS**

State of Incorporation or Organization:

Physical Address: **1000 JUNE ROAD**

City: **Memphis** State: **TN** Zip: **38119**

Contact Name: **JASON BRAVERMAN** Title:

Phone: **(901) 763-3030** Fax:

Email:*

Tax Exempt Certificate Number *:

* Please attach a copy of your tax-exempt certificate, if applicable. You will be charged tax if this document is not provided.

Billing Address (if different): **N/A**

City: **N/A** State: **N/A** Zip: **N/A**

This Agreement is subject to the terms and conditions set forth herein, and in any Addendum attached hereto, which are a material part of this Agreement and are applicable to all services ordered hereunder, whether at this time or at a later date. Subject to all such terms and conditions, US LEC agrees to provide, and Customer agrees to receive and pay for, the services identified on Exhibit 1 herein.

Customer selects the following commitments:

Minimum Monthly Usage Commitment (includes local, long distance, toll inbound (Toll Free) and data usage):

$40,000

Minimum Term Commitment (commencing on service initiation):

12 months

COMMITMENT LEVEL & TERM DISCOUNTS

Based on the Minimum Monthly Usage Commitment and Minimum Term Commitment, Customer will receive the product specific pricing shown in US LEC's tariffs for local, long distance toll, and/or data services and as detailed below by Customer location.

GENERAL TERMS AND CONDITIONS

1. Agreement Subject to Tariffs. This Agreement and all US LEC services and agreements are governed by the terms and conditions contained in US LEC's tariffs and price lists (collectively, the "Tariffs") filed with federal and state regulatory agencies. Tariff rates and terms are subject to change by US LEC or the appropriate regulatory agency. Customer agrees to be bound by the provisions of US LEC's Tariffs in effect from time to time. If, prior to the expiration of the term of this Agreement, US LEC voluntarily or involuntarily, as a result of governmental or judicial action, cancels, in whole or in part, any Tariff on file, where the affected provisions prior to such cancellation applied to any Service(s) US LEC provides under this Agreement, then effective on such cancellation and for the remainder of the term, this Agreement shall consist of the following, in order of precedence from (a) through (c): (a) US LEC Tariff provisions that remain in effect ("Effective Tariffs"); (b) specific provisions contained in this Agreement that expressly apply in lieu of, or that apply in addition to, provisions contained in the Effective Tariffs; and (c) provisions contained in the US LEC Rate Guide to the extent that (a) and (b) above are not applicable. US LEC may amend the US LEC Rate Guide from time to time and will maintain the Rate Guide open for public inspection at one or more offices during normal business hours and on US LEC's website at www.uslec.com. Immediately prior to the cancellation of any Tariff provisions applicable to the Service(s) provided hereunder, US LEC shall incorporate any such provisions into the US LEC Rate Guide and if US LEC fails to incorporate any such provisions, such provisions shall be deemed incorporated into this Agreement as if US LEC has so incorporated such provisions in the US LEC Rate Guide. In all events, the applicable rates and rate schedules shall continue to be subject to any discounts, waivers, credits or restrictions on rate changes that may be contained in this Agreement for Tariffed Services. Where rate and/or discount adjustments would have been made by reference to any canceled Tariff rate, rate schedule, discount and/or discount schedule, these adjustments shall instead be made by reference to the US LEC Rate Guide. To the extent that any adjustment to Tariffed rates, rates schedules, discounts and/or discount schedules is permitted under this Agreement, such adjustment may be made by US LEC to its Rate Guide. All references to Tariffs in this Agreement shall be construed to also mean the documents which will replace those Tariffs following cancellation of the same.

2. Payment for Services. Customer agrees to pay US LEC's charges for the Services as set forth in this Agreement or US LEC's applicable Tariff. Customer shall be responsible for paying for all calls originating from or terminating to either Customer's premises or the Services (whether or not authorized by Customer). Customer will be invoiced on a monthly basis. Invoices are payable upon receipt by Customer. If payments are not received by US LEC within twenty-eight (28) days of the date of the invoice, US LEC may at any time thereafter discontinue the Services, terminate this Agreement, request a security deposit and/or impose a late charge of one and one-half percent (1 1/2%) per month of the balance due (or such lesser amount as is permitted by applicable law). US LEC may also apply any Customer deposit to the unpaid bill. Customer agrees to pay US LEC all costs and expenses of collection of any amounts due from Customer hereunder, including reasonable attorney's fees and expenses.

3. Minimum Monthly Usage Commitment. Customer agrees to pay for the Minimum Monthly Usage Commitment indicated above. In any given month (after the third full month following Service initiation) where Customer's actual usage falls below the Minimum Monthly Usage Commitment, Customer will nonetheless be billed for and agrees to pay the Minimum Monthly Usage Commitment. If Customer's actual usage is less than Customer's Minimum Monthly Usage Commitment for a period of four consecutive months, US LEC may, but shall not be required to, reduce Customer's Minimum Monthly Usage Commitment, and alter its rates accordingly, to reflect Customer's actual usage in such four month period. US LEC may only reduce Customer's Minimum Monthly Usage Commitment once during each calendar year. Service usage types that contribute toward the Minimum Monthly Usage Commitment include outbound intraLATA; outbound long distance (domestic interstate, intrastate & international); and inbound (Toll Free) service, but only to the extent that such services are billed or invoiced to Customer directly by or through US LEC. Monthly recurring charges for local and long distance access, including line and feature charges, also contribute toward the Minimum Monthly Usage Commitment. Charges that do not contribute to the Minimum Monthly Usage Commitment include: all charges for all non-recurring charges, such as installation charges, expedite charges and late payment penalties, taxes and other government-imposed surcharges, and all charges by other carriers that are not invoiced by US LEC to Customer. Multiple Customer locations specifically referenced herein or in an addendum hereto are aggregated to satisfy the Minimum Monthly Usage Commitment.

4. Customer Satisfaction Guarantee. If, at any time, Customer is not satisfied that US LEC's network quality or the quality of the sales and service support Customer receives from US LEC is at least as good as the network quality and service that was provided to Customer by Customer's prior carrier(s), and US LEC fails to correct the problem to Customer's reasonable satisfaction within 15 days of receipt of written notice specifying in reasonable detail the nature of the problem, Customer may terminate this Agreement without penalty upon an additional 15 day written notice.

5. Term; Automatic Renewal. This Agreement shall become effective on the date it is signed by both Customer and US LEC (the "Effective Date"), subject, however, to US LEC's approval of Customer's credit application and US LEC's approval of the suitability of Customer's premises for the Services. This Agreement shall continue in force for the Minimum Term Commitment selected on the first page of this Agreement unless sooner terminated as provided herein, provided however, that if Customer adds additional T-1 facilities under this Agreement after the Effective Date, Customer's Minimum Term Commitment with respect to such facilities shall commence on the date of service initiation for such facility, and this Agreement shall continue in force until the Minimum Term Commitments applicable to all facilities ordered hereunder shall have expired. This Agreement shall be automatically renewed for successive one-year periods unless either party gives the other party written notice of non-renewal at least 30 days prior to the end of the then current term. The terms and conditions of this Agreement shall be applicable to any such renewal term.

6. Termination. (A) If a party materially breaches any of the terms of this Agreement, the other party may terminate this Agreement without liability to the breaching party, but only if 1) the non-breaching party has given at least thirty (30) days notice of its intent to terminate and 2) prior to the effective date of such notice, the breaching party has not substantially remedied such breach; provided, however, that if the breach relates to the failure by Customer to pay any amounts owing hereunder when due, then notice of termination may be effective on the day notice is given.

(B) If, prior to the expiration of the Minimum Term Commitment of this Agreement, Customer terminates this Agreement (other than as provided in Paragraphs 4 and 6(A) above) or US LEC terminates this Agreement pursuant to Paragraph 6(A) due to Customer's breach, Customer shall be liable to US LEC for: (i) a termination charge in an amount equal to 50% of the Minimum Monthly Usage Commitment multiplied by the number of months remaining in the then current term; and (ii) a termination charge in an amount equal to any promotional credits, discounts or fee waivers previously provided by US LEC to Customer. If, prior to the expiration of the Minimum Term Commitment, Customer terminates the Service(s) as provided in Paragraph 4 above, Customer shall be liable to US LEC for repayment of any promotional credits (including but not limited to DTI credits), discounts or fee waivers (including but not limited to installation fee waivers) previously provided by US LEC to Customer. In the event of termination of this Agreement for any reason, Customer acknowledges and agrees that US LEC may withhold customer service information (including, but not limited to, customer telephone numbers) until US LEC receives payment for all amounts incurred by Customer through the effective date of termination. Nothing contained herein or in paragraph 2 shall be construed as prohibiting US LEC from pursuing any other legal or equitable remedy that may be available to it, or limiting the damages to which US LEC may be entitled in law or in equity, due to Customer's breach.

The Competitive Telephone Company

7. Certain Damages. Customer hereby agrees to reimburse US LEC for loss of or damage to any Services or related facilities or equipment of US LEC, which may be caused by the negligence or willful misconduct of Customer, its agents, employees or representatives.

8. Special Construction. Customer shall be responsible for all costs associated with any special construction requested by Customer as part of US LEC's provision of Service, and all costs arising from any Customer requested change in location of all or part of the Services prior to the completion of construction or installation.

9. Liability of US LEC; Disclaimer of Warranties. The liability of US LEC (or any other carrier furnishing any portion of the Services) for any interruption or failure of any Service furnished pursuant to this Agreement shall be limited to the amount of actual charges paid by Customer for the interrupted Service(s). US LEC shall not be liable for any interruption caused by any act or omission of any other carrier or other provider furnishing any portion of the Services, including directory listings. Neither US LEC nor any other carrier furnishing any portion of the Services shall be liable or responsible for any fraudulent or unauthorized calls originating from or terminating to Customer's premises or the Services. Neither US LEC nor any other carrier furnishing any portion of the Services shall have liability for any incidental, indirect or consequential damages arising from any Services provided under this Agreement or any interruption or failure of any such Services. EXCEPT AS PROVIDED IN PARAGRAPH 4 ABOVE, US LEC MAKES NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR USE WITH RESPECT TO ANY SERVICES, FACILITIES OR EQUIPMENT PROVIDED PURSUANT TO THIS AGREEMENT. CUSTOMER ACKNOWLEGES THAT IT HAS SOLE RESPONSIBILITY OF ENSURING THAT ITS PBX'S ARE PROGRAMMED TO CORRECTLY ROUTE 911 CALLS. US LEC IS NOT LIABLE TO CUSTOMER FOR ANY DIRECT, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES ARISING FROM ANY INCORRECT CUSTOMER PBX PROGRAMMING. BY ENTERING INTO THIS AGREEMENT CUSTOMER HEREBY FOREVER RELEASES AND FORGIVES US LEC FROM ANY SUCH LIABILITY, KNOWN OR UNKNOWN AND WHETHER NOW EXISTING OF HEREAFTER ARISING.

10. Credit Information. US LEC reserves the right to request a copy of Customer's most recent financial statement and/or remittance portion of the invoice from Customers previous or current telecommunication carrier. Customer's signature below constitutes authorization for US LEC to obtain credit information from any credit bureau or other investigative agency pertaining to the credit and financial responsibility of Customer. Customer understands that, as a result of this credit review, it may be required to submit a deposit or a guaranty(ies) of related parties in order to receive the Services.

11. Entire Agreement; Modification; Waiver. This Agreement and any attachments, exhibits or addendum hereto, and any applicable Tariff provisions constitute the entire agreement between the parties relating to the subject matter hereof. Except as set forth in the Tariffs, there are no terms, conditions or obligations other than those contained herein and there are no verbal statements, representations, warranties or agreements with respect to this transaction, which have not been embodied herein. This Agreement may only be amended or modified by a written agreement executed by authorized signatories of the parties hereto. No waiver of any breach of this Agreement will be valid unless in writing and signed by the party against whom enforcement is sought, and no such waiver shall be deemed to be a waiver of any future breach.

12. Notices. All notices hereunder shall be in writing and mailed first class certified mail, return receipt requested, or delivered by hand to the address of the other party set forth on the first page of this Agreement or such other address as such party may designate from time to time by such notice and shall take effect: (a) when mailed, or (b) when received, if delivered by hand.

13. Governing Law; Assignment; Miscellaneous. This Agreement shall in all respects be governed by and construed in accordance with the laws of the State of North Carolina without regard to its choice of law rules. Customer may not assign this Agreement without the express written consent of US LEC. US LEC may assign this Agreement in whole or in part to any of its affiliates as long as such affiliate is licensed to provide the services assigned to it and US LEC remains responsible for the performance of all of its obligations under this Agreement. If any provision of this Agreement shall be held to be illegal, invalid or unenforceable as a matter of law, the same shall not invalidate this Agreement, which shall be construed as if not containing such provision, and the rights and obligations of the parties shall be construed and enforced as if a commercially reasonable provision had been substituted in place thereof, consistent with the undertakings of the parties herein. Notwithstanding anything contained herein to the contrary, neither party shall be responsible to the other for damages or losses caused by an "Act of God" or other "force majeure" event. This Agreement may be executed in one or more counterparts each one of which shall be deemed an original and all of which together shall constitute one and the same instrument. Neither party shall use the name of the other party for advertising or other such purposes without the prior written consent of the party, except that US LEC may include Customer's name in generic customer lists compiled from time to time. This offer expressly limits acceptance to the pre-printed terms and conditions as set forth herein, and those contained in US LEC's Internet Use Policy (incorporated herein by this reference and found at www.uslec.com). Any additional or different terms proposed by Customer (either by notation on this form or in another instrument previously or hereafter furnished to US LEC) are rejected in their entirety unless expressly agreed to in writing by a US LEC Director or Vice President of Sales.

THE FOLLOWING TERMS AND CONDITIONS ARE APPLICABLE ONLY IF LONG DISTANCE ONLY IS CHOSEN

Percentage of Interstate Usage (PIU). Customer agrees to meet a minimum PIU requirement, as a percentage of total billed traffic minutes, of forty percent (40%) of total billed traffic minutes. This requirement shall not apply in the state of Georgia. Customers not meeting this threshold of interstate traffic will, at US LEC's discretion, face termination of contract as per Paragraph 6.

The Competitive Telephone Company

THE FOLLOWING TERMS AND CONDITIONS ARE APPLICABLE ONLY IF TOLL FREE INBOUND OR LOCAL TOLL FREE IS CHOSEN

Fraud Notice. US LEC hereby notifies Customer that fraud potential exists when using Toll Free Inbound or Local Toll Free Service to remotely access Customer's phone equipment for the purpose of gaining access to an outside line (through the use of DISA or any other method).

Fraud Waiver. US LEC recommends that Customer configure its phone equipment to prevent the use of Toll Free Inbound or Local Toll Free Services to remotely access Customer's phone equipment for the purpose of gaining access to an outside line (through the use of DISA or any other method) due to the potential for unauthorized or fraudulent calls, and Customer agrees to be responsible for and pay all charges relating to all calls made to or from their premises or to or from services provided by US LEC.

Liability of US LEC. US LEC IS NOT LIABLE TO CUSTOMER FOR ANY DIRECT, INDIRECT OR CONSEQUENTIAL DAMAGES ARISING FROM CUSTOMER'S FAILURE TO PROVIDE ADEQUATE PROTECTION FROM TOLL FRAUD. BY SIGNING THIS CUSTOMER SERVICE AGREEMENT, CUSTOMER HEREBY FOREVER RELEASES AND FORGIVES US LEC FROM ANY SUCH LIABILITY, KNOWN OR UNKNOWN AND WHETHER EXISTING OR HEREAFTER ARISING.

Toll Free Resp.Org. A Resp.Org. is an agent appointed by a customer to access the national toll free database, which stores characteristics of each toll free number, and to act on the Customer's behalf in defining and administering the toll free number(s) in the national database used by the customer. US LEC provides Resp.Org. functions in accordance with Bell Operating Companies Tariff FCC#1, however, US LEC may, at its discretion, limit the quantity of numbers it manages as a Resp.Org. for any Customer. Subject to the preceding sentence, where a Customer requests that US LEC serve as its Resp.Org., US LEC will subscribe to Toll Free Directory Listing for the number(s) assigned to the Customer. In the event that a Customer transfers its Service to another Resp.Org., US LEC shall cease to subscribe to Toll Free Directory Listing Service on behalf of the Customer and the Customer is responsible for assuring that Directory Listing Service is maintained through the new Resp.Org. Customer is responsible for payment of any outstanding Toll Free Directory Listing responsibility. US LEC reserves the right not to honor a Customer's request for a Resp.Org. change until all delinquent charges are paid in full. Recurring charges, as specified in the applicable tariff, shall apply if Customer retains US LEC as Resp.Org. when using another Toll Free service provider. The Customer must place each Toll-Free telephone number in actual and substantial use. If the Customer elects to retain a non-US LEC Resp.Org., the Customer must notify US LEC of any changes in the Customer's Resp.Org. in writing within 48 hours of the change and the Customer shall remain liable for all Resp.Org. functions provided to Customer by US LEC until such change in Customer's Resp.Org. is effective. The Customer is responsible for all outstanding indebtedness for services provided by a previous Resp.Org. or for any obligations of Customer to such previous service providers existing at the time of transfer to US LEC.

Facilities. It is Customer's responsibility to obtain an adequate number of access lines from US LEC for Toll Free and/or Local Toll Free Service to meet Customer's reasonably expected demand.

THE FOLLOWING TERMS AND CONDITIONS ARE APPLICABLE ONLY IF LONG DISTANCE ONLY IS CHOSEN OR 911/411/OPERATOR SERVICES ARE NOT AVAILABLE

The services provided to customers of US LEC under this Customer Service Agreement do not include Local access, 911 access, 411 access, or Operator Services. Customer's access to Local, 911, 411 and Operator Services must be made on local access facilities provided by Customer's local dial tone provider. US LEC IS NOT LIABLE TO CUSTOMER FOR ANY DIRECT, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES ARISING FROM ATTEMPTS TO ACCESS 911, 411 OR OPERATORS FROM US LEC PROVIDED ACCESS FACILITIES. BY ENTERING INTO THIS AGREEMENT CUSTOMER HEREBY FOREVER RELEASES AND FORGIVES US LEC FROM ANY SUCH LIABILITY, KNOWN OR UNKNOWN AND WHETHER NOW EXISTING OR HEREAFTER ARISING.

TERMS AND CONDITIONS ARE APPLICABLE ONLY IF CALLING CARD SERVICE IS CHOSEN

The Competitive Telephone Company

APPOINTMENT OF AGENT

Customer Name: AIRSTREAM WIRELESS SVCS

Physical Address: 1000 JUNE ROAD

City: Memphis State: TN Zip: 38119

In connection with this Agreement between US LEC and Customer, Customer hereby appoints US LEC to act as its agent in dealing with any or all of the following:

a. Local Exchange Carriers
b. Long Distance Carriers, including but not limited to, AT&T Corp., Sprint and MCI WorldCom
c. Other and/or Specialized Common Carriers
d. Facility Providers
e. Joint User Groups
f. Equipment Vendors
g. Consultants

Solely for the purposes of ordering, changing and/or maintaining US LEC's provision of the Services, provided, however, that US LEC will not change Customer's long distance carrier without Customer's prior written authorization.

THIS AUTHORIZATION SHALL REMAIN IN EFFECT UNTIL MODIFIED OR REVOKED IN WRITING BY CUSTOMER.

N/A

Customer Main Account Billing Telephone Number

And All Associated Customer Accounts:

Customer: AIRSTREAM WIRELESS SVCS

By: [signature]

Name: JASON BRANERMAN

Title: CEO

Date: 3/27/2002

US LEC of Tennessee Inc.,

By: [signature]

Name: Rod Baine

Title: Dir of Sales

Date: 4/11/02

Exhibit 1

For the following Customer location(s) (note existing NPA/NXX)

Location:

Customer Name:	AIRSTREAM WIRELESS SVCS				
Address :	1000 JUNE ROAD				
City:	Memphis	State :	TN	Zip : 38119	County : Shelby
Main Telphone	(901) 763-3030				

For the following Service(s):

Local Service	☐	Long Distance	☒	Toll Free (Inbound)	☐
Local Toll Free	☐	Calling Cards	☐	US LECnet	☐
Frame Relay	☐	DPL	☐	DSL	☐

All Services chosen under this Agreement or in any Addendum hereto are referred to herein as the "Services".

911/411/Operator Services Included ☒ Yes ☐ No

In Service Products:

Service Information	Monthly Recurring	Monthly Recurring	One Time / Non-Recurring	Additions/ Changes

Description	Quantity	Unit Price	Total MRC	NRC	Initial	Date
Total Monthly & NRC Charges			$0.00	$0.00		

Proposed Add Products:

Service Information	Monthly Recurring	Monthly Recurring	One Time / Non-Recurring	Additions/ Changes

Description	Quantity	Unit Price	Total MRC	NRC	Initial	Date
ADVANTAGE World //3643	4	$0.00	$0.00	$0.00		4/11-02
MRC - LD Only T-1 //3391	4	$200.00	$800.00	$0.00		4/11-02
NRC - Access Only T-1 //3392	4	$1000.00	$0.00	$4000.00		4-11-02

[redacted] 3/28/2002

Exhibit 1 [redacted]

Proposed Add Products:

Service Information		Monthly Recurring	Monthly Recurring	One Time / Non-Recurring	Additions/ Changes	
Description	**Quantity**	**Unit Price**	**Total MRC**	**NRC**	**Initial**	**Date**
						4-11-02
Total Monthly & NRC Charges			$800.00	$4000.00		

Disconnect Products:

Service Information		Monthly Recurring	Monthly Recurring	One Time / Non-Recurring	Additions/ Changes	
Description	**Quantity**	**Unit Price**	**Total MRC**	**NRC**	**Initial**	**Date**
						4-11-02
Total Monthly & NRC Charges			$0.00	$0.00		

Revision #: _____ <Pick 'Svc Site Loc' on 'Order Entry'> _____ of _____

ADVANTAGE - Attachment A - Order Form

Customer Name: Airsteam Wireless Service
Service Address: 1000 June Road Suite 102
City: Memphis State: TN Zip: 38119
County: Shelby Main Telephone Number: 901-763-3030

Switch: MEM
Rate Schedule: 1
Int'l Plan: ICB
LATA: 468

Invoke BTN:

Summary of Items & Detail of Services							Restrictions			Services Information		Monthly	Monthly	One-time
Existing #	Existing Telco	US LEC #	PIC 0+	PIC 1+	PIC Intralata	Trunk / Line	BNS	INTL Y/N	Special Blocking	Description (PIC'd or 10-15-XXX)	Qty	Unit Price	Total Price	Install
new										International Rates				
										.06 to UK				
										.06 to Germany				
										.10 to Italy				
										.15 to Spain				

Total Monthly & Install Charges

Customer Signature _____ Date 3/27/02

US LEC Representative Signature _____ Date 4/11/02

Restrictions:	BNS	Special Blocking
INTL Y = Wants International N = Restricted - No Intl.	0 - No Restrictions 1 - Collect Calls 2 - Third Party Calls 3 - Both Restrictions	0 - No Restrictions 1 - 900 Collect Calls 2 - 976 Calls Restricted 3 - Both Restrictions

ADDENDUM TO THE ADVANTAGE CUSTOMER SERVICE AGREEMENT BETWEENUS LEC OF TENNESSEE INC. AND AIRSTREAM WIRELESS SERVICES

This Addendum made as of the 11th day of April, 2002, by and between US LEC of Tennessee Inc. ("USLEC"), a Delaware corporation with an office at Lenox Park Building C, 3150 Lanox Park Drive, Suite 417, Memphis TN 38115 and Airstream Wireless Services ("Customer"), a Delaware corporation with an office at 1000 June Road, Suite 102, Memphis, TN, 38119, contains modifications and additions to the terms and conditions of the Customer Service Agreement (the "Agreement") of even date herewith between USLEC and Customer.

In consideration of the mutual covenants contained in the Agreement and herein, and for other good and valuable consideration, USLEC and Customer hereby agree as follows:

I. Customer hereby selects a Minimum Monthly Usage Commitment of $40,000.00.

II. US LEC will notify Customer at least sixty (60) days in advance of any increase of the tariffed rates for Services to the United Kingdom, Spain, Germany or Italy. Customer may, on prior written notice to US LEC during such sixty (60) day period, terminate provision of Services effective as of the effective date of the rate increase indicated in US LEC's notice. In addition, US LEC may on written notice to Customer, terminate provision of the Services effective as of the effective date of the rate increase indicated in US LEC's notice.

III. Customer hereby agrees to submit deposits to US LEC as follows:

- $40,000.00 prior to Service initiation, and
- $40,000.00 within thirty (30) days following Service initiation.

In the event that the Agreement is terminated for any reason, US LEC will return the above-referenced amounts to Customer, less any amounts due to US LEC through the effective date of termination.

IV. All other terms and conditions of the agreement shall remain in full force and effect. In the event of any conflict between the terms and conditions of this Addendum and the terms and conditions of the Agreement, this Addendum shall prevail. The terms defined in the Agreement and used in this Addendum shall have the same respective meanings as set forth in the Agreement, unless clearly otherwise defined herein.

IN WITNESS WHEREOF, this Addendum to the Agreement is hereby executed by an authorized representative of each party hereto as of the date first above written.

US LEC of Tennessee Inc.
By: _____
Name: Rob Bairoa
Title: Director of Sales
Date: 4/11/02

Airstream Wireless Services
By: _____
Name: JASON BRAVERMAN
Title: CEO / President
Date: 4-11-02

General Company Information (If you would like us to consider the credit of an affiliated Company, please complete the section below. Use additional pages if necessary.)

Affiliated or Parent Company: _____

Address: _____

City: _____ State: _____ Zip: _____

Contact Person: _____ Title: _____ Phone: _____

Trade Reference

Company Name: ATAR TWIN MEDIA

Address: 1478 President Street

City: Brooklyn State: NY Zip: 11238

Contact Person: Dov Schwartz Title: _____ Phone: 509-695-3957

USA CALL, Inc. 0224 Gutman FAX # 702-442-7185

Bank Reference

Bank Name: Amsouth Bank Phone: 901-684-4444

Address: Poplar & Mendenhall

City: Memphis State: TN Zip: 38119

Business Checking Account Number(s): 5326675013

US LEC OF TENNESSEE INC. RESERVES THE RIGHT TO REQUEST A COPY OF THE COMPANY'S MOST RECENT FINANCIAL STATEMENT AND/OR REMITTANCE PORTION OF THE INVOICE FROM THE PREVIOUS OR CURRENT TELECOMMUNICATIONS CARRIER.

I understand that the information contained in this application is for the purpose of obtaining credit in connection with the provision by US LEC of Tennessee Inc. of telecommunication services. I hereby certify that I am an officer of the Company named on the front page of this application, that I am duly authorized to provide the information contained herein on behalf of the Company, and that the information contained herein is true and correct to the best of my knowledge. I hereby authorize US LEC of Tennessee Inc. to obtain credit information from any credit bureau or other investigative agency pertaining to the credit and financial responsibility of the Company. I further understand as a result of this credit review, that the Company may be required to submit a deposit or a guaranty(ies) of related parties in order to use the services of US LEC of Tennessee Inc.

Airstream Wireless, Services, Inc.
Company Name

Jason Braverman, CEO
Type or Print Name and Title of Owner or Officer

X _____ 3/27/2002
Authorized Signature Date

US LEC OF TENNESSEE INC.

CUSTOMER CREDIT APPLICATION FOR BUSINESSES

Date of Application: 3/28/02

Important: All applicable information (front and back) must be completed in its entirety. Please print clearly and legibly to help ensure accurate and timely processing. When used herein, the term "Company" means the legal entity that owns the business that has requested service from US LEC of Tennessee Inc.

General Company Information

Legal Company Name: Airstream Wireless Services, Inc. (the Company).

Type of Entity: ☐ Partnership ☐ Sole Proprietor ☒ Corporation ☐ Limited Liability Company ☐ Other _____

Dun & Bradstreet Number: _____

Other Trade Name(s): _____ DBA: _____

Years in Business: 1 yrs. _____ mos.

Federal Tax ID: 22-3819175 Number of Employees: 5 Annual Sales: $ 3.5 million

Physical Street Address (no PO Box numbers please) 1000 June Road Suite 102

City: Memphis State: TN Zip: 38119

How long at this address? 1 yrs. _____ mos.

Contact Person: Jason Braverman Phone: 901-331-2754 Fax: 901-763-2223

Previous Address: _____

City: _____ State: _____ Zip: _____

How long at this address? _____ yrs. _____ mos.

Do you own or lease the building in which you are located? (please check one) ☐ Own ☒ Lease

Principal of the Company

(If Sole owner or Partnership, please complete the section below. Use additional pages if necessary.)

I hereby authorize US LEC of Tennessee Inc. to use the information provided below to obtain a consumer credit report, and I understand that my creditworthiness may be considered when making a decision whether to provide services to the Company on credit.

Principal Name: Jason Braverman Signature: _____

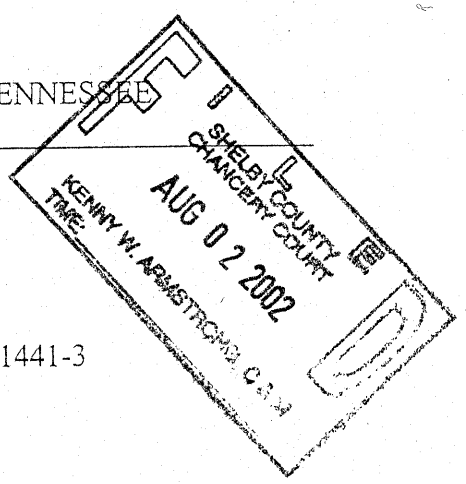
Title or Position: CEO Phone: 901-331-2754

Social Security Number: _____ Year of Birth: _____

Residential Street Address: _____

City: _____ State: _____ Zip: _____

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE



AIRSTREAM WIRELESS SERVICES,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. CH-02-1441-3
	)	
US LEC OF TENNESSEE, INC.,	)	
	)	
Defendant.	)	

MOTION TO SHOW CAUSE WHY DEFENDANT SHOULD NOT BE HELD IN CONTEMPT FOR VIOLATING TEMPORARY RESTRAINING ORDER

TO THE HONORABLE D. J. ALISSANDRATOS, CHANCELLOR OF PART III OF THE CHANCERY COURT OF TENNESSEE FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS:

Comes now the Plaintiff, Airstream Wireless Services ("Airstream") and petitions this Court to require Defendant to show cause why it should not be held in contempt for violating the Temporary Restraining Order issued by this Court on July 30, 2002, and states as follows:

1. Plaintiff filed suit against Defendant for money damages and requested this Court to issue a Temporary Restraining Order ("TRO") enjoining Defendant from refusing to provide service to Plaintiff pursuant to the terms of the Customer Service Agreement at issue in this matter.

2. On July 30, 2002, this Court issued a TRO enjoining Defendant from refusing to provide service to Plaintiff pursuant to the terms of the Customer Service Agreement. A temporary injunction hearing has been set for August 14, 2002 at 9:00 a.m. in this Court.

3. Plaintiff issued process of service to Defendant, through its registered agent, through the Secretary of State of Tennessee. Plaintiff also notified and provided via facsimile

Mr. Shane Turley, in-house counsel for Defendant, copies of Plaintiff's Complaint and this Court's TRO executed on July 30, 2002. (A copy of the letter and fax confirmation sheet are attached as collective Exhibit "A").

4. After receiving no response from Defendant, Plaintiff sent, via facsimile, a letter on July 31, 2002, to Defendant notifying it of the TRO enjoining Defendant from failing to provide service pursuant to the terms of the Customer Service Agreement and the necessity of its compliance with this Court's TRO. (A copy of the July 31, 2002 letter is attached as Exhibit "B").

5. Plaintiff's counsel, Clinton J. Simpson, contacted Mr. Shane Turley on July 31, 2002 and spoke with Mr. Turley on two separate occasions in which Mr. Turley was further informed of this Court's Order. Mr. Turley stated that he did not receive the first set of materials, including the TRO, which were sent on July 30, 2002. Plaintiff then re-faxed its Complaint and this Court's TRO to Defendant on July 31, 2002. Plaintiff received no further response from Defendant on July 31, 2002, after resending the Complaint and TRO. (Affidavit of Simpson, ¶ 6). (A copy of the Affidavit of Clinton J. Simpson is attached hereto as Exhibit "C").

6. On August 1, 2002, Plaintiff attempted to contact Defendant's counsel on three occasions and was unable to discuss Defendant's failure to comply with this Court's TRO with anyone at length or in detail. (Affidavit of Simpson, ¶¶ 7, 8, 9).

7. As of August 2, 2002, Defendant has not restored service to Plaintiff pursuant to the terms of the Customer Service Agreement and continues to be in direct violation of this Court's TRO.

WHEREFORE, PREMISES CONSIDERED, Plaintiff petitions this Court to require Defendant to show cause why it should not be held in willful contempt of this Court's temporary restraining order and seeks the following:

(a) Plaintiff be awarded a money judgment for the attorneys fees, and other expenses it incurred in prosecution of Defendant's willful contempt of this Court's TRO;

(b) Plaintiff be awarded a money judgment for lost business as a direct result of Defendant's failure to abide by this Court's TRO;

(c) This Court retain jurisdiction to ensure compliance with its TRO through the expiration date on August 14, 2002; and

(d) Plaintiff have such other relief as it may be entitled to in the premises or which the Court thinks is necessary to punish violation its orders and decree.

Respectfully submitted,

Clinton J. Simpson

EUGENE J. PODESTA, JR. (#9881)
CLINTON J. SIMPSON (#20284)
Attorneys for Plaintiff
Airstream Wireless Services

OF COUNSEL:

BAKER, DONELSON, BEARMAN & CALDWELL
165 Madison Avenue, Suite 2000
Memphis, TN 38103
(901) 526-2000

CERTIFICATE OF SERVICE

I, Clint Simpson, hereby certify that I have served a true and exact copy of this Motion to Show Cause via facsimile to Shane Turley, Esq., Fax No. *1-704-409-6874,* Legal Department, US LEC of Tennessee, Inc., Morrocrost #3, 6801 Morrison Boulevard, Charlotte, NC 28211, and Henry Walker, Esq., Boult, Cummings, Conners & Berry, PLC, 414 Union Street, Suite 1600, P. O. Box 198062, Nashville, Tennessee, 37219, this the 2nd day of August, 2002.

Clint Simpson
CLINT SIMPSON

LAW OFFICES
BAKER, DONELSON, BEARMAN & CALDWELL
A PROFESSIONAL CORPORATION
FIRST TENNESSEE BUILDING
165 MADISON AVENUE
SUITE 2000
MEMPHIS, TENNESSEE 38103

(901) 526-2000

FACSIMILE
(901) 577-2303

TENNESSEE
MEMPHIS
NASHVILLE
CHATTANOOGA
KNOXVILLE
JOHNSON CITY
HUNTSVILLE

JACKSON, MISSISSIPPI
WASHINGTON, D.C.
ATLANTA, GEORGIA

BDBC INTERNATIONAL, LLC
BEIJING, CHINA
REPRESENTATIVE OFFICE

CLINTON J. SIMPSON
Direct Dial: (901) 577-8183
Direct Fax: (901) 577-4233
E-Mail Address:cjsimpson@bdbc.com

July 30, 2002

VIA FAX NO. 1-704-409-6874

Shane Turley, Esq.
Legal Department
US LEC of Tennessee, Inc.
Morrocrost #3
6801 Morrison Boulevard
Charlotte, NC 28211

Re: Customer Service Agreement Between US LEC of Tennessee, Inc. and Airstream Wireless Services
Entered on April 11, 2002

Dear Mr. Turley:

Enclosed please find a copy of Airstream Wireless Services's Complaint for Injunctive Relief and Money Damages. We appeared before Chancellor Alissandratos on July 30, 2002, whereby he signed the Fiat and granted our Restraining Order prohibiting US LEC of Tennessee from failing to provide service pursuant to the terms of the Customer Service Agreement. Please allow this communication to serve as official notice of the Court's Order, and as ordered by the Court, Airstream Wireless Services expects full service to be resumed immediately.

