BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

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

BRIEF OF US LEC ON THE JURISDICTION OF THE TENNESSEE REGULATORY AUTHORITY

The Petitioner, US LEC of Tennessee Inc. ("US LEC") submits the following reply to the Memorandum submitted by Airstream Wireless Services, Inc. ("Airstream") on the issue of whether the Tennessee Regulatory Authority has jurisdiction over this case.

SUMMARY

This case began as a lawsuit in the Chancery Court of Shelby County. Despite evidence that Airstream was using the telecommunications network of US LEC for a fraudulent purpose, Airstream asked the Court to force US LEC to continue providing service to Airstream. In response, US LEC noted that its tariffs on file at the Tennessee Regulatory Authority specifically authorized the carrier to terminate service "without notice" in the event of "fraudulent use of the Company's network." Tariff Section 2.5.5(E). As Airstream has acknowledged, that tariff language is "incorporated into the Customer Service Agreement" ("CSA") which both parties signed prior to the initiation of service. Airstream Brief at 1. Presented with this information, the Chancellor agreed to delay further proceedings until the TRA could address US LEC's claims.

When a customer believes that his service has been wrongly terminated and the utility, in its defense, relies upon what the utility believes is a reasonable interpretation of its tariffs, there is no question that the Tennessee Regulatory Authority has jurisdiction over such disputes. See

T.C.A. §65-4-117(1). As the agency is aware, such matters are routinely handled by the TRA staff and, if necessary, the agency's Directors. See T.C.A. §65-4-119.

This case is especially appropriate for resolution by the TRA because, as further described below, unraveling the fraudulent scheme of Airstream will require an expert understanding of the telecommunications network, normal calling patterns within the industry, and inter-carrier compensation arrangements. Applying its expertise in these areas, the TRA is better equipped than the Chancery Court to determine the underlying facts and then decide whether US LEC acted properly in terminating service to Airstream.

Finally, US LEC has recently learned that two lawsuits involving the same fraudulent scheme have been referred to the Federal Communications Commission under the primary jurisdiction doctrine. In Audiotext v. MCI WorldCom, Civil Action No. 00-3982 (E.D. Penn.), the District Court entered an Order on December 11, 2001, referring the case to the FCC. Similarly, in Audiotext v. AT& T Corp., Civil Action No. 00-5010 (E.D. Penn.), the Court issued an order January 17, 2002, referring the case to the FCC and staying all further judicial proceedings pending a decision by the agency.[1] Both cases involved the same type of scheme as this one. Just as US LEC did, AT&T and MCI WorldCom quickly discontinued service once they discovered the fraudulent use of their networks. The FCC is now in the process of addressing whether the anti-fraud provisions in the tariffs of AT&T and MCI WorldCom authorized those carriers to disconnect service without notice to the customers. That, of course, is the same issue which is now before the TRA.

[1] US LEC is in the process of obtaining copies of both court orders and will file them with the TRA.

FACTS

On or about April 11, 2002, US LEC entered into a contract with Airstream in which US LEC agreed to terminate traffic, including international traffic originated by Airstream.[2] This contract expressly included the terms of US LEC's tariff before the TRA. 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 of the unusual nature of the traffic coming from Airstream. Contrary to normal traffic patterns and the representations of Airstream made during contract negotiations, approximately 99% of all calls coming from Airstream were international calls terminating, not at land line telephones, but at wireless phones in Europe and the United Kingdom. This artificial traffic pattern demonstrated that Airstream, or someone working in conjunction with Airstream, was intentionally generating calls, probably through the use of auto-dialers, to wireless numbers where the costs to US LEC of terminating the calls was substantially higher than the costs of terminating calls to wireline telephones. Moreover, the volume of such calls rapidly increased and soon reached a level much higher than Airstream had represented. Because of the volume of calls and the unusually high termination charges, Airstream owed US LEC in July alone approximately $80,000 for handling traffic from Airstream but US LEC incurred more than $400,000 in terminating charges from wireless carriers in Europe and the United Kingdom. Because of this evidence of traffic manipulation, US LEC terminated service to Airstream in accordance with the provisions of its tariffs and the rules of the TRA.

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[2] This statement of fact is based on the verified response and affidavits filed by US LEC in the Shelby County Chancery Court. Copies of those documents have previously been provided to the Authority.

