BOULT ▪ CUMMINGS
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TN REGULATORY AUTHORITY
DOCKET ROOM

February 13, 2003

Ms. Kim Beals
Legal Counsel
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243-0505

Re: Petition for Declaratory Order Before the TRA - US LEC; Airstream
02-00890

Dear Ms. Beals:

Enclosed please find all the pleadings filed in the Shelby County Chancery Court that you recently requested in the above-referenced matter. Our file copy of the agreement between US LEC and Airstream may not be more legible than the one you already have. We are trying to secure a more legible copy and will forward the same to you as soon as we have it.

If you have any further questions, please feel free to give me or Henry Walker a call.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Luther Wright, Jr.
Luther Wright, Jr.

LW/jrb
Enclosure

cc: Henry Walker

849798 v1
097855-001
2/13/2003

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.	)	

PLEADING

1. Complaint for Injunctive Relief and Money Damages (fax) 07/30/02

2. Motion to Show Cause Why Defendant Should Not Be Held in Contempt for Violating Temporary Restraining Order 08/02/02

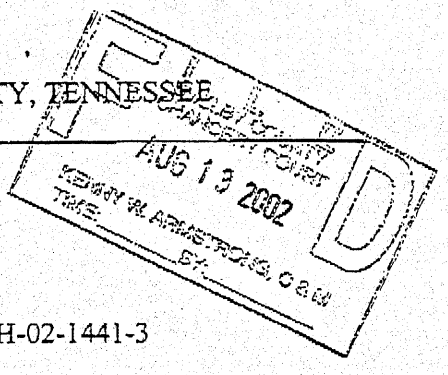
3. Emergency Motion To Dissolve Temporary Restraining Order and to Dismiss 08/06/02

4. Memorandum in Support of Emergency Motion to Dissolve Temporary Restraining Order and to Dismiss and Response In Opposition to Motion for Contempt 08/06/02

5. Defendants' Notice of Filing Affidavits 08/08/02

6. Response of Airstream Wireless Services to Defendant's Motion To Dissolve Temporary Restraining Order and to Dismiss (fax copy) 8/13/02

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE



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

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

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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

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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

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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

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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.

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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

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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

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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.

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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.

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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

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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

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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*:

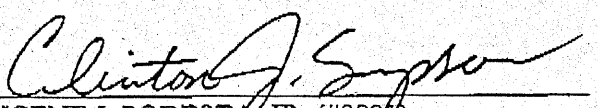
> Only when a court is so obviously traveling outside its orbit as to be merely usurping judicial forms and facilities, may an order issued by a court be disobeyed and treated as though it were a letter to a newspaper. Short of an indisputable want of authority on the part of a court, the very existence 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

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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,



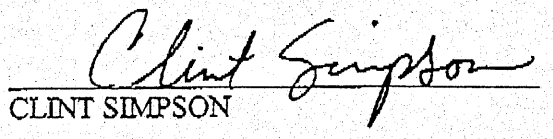
EUGENE J. PODESTA, JR. (#9834)
CLINTON J. SIMPSON (#20284)
Attorneys for Plaintiff
Airstream Wireless Services

OF COUNSEL:

BAKER, DONELSON, BEARMAN & CALDWELL
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 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

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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

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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

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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

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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...."

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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

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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

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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.

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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

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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

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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,

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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).

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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

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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

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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).

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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

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> 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.

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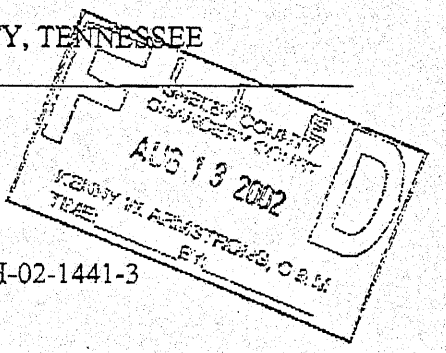
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The judgment is affirmed. Costs are assessed to CAD and United Telephone equally.

END OF DOCUMENT

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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

M CJS 665009 v1
789939-00001 08/13/02

AUG-13-02 15:54 FROM:BAKER DONELSON ID:9015772303 PAGE 35/4

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

AUG-13-02 15:55 FROM:BAKER DONELSON ID:9015772303 PAGE 38/4

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.

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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 SHELBY COUNTY, TN MY COMMISSION EXP. 3-25-05

M CJS 664577 v1
789939-00001 08/09/02

AUG-13-02 15:55 FROM:BAKER DONELSON ID:9015772303 PAGE 38/4

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

AUG-13-02 15:55 FROM:BAKER DONELSON ID:9015772303 PAGE 39/4

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

AUG-13-02 15:55 FROM:BAKER DONELSON ID:9015772303 PAGE 40/4:

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

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

My Commission Expires:

My Commission Expires Sept. 18, 2002

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

AUG-13-02 15:55 FROM:BAKER DONELSON ID:9015772303 PAGE 4/4

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 13th day of August, 2002.

CLINT SIMPSON

AUG-13-02 15:58 FROM:BAKER DONELSON ID:9015772303 PAGE 42/4

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A PROFESSIONAL CORPORATION
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SUITE 2000
MEMPHIS, TENNESSEE 38103

(901) 526-2000

Facsimile
(901) 577-2303

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DATE:	August 13, 2002	**TIME:** 3:18 PM
DELIVER TO:	**FACSIMILE PHONE NO.:**	
LUTHER WRIGHT, ESQ.	1-615-252-6358	
FROM:	Clinton J. Simpson	
PHONE NO.:	(901) 577-8183	
FACSIMILE PHONE NO.	(901) 577-4233	
USER NO.:	6327	
CLIENT/MATTER NO.:	789939-00001	

MESSAGE:

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LAW OFFICES
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GEORGIA
ATLANTA

WASHINGTON, D.C.

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

August 13, 2002

Luther Wright, Esq.
Boult, Cummings, Conners & Berry
414 Union Street, Suite 1600
Nashville, TN 37219

VIA FAX NO. 1-615-252-6358

Re: Airstream Wireless Services v. US LEC of Tennessee, Inc.

Dear Luther:

Enclosed please find a copy of our Response to Defendant's Motion to Dissolve Temporary Restraining Order and to Dismiss and Plaintiff's Notice of Filing Affidavits which documents have been filed in the above-referenced matter.

Very truly yours,

Clint Simpson

Clinton J. Simpson

CJS:dj
enclosures

M CJS 663630 v1
0-0 08/02/02

AUG-13-02 15:40 FROM:BAKER DONELSON ID:9015772303 PAGE 2/4

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 the Plaintiff. The Defendant has ignored the orders of this Court and has continued to date to refuse to provide the bargained for service to the Plaintiff. The effect of Defendant's conduct is to shut down Plaintiff's operation. Plaintiff 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 went on to quote *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 208.

The Defendant also cites to *Aladdin Industries, Inc. v. Associated Transport, Inc., et al.*, 323 S.W.2d 222 (Tenn. Ct. App. 1958) 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 343.

The *Aladdin* court further stated that "if a court should go so clearly and so far outside its jurisdiction as to act, not as a court but as an 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 was a letter to a newspaper. Short of an indisputable want of authority on the part of the court, the very existence of a court presupposes its powers to entertain a controversy, if only to decide, after deliberation, that it has not power over the particular controversy.

United States v. United Mine Workers of America, supra, 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 also 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 modify 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 391, 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.

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 was a letter to a newspaper. Short of an indisputable want of authority on the part of the court, the very existence of a court presupposes its powers to entertain a controversy, if only to decide, after deliberation, that it has not 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. (#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 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 _____ day of August, 2002.

CLINT SIMPSON

M CJS 664401 v1
789939-00001 08/09/02

LAW OFFICES
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JACKSON

GEORGIA
ATLANTA

WASHINGTON, D.C.

BDBC INTERNATIONAL LLC
BEIJING, CHINA
REPRESENTATIVE OFFICE

CLINTON J. SIMPSON
Direct Dial (901) 577-8183
Direct Fax (901) 577-0233
E-Mail Address cjsimpson@bdbc.com

August 12, 2002

Luther Wright, Esq.
Boult, Cummings, Conners & Berry
414 Union Street, Suite 1600
Nashville, TN 37219

VIA FAX NO. 1-615-252-6358

Re: Airstream Wireless Services v. US LEC of Tennessee, Inc.

Dear Luther:

Enclosed please find a copy of our Response which we plan to file tomorrow morning in this matter. I will fax to you copies of mine and Mr. Braverman's Affidavits once we have finalized and signed them.

Very truly yours,

Clinton J. Simpson

CJS:dj
enclosures

M CJS 663630 v1
0-0 08/02/02

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SUITE 2000
MEMPHIS, TENNESSEE 38103

(901) 526-2000

Facsimile
(901) 577-2303

FACSIMILE TRANSMISSION FORM

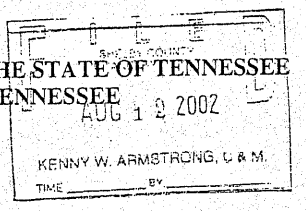
PLEASE DELIVER IMMEDIATELY

DATE:	August 12, 2002	**TIME:** 4:37 PM
DELIVER TO:	**FACSIMILE PHONE NO.:**	
LUTHER WRIGHT, ESQ.	1-615-252-6358	
FROM:	Clinton J. Simpson	
PHONE NO.:	(901) 577-8183	
FACSIMILE PHONE NO.	(901) 577-4233	
USER NO.:	6327	
CLIENT/MATTER NO.:	789939-00001	

MESSAGE:

Note: This facsimile contains PRIVILEGED and CONFIDENTIAL information intended only for the use of the specific individual or entity named above. If you or your employer are not the intended recipient, you are hereby notified that any unauthorized dissemination or copying of this facsimile or the information contained in it is strictly prohibited. If you have received this facsimile in error, please immediately notify the person named above at once by telephone and return the original facsimile to us at the above address via the U.S. Postal Service. Thank you.

RECEIVED AUG 16 2002



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
Memphis, TN 38103

on this the 8TH day of August, 2002.

_____
Luther Wright, Jr.

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 June 1, 2004

My Commission Expires: _____

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

TRANSMISSION OK

TX/RX NO	0342
CONNECTION TEL	16152526364
CONNECTION ID	
ST. TIME	08/05 14:54
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PGS. SENT	3
RESULT	OK

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.

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.

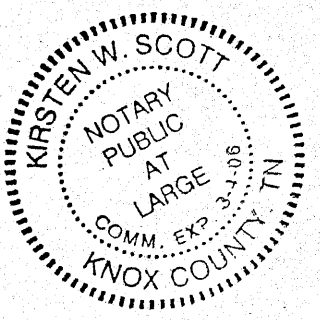
Further, Affiant saith not.

Mike Moeller

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

Notary Public

My Commission Expires: 3/4/2006



RECEIVED AUG 15 2002

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

RECEIVED
AUG 07 2002
CHANCERY COURT

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 expressly included the terms of US LEC's Tariff before the TRA and the International Tariff available on US LEC's website. *See* Verified Complaint at Exhibit A, ¶ (1). US LEC began providing service to Airstream on June 10, 2002. On July 17, 2002, US LEC was contacted by the fraud division of a major telecommunications company and was informed by fraud personnel about the unusual nature of the long distance traffic coming from Airstream. Contrary to normal traffic patterns and the representations of Airstream made during contract negotiations,

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 by Airstream as a result of US LEC's alleged contempt.

II. ARGUMENT

A. AIRSTREAM'S COMPLAINT IS NOT PROPERLY BEFORE THIS COURT BECAUSE THE TRA HAS ORIGINAL JURISDICTION OVER THIS MATTER.

Tennessee law is clear that the TRA has practically plenary jurisdiction in the area of public utility regulation and original jurisdiction in telecommunications matters arising out of the

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 about providing service:

> As we read the Act, it is clearly a matter that the legislature, in creating the Public Utilities Commission, has determined that **this Commission shall in the first instance have jurisdiction to determine whether or not the Telephone Company does give this service to the people in a position as are the appellants herein.**

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.*

As a "competing telecommunications service provider" as defined in Tenn. Code Ann. § 65-4-101(e), US LEC's very existence arises out of the Act's changes to the telecommunications

[1] Defendant notes that the federal Telecommunications Act of 1996 preempted state regulation to the extent state regulations are inconsistent with its regulatory scheme and requirements. Defendant, of course, recognizes that federal law is an additional limitation on the TRA's authority, but observes that federal preemption is not an issue in this matter.

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 the reasons listed in subparagraph (c) as it believes that Airstream (perhaps unintentionally) is part of a scheme designed to defraud US LEC and consumers. US LEC's Tariff on file with the TRA expressly 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.

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 restraining order. See Tenn. R. Civ. Proc. 65.03(2). The grounds for dissolving an *ex parte*

[2] Again, Defendant notes that federal law may limit the TRA's authority to the extent that the TRA's exercise of its authority is inconsistent with federal requirements.

[3] As a customer of a regulated entity, Airstream has the right to petition the TRA for the requested relief . *See* T.C.A. 65-2-104, 65-2-106

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 omissions and misrepresented facts to the Court. As a result of these omissions and misrepresentations, the Court did not have all of the necessary facts before it. Had it had those facts, this Court would have been able to evaluate the jurisdictional issues as well as the true nature of the relief sought in this matter. Because all of the critical facts were not present, the TRO should not have been granted.

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 money to service the traffic received from Airstream. This amount far exceeds the sums due from Airstream to US LEC. While Airstream can cover in the market, US LEC is forced to pay

[4] Since US LEC has addressed Airstream's inability to prevail on the merits previously in the brief that discussion is not repeated here.

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 more than five times the bond amount on a daily basis based on Airstream's past usage pattern. Accordingly, the Court should dissolve the injunction, or, at a minimum, increase the amount of the bond to $215,000. *See generally* Wright Medical Technology, Inc. v. Grisoni, 2001 WL 1683754 (Tenn. Ct. App. 2001)(permission to appeal denied May 20, 2002) (copy attached) (raising injunction bond from $7,500 to $500,00 based on potential damages to defendant).

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.

Airstream's Motion for Contempt should be denied for two reasons. First, US LEC cannot be held in contempt because the TRO is facially void. Second, Airstream has made no attempt at showing actual damages as a result of US LEC's alleged contempt.

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 business in its motion for contempt. In its Complaint, Airsteam asserts that it is incapable of measuring or quantifying its damages for business losses (Verified Complaint at ¶ 15) and thus, should not be heard to do so at this juncture. Should Airstream attempt to quantify its damages, it will invalidate the underlying rationale for the requested injunctive relief. Additionally, Airstream has not alleged any other specific amounts of actual damages in its motion for

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,

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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:

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on this the 6TH day of August, 2002.

Luther Wright Jr.

Only the Westlaw citation is currently available.

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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.

[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

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

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requirement was reasonably related to state's interest in preventing deception of consumers. U.S.C.A. Const.Amend. 1.

[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,

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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. A short time after local services were opened to competition by the enactment of Chapter 408, the long-distance telephone service market was opened to competition by the federal Telecommunications Act of 1996. [FN1]

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). [FN2]

*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."

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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. [FN3] 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. [FN4]

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. [FN5]

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. [FN6] In pertinent part, it concluded that its interpretation of Rule 1220-4-2-.15 in the AT

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& 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. [FN7]

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. [FN8] 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).

*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.

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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

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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. [FN9] 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

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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

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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. [FN10] 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* [FN11] and *Keller v. State Bar of California*. [FN12] 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

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compelled financial contributions to commercial speech. [FN13] 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.* [FN14] 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

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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, [FN15] 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). [FN16]

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. [FN17] 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

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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).