As you will see in the Restraining Order, a hearing for the Injunction has been set for August 14, 2002 at 9:00 a.m. in Division III of the Chancery Court of Memphis, Shelby County, Tennessee.

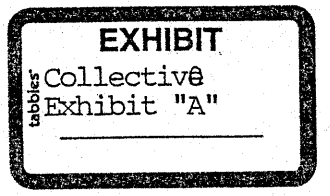
If you have any further questions or comments regarding this matter, please do not hesitate to contact me.

Very truly yours,

Clint Simpson

Clinton J. Simpson

CJS:dj
enclosures



××× TRANSMISSION REPORT ×××

JUL-30-02 15:39 ID:9015772303 BAKER DONELSON

JOB NUMBER	061		
INFORMATION CODE	OK		
TELEPHONE NUMBER	6327#960000*00100#17044096874#		
NAME(ID NUMBER)	RightFax		
START TIME	JUL-30-02 15:32		
PAGES TRANSMITTED	022	TRANSMISSION MODE	EMMR
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SECURITY	OFF	MAILBOX	OFF
MACHINE ENGAGED	06'49		

THIS TRANSMISSION IS COMPLETED.

LAST SUCCESSFUL PAGE 022

LAW OFFICES
BAKER, DONELSON, BEARMAN & CALDWELL
A PROFESSIONAL CORPORATION
FIRST TENNESSEE BUILDING - 165 MADISON AVENUE
SUITE 2000
MEMPHIS, TENNESSEE 38103
(901) 526-2000
Facsimile
(901) 577-2303

FACSIMILE TRANSMISSION FORM

PLEASE DELIVER IMMEDIATELY

DATE:	July 30, 2002	**TIME:**	1:45 PM
DELIVER TO:	**FACSIMILE PHONE NO.:**		
SHANE TURLEY, ESQ.	1-704-409-6874		
FROM:	Clinton J. Simpson		
PHONE NO.:	(901) 577-8183		
FACSIMILE PHONE NO.	(901) 577-4233		
USER NO.:	6327		
CLIENT/MATTER NO.:	960000-00100		

MESSAGE:

LAW OFFICES
BAKER, DONELSON, BEARMAN & CALDWELL
A PROFESSIONAL CORPORATION
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165 MADISON AVENUE
SUITE 2000
MEMPHIS, TENNESSEE 38103

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(901) 577-2303

TENNESSEE
MEMPHIS
NASHVILLE
CHATTANOOGA
KNOXVILLE
JOHNSON CITY
HUNTSVILLE

JACKSON, MISSISSIPPI
WASHINGTON, D.C.
ATLANTA, GEORGIA

BDBC INTERNATIONAL, LLC
BEIJING, CHINA
REPRESENTATIVE OFFICE

CLINTON J. SIMPSON
Direct Dial: (901) 577-8183
Direct Fax: (901) 577-4233
E-Mail Address:cjsimpson@bdbc.com

July 31, 2002

VIA FAX NO. 1-704-409-6874

Shane Turley, Esq.
Legal Department
US LEC of Tennessee, Inc.
Morrocrost #3
6801 Morrison Boulevard
Charlotte, NC 28211

Re: Customer Service Agreement Between US LEC of Tennessee, Inc. and Airstream Wireless Services
Entered on April 11, 2002

Dear Shane:

As of 4:15 CST on July 31, 2002, service has not been restored to Airstream Wireless Services pursuant to the terms of the Customer Service Agreement at issue in this matter. Please notify me immediately whether US LEC intends to resume service or not. If US LEC does not intend to resume service immediately, we will have no other alternative than to seek to have the Chancery Court hold US LEC in contempt of its Order.

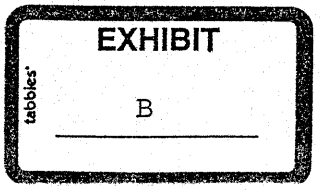
Please notify me of US LEC's decision once you have had a chance to review this letter with the appropriate authorities of US LEC.

Very truly yours,

Clint Simpson

Clinton J. Simpson

CJS:dj



IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. CH-02-1441-3
	)	
US LEC OF TENNESSEE, INC.,	)	
	)	
Defendant.	)	

AFFIDAVIT OF CLINTON J. SIMPSON IN SUPPORT OF MOTION TO SHOW CAUSE

STATE OF TENNESSEE)
COUNTY OF SHELBY)

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1. I am an attorney licensed to practice in Tennessee and I am counsel of record for Plaintiff in this cause.

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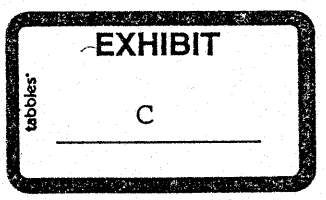

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FURTHER AFFIANT SAITH NOT.

Clint Simpson
CLINT SIMPSON

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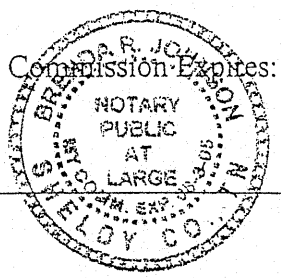
Brenda R. Johnson
Notary Public

My Commission Expires:



Respectfully submitted,

Clinton J. Simpson

EUGENE J. PODESTA, JR. (#9831)
CLINTON J. SIMPSON (#20284)
Attorneys for Plaintiff
Airstream Wireless Services

OF COUNSEL:

BAKER, DONELSON, BEARMAN & CALDWELL
165 Madison Avenue, Suite 2000
Memphis, TN 38103
(901) 526-2000

M CJS 663444 v1
0-0 08/01/02

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CLINT SIMPSON

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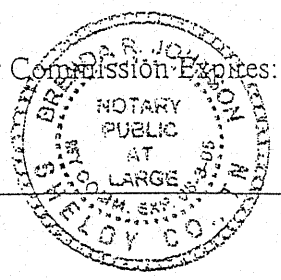

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Attorneys for Plaintiff
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OF COUNSEL:

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CLINT SIMPSON

Simpson, Clinton J.

From: Turley, Shane [sturley@uslec.com]
Sent: Thursday, August 01, 2002 2:59 PM
To: 'cjsimpson@bdbc.com'
Subject: Airstream

Importance: High

Clint:

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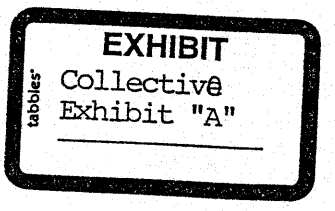
Shane



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Sent: Thursday, August 01, 2002 4:05 PM
To: 'Simpson, Clinton J.'
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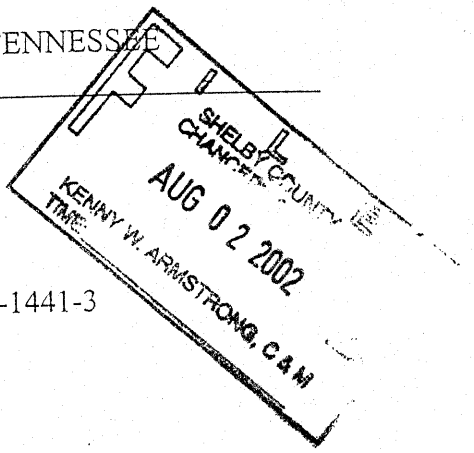

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	)	
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	)	
VS.	)	NO. CH-02-1441-3
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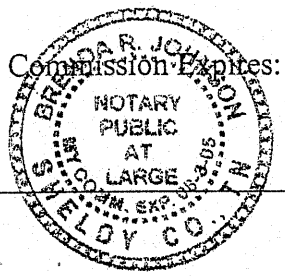

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OF COUNSEL:

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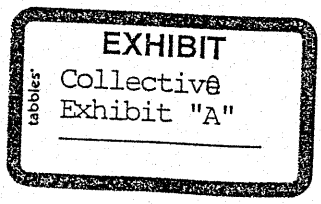

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IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES, Plaintiff, v. US LEC OF TENNESSEE, INC., Defendant.	)	No. CH-02-1441-3

AFFIDAVIT OF MIKE MOELLER

1. My name is Mike Moeller and I am the Vice President- Sales for Tennessee and Kentucky at US LEC Corp., headquartered in Charlotte, North Carolina ("US LEC"). My office is located at First Tennessee Plaza, 800 S. Gay Street, Knoxville, Tennessee 37929. All information contained in this Affidavit is based upon events that occurred, of which I have personal knowledge.

2. US LEC, via its wholly owned subsidiaries is a telecommunications carrier operating in 14 states including Tennessee, where the operating subsidiary is US LEC of Tennessee, Inc.. US LEC offers a variety of telecommunications services including local and long distance calling under the jurisdiction of the Tennessee Regulatory Authority and the Federal Communications Commission.

3. Pursuant to Chapter 408 of the Public Acts of 1995, T.C.A. §65-4-201(c), US LEC holds a certificate of convenience and necessity from the Tennessee Regulatory Authority to operate as a "competing telecommunications service provider" in Tennessee. The terms and conditions under which US LEC operates are set forth in the carrier's tariffs which, by

law, must be filed with, and approved by, the Authority. US LEC's tariff on file with the Authority states that the company may, without notice, immediately discontinue service to any customer if the company determines that the service is being used for a fraudulent purpose.

4. US LEC has a contract to provide long distance telecommunications services to Airstream Wireless Services, Inc., which is located in Memphis, Tennessee. The contract states, inter alia, "This Agreement and all US LEC services and agreements are governed by the terms and conditions contained in US LEC's tariffs and price lists (collectively, the "Tariffs") filed with federal and state regulatory agencies...Customer agrees to be bound by the provisions of US LEC's Tariffs in effect from time to time."

5. The contract with Airstream states that US LEC will provide long distance telephone international service, including service to the United Kingdom, Germany, Italy and Spain.

6. The cost to US LEC of handling that international traffic varies substantially depending upon whether the call is made to a wireless telephone or to a non-wireless telephone (land line) telephone. The cost to US LEC of handling an international call made to a wireless telephone in the United Kingdom, Germany, Italy and Spain ranges from $.41 to $.45 per minute. The cost to US LEC of handling an international call made to a land line telephone in the same countries is a small fraction of what it costs to terminate an international call made to a wireless telephone.

7. Based on normal calling patterns, approximately 10% of all long distance calls are made to wireless telephones. During negotiations with Airstream, Airstream represented to US LEC that no more than 10% to 15% of Airstream's international traffic would

be made to wireless telephones. Based on US LEC's experience with normal traffic patterns and those representations of Airstream, US LEC agreed to accept and complete international calls for rates of $.06 to $.15 per minute depending on the country where the call terminates. Those rates are reflected in the contract between US LEC and Airstream.

8. US LEC began providing service to Airstream on June 10, 2002. By July 17, 2002, US LEC had been contacted by the fraud division of a major telecommunications company and was informed by them of the unusual nature of the traffic coming from Airstream. Contrary to normal traffic patterns and the representation of Airstream, approximately 99.7% of all international calls coming from Airstream were being made to wireless telephones.

9. Based on my experience in the telecommunications industry, such an abnormal traffic pattern cannot be accidental. Someone is apparently either (1) using a switch to separate, based on the number being called, calls made to wireless telephones from calls made to land line telephones and routing all wireless calls to US LEC or (2) using auto-dialers, or similar equipment, to dial repeatedly to wireless telephones. In either case, this abnormal traffic pattern is the result of deliberate manipulation and is likely being done for a fraudulent purpose.

10. Upon discovery of this manipulation of the traffic coming from Airstream, US LEC made a decision to terminate service to Airstream.

11. If US LEC is required to restore service to Airstream, US LEC will lose approximately $12,000 per day, representing the difference between the contract price and the significant costs required to pay third party telecommunication carriers to terminate this particular type of traffic.

Further, Affiant saith not.

Mike Moeller

Sworn to and subscribed before me this the 6th day of August, 2002.

Notary Public

My Commission Expires: 3/4/2006

KIRSTEN W. SCOTT NOTARY PUBLIC AT LARGE COMM. EXP. 3-4-06 KNOX COUNTY, TN

State NC
County Mecklenburg

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES, Plaintiff,	)	
v.	)	No. CH-02-1441-3
US LEC OF TENNESSEE, INC., Defendant.	)	

AFFIDAVIT OF SHANE TURLEY

1. My name is Stephen Shane Turley, and I am Deputy Senior Counsel for US LEC Corp., headquartered in Charlotte, North Carolina ("US LEC"). My office is located at 6801 Morrison Blvd., Morrocroft III, Charlotte, N.C. 28211. I am an attorney currently licensed, in good standing and admitted to practice law in the Commonwealth of Virginia. All information contained in this Affidavit is based upon events that occurred, of which I have personal knowledge.

2. Over the past week or so I have been communicating with Clinton Simpson, an attorney with Baker Donelson Bearman & Caldwell, PC, and counsel for Airstream Wireless Services ("Airstream"), to resolve outstanding issues between Airstream and US LEC regarding telecommunications service.

3. When I first began speaking with Mr. Simpson, he mentioned Airstream's desire to take some form of legal action if we could not resolve the outstanding issues. At the outset of our conversations, I was expressly advised by Mr. Simpson that I would be personally notified prior to any action taken by Airstream, so

that I would have an opportunity to have counsel present at any hearings. To this end, I provided Mr. Simpson with my cellular phone number so that he could contact me at any time.

4. Prior to the filing of the Complaint in this matter, I received no phone call, fax or other communication from Mr. Simpson or anyone else on behalf of Airstream. Indeed, I did not receive a faxed copy of Airstream's Complaint for Injunctive Relief and Money Damages and Fiat until July 31, 2002, at approximately 6:00 p.m. Eastern Standard Time. From the fax, it appeared there was a court hearing held the morning of the day before (July 30, 2002).

Further, the Affiant saith not.

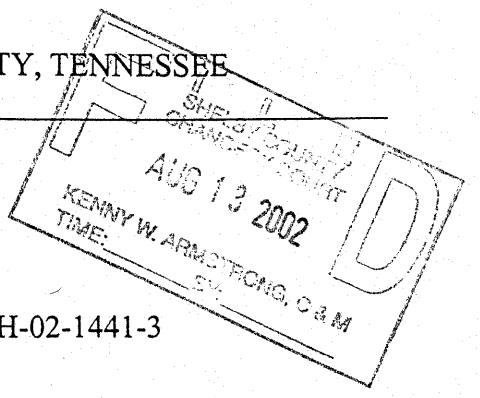
Stephen Shane Turley, Affiant

Sworn to and subscribed before me this the 5 day of August, 2002.

Notary Public

My Commission Expires: My Commission Expires June 1, 2004

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE



AIRSTREAM WIRELESS SERVICES,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. CH-02-1441-3
	)	
US LEC OF TENNESSEE, INC.,	)	
	)	
Defendant.	)	

PLAINTIFF'S NOTICE OF FILING AFFIDAVITS

Plaintiff, Airstream Wireless Services, hereby gives notice of filing the original Affidavits of Jason Braverman and Clint Simpson attached hereto as Exhibit 1 and Exhibit 2 respectively.

Respectfully submitted,

EUGENE J. PODESTA, JR. (#9831)
CLINTON J. SIMPSON (#20284)
Attorneys for Plaintiff
Airstream Wireless Services

OF COUNSEL:

BAKER, DONELSON, BEARMAN & CALDWELL
165 Madison Avenue, Suite 2000
Memphis, TN 38103
(901) 526-2000

CERTIFICATE OF SERVICE

I, Clint Simpson, hereby certify that I have served a true and exact copy of this Notice of Filing Affidavits on Luther Wright, Esquire, Esq., Boult, Cummings, Conners & Berry, PLC, 414 Union Street, Suite 1600, P. O. Box 198062, Nashville, Tennessee, 37219, this the 13th day of August, 2002.

Clint Simpson

CLINT SIMPSON

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. CH-02-1441-3
	)	
US LEC OF TENNESSEE, INC.,	)	
	)	
Defendant.	)	

AFFIDAVIT OF CLINTON J. SIMPSON

STATE OF TENNESSEE)
COUNTY OF SHELBY)

Comes now Clinton J. Simpson, Attorney for Plaintiff, Airstream Wireless Services, and after being first duly sworn, would state:

1. I am an attorney licensed to practice in Tennessee and I am counsel of record for Plaintiff in this cause.

2. On July 26, 2002, I spoke with Shane Turley and other representatives of US LEC of Tennessee, Inc. ("US LEC") regarding the restoration of service to Airstream Wireless Services.

3. On July 26, 2002, I informed Mr. Shane Turley, in-house counsel for US LEC of Tennessee, of the necessity that service be restored immediately to Airstream as Airstream would incur irreparable harm if service was not restored.

4. On Monday, July 29, 2002, I spoke with Mr. Turley, and informed him that it was Airstream's intent to go to court on the following morning, July 30, 2002, and request that the

Court issue a temporary restraining order to enjoin US LEC from refusing to provide service pursuant to the terms of the Customer Service Agreement.

5. Solely as a courtesy to US LEC, I requested from Mr. Turley the name of local counsel for US LEC in the State of Tennessee. Mr. Turley informed me that he did not know the name of US LEC's local counsel in Tennessee.

6. I explained to Mr. Turley that this matter was urgent as Airstream was facing substantial expense and potential liability with its customers as a result of the termination of its service by US LEC.

7. I did not receive any further response from Mr. Turley for the remainder of July 29, 2002, after our conversation regarding Airstream's intent to petition the Court for a temporary restraining order.

8. I did not learn the identity of US LEC's local counsel until Thursday, August 1, 2002.

9. I called local counsel, Henry Walker, at approximately 1:30 CST on August 1, 2002. I did not receive a return call until later that evening.

FURTHER AFFIANT SAITH NOT.

CLINT SIMPSON

SWORN to and subscribed before me this 13th day of August, 2002.

Notary Public

JENNIFER HULMERT HARDEN
NOTARY PUBLIC AT LARGE
SHELBY CO., TN
MY COMM. EXP. 9-18-02

My Commission Expires:

My Commission Expires Sept. 18, 2002

M CJS 664568 v1
789939-00001 08/09/02

Respectfully submitted,

EUGENE J. PODESTA, JR. (#9830)
CLINTON J. SIMPSON (#20284)
Attorneys for Plaintiff
Airstream Wireless Services

OF COUNSEL:

BAKER, DONELSON, BEARMAN & CALDWELL
165 Madison Avenue, Suite 2000
Memphis, TN 38103
(901) 526-2000

CERTIFICATE OF SERVICE

I, Clint Simpson, hereby certify that I have served a true and exact copy of this Affidavit was served upon Luther Wright, Esq., Boult, Cummings, Conners & Berry, PLC, 414 Union Street, Suite 1600, P. O. Box 198062, Nashville, Tennessee, 37219, this the 13th day of August, 2002.

CLINT SIMPSON

M CJS 664568 v1
789939-00001 08/09/02

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. CH-02-1441-3
	)	
US LEC OF TENNESSEE, INC.,	)	
	)	
Defendant.	)	

AFFIDAVIT OF JASON BRAVERMAN

STATE OF TENNESSEE)
COUNTY OF SHELBY)

Comes now Jason Braverman, Plaintiff in the above-referenced cause, and after being first duly sworn, would state:

1. I am the CEO of Airstream Wireless Services.

2. As a consequence of US LEC's termination of Airstream's service, Airstream lost substantial business and can no longer fulfill its obligations under the original terms of the Customer Service Agreement it entered into with US LEC.

3. After learning that service was disconnected by US LEC on July 24, 2002, I called US LEC on that same day and spoke with Mr. Rod Baine and Mr. Bob Stanton of US LEC to notify them that Airstream's service had been disconnected.

4. During the July 24, 2002 call with Mr. Baine and Mr. Stanton, US LEC expressed to me that in order to restore service, the rates in the Agreement would need to be re-negotiated.

5. At no time during the negotiations of the Customer Service Agreement between Airstream and US LEC did I represent nor any agent of Airstream represent to US LEC that no more than 10% to 15% of Airstream's international traffic would be made to wireless telephones.

6. No distinction between calls to land line telephones and wireless telephones was ever discussed prior to the signing of the Customer Service Agreement and the addendums thereto.

7. It was not until several days after the signing of the Customer Service Agreement that Brad Uebelecker ("Mr. Uebelacker") called me and inquired what percentage of calls would be made to wireless destinations.

8. I did not know what percentage of use would be made to wireless telephones and did not provide Mr. Uebelecker or anyone at US LEC with any number or representation as to the percentage of calls that would be made to wireless telephones.

9. To my knowledge, Airstream has not participated in or facilitated any fraudulent scheme or illegal activity.

FURTHER AFFIANT SAITH NOT.

JASON BRAVERMAN

SWORN to and subscribed before me this 13th day of August, 2002.

Notary Public

My Commission Expires:

BRENDA R. JOHNSON NOTARY PUBLIC AT LARGE MY COMM. EXP. 2-2-05 SHELBY CO. TN

Respectfully submitted,

EUGENE J. PODESTA, JR. (#9831)
CLINTON J. SIMPSON (#20284)
Attorneys for Plaintiff
Airstream Wireless Services

OF COUNSEL:

BAKER, DONELSON, BEARMAN & CALDWELL
165 Madison Avenue, Suite 2000
Memphis, TN 38103
(901) 526-2000

CERTIFICATE OF SERVICE

I, Clint Simpson, hereby certify that I have served a true and exact copy of this Affidavit was served upon Luther Wright, Esq., Boult, Cummings, Conners & Berry, PLC, 414 Union Street, Suite 1600, P. O. Box 198062, Nashville, Tennessee, 37219, this the _____ day of August, 2002.

CLINT SIMPSON

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. CH-02-1441-3
	)	
US LEC OF TENNESSEE, INC.,	)	
	)	
Defendant.	)	

RESPONSE OF AIRSTREAM WIRELESS SERVICES TO DEFENDANT'S MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO DISMISS

Airstream Wireless Services ("Airstream") in response to Defendant's Motion to Dissolve Temporary Restraining Order and to Dismiss would respectfully state to this Court that:

I. The Temporary Restraining Order ("TRO") issued by this Court on July 30, 2002, is valid and enforceable; and

II. This Court has proper jurisdiction over this matter.

LAW AND ARGUMENT

I. THE TRO ISSUED BY THIS COURT ON JULY 30, 2002, IS VALID AND ENFORCEABLE.

A. Defendant failed to show that the TRO issued by this Court is void.

This Court entered a Temporary Restraining Order on July 30, 2002, prohibiting the Defendant from continuing to breach its contractual obligations to provide international telephone service to Airstream. The Defendant has ignored the orders of this Court and has continued to date to refuse to provide the bargained for service to Airstream. The effect of Defendant's conduct is to shut down Airstream's operation. Airstream has lost its customers and thus has no market for the telephone services at this point even should Defendant immediately

elect to abide by its contractual obligations and to obey the orders of this Court. This Court must now decide whether a party may disregard its orders with impunity.

The Defendant contends that the TRO issued by this Court on July 30, 2002, is facially void, and as a result, may be disregarded without penalty, as evidenced by Defendant's failure to abide by the TRO issued by this Court in this matter.

In its argument that this Court's TRO is void, Defendant cites *Segelke v. Segelke,* 584 S.W.2d 211 (Tenn. Ct. App. 1978) stating that it is a well-settled rule in Tennessee that facially void injunctions may be disobeyed without penalty. In *Segelke,* the pertinent issues arose out of a child custody dispute between a mother and father. The father, Mr. Segelke, blatantly disregarded a Tennessee court's temporary restraining order by removing his children from the State of Tennessee and returning them to Texas where he resided. After being found in contempt of the court's TRO, Mr. Segelke moved the court to vacate the temporary restraining order and other various decrees issued by the court. The court stated that it is a well-settled rule in this jurisdiction (Tennessee) that unless an injunction is void, it must be obeyed until set aside by the court. *Segelke,* 584 S.W.2d at 214. The court also quoted *Aladdin Industries, Inc. v. Associated Transport, Inc.,* 323 S.W.2d 222 (1958) which stated that, "Such an injunction, however erroneous, must be obeyed until set aside by the court granting it or by an appellate court." In that same case, the *Aladdin* court held that before an injunction can be disregarded, it must be "void," not voidable. *Aladdin,* 323 S.W.2d at 228.

The Defendant also cites to *Aladdin Industries, Inc. v. Associated Transport, Inc., et al.,* 323 S.W.2d 222 (Tenn. Ct. App. 1958) in its Motion to further support its contention that an injunction is facially void when the court entering the injunction does not have subject matter jurisdiction. In *Aladdin,* the court provides guidance regarding the jurisdiction issue and stated

that irrespective of whether a court has jurisdiction in the sense that it could have entered final decrees that would have ultimately been held free from error, that court has jurisdiction to determine all the issues, including that of its own jurisdiction, and to grant a temporary injunction to preserve the status quo pending such determination. *Aladdin,* 323 S.W.2d at 228.

The *Aladdin* court further stated that "if a court should go so clearly and so far outside of its jurisdiction as to act, not as a court but as a usurper, its order would be void, would bind no one, and could be disregarded by anyone with impunity." *Aladdin,* 323 S.W.2d at 229. In support of this statement, the *Aladdin* court quoted Mr. Justice Frankfurter who stated:

> Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities, may an order issued by a court be disobeyed and treated as though it were a letter to a newspaper. Short of an indisputable want of authority on the part of a court, the very existence of a court presupposes its power to entertain a controversy, if only to decide, after deliberation, that it has no power over the particular controversy.

United States v. United Mine Workers of America, 330 U.S. 309-310, 67 S. Ct. 704, 91 L.Ed. 921.

The *Aladdin* court affirmed its previous ruling that as a general principal of equity, irrespective of the question of the court's ultimate jurisdiction, the court in this case had the jurisdiction to determine the question and to issue a temporary injunction preserving the status quo pending such determination, and to punish appellants for contempt for disobeying the injunction. *Aladdin,* 323 S.W.2d at 231.

In accordance with the laws of the State of Tennessee, this Court properly issued the TRO petitioned for by Airstream on July 30, 2002. In its argument that this Court lacked jurisdiction to issue the TRO, Defendant failed to establish any proof that this Court was so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities. Thus, the TRO issued by this Court on July 30, 2002, is valid. As a direct consequence of Defendant's

blatant disregard for this Court's authority, Airstream has incurred substantial detriment and respectfully requests this Court, as permitted by law, to find Defendant in contempt of this Court's Order.

B. Defendant's Argument to Dissolve the TRO is Moot.

Airstream further contends that Defendant's argument to dissolve the TRO issued by this Court on July 30, 2002, is moot at this time as Defendant's blatant disregard for this Court's order has resulted in the loss of Airstream's customers for the service at issue. As a consequence, Airstream can no longer fulfill its obligations under the terms of the Customer Service Agreement entered into with Defendant. (Affidavit of Jason Braverman, ¶ 2). Therefore, there is no longer any reason why this Court's TRO should remain effective.

However, Airstream will address, for purposes of this response, Defendant's allegations that: (1) this TRO was improvidently granted; and (2) Defendant's contention that compliance with the TRO in this matter would have forced Defendant to knowingly participate in a fraudulent scheme.

First, Defendant asserts that counsel for Airstream represented to US LEC's in-house counsel, Mr. Shane Turley, that Airstream would inform Mr. Turley before any legal action was filed or injunction sought in order to provide Defendant with an opportunity to be present at the hearing. (Affidavit of Shane Turley, ¶ 4). After Jason Braverman, CEO of Airstream, attempted to resolve the matter with Defendant on July 24, 2002, Mr. Braverman consulted counsel to represent Airstream. Counsel for Airstream spoke with representatives of Defendant on July 26, 2002, regarding the restoration of service. (Affidavit of Simpson, ¶ 2). Counsel for Airstream notified Mr. Turley, in-house counsel for Defendant, of the necessity that service be restored immediately as Airstream would incur irreparable harm if service was not restored. (Affidavit of Simpson, ¶ 3). On Monday, July 29, 2002, counsel for Airstream informed Mr. Turley that it

was Airstream's intent to go to court on the following morning, July 30, 2002, and request that the Court issue a temporary restraining order to enjoin Defendant from refusing to provide service pursuant to the terms of the Customer Service Agreement. (Affidavit of Simpson, ¶ 4). Solely as a courtesy to Defendant, counsel for Airstream asked Mr. Turley for the name of local counsel for Defendant in the State of Tennessee. (Affidavit of Simpson, ¶ 5). Mr. Turley informed counsel for Airstream that he did not know the names of Defendant's local counsel in Tennessee at that moment. (Affidavit of Simpson, ¶ 5). Counsel for Airstream explained to Mr. Turley that this matter was urgent as Airstream was facing substantial expense and potential liability with its customers as a result of the termination of its service by Defendant. (Affidavit of Simpson, ¶ 6). Counsel for Airstream did not receive any further response regarding this matter from Mr. Turley for the remainder of that day, July 29, 2002. (Affidavit of Simpson, ¶ 7).

The conversation between counsel for Airstream and Mr. Turley on July 29, 2002 was notice to Defendant that Airstream was going to court the following morning to request the Court to issue a temporary restraining order. Defendant had the opportunity to obtain local counsel's name and notify its local counsel of the situation and have them call counsel for Airstream on Monday, July 29, 2002, and never did so. In fact, counsel for Airstream did not learn of local counsel's identity until Thursday, August 1, 2002. (Affidavit of Simpson, ¶ 8). Counsel for Airstream called local counsel on the afternoon of August 1, 2002, and did not receive a return call until that evening. (Affidavit of Simpson, ¶ 9). Airstream did not have time to wait for Defendant to act at its own pace, as Airstream was faced with dire circumstances. Therefore, Defendant was not misled by Airstream or its counsel. Faced with immediate and irreparable harm as a result of Defendant's conduct, Airstream was forced to act as quickly as possible to avoid substantial detriment.

Next, Airstream also rebuts Defendant's allegation that adherence to this Court's TRO would have forced it to participate in a fraudulent scheme. Even if Defendant was permitted to temporarily terminate Airstream's service because its traffic patterns were indicative of a fraudulent scheme, Defendant did not possess the right to continue denying service pursuant to the terms of the Customer Service Agreement after it learned that Airstream was not defrauding Defendant and that Airstream fully intended to pay its bill as it became due.

The Defendant alleges two types of fraud in this matter. First, the Defendant alleges that upon learning that the traffic patterns of Airstream indicated 99.7% of its minutes were being terminated to wireless telephones, that such traffic patterns were indicative of fraudulent activity. In this instance, the fraudulent activity alleged by Defendant primarily means that a customer is running up substantial minutes for which it does not intend to pay. In the case at hand, Airstream clearly intended to pay for all minutes it used. After speaking with Mr. Braverman on July 24, 2002, the Defendant was aware that Airstream intended to pay for the minutes used at the rates contained in the Agreement.

The second allegation of fraud originates from Defendant's contention that Airstream fraudulently induced it into entering the Agreement. Defendant alleges that Airstream represented to it that no more than 10% to 15% of calls would be terminated to wireless telephones. However, Mr. Braverman stated, in his Affidavit, that there were no such representations made. (Affidavit of Braverman, ¶ 5). Additionally, the Customer Service Agreement does not contain any provision which indicates that such restrictions were in place on service. Furthermore, the Defendant is confronted with a parol evidence issue in its attempt to prove that Airstream made these alleged representations which were not reflected in the

Agreement. Either instance of Defendant's allegations of fraud are exactly the type of matters this Court has jurisdiction to hear.

In its attempts to illustrate the alleged fraudulent activities, Defendant alleges that someone was using a switch to separate, based on the numbers being called, calls made to wireless telephones from calls made to land line telephones and routing all wireless calls to Defendant or using auto dialers, or similar equipment, to dial repeatedly to wireless telephones. (Affidavit of Mike Moeller, ¶ 9). Defendant states that this abnormal traffic pattern is the result of deliberate manipulation and is likely being done for fraudulent purpose. (Affidavit of Moeller, ¶ 9). However, Defendant has failed to provide any evidence or explanation what the fraudulent purpose may be. Defendant alleges that it was concerned about a pattern of activity which, it felt, could evidence an intent not to pay for the contracted service. What Defendant is really concerned about is the fact that it sold for six cents per minute service which, as it turns out cost Defendant much more. This point is evidenced by the Affidavit of Mike Moeller who expressly states the true underlying reason why service was terminated by Defendant. In his Affidavit, Mr. Moeller states that, "If US LEC is required to restore services to Airstream, US LEC will lose approximately $12,000.00 per day ..." (Affidavit of Moeller, ¶ 11).

Upon terminating the service and learning that there was no fraudulent scheme, Defendant was obligated to restore service pursuant to the terms of the Agreement. Defendant's actions and course of dealings with Airstream completely contradict their argument and defense in this matter that there was a fraudulent scheme. Defendant states that it terminated Airstream's service because the traffic patterns were indicative of fraud. However, after speaking with Mr. Braverman on July 24, 2002, Defendant, represented by Rod Baine and Bob Stanton, was willing and proposing to re-negotiate the Customer Service Agreement by increasing the agreed

upon rates in the Agreement. (Affidavit of Braverman, ¶ 4). Defendant's actions to attempt to re-negotiate the wireless rates pursuant to the Agreement and then allow Airstream to continue operating in the same manner at a higher rate is not consistent with its claim that adhering to this Court's TRO would have forced Defendant to participate in a fraudulent scheme. Defendant's actions fly in the face of the defense it is using to avoid its obligations pursuant to the terms of the Customer Agreement.

II. PROPER JURISDICTION FOR THIS CASE RESIDES WITH THIS COURT, NOT THE TENNESSEE REGULATORY AUTHORITY.

A. Airstream did not expressly submit to the Jurisdiction of the Tennessee Regulatory Authority.

Although Defendant does not allege that Airstream expressly submitted to the jurisdiction of the Tennessee Regulatory Authority ("TRA"), Airstream states that neither the Agreement nor the tariff incorporated in the Agreement provides that the parties submit to the jurisdiction of the TRA to hear any matter arising out of the Customer Service Agreement at issue in this case.

B. This Case Does Not Arise Out of the Tennessee Telecommunications Act.

The case at hand does not arise out of the Tennessee Telecommunications Act (the "Act"). 1995 Tenn. Pub. Acts, chapter 408; Tenn. Code Ann. § 65-4-123, *et seq.* In support of its contention that this Court does not have jurisdiction to hear this matter, Defendant cites to *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 394-96, 119 S. Ct. 721, 737-38, 142 L. Ed.2d 834 (1999), which discussed in part that the General Assembly obviously intended the TRA, rather than the courts, to apply its expertise in managing the transition of local telephone service from a monopolistic to a competitive environment. The issues at hand have absolutely no relation to monopolies and the competitive environment of telecommunications service providers. The real issue at hand in this matter is whether the Defendant breached its Agreement with Airstream.

The Defendant requests the Court to look at the gravamen of the issues involved in this matter. Upon analyzing the real issues in this matter, it is clear that this Court does have jurisdiction over this matter and that this matter does not unquestionably arise out of the Act. Defendant alleges that it terminated service to Airstream because Airstream's traffic patterns were the result of deliberate manipulation and likely being done for a fraudulent purpose. (Affidavit of Mike Moeller, ¶ 9). Defendant does not contend that using a switch to separate, based on the number being called, calls made to land line telephone and routing all wireless calls to Defendant or that using auto dialers to dial repeatedly to wireless telephones are illegal or fraudulent acts. If the fact that Airstream's traffic patterns, which Defendant alleges reflected that 99.7% of the calls from Airstream were being made to wireless telephones, was fraudulent, Defendant would have never attempted to re-negotiate the rates of original contract with Airstream to allow Airstream to continue doing business in the same manner only at a higher rate. Thus, the real gravamen of this case is clearly expressed in paragraph 7 of the Affidavit of Mike Moeller, whereby Mr. Moeller states that during negotiations with Airstream, Airstream represented to Defendant that no more than 10% to 15% of international traffic would be made to wireless telephones. (Affidavit of Moeller, ¶ 7). The real gravamen of this case is that Defendant contends that they were fraudulently induced to enter the Contract with Airstream. Therefore, this matter does not arise out of the Act, but rather, is a common law suit based on a claim for breach of contract by Airstream and a counter-claim or defense based on fraudulent inducement to enter such contract by Defendant. Again, Defendant would have never attempted to modify the Contract and renegotiate the rates in the Agreement if Airstream's actual traffic was fraudulent or illegal. Therefore, this case neither requires an interpretation by the TRA of its rules or regulations nor an analysis of whether any communications laws were being violated.