After service was terminated, Airstream filed suit against US LEC in the Chancery Court of Shelby County, Tennessee. *Airstream Wireless Services v. US LEC of Tennessee, Inc.*, Docket No. CH-02-1441-3. On July 30, 2002, the day the suit was filed, Airstream obtained an *ex parte* temporary restraining order directing US LEC to resume service to Airstream. US LEC did not restore service but filed an "Emergency Motion to Dissolve Temporary Restraining Order and to Dismiss." US LEC argued, *inter alia*, that the Tennessee Regulatory Authority, not the Court, has original jurisdiction over this dispute and that, based on US LEC's tariff and the TRA's rules, US LEC properly terminated service to Airstream.

On August 2, 2002, US LEC filed a "Petition for Declaratory Order" at the Authority, asking that the Authority rule that US LEC properly terminated service to Airstream because of the apparent fraudulent use of US LEC's network.[3]

On August 27, 2002, this matter was heard by the Chancery Court of Shelby County. After hearing oral argument by the parties, the Court declared a recess and directed the parties to conduct additional research on matters the Court believed relevant to the case. After the recess, the parties jointly asked the Court to defer further proceedings pending a ruling by the TRA on US LEC's Petition for Declaratory Order. The Court orally granted the parties' request.[4]

ARGUMENT

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"). T.C.A. § 65-4-123, et seq. In

[3] In the Petition, US LEC noted that the majority of the calls from Airstream lasted only thirty seconds. Based on information discovered by AT&T in the Audiotext case, *supra*, it now appears likely that Airstream, or someone working in concert with Airstream, was using auto-dialers to generate large volumes of artificial calls.

[4] To the knowledge of US LEC, the Court has not issued a written order.

BellSouth Advertising & Publishing Corp. v. Tennessee Regulatory Authority, 79 S.W.3d 506 (Tenn. 2002), 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. More significantly, the Court 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 512 (quoting and citing Tenn. Code Ann. § 65-5-210(a) (emphasis added). Both the statute and the 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.

Furthermore, Tennessee case law prior to the Act is 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., 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 Tennessee Commission in this dispute:

> 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. As a result of this holding, the plaintiffs' case was dismissed. The Breeden decision, cited with approval in Consumer Advocate Div. v. Tennessee Regulatory Authority,

2002 WL 1579700 (Tenn. Ct. App. 2002), made it clear that courts have no jurisdiction in service disputes until the Commission (now the 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); Chumbley v. Duck River Elec. Membership Corp., 203 Tenn. 243310 S.W.2d 453 (Tenn.1958)(citing Breeden for the proposition that a 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).

Airstream's suit to the contrary, this is not a contract dispute between private entities but a question of the proper interpretation and application of US LEC's tariffs and the rules of the TRA. Such matters are within the exclusive jurisdiction of the TRA. See, Breeden and BellSouth, *supra*, and New River Lumber Co. v. Tenn. Railway Co., 238 S.W. 867 (Tenn. 1922). "No private agreement can replace a tariff's terms . . . . [and] a tariff must be enforced unless the regulatory agency intervenes." Metro East Center v. Quest Communications, 294 F.3d 924 (7th Cir., 2002). The real purpose of Airstream's action is to require US LEC 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's rules and the tariffs filed by US LEC. The TRA has original jurisdiction over these issues. *See* Tenn. Code Ann. § 65-5-210(a).

Even if this matter is one over which both the TRA and the Chancery Court have jurisdiction, it is clear that this is an appropriate case for the court to defer to the primary jurisdiction of the regulatory agency. The primary jurisdiction doctrine "exists to promote the consistent, excellent, and efficient resolution of matters that have been specially entrusted to administrative agencies." FBN America, Inc. v. Athena Inter., LLC, WL 698492, at 3 (E.D. Pa.)

(referring tortuous inference and statutory telecommunication claims to FCC in termination of service case). The justification of applying the doctrine "is the need for an orderly and sensible coordination of the work of agencies and the courts." AT&T Corp. v. PAB, Inc., 935 F.Supp. 584 (E.D. Pa. 1996) citing Cheney State College Faculty v. Hufstedler, 703 F.2d 732 (3d Cir. 1983). Although courts may have jurisdiction to hear cases concerning these issues, courts typically defer jurisdiction to an administrative agency "whenever enforcement of the claim requires resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body." MCI Telecommunication Corp. v. Teleconcepts, Inc., 721 F2d 1086, 1103 (rd Cir. 1995). Therefore, "a court should refer a matter to an administrative agency for resolution, even if the matter is otherwise properly before the court, if it appears that the matter involves technical or policy considerations which are beyond the court's ordinary experience and within the agency's particular field of expertise." MCI Communications Corp. v. AT&T Co., 496 F.2d 214, 220 (3rd Cir. 1974).