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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

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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. Pub.L. No. 104-104, 110 Stat. 56 (codified in various sections of 47 U.S.C). *See generally Verizon Communications, Inc. v. Federal Communications Comm'n*, No. 00-511, 2002 U.S. Lexis 3559 (May 13, 2002) (discussing the enactment of the Telecommunication Act of 1996 and the effect of the Act on rate-setting by state regulatory agencies).

FN2. 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.

FN3. 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.

FN4. 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.

FN5. *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.").

FN6. 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[.]"

FN7. 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."

FN8. 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,

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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.

FN9. 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."

FN10. 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).

FN11. 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).

FN12. 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]' ").

FN13. 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.

FN14. 521 U.S. 457, 117 S.Ct. 2130, 138 L.Ed.2d 585 (1997).

FN15. *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").

FN16. 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.

FN17. 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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Only the Westlaw citation is currently available.

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

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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

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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

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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 progress of 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

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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 thebasic 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

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> or service, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic or service toany 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.

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SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

WRIGHT MEDICAL TECHNOLOGY, INC.,
v.
Bernard GRISONI and Biogeneration, Inc.

Dec. 18, 2001.
Application for Permission to Appeal Denied by Supreme Court May 20, 2002.

Appeal from the Chancery Court for Shelby County, No. 98-0285-1; Walter L. Evans, Chancellor.

Leo Bearman, Jr., George T. Lewis, III, and Marianne B. Matthews, Memphis, Tennessee, for the plaintiff/appellant, Wright Medical Technology, Inc.

Ronald D. Krelstein, Germantown, Tennessee, and Steven M. Markowitz, Memphis, Tennessee, for the defendant/ appellees, Bernard F. Grisoni, and Biogeneration, Inc.

Michael I. Less and Ted M. Hayden, Memphis, Tennessee, for the appellee, Travelers Casualty and Surety Company of America.

Lucian T. Pera and W. Bryan Smith, Memphis, Tennessee, submitting Amicus Curiae Brief for William H. Haltom, Jr.

OPINION

HOLLY KIRBY LILLARD, J., delivered the opinion of the court, in which ALAN E. HIGHERS, J. and DAVID FARMER, J., joined.

*1 This case involves the alleged use of confidential information by an ex- employee. The defendant employee worked for the plaintiff employer developing a medical product. The employee signed an agreement prohibiting the use of confidential information after his employment ended, but did not sign a non- competition agreement. The employee was terminated and thereafter began manufacturing a competing medical product. The plaintiff employer sued and obtained a temporary injunction prohibiting the ex-employee from manufacturing the product. The trial court later dissolved the injunction. Subsequently, it found the defendant employer liable for malicious prosecution and punitive damages, awarding damages of over $9 million. The employer appeals. We affirm in part, reverse in part and modify. We reverse the finding of malicious prosecution, holding that the evidence is insufficient to establish malice or lack of probable cause. We also reverse the award of punitive damages. We affirm the trial court's dissolution of the injunction against the former employee, and find that the compensatory damages are limited by the amount of the injunction bond. Consequently, the award of compensatory damages is modified to this amount.

This case involves the alleged use of confidential information by an ex- employee. Plaintiff/Appellant Wright Medical Technology, Inc. (Wright), is a Memphis corporation which develops and markets medical products. Defendant/Appellee Bernard Grisoni ("Grisoni") is a former employee of Wright, and Defendant/Appellee Biogeneration, Inc. ("Biogeneration") is the company Grisoni started after his employment with Wright was terminated.

FACTS AND PROCEEDINGS

Grisoni was hired by Wright in February 1994 as manager of silicone materials and process research. Grisoni holds a bachelor's degree in material science, master's degrees in polymer technology and business administration, and a Ph.D. in manufacturing engineering. Grisoni began working in the field of manufacturing medical devices in 1985. Before coming to Wright, Grisoni

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worked with silicone materials at Dow Corning. Immediately before joining Wright, Grisoni was the project manager for the development of interocular lenses at Allergan Medical Optics.

When Grisoni became employed at Wright, he was required to sign a confidentiality agreement. The agreement read, in pertinent part:

> Other than as required in my duties as an employee of Wright Medical Technology, I will not disclose to anyone or use either during or after my employment; except with the prior written consent of Wright Medical Technology, any trade secret, confidential know-how or confidential business or technical information of Wright Medical Technology. The foregoing obligation shall also apply to any trade secrets or other confidential information of any third party learned by me as a Wright Medical Technology employee and which Wright Medical Technology has an obligation to maintain in secrecy. The obligations of secrecy and non-use of this paragraph shall not apply to any information which has become publicly available through no fault of my own.

*2 Thus, the confidentiality agreement prohibited Grisoni from using or disclosing any confidential information of Wright that had not become publicly available. However, it did not include a noncompetition clause prohibiting Grisoni from developing a competing product after leaving his employment with Wright.

In 1994, Wright began developing calcium sulfate bone void fillers, and soon thereafter it became one of Wright's major priorities. Bone void filler is a material used by an orthopedic surgeon to fill a cavity appearing in a patient's bone, resulting from either traumatic injury or the surgical removal of diseased or infected bone matter. The bone void filler material is grafted over the area of missing bone or void until the area is replenished by the body's own natural bone formation. Use of a bone void filler decreases the risk of infection and harmful scar tissue while the natural bone regenerates. Traditionally, surgeons have transplanted bone matter from other parts of the patient's body, such as the patient's ribs, or implanted pieces of bone from a bone bank. Synthetic materials have also been used with varying degrees of success. Calcium sulfate has been used as an artificial bone void filler for at least a century. The advantage of calcium sulfate is that it is absorbed into the body, that is, it dissolves, at roughly the same rate as the new bone growth. This allows for the cavity to remain filled while the new bone forms directly behind the calcium sulfate filler material.

Wright experimented with several methods of calcium sulfate bone graft production. Calcium sulfate dihydrate, also known as gypsum, is a natural occurring compound which is mined and processed. The resulting powder can be used in both food and pharmaceutical production. Under the "pressed" method of bone void filler production, a small amount of stearic acid is added as a binding agent to the calcium sulfate dihydrate powder. The mixture is then compressed into small tablets or pellets to be surgically grafted into the bone cavity. A second method of bone void filler production involves the removal of water from the calcium sulfate dihydrate, thereby creating calcium sulfate hemihydrate. This can be done by simply heating the compound in order to remove the water, forming beta-type hemihydrate, or by a combination of heat and pressure to crystalize the hemihydrate, forming alfa-type hemihydrate. Regardless of which type of hemihydrate is produced, the calcium sulfate is then combined with a fixed amount of water. This results in a dihydrate in paste form. This paste can then be directly implanted into the bone cavity to solidify, or the paste can be first molded into small pellets, dried, and then surgically implanted at a later time.

Wright and other companies had tried to develop a number of calcium sulfate bone void fillers, but neither Wright nor any of Wright's competitors had gained the necessary FDA approval for the products. FDA approval was essential to developing a commercially viable product. In 1976, Congress amended the

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Federal Food, Drug and Cosmetic Act, 21 U.S.C.S. §§ 301 et seq. (1984) ("the Act."). The amendments to the Act require FDA clearance before a medical device can be marketed in the United States. The amendments did not cover products which existed in interstate commerce prior to May 23, 1976. New medical devices developed after that date were required to meet certain performance standards established by the FDA. To demonstrate that a product is effective and safe for use for humans, and thus obtain FDA approval, extensive animal and human clinical studies are often required.

*3 The Act allows for clearance of a medical product through an application process whereby the submitting company demonstrates to the FDA that the non-approved device is "substantially equivalent" to a predicate device, either a pre 1976 product or a product which has already been given FDA clearance. This "piggybacking" approval process permits the submitting company to obtain FDA clearance for a medical product without having to engage in the lengthy animal and human clinical studies that would otherwise be necessary. The FDA exercises a great deal of discretion in determining whether a product will be approved as "substantially equivalent" to a predicate product. If the application, known as a 510(k), fails to meet FDA approval, the FDA will usually provide feedback informing the company of the factors it considered in concluding that the two compared products were not "substantially equivalent." The submitting company then has several options to obtain clearance. The company can modify its product to more closely mimic the predicate device, or find a predicate device more similar to its product and resubmit the 510(k) application. If the company's product is not modified or a new predicate product is not found, the company could use an alternate method of demonstrating "substantial equivalency," such as by using more extensive forms of testing or comparing different variables. If FDA approval is not obtained by one of these means, the company would likely be forced to engage in extensive animal and human clinical studies to obtain approval.

Once FDA clearance is given, the FDA provides the public limited access to the submitting company's 510(k) application by placing a summary of it on the FDA's website. Information not included in the FDA summary is normally kept confidential.

Within a few months of beginning his employment with Wright, Grisoni was given responsibility over Wright's calcium sulfate bone void filler project. He worked on this project for the duration of his employment at Wright. Prior to joining Wright, Grisoni had no experience in the area of calcium sulfate bone void filler products and had reviewed no literature on such products. Once Grisoni was given the responsibility for developing these products, he researched a variety of publicly available sources on uses of calcium sulfate bone grafts.

In working on the calcium sulfate bone filler project, Grisoni worked closely with Dr. Warren Haggard ("Haggard"), also employed by Wright. Haggard holds a Ph.D. in biomedical engineering and is an expert in biomaterials. Haggard had worked for Wright since August 1993. Grisoni also worked with Robert Churinetz ("Churinetz"), who was the Wright official responsible for quality assurance and regulatory approval. Grisoni worked with Churinetz on obtaining FDA approval for Wright's bone void filler. Obtaining FDA approval for Wright's bone void filler proved to be a lengthy and difficult process.

*4 To get the raw materials for the bone void filler, Wright entered into a licensing agreement with U.S. Gypsum ("USG"). The agreement with USG also enabled Wright to gain access to USG's expertise in calcium sulfate bone void fillers. USG was one of the largest producers of calcium sulfate and had been engaged with other companies in extensive research into the use of calcium sulfate as a bone void filler.

While overseeing this project for Wright, Grisoni met with several individuals who were instrumental in the development of calcium sulfate bone void fillers. On one occasion in

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April 1995, Grisoni met with Max Sherman, a former employee of Zimmer, another company that manufactured orthopedic devices. While at Zimmer, Sherman had been in charge of regulatory affairs. Sherman provided Wright a bibliography developed at Zimmer containing several articles on the production and use of calcium sulfate bone void fillers, which Grisoni used to do background research. According to Sherman, Zimmer had tried to develop a calcium sulfate bone void filler but was unsuccessful in getting its 510(k) application approved by the FDA, primarily because Zimmer had used actual bone as the predicate device for its bone void filler in the 510(k) application. Sherman felt that a better predicate device for FDA approval would be Ethicon, a calcium sulfate bone filler device in pellet form which had been marketed unsuccessfully in the 1950s and 1960s. After production of Ethicon was ceased, the remaining supply of Ethicon pellets were given to Dr. Leonard Peltier, who supported the development of Ethicon.

In light of Sherman's comments, Wright made a decision to use Ethicon as the predicate device in the 510(k) application for FDA approval of its bone void filler. Wright's initial bone void filler was an antibiotic loaded calcium sulfate product in pellet form. However, by mid 1995, Wright's major effort was a kit, called Osteoset, which contained calcium sulfate hemihydrate powder, a vial of liquid, a mixing bowl and a mixing tool. The surgeon would mix the contents of the kit into a calcium sulfate paste and then graft the paste into the bone cavity, where it would then solidify. In September 1995, Wright's 510(k) application on the Osteoset kit was submitted to the FDA. The FDA denied approval of the 510(k) application, citing the technological differences between implanted pellets such as Ethicon and the direct application of a calcium sulfate paste. [FN1] In denying approval for the 510(k) application, the FDA also noted that Wright had not demonstrated that Ethicon was sold in interstate commerce prior to March 1976.

FN1. Subsequently, in March 1997, Wright received FDA clearance on the Osteoset plaster kit. However, the approved kit required the surgeon to first mold and dry the paste into small pellets before implantation. This device was approved using Osteoset pellets (approved in June 1996) and not Ethicon as the predicate device.

After this initial failure, Wright determined that its bone void filler needed to be in the form of calcium sulfate pellets, similar to Ethicon, in order to obtain FDA approval. In order to develop such a product, Wright obtained a single package of Ethicon pellets from Dr. Peltier. Wright then began consulting with Dr. Peltier on the development of Wright's own calcium sulfate pellets.

*5 Once Wright had access to Ethicon pellets, Wright employees began to "reverse engineer" calcium sulfate pellets which closely proximated Ethicon pellets. In January 1996, Wright opened the single package of Ethicon pellets and sent the contents to USG for chemical analysis. Within a few weeks after acquiring the Ethicon pellets from Dr. Peltier, Wright had created the prototype of its Osteoset pressed pellets, containing 98% calcium sulfate dihydrate and 2% stearic acid.

In order to gain FDA approval, Wright needed to demonstrate that the Osteoset pellets would perform similarly to Ethicon pellets when implanted into the human body. Since Ethicon's dissolution inside the human body had previously proven successful, Churinetz proposed to conduct dissolution tests of the two products inside the laboratory. Churinetz and Grisoni conducted the comparison by using water and phosphate buffered saline solution as the dissolution mediums. By establishing that the two products, Osteoset and Ethicon, had similar dissolution rates in water, which has less density than body fluids, and phosphate buffered saline solution, which has a density greater than body fluids, Churinetz hoped to demonstrate to the FDA that the dissolution rates for both Osteoset and Ethicon would correlate with the rate of new bone growth when implanted in the human body. In February 1996, Wright conducted the dissolution tests and verified that Osteoset

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had similar dissolution rates to Ethicon.

These dissolution tests were then incorporated into Wright's 510(k) application in order to show that the two products had "substantially equivalent" dissolution rates. Affidavits from former Ethicon employees and Dr. Peltier were submitted to show that Ethicon had been marketed in interstate commerce prior to May 1976. In June 1996, Wright's 510(k) application for Osteoset was approved by the FDA. Two months later, Wright began marketing Osteoset to the public. In July 1996, the summary of Wright's 510(k) application was made available on the FDA's website.

After Wright obtained FDA clearance for Osteoset, it switched to a casting process for producing Osteoset pellets. The process required that Wright first convert the dihydrate powder supplied by USG into hemihydrate powder. Water could then be added to form a dihydrate paste. Wright had previously learned from USG that either the alpha-type hemihydrate or beta-type hemihydrate could be used to produce calcium sulfate paste. [FN2] Wright opted to use alpha-type hemihydrate in its molding process.

FN2. Grisoni had conducted a dissolution test in 1995 comparing the dissolution rates of alpha-type hemihydrate and beta-type hemihydrate and concluded that the two had equivalent dissolution rates.

Wright produced alpha-type hemihydrate crystals using a calcination process involving heat and pressure. USG had previously developed temperature and pressure ranges for the calcination process, and Wright acquired this information as part of its agreement with USG. After the calcination process was completed, the hemihydrate powder was mixed with stearic acid and water to create a calcium sulfate dihydrate paste. This paste could then be mass molded and dried into pellets similar in size and composition to the pressed pellets. However, Wright discovered that the dissolution rate of the cast pellets was different than the dissolution rate of the pressed pellets. By decreasing the amount of stearic acid in the mixture of the cast pellets, Wright achieved a dissolution rate equivalent to that of the pressed pellets.

*6 Metal molds were originally used to mold the Osteoset pellets. However, to allow the pellets to expand during drying, Grisoni designed a flexible silicon mold. The pellets were bottled and then underwent a sterilization process using gamma radiation. Once the sterilization was completed, the pellets were packaged and stored for distribution.