C. This Case is not a Regulation Case Normally Heard by the TRA.

This is not the type of case within the jurisdiction of the TRA or the type of case normally heard by the TRA. In *BellSouth Advertising & Publishing Corp. v. Tennessee Regulatory Authority,* 2002 Westlaw 1473208 (Tenn. 2002) (petition to rehear pending) (copy attached), the court refers to Section 1 of Chapter 408 of the Tennessee Public Acts whereby the General Assembly outlined the public policy underlying the new regulatory scheme which, as stated earlier, altered in a most significant manner the telecommunications industry in Tennessee:

> **Declaration Of Telecommunication Services Policy.** The General Assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications service markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

Tenn. Code Ann. § 65-4-123 (Supp. 2001).

Further, the cases cited by Defendant in its argument that the TRA has original jurisdiction over this matter are very distinct from the case at hand. The *BellSouth* case involved competition issues whereby the court determined that the TRA had the authority to order a publisher to include competitors' names and logos on the directory covers of the white pages. *BellSouth Advertising & Publishing Corp. v. Tennessee Regulatory Authority,* 2002 Westlaw 1473208 (Tenn. 2002). The court in *BellSouth* stated that one of the more notable changes affected by the enactment of Tenn. Pub. Acts 408 (effective June 6, 1995) which comprehensibly reformed the rules under which providers of telephone services operate in

Tennessee was the abolition of monopolistic control over the local telephone service market and the initiation of open-market competition in the provision of local telephone service. *BellSouth* at p. 1.

Defendant also cites to *Breeden v. Southern Bell Tel. & Tel. Co.,* 199 Tenn. 203, 285 S.W.2d 346 (Tenn. 1955), whereby one of the issues before that court was whether the Commission (now the present day TRA) could require a telephone company to provide service to people in a community. The case was rooted in discrimination and whether a telecommunications company had to provide services to a certain community. The *Breeden* court took note of and referred to *McCollum v. Southern Bell Tel. & Tel. Co.,* 163 Tenn. 277, 43 S.W.2d 390, whereby the Court previously stated:

> The legal profession has generally so construed the Act, and we think there can be no doubt but that the Legislature intended to confer upon the commission (present day TRA) exclusive jurisdiction, in the first instance, to establish reasonable rates and charges.

The court in *Breeden* added that the same language is applicable to its case. *Breeden,* 285 S.W.2d at 351. Before the telephone company can be required to serve the people of the community such as the one at issue in *Breeden,* the Railroad and Public Utilities Commission must hear the matter and grant the necessary certificate therein. This case required a statutory interpretation and is very distinct from the present matter which does not require any similar interpretation.

The Defendant also cites to *Consumer Advocate Division v. Tennessee Regulatory Authority,* 2002 WL 1579700 (Tenn. Ct. App. 2002) (no Rule 11 application filed) (copy attached) whereby the principal issue in that case was whether the telephone directory assistance service is basic or non-basic under the statutory scheme. Defendant contends that this case stands for the rule that courts have no jurisdiction in service disputes until the commission (now

TRA) makes the initial determination about whether service should be provided. In the case at hand, there is no requirement that an initial determination about whether service should be provided should be made. The primary issue in this case is whether Defendant breached its contract with Airstream.

The cases cited by the Defendant in support of its argument that the TRA has original jurisdiction over this matter are all very distinguishable from the case at hand. The cases cited by Defendant all involve issues of competition, discrimination, determinations whether initial service should be provided to a community, and statutory interpretation of the TRA's own rules and statutory provisions. The case at hand involves no issues even remotely similar to the ones in the cases cited by Defendant.

CONCLUSION

Defendant failed to adhere to this Court's TRO, and as a direct result and consequence, Airstream suffered substantial detriment and now faces potential liability for breaching its contracts with its customers. This Court had proper jurisdiction to issue the TRO and has proper jurisdiction to hold Defendant in contempt of this Court's Order. As Justice Frankfurter stated in *United Mine Workers of America*:

> Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities, may an order issued by a court be disobeyed and treated as though it were a letter to a newspaper. Short of an indisputable want of authority on the part of a court, the very existence of a court presupposes its power to entertain a controversy, if only to decide, after deliberation, that it has no power over the particular controversy.

Furthermore, this Court has proper jurisdiction to hear this matter. As illustrated in Airstream's argument, the issues at hand in this matter do not involve regulation of the telecommunications industry, but only a breach of contract claim by Airstream. Also, by its own admission through the Affidavit of Mike Moeller, the Vice-President of Sales in Kentucky and

Tennessee of Defendant, Defendant clearly expresses the primary issue in this matter when Mr. Moeller states that Defendant would lose approximately $12,000.00 per day if it was required to restore service to Airstream pursuant to the terms of the Agreement. The central issue in this case is not whether Airstream's actions were fraudulent or illegal, but rather it is that Defendant will lose money based on the terms of the Agreement that it freely entered into with Airstream.

Respectfully submitted,

EUGENE J. PODESTA, JR. (#9834)
CLINTON J. SIMPSON (#20284)
Attorneys for Plaintiff
Airstream Wireless Services

OF COUNSEL:

BAKER, DONELSON, BEARMAN & CALDWELL
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CERTIFICATE OF SERVICE

I, Clint Simpson, hereby certify that I have served a true and exact copy of this Response of Airstream on Luther Wright, Esquire, Esq., Boult, Cummings, Conners & Berry, PLC, 414 Union Street, Suite 1600, P. O. Box 198062, Nashville, Tennessee, 37219, this the 13th day of August, 2002.

CLINT SIMPSON

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Only the Westlaw citation is currently available.

Supreme Court of Tennessee,
at Nashville.

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION,
v.
TENNESSEE REGULATORY AUTHORITY.
and
Bellsouth Advertising & Publishing Corporation,
v.
Nextlink Tennessee.

July 10, 2002.

Telephone directory publisher appealed from orders of the Tennessee Regulatory Authority (TRA) requiring it to brand covers of telephone directory with names and logos of local telecommunications companies in competition with its parent company. On consolidated appeal, the Court of Appeals reversed. Upon grant of permission to appeal, the Supreme Court, Adolpho A. Birch Jr., J., held that: (1) TRA had authority to order publisher to include competitor's names and logos on directory covers; (2) TRA had jurisdiction over directory publisher; and (3) requiring publisher to include competitor's names and logos did not violate First Amendment.

Court of Appeals reversed.

West Headnotes

[1] **Telecommunications** 267
372k267 Most Cited Cases

Tennessee Regulatory Authority (TRA) had authority to require telephone directory publisher to include names and logos of competing local telephone service providers on cover of directory. T.C.A. § § 65-2-102(2), 65-4- 104, 65-4-106.

[2] **Public Utilities** 194
317Ak194 Most Cited Cases

The Supreme Court interprets the statutes governing the Tennessee Regulatory Authority's (TRA) authority de novo as a question of law, and construes the statutes liberally to further the legislature's intent to grant broad authority to the TRA. T.C.A. § 65-4-104.

[3] **Telecommunications** 267
372k267 Most Cited Cases

Tennessee Regulatory Authority (TRA) had jurisdiction over telephone directory publisher, which was subsidiary of incumbent local exchange telephone company, and thus TRA could require that directory publisher include names and logos of competing local telephone service providers on directory cover, where parent company was required by law to provide white pages directory in its market areas, and parent company contracted that duty to subsidiary.

[4] **Constitutional Law** 90.1(9)
92k90.1(9) Most Cited Cases

[4] **Telecommunications** 267
372k267 Most Cited Cases

Requirement that telephone directory publisher include names and logos of competing local telephone service providers on cover of directory did not violate First Amendment, where requirement was reasonably related to state's interest in advancing competition in provision of local telephone services by informing consumers as to existence of alternative local telephone services, requiring names and logos on directory covers did not impose inordinate burden on incumbent local exchange telephone company, requiring that logos of competing firms be displayed on equal footing with incumbent's logo did not substantially affect incumbent's ability to communicate its own speech to customers in market, and requirement was reasonably related to state's interest in preventing deception of consumers. U.S.C.A. Const.Amend. 1.

[5] **Constitutional Law** 90.2
92k90.2 Most Cited Cases

[5] **Constitutional Law** 274.1(2.1)
92k274.1(2.1) Most Cited Cases

Commercial speech, that is, expression related solely to the economic interests of the speaker and his or her audience, is constitutionally protected under the First Amendment, as applied to the States under the Fourteenth Amendment. U.S.C.A. Const.Amends. 1, 14

Appeal from the Court of Appeals, Middle Section, Tennessee Regulatory Authority at Nashville, No. 96-01692.

J. Richard Collier and Julie M. Woodruff, Nashville, Tennessee, for the appellant, Tennessee Regulatory Authority.

Henry Walker, Nashville, Tennessee, for the appellants, AT & T Communications of South Central States, Inc., MCI Worldcom Network Services, Inc., and XO Tennessee, Inc.

Paul S. Davidson and Guilford F. Thornton, Jr., Nashville, Tennessee, Daniel J. Thompson, Jr., Tucker, Georgia, and James F. Bogan, III, Atlanta, Georgia, for the appellee, BellSouth Advertising & Publishing Corporation.

OPINION

ADOLPHO A. BIRCH, JR., J., delivered the opinion of the court, in which FRANK DROWOTA, III, C.J., E. RILEY ANDERSON, JANICE M. HOLDER, and WILLIAM M. BARKER, JJ. joined.

I. Facts and Procedural History

***1** This consolidated appeal presents two very important issues. They are: (1) whether the Tennessee Regulatory Authority has the authority to require that the names and logos of local telephone service providers who compete with BellSouth Telecommunications, Inc. be included on the cover of white pages telephone directories published by BellSouth Advertising & Publishing Corporation on behalf of BellSouth Telecommunications, Inc.; and (2) whether the Tennessee Regulatory Authority's decisions in these consolidated cases violate the First Amendment of the Constitution of the United States. For the reasons discussed herein, we hold that the Tennessee Regulatory Authority is authorized to require that the names and logos of competing local telephone service providers be included on the covers of the white pages telephone directories published on behalf of BellSouth Telecommunications, Inc., and that the Tennessee Regulatory Authority's decisions in these two cases do not violate the First Amendment. Accordingly, we reverse the judgment of the Court of Appeals in this consolidated appeal and reinstate the judgments of the Tennessee Regulatory Authority.

Prior to June 1995, local telephone services in Tennessee were sold to the consumer by monopoly providers. Provision of those services changed dramatically, however, with the Tennessee General Assembly's enactment of 1995 Tenn. Pub. Acts 408 (effective June 6, 1995) (Chapter 408), which comprehensively reformed the rules under which providers of telephone services operate in Tennessee. One of the more notable changes effected by the enactment of Chapter 408 was the abolition of monopolistic control of the local telephone service market and the initiation of open-market competition in the provision of local telephone service.

Under the two above-cited telecommunications statutes, any local telephone service provider who operated as a monopoly under the prior system was thenceforth designated as an "incumbent local exchange telephone company." Likewise, any telecommunications company providing local telephone services in competition with the incumbent local exchange telephone company was designated as a "competing local exchange telephone company."

BellSouth Telecommunications, Inc. (BellSouth), under its former name, South Central Bell, operated as a monopoly in providing local telephone service in Tennessee markets prior to the enactment of Chapter 408. BellSouth, therefore, is an incumbent local exchange telephone company for purposes of the new state and federal laws. Under the former regulatory system, BellSouth was required to publish for each service area a "white pages" telephone directory listing all telephone subscribers within the area. Tenn. Comp. R. & Regs 1220-4-2-.15 (1999). That obligation continues under the new regulatory scheme. *Id.;* Tenn.Code Ann. § 65-4-124(c) (Supp.2001). *See also* 47 U.S.C.A. § 271(c)(2)(B)(viii) (West Supp.2001). [FN1]

***2** In order to fulfill its obligation to publish a white pages directory, BellSouth contracted with BellSouth Advertising & Publishing Corporation (BAPCO). BAPCO publishes "white pages" and "yellow pages" directories for BellSouth in many different markets. While BellSouth and BAPCO are separate corporations, both are parts of BellSouth Corporation. The **"BELLSOUTH"** logo is the only logo printed on the white pages and yellow pages directories published by BAPCO for BellSouth.

A. The AT & T Proceeding

AT & T Communications of South Central States, Inc. (AT & T), a competing local exchange telephone

company, negotiated an "interconnection agreement" with BellSouth as was permitted under the new regulations. *See* Tenn.Code Ann. § 65-4-124(a) (Supp.2001). As to any issues relating to the telephone directories BAPCO published for BellSouth, however, BellSouth required AT & T to negotiate with BAPCO.

AT & T then opened negotiations with BAPCO for the purpose of including its subscribers within BellSouth's white pages and its name or logo on the cover of the white pages directories in areas in which AT & T competes with BellSouth in the provision of local telephone services. They reached an agreement and entered into a contract in August 1996 on all terms except the directory-cover issue, which was omitted from the contract.

At the time, the Tennessee Regulatory Authority (TRA), pursuant to the federal act, was conducting an arbitration proceeding pertaining to certain issues that had arisen in the implementation of the new competitive system. AT & T filed a petition in the arbitration proceeding asking the TRA to require BAPCO to place AT & T's name and logo on BellSouth's white pages directory covers. In turn, BAPCO filed a petition asking the TRA to declare that BAPCO was not subject to the TRA's jurisdiction and that issues relating to the publication of telephone directories were beyond the scope of the arbitration proceeding, which was governed by federal law. On October 21, 1996, the TRA formally declined to address the issue, finding that "private negotiations are the preferred method of resolving this issue."

On December 16, 1996, after further negotiations had proved fruitless, AT & T filed a petition with the TRA seeking a declaratory order as to the applicability of Tenn.Code Ann. § § 65-4-104,--117(3),--122(c), and Tenn. Comp. R. & Regs. 1220-4-2-.15 to the white pages directories published by BAPCO on behalf of BellSouth. In its petition, AT & T asked the TRA to join BellSouth and BAPCO as parties to the proceeding, to conduct a contested case hearing on the petition, and to declare that "telephone directories are an essential aspect of the telephone or telecommunications services of telephone utilities such as [BellSouth]; and that the covers of directories, published and distributed by BAPCO on behalf of [BellSouth] which include the names and numbers of customers of AT & T, must be nondiscriminatory and competitively neutral, and either must include the name and logo of AT & T in like manner to the name and logo of [BellSouth], or include no company's name and logo, including 'BellSouth.' "

*3 The TRA voted to convene a contested case hearing and formally made BellSouth and BAPCO parties to the proceeding. [FN2] The TRA subsequently granted petitions to intervene filed on behalf of MCI Telecommunications, Inc., American Communications Services, Inc., and Nextlink Tennessee, LLC ("Nextlink"), which, like AT & T, are competing local exchange telephone companies serving various local markets in Tennessee. [FN3]

After conducting a contested case hearing and considering the testimony and exhibits admitted into evidence, the TRA, in a 2 to 1 decision, ruled in favor of AT & T. In the written declaratory order issued by the majority, it declared that:

> BAPCO, in the publication of basic White pages directory listings on behalf of BellSouth, is required to comply with the directives of the [TRA] and the provisions of Authority Rule 1220-4-2-.15. Further, in the publication of these directory listings on behalf of BellSouth which contain the listings of local telephone customers of AT & T and other competing local exchange providers, BAPCO must provide the opportunity to AT & T to contract with BAPCO for the appearance of AT & T's name and logo on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract. Likewise, BAPCO must offer the same terms and conditions to AT & T in a just and reasonable manner.

The dissenting TRA Director stated in a separate opinion that he agreed with the majority that the names and logos of competing local exchange telephone companies should be placed on the front cover of the directories published by BAPCO on behalf of BellSouth. He concluded, however, that the rule relied upon by the majority (Rule 1220-4-2-.15), which was promulgated during the time of monopoly local telephone service, did not apply to the new competitive system and that the TRA should initiate a rulemaking proceeding to amend the rule to require that competitors' names and logos appear on the white pages directory covers. BAPCO appealed the decision to the Court of Appeals. [FN4]

B. The Nextlink Proceeding

While the appeal of the AT & T proceeding was pending in the Court of Appeals, Nextlink requested that BAPCO include Nextlink's name and logo on the

cover of the white pages directory published by BAPCO for Nextlink's service area. BAPCO denied that request. Nextlink subsequently filed a petition asking the TRA for a declaratory order on the issue. Nextlink asked the TRA to order BAPCO to comply with Rule 1220-4-2-.15 as interpreted in the declaratory order entered in the AT & T proceeding. Nextlink asserted that BAPCO is required to afford *all* competing local exchange telephone companies the opportunity to appear on white pages directory covers in their service areas as a result of the TRA's interpretation of the rule in the AT & T declaratory order.

After hearing oral arguments by the parties, the TRA ruled in favor of Nextlink. [FN5] In pertinent part, it concluded that its interpretation of Rule 1220-4-2-.15 in the AT & T proceeding "must be equally applied to all similarly situated carriers that seek the same relief." The TRA directed BAPCO "to comply with TRA Rule 1220-4-2-.15, as interpreted in its Declaratory Order entered on March 19, 1998 [the AT & T declaratory order]."

*4 BAPCO appealed the decision to the Court of Appeals. The appeals of the AT & T and Nextlink proceedings were argued separately in the Court of Appeals, although the court subsequently consolidated the two appeals. [FN6]

COA reversed TRA

The Court of Appeals reversed the two declaratory orders entered by the TRA. A majority of the three-judge panel agreed that the TRA had exceeded its authority under state law in ordering BAPCO to include the names and logos of competing telecommunications companies on the covers of the white pages directories published by BAPCO for BellSouth. The two-judge majority agreed also that the TRA's declaratory orders violated the First Amendment. In a dissenting opinion, the third member of the panel concluded that the TRA's decisions in these two cases were authorized by state law and did not violate First Amendment principles.

The TRA applied to this Court for permission to appeal pursuant to Tenn. R.App. P. 11, and we granted the application. On appeal, we must address two issues: (1) whether the TRA has the authority to require that the names and logos of "competing local exchange telephone companies" be included on the cover of white pages telephone directories published on behalf of BellSouth; and (2) whether imposing such a requirement violates the First Amendment of the United States Constitution. [FN7] After a painstaking review of the voluminous record and a thorough consideration of the issues, we hold that (1) the TRA is authorized to require that the names and logos of competing local exchange telephone companies be included on the cover of white pages directories published on behalf of BellSouth; and (2) the TRA's decisions in these two cases do not violate the First Amendment. Accordingly, the judgment of the Court of Appeals is reversed, and the judgments of the TRA are reinstated.

II. Authority of the Tennessee Regulatory Authority

[1] We address first the question whether the TRA has the authority to require that the names and logos of competing telephone companies be included on the cover of white pages directories published on behalf of BellSouth. In defining the authority of the TRA, this Court has held that "[a]ny authority exercised by the [TRA] must be as the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power." *Tennessee Pub. Serv. Comm'n v. Southern Ry. Co.*, 554 S.W.2d 612, 613 (Tenn.1977). The primary grant of authority to the TRA is located at Tenn.Code Ann. § 65-4-104 (Supp.2001), the provision defining the TRA's general jurisdiction. The statute provides, in pertinent part, that "the authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter." *Id.* In the exercise of this general power, Tenn.Code Ann. § 65-4-117 provides, "[T]he authority has the power to ... [a]fter hearing, by order in writing, fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility [.]" Tenn.Code Ann. § 65-4-117(3) (Supp.2001).

Prim. grant by statute

*5 In construing these provisions, we are guided both by statute and by the prior decisions of this Court. At the outset,

> This chapter shall not be construed as being in derogation of the common law, but shall be given a liberal construction, and any doubt as to the existence or extent of a power conferred on the authority by this chapter or chapters 1, 3 and 5 of this title shall be resolved in favor of the existence of the power, to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction by this chapter.

Tenn.Code Ann. § 65-4-106 (Supp.2001). In addition, this Court has held that the issue whether an administrative agency's action is explicitly or

implicitly authorized by the agency's governing statute "is a question of law, not of fact, and this Court's role is to interpret the law under the facts of the case." *Sanifill of Tennessee, Inc. v. Tennessee Solid Waste Disposal Control Bd.*, 907 S.W.2d 807, 810 (Tenn.1995). Moreover, this Court has observed:

> [T]he General Assembly has charged the TRA with the "general supervisory and regulatory power, jurisdiction and control over all public utilities." Tenn.Code Ann. § 65-4-104 (1997 Supp.). In fact, the Legislature has explicitly directed that statutory provisions relating to the authority of the TRA shall be given "a liberal construction" and has mandated that "any doubts as to the existence or extent of a power conferred on the [TRA] ... shall be resolved in favor of the existence of the power, to the end that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction...." Tenn.Code Ann. § 65-4-106 (1997 Supp.). The General Assembly, therefore, has "signaled its clear intent to vest in the [TRA] practically plenary authority over the utilities within its jurisdiction." *Tennessee Cable Television Ass'n v. Tennessee Public Service Comm'n*, 844 S.W.2d 151, 159 (Tenn.App.1992). To enable the TRA to effectively accomplish its designated purpose--the governance and supervision of public utilities--the General Assembly has empowered the TRA to "adopt rules governing the procedures prescribed or authorized," including "rules of practice before the authority, together with forms and instructions," and "rules implementing, interpreting or making specific the various laws which [the TRA] enforces or administers." Tenn.Code Ann. § 65-2-102(1) & (2) (1997 Supp.).

Consumer Advocate Div. v. Greer, 967 S.W.2d 759, 761-62 (Tenn.1998).

[2] Thus, in sum, we interpret the statutes governing the TRA's authority *de novo* as a question of law, and we construe the statutes liberally to further the legislature's intent to grant broad authority to the TRA.

A. Chapter 408

In Section I of Chapter 408, the General Assembly outlined the public policy underlying the new regulatory scheme which, as stated earlier, altered in a most significant manner the telecommunications industry in Tennessee:

> ***6 Declaration of telecommunications services policy.** The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

Tenn.Code Ann. § 65-4-123 (Supp.2001).

Another section of Chapter 408, now codified at Tenn.Code Ann. § 65-4-124 (Supp.2001), provides, in pertinent part:

> (a) All telecommunications services providers shall provide non- discriminatory interconnection to their public networks under reasonable terms and conditions; and all telecommunications services providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non- discriminatory basis from all other telecommunications services providers.
>
> (b) Prior to January 1, 1996, the commission shall, at a minimum, promulgate rules and issue such orders as necessary to implement the requirements of subsection (a) and to provide for unbundling of service elements and functions, terms for resale, interLATA presubscription, number portability, and packaging of a basic local exchange telephone service or unbundled features or functions with services of other providers.
>
> (c) These rules shall also ensure that all telecommunications services providers who provide basic local exchange telephone service or its equivalent provide each customer a basic White Pages directory listing....

Two of the provisions in Tenn.Code Ann. § 65-4-124 are especially relevant to the pending cases: subparagraph (b) requires the TRA to "promulgate rules *and issue such orders as necessary* to implement the provisions of subsection (a)" (emphasis added); and subparagraph (c) requires the TRA to "ensure that all telecommunications services providers who provide basic local exchange telephone service ... provide each customer a basic White Pages directory listing...."

The TRA relies on the two foregoing provisions of Chapter 408 (Tenn.Code Ann. § § 65-4-123 and--124) to support its contention that its declaratory orders did not exceed the agency's statutory authority. In addition to its reliance upon the above-enumerated statutes, the TRA relies upon Rule 1220- 4-2-.15 as its authority for the declaratory orders issued in the case under submission. Mindful of the provisions of Chapter 408, we now consider Rule 1220-4-2-.15 in the context of TRA's contentions.

B. Rule 1220-4-2-.15

*7 This rule was originally promulgated by the TRA's predecessor agency, the Public Service Commission, long before the enactment of Chapter 408. [FN8] The rule provides, in pertinent part:

> 1220-4-2-.15 DIRECTORIES-ALPHABETICAL LISTING (WHITE PAGES)
> (1) Telephone directories shall be regularly published, listing the name; address and telephone number of all customers, except public telephones and number unlisted at customer's request.
> (2) Upon issuance, a copy of each directory shall be distributed to all customers served by that directory and a copy of each directory shall be furnished to the Commission upon request.
> (3) The name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover....

In its declaratory orders in these two proceedings, the TRA interpreted Rule 1220-4-2-.15 to require that the names and logos of competing local exchange telephone companies be placed on the covers of the white pages directories that BAPCO publishes for BellSouth, the incumbent local exchange telephone company that is required by law to publish a white pages directory. As we stated in *Jackson Express, Inc. v. Tennessee Public Service Commission,* "Generally, courts must give great deference and controlling weight to an agency's interpretation of its own rules. A strict standard of review applies in interpreting an administrative regulation, and the administrative interpretation 'becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " 679 S.W.2d 942, 945 (Tenn.1984).

We therefore must give "great deference" to the TRA's interpretation of Rule 1220-4-2-.15, and the TRA's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." In addition, we review the agency's interpretation in light of the statutes, discussed above, governing the TRA. Referring again to those statutes, we note that the General Assembly has provided that the laws governing the TRA shall be given "a liberal construction" and has mandated that "any doubts as to the existence or extent of a power conferred on the [TRA] ... shall be resolved in favor of the existence of the power, to the end that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction...." Tenn.Code Ann. § 65-4-106. The General Assembly also has empowered the TRA to "adopt rules governing the procedures prescribed or authorized," including "rules implementing, interpreting or making specific the various laws which [the TRA] enforces or administers." Tenn.Code Ann. § 65-2- 102(2) (Supp.2001). Finally, the legislature has stated that "[i]n addition to any other jurisdiction conferred, the authority shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408." Tenn.Code Ann. § 65-5-210(a) (Supp.2001).

***8** As stated, Rule 1220-4-2-.15 requires that the "name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover[.]" We have considered Tenn.Code Ann. § § 65- 2-102(2), 65-4-104, 65-4-106 and the pertinent provisions of Chapter 408. Additionally, we have accorded the TRA's interpretation of its own rules the deference required. In so doing, we fail to find any demonstration that the TRA has acted in excess of its authority in requiring that the names of competing local exchange providers be included on the cover of BellSouth's white pages directories. The declaratory orders as promulgated serve to "resolve ... contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408." Accordingly, the declaratory orders are expressly authorized by Tenn.Code Ann. § 65-5-210(a).

III. TRA's Jurisdiction over BAPCO

[3] While it is abundantly clear that the TRA has jurisdiction over BellSouth, a regulated public utility, BAPCO suggests that because it is not a public utility, it is beyond the reach of the TRA.

In its declaratory orders, the TRA required that BAPCO provide AT & T and Nextlink the opportunity "to contract with BAPCO for the appearance of AT & T's [and Nextlink's] name[s] and logo[s] on the cover of such directories under the

same terms and conditions as BAPCO provides to BellSouth by contract."

While we recognize that this issue could have been avoided had the TRA ordered BellSouth, as distinct from BAPCO, to implement the TRA's interpretation of Rule 1220-4-2-.15, we nevertheless conclude that the TRA did not err in ordering BAPCO to allow competing service providers to contract with BAPCO to be included on the covers of BellSouth's white pages directories. Our conclusion is based upon the particular facts of these related proceedings and upon legal precedent governing public utilities and their non-utility subsidiaries and affiliates.

Factually, much of the testimony admitted into evidence during the AT & T proceeding pertained to BAPCO's role in publishing directories on behalf of BellSouth. The testimony of a number of witnesses can be summarized by quoting a single sentence of the testimony of one witness employed by BAPCO: "[a]ll editorial, publishing, and business decisions [regarding the directories] are under BAPCO's exclusive control." R., Vol. 16, p. 37 (Testimony of R.F. Barretto, Director-Local Exchange Carrier Interface for BAPCO). Moreover, BellSouth admitted in its answer to AT & T's petition for a declaratory order that "during the course of the negotiations between AT & T and [BellSouth] for an interconnection agreement ... [BellSouth] properly maintained that negotiations with respect to telephone directories were to be conducted with BAPCO." R., Vol. I, p. 35. Likewise, BAPCO stated in its answer to the AT & T petition that "[t]he issues raised in the AT & T Petition should be resolved between AT & T and BAPCO[.]" R., Vol. I, p. 45.

***9** With regard to precedent, we considered in *Tennessee Public Service Commission v. Nashville Gas Co.*, an analogous issue concerning a parent corporation and its subsidiary in the context of rate-making. 551 S.W.2d 315 (Tenn.1977). In permitting the TRA's predecessor, the Public Service Commission, to consider pertinent financial data of the parent corporation (not a public utility regulated by the Commission) in setting the rates for the subsidiary corporation (a public utility regulated by the Commission), we stated:

> [A] regulatory body, such as the Public Service Commission, is not bound in all instances to observe corporate charters and the form of corporate structure or stock ownership in regulating a public utility, and in fixing fair and reasonable rates for its operations. The filing of consolidated reports by parent and subsidiary corporations, both for tax purposes and regulatory purposes, is so commonplace as to be completely familiar in modern law and practice. Considerations of "piercing the veil," which are involved in cases involving tort, misconduct or fraud, are largely irrelevant in the regulatory and revenue fields. In order for taxing authorities to obtain accurate information as to revenues and expenses, the filing of consolidated tax returns by affiliated corporations is frequently required, and rate-making and regulatory bodies frequently can and do consider entire operating systems of utility companies in determining, from the standpoint both of the regulated carrier and the consuming public fair and reasonable rates of return.

Id. at 319-20. Continuing, we stated that holding otherwise would allow the regulated utility, "through the device of holding companies, spinoffs, or other corporate arrangements, to place the cream of a utility market in the hands of a parent or an affiliate, and to strip the marketing area of a regulated subsidiary of its most profitable customers." *Id.* at 321.

Although the cases under submission are not rate-making proceedings, we conclude that the reasoning and the principles stated in *Nashville Gas* are applicable thereto. BellSouth is a public utility regulated by the TRA and is required by law to provide a white pages directory in its market areas. BellSouth has contracted that duty to BAPCO, an affiliated company within BellSouth's parent corporation. Thus, for purposes of these two declaratory order proceedings, we conclude that the TRA had jurisdiction over BAPCO. Were we to conclude otherwise, BellSouth could escape the legal responsibilities thrust upon it by Rule 1220-4-2-.15. Because BellSouth delegated its responsibility over the white pages directories to BAPCO, and because BAPCO has exclusive control over the directories, we conclude that the TRA has jurisdiction over BAPCO for the purposes of these two proceedings.

IV. First Amendment Issue

Next, the TRA contends that the Court of Appeals erred in holding that the TRA's decisions in these two cases amount to "compelled speech" and therefore violate the First Amendment. [FN9] For the reasons set out below, we hold that the TRA's orders do not violate the First Amendment.

***10** [4] The TRA's orders in these two proceedings implicate two lines of First Amendment cases: those pertaining to "compelled speech" and those

pertaining to "commercial speech." The parties focus most heavily upon the former line, so we begin with an analysis of the law regarding compelled speech.

The United States Supreme Court, in its cases involving compelled speech, has held that the First Amendment not only bars the government from prohibiting protected speech, it also may bar the government from compelling the expression of certain views or the subsidization of speech to which an individual objects. *United States v. United Foods, Inc.*, 533 U.S. 405, 410, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001); *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991); *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). Although the Court's compelled speech cases may be divided into numerous categories, the parties rely most heavily on those cases involving laws or regulations requiring individuals to contribute financially to speech with which they disagree. This category of cases is typified by *Abood v. Detroit Board of Education* [FN10] and *Keller v. State Bar of California.* [FN11] In that pair of cases, the Court set out a "germaneness" test, under which compelled contributions do not offend First Amendment principles so long as they are used for activities that are germane to the organization's central purpose.

The parties focus upon two separate cases discussing *Abood* and *Keller* in the context of compelled financial contributions to commercial speech. [FN12] The TRA, in contending that the Court of Appeals erred in reversing its orders on First Amendment grounds, relies on *Glickman v. Wileman Bros. & Elliott, Inc.* [FN13] Conversely, BAPCO, contending that the First Amendment analysis of the Court of Appeals is correct, relies upon *United States v. United Foods, Inc.* Both *Glickman* and *United Foods* involve federal programs administered by the Secretary of Agriculture, in which the Secretary imposed mandatory assessments on two different agricultural industries for funding generic advertising for the respective industries.

In *Glickman,* growers, handlers, and processors of California tree fruits challenged marketing orders promulgated by the Secretary. The orders imposed mandatory assessments on the petitioners to cover the expenses of administering the orders, including the cost of generic advertising of California nectarines, plums, and peaches. The petitioners asserted that the government-mandated financial contribution to the generic advertising campaign violated their First Amendment rights. After summarizing the components of the regulatory scheme of which the marketing orders were a part, the Court concluded that "[t]hree characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge freedom of speech protected by the First Amendment." *Id.* 521 U.S. at 469. The Court continued:

> *11 First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. *Second, they do not compel any person to engage in any actual or symbolic speech.* Third, they do not compel the producers to endorse or to finance any political or ideological views.

Id. at 469-70 (emphasis added). The Court then found that the assessments under the marketing orders did not constitute compelled speech. As the Court stated:

> Our compelled speech case law ... is clearly inapplicable to the regulatory scheme at issue here. The use of the assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they "would prefer to remain silent," or require them to be publicly identified or associated with another's message.

Id., 521 U.S. at 470-71 (citations omitted). Applying the *Abood-Keller* "germane[ness]" test, the Court concluded that the generic advertising program was "unquestionably germane to the purposes of the marketing orders" and that the assessments were not used to fund ideological activities. *Glickman,* 521 U.S. at 473.

Superficially, *United Foods* appears to be similar to *Glickman. United Foods* involved a mandatory assessment imposed by the Secretary of Agriculture on handlers of fresh mushrooms, to be used primarily for funding advertising for the mushroom industry. Despite the facial similarity between the two cases, however, the Court in *United Foods* distinguished *Glickman* on the grounds that the compelled assessments in *Glickman* were part of a broad regulatory scheme, whereas the assessments in *United Foods* were not. Indeed, the *United Foods* Court found that the only program served by the compelled contributions was the very advertising scheme in question. 533 U.S. at 411- 12. The Court then applied the *Abood-Keller* principles to the mandatory assessments and ultimately held that they violated the First Amendment.

Having reviewed this authority, however, we cannot conclude that the cases cited by either of the parties are completely apposite to the case under submission. The principles stated in *Abood* and *Keller,* and in the later cases in which *Abood* and *Keller* have been applied (including *Glickman* and *United Foods*), are limited to cases involving compelled *contributions* to speech. The TRA's orders, on the other hand, effectively require BAPCO to engage in *actual speech.* The distinction, we conclude, is significant. *Cf. Glickman,* 521 U.S. at 469 (stating that the marketing orders did not "compel any person to engage in any actual or symbolic speech"); and 521 U.S. at 470-71 (stating that the Court's "compelled speech case law ... is clearly inapplicable to the regulatory scheme at issue here. The use of the assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths....").

***12** Because the *Abood-Keller* standards applied in *Glickman* and *United Foods* are inapposite, we next must determine what standard to apply to these two cases. Consequently, our analysis takes us to the United States Supreme Court case law involving commercial speech.

[5] Commercial speech, that is, expression related solely to the economic interests of the speaker and his or her audience, is constitutionally protected under the First Amendment, as applied to the States under the Fourteenth Amendment. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.,* 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council,* 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). The Supreme Court, however, has distinguished between commercial speech and other types of speech in that "[t]he Constitution ... accords a lesser protection to commercial speech than to other constitutionally protected expression." *Central Hudson,* 447 U.S. at 562-63; *see also United Foods,* 533 U.S. at 409.