Airstream argues that there is nothing about this case that requires the regulatory expertise of the TRA. "Rather, the Chancery Court must simply decide whether or not Airstream fraudulently used US LEC's network." Airstream Brief at 10. But to understand the nature of the fraudulent scheme used by Airstream requires (1) an understanding of the fact that, if 99% of a carrier's calls terminate to wireless phones outside the United States, this demonstrates that the traffic is being manipulated; (2) a basic knowledge of the telecommunications network, of originating and terminating access charges, and the inter-relationship among connecting carriers; (3) an understanding that if 99% of all calls are being made to wireless phones, the volume of traffic is growing at an unexpectedly rapid pace, and a majority of calls are thirty seconds or less, this strongly indicates that auto-dialers are being used to generate artificial calls, and (4) the rules of construction regarding the enforceability and construction of tariffs.

In sum, it is clear to US LEC and to anyone with knowledge of the telecommunications industry that Airstream was using LEC's network for a fraudulent purpose and that, under US LEC's tariffs, US LEC had the right to disconnect service immediately. As the state agency with regulatory jurisdiction over this dispute and the expertise to understand the nature of the problem, the TRA is obviously better equipped than the Court to address this dispute.

A. Response of Airstream

In the face of these precedents, Airstream argues that the TRA lacks subject matter jurisdiction over this matter because (1) the statutes granting the TRA jurisdiction over utilities do not "repeal the jurisdiction of the courts to decide contract disputes" and (2) T.C.A. §65-3-120 "makes clear that jurisdiction over civil claims brought under these provisions [the TRA's regulatory statutes] are within the jurisdiction of the court and not the TRA."

Both arguments are frivolous. In New River Lumber Co v. Tenn. Railway Co., 238 S.W. 2d 867 (Tenn. 1922), the Tennessee Supreme Court addressed a similar situation. In that case, a shipper entered into a private contract with a regulated carrier and filed suit in court enforce the contract. On appeal, the Supreme Court dismissed the suit, ruling that a regulated carrier could not, by private contract, enter into an agreement which was inconsistent with the carrier's tariffs and that the terms and conditions under which a regulated carrier provides service to a customer fell under the exclusive jurisdiction of the state regulatory authorities. In other words, Airstream's argument that a contract dispute between a shipper and a carrier should be settled in a courtroom rather than before a state regulatory body was rejected eighty years ago and has not been the law in this state since the creation of the agency.

Second, the statute cited by Airstream, T.C.A. §65-3-120, refers not to regulatory disputes before the agency but to those rare situations in which a judicial action may be brought for criminal or civil penalties against a regulated carrier. (See, for example, T.C.A. §65-3-119,

§65-3-121, and §65-4-122.) The statute has nothing whatever to do with the TRA's broad jurisdiction over regulated carriers. If Airstream were correct, all of the disputes between carriers and customers now docketed at the Authority would have to be removed to the state courts.

B. Other Issues

The Pre-Hearing Officer also asked that the parties address the following additional issues:

- Whether the TRA has jurisdiction to interpret the parties' contract?
- Whether Airstream is a public utility under state law?
- Whether Airstream purchases intrastate access service from US LEC?

The answers to these questions are as follows:

1. Yes, the TRA has jurisdiction to interpret the parties' contract just as it has jurisdiction to address any tariff or CSA which defines the terms and conditions of regulated service provided by a Tennessee carrier to a Tennessee customer. See, New River Lumber Co., *supra.*

2. No. As a wireless carrier, Airstream is not a "public utility" subject to the jurisdiction of the TRA. See T.C.A. §65-4-101(6).

3. The answer is unclear. U.S. LEC signed a contract to terminate traffic originated by Airstream. Pursuant to that contract, US LEC was prepared to terminate all such traffic, whether the calls were local, toll, or international. Because of the manipulation of the traffic, however, virtually all calls originated by Airstream were international calls. Therefore, although Airstream had the right under the contract to purchase intrastate access services, it is not clear whether Airstream was, in fact, doing so. Of course, whenever a carrier terminates service to a customer, that action prevents the customer from making calls of any type, whether local or international. But that does not affect the jurisdiction of the TRA. The agency has the power to

address a dispute over the termination of utility service regardless of the type of calls the customer was making.

CONCLUSION

For these reasons, the TRA should exercise its jurisdiction over this dispute and grant the Petition for Declaratory Order.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

Henry Walker (No.000272)
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2363

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via U.S. Mail, to Thomas Barnett, 165 Madison Avenue, Suite 2000, Memphis, Tennessee, 38103 on this the 14th day of March, 2003.

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Henry Walker