In August 1997, Wright implemented a company-wide reduction in force in which approximately 75 employees were terminated. As part of the reduction in force, on August 19, 1997, Grisoni's employment with Wright was terminated. Within a few days of his termination, Grisoni decided to start his own business dealing in tissue repair, which he called Biogeneration, Inc. Grisoni's experience at Wright, as well as several articles appearing in Memphis newspapers, made him aware of the growing market in calcium sulfate bone substitutes. Grisoni chose to manufacture calcium sulfate bone filler because such filler can be manufactured without a large amount of startup capital. Grisoni later testified that he went to area libraries to review books and articles on calcium sulfate. Many of these articles were listed in the bibliography of Wright's technical monograph for Osteoset, published and distributed as part of Osteoset's marketing campaign. Grisoni later testified that he accessed the FDA web page to review Wright's 510(k) summaries to Osteoset products.

After Grisoni's initial research, he began working on a competing bone void filler using betatype calcium sulfate hemihydrate. By September 8, 1997, less than three weeks after his termination, Grisoni had designed a prototype of his competing bone filler, which contained 98% calcium sulfate dihydrate and 2% stearic acid and was in pellet form, similar to Osteoset. On September 26, 1997, a little over a month after his termination, Grisoni submitted to the FDA a 510(k) application on

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his product, called ProFusion, using Osteoset as his predicate device. In his application, Grisoni described ProFusion as being "identical" to Osteoset. Also included in the 510(k) application for ProFusion were the results of dissolution studies comparing the dissolution rates of ProFusion with those of Osteoset. The studies were conducted using the same test fluids, water and phosphate buffered saline solution, as Grisoni had used previously for Wright's dissolution studies in its 510(k) application for Osteoset. Grisoni ran his test for the same number of days, eight, and used the same amount of water, 100 millileters, as was used in conducting the Wright dissolution studies. In this manner, Grisoni was able to demonstrate to the FDA that the dissolution rates of ProFusion and Osteoset were "substantially equivalent." In April 1998, the FDA approved Grisoni's 510(k) application for ProFusion.

Meanwhile, after Grisoni was terminated, Wright began having technical problems with its antibiotic loaded bone void filler process. Consequently, not long after Grisoni was terminated, Wright asked Grisoni to return to Wright as a consultant for a limited period of time, from September 29 to October 31, 1997. On September 29, 1997, Grisoni's first day back as a consultant, Grisoni told Haggard that he was involved in developing a bone graft substitute. The next day, Grisoni met with the vice president and general counsel of Wright, Tom Patton ("Patton"), and discussed his involvement in producing a competing bone filler product. Patton reminded Grisoni of his obligations under the confidentiality agreement. Grisoni assured Patton that he was honoring the agreement.

*7 Grisoni later testified that, while working as a consultant at Wright, Grisoni would take his ProFusion lab notebook with him, keeping it in his briefcase. He said that he took the notebook with him to Wright so that he could write down ideas. Grisoni's briefcase did not have a lock. On several occasions, Grisoni left his briefcase unattended at his desk while working in the lab or attending meetings. Grisoni's desk was located close to Haggard's office. Haggard did not attend the majority of the meetings Grisoni attended during this time.

After Grisoni's meeting with Patton regarding Grisoni's obligations under the confidentiality agreement, Patton remained concerned with the possible conflict of having Grisoni consult with Wright while Grisoni continued to develop a competing bone filler device. As a consequence, on October 8, 1997, Wright terminated Grisoni's services as a consultant. At that time, Wright had Grisoni sign a consulting agreement which, similar to the earlier confidentiality agreement, prohibited Grisoni from using or disclosing any confidential information he received from Wright pursuant to the consulting agreement. [FN3] Thereafter, Grisoni received a letter from Patton dated October 6, 1997, informing him what Patton believed to be included within the confidentiality agreement, including the production process and regulatory strategy for Osteoset. [FN4] Grisoni's attorney, Fred Acuff, sent a letter to Patton denying that Grisoni had used any confidential information and offered to meet with Patton to discuss any alleged violations of the confidentiality agreement. Instead of meeting with Acuff, Patton sent a letter to Acuff stating that "whether this matter is put to rest or not is up to your client."

FN3. Like the original confidentiality agreement, the consulting agreement provided an exception for information which was or became publicly available. While the agreement prohibited the use or disclosure of any confidential information, it acknowledged Grisoni's participation in developing a competing calcium sulfate bone void filler. The agreement provides "WMT hereby acknowledges and approves that you are currently and will continue to be engaged individually and with another corporation in the field."

FN4. The letter provides that "confidential information would include the production process for creating the OSTEOSET(R) HEMI-HYDRATE ALPHA crystals. Also confidential is such non-public information as the 510(k) for OSTEOSET, the company's regulatory strategy for OSTEOSET, the dissolution curve for each of the OSTEOSET products, how to attain such curves, the ability to

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vary the curves, the type and the source of the raw material for the original OSTEOSET, the difference and similarities between the original and subsequent OSTEOSET products, and the process for creating OSTEOSET...."

In early March 1998, Grisoni attended the annual meeting of the American Academy of Orthopedic Surgeons in New Orleans. During the meeting, Grisoni exhibited ProFusion and offered brochures and other information to those in attendance. Wright also had a booth at the annual meeting and saw that Grisoni was producing his own calcium sulfate bone void filler. When Patton, who by then was Wright's president, learned that Grisoni was marketing a competing product, he instructed Wright's general counsel, Michael McLaren, to investigate the matter. McLaren was an experienced attorney and a partner in the Memphis law firm of Thomason, Hendrix, Harvey, Johnson and Mitchell ("Thomason Hendrix"), as well as Wright's general counsel. McLaren reviewed Grisoni's confidentiality agreement and talked to several Wright officials, including Haggard and Churinetz. After the investigation, McLaren advised Wright to retain the Thomason Hendrix law firm to seek injunctive relief against Grisoni. Attorneys William Haltom and Robert Moore of the Thomason Hendrix firm were assigned to represent Wright in the matter.

On March 23, 1998, Grisoni sent a letter to Patton offering to meet with Wright officials to discuss any alleged violations of the confidentiality agreement. Grisoni and Acuff later met with Wright's attorneys to discuss possible resolution of the matter. The meeting was verbally combative and resulted in no resolution.

*8 On March 31, 1998, Wright filed an action in Shelby County Chancery Court, seeking injunctive relief against Grisoni and his company, BioGeneration. The lawsuit asserted that Grisoni had violated his confidentiality agreement by using Wright's confidential information to develop ProFusion. In the complaint, Wright sought injunctive relief prohibiting the use or disclosure of any confidential information or trade secrets and asked the trial court to enjoin Grisoni from manufacturing and marketing ProFusion. The trial judge, Chancellor Neal Small, immediately issued a temporary restraining order (TRO) prohibiting any further violations of the confidentiality agreement. The TRO prohibited the use of confidential information and trade secrets but did not enjoin Grisoni from manufacturing and marketing ProFusion, so long as no confidential information or trade secrets were utilized. A temporary injunction hearing was set for April 13, 1998, and Wright was ordered to post a $500 bond. On April 6, 1998, attorney Stephen Biller entered a Notice of Appearance on behalf of Grisoni.

On the date of the scheduled hearing, both parties were conducting extensive discovery. Consequently, the parties consented to an order modifying and extending the TRO until April 27, 1998. Unlike the original TRO, the modified TRO prohibited Grisoni from manufacturing or marketing ProFusion or from transferring his interest in ProFusion or his approved 510(k) application. [FN5]

FN5. Grisoni alleges that he did not agree to these additional terms in the modified TRO.

On April 23, 1998, Grisoni filed his answer, including a jury demand. At a meeting on the morning of the scheduled hearing on April 27, Biller told Grisoni that he felt that Grisoni should not oppose Wright's request for a temporary injunction order pending a hearing on the merits. Thereafter, Biller contacted the attorney for Wright and told him that Grisoni would not oppose the temporary injunction order. The attorneys for both parties made alternate proposals regarding the wording of the order. The temporary injunction order that was finally entered contained the same language as the modified TRO, prohibiting the manufacture and marketing of ProFusion. [FN6] The temporary injunction order also increased the injunction bond to $7500. Travelers Casualty and Surety Company (Travelers) was the surety under the bond. While Biller, on behalf of Grisoni, consented to the temporary injunction, Biller and

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Grisoni maintained that Grisoni had used no confidential information. Thereafter, the parties continued discovery, including Grisoni's deposition. In his deposition, Grisoni asserted that ProFusion was substantially different from Osteoset.

FN6. Grisoni asserts that he did not agree to this language and did not even see the temporary injunction order until sometime in June.

On June 3, 1998, Grisoni and Biller attended a settlement conference at the law offices of Thomason Hendrix. Attorney William Haltom represented Wright at the settlement conference. Unbeknownst to the attorneys, Grisoni secretly tape recorded the settlement conference. During the meeting, Haltom asserted that Grisoni's testimony in his deposition, that ProFusion was altogether different than Osteoset, was inconsistent with the prior claim made in his 510(k) application that the two products were "identical." [FN7] Haltom said that, unless Grisoni agreed to surrender his 510(k) on ProFusion, Wright intended to go to both the chancery court and the FDA and inform them of Grisoni's contradictory statements.

FN7. In September 1998, in response to these allegations Grisoni submitted a letter to the FDA explaining that he intended the term "identical" to mean "essentially alike" or "substantially equivalent."

*9 By September 1998, the relationship between Biller and Grisoni had deteriorated and a consent order was entered substituting Steven Markowitz as the attorney for Grisoni. On November 23, 1998, Grisoni filed a motion to dissolve or modify the temporary injunction, asserting that (1) he had never consented to the language in the temporary injunction order dealing specifically with ProFusion and (2) he had not violated the confidentiality agreement.

The hearing on Grisoni's motion to dissolve the injunction was held on January 26, 1999. At the outset, Wright's attorney assumed that the only issue the trial court planned to consider was whether Grisoni had consented to the temporary injunction; consequently, he assumed that Grisoni would have the burden of showing lack of consent to the injunction. However, the trial judge, Chancellor Walter Evans, [FN8] decided that, since no evidence had ever been presented on whether Wright was entitled to a temporary injunction, the hearing on dissolving the temporary injunction would be consolidated with the hearing on Wright's request for a permanent injunction. [FN9] Accordingly, over Wright's objection, the burden of proof was assigned to Wright. Grisoni did not object to proceeding on Wright's request for a permanent injunction, despite having originally demanded a jury trial.

FN8. During the interim, Chancellor Small's bid for re-election was defeated and Chancellor Evans was elected.

FN9. Rule 65.04(7) of the Tennessee Rules of Civil Procedure provides: "Before or after the commencement of the hearing of an application for a preliminary injunction, the Court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application."

At the outset of the hearing, Grisoni objected to the amount of the injunction bond, which was, at the time, $7,500. Grisoni noted that the injunction would cause him to miss the Annual Meeting of the American Academy of Orthopedic Surgeons, the premier event for marketing a product such as ProFusion. In light of this, the trial judge increased the amount of the injunction bond from $7,500 to $250,000. On February 1, 1999, Travelers issued a rider to the original injunction bond increasing the penal sum to $250,000.

Testimony was heard over a six week period. Wright first presented testimony from attorney Biller that Grisoni had in fact consented to the temporary injunction. After Biller's testimony, the trial court decided that the hearing should be on Wright's request for a permanent injunction. Wright was then obliged to present evidence showing that Grisoni had, in fact, violated his confidentiality agreement with Wright during the course of Grisoni's development of a

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competing bone void filler. The evidence presented by Wright included evidence of the following:(1) Grisoni had no experience with calcium sulfate bone void fillers before coming to Wright; (2) while with Wright, Grisoni was placed in charge of Wright's calcium sulfate bone void filler project; (3) while overseeing the project, Grisoni was given access to a variety of technical sources of information that Wright considered confidential, including information from USG that either alpha-type or beta- type hemihydrate could be used in producing bone void fillers; (4) by trial and error, and at substantial time and investment, Wright was able to develop Osteoset, get regulatory approval, and bring Osteoset to the market; (5) after being terminated from Wright, Grisoni was able to develop a competing bone void filler within a matter of weeks; and (6) Grisoni was able to get FDA approval by showing that his competing bone void filler was "substantially equivalent" to Osteoset.

***10** For each piece of information or technical know-how Wright asserted to be confidential, Grisoni sought to show either that the information was publicly available, and therefore outside the scope of the confidentiality agreement, or that Grisoni's process was different from the processes he learned while at Wright. Grisoni testified extensively about the independent research he did after his termination on calcium sulfate and the FDA approval process. Grisoni also testified extensively on the differences between ProFusion and Osteoset in composition, production processes, and testing.

Grisoni also questioned the credibility of Wright's witnesses. Grisoni noted that Wright had asserted in its complaint that Grisoni had developed his prototype of ProFusion "by" September 8, 1997, a matter of weeks after his termination. Grisoni asserted that he had told no one this date, and that the only place that information appeared was in the lab notebook he brought to Wright in his brief case while working as a consultant. When questioned about this in his testimony, Haggard was unable to say how Wright arrived at September 8, 1997 date in its complaint. The lab notebook was not produced to Wright until discovery was commenced, after Wright's complaint was filed in March 1998. [FN10] From these facts, Grisoni asserted that Haggard or another employee of Wright must have gained access to Grisoni's briefcase and looked at his lab notebook while he was consulting for Wright in October 1997.

FN10. At the injunction hearing, Wright's counsel, Steve Vescovo, stated: "Do they want to know how we found out? I know, but he can't ask me. That's my business. Okay? But the fact of the matter is we're right on the date. Okay? How we found out about it is my business."

At the hearing to dissolve the injunction, for reasons that are not entirely clear from the record, [FN11] the attorney for Wright, William Haltom, was subpoenaed to testify. In his testimony, Haltom was questioned at length about the settlement conference with Grisoni at which Haltom told Grisoni that, if Grisoni refused to give up his 510(k) on ProFusion, Wright would go to the chancery court and to the FDA to tell both of Grisoni's contradictory statements on whether ProFusion was "identical" to Osteoset. The questioning and Haltom's testimony were often contentious. Later in the hearing, the tape Grisoni secretly made of the settlement conference was disclosed and played for the trial court, in an effort to show that Haltom had "threatened" Grisoni but would not admit to doing so in his testimony.

FN11. The trial judge questioned Grisoni's attorney about the relevance of Haltom's testimony. Grisoni's attorney, Steve Markovitz, responded that Haltom's testimony was relevant to whether Haltom's law firm should be permitted to continue representing Wright at the trial. Wright's attorney, Steve Vescovo, indicated that Wright did not object to Haltom's testimony because Grisoni's attorney had called into question Haltom's ethics and Wright wished to respond. Haltom's testimony later became relevant to the issue of malicious prosecution for which Grisoni sought damages at the subsequent damages hearing.

After the hearing was concluded, on March 10, 1999, the trial court issued from the bench its findings of facts and conclusions of law.

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The trial court stated the issue as "whether the defendant used confidential information or trade secrets of the plaintiff which had not become publicly available." The trial court noted that it was very impressed with Grisoni's knowledge, expertise and credibility. The trial court made no findings at that time regarding the credibility of Wright's witnesses or of Wright's attorney, William Haltom. The trial court found, *inter alia,* that any information on which Grisoni relied to develop ProFusion was not confidential but was publicly available. Based on its view of the evidence, and its determinations of credibility, the trial court concluded that ProFusion was developed as a result of Grisoni's ingenuity, hard work and ability, and not as a result of any misappropriation of confidential information or trade secrets of Wright.