In *Central Hudson,* the Supreme Court adopted a four-part analysis to be used in determining whether a law impermissibly restricts commercial speech. The Court stated:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

The *Central Hudson* test, however, has been a subject of considerable debate. Although the Court has preserved the test in cases involving *restrictions* on commercial speech, [FN14] it has not applied the test in cases involving *compelled* commercial speech or *compelled financial support of commercial speech. See Glickman,* 521 U.S. at 474 (holding that the Court of Appeals erred in relying on *Central Hudson* for the purpose of testing the constitutionality of government-mandated assessments for promotional advertising). [FN15]

In *Walker v. Board of Professional Responsibility of the Supreme Court of Tennessee,* this Court noted that the distinction between restricted speech cases and compelled speech cases is significant, stating, "The fact that a regulation requires disclosure rather than prohibition tends to make it less objectionable under the First Amendment." 38 S.W.3d 540, 545 (Tenn.2001). Accordingly, we looked to the more forgiving standard set forth by the United States Supreme Court in *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio,* 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), as the defining test for First Amendment analysis of compelled speech cases. *Walker,* 38 S.W.3d at 545. [FN16] As we noted in *Walker, Zauderer* states:

> ***13** We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers.

Id. at 546 (quoting *Zauderer,* 471 U.S. at 65). In other words, "under current law--as announced in *Zauderer*--as long as the disclosure requirement is reasonably related to the state's interest in preventing deception of consumers, and not unduly burdensome, it should be upheld." *Id.*

Although both the *Zauderer* and *Walker* cases specifically involved application of First Amendment principles to attorney advertising, we noted in *Walker* that attorney advertising is considered commercial

speech under the First Amendment. *Id.* at 544. We see no reason why the compelled commercial speech at issue in *Zauderer* and *Walker* should be governed by a different standard than the compelled commercial speech at issue here; accordingly, we now apply the *Zauderer* standard to the case under submission.

An application of *Zauderer* to the pending appeals requires that we determine:

1. Whether the TRA's disclosure requirement is reasonably related the state's interest in preventing deception of consumers; and
2. Whether the disclosure requirement is unduly burdensome.

We first address the relationship between the TRA's orders and the state's interest in preventing deception of consumers. This interest in preventing deception presents itself in a different context than is seen in the attorney advertising regulations of *Zauderer* and *Walker*. The rules in *Zauderer* and *Walker* compelled attorneys to disclose additional information about themselves, whereas the TRA's orders compel BellSouth to disclose information about the identity of its competitors. The ultimate object of the regulations, however, is the same: to inform consumers. In other words, BellSouth is compelled to disclose information which will prevent consumers from mistakenly believing that no alternative providers of telecommunications services are available.

Richard Guepe,District Manager in the Law & Governmental Affairs organization of AT & T, in his testimony before the TRA, addressed the value of having the names and logos of the competing local exchange telephone companies on the cover of the white pages directory published on behalf of BellSouth:

> The cover of the phone book is a simple, direct, and very important means to communicate to Tennessee consumers. To be effective, consumer communication must be simple, it must be clear, and it must be repeated. That is why the phone book cover is important. Consumers see it often. The cover of the book does tell the consumer what's inside. They read it by its symbols, not by its fine print. We are asking that the cover of the phone book tell Tennessee consumers very clearly that they have a choice in the local service market.

*14 R., Vol. 15, p. 64. As explained by Guepe, the TRA's two declaratory orders directly advance competition in the provision of local telephone services by effectively informing consumers as to the existence of alternative local telephone services. Thus, we conclude that the orders are reasonably related to the state's asserted interest.

The second step of the *Zauderer* test is to determine whether the TRA's orders are unduly burdensome. To assist in this determination, the United States Supreme Court has provided guidance. In *Board of Trustees of the State University of New York v. Fox,* the Supreme Court held that governmental restrictions upon commercial speech are not invalid merely because they go beyond the least restrictive means capable of achieving the desired end. *Fox,* 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). The Court stated:

> [W]hile we have insisted that " 'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing ... the harmless from the harmful,' " we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a " 'fit' between the legislature's ends and the means chosen to accomplish those ends,"--a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served"; that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Fox, 492 U.S. at 480 (citations omitted).

Under *Fox,* the TRA is the proper body to determine "the manner of regulation that may best be employed" to fulfill the government's objective. *Id.* Thus, this Court may not determine whether the manner of regulation chosen by the TRA should have been more or less restrictive. Ours is merely to review the chosen regulation and determine whether it is unduly burdensome.

Reviewing the record thoroughly in light of the principles articulated in *Fox,* we are firmly convinced that the TRA's decisions requiring the logos and names of competing service providers to be displayed on the directory covers do not impose an inordinate burden on BellSouth. As discussed *supra,* the governmental interest in this case is important, indeed, for informing consumers about their choices in the local telecommunications service market is a

fundamental aspect of promoting free competition. Moreover, the government's chosen means to advance its goals, the requirement that logos of competing telecommunications service providers be displayed on equal footing with BellSouth's logo, does not substantially affect BellSouth's ability to communicate its own speech to customers in the market. Given the significant weight of the governmental interest and the relatively narrow impact of the orders in this case, we conclude that the TRA's orders are not unduly burdensome.

***15** Concluding the *Zauderer* analysis, we find that the TRA's orders are reasonably related to the state's substantial interest in preventing the deception of consumers, and we further find that the orders under review directly advance the state's interest without imposing an excessive burden. Thus, we hold that the TRA's orders survive *Zauderer* scrutiny and consequently are valid under the First Amendment.

V. BAPCO's Additional Arguments

BAPCO raises two other arguments in its brief; however, neither was considered and decided as an issue by the TRA or by the Court of Appeals. We find that both arguments are without merit.

In its first argument, BAPCO contends that the TRA's orders amount to a confiscatory taking in violation of the state and federal constitutions. BAPCO's claim is based upon a factual premise that the TRA's orders require BAPCO to display AT & T's name and logo (and those of other competing providers) without compensation. BAPCO's factual premise simply is incorrect. The TRA ordered BAPCO to permit AT & T and, as a result of the Nextlink proceeding, all other competing local exchange telephone companies to contract with BAPCO for the display of their names and logos on the covers of the white pages directories "under the same terms and conditions as BAPCO provides to BellSouth by contract." It is true that the evidence shows BellSouth was not paying BAPCO at the time of the hearing for displaying the BellSouth logo on the directory covers, but nothing in the TRA's orders precludes BAPCO from charging BellSouth for displaying BellSouth's name and logos on the directory covers. The TRA's orders merely require BAPCO to contract with the competing providers "under the same terms and conditions as BAPCO provides to BellSouth by contract." BAPCO therefore has a choice--it may charge BellSouth for displaying BellSouth's name and logo, in which case BAPCO also may charge the competing companies, or it may choose not to charge BellSouth, in which case it may not charge the other companies. For this reason, BAPCO's confiscatory- taking argument is without merit.

BAPCO's second argument is that the TRA's orders violate BAPCO's trademark rights. This argument is based upon the erroneous premise that the "**BELLSOUTH**" trademark displayed on the directory covers is intended to represent BAPCO, not BellSouth. Throughout the administrative proceedings, BAPCO claimed that the "**BELLSOUTH**" trademark on the covers indicates that the directories are published by BAPCO and that the trademark only coincidentally represents BellSouth. The TRA rejected BAPCO's factual argument on this point and found that the "**BELLSOUTH**" trademark on the directories referred to BellSouth, the incumbent local exchange telephone company. The record fully supports the TRA's factual finding on this point. Moreover, we note that BAPCO has failed to cite any authority that would support striking down a regulatory agency's actions over a regulated utility on trademark-infringement grounds. For these reasons, we find that BAPCO's trademark issue is without merit.

VI. Conclusion

***16** Accordingly, we hold that the TRA's two declaratory orders are not in excess of the statutory authority of the agency and that the TRA had jurisdiction over BAPCO for the purposes of these proceedings. In addition, we hold that the orders do not violate the First Amendment. Therefore, we reverse the judgment of the Court of Appeals in these two cases and reinstate the judgments of the Tennessee Regulatory Authority.

The costs are taxed to BellSouth Advertising & Publishing Corporation, for which execution may issue if necessary.

FN1. Section 271(c)(2)(B)(viii) requires any Bell operating company (which includes BellSouth) that seeks to enter the long distance market to list customers of competing local exchange carriers in its white pages directory listings.

FN2. Both BellSouth and BAPCO participated in the AT & T declaratory order proceeding before the TRA. BellSouth,

however, did not enter an appearance in the pending appeals.

FN3. MCI Telecommunications, Inc., and Nextlink Tennessee, LLC now operate under new names, MCI WORLDCOM Network Services, Inc. and XO Tennessee, Inc., respectively. For purposes of clarity, each company is referred to in this opinion by the name it had at the time of the administrative proceedings.

FN4. *See* Tenn.Code Ann. § 4-5-322(b)(1) (1998) (stating, in pertinent part, "A person who is aggrieved by any final decision of the Tennessee regulatory authority ... shall file any petition for review with the middle division of the court of appeals.").

FN5. Like the AT & T declaratory order, the Nextlink order was the result of a 2 to 1 vote. The dissenting TRA Director in the Nextlink proceeding "voted not to support the decision of the majority because the Declaratory Order [from the AT & T proceeding] interpreting TRA Rule 1220-4-2-.15[was] currently pending before the Court of Appeals[.]"

FN6. The Court of Appeals stated in the Nextlink case: "Because of the substantial similarity of the issues, this appeal will be consolidated for consideration with *BellSouth Advertising & Publishing Corp. v. Tennessee Regulatory Auth.*, No. 01A01-9805-BC-00248. However, both appeals shall maintain their separate appeal numbers and papers filed in either of these appeals shall bear the appeal number of the proceeding in which they are filed."

FN7. The Uniform Administrative Procedures Act, Tenn.Code Ann. § 4-5-322(h) (1998), sets forth the analysis to be applied when reviewing decisions of administrative agencies. Section 4-5-322(h) provides:
The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(5) Unsupported by evidence which is both substantial and material in the light of the entire record.
In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.
Although BAPCO refers to all five subsections of the above-quoted statute in its brief, the pertinent provisions for purposes of the consolidated appeal are Tenn.Code Ann. § § 4-5-322(h)(1) and--322(h)(2)--in other words, we must determine whether, under those subsections, the TRA's decisions either were "in violation of constitutional ... provisions" or "in excess of the statutory authority of the agency" and subject to reversal or modification for those reasons.

FN8. The Administrative History for Rule 1220-4-2-.15 states: "Original rule certified May 9, 1974. Amendment filed August 18, 1982; effective September 17, 1982. Amendment filed November 9, 1984; effective December 9, 1984."

FN9. The First Amendment applies to the States through the Fourteenth Amendment. *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

FN10. 431 U.S. 209, 235-36, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (holding that teachers' compulsory union dues could not be used for political or ideological purposes that were not "germane" to the union's duties as a collective-bargaining representative).

FN11. 496 U.S. 1, 14, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) (holding that a state bar's use of compulsory dues to finance political activities with which the petitioners disagreed violated their right to free speech when the expenditures were not "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of [legal services]' ").

FN12. The TRA argues in the alternative that its two orders meet the test set forth in *Central Hudson Gas & Electric Corp. v. Public Service Commission of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). BAPCO argues in response that the orders do not meet the requirements of *Central Hudson*. The application of *Central Hudson* is discussed later in this opinion.

FN13. 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997).

FN14. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999); *see also United Foods*, 533 U.S. at 409-10 (noting criticism of *Central Hudson* test but declining to "enter into the controversy").

FN15. The *United Foods* Court noted that the *Central Hudson* test has been criticized, but did not revisit the *Central Hudson* test and did not apply it to the mandatory assessments at issue in that case. The Court simply noted that the mandatory assessments could not be sustained under *any* of the Court's precedents. *Id.* 533 U.S. at 410.

FN16. Notably, several federal circuits also have applied the *Zauderer* test to governmental regulations that require disclosure of information. *See, e.g., Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 233 F.3d 981, 994 (7th Cir.2000); *Commodity Futures Trading Comm'n v. Vartuli*, 228 F.3d 94, 108 (2d Cir.2000); *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 54 (1st Cir.2000).

2002 WL 1473208, 2002 WL 1473208 (Tenn.)

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

CONSUMER ADVOCATE DIVISION,
v.
TENNESSEE REGULATORY AUTHORITY.

July 18, 2002.

Appeal from the Tennessee Regulatory Authority, No. TRA 96-01423; Melvin Malone, Director.

John Knox Walkup, Attorney General & Reporter; Michael E. Moore, Solicitor General; L. Vincent Williams, Consumer Advocate; Vance L. Broemel, Assistant Attorney General, for appellant, Consumer Advocate Division.

Guy M. Hicks, Nashville, Tennessee and Patrick William Turner, Atlanta, Georgia, for appellee, BellSouth Telecommunications.

Citizens Telecommunication Company, Pro Se.

Dennis McNamee, J. Richard Collier and William Valerius Sanford, Nashville, Tennessee, and H. Edward Phillips, Wake Forest, North Carolina, for appellee, Tennessee Regulatory Authority.

Joseph F. Welborn, Robert Dale Grimes and Theodore G. Pappas, Nashville, Tennessee for appellee, United Telephone Southeast, Inc.

OPINION

PER CURIAM.

*1 The principal issue in this case is whether telephone directory assistance service is basic or non-basic under the statutory scheme. Secondary issues involve the practice of grandfathering existing customers when a new tariff is approved, the exemptions to directory assistance charges, and whether the Tennessee Regulatory Authority was authorized to transfer a contested case to another docket. We affirm.

This is a direct appeal by the Consumer Advocate Division [CAD] of the office of the Attorney General.

The genesis of this litigation dates from the filing of a tariff by United Telephone [United] with the Tennessee Regulatory Authority [TRA] for an increase in rates, particularly for directory assistance, which was provided without charge to a telephone customer.

The filing was made pursuant to Tennessee Code Annotated § 65-5-209(e) which allows regulated telephone companies that have qualified under a price regulation plan to adjust prices for non-basic services so long as the annual adjustments do not exceed lawfully imposed limitations.

Intervening petitions were filed by CAD, by Citizens Telecommunications Company of Tennessee [Citizens], by BellSouth Telecommunications, Inc. [BellSouth] and AT & T Communications of the South Central States, Inc. [AT & T], all of which were granted.

The telephone services described as basic services are subject to a four-year price freeze under Tennessee Code Annotated § 65-5-209(f), that is, if a service is basic, its rates cannot be raised for four years.

United insisted that directory service was not a basic service and hence not subject to the price freeze. As the case progressed, CAD raised other issues of (1) whether United was entitled to have its 911 Emergency Service and educational discounts classified as non-basic and therefore subject to a price increase; (2) whether a company could continue to offer a service to certain classes of customers while refusing the service to newer customers; (3) whether a previously approved tariff filed by United limiting to five the number of lines at a single location could be considered residential service.

By order entered September 4, 1997, the TRA ruled that (1) directory service is non-basic and approved the tariff as filed subject "to free-call allowance up to six inquiries with an allowance of two telephone numbers per inquiry for residents and business access lines per billing period," an exemption for customers over sixty-five and those with a confirmable visual or physical disability; (2) a previous tariff filed by United which limited the number of access lines that could be charged a residential rate to five per location was not proper to be considered in this proceeding; and (3) a previous tariff approving a business service

to existing customers but denying it to newer customers was not proper to be considered in this proceeding.

CAD appeals and presents for review the issues of (1) whether directory service is a basic or non-basic service; (2) whether the TRA erred in holding that the five-line tariff would be adjudicated in another proceeding; and (3) whether the TRA erred in holding that United could obsolete a business service, change its characteristics, and offer it to new customers for an increased price.

*2 BellSouth presents an additional issue for review: Whether the TRA erred in requiring United to provide free directory assistance in certain instances.

United presents for review issues similar to those presented by CAD and BellSouth.

Appellate review is governed by Tennessee Code Annotated § 4-5-322(h) which provides:

> The [reviewing] court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision ft the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
> (1) In violation of constitutional or statutory provisions;
> (2) In excess of statutory authority of the agency;
> (3) Made upon unlawful procedure;
> (4) Arbitrary or capricious or characterized by an abuse of discretion or clearly unwarranted exercise of discretion; or
> (5) Unsupported by evidence which is both substantial and material ...

Directory Assistance

Tennessee Code Annotated § 65-5-209, a 1995 enactment, allows a telecommunications company to utilize a price regulation plan in the calculation of rates. This plan establishes, inter alia, a cap on the amounts a company can raise its rates for basic and non-basic telephone service as defined in Tennessee Code Annotated § 65-5-208(a)(1), with the maximum rate increase indexed to the rate of inflation, and the rates for basic service are frozen for four years from the date the company elects to be bound by the price regulation plan. United elected to be bound by the plan and its application was approved October 15, 1995. Tariff 96-201, the predicate of the case at Bar, sought a rate increase for non-basic services for an amount less than the rate of inflation. United proposed a charge for directory assistance because it was a non-basic service and therefore not subject to the price freeze. The TRA agreed, and approved the proposed rate increase subject to Tennessee Code Annotated § 65-5-208 as follows:

> Classification of Services--Exempt services--Price floor--Maximum rates for non-basic services.--(a) Services of incumbent local exchange telephone companies who apply for price regulation under § 65-5-209 are classified as follows:
> (1) "Basic local exchange telephone services" are telecommunications services which are comprised of an access line, dial tone, touch-tone and usage provided to the premises for the provision of two-way switched voice or data transmission over voice grade facilities of residential customers or business customers within a local calling area, Lifeline, Link-Up Tennessee, 911 Emergency Services and educational discounts existing on June 6, 1995, or other services required by state or federal statute. These services shall, at a minimum, be provided at the same level of quality as is being provided on June 6, 1995. Rates for these services shall include both recurring and nonrecurring charges.
> (2) "Non basic services" are telecommunications services which are not defined as basic local exchange telephone services and are not exempted under subsection (b). Rates for these services shall include both recurring and nonrecurring charges.

*3 CAD insists that the TRA erred in its interpretation of the statute because directory assistance was a part of the "usage" enjoyed by customers who subscribed to telephone service, in contrast to United's insistence that since the statutory definition of basic services does not refer to "directory assistance," it is a non-basic service.

The sub-issue of statutory construction is thus squarely posed. We begin our analysis by observing that "interpretations of statutes by administrative agencies are customarily given respect and accorded deference by courts." *Collins v. McCanless*, 169 S.W.2d 850 (Tenn.1943); *Riggs v. Burson*, 941 S.W.2d 44 (Tenn.1997).

The TRA seemingly was cognizant of the long-standing principle that the legislative intent should be ascertained from the natural and ordinary meaning of the language used without a forced or subtle construction that would limit or extend the meaning of the language, *Hamblen County Ed. Asso.v. Bd. of Education*, 892 S.W.2d 428 (Tenn.Ct.App.1994); *Worrall v. Kroger Co.*, 545 S.W.2d 736 (Tenn.1977), since each party argued that the plain language of the statute supported its position, the TRA concluded that the language was susceptible of more than one

meaning and hence was unclear, which justified recourse to its legislative history.

What we held in *BellSouth Tele. v. Greer*, 972 S.W.2d 663 (Tenn. Ct App.1997) is apropos in the case at Bar:

> The legislative process does not always produce precisely drawn laws. When the words of a statute are ambiguous or when it is just not clear what the legislature had in mind, courts may look beyond a statute's text for reliable guides to the statute's meaning. We consider the statute's historical background, the conditions giving rise to the statute, and the circumstances contemporaneous with the statute's enactment. (Citations omitted).
>
> Courts consult legislative history not to delve into the personal, subjective motives of individual legislators, but rather to ascertain the meaning of the words in the statute. The subjective beliefs of legislators can never substitute for what was, in fact, enacted. There is a distinction between what the legislature intended to say is the law and what various legislators, as individuals, expected or hoped the consequences of the law would be. The answer to the former question is what courts pursue when they consult legislative history; the latter question is not within the courts' domain.
>
> Relying on legislative history is a step to be taken cautiously. (Citations omitted). Legislative records are not always distinguished for their candor and accuracy, and the more that courts have come to rely on legislative history, the less reliable it has become. (Citation omitted). Rather than reflecting the issues actually debated by the legislature, legislative history frequently consists of self-serving statements favorable to particular interest groups prepared and included in the legislative record solely to influence the courts' interpretation of the statute. (Citations omitted).
>
> *4 Even the statements of sponsors during legislative debate should be evaluated cautiously. (Citation omitted). These comments cannot alter the plain meaning of a statute (citations omitted), because to do so would be to open the door to the inadvertent, or perhaps planned, undermining of statutory language. (Citation omitted). Courts have no authority to adopt interpretations of statutes gleaned solely from legislative history that have no statutory reference points. (Citation omitted). Accordingly, when a statute's text and legislative history disagree, the text controls. (Citation omitted).

The Legislature considered and debated at length the issue of whether directory service was a basic or non-basic service. A transcript of the debate is included in the record and we have carefully studied it; suffice to say that the Legislature, by a substantial majority, approved the bill as now codified, reflecting its intent to exclude directory service as a basic service.

The interpretation of a statute is strictly one of law, *Roseman v. Roseman*, 890 S.W.2d 27, (Tenn.1994), and courts must construe statutes as they are written, *Jackson v. Jackson*, 210 S.W.2d 332 (Tenn.1948). While the logicality of the argument of CAD is obvious, the counter-arguments of the TRA and BellSouth are equally logical: That basic services are those specifically enumerated in the statute, and that if every "use" of a telephone were a basic service, Unified could not increase its rates for any service during the first four years of the price regulation plan and the price freeze admittedly applies only to basic services. Upon a consideration of all the recognized principles of statutory construction, we conclude that the meaning attributed to the statute by the TRA is the correct one.

The Five-Line Tariff

In the process of reviewing United's proposed rate filing, CAD discovered that United had raised the rates for residential customers with more than five access lines, and insisted that these lines were a basic service and subject to the statutory price freeze. Tenn.Code Ann. § 65-5-209(f). After hearing testimony concerning this issue, the TRA ruled that it should be heard in another docket. CAD challenges the action of the TRA, insisting that it had no authority to transfer the case to another docket after hearing proof on the issue in the case at Bar.

The tariff at issue was permitted to take effect by the Public Service Commission in October 1995. CAD argues that the tariff was never approved, but did not intervene in the proceeding. [FN1] TRA argues that it had the discretion to reopen the issue of the tariff in the case at Bar within a proceeding of its choosing. We agree that the TRA acted within its discretion in considering that the issue raised by CAD was more appropriately joined in another pending case. *See, South Central Bell Tele. Co. v. TPSC*, 675 S.W.2d 718 (Tenn.Ct.App.1984). We are referred to no rule or statute which forbids the TRA from ordering that this issue should be heard in another docket, and thus cannot fault the TRA for doing so.

FN1. New tariffs automatically became effective unless suspended. *See, Consumer Ad. Div. v. Bissell*, No. 01-A-01-9601-B-00049 (Tenn.Ct.App.1996).

The Grandfathering Issue

*5 During the progressof the directory assistance docket, CAD raised the issue that United impermissibly raised rates for its ABC Service, described as a kind of advanced business service. A witness for CAD testified that United made some changes in its ABC Service, renamed it "Centrex Services," and increased its rates above those charged to ABC customers. CAD specifically alleges that Centrex Services is not a new service, but merely a new name with a new way of combining and pricing the service provided under the ABC Service tariff.

TRA argues that CAD has impermissibly sought appellate review by collaterally attacking an agency decision that was rendered in another contested case hearing initiated upon a complaint filed by a customer of United. Docker Number 96-00462 was assigned, a hearing on the merits was held, and a final judgment was rendered on October 3, 1996, which was modified to approve a stipulation between regarding ABC Service on January 22, 1997. These judgments required United, inter alia, to revise the terms of its central office-based service; to comply, United filed a tariff which included the grandfathering of ABC Service and a revised service called Centrex Services, which was approved by the TRA by Order entered January 22, 1997.

TRA further argues that since it found that Centrex Services was a unique bundling of products and pricing arrangements, it was not a service offered on June 6, 1995, [FN2] and that as a new service the Centrex tariff was "specifically considered and approved by the TRA in a prior docket and not found to be contrary to law."

FN2. Referring to the language of the tariff then in effect.

It was further found by TRA that the proposed tariffs to obsolete ABC Service and that introduced Centrex Services were filed in September 1996 with a revision filed in December 1996. The initial filing was served on CAD which did not intervene or otherwise participate in the hearing.

The TRA thereupon determined that there was no legal basis for the position urged by CAD, which should not be permitted to attack collaterally a TRA decision for which appellate review is time barred. [FN3]

FN3. Judicial review must be sought within sixty days from entry of judgment. Tenn.Code Ann. § 4-5-322; Rule 12(a) T.R.A.P.

CAD contends that grandfathering is not permitted under Tennessee law because a telephone company must "treat all alike and it cannot discriminate in favor of one of its patrons against another," citing *Breeden v. Southern Bell Telephone & Telegraph Co.*, 285 S .W.2d 346 (Tenn.1955). If, as CAD argues, United provides services to one group of customers while refusing to provide the same service to another group--new customers--we agree that the practice is contrary to Tennessee law. Tenn.Code Ann. § 65-4-122; § 65-5-204.

TRA ordered United to obsolete the ABC Service tariff following a docket hearing involving a complaining customer. TRA found that the ABC Service tariff as it applied to the complaining customer, ZETA Images, Inc., was insufficient, discriminatory, unreasonable and excessive.

The Centrex tariff was approved January 22, 1997. CAD insists that it is no different from the ABC tariff; that the ABC Service and Centrex Services are the same.

*6 There are differences between the tariffs. ABC Service is distant- restrictive but Centrex Services is not. ABC Service charges only for outgoing traffic over Network Access Registers, while Centrex Services charges for outgoing and incoming traffic. ABC Service requires a customer to purchase basic features separately, while Centrex Services included the basic features in the price of the line. Minimum service for ABC Service requires the use of two access lines and one NAR while Centrex Services requires two access lines and two NARs.

Grandfathering [FN4] is not, per se, illegal. But if it results in discrimination between old and new customers, and is unjust or unduly preferential and thus violative of the statutes, it cannot be permitted. The thrust of CAD's argument is that ABC and Centrex Services are essentially the same, and to require one class of customer to pay more for the same service is unjust discrimination and unlawful.

FN4. A provision in a new law or regulation

> exempting those already in or a part of an existing system which is being regulated. An exception to a restriction that allows those already doing something to continue doing it even if they would be stopped by the new restriction. *Black's Law Dictionary,* 699 (6th ed.1990).

The record reflects that if the ABC Service had been obsoleted without grandfathering the existing customers, they would have been required to pay the rate under the Centrex Services tariff, an increase in their cost of service. United has the right to price a non-basic service as it chooses, but any rate increase must be accompanied by off setting rate reductions which result in the rate increase being revenue neutral. Otherwise, United would be in violation of Tennessee Code Annotated § 65-5-209(e). The TRA argues that without a showing of a revenue neutral rate increase, United cannot obey its order to obsolete ABC Service without grandfathering the existing service. This argument has merit. If United is required to offer ABC Service to existing and new customers, it could not obsolete that service unless the service was withdrawn. But under the revenue neutral requirements, United could only obsolete a service where existing customers did not experience a rate increase or where a rate increase was neutralized by other rate deceases.

The CAD argues that grandfathering constitutes unjust discrimination and an undue preference as a matter of law and, is illegal in this case because the company has the technical ability to offer the service but chooses to offer it only to a certain group of customers. As we have seen, the statutes only prohibit discrimination that is unjust or unreasonable or preferences that are undue or unreasonable. The TRA is permitted to establish separate classifications of customers for the purposes of assessing different rates and has done so many times over the years.

Tennessee Code Annotated § 65-4-122 provides as pertinent here:

> (a) If any common carrier or public service company, directly or indirectly, by any special rate, rebate, drawback or other device, charges, demands, collects, or receives from any person a greater or less compensation for any service of a like kind under substantially like circumstances and conditions, and if such common carrier or such other public service company makes any reference between the parties aforementioned such common carrier or other public service company commits unjust discrimination, which is prohibited and declared unlawful.
>
> *7 (b) Any such corporation which charges, collects, or receives more than a just and reasonable rate of toll or compensation for service in this state commits extortion, which is prohibited and declared unlawful.
>
> (c) It is unlawful for any such corporation to make or give an undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic or service, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic or service to any undue or unreasonable prejudice or disadvantage.

The operative language "for any service of a like kind under substantially like circumstances and conditions" is significant in this case because there is material proof that the Centrex Services was a new service, and one that was not offered on June 6, 1995. We cannot say that the action of the TRA was not supported by substantial and material evidence.

Exemptions from Directory Assistance Charges

United argues that while the TRA properly determined that directory assistance is a non-basic service, thus allowing United to set rates as it deems appropriate subject to certain safeguards, the TRA impermissibly ordered it to amend its tariff (1) to increase the directory assistance free call allowance to six inquiries with an allowance of two telephone numbers per inquiry per billing period; (2) to exempt from directory assistance charges those customers who are unable to use the directory owing to visual or physical disability, and (3) to exempt from directory assistance charges residential customers who are older than sixty-five years. United argues that these requirements are in excess of the authority of TRA. We disagree. Tennessee Code Annotated § 65- 4-117 provides:

> The Authority has the power to:
>
> * * * * *
>
> (3) after hearing, by order in writing, fix just and reasonable standards, classifications, regulations, practices and services to be furnished, imposed, observed and followed thereafter by any public utility.

This statute is required to be liberally construed, Tennessee Code Annotated § 65-4-106, and thus any reasonable doubt as to whether the language is sufficiently broad to include the right of TRA to impose conditions should be resolved in favor of the existence of that right. We therefore conclude that the action United complains of is authorized by the statutes.

The judgment is affirmed. Costs are assessed to CAD and United Telephone equally.

END OF DOCUMENT

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CH-02-1441-3
	)	
US LEC OF TENNESSEE, INC.,	)	
	)	
Defendant.	)	

AFFIDAVIT OF MIKE MOELLER

1. My name is Mike Moeller and I am the Vice President- Sales for Tennessee and Kentucky at US LEC Corp., headquartered in Charlotte, North Carolina ("US LEC"). My office is located at First Tennessee Plaza, 800 S. Gay Street, Knoxville, Tennessee 37929. All information contained in this Affidavit is based upon events that occurred, of which I have personal knowledge.

2. US LEC, via its wholly owned subsidiaries is a telecommunications carrier operating in 14 states including Tennessee, where the operating subsidiary is US LEC of Tennessee, Inc.. US LEC offers a variety of telecommunications services including local and long distance calling under the jurisdiction of the Tennessee Regulatory Authority and the Federal Communications Commission.

3. Pursuant to Chapter 408 of the Public Acts of 1995, T.C.A. §65-4-201(c), US LEC holds a certificate of convenience and necessity from the Tennessee Regulatory Authority to operate as a "competing telecommunications service provider" in Tennessee. The terms and conditions under which US LEC operates are set forth in the carrier's tariffs which, by

law, must be filed with, and approved by, the Authority. US LEC's tariff on file with the Authority states that the company may, without notice, immediately discontinue service to any customer if the company determines that the service is being used for a fraudulent purpose.

4. US LEC has a contract to provide long distance telecommunications services to Airstream Wireless Services, Inc., which is located in Memphis, Tennessee. The contract states, inter alia, "This Agreement and all US LEC services and agreements are governed by the terms and conditions contained in US LEC's tariffs and price lists (collectively, the "Tariffs") filed with federal and state regulatory agencies...Customer agrees to be bound by the provisions of US LEC's Tariffs in effect from time to time."

5. The contract with Airstream states that US LEC will provide long distance telephone international service, including service to the United Kingdom, Germany, Italy and Spain.

6. The cost to US LEC of handling that international traffic varies substantially depending upon whether the call is made to a wireless telephone or to a non-wireless telephone (land line) telephone. The cost to US LEC of handling an international call made to a wireless telephone in the United Kingdom, Germany, Italy and Spain ranges from $.41 to $.45 per minute. The cost to US LEC of handling an international call made to a land line telephone in the same countries is a small fraction of what it costs to terminate an international call made to a wireless telephone.

7. Based on normal calling patterns, approximately 10% of all long distance calls are made to wireless telephones. During negotiations with Airstream, Airstream represented to US LEC that no more than 10% to 15% of Airstream's international traffic would

be made to wireless telephones. Based on US LEC's experience with normal traffic patterns and those representations of Airstream, US LEC agreed to accept and complete international calls for rates of $.06 to $.15 per minute depending on the country where the call terminates. Those rates are reflected in the contract between US LEC and Airstream.

8. US LEC began providing service to Airstream on June 10, 2002. By July 17, 2002, US LEC had been contacted by the fraud division of a major telecommunications company and was informed by them of the unusual nature of the traffic coming from Airstream. Contrary to normal traffic patterns and the representation of Airstream, approximately 99.7% of all international calls coming from Airstream were being made to wireless telephones.

9. Based on my experience in the telecommunications industry, such an abnormal traffic pattern cannot be accidental. Someone is apparently either (1) using a switch to separate, based on the number being called, calls made to wireless telephones from calls made to land line telephones and routing all wireless calls to US LEC or (2) using auto-dialers, or similar equipment, to dial repeatedly to wireless telephones. In either case, this abnormal traffic pattern is the result of deliberate manipulation and is likely being done for a fraudulent purpose.

10. Upon discovery of this manipulation of the traffic coming from Airstream, US LEC made a decision to terminate service to Airstream.

11. If US LEC is required to restore service to Airstream, US LEC will lose approximately $12,000 per day, representing the difference between the contract price and the significant costs required to pay third party telecommunication carriers to terminate this particular type of traffic.

Further, Affiant saith not.

Mike Moeller

Sworn to and subscribed before me this the 6th day of August, 2002.

Notary Public

My Commission Expires: 3/4/2006

KIRSTEN W. SCOTT NOTARY PUBLIC AT LARGE COMM. EXP. 3-4-06 KNOX COUNTY, TN

State NC
County Mecklenburg

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES, Plaintiff,	)	
v.	)	No. CH-02-1441-3
US LEC OF TENNESSEE, INC., Defendant.	)	

AFFIDAVIT OF SHANE TURLEY

1. My name is Stephen Shane Turley, and I am Deputy Senior Counsel for US LEC Corp., headquartered in Charlotte, North Carolina ("US LEC"). My office is located at 6801 Morrison Blvd., Morrocroft III, Charlotte, N.C. 28211. I am an attorney currently licensed, in good standing and admitted to practice law in the Commonwealth of Virginia. All information contained in this Affidavit is based upon events that occurred, of which I have personal knowledge.

2. Over the past week or so I have been communicating with Clinton Simpson, an attorney with Baker Donelson Bearman & Caldwell, PC, and counsel for Airstream Wireless Services ("Airstream"), to resolve outstanding issues between Airstream and US LEC regarding telecommunications service.

3. When I first began speaking with Mr. Simpson, he mentioned Airstream's desire to take some form of legal action if we could not resolve the outstanding issues. At the outset of our conversations, I was expressly advised by Mr. Simpson that I would be personally notified prior to any action taken by Airstream, so

that I would have an opportunity to have counsel present at any hearings. To this end, I provided Mr. Simpson with my cellular phone number so that he could contact me at any time.

4. Prior to the filing of the Complaint in this matter, I received no phone call, fax or other communication from Mr. Simpson or anyone else on behalf of Airstream. Indeed, I did not receive a faxed copy of Airstream's Complaint for Injunctive Relief and Money Damages and Fiat until July 31, 2002, at approximately 6:00 p.m. Eastern Standard Time. From the fax, it appeared there was a court hearing held the morning of the day before (July 30, 2002).

Further, the Affiant saith not.

Stephen Shane Turley, Affiant

Sworn to and subscribed before me this the 5 day of August, 2002.

Notary Public

My Commission Expires: My Commission Expires June 1, 2004

****
*** TX REPORT ***
****

TRANSMISSION OK

TX/RX NO	0342
CONNECTION TEL	16152526364
CONNECTION ID	
ST. TIME	08/05 14:54
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Fax Communication

To:	Luther Wright, Esq.	Fax:	615-252-6364	Phone:	
Company:				Total Pages:	3
From:	Shane Turley	Fax:	(704) 409-6874	Phone:	(704) 319-6874
Reference:				Date:	August 5, 2002

☐ *Urgent* ☐ *For Your Review* ☐ *See Attached*
☐ *Please Respond* ☐ *Please Recycle* ☐ *Confidential*

Message: My affidavit.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

'02 AUG 23 PM 4 1?

IN RE: PETITION OF US LEC TENNESSEE, INC. FOR DECLARATORY ORDER

DOCKET NO. 02-00890

DOCKET ROOM

PETITION FOR DECLARATORY ORDER

Pursuant to T.C.A. § 4-5-225 and T.R.A. Rule 1220-1-2-.05, US LEC of Tennessee, Inc. ("US LEC") petitions the Tennessee Regulatory Authority ("TRA") for a declaratory order as to the applicability of the TRA's rules and the tariffs of US LEC to the factual circumstances described below.

1. US LEC Corp., via its wholly owned subsidiaries is a telecommunications carrier operating in 14 states including Tennessee, where the operating subsidiary is US LEC of Tennessee, Inc. US LEC offers a variety of telecommunications services including local and long distance calling under the jurisdiction of the Tennessee Regulatory Authority and the Federal Communications Commission.

2. Pursuant to Chapter 408 of the Public Acts of 1995, T.C.A. §65-4-201(c), US LEC holds a certificate of convenience and necessity from the TRA to operate as a "competing telecommunications service provider" in Tennessee. In accordance with state law and the TRA's rules, the terms and conditions under which US LEC provides service in Tennessee are set forth in the carrier's tariffs which are on file at the Authority. Section 2.5.5 (E) of that tariff authorizes the company to discontinue service, without notice, to any customer

if the company reasonably believes that the service is being used for a fraudulent purpose. The tariff section states:

> In the event of fraudulent use of the Company's network, the Company will discontinue service without notice and/or seek legal recourse to recover all costs involved in enforcement of this provision.

3. TRA Rule 1220-4-2-.12, "Reasons for Denying Service," states, "Service may be refused or discontinued for . . . non-compliance with the utility's rules on file with the Commission [now the Authority]." Therefore, pursuant to US LEC's tariffs and the rules of the Authority, US LEC has the right to terminate service, without notice, in the event of fraudulent use of the company's service.

4. US LEC has a contract to provide long distance telecommunications services, including international service, to Airstream Wireless Services, Inc., which is located in Memphis, Tennessee. The contract states, *inter alia*, "This Agreement and all US LEC services and agreements are governed by the terms and conditions contained in US LEC's tariffs and price lists (collectively, the "Tariffs") filed with federal and state regulatory agencies.... Customer agrees to be bound by the provisions of US LEC's Tariffs in effect from time to time."

5. The cost to US LEC of handling an international call varies substantially depending upon whether the call is made to a wireless telephone or to a non-wireless telephone (land line) telephone. The cost to US LEC of handling an international call made to a wireless telephone in some European countries is substantially more than the cost of handling a call made to a land line telephone in the same country. The reason for this rate imbalance is due, in part, to the fact that some European wireless carriers have unusually high termination charges which provide a substantial source of revenue for those carriers.

6. Based on normal calling patterns, approximately 10% of all long distance calls are made to wireless telephones. During negotiations with Airstream, Airstream represented to US LEC that no more than 10% to 15% of Airstream's international traffic would be made to wireless telephones. Based on US LEC's experience with normal traffic patterns and those representations of Airstream, US LEC agreed to accept and complete international calls for rates of $.06 to $.15 per minute depending on the country where the call terminates. Those rates are reflected in the contract between US LEC and Airstream.

7. US LEC began providing service to Airstream on June 10, 2002. To complete international calls, US LEC partners with a major international carrier which actually carries the call to Europe. On July 17, 2002, US LEC was contacted by the fraud division of that carrier and was informed by them of the unusual nature of the traffic coming from Airstream. Contrary to normal traffic patterns and the representation of Airstream, approximately 99.7% of all international calls coming from Airstream were being made to wireless telephones, mostly in Germany and in the United Kingdom. The majority of the calls lasted only thirty seconds.

8. Such an abnormal traffic pattern cannot be accidental. US LEC believes that someone is either (1) using a switch to separate calls made to wireless telephones from calls made to land line telephones and routing all wireless calls to US LEC or (2) using auto-dialers, or similar equipment, to dial repeatedly to wireless telephones simply in order to generate a large number of terminating minutes for the financial benefit of the terminating carrier. In either case, this abnormal traffic pattern is the result of deliberate manipulation and is likely being done for a fraudulent purpose.

9. Upon discovery of this manipulation of the traffic coming from Airstream, US LEC made a decision, based on the above-referenced section of US LEC's tariff, to terminate service to Airstream.

10. Before terminating service to Airstream, US LEC was losing approximately $12,000 per day, representing the difference between the contract price and the significant costs incurred by US LEC to terminate this particular type of traffic.

11. After service was terminated, Airstream filed suit against US LEC in the Chancery Court of Shelby County, Tennessee. *Airstream Wireless Services v. US LEC of Tennessee, Inc.*, Docket No. CH-02-1441-3. On July 30, 2002, the day the suit was filed, Airstream obtained an *ex parte* temporary restraining order directing US LEC to resume service to Airstream. US LEC did not restore service but filed an "Emergency Motion to Dissolve Temporary Restraining Order and to Dismiss." US LEC argued, *inter alia*, that the Tennessee Regulatory Authority, not the Court, has original jurisdiction over this dispute and that, based on US LEC's tariff and the TRA's rules, US LEC properly terminated service to Airstream. The temporary restraining order has now expired. Airstream is no longer asking for the resumption of service but is pursuing a suit for damages against US LEC for the discontinuance of service and has also asked the Court to hold US LEC in contempt for US LEC's failure to resume service when the temporary restraining order was issued. These matters are scheduled to be argued before the Court on August 27, 2002.

12. The TRA has jurisdiction over the subject matter of this dispute pursuant to T.C.A. § 65-4-117 (The Authority "has the power to investigate . . . . any matter concerning any public utility.") and T.C.A. §65-5-210(a), *See BellSouth Advertising & Publishing Co. v.*

TRA, 2002 WL 1473208 (Tenn. 2002) (holding that the TRA "shall have original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested cases issues of fact and law arising as a result of the application of Acts 1995, ch. 408.") *See also, Breeden v. Southern Bell*, 285 S.W. 2d 346 (Tenn. 1955).

13. Airstream's lawsuit to the contrary, this is not a private contract dispute but a question of the proper interpretation and application of US LEC's tariffs and the rules of the TRA. Such matters are within the exclusive jurisdiction of the TRA. *See*, *Breeden* and *BellSouth, supra*, and *New River Lumber Co. v. Tenn. Railway Co.*, 238 S.W. 867 (Tenn. 1922). "No private agreement can replace a tariff's terms . . . . [and] a tariff must be enforced unless the regulatory agency intervenes." *Metro East Center v. Quest Communications*, 294 F.3d 924 (7th Cir., 2002).

14. Based on these facts, US LEC asks that the TRA issue a declaratory order interpreting US LEC's tariff in light of these circumstances and declaring that US LEC properly terminated service to Airstream because of the apparent fraudulent use of US LEC's network.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

Henry Walker
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2363
Counsel for US LEC of Tennessee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the following on this the 23rd day of August, 2002.

Clint Simpson, Esq.
Baker, Donelson, Bearman & Caldwell
165 Madison Ave., Suite 2000
Memphis, TN 38103

Henry Walker

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: PETITION OF US LEC TENNESSEE, INC. FOR DECLARATORY ORDER	)))))	DOCKET NO. 02-00890

AMENDMENTS TO THE PETITION FOR DECLARATORY ORDER

US LEC of Tennessee, Inc. ("US LEC") moves to amend the above-captioned Petition for Declaratory Order as follows:

Paragraphs no. 7 and 11 are deleted and the following paragraphs substituted instead:

7. US LEC began providing service to Airstream on June 10, 2002. To complete international calls, US LEC partners with a major international carrier which actually carries the call to Europe. On July 17, 2002, US LEC was contacted by the fraud division of that carrier and was informed by them of the unusual nature of the traffic coming from Airstream. Contrary to normal traffic patterns and the representation of Airstream, approximately 99.1% of all international calls coming from Airstream were being made to wireless telephones, mostly in Germany and in the United Kingdom. The majority of the calls from Airstream were recorded as being thirty second calls which is the minimum billing period.[1]

11. After service was terminated, Airstream filed suit against US LEC in the Chancery Court of Shelby County, Tennessee. *Airstream Wireless Services v. US LEC of Tennessee, Inc.*, Docket No.CH-02-1441-3. On July 30, 2002, the day the suit was filed,

---

[1] A call of any duration less than thirty seconds is recorded as a thirty second call.

Airstream obtained an *ex parte* temporary restraining order directing US LEC to resume service to Airstream. US LEC did not restore service but filed an "Emergency Motion to Dissolve Temporary Restraining Order and to Dismiss." US LEC argued, *inter alia*, that the Tennessee Regulatory Authority, not the Court, has original jurisdiction over this dispute and that, based on US LEC's tariff and the TRA's rules, US LEC properly terminated service to Airstream. The temporary restraining order has now expired. Airstream is no longer asking for the resumption of service but is pursuing a suit for damages against US LEC for the discontinuance of service and has also asked the Court to hold US LEC in contempt for US LEC's failure to resume service when the temporary restraining order was issued. These matters were heard before the Court on August 27, 2002. At that time, both US LEC and Airstream jointly requested that the Court stay all further proceedings in the lawsuit until the Authority had ruled on the issues presented in this Petition. The Court agreed to the parties' request.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

Henry Walker
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2363
Counsel for US LEC of Tennessee

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to the following on this the 17th day of September, 2002.

Clint Simpson, Esq.
Baker, Donelson, Bearman & Caldwell
165 Madison Ave., Suite 2000
Memphis, TN 38103

Henry Walker

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: PETITION OF US LEC TENNESSEE, INC. FOR DECLARATORY ORDER	)	
	)	
	)	DOCKET NO. 02-00890

RESPONSE OF AIRSTREAM WIRELESS SERVICES TO US LEC OF TENNESSEE, INC.'S PETITION FOR DECLARATORY ORDER

In response to US LEC of Tennessee, Inc.'s ("US LEC") Petition for Declaratory Order, Airstream Wireless Services ("Airstream") does hereby specially appear, by and through counsel, for the particular purpose of determining whether the Tennessee Regulatory Authority ("TRA") possesses jurisdiction over the subject matter, and would respectfully state as follows:

AFFIRMATIVE DEFENSES

Pursuant to TRA Rule 12-1-2-.03(2)(a), Airstream raises the defense that the TRA does not possess jurisdiction over the subject matter in the case at hand.

RESPONSE TO US LEC'S PETITION FOR DECLARATORY ORDER

FACTS

1. Airstream is a corporation duly organized and existing under the laws of the State of Delaware and doing business in Tennessee with its principal offices located at 1000 June Road, Memphis, Tennessee, 38119.

2. US LEC is, upon information and belief, a Delaware corporation having its principal place of business at Harpeth on Green V, 105 Westwood Place, Suite 100, Brentwood, Tennessee, 37027.

3. On or about April 11, 2002, Airstream and US LEC entered into an Advantage Customer Service Agreement (the "Agreement") which provides that US LEC agrees to provide international long distance service to Airstream at the agreed upon prices contained in the Agreement. (A true and correct copy of the Agreement is attached hereto as Exhibit "A").

4. The Agreement provides that service to the UK and to Germany shall be $.06 cents per minute. In consideration for such rates, Airstream agreed to a $40,000.00 minimum monthly usage commitment.

5. Upon entering an Agreement with a carrier such as US LEC, Airstream then binds itself to an agreement identical or near identical with its customers. Any breach of the Agreement by a carrier such as US LEC can and does result in substantial harm and injury to a company such as Airstream and may subject Airstream to substantial liability to its customers.

6. Airstream was a relatively new business operating in Tennessee for only a short period of time and was in the process of building its client base. Airstream only maintained the one contract with US LEC for international long distance services. Airstream did not have any other immediate means to provide its customers with service.

7. US LEC began providing service to Airstream on or about June 10, 2002. Airstream is without sufficient knowledge to attest to what carrier US LEC partners with to carry such calls to Europe. Airstream can neither admit not deny that US LEC was contacted by the Fraud Division of their major international carrier on July 17, 2002.

8. On or about July 24, 2002, US LEC terminated service to Airstream. Upon learning of the disconnection of service, Mr. Jason Braverman, CEO of Airstream, immediately contacted Rod Bain ("Bain"), the Director of Sales and authorized agent of US LEC, regarding

the termination of such service. Mr. Bain also requested that Bob Stanton participate in the telephone conference.

9. At the conclusion of this telephone conference, Mr. Braverman understood that US LEC would provide a minimum of sixty (60) days notice of any proposed change in rate for service, as required by the Agreement. (See Addendum to the Agreement, ¶ II).

10. During such conversation on July 24, 2002, US LEC, represented by Rod Baine and Bob Stanton, was willing and proposing to renegotiate the Agreement by increasing the agreed upon rates for international long distance service in the Agreement. (Affidavit of Braverman, ¶ 4). (A copy of the Affidavit of Jason Braverman was filed in the Chancery Court of Shelby County on August 13, 2002, and is attached hereto as Exhibit "B").

11. As of July 26, 2002, neither Airstream nor Mr. Braverman received any notice of any proposed rate change as required by the Agreement and service was not restored, thereby resulting in Airstream's inability to perform under its contracts to provide long distance service to its customers.

12. On July 30, 2002, Airstream filed suit against US LEC for money damages and requested the Chancery Court of Shelby County, Tennessee to issue a temporary restraining order ("TRO") enjoining US LEC from refusing to provide service to Airstream pursuant to the terms of the Agreement at issue in this matter.

13. On July 30, 2002, this Court issued a TRO enjoining US LEC from refusing to provide service to Plaintiff pursuant to the terms of the Agreement.

14. However, US LEC did not restore service as required by the TRO. Instead, US LEC filed an "Emergency Motion to Dissolve Temporary Restraining Order and to Dismiss."

15. As a consequence of US LEC's failure to abide by the Chancery Court's TRO, Airstream filed a Motion to Show Cause why US LEC should not be held in contempt for violating such TRO. These matters were scheduled before the Court on August 27, 2002, whereby the parties agreed to stay those proceedings and defer the issue of jurisdiction to the TRA.

LAW AND ARGUMENT

A. PROPER JURISDICTION FOR THIS CASE RESIDES WITH THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE, NOT THE TENNESSEE REGULATORY AUTHORITY.

(1) Airstream did not expressly submit to the jurisdiction of the Tennessee Regulatory Authority.

Although US LEC does not allege that Airstream expressly submitted to the jurisdiction of the TRA, Airstream states that neither the Agreement nor the tariff incorporated in the Agreement provides that the parties submit to the jurisdiction of the TRA to hear any matter arising out of the Agreement at issue in this case.

(2) This Case Does Not Arise Out of the Tennessee Telecommunications Act.

US LEC alleges that the facts of this case require an interpretation of its tariff filed with the TRA and the TRA's rules, more specifically Section 2.5.5(E) of US LEC's tariff which states:

> In the event of fraudulent use of the Company's network, the Company will discontinue service without notice and/or seek legal recourse to recover all costs involved in enforcement of this provision.

US LEC alleges that this provision contained in its tariff on file with the TRA authorizes it to discontinue service without notice to any customer if the company reasonably believes that the service is being used for a fraudulent purpose. (*See* ¶ 2 of US LEC's Petition for Declaratory Order). The plain wording of the tariff states: "In the event of fraudulent use of the Company's

network, the Company will discontinue service without notice ..." This provision does not state that, upon reasonable belief or a suspicion that the traffic patterns of its customers are the result of fraudulent activity or a fraudulent scheme, US LEC can terminate service without notice or without performing any type of investigation into the alleged fraudulent scheme.

In the case at hand, US LEC alleges that service was terminated to Airstream because US LEC believed that its network was being used for a fraudulent purpose or scheme. However, US LEC failed to provide any proof or any evidence to substantiate their alleged belief that its network was being used to commit a fraudulent scheme. In fact, US LEC's actions contradict such a belief. Mr. Braverman, CEO of Airstream, states in his Affidavit that US LEC, through its representatives, was willing and proposing to renegotiate the Agreement by increasing the agreed upon rates in the Agreement. (Exhibit "B". Affidavit of Braverman, ¶ 4). It makes absolutely no sense that US LEC would attempt to renegotiate the prices in the Agreement and then permit Airstream to continue in a scheme which US LEC, by its own allegation, reasonably believed was fraudulent. Once again, US LEC's actions completely contradict its claim and defense for terminating service to Airstream. To allow US LEC to operate under this provision of its tariff in the manner which US LEC has done, without substantiating any proof or even providing any indica that there was a fraudulent scheme, allows US LEC to cripple companies such as Airstream. Therefore, it is not US LEC's tariff or the TRA rules which require interpretation, but rather, an analysis of US LEC's actions under the circumstances of this case which must be done.

Upon analyzing the gravamen of the real issues in this matter, it is clear that the TRA does not have jurisdiction over this matter and that this matter does not arise out of the Tennessee Telecommunications Act (the "Act") or require an interpretation of tariffs and TRA

Rules. US LEC alleges that it terminated service to Airstream because Airstream's traffic patterns were the result of deliberate manipulation and likely being done for a fraudulent purpose. (Affidavit of Mike Moeller, ¶ 9). (A copy of the Affidavit of Mike Moeller was filed on August 6, 2002, in the Chancery Court of Shelby County and is attached hereto as Exhibit "C") (Mike Moeller is the Vice President-Sales for Tennessee and Kentucky at US LEC Corp.). US LEC does not contend that using a switch to separate, based on the number being called, calls made to land line telephones and routing all wireless calls to US LEC or that using auto dialers to dial repeatedly to wireless telephones are illegal or fraudulent acts. If the fact that Airstream's traffic patterns, which US LEC alleges reflected that 99.1% of the calls from Airstream were being made to wireless telephones, was fraudulent, US LEC would have never attempted to re-negotiate the rates of original Agreement with Airstream to allow Airstream to continue doing business in the same manner only at a higher rate.

US LEC essentially alleges two types of fraud in this matter. First, the US LEC alleges that upon learning that the traffic patterns of Airstream indicated 99.1% of its minutes were being terminated to wireless telephones, that such traffic patterns were indicative of fraudulent activity. In this instance, the fraudulent activity alleged by US LEC primarily means that a customer is running up substantial minutes for which it does not intend to pay. In the case at hand, Airstream clearly intended to pay for all minutes it used. After speaking with Mr. Braverman on July 24, 2002, the US LEC was aware that Airstream intended to pay for the minutes used at the rates contained in the Agreement.

The second allegation of fraud originates from US LEC's contention that Airstream fraudulently induced it into entering the Agreement. US LEC alleges that Airstream represented to it that no more than 10% to 15% of calls would be terminated to wireless telephones.

However, Mr. Braverman stated, in his Affidavit, that there were no such representations made. (Affidavit of Braverman, ¶ 5). Additionally, the Agreement does not contain any provision which indicates that such restrictions were in place on service. Furthermore, US LEC is confronted with a parol evidence issue in its attempt to prove that Airstream made these alleged representations which were not reflected in the Agreement. Either instance of US LEC's allegations of fraud are exactly the type of matters that a Chancery Court has jurisdiction to hear.

In its attempts to illustrate the alleged fraudulent activities, US LEC alleges that someone was using a switch to separate, based on the numbers being called, calls made to wireless telephones from calls made to land line telephones and routing all wireless calls to US LEC or using auto dialers, or similar equipment, to dial repeatedly to wireless telephones. (Exhibit "C". Affidavit of Mike Moeller, ¶ 9). US LEC states that this abnormal traffic pattern is the result of deliberate manipulation and is likely being done for fraudulent purpose. (Affidavit of Moeller, ¶ 9). However, US LEC has failed to provide any evidence or explanation what the fraudulent purpose may be. US LEC alleges that it was concerned about a pattern of activity which, it felt, could evidence an intent not to pay for the contracted service. What US LEC is really concerned about is the fact that it sold for six cents per minute service which, as it turns out cost US LEC much more. This point is evidenced by the Affidavit of Mike Moeller who expressly states the true underlying reason why service was terminated by US LEC. In his Affidavit, Mr. Moeller states that, "If US LEC is required to restore services to Airstream, US LEC will lose approximately $12,000.00 per day ..." (Affidavit of Moeller, ¶ 11).

Upon terminating the service and learning that there was no fraudulent scheme, US LEC was then obligated to restore service pursuant to the terms of the Agreement. US LEC's actions and course of dealings with Airstream completely contradict their argument and defense in this

matter that there was a fraudulent scheme. US LEC states that it terminated Airstream's service because the traffic patterns were indicative of fraud. However, after speaking with Mr. Braverman on July 24, 2002, US LEC, represented by Rod Baine and Bob Stanton, was willing and proposing to re-negotiate the Agreement by increasing the agreed upon rates in the Agreement. (Affidavit of Braverman, ¶ 4). US LEC's actions to attempt to re-negotiate the wireless rates pursuant to the Agreement and then allow Airstream to continue operating in the same manner at a higher rate is not consistent with its reasoning for terminating service to Airstream. US LEC's actions fly in the face of the defense it is using to avoid its obligations pursuant to the terms of the Agreement.

Thus, the real gravamen of this case is so clearly summarized in paragraph 7 of the Affidavit of Mike Moeller, whereby Mr. Moeller states that during negotiations with Airstream, Airstream represented to US LEC that no more than 10% to 15% of international traffic would be made to wireless telephones. (Affidavit of Moeller, ¶ 7). The real gravamen of this case is that US LEC contends that they were fraudulently induced to enter the Contract with Airstream. Therefore, this matter does not arise out of the Act, but rather, is a common law suit based on a claim for breach of contract by Airstream and a counter-claim or defense based on fraudulent inducement to enter such contract by US LEC. Again, US LEC would have never attempted to modify the Agreement and renegotiate the rates in the Agreement if Airstream's actual traffic was fraudulent or illegal. Therefore, this case neither requires an interpretation by the TRA of US LEC's tariffs, the TRA rules, or an analysis of whether any communications laws were being violated.

(3) This Case is not a Regulation Case Normally Heard by the TRA.

Finally, this is not the type of case within the jurisdiction of the TRA or the type of case normally heard by the TRA. In its Petition for Declaratory Order, US LEC cites to *BellSouth*

Advertising & Publishing Corp. v. Tennessee Regulatory Authority, 2002 Westlaw 1473208 (Tenn. 2002) (petition to rehear pending) (A copy of the *BellSouth* decision is attached hereto as Exhibit "D"), whereby the court refers to Section 1 of Chapter 408 of the Tennessee Public Acts where the General Assembly outlined the public policy underlying the new regulatory scheme which, as stated earlier, altered in a most significant manner the telecommunications industry in Tennessee:

> **Declaration Of Telecommunication Services Policy.** The General Assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications service markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

Tenn. Code Ann. § 65-4-123 (Supp. 2001).

Further, the cases cited by US LEC in its argument that the TRA has original jurisdiction over this matter are very distinct from the case at hand. The *BellSouth* case involved competition issues whereby the court determined that the TRA had the authority to order a publisher to include competitors' names and logos on the directory covers of the white pages. *BellSouth Advertising & Publishing Corp. v. Tennessee Regulatory Authority,* 2002 Westlaw 1473208 (Tenn. 2002). The court in *BellSouth* stated that one of the more notable changes affected by the enactment of Tenn. Pub. Acts 408 (effective June 6, 1995) which comprehensibly reformed the rules under which providers of telephone services operate in Tennessee was the abolition of monopolistic control over the local telephone service market and the initiation of open-market competition in the provision of local telephone service. *BellSouth* at p. 1.

US LEC also cites to *Breeden v. Southern Bell Tel. & Tel. Co.,* 199 Tenn. 203, 285 S.W.2d 346 (Tenn. 1955), whereby one of the issues before that court was whether the Commission (now the present day TRA) could require a telephone company to provide service to people in a community. The case was rooted in discrimination and whether a telecommunications company had to provide services to a certain community. The *Breeden* court took note of and referred to *McCollum v. Southern Bell Tel. & Tel. Co.,* 163 Tenn. 277, 43 S.W.2d 390, whereby the Court previously stated:

> The legal profession has generally so construed the Act, and we think there can be no doubt but that the Legislature intended to confer upon the commission (present day TRA) exclusive jurisdiction, in the first instance, to establish reasonable rates and charges.

The court in *Breeden* added that the same language is applicable to its case. *Breeden,* 285 S.W.2d at 351. Before the telephone company can be required to serve the people of the community such as the one at issue in *Breeden,* the Railroad and Public Utilities Commission must hear the matter and grant the necessary certificate therein. This case required a statutory interpretation and is very distinct from the present matter which does not require any similar interpretation.

The cases cited by US LEC in support of its argument that the TRA has original jurisdiction over this matter are all very distinguishable from the case at hand. The cases cited by US LEC all involve issues of competition, discrimination, determinations whether initial service should be provided to a community, and statutory interpretation of the TRA's own rules and statutory provisions. The case at hand involves no issues even remotely similar to the ones in the cases cited by US LEC.

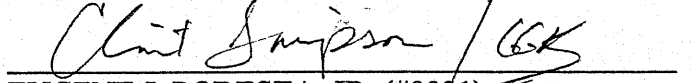
CONCLUSION

The TRA does not have jurisdiction in the case at hand. This case does not arise out of the Tennessee Telecommunications Act and does not require an interpretation of US LEC's tariff or the TRA rules.

However, if the TRA does determine that the issues involved in this matter do fall within its jurisdiction, then Airstream requests that the TRA find that US LEC did not act properly when it terminated service to Airstream. US LEC provided no evidence and has failed to offer any factual support that it terminated service to Airstream as a result of the fraudulent use of its network. US LEC did not act reasonable when terminating service to Airstream and continued to act in bad faith by not restoring service to Airstream upon learning that Airstream was not defrauding US LEC.

Based on these facts, Airstream requests that the TRA (1) deny US LEC's Petition for Declaratory Order; (2) issue an order stating that the TRA does not have jurisdiction in this matter, that the issues presented before the TRA do not arise out of the Tennessee Telecommunications Act; or in the alternative; (3) issue an order stating that US LEC did not properly terminate service to Airstream on July 24, 2002.

Respectfully submitted,



EUGENE J. PODESTA, JR. (#9831)
CLINTON J. SIMPSON (#20284)
Attorneys for Respondent
Airstream Wireless Services

OF COUNSEL:

BAKER, DONELSON, BEARMAN & CALDWELL
165 Madison Avenue, Suite 2000
Memphis, TN 38103
(901) 526-2000

CERTIFICATE OF SERVICE

I, Clint Simpson, hereby certify that I have served a true and exact copy of this Response of Airstream on Luther Wright, Esquire, Esq., Boult, Cummings, Conners & Berry, PLC, 414 Union Street, Suite 1600, P. O. Box 198062, Nashville, Tennessee, 37219, this the 23rd day of September, 2002.

Clint Simpson / CGB

CLINT SIMPSON

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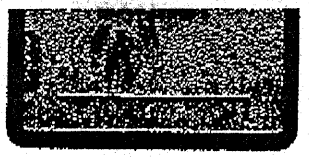


ADVANTAGE
Customer Service Agreement

THIS CUSTOMER SERVICE AGREEMENT (this "Agreement") is made by and between:

US LEC OF TENNESSEE INC., a Delaware corporation ("US LEC"), having its principal place of business at Harpeth on Green V, 105 Westwood Place, Suite 100, Brentwood, Tennessee 37027; and

Customer Name: AIRSTREAM WIRELESS SVCS

State of Incorporation or Organization:

Physical Address: 1000 JUNE ROAD

City: Memphis State: TN Zip: 38119

Contact Name: JASON BRAVERMAN Title:

Phone: (901) 763-3030 Fax:

Email:*

Tax Exempt Certificate Number *:

* Please attach a copy of your tax-exempt certificate, if applicable. You will be charged tax if this document is not provided.

Billing Address (if different): N/A

City: N/A State: N/A Zip: N/A

This Agreement is subject to the terms and conditions set forth herein, and in any Addendum attached hereto, which are a material part of this Agreement and are applicable to all services ordered hereunder, whether at this time or at a later date. Subject to all such terms and conditions, US LEC agrees to provide, and Customer agrees to receive and pay for, the services identified on Exhibit 1 herein.

Customer selects the following commitments:

Minimum Monthly Usage Commitment (includes local, long distance, toll inbound (Toll Free) and data usage):

$40,000

Minimum Term Commitment (commencing on service initiation):

12 months

COMMITMENT LEVEL & TERM DISCOUNTS

Based on the Minimum Monthly Usage Commitment and Minimum Term Commitment, Customer will receive the product specific pricing shown in US LEC's tariffs for local, long distance toll, and/or data services and as detailed below by Customer location.

The Competitive Telephone Company

GENERAL TERMS AND CONDITIONS

1. Agreement Subject to Tariffs. This Agreement and all US LEC services and agreements are governed by the terms and conditions contained in US LEC's tariffs and price lists (collectively, the "Tariffs") filed with federal and state regulatory agencies. Tariff rates and terms are subject to change by US LEC or the appropriate regulatory agency. Customer agrees to be bound by the provisions of US LEC's Tariffs in effect from time to time. If, prior to the expiration of the term of this Agreement, US LEC voluntarily or involuntarily, as a result of governmental or judicial action, cancels, in whole or in part, any Tariff on file, where the affected provisions prior to such cancellation applied to any Service(s) US LEC provides under this Agreement, then effective on such cancellation and for the remainder of the term, this Agreement shall consist of the following, in order of precedence from (a) through (c): (a) US LEC Tariff provisions that remain in effect ("Effective Tariffs"); (b) specific provisions contained in this Agreement that expressly apply in lieu of, or that apply in addition to, provisions contained in the Effective Tariffs; and (c) provisions contained in the US LEC Rate Guide to the extent that (a) and (b) above are not applicable. US LEC may amend the US LEC Rate Guide from time to time and will maintain the Rate Guide open for public inspection at one or more offices during normal business hours and on US LEC's website at www.uslec.com. Immediately prior to the cancellation of any Tariff provision applicable to the Service(s) provided hereunder, US LEC shall incorporate any such provisions into the US LEC Rate Guide and if US LEC fails to incorporate any such provisions, such provisions shall be deemed incorporated into this Agreement as if US LEC had so incorporated such provisions in the US LEC Rate Guide. In all events, the applicable rates and rate structures shall continue to be subject to any discounts, waivers, credits or restrictions on rate changes that may be contained in this Agreement for Tariffed Services. Where rate and/or discount adjustments would have been made by reference to any canceled Tariff rate, rate structure, discount and/or discount schedule in provisions under this Agreement, such adjustment may be made by US LEC in its Rate Guide. All references to Tariffs in this Agreement shall be construed to also mean the documents which will replace those Tariffs following cancellation of the same.

2. Payment for Services. Customer agrees to pay US LEC's charges for the Services as set forth in this Agreement or US LEC's applicable Tariff. Customer shall be responsible for paying for all calls originating from or terminating to either Customer's premises or the Services (whether or not authorized by Customer). Customer will be invoiced on a monthly basis. Invoices are payable upon receipt by Customer. If payments are not received by US LEC within twenty-eight (28) days of the date of the invoice, US LEC may at any time thereafter discontinue the Services, terminate this Agreement, require a security deposit and/or impose a late charge of one and one-half percent (1 1/2%) per month of the balance due (or such lesser amount as is permitted by applicable law). US LEC may also apply any Customer deposit to the unpaid bill. Customer agrees to pay US LEC all costs and expenses of collection of any amounts due from Customer hereunder, including reasonable attorney's fees and expenses.

3. Minimum Monthly Usage Commitment. Customer agrees to pay for the Minimum Monthly Usage Commitment indicated above. In any given month (after the third full month following Service initiation) where Customer's actual usage falls below the Minimum Monthly Usage Commitment, Customer will nonetheless be billed for and agrees to pay the Minimum Monthly Usage Commitment. If Customer's actual usage is less than Customer's Minimum Monthly Usage Commitment for a period of four consecutive months, US LEC may, but shall not be required to, reduce Customer's Minimum Monthly Usage Commitment, and alter its rates accordingly, to reflect Customer's actual usage in such four month period. US LEC may only reduce Customer's Minimum Monthly Usage Commitment once during each calendar year. Service usage types that contribute toward the Minimum Monthly Usage Commitment include outbound IntraLATA, outbound long distance (domestic interstate, intrastate or international) and inbound (Toll Free) service, but only to the extent that such services are billed or provided to Customer directly by or through US LEC. Monthly recurring charges for local and long distance access, including line and feature charges, also contribute toward the Minimum Monthly Usage Commitment. Charges that do not contribute to the Minimum Monthly Usage Commitment include: all charges for all non-recurring charges, such as installation charges, expedite charges and late payment penalties, taxes and other governmental-imposed surcharges, and all charges by other carriers that are not invoiced by US LEC to Customer. Multiple Customer locations specifically referenced herein or in addendum hereto are aggregated to satisfy the Minimum Monthly Usage Commitment.

4. Customer Satisfaction Guarantee. If at any time, Customer is not satisfied that US LEC's network quality or the quality of the sales and service support Customer receives from US LEC is at least as good as the network quality and service that was provided to Customer by Customer's prior carrier(s), and US LEC fails to correct the problem to Customer's reasonable satisfaction within 15 days of receipt of written notice specifying in reasonable detail the nature of the problem, Customer may terminate this Agreement without penalty upon an additional 15 day written notice.

5. Term; Automatic Renewal. This Agreement shall become effective on the date it is signed by both Customer and US LEC (the "Effective Date"), subject, however, to US LEC's approval of Customer's credit application and US LEC's approval of the suitability of Customer's premises for the Services. This Agreement shall continue in force for the Minimum Term Commitment selected on the first page of this Agreement unless earlier terminated as provided herein, provided however, that if Customer adds additional T-1 facilities under this Agreement after the Effective Date, Customer's Minimum Term Commitment with respect to such facilities shall commence on the date of service initiation for such facility, and this Agreement shall continue in force until the Minimum Term Commitments applicable to all facilities ordered hereunder shall have expired. This Agreement shall be automatically renewed for successive one-year periods unless either party gives the other party written notice of non-renewal at least 30 days prior to the end of the then current term. The terms and conditions of this Agreement shall be applicable to any such renewal term.

6. Termination. (A) If a party materially breaches any of the terms of this Agreement, the other party may terminate this Agreement without liability to the breaching party, but only if (i) the non-breaching party has given at least thirty (30) days notice of its intent to terminate and (ii) prior to the effective date of such notice, the breaching party has not substantially remedied such breach; provided, however, that if the breach relates to the failure by Customer to pay any amounts owing hereunder when due, then notice of termination may be effective on the day notice is given.