*11 After the trial court issued its ruling from the bench, Wright indicated that it intended to file an interlocutory appeal. Wright then sought from the trial court a stay of the trial court's order, pending its interlocutory appeal. The trial judge declined to rule on Wright's motion for a stay. By order dated March 22, 1999, the trial court dissolved the injunction and set a hearing for March 29, 1999 to determine the amount of any damages Grisoni sustained as a result of the wrongfully issued injunction.

Shortly thereafter, on March 24, 1999, Wright filed its motion for interlocutory appeal pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure, as well as a motion under Rule 7 of the appellate rules for a stay of the trial court's order. The appellate court immediately stayed the trial court's order dissolving the injunction, conditioned upon Wright posting an additional $250,000 bond, [FN12] making a total bond of $500,000. On March 31, the appellate court stayed any further proceedings in the trial court in order to permit the appellate court to address Wright's motion for interlocutory appeal. The earlier order staying dissolution of the injunction also remained in effect.

FN12. The additional $250,000 bond was posted by Wright, not Travelers.

On May 11, 1999, the appellate court entered an order, holding that the injunction against Grisoni should remain in place until final disposition of the case, and finding that there was nothing further for the appellate court to consider at that time. The appellate court remanded the matter to the trial court for a hearing on damages and entry of final judgment, and noted that the trial court had the authority to determine the adequacy of the bond pending entry of final judgment as well as pending appeal.

Thereafter, on May 19, 1999, Wright filed a petition with the appellate court for a rehearing of the appellate court's denial of Wright's Rule 10 motion for interlocutory appeal. Wright argued that remanding the cause to the trial court for a hearing on damages was inappropriate because Grisoni had never requested damages in any pleading filed with the trial court. On May 24, Grisoni filed a response to Wright's petition to rehear, but did not address the issue of damages.

Meanwhile, on May 26, 1999, Grisoni filed a motion with the trial court to increase the injunction bond to $5 million. Grisoni's motion before the trial court noted that the appellate court had previously required an additional $250,000 bond, which remained in effect, making a total bond at that point of $500,000. Grisoni maintained that the bond in effect at that time was "wholly inadequate."

On June 8, 1999, the appellate court entered an order on Wright's petition for rehearing on its denial of Wright's motion for interlocutory appeal. Since Grisoni's response to the petition had not addressed the issue of damages, the appellate court ordered Grisoni to show cause on whether Grisoni had filed any pleadings with the trial court requesting damages. The June 8 order stated that further proceedings in the trial court were stayed until further order of the appellate court.

*12 On the same date, June 8, 1999, the trial court held a hearing on Grisoni's motion to increase the injunction bond. Without knowledge of the order of the appellate court staying further proceedings, the trial court

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entered an order requiring Wright to post an additional $1.9 million bond, making a total bond of $2.4 million. The trial court's order stated that the additional bond had to "be posted on or before June 18, 1999, otherwise, the injunction presently in effect, whose dissolution was stayed by the Court of Appeals, is dissolved."

In light of its earlier order staying proceedings in the trial court, on June 17, 1999, the appellate court entered an order vacating the trial court's June 8 order increasing the injunction bond to $2.4 million, finding that the $500,000 bond in effect at that time was "sufficient for present purposes." The appellate court denied Wright's petition to rehear. It noted that the parties agreed that the only remaining issue was damages, [FN13] and concluded that it was best for the case to proceed to final judgment rather than hearing an interlocutory appeal. The appellate court remanded the case to the trial court and ordered that the injunction against Grisoni should remain in effect. Grisoni then sought permission from the Tennessee Supreme Court for an interlocutory appeal of the Court of Appeals' order setting the injunction bond at its previous level of $500,000. Grisoni's petition with the Tennessee Supreme Court was denied. The injunction bond remained at $500,000 until the conclusion of the trial court's proceedings on the issue of damages.

FN13. On July 15, 1999, Grisoni filed a motion with the trial court to amend and supplement his Answer to include an allegation of damages suffered as a result of the wrongfully issued injunction, as well as a request for punitive damages.

The hearing on damages commenced on March 6, 2000. Grisoni sought damages under Rule 65 of the Tennessee Rules of Civil Procedure on the theory that the injunction was wrongfully issued, as well as damages for malicious prosecution, damages under the Tennessee penalty statute for wrongful injunctions, Tennessee Code Annotated § 29-23-104, and damages for Wright's alleged misappropriation of Grisoni's proprietary information to develop another product called Allomatrix. Grisoni also sought punitive damages and attorney's fees.

At the hearing on damages, Grisoni testified regarding his sales projections for ProFusion, as well as his expected costs and profit margin. Grisoni also presented the testimony of an economic expert, Robert Bush. Bush calculated that potentially Grisoni could have achieved approximately 10 percent of an estimated $500 million to $750 million total annual market for bone filler products. For the period during which the injunction was in place, taking into account the amount of product Grisoni could have produced, Bush estimated that Grisoni could have realized on approximately 10 percent of his sales potential or, roughly, $5.3 million per year. [FN14]

FN14. Operation costs were estimated at between 20 and 30 percent of total sales, leaving Grisoni with between $310,000 and $350,000 monthly profit.

Grisoni again testified on his assertion that Wright officials accessed the information in his lab notebook during the time in which Grisoni worked as a consultant for Wright. In his testimony, Grisoni said that the fact that his prototype for ProFusion was developed on September 8, 1997 was noted in his lab notebook. Grisoni maintained that the only place this date appeared was in his lab notebook. He had not discussed this date with anyone at Wright. Nevertheless, in its original complaint, Wright alleged that Grisoni developed his prototype "by" September 8. Grisoni alleged that, during the time he was consulting for Wright in October 1997, Haggard accessed Grisoni's briefcase without Grisoni's permission, read through the lab notebook and, thereby, learned the date the prototype was developed.

***13** In support of his claim for malicious prosecution, Grisoni proffered the testimony of Larry Houk, Ph. D., a chemistry professor for nearly 30 years, employed at the time of trial at the University of Memphis. The substance of Houk's testimony was that anyone with a chemistry background would have been able to produce ProFusion using only publicly available information. Houk asserted that this

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fact would have been obvious to Wright at the time that Wright allegedly reviewed Grisoni's lab notebook.

Grisoni sought compensatory damages for malicious prosecution as well as punitive damages. In response to the allegation of malicious prosecution, Wright offered the testimony of Wright officials and attorneys concerning the reasons why they believed that seeking an injunction was appropriate. Patton testified that he first observed Grisoni's ProFusion product at the annual meeting of the American Academy of Orthopedic Surgeons. The similarities in the two products and the fact that Grisoni was able to develop ProFusion in such a short time convinced Patton that Grisoni had likely used Wright's confidential information to develop ProFusion. Afterward, Patton asked Wright's general counsel, Mike McLaren, to investigate the matter. McLaren testified that he interviewed Haggard and Churinetz and reviewed the work in which Grisoni was involved while employed at Wright, as well as the confidentiality agreements Grisoni had signed. McLaren said that he was familiar with the legal requirements to obtain injunctive relief and felt at the time that injunctive relief was warranted.

Grisoni also sought damages for the alleged misappropriation of information from his lab notebook. Grisoni testified that, in early 1998, he began researching a calcium sulfate putty which contained substances to promote bone growth. Grisoni recorded his research on the calcium sulfate putty in his lab notebook. The lab notebook was later turned over to Wright in April 1998 as part of discovery into Grisoni's development of ProFusion. Grisoni testified that lab notes obtained during discovery from Don Peterson, the engineer in charge of developing of Wright's calcium sulfate based putty, called Allomatrix, indicated that Peterson had used test data described in Grisoni's lab notebook. From this, Grisoni argued that Wright had misappropriated proprietary information from Grisoni's notebook and that Grisoni should therefore recover any profits Wright realized on Allomatrix.

After the damages hearing, the trial judge issued lengthy written findings of fact and conclusions of law. In its findings of facts and conclusions of law, the trial court made specific credibility determinations, weighing heavily in favor of Grisoni. The trial court found Grisoni to be a "very credible witness" and found support for his testimony in other evidence in the record. In contrast, the trial court found the testimony of several of Wright's witnesses, particularly Dr. Haggard and attorney Haltom, to be untruthful and unsupported by other evidence. Specifically, the trial court found that Wright witnesses testified untruthfully regarding the source of the date alleged in the complaint as the date by which Grisoni had developed his ProFusion prototype. The trial court concluded that Wright must have learned this date from an unauthorized inspection of Grisoni's lab notebook during the period in which Grisoni was a consultant for Wright, in October 1997. The trial court also concluded, relying on Dr. Houk's testimony, that Wright knew or should have known, after its unauthorized review of Grisoni's lab notebook, that ProFusion was not developed by the use of any confidential information. Despite this, the trial court noted, Wright consistently sought injunctive relief against Grisoni and refused any offers by Grisoni to show that he had not used confidential information.

*14 The trial court also reviewed at length the testimony of attorney William Haltom regarding his statements to Grisoni in the course of the settlement conference that Grisoni secretly recorded. The trial judge concluded that Haltom testified untruthfully that he did not tell Grisoni or his attorney at that time, Steve Biller, that he would "go to the FDA" if Grisoni refused to surrender his 510(k) on ProFusion. The trial court noted that Wright refused to consider Grisoni's overtures to demonstrate that he had not used confidential information and instead, through attorney Haltom, threatened Grisoni with criminal prosecution for perjury if he refused to surrender his 510(k) on ProFusion. From these facts the trial court concluded that Wright acted without probable cause, and that Wright's motivation in filing suit against

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Grisoni was to keep Grisoni out of the calcium sulfate bone void filler market, rather than any belief that Grisoni had developed ProFusion through the use of confidential information.

The trial court concluded that Grisoni had been wrongfully enjoined from participating in the bone void filler market for two years. As a result, the trial court found, Grisoni had suffered significant damages in the form of lost profits from sales of ProFusion and lost opportunities in developing new calcium sulfate products. It noted that, in Tennessee, damages from an injunction that has been wrongfully issued are limited to the amount of the injunction bond, unless there is a finding of malicious prosecution. Based on its finding that Wright was liable for malicious prosecution, the trial court found that Grisoni's damages were not limited by the amount of the injunction bond. It found that the amount of damages sustained by Grisoni, while not mathematically certain, could reasonably be assessed. Considering the proof at the hearing, the trial court awarded Grisoni and Biogeneration $4.79 million in compensatory damages and an additional $408,000 per month for the next twelve months or until the final resolution of the case, whichever occurred first. The trial court declined to award damages on Grisoni's claim that Wright developed Allomatrix by utilizing wrongfully obtained material from Grisoni's lab notebook. The trial court found that "although there is a strong inference to support Defendants' contention [that Wright misappropriated material from the lab notebook], this court cannot say, by a preponderance of the evidence, that Wright's Allomatrix putty is the product of Grisoni's research and lab book information." On Grisoni's claim for punitive damages, the trial court found that Wright had acted with malice in instituting the injunction proceeding and awarded Grisoni punitive damages in the amount of $4.79 million. The final judgment was issued on May 10, 2000. On May 26, 2000, Wright filed its notice of appeal.

On May 30, 2000, Grisoni filed a motion with the trial court seeking an order requiring Wright and Travelers to post an appeal bond in the amount of $18 million. On that same day the trial court conducted a hearing to determine Wright's application for a stay of execution. The trial court granted a stay but ordered that Wright post a stay bond for $9.7 million. However, if Wright agreed to file with the Court of Appeals a consent order dissolving the temporary injunction, the bond would be reduced to $5 million. On June 21, 2000 the $5 million bond was posted and five days later the consent order was entered permitting Grisoni to begin producing and marketing ProFusion. On July 6, 2000, the trial court conducted a hearing to determine Travelers' liability on the injunction bond. The injunction bond provides:

***15** That the undersigned, Wright Medical Technology, Inc., as PRINCIPAL and TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, as SURETY, are held and firmly bound unto Bernard F. Grisoni and Biogeneration, Inc., in the sum of Seven Thousand, Five Hundred and no/100 Dollars ($7,500.00) [later amended by rider to $250,000] for the payment of which well and truly to be made, we bind ourselves firmly by these presents:

The condition of this bond is such that, whereas, WRIGHT MEDICAL TECHNOLOGY, INC., has sought and obtained a Temporary Restraining Order in this cause; now, if said Principal or Surety pays all damages and costs which any person may sustain by the suing out of such Temporary Restraining Order if the same is dissolved, this obligation to be void; otherwise, to remain in full force and effect.

Grisoni argued to the trial court that the terms of the Travelers' bond can be interpreted in two different ways. Grisoni admitted that the first paragraph limits Travelers' liability to the penal sum, $250,000. However, Grisoni argued that the second paragraph subjected Travelers to liability for the entire judgment in excess of $9 million. Grisoni asserted that the clause "if said Principal or Surety pays all damages and costs" creates an obligation for Travelers to pay all damages and costs. Because Travelers drafted the instrument, Grisoni maintained, the second interpretation should prevail. The

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trial court rejected Grisoni's argument and fixed Travelers' liability at $250,000.

ISSUES ON APPEAL

In this appeal, Wright, Grisoni and Travelers all raise issues to be considered by this Court. In addition, attorney Haltom, while not a party, filed an *amicus* brief in this appeal. The issues raised by all parties are outlined below.

On appeal, Wright contends that the evidence preponderates against the trial court's ruling that Grisoni did not use confidential information to develop ProFusion and obtain FDA approval and, consequently, erred in dissolving the injunction. In the alternative, even if the injunction was improperly issued, Wright argues that Grisoni is estopped from recovering damages resulting from the injunction because he consented to it. Further, Wright asserts that the evidence shows that Wright had probable cause to institute the lawsuit and acted without malice, and consequently, the trial court erred in finding liability for malicious prosecution. Wright also argues that the trial court erred in its award of compensatory damages because proof of the amount of Grisoni's damages was too speculative to support an award. Lastly, Wright argues that the evidence was insufficient to justify an award of punitive damages.

In response, Grisoni argues that the evidence establishes that his product, ProFusion, is considerably different than Wright's product, Osteoset. Grisoni contends that the evidence shows that he developed ProFusion and obtained FDA approval by using only information that was publicly available. Grisoni argues that the appellate court may reverse the trial court's order to dissolve the injunction only if it finds that the trial court abused its discretion in dissolving the injunction. In the alternative, even if the standard is preponderance of the evidence, Grisoni maintains that the trial court's decision to dissolve the injunction should be affirmed. On the trial court's decision to find Wright liable for malicious prosecution, Grisoni asserts that the evidence shows that Wright gained unauthorized access to Grisoni's lab notebook. In so doing, Grisoni contends, the evidence shows that Wright became aware that ProFusion was significantly different from Osteoset and that ProFusion was developed without the use of confidential information. Despite this, Grisoni argues, Wright sought and obtained injunctive relief and, therefore, should be held liable for malicious prosecution as well as punitive damages. Grisoni asserts that Wright's improper review of his lab notebook constitutes "unclean hands" and bars Wright from seeking equitable relief. Grisoni argues that the award of compensatory damages was supported by evidence that was not too speculative to support such an award. In the alternative, Grisoni argues that even in the absence of malicious prosecution, he is entitled to recover a statutory penalty under Tennessee Code Annotated § 29- 23-104(a). Punitive damages were supported, Grisoni argues, by the evidence of malice and unclean hands. Grisoni asserts that the trial court erred in declining to award him damages for Wright's use of material allegedly misappropriated from his lab notebook to develop Allomatrix. Lastly, Grisoni asserts that the trial court erred in limiting Travelers' liability under the bond to $250,000.