(B) If, prior to the expiration of the Minimum Term Commitment of this Agreement, Customer terminates this Agreement (other than as provided in Paragraph 6 and 6(A) above) or US LEC terminates this Agreement pursuant to Paragraph 6(A) due to Customer's breach, Customer shall be liable to US LEC for: (i) a termination charge in an amount equal to 50% of the Minimum Monthly Usage Commitment multiplied by the number of months remaining in the then current term; and (ii) a termination charge in an amount equal to any promotional credits, discounts or fee waivers previously provided by US LEC to Customer. If, prior to the expiration of the Minimum Term Commitment, Customer terminates the Service(s) as provided in Paragraph 6 above, Customer shall be liable to US LEC for repayment of any promotional credits (including but not limited to DTI credits), discounts or fee waivers (including but not limited to installation fee waivers) previously provided by US LEC to Customer. In the event of termination of this Agreement for any reason, Customer acknowledges and agrees that US LEC may withhold customer service information (including, but not limited to, customer telephone numbers) until US LEC receives payment for all amounts incurred by Customer through the effective date of termination. Nothing contained herein or in paragraph 7 shall be construed as prohibiting US LEC from pursuing any other legal or equitable remedy that may be available to it, or limiting the damages to which US LEC may be entitled in law or in equity, due to Customer's breach.

The Competitive Telephone Company

7. Carrier Damages. Customer hereby agrees to reimburse US LEC for loss of or damage to any Services or related facilities or equipment of US LEC, which may be caused by the negligence or willful misconduct of Customer, its agents, employees or representatives.

8. Special Construction. Customer shall be responsible for all costs associated with any special construction requested by Customer as part of US LEC's provision of Service, and all costs arising from any Customer requested change in location of all or part of the Services prior to the completion of construction or installation.

9. Liability of US LEC; Disclaimer of Warranties. The liability of US LEC (or any other carrier furnishing any portion of the Services) for any interruption or failure of any Service furnished pursuant to this Agreement shall be limited to the amount of actual charges paid by Customer for the interrupted Service(s). US LEC shall not be liable for any interruption caused by any act or omission of any other carrier or other provider furnishing any portion of the Services, including directory listings. Neither US LEC nor any other carrier furnishing any portion of the Services shall be liable or responsible for any fraudulent or unauthorized calls originating from or terminating to Customer's premises or the Services. Neither US LEC nor any other carrier furnishing any portion of the Services shall have liability for any incidental, indirect or consequential damages arising from any Service provided under this Agreement or any interruption or failure of any such Service. EXCEPT AS PROVIDED IN PARAGRAPH 4 ABOVE, US LEC MAKES NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO ANY WARRANTY OF MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE OR USE WITH RESPECT TO ANY SERVICES, FACILITIES OR EQUIPMENT PROVIDED PURSUANT TO THIS AGREEMENT. CUSTOMER ACKNOWLEDGES THAT IT HAS SOLE RESPONSIBILITY OF ENSURING THAT ITS PBXS ARE PROGRAMMED TO CORRECTLY ROUTE 911 CALLS. US LEC IS NOT LIABLE TO CUSTOMER FOR ANY DIRECT, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES ARISING FROM ANY INCORRECT CUSTOMER PBX PROGRAMMING. BY ENTERING INTO THIS AGREEMENT CUSTOMER HEREBY FOREVER RELEASES AND FORGIVES US LEC FROM ANY SUCH LIABILITY, KNOWN OR UNKNOWN AND WHETHER NOW EXISTING OR HEREAFTER ARISING.

10. Credit Information. US LEC reserves the right to request a copy of Customer's most recent financial statement and/or remittance portion of the invoice from Customer's previous or current telecommunication carrier. Customer's signature below constitutes authorization for US LEC to obtain credit information from any credit bureau or other investigative agency pertaining to the credit and financial responsibility of Customer. Customer understands that, as a result of this credit review, it may be required to submit a deposit or a guarantor(s) of related parties in order to receive the Services.

11. Entire Agreement; Modification; Waiver. This Agreement and any attachments, exhibits or addendum hereto, and any applicable Tariff provisions constitute the entire agreement between the parties relating to the subject matter hereof. Except as set forth in the Tariffs, there are no terms, conditions or obligations other than those contained herein and there are no verbal statements, representations, warranties or agreements with respect to this transaction, which have not been embodied herein. This Agreement may only be amended or modified by a written agreement executed by authorized signatories of the parties hereto. No waiver of any breach of this Agreement will be valid unless in writing and signed by the party against whom enforcement is sought, and no such waiver shall be deemed to be a waiver of any future breach.

12. Notices. All notices hereunder shall be in writing and mailed first class certified mail, return receipt requested, or delivered by hand to the address of the other party as set forth on the first page of this Agreement or such other address as such party may designate from time to time by such notice and shall take effect (a) when mailed, or (b) when received, if delivered by hand.

13. Governing Law; Assignment; Miscellaneous. This Agreement shall in all respects be governed by and construed in accordance with the laws of the State of North Carolina without regard to its choice of law rules. Customer may not assign this Agreement without the express written consent of US LEC. US LEC may assign this Agreement in whole or in part to any of its affiliates as long as such affiliate is licensed to provide the services assigned to it and US LEC remains responsible for the performance of all of its obligations under this Agreement. If any provision of this Agreement shall be held to be illegal, invalid or unenforceable as a matter of law, the same shall not invalidate this Agreement, which shall be construed as if not containing such provision, and the rights and obligations of the parties shall be construed and enforced as if a commercially reasonable provision had been substituted in place thereof, consistent with the understandings of the parties hereto. Notwithstanding anything contained herein to the contrary, neither party shall be responsible to the other for damages or losses caused by an "Act of God" or other "force majeure" event. This Agreement may be executed in one or more counterparts each one of which shall be deemed an original and all of which together shall constitute one and the same instrument. Neither party shall use the name of the other party for advertising or other such purposes without the prior written consent of the party, except that US LEC may include Customer's name in general customer lists compiled from time to time. This offer expressly limits acceptance to the pre-printed terms and conditions as set forth herein, and those contained in US LEC's Internet Use Policy (Enterprise) found by this reference and found at www.uslec.com). Any additional or different terms proposed by Customer (either by addition on this form or in another instrument previously or hereafter furnished to US LEC) are rejected in their entirety unless expressly agreed to in writing by a US LEC Director or Vice President of Sales.

THE FOLLOWING TERMS AND CONDITIONS ARE APPLICABLE ONLY IF LONG DISTANCE ONLY IS CHOSEN

Percentage of Interstate Usage (PIU). Customer agrees to meet a minimum PIU requirement, as a percentage of total billed traffic minutes, of forty percent (40%) of total billed traffic minutes. This requirement shall not apply in the state of Georgia. Customers not meeting this threshold of interstate traffic will, at US LEC's discretion, face termination of contract as per Paragraph 6.

[redacted]

THE FOLLOWING TERMS AND CONDITIONS ARE APPLICABLE ONLY IF TOLL FREE INBOUND OR LOCAL TOLL FREE IS CHOSEN

Fraud Notice. US LEC hereby notifies Customer that fraud potentially exists when using Toll Free inbound or Local Toll Free Service to remotely access Customer's phone equipment for the purpose of gaining access to an outside line (through the use of DISA or any other method).

Fraud Waiver. US LEC recommends that Customer configure its phone equipment to prevent the use of Toll Free inbound or Local Toll Free Services to remotely access Customer's phone equipment for the purpose of gaining access to an outside line (through the use of DISA or any other method) due to the potential for unauthorized or fraudulent calls, and Customer agrees to be responsible for and pay all charges relating to all calls made to or from their premises or to or from services provided by US LEC.

Liability of US LEC. US LEC IS NOT LIABLE TO CUSTOMER FOR ANY DIRECT, INDIRECT OR CONSEQUENTIAL DAMAGES ARISING FROM CUSTOMER'S FAILURE TO PROVIDE ADEQUATE PROTECTION FROM TOLL FRAUD. BY SIGNING THIS CUSTOMER SERVICE AGREEMENT, CUSTOMER HEREBY FOREVER RELEASES AND FORGIVES US LEC FROM ANY SUCH LIABILITY, KNOWN OR UNKNOWN AND WHETHER EXISTING OR HEREAFTER ARISING.

Toll Free Resp.Org. A Resp.Org. is an agent appointed by a customer to access the national toll free database, which stores characteristics of each toll free number, and to act on the Customer's behalf in defining and administering the toll free number(s) in the national database used by the customer. US LEC provides Resp.Org. functions in accordance with Bell Operating Companies Tariff FCC#1, however, US LEC may, at its discretion, limit the quantity of numbers it manages as a Resp.Org. for any Customer. Subject to the preceding sentence, where a Customer requests that US LEC serve as its Resp.Org., US LEC will subscribe to Toll Free Directory Listing for the number(s) assigned to the Customer. In the event that a Customer transfers its Service to another Resp.Org., US LEC shall cease to subscribe to Toll Free Directory Listing Service on behalf of the Customer and the Customer is responsible for ensuring that Directory Listing Service is maintained through the new Resp.Org. Customer is responsible for payment of any outstanding Toll Free Directory Listing responsibility. US LEC reserves the right not to honor a Customer's request for a Resp.Org. change until all outstanding charges are paid in full. Recurring charges, as specified in the applicable tariff, shall apply if Customer retains US LEC as Resp.Org. when using another Toll Free service provider. The Customer must place each Toll-Free telephone number in actual and substantial use. If the Customer ceases to retain a service US LEC Resp.Org., the Customer must notify US LEC of any changes to the Customer's Resp.Org. in writing within 48 hours of the change and the Customer shall remain liable for all Resp.Org. functions provided to Customer by US LEC until such change in Customer's Resp.Org. is effective. The Customer is responsible for all outstanding indebtedness for services provided by a previous Resp.Org. or for any obligations of Customer to such previous service providers existing at the time of transfer to US LEC.

Facilities. It is Customer's responsibility to obtain an adequate number of access lines from US LEC for Toll Free and/or Local Toll Free Service to meet Customer's reasonably expected demand.

THE FOLLOWING TERMS AND CONDITIONS ARE APPLICABLE ONLY IF LONG DISTANCE ONLY IS CHOSEN OR 911/411/OPERATOR SERVICES ARE NOT AVAILABLE

The services provided to customers of US LEC under this Customer Service Agreement do not include Local access, 911 access, 411 access, or Operator Services. Customer's access to Local, 911, 411 and Operator Services must be made on local access facilities provided by Customer's local dial tone provider. US LEC IS NOT LIABLE TO CUSTOMER FOR ANY DIRECT, INCIDENTAL, INDIRECT OR CONSEQUENTIAL DAMAGES ARISING FROM ATTEMPTS TO ACCESS 911, 411 OR OPERATORS FROM US LEC PROVIDED ACCESS FACILITIES. BY ENTERING INTO THIS AGREEMENT CUSTOMER HEREBY FOREVER RELEASES AND FORGIVES US LEC FROM ANY SUCH LIABILITY, KNOWN OR UNKNOWN AND WHETHER NOW EXISTING OR HEREAFTER ARISING.

[redacted]

TERMS AND CONDITIONS ARE APPLICABLE ONLY IF CALLING CARD SERVICE IS CHOSEN

[redacted]

The Competitive Telephone Company

APPOINTMENT OF AGENT

Customer Name: AIRSTREAM WIRELESS SVCS

Physical Address: 1000 JUNE ROAD

City: Memphis State: TN Zip: 38119

In connection with this Agreement between US LEC and Customer, Customer hereby appoints US LEC to act as its agent in dealing with any or all of the following:

a. Local Exchange Carriers
b. Long Distance Carriers, including but not limited to, AT&T Corp., Sprint and MCI WorldCom
c. Other and/or Specialized Common Carriers
d. Facility Providers
e. Joint User Groups
f. Equipment Vendors
g. Consultants

Solely for the purposes of ordering, changing and/or maintaining US LEC's provision of the Services, provided, however, that US LEC will not change Customer's long distance carrier without Customer's prior written authorization.

THIS AUTHORIZATION SHALL REMAIN IN EFFECT UNTIL MODIFIED OR REVOKED IN WRITING BY CUSTOMER.

N/A

Customer Main Account Billing Telephone Number

And All Associated Customer Accounts

Customer: AIRSTREAM WIRELESS SVCS

By: [signature]

Name: JASON BRANDEMARAI

Title: CEO

Date: 3/27/2002

US LEC of Tennessee Inc.,

By: [signature]

Name: Rod Bailey

Title: Dir of Sales

Date: 4/11/02

Exhibit 1

For the following Customer location(s) (note existing NPA/NXX)

Location:

Customer Name: AIRSTREAM WIRELESS SVCS
Address: 1060 JUNE ROAD
City: Memphis State: TN Zip: 38119 County: Shelby
Main Telphone (901) 763-3030

For the following Service(s):

Local Service	☐	Long Distance	☒	Toll Free (Inbound)	☐
Local Toll Free	☐	Calling Cards	☐	US LECnet	☐
Frame Relay	☐	DPL	☐	DSL	☐

All Services chosen under this Agreement or in any Addendum hereto are referred to herein as the "Services".
911/411/Operator Services Included ☒ Yes ☐ No

In Service Products:

Service Information			Monthly Recurring	Monthly Recurring	One Time / Non-Recurring	Additions/ Changes
Description	**Quantity**	**Unit Price**	**Total MRC**	**NRC**	**Initial**	**Date**
Total Monthly & NRC Charges			**$0.00**	**$0.00**		

Proposed Add Products:

Service Information			Monthly Recurring	Monthly Recurring	One Time / Non-Recurring	Additions/ Changes
Description	**Quantity**	**Unit Price**	**Total MRC**	**NRC**	**Initial**	**Date**
ADVANTAGE World #3643	4	$0.00	$0.00	$0.00		4-11-02
MRC - LD Only T-1 #3381	4	$200.00	$800.00	$0.00		4-11-02
NRC - Access Only T-1 #3382	4	$1000.00	$0.00	$4000.00		4-11-02

[redacted] 3/28/2002

[redacted]

Exhibit 1 [redacted]

Proposed Add Products:

Service Information			Monthly Recurring	Monthly Recurring	One Time / Non-Recurring	Additions/ Changes	
Description	Quantity	Unit Price	Total MRC	NRC		Initial	Date
Total Monthly & NRC Charges			$800.00	$4000.00			

Disconnect Products:

Service Information			Monthly Recurring	Monthly Recurring	One Time / Non-Recurring	Additions/ Changes	
Description	Quantity	Unit Price	Total MRC	NRC		Initial	Date
Total Monthly & NRC Charges			$0.00	$0.00			

[redacted]

Revision # _____ <Pick 'Svc Site Loc' on 'Order Entry'> ____ of ____

ADVANTAGE - Attachment A - Order Form

Customer Name:	Alcsteam Wireless Service			Switch:	MEM
Service Address:	1000 June Road Suite 102			Rate Schedule:	1
				Tariff Plan:	ICB
City:	Memphis	State: TN	Zip: 38119	LATA:	460
County:	Shelby	Main Telephone Number:	901-763-3030		

Invoice BTN: _____

Summary of Items & Detail of Services							Restrictions			Services Information		Monthly	Monthly	One-time
Existing #	Existing Telco	US LEC #	PIC 0+	PIC 1+	PIC Intralata	Trunk/ Line	BNS	INTL Y/N	Special Blocking	Description (PIC'd or 10-10-XXX)	Qty	Unit Price	Total Price	Install
new										International Rates				
										.06 to UK				
										.06 to Germany				
										.10 to Italy				
										.13 to Spain				

Total Monthly & Install Charges

Customer Signature _____ Date 3/27/02

US LEC Representative Signature _____ Date 4/11/02

Restrictions:	BNS	Special Blocking
INTL Y = Wants International N = Restricted - No Intl.	0 - No Restrictions 1 - Collect Calls 2 - Third Party Calls 3 - Both Restrictions	0 - No Restrictions 1 - 900 Collect Calls 2 - 976 Calls Restricted 3 - Both Restrictions

9

ADDENDUM TO THE ADVANTAGE CUSTOMER SERVICE AGREEMENT BETWEENUS LEC OF TENNESSEE INC. AND AIRSTREAM WIRELESS SERVICES

This Addendum made as of the 11th day of April, 2002, by and between US LEC of Tennessee Inc. ("USLEC"), a Delaware corporation with an office at Lenox Park Building C, 3150 Lenox Park Drive, Suite 417, Memphis TN 38115 and Airstream Wireless Services ("Customer"), a Delaware corporation with an office at 1000 Juna Road, Suite 102, Memphis, TN, 38119, contains modifications and additions to the terms and conditions of the Customer Service Agreement (the "Agreement") of even date herewith between USLEC and Customer.

In consideration of the mutual covenants contained in the Agreement and herein, and for other good and valuable consideration, USLEC and Customer hereby agree as follows:

I. Customer hereby selects a Minimum Monthly Usage Commitment of $40,000.00.

II. US LEC will notify Customer at least sixty (60) days in advance of any increase of the tariffed rates for Services to the United Kingdom, Spain, Germany or Italy. Customer may, on prior written notice to US LEC during such sixty (60) day period, terminate provision of Services effective as of the effective date of the rate increase indicated in US LEC's notice. In addition, US LEC may on written notice to Customer, terminate provision of the Services effective as of the effective date of the rate increase indicated in US LEC's notice.

III. Customer hereby agrees to submit deposits to US LEC as follows:

- $40,000.00 prior to Service initiation, and
- $40,000.00 within thirty (30) days following Service initiation.

In the event that the Agreement is terminated for any reason, US LEC will return the above-referenced amounts to Customer, less any amounts due to US LEC through the effective date of termination.

IV. All other terms and conditions of the agreement shall remain in full force and effect. In the event of any conflict between the terms and conditions of this Addendum and the terms and conditions of the Agreement, this Addendum shall prevail. The terms defined in the Agreement and used in this Addendum shall have the same respective meanings as set forth in the Agreement, unless clearly otherwise defined herein.

IN WITNESS WHEREOF, this Addendum to the Agreement is hereby executed by an authorized representative of each party hereto as of the date first above written.

US LEC of Tennessee Inc.
By: _____
Name: Rob Baines
Title: Director of Sales
Date: 4/11/02

Airstream Wireless Services
By: _____
Name: JASON BRAVERMAN
Title: CEO / President
Date: 4-11-02

General Company Information (If you would like us to consider the credit of an affiliated Company, please complete the section below. Use additional pages if necessary.)

Affiliated or Parent Company: _____

Address: _____

City: _____ State: _____ Zip: _____

Contact Person: _____ Title: _____ Phone: _____

Trade References

Company Name: ATAR Twin MEDIA

Address: 1477 President Street

City: Brooklyn State: NY Zip: 11238

Contact Person: Dov Schwartz Title: _____ Phone: 509-665-3757

USA Cell, Inc. 0224 Gutman Fax # 702-442-7185

Bank Reference

Bank Name: Bank South Bank Phone: 901-684-4444

Address: Poplar & Mendenhall

City: Memphis State: TN Zip: 38119

Business Checking Account Number(s): 5326675013

US LEC OF TENNESSEE INC. RESERVES THE RIGHT TO REQUEST A COPY OF THE COMPANY'S MOST RECENT FINANCIAL STATEMENT AND/OR REMITTANCE PORTION OF THE INVOICE FROM THE PREVIOUS OR CURRENT TELECOMMUNICATIONS CARRIER.

I understand that the information contained in this application is for the purpose of obtaining credit in connection with the provision by US LEC of Tennessee Inc. of telecommunication services. I hereby certify that I am an officer of the Company named on the front page of this application, that I am duly authorized to provide the information contained herein on behalf of the Company, and that the information contained herein is true and correct to the best of my knowledge. I hereby authorize US LEC of Tennessee Inc. to obtain credit information from any credit bureau or other investigative agency pertaining to the credit and financial responsibility of the Company. I further understand as a result of this credit review, that the Company may be required to submit a deposit or a guaranty(ies) of related parties in order to use the services of US LEC of Tennessee Inc.

Airstream Wireless Services, Inc.
Company Name

Jason Braverman, CEO
Type or Print Name and Title of Owner or Officer

X _____ 3/27/2002
Authorized Signature Date

US LEC OF TENNESSEE INC.

CUSTOMER CREDIT APPLICATION FOR BUSINESSES

Date of Application: 3/28/02

Important: All applicable information (front and back) must be completed in its entirety. Please print clearly and legibly to help ensure accurate and timely processing. When used herein, the term "Company" means the legal entity that owns the business that has requested service from US LEC of Tennessee Inc.

General Company Information

Legal Company Name: Airstream Wireless Services, Inc. (the Company).

Type of Entity: ☐ Partnership ☐ Sole Proprietor ☒ Corporation ☐ Limited Liability Company ☐ Other _____

Dun & Bradstreet Number: _____

Other Trade Name(s): _____ DBA: _____

Years in Business: 1 yrs. _____ mos.

Federal Tax ID: 22-3819175 Number of Employees: 5 Annual Sales: $ $.5 million

Physical Street Address (no PO Box numbers please) 1099 Jone Road Suite 102

City: Memphis State: TN Zip: 38119

How long at this address? 1 yrs. _____ mos.

Contact Person: Jason Braverman Phone: 901-331-2754 Fax: 901-763-2223

Previous Address: _____

City: _____ State: _____ Zip: _____

How long at this address? _____ yrs. _____ mos.

Do you own or lease the building in which you are located? (please check one) ☐ Own ☒ Lease

Principal of the Company

(If Sole owner or Partnership, please complete the section below. Use additional pages if necessary.)

I hereby authorize US LEC of Tennessee Inc. to use the information provided below to obtain a consumer credit report, and I understand that my creditworthiness may be considered when making a decision whether to provide services to the Company on credit.

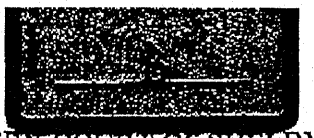
Principal Name: Jason Braverman Signature: _____

Title or Position: CEO Phone: 901-331-2754

Social Security Number: _____ Year of Birth: _____

Residential Street Address: _____

City: _____ State: _____ Zip: _____



IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES,	)	
	)	
Plaintiff,	)	
	)	
VS.	)	NO. CH-02-1441-3
	)	
US LEC OF TENNESSEE, INC ,	)	
	)	
Defendant.	)	

AFFIDAVIT OF JASON BRAVERMAN

STATE OF TENNESSEE)
COUNTY OF SHELBY)

Comes now Jason Braverman, Plaintiff in the above-referenced cause, and after being first duly sworn, would state:

1. I am the CEO of Airstream Wireless Services.

2. As a consequence of US LEC's termination of Airstream's service, Airstream lost substantial business and can no longer fulfill its obligations under the original terms of the Customer Service Agreement it entered into with US LEC.

3. After learning that service was disconnected by US LEC on July 24, 2002, I called US LEC on that same day and spoke with Mr. Rod Baine and Mr. Bob Stanton of US LEC to notify them that Airstream's service had been disconnected.

4. During the July 24, 2002 call with Mr. Baine and Mr. Stanton, US LEC expressed to me that in order to restore service, the rates in the Agreement would need to be re-negotiated.

5. At no time during the negotiations of the Customer Service Agreement between Airstream and US LEC did I represent nor any agent of Airstream represent to US LEC that no more than 10% to 15% of Airstream's international traffic would be made to wireless telephones

6. No distinction between calls to land line telephones and wireless telephones was ever discussed prior to the signing of the Customer Service Agreement and the addendums thereto.

7 It was not until several days after the signing of the Customer Service Agreement that Brad Uebelecker ("Mr. Uebelacker") called me and inquired what percentage of calls would be made to wireless destinations.

8. I did not know what percentage of use would be made to wireless telephones and did not provide Mr. Uebelecker or anyone at US LEC with any number or representation as to the percentage of calls that would be made to wireless telephones.

9. To my knowledge, Airstream has not participated in or facilitated any fraudulent scheme or illegal activity.

FURTHER AFFIANT SAITH NOT.

JASON BRAVERMAN

SWORN to and subscribed before me this 13th day of August, 2002.

Brenda R. Johnson
Notary Public

My Commission Expires:

BRENDA R. JOHNSON NOTARY PUBLIC AT LARGE SHELBY CO

Respectfully submitted,

EUGENE J. PODESTA, JR. (#9831)
CLINTON J. SIMPSON (#20284)
Attorneys for Plaintiff
Airstream Wireless Services

OF COUNSEL:

BAKER, DONELSON, BEARMAN & CALDWELL
165 Madison Avenue, Suite 2000
Memphis, TN 38103
(901) 526-2000

CERTIFICATE OF SERVICE

I, Clint Simpson, hereby certify that I have served a true and exact copy of this Affidavit was served upon Luther Wright, Esq., Boult, Cummings, Conners & Berry, PLC, 414 Union Street, Suite 1600, P. O. Box 198062, Nashville, Tennessee, 37219, this the _____ day of August, 2002.

CLINT SIMPSON

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CH-02-1441-3
	)	
US LEC OF TENNESSEE, INC.,	)	
	)	
Defendant.	)	

AFFIDAVIT OF MIKE MOELLER

1. My name is Mike Moeller and I am the Vice President- Sales for Tennessee and Kentucky at US LEC Corp., headquartered in Charlotte, North Carolina ("US LEC"). My office is located at First Tennessee Plaza, 800 S. Gay Street, Knoxville, Tennessee 37929. All information contained in this Affidavit is based upon events that occurred, of which I have personal knowledge.

2. US LEC, via its wholly owned subsidiaries is a telecommunications carrier operating in 14 states including Tennessee, where the operating subsidiary is US LEC of Tennessee, Inc.. US LEC offers a variety of telecommunications services including local and long distance calling under the jurisdiction of the Tennessee Regulatory Authority and the Federal Communications Commission.

3. Pursuant to Chapter 408 of the Public Acts of 1995, T.C.A. §65-4-201(c), US LEC holds a certificate of convenience and necessity from the Tennessee Regulatory Authority to operate as a "competing telecommunications service provider" in Tennessee. The terms and conditions under which US LEC operates are set forth in the carrier's tariffs which, by

law, must be filed with, and approved by, the Authority. US LEC's tariff on file with the Authority states that the company may, without notice, immediately discontinue service to any customer if the company determines that the service is being used for a fraudulent purpose.

4. US LEC has a contract to provide long distance telecommunications services to Airstream Wireless Services, Inc., which is located in Memphis, Tennessee. The contract states, inter alia, "This Agreement and all US LEC services and agreements are governed by the terms and conditions contained in US LEC's tariffs and price lists (collectively, the "Tariffs") filed with federal and state regulatory agencies...Customer agrees to be bound by the provisions of US LEC's Tariffs in effect from time to time."

5. The contract with Airstream states that US LEC will provide long distance telephone international service, including service to the United Kingdom, Germany, Italy and Spain.

6. The cost to US LEC of handling that international traffic varies substantially depending upon whether the call is made to a wireless telephone or to a non-wireless telephone (land line) telephone. The cost to US LEC of handling an international call made to a wireless telephone in the United Kingdom, Germany, Italy and Spain ranges from $.41 to $.45 per minute. The cost to US LEC of handling an international call made to a land line telephone in the same countries is a small fraction of what it costs to terminate an international call made to a wireless telephone.

7. Based on normal calling patterns, approximately 10% of all long distance calls are made to wireless telephones. During negotiations with Airstream, Airstream represented to US LEC that no more than 10% to 15% of Airstream's international traffic would

be made to wireless telephones. Based on US LEC's experience with normal traffic patterns and those representations of Airstream, US LEC agreed to accept and complete international calls for rates of $.06 to $.15 per minute depending on the country where the call terminates. Those rates are reflected in the contract between US LEC and Airstream.

8. US LEC began providing service to Airstream on June 10, 2002. By July 17, 2002, US LEC had been contacted by the fraud division of a major telecommunications company and was informed by them of the unusual nature of the traffic coming from Airstream. Contrary to normal traffic patterns and the representation of Airstream, approximately 99.7% of all international calls coming from Airstream were being made to wireless telephones.

9. Based on my experience in the telecommunications industry, such an abnormal traffic pattern cannot be accidental. Someone is apparently either (1) using a switch to separate, based on the number being called, calls made to wireless telephones from calls made to land line telephones and routing all wireless calls to US LEC or (2) using auto-dialers, or similar equipment, to dial repeatedly to wireless telephones. In either case, this abnormal traffic pattern is the result of deliberate manipulation and is likely being done for a fraudulent purpose.

10. Upon discovery of this manipulation of the traffic coming from Airstream, US LEC made a decision to terminate service to Airstream.

11. If US LEC is required to restore service to Airstream, US LEC will lose approximately $12,000 per day, representing the difference between the contract price and the significant costs required to pay third party telecommunication carriers to terminate this particular type of traffic.

Further, Affiant saith not.

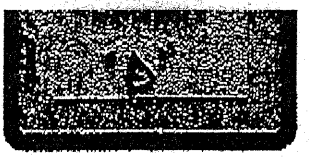
Mike Moeller

Sworn to and subscribed before me this the 6th day of August, 2002.

Notary Public

My Commission Expires: 3/4/2006

KIRSTEN W. SCOTT NOTARY PUBLIC AT LARGE COMM. EXP. 3-4-06 KNOX COUNTY TN



H
Only the Westlaw citation is currently available

Supreme Court of Tennessee,
at Nashville.

BELLSOUTH ADVERTISING & PUBLISHING CORPORATION,
v.
TENNESSEE REGULATORY AUTHORITY.
and
Bellsouth Advertising & Publishing Corporation,
v.
Nextlink Tennessee.

July 10, 2002.

Telephone directory publisher appealed from orders of the Tennessee Regulatory Authority (TRA) requiring it to brand covers of telephone directory with names and logos of local telecommunications companies in competition with its parent company. On consolidated appeal, the Court of Appeals reversed. Upon grant of permission to appeal, the Supreme Court, Adolpho A. Birch Jr., J., held that: (1) TRA had authority to order publisher to include competitor's names and logos on directory covers; (2) TRA had jurisdiction over directory publisher; and (3) requiring publisher to include competitor's names and logos did not violate First Amendment.

Court of Appeals reversed.

West Headnotes

[1] **Telecommunications** 267
372k267 Most Cited Cases

Tennessee Regulatory Authority (TRA) had authority to require telephone directory publisher to include names and logos of competing local telephone service providers on cover of directory. T.C.A. § § 65-2-102(2), 65-4- 104, 65-4-106.

[2] **Public Utilities** 194
317Ak194 Most Cited Cases

The Supreme Court interprets the statutes governing the Tennessee Regulatory Authority's (TRA) authority de novo as a question of law, and construes the statutes liberally to further the legislature's intent to grant broad authority to the TRA. T.C.A. § 65-4-104.

[3] **Telecommunications** 267
372k267 Most Cited Cases

Tennessee Regulatory Authority (TRA) had jurisdiction over telephone directory publisher, which was subsidiary of incumbent local exchange telephone company, and thus TRA could require that directory publisher include names and logos of competing local telephone service providers on directory cover, where parent company was required by law to provide white pages directory in its market areas, and parent company contracted that duty to subsidiary.

[4] **Constitutional Law** 90.1(9)
92k90.1(9) Most Cited Cases

[4] **Telecommunications** 267
372k267 Most Cited Cases

Requirement that telephone directory publisher include names and logos of competing local telephone service providers on cover of directory did not violate First Amendment, where requirement was reasonably related to state's interest in advancing competition in provision of local telephone services by informing consumers as to existence of alternative local telephone services, requiring names and logos on directory covers did not impose inordinate burden on incumbent local exchange telephone company, requiring that logos of competing firms be displayed on equal footing with incumbent's logo did not substantially affect incumbent's ability to communicate its own speech to customers in market, and requirement was reasonably related to state's interest in preventing deception of consumers. U.S.C.A. Const.Amend. 1.

[5] **Constitutional Law** 90.2
92k90.2 Most Cited Cases

[5] **Constitutional Law** 274.1(2.1)
92k274.1(2.1) Most Cited Cases

Commercial speech, that is, expression related solely to the economic interests of the speaker and his or her audience, is constitutionally protected under the First Amendment, as applied to the States under the Fourteenth Amendment. U.S.C.A. Const.Amends. 1, 14

Appeal from the Court of Appeals, Middle Section, Tennessee Regulatory Authority at Nashville, No. 96-01692

J. Richard Collier and Julie M. Woodruff, Nashville, Tennessee, for the appellant, Tennessee Regulatory Authority.

Henry Walker, Nashville, Tennessee, for the appellants, AT & T Communications of South Central States, Inc., MCI Worldcom Network Services, Inc., and XO Tennessee, Inc.

Paul S. Davidson and Guilford F. Thornton, Jr., Nashville, Tennessee, Daniel J. Thompson, Jr., Tucker, Georgia, and James F. Bogan, III, Atlanta, Georgia, for the appellee, BellSouth Advertising & Publishing Corporation.

OPINION

ADOLPHO A. BIRCH, JR., J., delivered the opinion of the court, in which FRANK DROWOTA, III, C.J., E. RILEY ANDERSON, JANICE M. HOLDER, and WILLIAM M. BARKER, JJ. joined.

I. Facts and Procedural History

*1 This consolidated appeal presents two very important issues. They are: (1) whether the Tennessee Regulatory Authority has the authority to require that the names and logos of local telephone service providers who compete with BellSouth Telecommunications, Inc. be included on the cover of white pages telephone directories published by BellSouth Advertising & Publishing Corporation on behalf of BellSouth Telecommunications, Inc.; and (2) whether the Tennessee Regulatory Authority's decisions in these consolidated cases violate the First Amendment of the Constitution of the United States. For the reasons discussed herein, we hold that the Tennessee Regulatory Authority is authorized to require that the names and logos of competing local telephone service providers be included on the covers of the white pages telephone directories published on behalf of BellSouth Telecommunications, Inc., and that the Tennessee Regulatory Authority's decisions in these two cases do not violate the First Amendment. Accordingly, we reverse the judgment of the Court of Appeals in this consolidated appeal and reinstate the judgments of the Tennessee Regulatory Authority.

Prior to June 1995, local telephone services in Tennessee were sold to the consumer by monopoly providers. Provision of those services changed dramatically, however, with the Tennessee General Assembly's enactment of 1995 Tenn. Pub. Acts 408 (effective June 6, 1995) (Chapter 408), which comprehensively reformed the rules under which providers of telephone services operate in Tennessee. One of the more notable changes effected by the enactment of Chapter 408 was the abolition of monopolistic control of the local telephone service market and the initiation of open-market competition in the provision of local telephone service.

Under the two above-cited telecommunications statutes, any local telephone service provider who operated as a monopoly under the prior system was thenceforth designated as an "incumbent local exchange telephone company." Likewise, any telecommunications company providing local telephone services in competition with the incumbent local exchange telephone company was designated as a "competing local exchange telephone company."

BellSouth Telecommunications, Inc. (BellSouth), under its former name, South Central Bell, operated as a monopoly in providing local telephone service in Tennessee markets prior to the enactment of Chapter 408. BellSouth, therefore, is an incumbent local exchange telephone company for purposes of the new state and federal laws. Under the former regulatory system, BellSouth was required to publish for each service area a "white pages" telephone directory listing all telephone subscribers within the area. Tenn. Comp. R. & Regs. 1220-4-2-.15 (1999). That obligation continues under the new regulatory scheme. *Id.*; Tenn.Code Ann. § 65-4-124(c) (Supp.2001). *See also* 47 U.S.C.A. § 271(c)(2)(B)(viii) (West Supp.2001). [FN1]

*2 In order to fulfill its obligation to publish a white pages directory, BellSouth contracted with BellSouth Advertising & Publishing Corporation (BAPCO). BAPCO publishes "white pages" and "yellow pages" directories for BellSouth in many different markets. While BellSouth and BAPCO are separate corporations, both are parts of BellSouth Corporation. The "**BELLSOUTH**" logo is the only logo printed on the white pages and yellow pages directories published by BAPCO for BellSouth.

A. The AT & T Proceeding

AT & T Communications of South Central States, Inc. (AT & T), a competing local exchange telephone

company, negotiated an "interconnection agreement" with BellSouth as was permitted under the new regulations. *See* Tenn.Code Ann. § 65-4-124(a) (Supp.2001). As to any issues relating to the telephone directories BAPCO published for BellSouth, however, BellSouth required AT & T to negotiate with BAPCO.

AT & T then opened negotiations with BAPCO for the purpose of including its subscribers within BellSouth's white pages and its name or logo on the cover of the white pages directories in areas in which AT & T competes with BellSouth in the provision of local telephone services. They reached an agreement and entered into a contract in August 1996 on all terms except the directory-cover issue, which was omitted from the contract.

At the time, the Tennessee Regulatory Authority (TRA), pursuant to the federal act, was conducting an arbitration proceeding pertaining to certain issues that had arisen in the implementation of the new competitive system. AT & T filed a petition in the arbitration proceeding asking the TRA to require BAPCO to place AT & T's name and logo on BellSouth's white pages directory covers. In turn, BAPCO filed a petition asking the TRA to declare that BAPCO was not subject to the TRA's jurisdiction and that issues relating to the publication of telephone directories were beyond the scope of the arbitration proceeding, which was governed by federal law. On October 21, 1996, the TRA formally declined to address the issue, finding that "private negotiations are the preferred method of resolving this issue."

On December 16, 1996, after further negotiations had proved fruitless, AT & T filed a petition with the TRA seeking a declaratory order as to the applicability of Tenn.Code Ann. § § 65-4-104,-117(3),-122(c), and Tenn. Comp. R. & Regs. 1220-4-2-.15 to the white pages directories published by BAPCO on behalf of BellSouth. In its petition, AT & T asked the TRA to join BellSouth and BAPCO as parties to the proceeding, to conduct a contested case hearing on the petition, and to declare that "telephone directories are an essential aspect of the telephone or telecommunications services of telephone utilities such as [BellSouth]; and that the covers of directories, published and distributed by BAPCO on behalf of [BellSouth] which include the names and numbers of customers of AT & T, must be nondiscriminatory and competitively neutral, and either must include the name and logo of AT & T in like manner to the name and logo of [BellSouth], or include no company's name and logo, including 'BellSouth.' "

*3 The TRA voted to convene a contested case hearing and formally made BellSouth and BAPCO parties to the proceeding. [FN2] The TRA subsequently granted petitions to intervene filed on behalf of MCI Telecommunications, Inc., American Communications Services, Inc., and Nextlink Tennessee, LLC ("Nextlink"), which, like AT & T, are competing local exchange telephone companies serving various local markets in Tennessee. [FN3]

After conducting a contested case hearing and considering the testimony and exhibits admitted into evidence, the TRA, in a 2 to 1 decision, ruled in favor of AT & T. In the written declaratory order issued by the majority, it declared that:

> BAPCO, in the publication of basic White pages directory listings on behalf of BellSouth, is required to comply with the directives of the [TRA] and the provisions of Authority Rule 1220-4-2-.15. Further, in the publication of these directory listings on behalf of BellSouth which contain the listings of local telephone customers of AT & T and other competing local exchange providers, BAPCO must provide the opportunity to AT & T to contract with BAPCO for the appearance of AT & T's name and logo on the cover of such directories under the same terms and conditions as BAPCO provides to BellSouth by contract. Likewise, BAPCO must offer the same terms and conditions to AT & T in a just and reasonable manner.

The dissenting TRA Director stated in a separate opinion that he agreed with the majority that the names and logos of competing local exchange telephone companies should be placed on the front cover of the directories published by BAPCO on behalf of BellSouth. He concluded, however, that the rule relied upon by the majority (Rule 1220-4-2-.15), which was promulgated during the time of monopoly local telephone service, did not apply to the new competitive system and that the TRA should initiate a rulemaking proceeding to amend the rule to require that competitors' names and logos appear on the white pages directory covers. BAPCO appealed the decision to the Court of Appeals. [FN4]

B The Nextlink Proceeding

While the appeal of the AT & T proceeding was pending in the Court of Appeals, Nextlink requested that BAPCO include Nextlink's name and logo on the

cover of the white pages directory published by BAPCO for Nextlink's service area. BAPCO denied that request. Nextlink subsequently filed a petition asking the TRA for a declaratory order on the issue. Nextlink asked the TRA to order BAPCO to comply with Rule 1220-4-2-.15 as interpreted in the declaratory order entered in the AT & T proceeding. Nextlink asserted that BAPCO is required to afford *all* competing local exchange telephone companies the opportunity to appear on white pages directory covers in their service areas as a result of the TRA's interpretation of the rule in the AT & T declaratory order.

After hearing oral arguments by the parties, the TRA ruled in favor of Nextlink. [FN5] In pertinent part, it concluded that its interpretation of Rule 1220-4-2-.15 in the AT & T proceeding "must be equally applied to all similarly situated carriers that seek the same relief." The TRA directed BAPCO "to comply with TRA Rule 1220-4-2-.15, as interpreted in its Declaratory Order entered on March 19, 1998 [the AT & T declaratory order]."

*4 BAPCO appealed the decision to the Court of Appeals. The appeals of the AT & T and Nextlink proceedings were argued separately in the Court of Appeals, although the court subsequently consolidated the two appeals. [FN6]

COA reversed TRA

The Court of Appeals reversed the two declaratory orders entered by the TRA. A majority of the three-judge panel agreed that the TRA had exceeded its authority under state law in ordering BAPCO to include the names and logos of competing telecommunications companies on the covers of the white pages directories published by BAPCO for BellSouth. The two-judge majority agreed also that the TRA's declaratory orders violated the First Amendment. In a dissenting opinion, the third member of the panel concluded that the TRA's decisions in these two cases were authorized by state law and did not violate First Amendment principles.

The TRA applied to this Court for permission to appeal pursuant to Tenn. R.App. P. 11, and we granted the application. On appeal, we must address two issues: (1) whether the TRA has the authority to require that the names and logos of "competing local exchange telephone companies" be included on the cover of white pages telephone directories published on behalf of BellSouth; and (2) whether imposing such a requirement violates the First Amendment of the United States Constitution. [FN7] After a painstaking review of the voluminous record and a thorough consideration of the issues, we hold that (1) the TRA is authorized to require that the names and logos of competing local exchange telephone companies be included on the cover of white pages directories published on behalf of BellSouth; and (2) the TRA's decisions in these two cases do not violate the First Amendment. Accordingly, the judgment of the Court of Appeals is reversed, and the judgments of the TRA are reinstated.

II. Authority of the Tennessee Regulatory Authority

[1] We address first the question whether the TRA has the authority to require that the names and logos of competing telephone companies be included on the cover of white pages directories published on behalf of BellSouth. In defining the authority of the TRA, this Court has held that "[a]ny authority exercised by the [TRA] must be as the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power." *Tennessee Pub. Serv. Comm'n v. Southern Ry. Co.*, 554 S.W.2d 612, 613 (Tenn.1977). The primary grant of authority to the TRA is located at Tenn.Code Ann. § 65-4-104 (Supp.2001), the provision defining the TRA's general jurisdiction. The statute provides, in pertinent part, that "the authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter." *Id.* In the exercise of this general power, Tenn.Code Ann. § 65-4-117 provides, "[T]he authority has the power to ... [a]fter hearing, by order in writing, fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public utility [.]" Tenn.Code Ann. § 65-4-117(3) (Supp.2001).

Primary grant of authority

*5 In construing these provisions, we are guided both by statute and by the prior decisions of this Court. At the outset,

> This chapter shall not be construed as being in derogation of the common law, but shall be given a liberal construction, and any doubt as to the existence or extent of a power conferred on the authority by this chapter or chapters 1, 3 and 5 of this title shall be resolved in favor of the existence of the power, to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction by this chapter.

Tenn.Code Ann. § 65-4-106 (Supp.2001). In addition, this Court has held that the issue whether an administrative agency's action is explicitly or

implicitly authorized by the agency's governing statute "is a question of law, not of fact, and this Court's role is to interpret the law under the facts of the case." *Sanifill of Tennessee, Inc. v Tennessee Solid Waste Disposal Control Bd.* 907 S.W.2d 807, 810 (Tenn.1995). Moreover, this Court has observed:

> [T]he General Assembly has charged the TRA with the "general supervisory and regulatory power, jurisdiction and control over all public utilities." Tenn.Code Ann. § 65-4-104 (1997 Supp.). In fact, the Legislature has explicitly directed that statutory provisions relating to the authority of the TRA shall be given "a liberal construction" and has mandated that "any doubts as to the existence or extent of a power conferred on the [TRA] ... shall be resolved in favor of the existence of the power, to the end that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction...." Tenn.Code Ann. § 65-4-106 (1997 Supp.). The General Assembly, therefore, has "signaled its clear intent to vest in the [TRA] practically plenary authority over the utilities within its jurisdiction." *Tennessee Cable Television Ass'n v Tennessee Public Service Comm'n*, 844 S.W.2d 151, 159 (Tenn.App.1992). To enable the TRA to effectively accomplish its designated purpose--the governance and supervision of public utilities--the General Assembly has empowered the TRA to "adopt rules governing the procedures prescribed or authorized," including "rules of practice before the authority, together with forms and instructions," and "rules implementing, interpreting or making specific the various laws which [the TRA] enforces or administers." Tenn.Code Ann. § 65-2-102(1) & (2) (1997 Supp.).

Consumer Advocate Div v Greer, 967 S.W.2d 759, 761-62 (Tenn.1998).

[2] Thus, in sum, we interpret the statutes governing the TRA's authority *de novo* as a question of law, and we construe the statutes liberally to further the legislature's intent to grant broad authority to the TRA.

A. Chapter 408

In Section 1 of Chapter 408, the General Assembly outlined the public policy underlying the new regulatory scheme which, as stated earlier, altered in a most significant manner the telecommunications industry in Tennessee:

> "6 **Declaration of telecommunications services policy.** The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

Tenn.Code Ann. § 65-4-123 (Supp.2001).

Another section of Chapter 408, now codified at Tenn.Code Ann. § 65-4-124 (Supp.2001), provides, in pertinent part:

> (a) All telecommunications services providers shall provide non- discriminatory interconnection to their public networks under reasonable terms and conditions; and all telecommunications services providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non- discriminatory basis from all other telecommunications services providers.
>
> (b) Prior to January 1, 1996, the commission shall, at a minimum, promulgate rules and issue such orders as necessary to implement the requirements of subsection (a) and to provide for unbundling of service elements and functions, terms for resale, interLATA presubscription, number portability, and packaging of a basic local exchange telephone service or unbundled features or functions with services of other providers.
>
> (c) These rules shall also ensure that all telecommunications services providers who provide basic local exchange telephone service or its equivalent provide each customer a basic White Pages directory listing....

Two of the provisions in Tenn.Code Ann. § 65-4-124 are especially relevant to the pending cases. subparagraph (b) requires the TRA to "promulgate rules *and issue such orders as necessary* to implement the provisions of subsection (a)" (emphasis added); and subparagraph (c) requires the TRA to "ensure that all telecommunications services providers who provide basic local exchange telephone service ... provide each customer a basic White Pages directory listing...."

The TRA relies on the two foregoing provisions of Chapter 408 (Tenn.Code Ann. § § 65-4-123 and--124) to support its contention that its declaratory orders did not exceed the agency's statutory authority. In addition to its reliance upon the above-enumerated statutes, the TRA relies upon Rule 1220- 4-2-.15 as its authority for the declaratory orders issued in the case under submission. Mindful of the provisions of Chapter 408, we now consider Rule 1220-4-2- 15 in the context of TRA's contentions

B. Rule 1220-4-2- 15

*7 This rule was originally promulgated by the TRA's predecessor agency, the Public Service Commission, long before the enactment of Chapter 408. [FN8] The rule provides, in pertinent part:

> 1220-4-2-.15 DIRECTORIES-ALPHABETICAL LISTING (WHITE PAGES)
> (1) Telephone directories shall be regularly published, listing the name; address and telephone number of all customers, except public telephones and number unlisted at customer's request.
> (2) Upon issuance, a copy of each directory shall be distributed to all customers served by that directory and a copy of each directory shall be furnished to the Commission upon request.
> (3) The name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover....

In its declaratory orders in these two proceedings, the TRA interpreted Rule 1220-4-2-.15 to require that the names and logos of competing local exchange telephone companies be placed on the covers of the white pages directories that BAPCO publishes for BellSouth, the incumbent local exchange telephone company that is required by law to publish a white pages directory. As we stated in *Jackson Express, Inc v. Tennessee Public Service Commission*, "Generally, courts must give great deference and controlling weight to an agency's interpretation of its own rules. A strict standard of review applies in interpreting an administrative regulation, and the administrative interpretation 'becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.' " 679 S.W.2d 942, 945 (Tenn.1984).

We therefore must give "great deference" to the TRA's interpretation of Rule 1220-4-2-.15, and the TRA's interpretation "becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." In addition, we review the agency's interpretation in light of the statutes, discussed above, governing the TRA. Referring again to those statutes, we note that the General Assembly has provided that the laws governing the TRA shall be given "a liberal construction" and has mandated that "any doubts as to the existence or extent of a power conferred on the [TRA] ... shall be resolved in favor of the existence of the power, to the end that the [TRA] may effectively govern and control the public utilities placed under its jurisdiction. " Tenn.Code Ann. § 65-4-106. The General Assembly also has empowered the TRA to "adopt rules governing the procedures prescribed or authorized," including "rules implementing, interpreting or making specific the various laws which [the TRA] enforces or administers." Tenn.Code Ann. § 65-2- 102(2) (Supp.2001). Finally, the legislature has stated that "[i]n addition to any other jurisdiction conferred, the authority shall have the original jurisdiction to investigate, hear and enter appropriate orders to resolve all contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408." Tenn.Code Ann. § 65-5-210(a) (Supp.2001).

*8 As stated, Rule 1220-4-2- 15 requires that the "name of the telephone utility, the area included in the directory and the month and year of issue shall appear on the front cover[.]" We have considered Tenn.Code Ann. § § 65- 2-102(2), 65-4-104, 65-4-106 and the pertinent provisions of Chapter 408 Additionally, we have accorded the TRA's interpretation of its own rules the deference required. In so doing, we fail to find any demonstration that the TRA has acted in excess of its authority in requiring that the names of competing local exchange providers be included on the cover of BellSouth's white pages directories. The declaratory orders as promulgated serve to "resolve ... contested issues of fact or law arising as a result of the application of Acts 1995, ch. 408." Accordingly, the declaratory orders are expressly authorized by Tenn.Code Ann. § 65-5-210(a).

III. TRA's Jurisdiction over BAPCO

[3] While it is abundantly clear that the TRA has jurisdiction over BellSouth, a regulated public utility, BAPCO suggests that because it is not a public utility, it is beyond the reach of the TRA.

In its declaratory orders, the TRA required that BAPCO provide AT & T and Nextlink the opportunity "to contract with BAPCO for the appearance of AT & T's [and Nextlink's] name[s] and logo[s] on the cover of such directories under the

same terms and conditions as BAPCO provides to BellSouth by contract."

While we recognize that this issue could have been avoided had the TRA ordered BellSouth, as distinct from BAPCO, to implement the TRA's interpretation of Rule 1220-4-2-.15, we nevertheless conclude that the TRA did not err in ordering BAPCO to allow competing service providers to contract with BAPCO to be included on the covers of BellSouth's white pages directories. Our conclusion is based upon the particular facts of these related proceedings and upon legal precedent governing public utilities and their non-utility subsidiaries and affiliates.

Factually, much of the testimony admitted into evidence during the AT & T proceeding pertained to BAPCO's role in publishing directories on behalf of BellSouth. The testimony of a number of witnesses can be summarized by quoting a single sentence of the testimony of one witness employed by BAPCO: "[a]ll editorial, publishing, and business decisions [regarding the directories] are under BAPCO's exclusive control." R., Vol. 16, p. 37 (Testimony of R.F. Barreto, Director-Local Exchange Carrier Interface for BAPCO). Moreover, BellSouth admitted in its answer to AT & T's petition for a declaratory order that "during the course of the negotiations between AT & T and [BellSouth] for an interconnection agreement ... [BellSouth] properly maintained that negotiations with respect to telephone directories were to be conducted with BAPCO." R., Vol. I, p. 35. Likewise, BAPCO stated in its answer to the AT & T petition that "[t]he issues raised in the AT & T Petition should be resolved between AT & T and BAPCO[.]" R., Vol. I, p. 45.

*9 With regard to precedent, we considered in *Tennessee Public Service Commission v Nashville Gas Co*, an analogous issue concerning a parent corporation and its subsidiary in the context of rate-making. 551 S.W.2d 315 (Tenn 1977). In permitting the TRA's predecessor, the Public Service Commission, to consider pertinent financial data of the parent corporation (not a public utility regulated by the Commission) in setting the rates for the subsidiary corporation (a public utility regulated by the Commission), we stated:

> [A] regulatory body, such as the Public Service Commission, is not bound in all instances to observe corporate charters and the form of corporate structure or stock ownership in regulating a public utility, and in fixing fair and reasonable rates for its operations. The filing of consolidated reports by parent and subsidiary corporations, both for tax purposes and regulatory purposes, is so commonplace as to be completely familiar in modern law and practice. Considerations of "piercing the veil," which are involved in cases involving tort, misconduct or fraud, are largely irrelevant in the regulatory and revenue fields. In order for taxing authorities to obtain accurate information as to revenues and expenses, the filing of consolidated tax returns by affiliated corporations is frequently required, and rate-making and regulatory bodies frequently can and do consider entire operating systems of utility companies in determining, from the standpoint both of the regulated carrier and the consuming public fair and reasonable rates of return.

Id. at 319-20. Continuing, we stated that holding otherwise would allow the regulated utility, "through the device of holding companies, spinoffs, or other corporate arrangements, to place the cream of a utility market in the hands of a parent or an affiliate, and to strip the marketing area of a regulated subsidiary of its most profitable customers." *Id.* at 321.

Although the cases under submission are not rate-making proceedings, we conclude that the reasoning and the principles stated in *Nashville Gas* are applicable thereto. BellSouth is a public utility regulated by the TRA and is required by law to provide a white pages directory in its market areas. BellSouth has contracted that duty to BAPCO, an affiliated company within BellSouth's parent corporation. Thus, for purposes of these two declaratory order proceedings, we conclude that the TRA had jurisdiction over BAPCO. Were we to conclude otherwise, BellSouth could escape the legal responsibilities thrust upon it by Rule 1220-4-2-.15. Because BellSouth delegated its responsibility over the white pages directories to BAPCO, and because BAPCO has exclusive control over the directories, we conclude that the TRA has jurisdiction over BAPCO for the purposes of these two proceedings.

IV. First Amendment Issue

Next, the TRA contends that the Court of Appeals erred in holding that the TRA's decisions in these two cases amount to "compelled speech" and therefore violate the First Amendment. [FN9] For the reasons set out below, we hold that the TRA's orders do not violate the First Amendment.

*10 [4] The TRA's orders in these two proceedings implicate two lines of First Amendment cases: those pertaining to "compelled speech" and those

pertaining to "commercial speech." The parties focus most heavily upon the former line, so we begin with an analysis of the law regarding compelled speech.

The United States Supreme Court, in its cases involving compelled speech, has held that the First Amendment not only bars the government from prohibiting protected speech, it also may bar the government from compelling the expression of certain views or the subsidization of speech to which an individual objects. *United States v. United Foods, Inc.* 533 U.S. 405, 410, 121 S.Ct. 2334, 150 L.Ed.2d 438 (2001); *see also Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 111 S.Ct. 1950, 114 L.Ed.2d 572 (1991); *Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977). Although the Court's compelled speech cases may be divided into numerous categories, the parties rely most heavily on those cases involving laws or regulations requiring individuals to contribute financially to speech with which they disagree. This category of cases is typified by *Abood v. Detroit Board of Education* [FN10] and *Keller v. State Bar of California*. [FN11] In that pair of cases, the Court set out a "germaneness" test, under which compelled contributions do not offend First Amendment principles so long as they are used for activities that are germane to the organization's central purpose.

The parties focus upon two separate cases discussing *Abood* and *Keller* in the context of compelled financial contributions to commercial speech. [FN12] The TRA, in contending that the Court of Appeals erred in reversing its orders on First Amendment grounds, relies on *Glickman v. Wileman Bros. & Elliott, Inc.* [FN13] Conversely, BAPCO, contending that the First Amendment analysis of the Court of Appeals is correct, relies upon *United States v. United Foods, Inc.* Both *Glickman* and *United Foods* involve federal programs administered by the Secretary of Agriculture, in which the Secretary imposed mandatory assessments on two different agricultural industries for funding generic advertising for the respective industries.

In *Glickman*, growers, handlers, and processors of California tree fruits challenged marketing orders promulgated by the Secretary. The orders imposed mandatory assessments on the petitioners to cover the expenses of administering the orders, including the cost of generic advertising of California nectarines, plums, and peaches. The petitioners asserted that the government-mandated financial contribution to the generic advertising campaign violated their First Amendment rights. After summarizing the components of the regulatory scheme of which the marketing orders were a part, the Court concluded that "[t]hree characteristics of the regulatory scheme at issue distinguish it from laws that we have found to abridge freedom of speech protected by the First Amendment." *Id.* 521 U.S. at 469. The Court continued:

> "[1] First, the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience. *Second, they do not compel any person to engage in any actual or symbolic speech.* Third, they do not compel the producers to endorse or to finance any political or ideological views.

Id. at 469-70 (emphasis added). The Court then found that the assessments under the marketing orders did not constitute compelled speech. As the Court stated:

> Our compelled speech case law ... is clearly inapplicable to the regulatory scheme at issue here. The use of the assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths, require them to use their own property to convey an antagonistic ideological message, force them to respond to a hostile message when they "would prefer to remain silent," or require them to be publicly identified or associated with another's message.

Id., 521 U.S. at 470-71 (citations omitted). Applying the *Abood-Keller* "germane[ness]" test, the Court concluded that the generic advertising program was "unquestionably germane to the purposes of the marketing orders" and that the assessments were not used to fund ideological activities. *Glickman*, 521 U.S. at 473.

Superficially, *United Foods* appears to be similar to *Glickman*. *United Foods* involved a mandatory assessment imposed by the Secretary of Agriculture on handlers of fresh mushrooms, to be used primarily for funding advertising for the mushroom industry. Despite the facial similarity between the two cases, however, the Court in *United Foods* distinguished *Glickman* on the grounds that the compelled assessments in *Glickman* were part of a broad regulatory scheme, whereas the assessments in *United Foods* were not. Indeed, the *United Foods* Court found that the only program served by the compelled contributions was the very advertising scheme in question. 533 U.S. at 411-12. The Court then applied the *Abood-Keller* principles to the mandatory assessments and ultimately held that they violated the First Amendment.

Having reviewed this authority, however, we cannot conclude that the cases cited by either of the parties are completely apposite to the case under submission. The principles stated in *Abood* and *Keller*, and in the later cases in which *Abood* and *Keller* have been applied (including *Glickman* and *United Foods*), are limited to cases involving compelled *contributions* to speech. The TRA's orders, on the other hand, effectively require BAPCO to engage in *actual speech*. The distinction, we conclude, is significant. *Cf. Glickman*, 521 U.S. at 469 (stating that the marketing orders did not "compel any person to engage in any actual or symbolic speech"); and 521 U.S. at 470-71 (stating that the Court's "compelled speech case law ... is clearly inapplicable to the regulatory scheme at issue here. The use of the assessments to pay for advertising does not require respondents to repeat an objectionable message out of their own mouths....").

*12 Because the *Abood-Keller* standards applied in *Glickman* and *United Foods* are inapposite, we next must determine what standard to apply to these two cases. Consequently, our analysis takes us to the United States Supreme Court case law involving commercial speech.

[5] Commercial speech, that is, expression related solely to the economic interests of the speaker and his or her audience, is constitutionally protected under the First Amendment, as applied to the States under the Fourteenth Amendment. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). The Supreme Court, however, has distinguished between commercial speech and other types of speech in that "[t]he Constitution ... accords a lesser protection to commercial speech than to other constitutionally protected expression." *Central Hudson*, 447 U.S. at 562-63; *see also United Foods*, 533 U.S. at 409.

In *Central Hudson*, the Supreme Court adopted a four-part analysis to be used in determining whether a law impermissibly restricts commercial speech. The Court stated:

> At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566.

The *Central Hudson* test, however, has been a subject of considerable debate. Although the Court has preserved the test in cases involving *restrictions* on commercial speech, [FN14] it has not applied the test in cases involving *compelled* commercial speech or *compelled financial support of commercial speech*. *See Glickman*, 521 U.S. at 474 (holding that the Court of Appeals erred in relying on *Central Hudson* for the purpose of testing the constitutionality of government-mandated assessments for promotional advertising). [FN15]

In *Walker v. Board of Professional Responsibility of the Supreme Court of Tennessee*, this Court noted that the distinction between restricted speech cases and compelled speech cases is significant, stating, "The fact that a regulation requires disclosure rather than prohibition tends to make it less objectionable under the First Amendment." 38 S.W.3d 540, 545 (Tenn.2001). Accordingly, we looked to the more forgiving standard set forth by the United States Supreme Court in *Zauderer v. Office of the Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), as the defining test for First Amendment analysis of compelled speech cases. *Walker*, 38 S.W.3d at 545. [FN16] As we noted in *Walker*, *Zauderer* states:

> *13 We do not suggest that disclosure requirements do not implicate the advertiser's First Amendment rights at all. We recognize that unjustified or unduly burdensome disclosure requirements might offend the First Amendment by chilling protected commercial speech. But we hold that an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the state's interest in preventing deception of consumers.

Id. at 546 (quoting *Zauderer*, 471 U.S. at 65). In other words, "under current law--as announced in *Zauderer*--as long as the disclosure requirement is reasonably related to the state's interest in preventing deception of consumers, and not unduly burdensome, it should be upheld." *Id.*

Although both the *Zauderer* and *Walker* cases specifically involved application of First Amendment principles to attorney advertising, we noted in *Walker* that attorney advertising is considered commercial

speech under the First Amendment. *Id.* at 544. We see no reason why the compelled commercial speech at issue in *Zauderer* and *Walker* should be governed by a different standard than the compelled commercial speech at issue here; accordingly, we now apply the *Zauderer* standard to the case under submission.

An application of *Zauderer* to the pending appeals requires that we determine:

1. Whether the TRA's disclosure requirement is reasonably related the state's interest in preventing deception of consumers; and
2. Whether the disclosure requirement is unduly burdensome.

We first address the relationship between the TRA's orders and the state's interest in preventing deception of consumers. This interest in preventing deception presents itself in a different context than is seen in the attorney advertising regulations of *Zauderer* and *Walker*. The rules in *Zauderer* and *Walker* compelled attorneys to disclose additional information about themselves, whereas the TRA's orders compel BellSouth to disclose information about the identity of its competitors. The ultimate object of the regulations, however, is the same: to inform consumers. In other words, BellSouth is compelled to disclose information which will prevent consumers from mistakenly believing that no alternative providers of telecommunications services are available.

Richard Guepe,District Manager in the Law & Governmental Affairs organization of AT & T, in his testimony before the TRA, addressed the value of having the names and logos of the competing local exchange telephone companies on the cover of the white pages directory published on behalf of BellSouth:

> The cover of the phone book is a simple, direct, and very important means to communicate to Tennessee consumers. To be effective, consumer communication must be simple, it must be clear, and it must be repeated. That is why the phone book cover is important. Consumers see it often. The cover of the book does tell the consumer what's inside. They read it by its symbols, not by its fine print. We are asking that the cover of the phone book tell Tennessee consumers very clearly that they have a choice in the local service market.

*14 R., Vol. 15, p. 64. As explained by Guepe, the TRA's two declaratory orders directly advance competition in the provision of local telephone services by effectively informing consumers as to the existence of alternative local telephone services. Thus, we conclude that the orders are reasonably related to the state's asserted interest.

The second step of the *Zauderer* test is to determine whether the TRA's orders are unduly burdensome. To assist in this determination, the United States Supreme Court has provided guidance. In *Board of Trustees of the State University of New York v. Fox*, the Supreme Court held that governmental restrictions upon commercial speech are not invalid merely because they go beyond the least restrictive means capable of achieving the desired end. *Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989). The Court stated:

> [W]hile we have insisted that " 'the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing ... the harmless from the harmful,' " we have not gone so far as to impose upon them the burden of demonstrating that the distinguishment is 100% complete, or that the manner of restriction is absolutely the least severe that will achieve the desired end. What our decisions require is a " 'fit between the legislature's ends and the means chosen to accomplish those ends,"--a fit that is not necessarily perfect, but reasonable, that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served"; that employs not necessarily the least restrictive means but ... a means narrowly tailored to achieve the desired objective. Within those bounds we leave it to governmental decisionmakers to judge what manner of regulation may best be employed.

Fox, 492 U.S. at 480 (citations omitted).

Under *Fox*, the TRA is the proper body to determine "the manner of regulation that may best be employed" to fulfill the government's objective. *Id.* Thus, this Court may not determine whether the manner of regulation chosen by the TRA should have been more or less restrictive. Ours is merely to review the chosen regulation and determine whether it is unduly burdensome.

Reviewing the record thoroughly in light of the principles articulated in *Fox*, we are firmly convinced that the TRA's decisions requiring the logos and names of competing service providers to be displayed on the directory covers do not impose an inordinate burden on BellSouth. As discussed *supra*, the governmental interest in this case is important, indeed, for informing consumers about their choices in the local telecommunications service market is a

fundamental aspect of promoting free competition. Moreover, the government's chosen means to advance its goals, the requirement that logos of competing telecommunications service providers be displayed on equal footing with BellSouth's logo, does not substantially affect BellSouth's ability to communicate its own speech to customers in the market. Given the significant weight of the governmental interest and the relatively narrow impact of the orders in this case, we conclude that the TRA's orders are not unduly burdensome.

*15 Concluding the *Zauderer* analysis, we find that the TRA's orders are reasonably related to the state's substantial interest in preventing the deception of consumers, and we further find that the orders under review directly advance the state's interest without imposing an excessive burden. Thus, we hold that the TRA's orders survive *Zauderer* scrutiny and consequently are valid under the First Amendment.

V. BAPCO's Additional Arguments

BAPCO raises two other arguments in its brief; however, neither was considered and decided as an issue by the TRA or by the Court of Appeals. We find that both arguments are without merit.

In its first argument, BAPCO contends that the TRA's orders amount to a confiscatory taking in violation of the state and federal constitutions. BAPCO's claim is based upon a factual premise that the TRA's orders require BAPCO to display AT & T's name and logo (and those of other competing providers) without compensation. BAPCO's factual premise simply is incorrect. The TRA ordered BAPCO to permit AT & T and, as a result of the Nextlink proceeding, all other competing local exchange telephone companies to contract with BAPCO for the display of their names and logos on the covers of the white pages directories "under the same terms and conditions as BAPCO provides to BellSouth by contract." It is true that the evidence shows BellSouth was not paying BAPCO at the time of the hearing for displaying the BellSouth logo on the directory covers, but nothing in the TRA's orders precludes BAPCO from charging BellSouth for displaying BellSouth's name and logos on the directory covers. The TRA's orders merely require BAPCO to contract with the competing providers "under the same terms and conditions as BAPCO provides to BellSouth by contract." BAPCO therefore has a choice--it may charge BellSouth for displaying BellSouth's name and logo, in which case BAPCO also may charge the competing companies, or it may choose not to charge BellSouth, in which case it may not charge the other companies. For this reason, BAPCO's confiscatory- taking argument is without merit.

BAPCO's second argument is that the TRA's orders violate BAPCO's trademark rights. This argument is based upon the erroneous premise that the "BELLSOUTH" trademark displayed on the directory covers is intended to represent BAPCO, not BellSouth. Throughout the administrative proceedings, BAPCO claimed that the "BELLSOUTH" trademark on the covers indicates that the directories are published by BAPCO and that the trademark only coincidentally represents BellSouth. The TRA rejected BAPCO's factual argument on this point and found that the "BELLSOUTH" trademark on the directories referred to BellSouth, the incumbent local exchange telephone company. The record fully supports the TRA's factual finding on this point. Moreover, we note that BAPCO has failed to cite any authority that would support striking down a regulatory agency's actions over a regulated utility on trademark-infringement grounds. For these reasons, we find that BAPCO's trademark issue is without merit.

VI. Conclusion

*16 Accordingly, we hold that the TRA's two declaratory orders are not in excess of the statutory authority of the agency and that the TRA had jurisdiction over BAPCO for the purposes of these proceedings. In addition, we hold that the orders do not violate the First Amendment. Therefore, we reverse the judgment of the Court of Appeals in these two cases and reinstate the judgments of the Tennessee Regulatory Authority.

The costs are taxed to BellSouth Advertising & Publishing Corporation, for which execution may issue if necessary.

FN1. Section 271(c)(2)(B)(viii) requires any Bell operating company (which includes BellSouth) that seeks to enter the long distance market to list customers of competing local exchange carriers in its white pages directory listings.

FN2. Both BellSouth and BAPCO participated in the AT & T declaratory order proceeding before the TRA. BellSouth,

however, did not enter an appearance in the pending appeals.

FN3. MCI Telecommunications, Inc., and Nextlink Tennessee, LLC now operate under new names, MCI WORLDCOM Network Services, Inc. and XO Tennessee, Inc., respectively. For purposes of clarity, each company is referred to in this opinion by the name it had at the time of the administrative proceedings

FN4. *See* Tenn.Code Ann. § 4-5-322(b)(1) (1998) (stating, in pertinent part, "A person who is aggrieved by any final decision of the Tennessee regulatory authority ... shall file any petition for review with the middle division of the court of appeals.").

FN5. Like the AT & T declaratory order, the Nextlink order was the result of a 2 to 1 vote. The dissenting TRA Director in the Nextlink proceeding "voted not to support the decision of the majority because the Declaratory Order [from the AT & T proceeding] interpreting TRA Rule 1220-4-2-.15[was] currently pending before the Court of Appeals[ ]"

FN6. The Court of Appeals stated in the Nextlink case: "Because of the substantial similarity of the issues, this appeal will be consolidated for consideration with *BellSouth Advertising & Publishing Corp. v. Tennessee Regulatory Auth.*, No. 01A01-9805-BC-00248. However, both appeals shall maintain their separate appeal numbers and papers filed in either of these appeals shall bear the appeal number of the proceeding in which they are filed."

FN7. The Uniform Administrative Procedures Act, Tenn.Code Ann. § 4-5-322(h) (1998), sets forth the analysis to be applied when reviewing decisions of administrative agencies. Section 4-5-322(h) provides:
The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if the rights of the petitioner have been prejudiced because the administrative findings, inferences, conclusions or decisions are:
(1) In violation of constitutional or statutory provisions;
(2) In excess of the statutory authority of the agency;
(3) Made upon unlawful procedure;
(4) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; or
(5) Unsupported by evidence which is both substantial and material in the light of the entire record.
In determining the substantiality of evidence, the court shall take into account whatever in the record fairly detracts from its weight, but the court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.
Although BAPCO refers to all five subsections of the above-quoted statute in its brief, the pertinent provisions for purposes of the consolidated appeal are Tenn.Code Ann. § § 4-5-322(h)(1) and--322(h)(2)--in other words, we must determine whether, under those subsections, the TRA's decisions either were "in violation of constitutional ... provisions" or "in excess of the statutory authority of the agency" and subject to reversal or modification for those reasons.

FN8. The Administrative History for Rule 1220-4-2-.15 states: "Original rule certified May 9, 1974. Amendment filed August 18, 1982; effective September 17, 1982. Amendment filed November 9, 1984; effective December 9, 1984."

FN9. The First Amendment applies to the States through the Fourteenth Amendment. *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975).

FN10. 431 U.S. 209, 235-36, 97 S.Ct. 1782, 52 L.Ed.2d 261 (1977) (holding that teachers' compulsory union dues could not be used for political or ideological purposes that were not "germane" to the union's duties as a collective-bargaining representative).

FN11. 496 U.S. 1, 14, 110 S.Ct. 2228, 110 L.Ed.2d 1 (1990) (holding that a state bar's use of compulsory dues to finance political activities with which the petitioners disagreed violated their right to free speech when the expenditures were not "necessarily or reasonably incurred for the purpose of regulating the legal profession or 'improving the quality of [legal services]' ").

FN12. The TRA argues in the alternative that its two orders meet the test set forth in *Central Hudson Gas & Electric Corp. v Public Service Commission of N.Y.*, 447 U.S. 557, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980). BAPCO argues in response that the orders do not meet the requirements of *Central Hudson*. The application of *Central Hudson* is discussed later in this opinion.