*16 On appeal, Travelers asserts that the trial court correctly limited its liability to $250,000. Under the terms of the bond, Travelers argues, it is unambiguous that its liability is limited to the penal amount of the bond. Travelers also argues that its liability on the bond was discharged when the trial court failed to enter judgment against it and, alternatively, that the bond was discharged upon Wright's filing of an appeal bond.

Attorney Haltom filed an *amicus* brief on appeal asking this Court to review the trial court's finding that he did not testify truthfully regarding his statements in the settlement conference with Grisoni. Haltom argues that this Court can review the credibility determination made by the trial court since Haltom's trial testimony can be compared to the transcript of the tape recorded

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settlement conference.

ANALYSIS

In considering the issues raised on appeal, we analyze first the trial court's finding of liability for malicious prosecution. In connection with the award of damages for malicious prosecution, the award of punitive damages will be reviewed. Next we review the trial court's order dissolving the temporary injunction and its finding that Grisoni did not use confidential information in developing ProFusion. In connection with this, we address Wright's contention that Grisoni cannot obtain compensatory damages for wrongful issuance of the injunction because he consented to it, as well as the award of damages for wrongful issuance of the injunction. The remaining issues on appeal will then be discussed.

MALICIOUS PROSECUTION AND PUNITIVE DAMAGES

The elements of a cause of action for malicious prosecution are well settled. They are: (1) a judicial proceeding that has been instituted by the defendant and finally resolved in the favor of the claimant; (2) the defendant instituted the proceeding without probable cause; and (3) the defendant acted with malice. *Roberts v. Federal Express Corp.*, 842 S.W.2d 246, 247-248 (Tenn.1992). The claimant bears a heavy burden of proof in establishing the element of lack of probable cause and the element of malice. *Kauffman v. A.H. Robins Co., Inc.*, 223 Tenn. 515, 448 S.W.2d 400, 404 (Tenn.1969). Probable cause exists where the original plaintiff possessed a reasonable belief in both the existence of facts supporting his claim and that those facts made out a legally valid claim. *Buda v. Cassel Bros., Inc.*, 568 S.W.2d 628, 631-632 (Tenn.Ct.App.1978). The reasonableness of the defendant's belief and conduct is a factual determination. *Roberts*, 842 S.W.2d at 248-249 (overruling earlier cases holding that whether probable cause existed at the time the proceeding was instituted is a legal determination). The plaintiff may rely on the advice of counsel as to the validity of the claim where the advice is sought in good faith and is given after fair and complete disclosure of all relevant facts in his possession and all facts he could have ascertained by reasonable diligence. *Kelley v. Tomlinson*, 46 S.W.3d 742, 748 (Tenn.Ct.App.2000). As to malice, the claimant need not prove ill will or personal hatred, so long as he demonstrates an improper motive. *Lawson v. Wilkinson*, 60 Tenn.App. 406, 447 S.W.2d 369, 374 (Tenn.Ct.App.1969). While malice may be inferred from a total absence of probable cause, no amount or kind of malice is sufficient to establish lack of probable cause. *Nashville Union Stockyards, Inc. v. Grissim*, 13 Tenn.App. 115, 126-127 (Tenn.Ct.App.1930).

*17 In this case, the trial court found Wright liable for malicious prosecution and awarded Grisoni compensatory damages on this claim. Compensatory damages were awarded to Grisoni in the amount of $4.79 million for the period of April 3, 1998 through April 2, 2000, and $408,000 per month thereafter until resolution of the lawsuit.

The trial court's finding of malicious prosecution was based on its factual finding that Wright officials improperly gained access to Grisoni's lab notebook while Grisoni worked as a consultant for Wright. From this finding, the trial court inferred that Wright knew the entire content of Grisoni's lab notebook prior to filing suit. The trial court credited testimony to the effect that anyone looking at Grisoni's lab notebook would know that ProFusion was developed without the use of confidential information, and from this concluded that Wright instituted the lawsuit against Grisoni without probable cause. The trial court's finding of malicious prosecution was also premised on its conclusion that Wright's attorneys were untruthful and threatening to Grisoni, for the sole purpose of preventing Grisoni from introducing into the market a product to compete with Osteoset. The trial court's factual findings were based in part on its determination of the credibility of the witnesses for both parties.

When the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who has the opportunity to

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observe the witnesses in their manner and demeanor while testifying is in a far better position than this Court to decide those issues. *McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn.1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn.Ct.App.1997). The weight, faith, and credit to be given to any witness's testimony lies in the first instance with the trier of fact, and the credibility accorded will be given great weight by the appellate court. *Id.; Estate of Walton v. Young*, 950 S.W.2d 956, 959 (Tenn.1997). Where there is conflict in the testimony that requires a determination of the credibility of a witness, the trial court's finding is binding on the appellate court "unless from other real evidence the appellate court is compelled to conclude to the contrary." *Hudson v. Capps*, 651 S.W.2d 243, 246 (Tenn.Ct.App.1983) (citing *State ex rel Balsinger v. Town of Madisonville*, 222 Tenn. 272, 435 S.W.2d 803, 807 (Tenn.1968)).

On appeal, Wright argues that the trial court erred in finding that Wright improperly gained access to Grisoni's lab notebook while Grisoni worked at Wright as a consultant. The trial court's finding is based on Wright's allegation in the complaint that Grisoni had developed his prototype of ProFusion "by" September 8, 1997. Grisoni testified that he had told no one that he developed the ProFusion prototype on September 8, that the only document containing the date was Grisoni's lab notebook, and that the lab notebook was not disclosed to Wright until discovery commenced, well after Wright's complaint was filed. Grisoni testified that, while he worked as a consultant for Wright, he often left his lab notebook unattended on his desk, located near Haggard's office. While Haggard denied accessing Grisoni's lab notebook, the trial judge found that Haggard was not a credible witness. The trial court noted the statement by Wright's attorney, Steven Vescovo, that he knew where the September 8 date in the complaint came from, but that Grisoni's attorney could not ask him about it.

***18** In a situation such as this, the trial court's assessment of the credibility of the witnesses is necessarily dependent on the trial judge's evaluation of the witnesses' demeanor and manner while testifying under these circumstances; the trial court's determination on the witnesses' credibility must be accorded great weight by the appellate court. *See Estate of Walton*, 950 S.W.2d at 959.

In this case, the trial court credited Grisoni's testimony that the only way anyone could have known the date on which the ProFusion prototype was developed was by looking at his lab notebook. The trial judge discredited Haggard's denial that he improperly accessed the lab notebook. From this the trial judge inferred that Wright officials improperly accessed Grisoni's lab notebook and, moreover, inferred that Wright officials thereby gained knowledge of everything in the lab notebook. While this is a far-reaching conclusion to infer, we find that it is a permissible inference. With due deference to the trial court's determination of credibility, we find that the evidence does not preponderate against this factual finding.

Next we examine the trial court's finding that Wright's attorney, William Haltom, was untruthful and improperly threatening to Grisoni. This is a unique credibility determination in which the issue is whether Haltom testified truthfully at trial regarding his recollection of what he said in settlement conference. Since Grisoni secretly taped the settlement conference, this is not just a swearing contest between Haltom and Grisoni. Rather, determining Haltom's credibility involves comparing his testimony at trial to the transcript of the settlement conference.

In the settlement conference, Haltom noted that Grisoni swore in the 510(k) application for the FDA that ProFusion is identical to Osteoset, but in his deposition Grisoni denied that ProFusion was identical to Osteoset. Haltom said in the settlement conference that one or the other is not the truth. Haltom told Grisoni and his attorney Steve Biller that Wright would pursue the lawsuit and would go back to the FDA and would give information on Grisoni's contradictory statements to both the FDA and the chancery court.

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In the settlement conference, Grisoni's attorney Biller explained to Grisoni that, based on Grisoni's contradictory deposition testimony, Wright could go to the FDA and contest the validity of his 510K and Grisoni would "wind up with zero." Haltom said "it's a little more serious than that" and that "there's obvious implications for making false statements to the FDA ...," and promised to pursue those remedies unless Grisoni agreed to surrender his 510K and make the injunction permanent.

In Haltom's testimony at trial, Haltom was asked by Grisoni's attorney what was discussed at the meeting. Haltom described the contradiction between Grisoni's sworn statement to the FDA and his deposition testimony, said that he told Grisoni and Biller that Wright wanted Grisoni to surrender his 510(k), testified that he asserted that Wright would pursue its civil remedy in court, and stated that Wright had "an absolute right to go back to the FDA and point out his sworn testimony under oath which establishes a direct contradiction to everything he submitted to the FDA."

*19 Haltom was asked repeatedly whether he told Grisoni that if he did not surrender his 510(k), Haltom would notify the FDA. Haltom replied "no" and then explained that he told Grisoni that, as a lawyer, he had an obligation to pursue a civil remedy, including "going back to the FDA and saying you issued a 510(k), and according to the man you issued the 510(k) to, what he told you in this document he now says under sworn testimony isn't true."

In heated exchanges between Haltom and Grisoni's attorney at trial, Steve Markowitz, Haltom was also asked if he told Grisoni that the implications for making false statements were clear. Haltom said that he did not recall using those words, denied threatening Grisoni with criminal prosecution, denied unethical conduct, said he had no idea what the implications were for making false statements to the FDA, and said that he never threatened Grisoni with anything other than pursuing a lawful civil remedy.

In its findings on credibility, the trial court characterized the testimony of Wright's witnesses, naming Haltom specifically, as "either untruthful, inaccurate or strained credibility...." In discussing his conclusion that Haltom was not truthful, the trial court stated:

47. On June 3, 1998, a settlement conference was held at the Thomas [sic] Hendrix law firm office with Dr. Grisoni, Attorney Biller, and Attorney William Haltom, Jr. Unbeknowing to all the attorneys, Dr. Grisoni secretly recorded the entire conversations at the meeting.

48. In the recorded tape of the meeting, Attorney Haltom made it very clear that Wright was concerned about Dr. Grisoni and Biogeneration's entry into the calcium sulfate bone void filler market, by securing FDA approval. Attorney Haltom specifically stated that "this matter (lawsuit) can be brought to an end if Dr. Grisoni will surrender [to Wright] his 510(k)" approval from the FDA and consent to making the temporary injunction permanent.

49. Attorney Haltom specifically told Dr. Grisoni that "you've got to agree to a permanent injunction, and part of that would be surrendering the 510(k), but that would be the most crucial."

50. In a further effort to persuade Dr. Grisoni to give in to Wright's demands, Attorney Haltom made the following statement:

a. "We're prepared, starting tomorrow to go forward with a least a two-part war in this case--the court of FDA and the Shelby County Chancery Court."

b. "... there's obvious implications for making false statements to the FDA...."

c. "Dr. Grisoni either didn't tell the truth to the FDA or he hasn't told the truth to the chancellor (per his deposition) ... we're prepared to give that information to both the FDA and to the chancellor...."

51. Attorney William Haltom, Jr. was not truthful when he testified under oath at trial, on behalf of Wright, that he never told Mr. Biller or Dr. Grisoni that he would go to the FDA if Dr. Grisoni did not surrender the 510(k).

*20 52. Notwithstanding the clarity of the threat to Dr. Grisoni at the June 3rd

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meeting, as contained on the recorded tape and transcript, Attorney Haltom at trial testified that Attorney Biller never indicated to him that he felt like he was threatening Dr. Grisoni with criminal action (for perjury). He said that:

To the contrary, [Attorney Biller] and I have talked since this, and he said that there was no threat ever made, [and] that he's willing to support me on this.

Findings of Fact and Conclusions of Law (References to trial exhibits deleted).

This credibility determination presents a unique situation. In contrast to the trial court's determination of the witnesses' credibility regarding the alleged improper access to Grisoni's lab notebook, the questions to Haltom centered on his recollection of statements made at the settlement conference, and the truthfulness of his testimony can be ascertained from a comparison of his testimony to the tape of the settlement conference. In comparing the two, it is clear that Haltom's testimony overall is consistent with what was said during the settlement conference. When asked if he told Grisoni that, if he did not surrender his 510(k) that Wright would notify the FDA, Haltom's initial response was "no." [FN15] Immediately thereafter, however, and indeed repeatedly in his testimony, Haltom acknowledged telling Grisoni that Wright would go back to the FDA to point out the contradiction between his deposition testimony and his statements to the FDA. Thus, while the trial court made a factual finding that Haltom "was not truthful when he testified under oath at trial, on behalf of Wright, that he never told Mr. Biller or Dr. Grisoni that he would go to the FDA if Dr. Grisoni did not surrender his 510(k)," with due deference to the trial court's role in assessing credibility, we must conclude that this finding is clearly erroneous. *See Hudson v. Capps*, 651 S.W.2d 243, 246 (Tenn.Ct.App.1983)(holding that the trial court's determination of credibility is "binding on the appellate court unless from other real evidence the appellate court is compelled to conclude to the contrary"). *See also Krick v. City of Lawrenceburg*, 945 S.W.2d 709, 712 (Tenn.1997)(holding that where all the proof is by deposition, appellate court may draw its own conclusions about credibility).

FN15. The Court takes judicial notice that lawyers can be pugnacious witnesses.

Moreover, in support of the finding of malicious prosecution, the trial court relies on statements made during the settlement conference that, to settle the case, Grisoni must surrender his 510(k) on ProFusion; if not, Wright would wage a "two-part war" by pursuing the chancery court lawsuit and contacting the FDA. Citing Haltom's statements during the settlement conference that, if Grisoni did not surrender his 510(k), Wright would give the information on Grisoni's deposition testimony to the FDA and that "there's obvious implications for making false statements to the FDA ...," the trial court characterized these statements as "threats." It concluded from all of this that Wright's "primary motivation" in filing the lawsuit was to deny Grisoni "entry into its formerly exclusive calcium sulfate bone void filler market" and, based on this, found Wright liable for malicious prosecution.

***21** We must ascertain whether these statements, made during the course of a settlement attempt, can be the basis for a finding of malicious prosecution. In an unfair competition lawsuit such as this, it is axiomatic that the actions of the plaintiff, in filing the suit, are motivated by a desire to prevent the defendant from competing. Of course, this cannot be accomplished by filing a groundless lawsuit; however, the mere fact that the plaintiff desires to prevent the defendant from introducing into the market a competing product cannot be the basis for a finding of malicious prosecution. This fact indicates neither malice nor lack of probable cause.

Likewise, the statements made during the settlement conference, that Wright would pursue the lawsuit and go to the FDA if Grisoni did not surrender his 510(k), cannot be the basis for a finding of malicious prosecution. The trial court characterized these assertions as "threats," and that is not

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inaccurate. However, this is the harsh reality of litigation. Provided the lawsuit was not groundless, Wright had the legal right to pursue the chancery court litigation and to use legal means to call into question the validity of Grisoni's 510(k) on ProFusion. The trial court emphasized, and Grisoni calls unethical, [FN16] Haltom's statement during the settlement conference that "there's obvious implications for making false statements to the FDA...." While a perjury prosecution might result from Wright contacting the FDA regarding Grisoni's contradictory deposition testimony, Wright had a reasonable legal basis for questioning the validity of Grisoni's 501(k), regardless of peripheral consequences to Grisoni. This is an ugly but unavoidable consequence of settlement negotiations; each side must try to convince the other that refusing to relent to its settlement demand will result in consequences that are worse than giving in to the settlement demand. Provided the lawsuit is not groundless, statements of this type in settlement negotiations cannot form the basis for a finding of malicious prosecution.

FN16. Grisoni's allegation, that Haltom's statement constitutes a threat of criminal prosecution that violates the rules of ethics which govern attorneys, is not pertinent to this action.

The finding of malicious prosecution must now be evaluated in light of the remaining evidence. As noted above, the trial court found, based on its credibility determinations, that Wright had knowledge of the entire contents of Grisoni's lab notebook on ProFusion prior to instituting this lawsuit. At the same time, however, there are a number of other facts of which Wright was aware at the time the lawsuit was instituted. It is undisputed that Wright had knowledge that Grisoni had developed a prototype of ProFusion within a month of leaving his employment with Wright, a process that had taken Wright over a year of trial-and-error experimentation with Osteoset. [FN17] Wright knew that Grisoni had represented to the FDA that ProFusion was "identical" to Osteoset. Assuming that Wright knew that ProFusion utilized the beta form of calcium sulphate, Wright knew that Grisoni had been privy to Wright's experimentation with both the alpha and beta forms while Osteoset was being developed. Wright knew that ProFusion was being marketed in a pellet form that was nearly identical to Osteoset. Wright knew that Grisoni had used a process and methodology in his 510(k) application with the FDA that had great similarities to the process used by Wright in its 510(k) for Osteoset, a process that had included over a year of experimentation and modification by Wright, including an initial rejection by the FDA. Wright had knowledge of all of these facts in light of this Court's decision in *Hickory Specialties,* in which the Court held that, despite the fact that the processes in question were based on existing technology and potentially could have been developed by independent technology, the defendant former employee could be enjoined because he in fact used his knowledge of the confidential process obtained through his position with his former employer. *Hickory Specialties, Inc. v. B. & L Laboratories, Inc.*, 592 S.W.2d 583, 587 (Tenn.Ct.App.1979). Thus, Wright had reason for a good faith belief that Grisoni had developed ProFusion and applied for the 501(k) with the FDA by utilizing confidential information that he obtained during his employment with Wright. In light of *Hickory Specialties,* and the undisputed evidence, we must conclude that Wright had a reasonable basis for believing that it had a good chance of establishing grounds for its civil claim against Grisoni. *See Buda v. Cassel Bros., Inc.*, 568 S.W.2d 628, 631-632 (Tenn.Ct.App.1978); *Taylor v. Morris,* No. 01A01-9804-CH-00211, 1999 WL 675138, at *4 (Tenn.Ct.App. Sept.1, 1999).

FN17. Wright was able to develop an Osteoset prototype within a few weeks of opening the package of Ethicon pellets and Grisoni argues that this mitigates against Wright's assertion that the development of an Osteoset device occurred over a long period of trial-and-error experimentation and at great expense. However, Wright did not start from scratch upon opening the Ethicon packet. Rather, Wright was able to use much of what it had learned during the previous year's research into other calcium sulfate products.

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*22 Grisoni contends that Wright should be held liable for malicious prosecution for continuing the litigation as well. However, the trial court's conclusion that the temporary injunction was wrongfully issued hinges in large part on its credibility determination in Grisoni's favor. Grisoni testified essentially that he developed ProFusion by independent technology and not from using information he obtained while employed at Wright. Under *Hickory Specialties,* of course, even if the process could potentially be developed by independent technology, the employee could be held liable if he in fact used knowledge of the confidential process that he obtained while employed by the plaintiff employer. 592 S.W.2d at 587. Wright, of course, is not required to know in advance of the injunction hearing that the trial court would credit Grisoni's testimony that he developed ProFusion by independent technology and not through the use of knowledge he obtained while at Wright regarding the development of Osteoset. *See ILG Indus., Inc. v. Scott,* 49 Ill.2d 88, 273 N.E.2d 393, 398 (Ill.1971) ("In many cases the question of whether a specific matter is a trade secret is an extremely close one, often not readily predictable until a court has announced its ruling."). Grisoni's assertions were highly disputed. Consequently, in its continuation of the litigation, up to the trial court's finding that the injunction should be dissolved, Wright still had a reasonable basis for believing that it had a good chance of establishing grounds for its civil claim against Grisoni. After that point, continuation of the injunction was simply to preserve the status quo pending appeal. Under these circumstances, we cannot conclude that the evidence establishes either malice or lack of probable cause for Wright's continuation of the litigation. Accordingly, the trial court's finding that Wright is liable for malicious prosecution must be reversed.

In light of this holding, we must review the trial court's award of punitive damages. The trial court awarded punitive damages in the amount of $4.79 million, after noting that punitive damages could be awarded only if Wright's conduct amounted to "fraud, malice, oppression, gross negligence or outrageous conduct," and citing *Davenport v. Chrysler Credit Corp.,* 818 S.W.2d 23 (Tenn.Ct.App.1991). The standard for punitive damages was refined further in *Hodges v. S.C. Toof & Co.,* 833 S.W.2d 896 (Tenn.1992). In *Hodges,* the Tennessee Supreme Court cautioned that punitive damages should be awarded only in cases involving "the most egregious of wrongs." *Id.* at 901. The Court emphasized that it sought to avoid "dull[ing] the potentially keen edge of the doctrine as an effective deterrent of truly reprehensible conduct." *Id.* (quoting *Tuttle v. Raymond,* 494 A.2d 1353, 1361 (Me.1985)). It held that, in order to award punitive damages, the trial court must find "intentional, fraudulent, malicious or reckless conduct by clear and convincing evidence." *Id.*

*23 In this case, we have reversed the finding of malicious prosecution, concluding that Wright had a reasonable belief that it had a good chance of establishing grounds for its civil claim against Grisoni. Under these circumstances, the award of punitive damages is not warranted and must be reversed.

WRONGFUL INJUNCTION

Wright also argues on appeal that the trial court erred in dissolving the injunction against Grisoni. Resolution of this issue turns on whether the evidence preponderates against the trial court's finding that the information Grisoni used in developing and obtaining regulatory approval for ProFusion was available through independent research of public sources. Wright argues that the evidence shows that ProFusion was the product of Grisoni's prior access to Wright's confidential sources and its trial-and-error experimentation.

An employee may, of course, enter into an agreement with his employer barring him from engaging in any competition with the employer. *Heyer-Jordan & Assocs., Inc. v. Jordan,* 801 S.W.2d 814, 821 (Tenn.Ct.App.1990). In the absence of such an agreement, once the employment relationship ends, the employee is free to develop and market products which compete with those of his former employer. *Ed*

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Nowogroski Ins., Inc. v. Rucker, 137 Wash.2d 427, 971 P.2d 936, 941 (Wash.1999). However, the employee is still bound by the general duty not to disclose confidential information or trade secrets belonging to the former employer; violation of this duty gives rise to a cause of action in the employer to obtain relief against the former employee. *Id.* at 941-942 (citing Restatement (Third) of Unfair Competition § 42 cmt. b (1995)).

In addition to any common law duties, Grisoni also executed a confidentiality agreement. Similar to the standard under the common law, the agreement prohibits Grisoni from using or disclosing any of Wright's trade secrets or confidential information, but does not apply to "any information which has become publicly available through no fault of" Grisoni. The agreement, of course, must be interpreted by reference to common law principles. *Dynamics Research Corp. v. Analytic Sciences Corp.*, 9 Mass.App.Ct. 254, 400 N.E.2d 1274, 1288 (Mass.App.Ct.1980) (finding that a "nondisclosure agreement only affirmed the intent of the parties to be bound by the common law of trade secrets").

The burden of proof in a lawsuit to protect employer trade secrets was discussed in *Hickory Specialties, Inc. v. B & L Laboratories, Inc.*, 592 S.W.2d at 586 (citing *Smith v. Dravo Corp.*, 203 F.2d 369 (7th Cir.1953)). In such a lawsuit, the employer has the burden of proving that trade secrets were communicated to the employee in the course of a confidential employment relationship and that the employee is attempting to use those secrets to the detriment of the employer. *Id.* A trade secret is "any formula, process, pattern, device or compilation of information that is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not use it." *Id.* (quoting *Allis-Chalmers Mfg. Co. v. Continental Aviation & Eng. Corp.*, 255 F.Supp. 645, 653 (E.D.Mich.1966)). Confidential information is closely analogous to a trade secret and warrants similar protection. *See Vantage Technology, LLC, v. Cross,* 17 S.W.3d 637, 645 (Tenn.Ct.App.1999); *Heyer-Jordan,* 801 S.W.2d at 821. Several factors to consider in determining whether a piece of information constitutes a trade secret are:

***24** (1) the extent to which the information is known outside of the business;
(2) the extent to which it is known by employees and others involved in the business;
(3) the extent of measures taken by the business to guard the secrecy of the information;
(4) the value of the information to the business and to its competitors;
(5) the amount of money or effort expended by the business in developing the information;
(6) the ease or difficulty with which the information could be properly acquired or duplicated by others;

Venture Express, Inc. v. Zilly, 973 S.W.2d 602, 606 (Tenn.Ct.App.1998). Thus, the extent to which the information has become available outside the confidential relationship is significant. To constitute a trade secret, it must be difficult for anyone outside the confidential relationship to acquire the information by proper means. *Hickory Specialties,* 592 S.W.2d at 587. Information which has become readily available through public sources or is generally well known in the industry cannot be considered confidential. *Id.* However, information which was acquired by the defendant through the confidential relationship may be protected even if the information potentially could have been obtained through independent research. *Id.* This is particularly true where acquisition of the information through independent research would be difficult, costly, or time consuming. *Essex Group, Inc. v. Southwire Co.*, 269 Ga. 553, 501 S.E.2d 501, 504 (Ga.1998). In *Hickory Specialties,* the Court observed, "[t]he potential to develop the process by independent technology, affords the [former employee] no excuse to obtain the process through a confidential employer-employee relationship and then compete with the developer [of the process.]." 592 S.W.2d at 587. Thus, even if the process could have been developed by independent technology, it may be protectible if the former employee does not develop it by independent technology but in fact obtains his knowledge of the process from his former employer and then uses this knowledge to

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compete with the former employer.

Moreoever, even if individual pieces of information may be publicly known, the integration of the information into a unified process may be confidential or a trade secret:

"The fact that some or all of the components of the trade secret are well- known does not preclude protection for a secret combination, compilation, or integration of the individual elements." Restatement of the Law 3d, Unfair Competition (1995), § 39(f), p. 432. Hence courts have recognized that "a trade secret can exist in a combination of characteristics and components, each of which, by itself, is in the public domain, but the unified process, design and operation of which in unique combination, affords a competitive advantage and is a protectible secret."

Essex Group, 501 S.E.2d at 503 (quoting *Water Services, Inc. v. Tesco Chemicals, Inc.,* 410 F.2d 163, 173 (5th Cir.1969)). Thus, even if portions of the information used are in the public domain, the integration of the information into a process not commonly known may be protectible.

*25 However, while a former employee cannot use confidential business information, he is entitled to use the general knowledge, skill and experience he acquired over the course of his employment. *See Dynamics Research,* 400 N.E.2d at1282. The former employee "cannot be compelled to erase from his mind all of the general skills, knowledge and experience acquired through his experience." *ILG Indus., Inc. v. Scott,* 49 Ill.2d 88, 273 N.E.2d 393, 396 (Ill.1971). The employer's burden is greater where the employee brings to the job extensive experience, "for the loss to the individual and the economic loss to society are both greatest when a highly trained and specialized person is prevented from employing his special abilities ." *Dynamics Research,* 400 N.E.2d at 1282-83 (quoting *Blake, Employee Agreements Not to Compete,* 73 Harv. L.Rev. 625, 684-85 (1960)). It can be difficult to draw the line between confidential business information, which cannot be used, and the former employee's general knowledge, skill and experience, which can used. In *Essex Group* the employer Southwire developed a logistics system in the cable and wire industry. 501 S.E.2d at 502. Southwire's logistics system was developed over a lengthy time period at considerable expense, in a project headed by the defendant former employee, McMichael. *Id.* McMichael left Southwire and began working for a direct competitor, Essex, in its logistics department developing a logistics system for Essex. *Id.* To determine whether the information Southwire sought to protect was part of McMichael's general knowledge, skill and experience, the court looked at whether the information would be of value to McMichael if he were not employed by a direct competitor of his former employer:

The specific information McMichael possessed would not have availed another company that was not a direct competitor of Southwire. In other words, McMichael brought to Essex not only the general information acquired in his job, i.e., that a certain logistical factor such as the positioning of storage containers would need to be resolved before certain other factors were decided: [sic] McMichael also brought specific information, such as how, where, and when those storage containers had to be positioned so as to accommodate most efficiently the very same product Essex was producing in competition with Southwire.

Id. at 504. The *Essex* court offered an example:

For example, had McMichael taken a position overseeing the logistics system startup at a company that manufactured a totally different product, like pet goods or kitchen wares, he could be said to be utilizing his general knowledge regarding the manner in which a logistics system should be designed, since there would be no practical application for the specific, protected information he obtained while working at Southwire about the precise design that maximizes a logistics system for a cable and wire business.

Id. at 504, n. 3. Thus, where the information is specific and confidential and would be useful primarily to a direct competitor of the former employer, it is likely not part of the former employee's general skill, knowledge and experience and is protectible.

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*26 Grisoni argues that the parties are governed by the confidentiality agreement executed by Grisoni, rather than the common law. The provisions of the confidentiality agreement are broad; the agreement provides,

> I will not disclose to anyone or use either during or after my employment, except with the prior written consent of Wright Medical Technology, any trade secret, confidential know-how or confidential business or technical information of Wright Medical Technology. The foregoing obligation shall also apply to any trade secrets or other confidential information of any third party learned by me as a Wright Medical Technology employee and which Wright Medical Technology has an obligation to maintain in secrecy.

Therefore, it covers trade secrets, "confidential knowhow," and confidential business and technical information, as well as confidential information learned from a third party during Grisoni's employment. It excludes information which has become publicly available. Thus, the provisions of the confidentiality agreement are not appreciably different from the common law. *See Dynamics Research Corp.*, 400 N.E.2d at1288(finding that "non-disclosure agreement only affirmed the intent of the parties to be bound by the common law of trade secrets"). We must view the issue of whether information has become "publicly available" from a common sense standpoint, against the backdrop of the common law discussed above.

The facts in this case must now be evaluated in light of these legal standards. In this case, Wright emphasized that it viewed the overall process of developing and obtaining FDA approval for Osteoset as confidential, not simply the individual items of information which were integrated into the process. *See* Restatement (Third) of Unfair Competition § 39 cmt. f (1995) (quoted in *Essex Group*, 501 S.E.2d at 503). Haggard emphasized this in his testimony before the trial court below:

> Q. Let me stop you for a second. Is there anything in your last statement that we started from the 31 parts that you consider to be proprietary, confidential, or a trade secret, and if so, what?
>
> A. Again, sir, we consider this process to be proprietary.
>
> Q. Each--go back--then each part of it.
>
> A. No. We consider the process to be proprietary--
>
> Q. I want you to tell me each part of it.

Later, Haggard testified:

> Q. Is that step proprietary, confidential, or a trade secret?
>
> A. And as I was trying to answer before I was interrupted, we consider the procedure for making the pellets to be proprietary. Within that procedure, there may be certain elements that are not proprietary, that are common knowledge, but when you put them all together to make the overall procedure to make the pellets, that is what becomes proprietary....
>
> Again, in these individual steps, sifting itself is not proprietary. My mother sifts flour when she makes biscuits. I mean, we all know that. But doing the steps in this order and making sure that the material goes into the water first so it can completely wet out and mixing it for 60 seconds and not mixing and over-mixing it, that is where you get into some of the proprietary nature of this process.