FN13. 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997).

FN14. *See Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173, 184, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999); *see also United Foods*, 533 U.S. at 409-10 (noting criticism of *Central Hudson* test but declining to "enter into the controversy").

FN15. The *United Foods* Court noted that the *Central Hudson* test has been criticized, but did not revisit the *Central Hudson* test and did not apply it to the mandatory assessments at issue in that case. The Court simply noted that the mandatory assessments could not be sustained under *any* of the Court's precedents. *Id.* 533 U.S. at 410.

FN16. Notably, several federal circuits also have applied the *Zauderer* test to governmental regulations that require disclosure of information. *See, e.g., Commodity Trend Serv., Inc. v. Commodity Futures Trading Comm'n*, 233 F.3d 981, 994 (7th Cir.2000); *Commodity Futures Trading Comm'n v. Vartuli*, 228 F.3d 94, 108 (2d Cir.2000); *Consolidated Cigar Corp. v. Reilly*, 218 F.3d 30, 54 (1st Cir.2000).

2002 WL 1473208, 2002 WL 1473208 (Tenn.)

END OF DOCUMENT

TENNESSEE REGULATORY AUTHORITY

460 James Robertson Parkway
Nashville, Tennessee 37243-0505

NOTICE OF BRIEFING SCHEDULE

DOCKET: **02-00890**

IN RE: **Petition of US LEC Tennessee, Inc. for Declaratory Order**

DATE: **February 7, 2003**

On August 28, 2002, US LEC Tennessee, Inc. ("US LEC") commenced this action by filing the *Petition for Declaratory Order*. The Petition asserts that US LEC entered into a contract to provide long distance telecommunications service to Airstream Wireless Services, Inc. ("Airstream"), but terminated such services based upon the following language contained in a tariff US LEC filed at the Tennessee Regulatory Authority ("Authority" or "TRA") on January 6, 1998:

> In the event of fraudulent use of the Company's network, the Company will discontinue service without notice and/or seek legal recourse to recover all costs involved in enforcement of this provision.

US LEC's Petition requests the TRA to: (1) interpret the above quoted language authorizing termination of service in US LEC's tariff; and (2) find that US LEC properly terminated service to Airstream based on such tariff provision. The Petition further asserts that Airstream filed an action in the Chancery Court of Shelby County on July 30, 2002, and obtained an *ex parte* temporary restraining order requiring US LEC to restore long distance telecommunications service to Airstream. US LEC purportedly responded with a filing styled *Emergency Motion to Dissolve Temporary Restraining Order and to Dismiss*. It is undisputed that US LEC did not restore service to Airstream.

On September 18, 2002, US LEC amended its Petition, alleging that Airstream no longer seeks resumption of service, but was pursuing an action for damages. US LEC maintains that upon a joint request by both parties, the Chancery Court stayed proceedings in the lawsuit before it pending the Authority's ruling on the issues raised in US LEC's Petition and amendments thereto.

On September 23, 2002, Airstream filed the *Response of Airstream Wireless, Inc. to US LEC of Tennessee, Inc.'s Petition for Declaratory Order,* arguing that the TRA lacks jurisdiction over the subject matter of this dispute. The Response contends that this dispute does not arise out of the Tennessee Telecommunications Act or require an

interpretation of US LEC's tariff. Airstream argues that the gravamen of US LEC's petition is fraud, particularly fraudulent inducement to contract, a matter over which the Chancery Court has jurisdiction. Airstream requests the TRA to: (1) deny US LEC's Petition; (2) issue an order stating that the TRA lacks jurisdiction over this matter; or, alternatively, (3) issue an order stating that US LEC improperly terminated its service to Airstream on July 24, 2002.

At the regularly scheduled Authority Conference held on October 21, 2002, the panel assigned to this case unanimously voted to convene a contested case and appointed General Counsel or his designee to act as Pre-Hearing Officer to prepare the case for a determination on whether the Authority has jurisdiction over this action and, if necessary, to hear preliminary matters prior to a Hearing, to rule on any petition(s) for intervention, and to set a procedural schedule to completion.

Consistent with the Directors' decisions, the Pre-Hearing Officer will prepare the jurisdictional issue for consideration as follows:

Airstream is hereby directed to file no later than **Tuesday, February 18, 2003** a brief with legal support on the jurisdictional issue raised as an affirmative defense in its Response. At a minimum, the brief shall address:

- The TRA's jurisdictional authority over this dispute under Tenn. Code An 65-4-103, 65-4-104, 65-4-106, 65-4-117(1) and (3) and 65-5-210(a).
- Whether the TRA has jurisdiction to interpret the parties' Customer Se Agreement.
- Whether Airstream is a public utility within the meaning of Tenn. Code Ai 65-4-101(a).
- Whether Airstream is purchasing intrastate access service from US LEC.

Airstream shall attach to the brief all pleadings from the lawsuit relating to this ma filed in Shelby County Chancery Court.

US LEC is directed to file a response to Airstream's brief no later than **Friday, February 28, 2003.**

All filings shall be served by hand-delivery, facsimile or e-mail on the date of filing.

FOR THE TENNESSEE REGULATORY AUTHORITY:

Lynn Questell, Pre-Hearing Officer

cc: Parties of Record
(original in docket file)

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: PETITION OF US LEC TENNESSEE, INC. FOR DECLARATORY ORDER	)	
	)	
	)	DOCKET NO. 02-00890

JOINT MOTION TO MODIFY BRIEFING SCHEDULE

Come now the parties and move for a Order Modifying the Briefing Schedule established in this case by notice dated February 7, 2003. In support of said Motion, the parties would state:

1. On February 7, 2003, a Briefing Schedule was issued by the Tennessee Regulatory Authority requiring the Respondent, Airstream Wireless Services, to file a brief no later than Tuesday, February 18, 2003 and for Petitioner, US LEC of Tennessee, Inc., to file a responsive brief no later than Friday, February 28, 2003.

2. The parties request that each of those dates be extended two weeks. The parties are in agreement that this relief is appropriate and that no prejudice will result to either party.

Respectfully submitted,

Henry Walker (w/perm. by EJP)

HENRY WALKER
Attorney for Petitioner
US LEC of Tennessee, Inc.
Boult, Cummings, Conners & Berry, PLC
414 Union Street, Suite 1600
P. O. Box 198062
Nashville, Tennessee, 37219

EUGENE J. PODESTA, JR. (#9831)
Attorney for Respondent
Airstream Wireless Services
BAKER, DONELSON, BEARMAN &
CALDWELL
165 Madison Avenue, Suite 2000
Memphis, TN 38103
(901) 526-2000

CHANCERY COURT CLERK'S OFFICE
MEMPHIS, TENNESSEE

AIRSTREAM WIRELESS SERVICES
Plantiff(s)

VS

US LEC OF TENNESSEE, INC.
Defendant(s)

FILED
SHELBY COUNTY
CHANCERY COURT
JUL 30 2002
KENNY W. ARMSTRONG, C & M:
TIME: BY:

TO US LEC OF TENNESSEE, INC.

You are hereby notified that application for temporary restraining order will be heard before the Chancery Court, Part III, on ~~Monday~~ Wednesday the 14th, day of August 2002 at 9 o'clock A.M. as prayed for in the Complaint filed in this cause, a copy of which accompanies this writ and upon which Fiat has been granted.

HEREIN FAIL NOT.

Witness, Kenny W. Armstrong, Clerk and Master of said Court, at office, this _____ day of _____ ,19___.

Kenny W. Armstrong, C & M.

by _____
Deputy C. & M.

RESTRAINING ORDER

In the meantime,

Defendant is enjoined from refusing to provide service to Plaintiff pursuant to the terms of the Agreement of the parties.

CHANCERY COURT OF TENNESSEE

140 ADAMS AVENUE MEMPHIS, TENNESSEE 38103

FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

SUMMONS IN CIVIL ACTION

No. _____ D._____ AD DAMNUM $_____ AUTO ☐ OTHER ☐

AIRSTREAM WIRELESS SERVICES _____ Home Address

_____

_____ 1000 JUNE ROAD, MEMPHIS, TN 38119 Business Address

PLAINTIFF

VS

US LEC OF TENNESSEE, INC. _____ Home Address

_____

_____ HARPETH ON GREEN V, 105 WESTWOOD PLACE, SUITE 100, BRENTWOOD, TN 37027

DEFENDANT Business Address

FILED
SHELBY COUNTY
CHANCERY COURT
JUL 3 0 2002
KENNY W. ARMSTRONG, C & M:
TIME:_____BY:_____

TO THE DEFENDANT(S): SERVE THROUGH SECRETARY OF STATE: REGISTERED AGENT: CT CORPORATION SYSTEM, 530 GAY STREET, KNOXVILLE, TN 37902

You are hereby summoned and required to defend a civil action by filing your answer with the Clerk of the Court and serving a copy of your answer to the Complaint on EUGENE J. PODESTA, JR. Plaintiff's attorney, whose address is #2000, 165 MADISON AVENUE, MEMPHIS, TN 38103 within THIRTY (30) DAYS after this summons has been served upon you, not including the day of service. If you fail to do so, a judgment by default may be taken against you for the relief demanded in the Complaint.

KENNY W. ARMSTRONG, Clerk & Master

By: _____, D.C.

JIMMY MOORE, Clerk

By:_____, D.C.

TESTED AND ISSUED _____, _____

TO THE DEFENDANT(s):

NOTICE: Pursuant to Chapter 919 of the Public Acts of 1980 you are hereby given the following notice:
Tennessee law provides a Four Thousand Dollar ($4,000.00) personal property exemption from execution or seizure to satisfy a judgment. If a judgment should be entered against you in this action and you wish to claim property as exempt, you must file a written list, under oath, of the items you wish to claim as exempt. The list may be filed at the time of the filing of the complaint, or subsequently, and may be changed by you thereafter as necessary; however, unless it is filed before the judgment

CHANCERY COURT OF TENNESSEE

140 ADAMS AVENUE MEMPHIS, TENNESSEE 38103

FOR THE THIRTIETH JUDICIAL DISTRICT AT MEMPHIS

SUMMONS IN CIVIL ACTION

No. CH-02-1441-3 D._____ AD DAMNUM $_____ AUTO ☐ OTHER ☐

AIRSTREAM WIRELESS SERVICES _____ Home Address

PLAINTIFF

1000 JUNE ROAD, MEMPHIS, TN 38119 Business Address

VS

US LEC OF TENNESSEE, INC. _____ Home Address

DEFENDANT

HARPETH ON GREEN V, 105 WESTWOOD PLACE, SUITE 100, BRENTWOOD, TN 37027 Business Address

TO THE DEFENDANT(S): SERVE THROUGH SECRETARY OF STATE: REGISTERED AGENT: CT CORPORATION SYSTEM, 530 GAY STREET, KNOXVILLE, TN 37902

I hereby certify that this is a true copy of original instrument filed in my office
This 26th day of July 2002
KENNY W. ARMSTRONG, CLERK & MASTER
BY D.C. & M.

You are hereby summoned and required to defend a civil action by filing your answer with the Clerk of the Court and serving a copy of your answer to the Complaint on EUGENE J. PODESTA, JR. Plaintiff's attorney, whose address is #2000, 165 MADISON AVENUE, MEMPHIS, TN 38103 within THIRTY (30) DAYS after this summons has been served upon you, not including the day of service. If you fail to do so, a judgment by default may be taken against you for the relief demanded in the Complaint.

KENNY W. ARMSTRONG, Clerk & Master JIMMY MOORE, Clerk

By: L. Auletti, D.C.

TESTED AND ISSUED July 30, 2002 By:_____, D.C.

TO THE DEFENDANT(s):

NOTICE: Pursuant to Chapter 919 of the Public Acts of 1980 you are hereby given the following notice:
Tennessee law provides a Four Thousand Dollar ($4,000.00) personal property exemption from execution or seizure to satisfy a judgment. If a judgment should be entered against you in this action and you wish to claim property as exempt, you must file a written list, under oath, of the items you wish to claim as exempt

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CH-02-1441-3
	)	
US LEC OF TENNESSEE, INC.,	)	
	)	
Defendant.	)	

DEFENDANTS' NOTICE OF FILING AFFIDAVITS

Defendant, US LEC of Tennessee, Inc., hereby gives notice of filing the original Affidavits of Shane Turley and Mike Moeller attached hereto as **Exhibit A** and **Exhibit B** respectively.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

Henry Walker (No.000272)
Luther Wright, Jr. (No. 017626)
Chris L. Gilbert (No.20093)
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2364

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via U.S Mail, to:

Eugene J. Podesta, Jr. and Clinton J. Simpson
BAKER, DONELSON, BEARMAN & CALDWELL
165 Madison Avenue, Suite 2000

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CH-02-1441-3
	)	
US LEC OF TENNESSEE, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM IN SUPPORT OF EMERGENCY MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO DISMISS AND RESPONSE IN OPPOSITION TO MOTION FOR CONTEMPT

Defendant US LEC of Tennessee, Inc. ("US LEC") respectfully moves this Court to dissolve the Temporary Restraining Order (the "TRO") issued by the Court on July 30, 2002. As discussed in detail below, the Temporary Restraining Order issued by the Court should be dissolved and Airstream Wireless Services' ("Airstream") Complaint should be dismissed because: (1) The Tennessee Regulatory Authority, rather than this Court, has original jurisdiction over the current matter pursuant to the express provisions of the Tennessee Telecommunications Act of 1995; and (2) The TRO should not have been granted. Additionally, US LEC requests that this Court deny Airstream's Motion for Contempt because the TRO is void for lack of subject matter jurisdiction and, alternatively, because Airstream has not attempted to demonstrate any actual damages as a result of US LEC's alleged contempt.

I. SUMMARY OF THE RELEVANT FACTS

Defendant US LEC is a telecommunications service provider regulated by the Tennessee Regulatory Authority (the "TRA"). US LEC operates pursuant to the Tariffs on file with the TRA and subject to the rules and regulations promulgated by the TRA.

On or about April 11, 2002, US LEC entered into a contract with Airstream to provide phone service, including long distance to international destinations. This contract

approximately 99.7% (as opposed to the no more than 10-15% represented by Airstream in contract negotiations and the approximately 10% normal usage pattern) of all international calls coming from Airstream were being made to international wireless telephones. *See* Motion to Dissolve ("Motion"), Exhibit B, Affidavit of Michael Moeller ("Affidavit") at ¶ 7. This volume of international wireless traffic terminating at wireless telephones is extraordinary and much more expensive to US LEC than calls terminating at non-wireless (i.e. "land based") telephones. Id. at ¶6. Based on this call pattern, Airstream will owe US LEC more than $80,000 for international calls terminating at wireless telephones for the month of July alone. US LEC will incur charges of more than $400,000 for these same calls. *See id.* at ¶ 11. Because this unusual call pattern indicates that there has been manipulation of the long distance traffic coming from Airstream, US LEC terminated service to Airstream in accordance with the provisions of its Tariffs and the rules of the TRA. Id. at ¶ 9

Prior to the filing of the Complaint in this matter, counsel for the parties began discussing a resolution to this matter. *See* Motion, Exhibit A, Affidavit of Stephen Shane Turley ("Turley Affidavit") at ¶ 2. On July 30, 2002, Airstream filed suit, asserting that this cause is, in effect, a mere breach of contract claim and that US LEC terminated Airstream's telecommunications service for "invalid reasons." *See Verified Complaint.* Although Airstream represented that it would give US LEC notice of any court proceedings it initiated, Airstream sought a TRO before this Court without giving US LEC any notice. Id. at ¶ 3. Airstream was granted a TRO by this Court on July 30, 2002. US LEC became aware of the Complaint and TRO on July 31, 2002. Id. at ¶ 4.

Despite conversations with counsel for Airstream about US LEC's reasons for terminating service to Airstream and conversations about the TRA's original jurisdiction in this matter, Airstream filed a Motion for Contempt on August 2, 2002. The Motion for Contempt contains no discussion of the jurisdictional or fraud issues brought to the attention of Airstream by US LEC and its counsel, nor does this motion meaningfully discuss actual damages sustained

Tennessee Telecommunications Act of 1995 (the "Act"). 1995 Tenn. Pub. Acts, Ch. 408; Tenn. Code Ann. § 65-4-123, et seq. In BellSouth Advertising & Publishing Corp. v. Tennessee Regulatory Authority, 2002 WL 1473208 (Tenn.2002) (petition to rehear pending) (copy attached), decided less than a month ago, a unanimous Tennessee Supreme Court reaffirmed more than seventy years of case law regarding the plenary nature of the TRA's authority over public utilities. In its opinion, the Tennessee Supreme Court, citing to clear and unambiguous statutory language, noted that the General Assembly has empowered the TRA to make and adopt "'rules implementing, interpreting or making specific the various laws which [the TRA] enforces or administers.'" BellSouth, 2002 WL at * 7 (quoting and citing Tenn. Code Ann. § 65-2-102(2) (Supp. 2001)). More significantly, the Tennessee Supreme Court also noted that the legislature has stated that "'[i]n addition to any other jurisdiction conferred, the [TRA] shall have the **original jurisdiction** to investigate, hear and enter appropriate orders to resolve *all contested issues of fact or law* arising as a result of the application of Acts 1995, ch. 408.'" Id. at * 7 (quoting and citing Tenn. Code Ann. § 65-5-210(a)(Supp. 2001)) (emphasis added). Both the statute and the Tennessee Supreme Court's BellSouth opinion make it unmistakably clear that the Act specifically extended the TRA's original jurisdiction to all matters involving application of the Act.

Tennessee case law and statutory law prior to the Act are replete with examples of the TRA's (and its predecessor's) powers and jurisdiction, in the first instance, to resolve issues regarding public utilities. The most significant example is Breeden v. Southern Bell Tel. & Tel. Co. 199 Tenn. 203, 285 S.W.2d 346 (Tenn. 1955). In Breeden, citizens and taxpayers sued a telephone company to obtain a mandatory injunction to require the telephone company to extend service to their community and for discrimination because members of other communities were receiving service from the telephone company while they were not. Id. at 347. In denying the issuance of the mandatory injunction, the Tennessee Supreme Court discussed the role of the Railroad and Public Utilities Commission (one of the predecessors to the TRA) in this dispute

Id. at 348-349 (emphasis added). As a result of this holding, the plaintiffs' case was dismissed. *See id.* Breeden, cited with approval must recently less than a month ago, July 18, 2002, (*see* Consumer Advocate Div. v. Tennessee Regulatory Authority, 2002 WL 1579700 (Tenn. Ct. App. 2002) (no Rule 11 application filed) (copy attached)), made it clear that courts have no jurisdiction in service disputes until the Commission (now TRA) makes the initial determination about whether service should be provided. *See also* Tennessee Cable Television Ass'n v. Tennessee Public Service Comm'n, 844 S.W.2d 151, 159 (Tenn. Ct. App. 1992) (citing Breeden with approval); Chumbley v. Duck River Elec. Membership Corp., 203 Tenn. 243310 S.W.2d 453 (Tenn.1958)(citing Breeden for proposition that utility had no duty to extend its facilities to plaintiff unless ordered to do so by the Commission which had subject matter jurisdiction in the first instance).

Thus, through the plain language of the Act, Tennessee statute and Tennessee Supreme Court decree, it is clear that the TRA has practically plenary power over the public utilities, and express **original jurisdiction** in telecommunications matters arising out of the Act.[1] BellSouth, 2002 WL at * 7. *See generally*, Consumer Advocate Div. v. Greer, 967 S.W.2d 759, 762 (Tenn. 1998). The real purpose of Airstream's action is to require US LEC (a regulated utility) to provide telecommunications service to Airstream, despite US LEC's Tariffs and the TRA Rule allowing termination of service under appropriate circumstances. Although characterized as a breach of contract action by Airstream, the gravamen of this action necessitates a review of the Act, the TRA Rules and Regulations governing Telephone Companies and the Tariff filed by Defendant with the TRA. *See* Keller v. Colgems-EMI Music, Inc., 924 S.W.2d 357, 359 (Tenn. Ct. App. 1996) (noting that in order to determine the gravamen, or real purpose of an action, the court must look to the basis for which damages are sought). Yater v. Wachovia Bank of Georgia, N.A. , 861 S.W.2d 369, 372 (Tenn. Ct. App. 1993) (same). The TRA has original jurisdiction over all of these issues. *See* Tenn. Code Ann. § 65-5-210(a)(Supp. 2001).

1. *This matter "arises out of" the Act.*

industry. The legislature made it abundantly clear that in addition to all other authority previously granted to the TRA, the Act expressly grants original jurisdiction to the TRA to hear *all* matters of law or fact arising out of the application of the Act. *See id.* The General Assembly obviously intended that the TRA, rather than the courts, apply its expertise in managing the transition of local telephone service from a monopolistic to a competitive environment. *See* Tenn. Code Ann. §§ 65-4-123, 65-4-124. *See generally* AT & T Corp. v. Iowa Utilities Bd., 525 U.S. 366, 394-96, 119 S.Ct. 721, 737-38, 142 L.Ed.2d 834 (1999). Because this matter unquestionably arises out of the Act, the TRA, rather than this Court, has original jurisdiction over this matter. Airstream's attempt to characterize this matter as a breach of contract action does not change the nature and context of the relief it is actually requesting.

2. *This matter calls for the proper interpretation of TRA Rules and the US LEC Tariff filed before the TRA.*

TRA Rule 1220-4-2-.12 expressly provides that US LEC can terminate Airstream's service under certain circumstances:

> 1220-4-2.-12 **REASONS FOR DENYING SERVICE**
>
> (1) Service may; (sic) be refused or discontinued for any of the reasons listed below:
>
> (a) In the event of customer use of equipment in such a manner as to adversely affect the utility's equipment or the utility's service to others.
>
> (b) In the event of tampering with the equipment furnished and owned by the utility
>
> (c) For violation of or noncompliance with the Commission's Regulations Governing Service Supplied by Telephone Utilities, or for violation of or non-compliance with the utility's rules on file with the Commission.
>
> (d) For failure to comply with municipal ordinance or other laws
>
> (e) For failure of the customer to permit the utility reasonable access to its equipment.
>
> (f) For nonpayment of bill.

As the affidavit of Michael Moeller demonstrates, US LEC terminated Airstream's service for

See US LEC's Tariff on file with the Tennessee Regulatory Authority.

US LEC's justification for its termination of Airstream's service falls squarely within the province of the TRA's authority. Whether US LEC complied with the provisions of the TRA's Rules and the provisions of its own Tariff specifically mentioned in the Rule is, in the first instance, a question that must be passed upon by the TRA. Tennessee law is clear that as a general rule courts must give great deference and controlling weight to an agency's interpretation of its own rules. EDF, Inc. v. Tennessee Water Quality Control Bd., 660 S.W.2d 776, 781 (Tenn. Ct. App. 1983) *permission to appeal denied* (Tenn. 1983); Costello v. Acco Transport Co., 33 Tenn. App. 411, 437, 232 S.W.2d 297, 308 (1949). The only limitation to the agency's interpretation occurs when the agency's interpretation is plainly erroneous or inconsistent with the regulation itself.[2] EDF, Inc., 660 S.W.2d 776 at 781; Jackson Express, Inc. v. Tennessee PSC, 679 S.W.2d 942, 948 (Tenn. 1984). From this analysis, it logically follows that the TRA must make a pronouncement as to the proper interpretation of the Rule in this circumstance before a Court can determine whether or not that interpretation is appropriate. Moreover, the legislature's express grant of original jurisdiction over matters arising out of the application of the Act compel this conclusion.

In sum, this matter should have been brought before the TRA rather than before this Court. For this reason alone, the TRO should be dissolved and this Complaint should be dismissed. The TRA Rules and Regulations afford Airstream ample opportunity to obtain an Order from the TRA requiring US LEC to reactivate Airstream's telecommunications service.[3] Alternatively, this Court should dissolve the TRO, refuse to grant a preliminary injunction and stay all further proceedings until the TRA has ruled upon whether US LEC's termination of service was consistent with the TRA rules and its own Tariffs.

B. THE TEMPORARY RESTRAINING ORDER IN THIS MATTER SHOULD BE DISSOLVED BECAUSE IT WAS IMPROPERLY GRANTED

Should the Court decide it has jurisdiction, the TRO should still be dissolved. Under the Tennessee Rules of Civil Procedure, this Court has discretion to dissolve a temporary

temporary restraining order are well-settled in Tennessee common law. Under these common law maxims, an *ex parte* temporary restraining order should be dissolved where: (1) the plaintiff cannot prevail on the merits; (2) the injunction has been improvidently granted; (3) the bond amount is not sufficient; or (4) the plaintiff has misstated the case by misrepresenting or omitting material facts. See generally Tennessee Jurisprudence § 46. US LEC contends that the TRO should be dissolved for all of these reasons.

1. *Airstream cannot prevail on the merits.*

In seeking the TRO, Airstream has made no real attempt to show that it will prevail on the merits. As noted above, the resolution of the issues in this matter requires an interpretation of US LEC's Tariffs, TRA Rules and consideration of US LEC's belief that the traffic pattern of Airstream's calls is fraudulent. Because Airstream has not addressed these issues at all in its pleadings, there is nothing before the Court indicating that Airstream can prevail on the merits. Moreover, Airstream is incapable of disputing that 99.7% of its long distance calls terminate at international wireless numbers. This percentage is so overwhelmingly high that it is *prima facie* evidence forcing the conclusion that US LEC's termination of Airstream's service was justified, and clearly not in violation of its Tariffs or in breach of the parties' contract. For this reason, the TRO should be dissolved.

2. *The injunction has been improvidently granted*

US LEC asserts that the injunction was improvidently granted for several reasons. First, Airstream's counsel represented to US LEC's in-house counsel that he would inform him before any legal action was filed or injunction sought so that US LEC could have counsel present. This representation (though not required) and failure to comply casts a shadow of doubt on the "good faith" intentions of Airstream. Had counsel for US LEC been present at a TRO hearing (as contemplated), US LEC would have had the opportunity to address all of the issues regarding jurisdiction prior to the issuance of the TRO.

Additionally, as discussed more fully below, Airstream made several critical

Finally, Airstream made no attempt to provide the Court with any analysis regarding the traditional elements necessary to obtain this type of extraordinary relief. In assessing a complainant's entitlement to preliminary injunctive relief, four issues should be examined. These include: (1) the likelihood of irreparable harm to the complainant in the absence of an injunction; (2) the relative hardships to be borne by the parties as a result of the chancellor's determination; (3) the likelihood of the complainant's ultimate success on the merits of the lawsuit; and (4) the public interest to be served by the grant or denial of an injunction. Riverside Park Realty Co. v. FDIC, 465 F. Supp. 305, 309-10 (M.D. Tenn. 1978); Smith v. City of Manchester, 460 F. Supp. 30, 35 (Ed. Tenn. 1978). The allegations of the complaint demonstrate Airstream's inability to meet this standard.[4]

First, Airstream's own allegations make it clear that it will not suffer irreparable harm as a result of US LEC's termination of service. In the Complaint, Airstream alleges that reselling long distance is just a portion of what the company does, noting that it is "a leader in wireless hardware and software development" and writes "software for wireless communications in the medical, telecommunications and wireless fields." *See* Verified Complaint at ¶ 3. Reselling long distance is just "one of [Airstream's] operations" and US LEC is *just one* of the carriers from which Airstream "purchases long distance minutes." Id. at ¶ 4. Thus, from Airstream's own Complaint, it is clear that long distance service is not Airstream's main business and US LEC is only one of the undisclosed number of long distance providers to Airstream. Airstream does not attempt to explain why it cannot go into the market place and seek services from another provider, nor does it seek to quantify what portion of its business is related to long distance service. These allegations are simply insufficient to establish that Airstream will suffer irreparable harm as a result of Airstream's termination of service.

Additionally, at the time of filing suit, Airstream was aware of the significant costs associated with terminating calls at international wireless numbers. Airstream knew at the time of filing the Complaint that US LEC was being required to pay a substantial amount of

the outstanding amounts to its providers and would be forced to absorb the cost of the traffic pattern in the future. The hardship to US LEC far outweighs any hardships borne by Airstream.

Finally, if Airstream is intentionally or even unintentionally engaged in a fraudulent scheme, the public interest is not being served as countless telephone customers are being defrauded. The TRO in this matter would literally force US LEC to knowingly participate in a fraudulent scheme. Not only does such action jeopardize US LEC's status before the TRA and ability to operate, it also assures that more consumers will be harmed. The certain harm to the public interest compels the dissolution of the TRO and denial of a preliminary injunction.

Had Airstream attempted to address any of these issues, it would have had to advance positions that are not factually and legally supported. By not addressing these issues, Airstream received unjust relief. The Court should correct this error.

3. *The bond amount is not sufficient*

Tennessee law is clear that the bond amount must properly protect the interests of the party to be enjoined. The primary concern of the Court in setting the amount of the bond should be to ensure it is sufficient to compensate the enjoined party for any loss, expense or damages caused by an improvidently issued injunction order, which includes reasonable attorneys' fees. *See generally* Aluminum Workers Int'l Union, Local 215 v. Consolidated Aluminum Corp., 696 F.2d 437 (6th Cir. 1982). *See also* South Cent. Tenn. R.R. Auth. v. Harakas, 44 S.W.3d 912 (Tenn. Ct. App. 2000). If the bond amount is found to be inadequate, the court may increase the amount of the bond. *See* Standard Forms Co v. Nave, 422 F. Supp. 619 (E.D. Tenn. 1976).

In mandatory injunction matters, US LEC asserts that insufficiencies in the bond are exacerbated particularly when the relief forces a party to bear large economic consequences. This matter is clearly an instance of an arduous mandatory injunction. As demonstrated by the Affidavit of Michael Moeller a $2,500 bond does not even cover a half-day's potential losses. The costs to US LEC will be nearly 86 times this amount during the TRO period, and arguably

4. *Airstream has misstated the case by misrepresenting or omitting material facts.*

Airstream failed to present material facts to the Court in seeking the TRO. Airstream, for example, did not mention the nature of the dispute and circumstances leading to the termination of service, although it was well aware of US LEC's reasons for termination. Rather than stating US LEC's asserted reason for termination, Airstream merely alleges that its service was discontinued for "invalid reasons." *See* Verified Complaint at ¶ 9. Significantly, although the Complaint references a phone call between the parties on July 24, 2002 (Verified Complaint at ¶ 10), the Complaint does not disclose what was discussed. Instead, Airstream simply avers that there was a telephone conference and that Airstream's understanding after the call was that it would receive a rate change after 60 days notice. Id. at ¶¶ 10-11. The omission of the conversation about the unusual traffic pattern is material and clearly intentional.

Moreover, Airstream did not mention or provide a copy of US LEC's Tariff on file with the TRA and US LEC's International Tariff on its website, though both Tariffs are expressly incorporated into the agreement between the parties. Airstream knew that its termination was based on these Tariffs and should have so informed the Court. These Tariffs, particularly the Tariff on file with the TRA, are part of the contract and formed the basis for Airstream's termination. There is no reason for this omission, and this omission should not be excused by the Court.

Finally, Airstream's representations to the Court about the amount of the bond and the nature of the harm to US LEC is a critical and material omission. Airstream is well aware that the cost associated with continued service to Airstream by US LEC would be far more than $2,500 over a 14 day period. This issue, perhaps more than any other, speaks to the improper nature of the TRO entered in this cause and the lack of material information provided to the Court.

C. AIRSTREAM'S MOTION FOR CONTEMPT SHOULD BE DENIED.

1. *The TRO is facially void for lack of subject matter jurisdiction.*

It is a well-settled rule in Tennessee that facially void injunctions may be disobeyed without penalty. Segelke v. Segelke, 584 S.W.2d 211, 214 (Tenn. Ct. App. 1978). An injunction is facially void when the Court entering the injunction did not have subject matter jurisdiction. *See* Aladdin Industries, Inc. v. Associated Transport, Inc., 45 Tenn. App. 329, 323 S.W.2d 222, 229 (Tenn. Ct. App. 1958), *cert. denied* (Tenn. 1959).

As argued above, the Act gives the TRA original jurisdiction over matters of fact and law arising out of the application of the Act. T.C.A. 65-5-210(a) (Supp. 2001) Moreover, the TRA has jurisdiction to pass over, in the first instance, issues related to its authority as granted by the legislature. *See id.*; Breeden, 285 S.W.2d at 348-49. Because the grant of original jurisdiction is clear and unambiguous, the Court's exercise of jurisdiction over this matter is void and the TRO is facially void. Accordingly, even if US LEC failed to follow the TRO, such actions are not punishable by contempt. It also bears noting that adhering to the TRO would require US LEC's participation in a scheme it deems fraudulent.

2. *Airstream has not demonstrated any actual damages as a result of US LEC's alleged contempt.*

Even if the TRO in this matter is valid rather than void, Airstream's Motion for Contempt should still be denied. Under Tennessee law, the appropriate measure of compensatory damages in a contempt action is actual loss. Stingray Computer Services, Inc., v. McFarlane, 1993 WL 133235, * 5 (Tenn. Ct. App. 1993) (no Rule 11 petition filed). When the claimed loss is loss of profits, the claim must be based on net profits rather than gross profits. American Bldgs. Co. v. DBH Attach., Inc., 676 S.W.2d 558 (Tenn. Ct. App. 1984). In order to establish such loss, proof within a reasonable degree of certainty is required. Pinson & Assoc., Ins. v. Kreal, 800 S.W.2d 486 (Tenn. Ct. App. 1990). When such proof is not offered, a party may not recover for the alleged damages. *See* id.

Airstream has not attempted to quantify any amount of actual damages for lost

contempt. Accordingly, there is no basis for awarding damages to Airstream for US LEC's alleged contempt. Therefore, Airstream's Motion for contempt should be denied.

III. CONCLUSION

For the reasons stated herein, US LEC respectfully requests that the Court dissolve the July 30, 2002 Temporary Restraining Order and dismiss this matter based on lack of subject matter jurisdiction. Alternatively, US LEC requests that the Court increase the bond in this matter from $2,500 to $215,000. US LEC also requests that the Court deny Airstream's Motion for Contempt.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via Facsimile and U.S Mail to:

Eugene J. Podesta, Jr. and Clinton J. Simpson
BAKER, DONELSON, BEARMAN & CALDWELL
165 Madison Avenue, Suite 2000
Memphis, TN 38103

on this the 6TH day of August, 2002.

_____
Luther Wright, Jr.

IN THE CHANCERY COURT FOR THE STATE OF TENNESSEE
SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. CH-02-1441-3
	)	
US LEC OF TENNESSEE, INC.,	)	
	)	
Defendant.	)	

EMERGENCY MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO DISMISS

Defendant US LEC of Tennessee, Inc. ("US LEC") respectfully moves this Court to dissolve the Temporary Restraining Order issued by the Court on July 30, 2002 and to dismiss the Complaint in this action for lack of subject matter jurisdiction.[1] In support of its motion, US LEC states the following:

(1) The Tennessee Regulatory Authority, rather than this Court, has original jurisdiction over the current matter pursuant to the express provisions of the Tennessee Telecommunications Act of 1995;

(2) The temporary restraining order should not have been granted based on the facts in this matter.

In support of this motion, US LEC relies on the following:

1. The Affidavit of Stephen Shane Turley attached hereto as Exhibit A;

2. The Affidavit of Michael Moeller attached hereto as Exhibit B; and

3. A Memorandum in Support of Emergency Motion to Dissolve Temporary Restraining Order and to Dismiss and Response to Motion for Contempt filed contemporaneously herewith.

WHEREFORE, premises considered, US LEC respectfully requests that this Court dissolve the temporary restraining order issued on July 30, 2002 in this matter and dismiss the complaint for lack of jurisdiction so that this matter can be properly heard before the Tennessee Regulatory Authority.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via Facsimile and U.S Mail to:

Eugene J. Podesta, Jr. and Clinton J. Simpson
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165 Madison Avenue, Suite 2000
Memphis, TN 38103

on this the 6TH day of August, 2002.

_____
Luther Wright, Jr.