*27 The integration of all of this information into a process not commonly known can be protectible. Wright also asserts that there were numerous elements of information learned by Grisoni for which there was no public source. Broadly stated, these elements of information include the following:

1. Information Wright, and Grisoni, obtained from third parties such as U.S. Gypsum;
2. Studies, typically conducted by Grisoni, on the characteristics, dissolution rates, similarities and differences between alpha calcium sulfate and beta calcium sulfate, and the physical and chemical properties of medical grade calcium sulfate;
3. Techniques for including antibiotics in bone void filler;
4. Details on the molding process for Osteoset and which materials and processes worked best;
5. Details on the process for making Osteoset, such as the "working time" for the compound, and the temperature and humidity levels at which the product was kept;
6. Details on the dissolution tests and other

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measures taken by Wright to get FDA approval for Osteoset;
7. The chemical specifications for Osteoset and its predicate device, Ethicon;
8. Information on the market for bone void fillers, and Wright's marketing techniques and strategies.

Some of this information could potentially fall within the purview of Grisoni's general skill, knowledge and experience, but most would not. Grisoni came to Wright highly educated and with extensive experience. *See Dynamics Research Corp.*, 400 N.E.2d at 1282. For example, Grisoni had considerable experience in silicon molding prior to coming to Wright. However, it is undisputed that, prior to joining Wright, Grisoni had no experience working with calcium sulfate. All of his experience in calcium sulfate production came at Wright's expense during Grisoni's employment. Indeed, much of the information Wright seeks to protect is of the type that could be deemed confidential information. While various elements are commonly known, Wright integrated these elements into a process that could be deemed protectible. *See* Restatement (Third) of Unfair Competition § 39 cmt. f (1995). It is undisputed that Wright invested substantial time, effort and money into developing Osteoset and obtaining FDA approval for it, and that its efforts included considerable trial and error. The information Grisoni learned about bone void fillers would be of use primarily to direct competitors of Wright, and would be only of marginal value to a business that manufactured a different product. *See Essex Group*, 501 S.E.2d at 504. Moreover, there is evidence that Wright kept the information confidential. For instance, all Wright employees are required to sign confidentiality agreements, and files relating to the development of products, including 510(k)s, are marked confidential and usually kept under lock and key.

Yet, as to the majority of the information Wright seeks to protect, Grisoni presented testimony indicating Wright was not entitled to protection. For example, Grisoni was able to produce a number of public sources describing the general use and production of calcium sulfate bone void filler products. Wright's own technical monograph stated that "clinical use of calcium sulfate as a bone substitute for dental and orthopedic applications has been reported in literature for more than a century." Further, by the time Grisoni was terminated, Wright had published a number of brochures and user guides describing its new device and had submitted several press releases to Memphis newspapers describing the virtues of their product and the ever expanding market for bone graft substitutes. *See ILG Indus.*, 273 N.E.2d at 396 ("[S]omething which is fully and completely disclosed by a business through its catalogs or literature disseminated throughout an industry cannot be a trade secret.").

*28 Grisoni also presented testimony that, in many respects, ProFusion is significantly different from Osteoset, and that the manufacturing of ProFusion does not require Grisoni to use confidential information. The manufacture of Osteoset involves an elaborate process involving highly specialized equipment and large scale production methods. In contrast, Grisoni manufactures ProFusion on a much smaller scale, often utilizing standard kitchen utensils and raw materials purchased over-the-counter. While each production method starts out with the powdered form of calcium sulfate dihydrate, Grisoni produces the beta- type hemihydrate by simply heating the dihydrate in a household oven, while Wright produces the alpha-type hemihydrate using specialized heating and pressurizing equipment. Wright asserts that Grisoni learned confidential information on including antibiotics in bone void filler because Osteoset was initially loaded with antibiotics. However, there is no indication that Grisoni included antibiotics in ProFusion. As to other phases of the manufacturing process, Grisoni presented evidence either that the process was widely known, such as using gamma radiation for sterilization, or that Grisoni gained knowledge of the process in his employment prior to Wright, such as the molding processes.

In other respects, Grisoni testified that he developed ProFusion and applied for FDA approval by conducting independent research

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after leaving his employment with Wright. Given the fact that Grisoni developed his prototype for ProFusion within a month after leaving Wright and filed the 510(k) on ProFusion within a short time thereafter, this testimony seems dubious. However, there is no documentary or other evidence indicating that the trial court erred in determining that Grisoni's testimony was truthful. Unless there is other real evidence which compels a contrary conclusion, the credibility determination of the trial court is binding on the appellate court. *See Hudson v. Capps,* 651 S.W.2d 243, 246 (Tenn.Ct.App.1983).

Moreover, Grisoni notes persuasively that Wright's advantage in developing a calcium sulfate bone void filler product did not come primarily from a secret design or manufacturing technique; rather, Wright's advantage came from its ability to obtain FDA clearance. Wright's ingenuity in acquiring Ethicon pellets and using Ethicon as its predicate device gave it an advantage over its competitors, at least for a time. However, evidence was presented that once Osteoset was approved by the FDA, it was only a matter of time before other producers of orthopedic devices used Osteoset as a predicate device to obtain FDA approval for their products. [FN18] A trade secret does not exist simply because a producer has no competitors or even because it has produced a novel product. *See Koehring Co. v. E.D. Etnyre & Co.,* 254 F.Supp. 334,339 (N.D.Ill.1966). The producer's advantage must come from some design or process which remains generally unknown in the industry. *Id.*

FN18. Grisoni's knowledge allowed him to avoid much of the trial-and- error experimentation that would plague other new entrants into the market. This fact is significant but not necessarily determinative. *Koehring Co. v. E.D. Ethyre & Co.,* 254 F.Supp. 334, 339 (N.D.Ill.1966).

***29** In addition, while Grisoni was aware of Wright's use of dissolution rate comparison in its 510(k) for Osteoset, Grisoni presented evidence that dissolution rate comparison was an obvious choice to demonstrate "substantial equivalency" with Osteoset since its relevant characteristic was that its dissolution rate was roughly equal to the rate of new bone growth. Therefore, if this evidence is credited, Grisoni's knowledge of Wright's dissolution testing offered him little advantage over other Wright competitors.

While the evidence overall presents a close question, giving due deference to the trial judge's determinations of credibility, we must conclude that the evidence does not preponderate against the trial court's dissolution of the injunction. The decision of the trial court is affirmed on this issue.

DAMAGES

We must now consider the damages that Grisoni may recover for the wrongful issuance of the injunction. Rule 65.05(1) of the Tennessee Rules of Civil Procedure requires a party seeking a temporary injunction to provide indemnity "for the payment of such costs and damages as may be incurred or suffered by any person who is found to have been wrongfully restrained or enjoined." Tenn. R. Civ. P. 65.05.(1). The purpose of the rule is "to provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction or restraining order." *South Central Tenn. R.R. Auth. v. Harakas,* 44 S.W.3d 912, 916 (Tenn.Ct.App.2000) (quoting *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.,* 174 F.3d 411, 421 (4th Cir.1999)). Injunction bonds have long been required under Tennessee law. *Pyott Land & Mining Co. v.. Tarwater,* 126 Tenn. 601, 150 S.W. 539 (Tenn.1912).

As noted by the trial court in its memorandum opinion, Tennessee adheres to what is sometimes called the "injunction bond rule." *See Shanks v. Payne,* 180 Tenn. 708, 174 S.W.2d 461, 463, (Tenn.1943); *Taylor v. Morris,* No. 01A01-9804-CH-00211, 1999 WL 675138 at *3 (Tenn.Ct.App. Sept.1, 1999); 42 Am.Jur.2d *Injunctions* § 338. Under this rule, a wrongfully enjoined party's damages are limited to the amount of the injunction bond, in the absence of malicious prosecution. *Shanks,* 174 S.W.2d at 463; *Taylor,* 1999 WL 675138 at *3; 42 Am.Jur.2d *Injunctions* § 338.

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The reasoning behind the rule is that the party seeking the injunction "consents" to potential liability, up to the amount of the bond, as the price paid for the injunction. *See* 42 Am.Jur.2d *Injunction* § 338.

In seeking damages under the injunction bond, the enjoined defendant need not show that the plaintiff acted with any degree of fault. *South Central Tenn. R.R. Auth.*, 44 S.W.3d at 920; See also, Note, *Interlocutory Injunctions and the Injunction Bond*, 73 Harv. L.Rev. 333, 333 (1959) ("The American cases indicate that the purpose of the bond is to provide indemnity even when the plaintiff is not at fault."). The defendant need only show that he was wrongfully restrained or enjoined. *Taylor*, 1999 WL 675138 at *3. "A party has been wrongfully enjoined within the meaning of [Rule 65.05] when it turns out the party enjoined had the right all along to do what it was enjoined from doing.' " *South Central Tenn. R.R. Auth.*, 44 S.W.3d at 917 (quoting *Nintendo of America v. Lewis Galoob Toys*, 16 F.3d 1032, 1036 (9th Cir.1994)).

***30** In this case, the finding of liability for malicious prosecution has been reversed. Consequently, Grisoni's damages for the wrongful injunction are limited by the amount of the injunction bond, i.e. $500,000. [FN19]

FN19. As noted in the discussion of the proceedings in this case, at the time of the hearing to dissolve the injunction, the injunction bond was raised to $250,000. When the order dissolving the injunction was appealed, the appellate court stayed the order and raised the bond to $500,000. Thereafter, while an order was in effect staying the trial court proceedings, the trial court raised the bond to $2.4 million. However, because there was a stay in effect, this order was vacated. Grisoni appealed this order on the bond to the Tennessee Supreme Court; his petition was denied. The bond remained unchanged until the hearing on damages was concluded, after which the injunction was dissolved.

Of course, in order to recover the full amount of the bond, Grisoni is required to show that he suffered damages from the injunction in an amount equal to or greater than the amount of the bond. *Shanks*, 174 S.W.2d at 463. In this case the trial court, having found Wright liable for malicious prosecution, awarded Grisoni damages well in excess of $500,000.

Wright argues that the proof of Grisoni's alleged damages was too speculative to support an award of compensatory damages. The award of compensatory damages is reviewed with the presumption that it is correct and will only be set aside if the evidence preponderates against it or the trial court used the wrong measure of damages. *Beaty v. McGraw*, 15 S.W.3d 819, 829 (Tenn.Ct.App.1998). The award of compensatory damages in this case was based on Grisoni's lost profits, an appropriate measure of damages. Moreover, while an award of compensatory damages must be based on reasonable certainty, it does not require mathematical certainty. *Id.* We find that the evidence supports an award of compensatory damages at least up to the amount of the injunction bond.

Wright also argues that Grisoni should not recover damages for the wrongful injunction because he did not oppose the entry of the temporary injunction order. Wright cites no Tennessee caselaw which directly supports this assertion, and this Court has not discovered any Tennessee cases on point. The case of *Southern Ry. Co. v. Pardue*, 123 Tenn. 376, 131 S.W. 862 (Tenn.1910), appears to be most analogous. In that case, the defendant landowner was enjoined from building a house on land which was claimed by the plaintiff railroad to be part of its right of way. *Id.* at 862. In response to railroad's claim, the landowner filed a cross-claim seeking a judicial determination of the rights of the parties in the disputed property. *Id.* at 863. Later the injunction was dissolved and the landowner sought to recover on the injunction bond. The landowner testified that, after he heard of the railroad's claim, he wanted the matter settled before building on the property. *Id.* The trial court concluded that the landowner chose to forbear from building on the property, and would have done so regardless of the injunction. *Id.* Therefore, only nominal damages were awarded under the injunction bond. *Id.* The case simply stands

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for the proposition that the damages must be caused by the injunction, rather than a cause independent of the injunction. *See South Central Tenn. R.R. Auth.*, 44 S.W.3d at 921 (discussing *Southern Ry. Co. v. Pardue*).

In this case, there is no evidence that Grisoni's failure to further develop and market ProFusion was the result of anything other than the wrongfully issued injunction. The evidence does not indicate that Grisoni would have chosen not to market ProFusion in the absence of the injunction. Indeed, although Grisoni did not oppose entry of the temporary injunction, in all of the pleadings in the record, he steadfastly maintained that he had used no confidential information and that the injunction was not warranted. Simply consenting to a temporary injunction, to enable the parties to maintain the status quo while the lawsuit is pending, should not preclude the enjoined party from seeking damages under the injunction bond for a wrongful injunction.

***31** Grisoni argues that he should be able to recover a penalty under Tennessee Code Annotated § 29-23-104, [FN20] sometimes referred to as the "penalty statute." Grisoni argues, without citing supporting authority, that such a penalty is appropriate where the enjoined party is unable to prove malicious prosecution. Further, Grisoni argues, the penalty is not limited by the amount of the injunction bond. Grisoni's argument is without merit. The statute is a mechanism for an award of a penalty in a situation in which the enjoined party's damages are too speculative to support an award of compensatory damages. Obviously, the trial court did not conclude that the evidence was too speculative to support an award of compensatory damages. The statute, therefore, has no application to the facts in this case.

FN20. Tenn.Code. Ann. § 29-23-104(a) (2000) provides:
In cases where the court is of the opinion that the party enjoined has suffered a substantial injury, but that damages are speculative or incapable of ascertainment under legal rules, it may, on dissolution, in its sound discretion, assess and decree against the party suing out the writ a penalty in favor of the party enjoined.

Accordingly, we hold that Grisoni is entitled to recover as compensatory damages for the wrongful injunction the full amount of the injunction bond, $500,000. The trial court's award of compensatory damages is therefore modified to this amount.

SURETY LIABILITY

Grisoni argues on appeal that Travelers should be liable for the full judgment, rather than the amount of its bond, $250,000, based on alleged ambiguity in the terms of Travelers' bond. The first paragraph sets Travelers' liability under the bond at $250,000. The second paragraph then provides that, "*if* said Principal or Surety pays *all* damages and costs which any person may sustain by the suing out of such Temporary Restraining Order if the same is dissolved, this obligation to be void." (emphasis added). Grisoni argues that the use of the word "all" in the paragraph creates an obligation on the part of Travelers to pay the entire judgment. However, the use of the word "if" in the second paragraph creates a condition which, if met, discharges the obligation created in the first paragraph. Traveler's liability as a surety is, therefore, limited to $250,000.

Travelers asserts that the injunction bond has been discharged by the trial court's failure to enter a judgment against Travelers. Travelers also argues that the bond has been discharged by Wright's filing of an appeal bond. Travelers fails to offer any authority supporting these assertions. We find them without merit.

ALLOMATRIX

Grisoni appeals the trial court's decision to not award damages for Wright's alleged misappropriation of material from Grisoni's lab notebook. Grisoni produced his lab notebook to Wright as part of Wright's discovery into Grisoni's alleged use of confidential information. Along with information relating to Grisoni's development of ProFusion, the notebook also contained information on Grisoni's research into a

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calcium sulfate based putty. Grisoni testified that, within a few months of gaining access to his lab notebook, Wright was able to develop its own calcium sulfate putty product, Allomatrix, using several of the same development parameters described in Grisoni's lab notebook. Grisoni argues that this evidence preponderates in favor of finding that Wright used Grisoni's proprietary information in developing Allomatrix. Despite finding nearly all credibility determinations in Grisoni's favor, the trial judge nevertheless could not find that Wright had developed Allomatrix by using information from Grisoni's lab notebook. We hold that the preponderance of the evidence supports the trial court's holding.

CONCLUSION

*32 In sum, we affirm the trial court's factual finding that Wright improperly accessed Grisoni's lab notebook, reverse as clearly erroneous the trial court's finding on the credibility of Wright's attorney, William Haltom, and hold that the evidence is not sufficient to find either malice or lack of probable cause. Consequently, the finding of malicious prosecution is reversed. Because the evidence is insufficient to support a finding of malice, the award of punitive damages is likewise reversed. Deferring to the trial court's determinations on the credibility of the witnesses, we hold that the evidence does not preponderate against the trial court's order dissolving the injunction. The award of compensatory damages to Grisoni for the wrongful injunction must be limited by the amount of the injunction bond. Therefore, the award of compensatory damages is modified to the amount of the bond, $500,000. We hold that Travelers may be held liable for the amount of the bond it executed, $250,000. We affirm the trial court's holding that Wright is not liable for utilizing information allegedly misappropriated from Grisoni to develop Allomatrix. The remaining issues raised on appeal are pretermitted.

The decision of the trial court is affirmed in part, reversed in part and modified as set forth above. Costs are divided equally among the parties, appellant, Wright Medical Technology, Inc., and its surety, and the appellees, Bernard F. Grisoni and Biogeneration, Inc., and appellee, Travelers Casualty and Surety Company of America, for which execution may issue if necessary.

2001 WL 1683754 (Tenn.Ct.App.), 18 IER Cases 342

END OF DOCUMENT

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Westlaw.

RECEIVED AUG 15 2002

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

FILED
SHELBY COUNTY
CHANCERY COURT
AUG 07 2002
KENNY W. ARMSTRONG, C & M
TIME:

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 Tempora Restraining Order and to Dismiss and Response to Motion for Contempt fi contemporaneously herewith.

[1] US LEC has attempted to obtain a hearing date prior to the August 14, 2002 Preliminary Injunction date but has been unsuccessful. It is contemplated that US LEC's Motion and Plaintiff's Motion for Conte be taken up by the Court at the August 14, 2002 hearing.

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: _____

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 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. US LEC OF TENNESSEE, INC., Defendant.	)	No. CH-02-1441-3

EMERGENCY MOTION TO DISSOLVE TEMPORARY RESTRAINING ORDER AND TO DISMISS

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(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;

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[1] US LEC has attempted to obtain a hearing date prior to the August 14, 2002 Preliminary Injunction hearing date but has been unsuccessful. It is contemplated that US LEC's Motion and Plaintiff's Motion for Contempt will be taken up by the Court at the August 14, 2002 hearing.

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: _____

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 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.

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 FOR THE STATE OF TENNESSEE
SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES,	)	
	)	
Plaintiff,	)	
	)	
	)	No. CH-02-1441-3
v.	)	
	)	
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

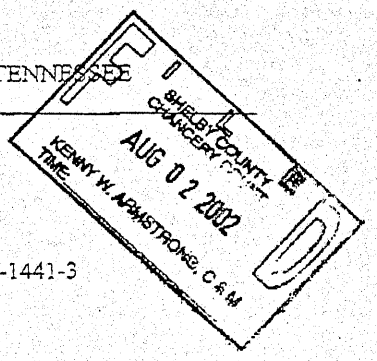
Sworn to and subscribed before me this the 6th day of August, 2002.

Notary Public

My Commission Expires: 3/4/2006

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

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

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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) 577-0233
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

EXHIBIT
Collective Exhibit "A"

AUG-02-02 16:39 FROM:BAKER DONELSON ID:9015772303 PAGE 9/17

XXX TRANSMISSION REPORT XXX

JUL-30-02 15:35 ID:9015772303 BAKER DONELSON

JOB NUMBER			061
INFORMATION CODE			OK
TELEPHONE NUMBER	6327#960000#00100#17044086874#		
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

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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) 577-8153	
FACSIMILE PHONE NO.	(901) 577-4233	
USER NO.:	6327	
CLIENT/MATTER NO.:	960000-00100	

MESSAGE:

Note: This facsimile contains PRIVILEGED and CONFIDENTIAL information intended only for the use of the specific individual or entity named above. If you or your employer are not the intended recipient, you are hereby notified that any unauthorized dissemination or copying of this facsimile or the information contained in it is strictly prohibited. If you have received this facsimile in error, please immediately notify the person named above or office by telephone and return the original facsimile to us at the above address via the U.S. Postal Service. Thank you.

LAW OFFICES
BAKER, DONELSON, BEARMAN & CALDWELL
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TENNESSEE
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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) 577-0233
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

EXHIBIT
tabbies
B

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)

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 30, 2002, I sent, via facsimile, a copy of Plaintiff's Complaint and this Court's Temporary Restraining Order ("TRO") to Mr. Shane Turley, in-house counsel for US LEC of Tennessee, Inc. ("US LEC"), to the following number: 704-409-6874. (A copy of the letter and faxed confirmation sheet are attached to the Motion to Show Cause collectively as Exhibit "A").

3. On July 31, 2002, I attempted to contact Mr. Turley at US LEC via telephone and received no response.

EXHIBIT
tabbies
C

4. On July 31, 2002, I sent, via facsimile, a letter to Mr. Turley informing him that service had not been restored to Airstream Wireless Services pursuant to the terms of the Customer Service Agreement and that unless we heard from US LEC immediately, Plaintiff would have no other alternative than to seek to have the Chancery Court hold US LEC in contempt of Court. (A copy of the July 31, 2002 letter is attached to the Motion to Show Cause as Exhibit "B").

5. On July 31, 2002, I spoke with Mr. Shane Turley and he informed me that he did not receive Plaintiff's Notice or copies of the TRO and Complaint which were sent by Plaintiff on July 30, 2002.

6. Immediately after speaking with Mr. Turley on July 31, 2002, I resent, via facsimile, a copy of Plaintiff's Complaint and this Court's TRO to Mr. Turley.

7. I heard no further response from Mr. Turley or US LEC on July 31, 2002.

8. On August 1, 2002, I spoke with Mr. Turley at approximately 11:00 a.m. C.S.T. and informed him of Plaintiff's intention to file a Motion to Show Cause why US LEC should not be held in contempt for violating this Court's TRO. Mr. Turley informed me that he would be in touch with me within the next couple of hours and provided me with the name of US LEC's Tennessee counsel, Henry Walker, Esquire, at Boult Cummings in Nashville, Tennessee.

9. At approximately 1:45 p.m. on August 1, 2002, I attempted to make contact with Mr. Walker and was unsuccessful.

10. On August 1, 2002, at approximately 2:00 p.m., I attempted to contact Mr. Shane Turley at US LEC and was unsuccessful.

11. On August 1, 2002, I received two e-mails from Mr. Turley informing me that he and Mr. Walker would be calling me shortly. No calls were received as indicated in the e-mails attached to this Affidavit. (A copy of the e-mails are attached hereto as Exhibit "A").

12. On August 1, 2002, I spoke with Mr. Turley and Mr. Walker whereby I was informed that it was Defendant's intention to file a motion with this Court on August 2, 2002, and set a hearing regarding this matter for the following week.

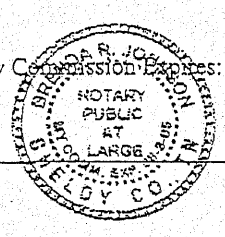
FURTHER AFFIANT SAITH NOT.

Clint Simpson
CLINT SIMPSON

SWORN to and subscribed before me this 2nd day of August, 2002.

Brenda R. Jackson
Notary Public

My Commission Expires:



Respectfully submitted,

Clinton J. Simpson
EUGENE J. PODESTA, JR. (#9834)
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

Simpson, Clinton J.

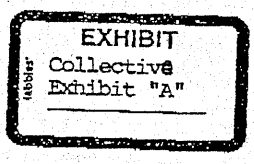
From: Turley, Shane [sturley@uslec.com]
Sent: Thursday, August 01, 2002 2:59 PM
To: 'cjsimpson@bakerdonelson.com'
Subject: Airstream

Importance: High

Clint:

Got your voicemail. Just got off the phone w/ Henry Walker and Luther Wright from Boult Cummings. Henry and I will be calling you in approximately 20 minutes.

Shane



Simpson, Clinton J.

From: Turley, Shane [sturley@uslec.com]
Sent: Thursday, August 01, 2002 4:05 PM
To: 'Simpson, Clinton J.'
Subject: RE: Airstream

My apologies for the delay. I will call you in 15 minutes.

Shane

-----Original Message-----
From: Simpson, Clinton J. [mailto:cjsimpson@bdbc.com]
Sent: Thursday, August 01, 2002 4:58 PM
To: 'Turley, Shane'
Subject: RE: Airstream

Shane,
What time are you going to call?

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

Clint:

Got your voicemail. Just got off the phone w/ Henry Walker and Luther Wright from Boult Cummings. Henry and I will be calling you in approximately 20 minutes.

Shane

****
NOTICE: This electronic mail transmission may constitute an attorney-client communication that is privileged at law. It is not intended for transmission to, or receipt by, any unauthorized persons. If you have received this electronic mail transmission in error, please delete it from your system without copying it, and notify the sender by reply e-mail, so that our address record can be corrected.
****

Simpson, Clinton J.

From: Turley, Shane [sturley@uslec.com]
Sent: Thursday, August 01, 2002 4:44 PM
To: 'cjsimpson@bdbc.com'
Subject: FW: Airstream

Importance: High

Clint: Don't give up on me. Now on the phone again w/ local counsel and my internal folks.

Shane

> -----Original Message-----
> From: Turley, Shane
> Sent: Thursday, August 01, 2002 3:59 PM
> To: 'cjsimpson@bdbc.com'
> Subject: Airstream
> Importance: High
>
> Clint:
>
> Got your voicemail. Just got off the phone w/ Henry Walker and Luther
> Wright from Boult Cummings. Henry and I will be calling you in
> approximately 20 minutes.
>
> Shane

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:	August 2, 2002	**TIME:** 4:26 PM
DELIVER TO:	**FACSIMILE PHONE NO.:**	
CHRIS GILBERT, ESQ.	1-615-252-6358	
HENRY WALKER, ESQ.	1-615-252-6363	
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:

Note: This facsimile contains PRIVILEGED and CONFIDENTIAL information intended only for the use of the specific individual or entity named above. If you or your employer are not the intended recipient, you are hereby notified that any unauthorized dissemination or copying of this facsimile or the information contained in it is strictly prohibited. If you have received this facsimile in error, please immediately notify the person named above at once by telephone and return the original facsimile to us at the above address via the U.S. Postal Service. Thank you.

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(901) 577-2303

TENNESSEE
MEMPHIS
NASHVILLE
CHATTANOOGA
KNOXVILLE
JOHNSON CITY

MISSISSIPPI
JACKSON
GEORGIA
ATLANTA
WASHINGTON, D.C.
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

August 2, 2002

VIA FAX NO. 1-615-252-6358

Chris Gilbert, Esq.
Boult, Cummings, Conners & Berry
414 Union Street, Suite 1600
Nashville, TN 37219

Re: Airstream Wireless Services v. US LEC of Tennessee, Inc.

Dear Chris:

Enclosed please find Airstream Wireless Services's Motion to Show Cause and my Affidavit in support thereof. I did attempt to contact the Chancery Court Clerk regarding a special setting and was unable to set this matter for Monday. On Monday morning, I will attempt to contact Chancellor Alissandratos and his Clerk and set a special hearing as soon as possible. Once I have a date for the special hearing, I will notice you accordingly.

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

Very truly yours,

C Clint Simpson

Clinton J. Simpson

CJS:dj
enclosures
cc: Shane Turley, Esq. *1-704-409-6874*
Legal Department
US LEC of Tennessee, Inc.
Morrocrost #3
6801 Morrison Boulevard
Charlotte, NC 28211

M CJS 663630 v1
0-0 08/02/02

Henry Walker, Esq. 1-615-252-6363

IN THE CHANCERY COURT OF SHELBY COUNTY, TENNESSEE

AIRSTREAM WIRELESS SERVICES,)

Plaintiff,)

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

US LEC OF TENNESSEE, INC.,)

Defendant.)

FILED
SHELBY COUNTY
CHANCERY COURT
JUL 30 2002
KENNY W. ARMSTRONG, C & M:
TIME: BY:

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. 08-30-05

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

M CJS 662661 v1
0-0

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: D.C.

Alissandra402
CHANCELLOR

DATE: 30 July 2002
9:25 am

M CJS 662661 v1
0-0

"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 Harperh 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 changes 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, those 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 5(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.

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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 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 telecommunications 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 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 so 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.

5 of 13



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.

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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 BRANTLEY

Title: CEO

Date: 3/27/2002

US LEC of Tennessee Inc.,

By: [signature]

Name: Rod Baird

Title: Dir of Sales

Date: 4/11/02

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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: 38118 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 //3642	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

Proposed Add Products:

Service Information			Monthly Recurring	Monthly Recurring	One Time / Non-Recurring	Additions/ Changes	
Description	Quantity	Unit Price	Total MRC	NRC		Initial	Date
							4-26-02
Total Monthly & NRC Charges				$600.00	$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		

[redacted] 3/26/2002

02-Aug-02 01:17P

ID:8015772303

AUG-02-02 13:28 FROM:BAKER DONELSON

02-Aug-02 01:17P

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

ADVANTAGE - Attachment A - Order Form

Customer Name: Airstream 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

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 10-16-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 = Wrote 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 Lenox 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 Baines
Title: Director of Sales
Date: 4/11/02

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

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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 Gotham Fax # 702-442-7185

Bank Reference

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

Address: Poplar & Mendenhall

City: Memphis State: TN Zip: 38119

Business Checking Account Number(s): 532667 5013

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

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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: _____

02-Aug-02 01:17P

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.
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.

until further Order of this Court to the contrary.

_____
Chancellor
Chancery Court, Shelby County, Tennessee

_____ .M
Date

02-Aug-02 01:17P

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

PLAINTIFF

Home Address

1000 JUNE ROAD, MEMPHIS, TN 38119

Business Address

VS

US LEC OF TENNESSEE, INC.

DEFENDANT

FILED
SHELBY COUNTY
CHANCERY COURT
JUL 9 8 2002
KENNY W. ARMSTRONG, C & M:
TIME: _____ BY: _____

Home Address

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

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: _____, D.C.

TESTED AND ISSUED _____, _____ 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 with the Clerk of the Court. The list may be filed at any time and may be changed by you thereafter as necessary; however, unless it is filed before the judgment becomes final, it will not be effective as to any execution or garnishment issued prior to the filing of the list. Certain items are automatically exempt by law and do not need to be listed; these include items of necessary wearing apparel (clothing) for yourself and your family and trunks or other receptacles necessary to contain such apparel, family portraits, the family Bible and school books. Should any of these items be seized, you would have the right to recover them. If you do not understand your exemption right or how to exercise it, you may wish to seek the counsel of a lawyer.

COST BOND

I hereby acknowledge and bind myself for the prosecution of this action and payment of all costs not to exceed $500.00 in this court which may at any time be adjudged against the plaintiff in the event the said plaintiff shall not pay the same.

Witness My Hand this _____ Day of _____

Certification when applicable

Baker Donelson Bearman & Caldwell

Surety

By: Eugene J. Podesta Jr.

02-Aug-02 01:17P

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

8/27 - 9:00 Tuesday

FACSIMILE TRANSMISSION FORM

PLEASE DELIVER IMMEDIATELY

DATE:	August 2, 2002	**TIME:** 1:09 PM
DELIVER TO:	**FACSIMILE PHONE NO.:**	
CAROL WALLACE	1-615-248-3013	
FROM:	Clinton J. Simpson	
PHONE NO.:	(901) 577-8183	
FACSIMILE PHONE NO.	(901) 577-4233	
USER NO.:	6327	
CLIENT/MATTER NO.:	960000-00100	

MESSAGE:

Note: This facsimile contains PRIVILEGED and CONFIDENTIAL information intended only for the use of the specific individual or entity named above. If you or your employer are not the intended recipient, you are hereby notified that any unauthorized dissemination or copying of this facsimile or the information contained in it is strictly prohibited. If you have received this facsimile in error, please immediately notify the person named above at once by telephone and return the original facsimile to us at the above address via the U.S. Postal Service. Thank you.

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