Guy M. Hicks
General Counsel

AT&T Tennessee
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

T: 615.214.6301
F: 615.214.7406
guy.hicks@att.com

June 16, 2008

VIA HAND DELIVERY

FILED ELECTRONICALLY IN DOCKET OFFICE ON 06/16/0

Hon. Eddie Roberson, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Answer and Response in Opposition to Petition to Convene Another Docket to Impose Rates for Competitive Switching*
Docket No. 08-00079

Dear Chairman Roberson:

Enclosed are the original and four copies of the AT&T Tennessee's *Answer and Response in Opposition to Petition to Convene Another Docket to Impose Rates for Competitive Switching.*

Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:rlc

710427

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Complaint of Momentum Telecom, Inc. against AT&T Tennessee Concerning Wholesale Switching Rates*

Docket No. 08-00079

AT&T's ANSWER AND RESPONSE IN OPPOSITION TO PETITION TO CONVENE ANOTHER DOCKET TO IMPOSE RATES FOR COMPETITIVE SWITCHING

Defendant/Respondent BellSouth Telecommunications Inc. d/b/a AT&T Tennessee ("AT&T Tennessee") hereby answers and responds in opposition to the Complaint filed by Complainant/Petitioner Momentum Telecom, Inc. ("Momentum"). For the reasons explained below, Momentum's Complaint should be denied because it asks the TRA to open a docket to set a rate for competitive switching, and the TRA has already closed such a docket upon finding that it was not appropriate to set such a rate.

Momentum's complaint plows no new ground since the closing of the last docket in which Momentum also appeared as the sole CLEC asking the TRA to reject commercial negotiations and mandate a rate for unbundled switching. In fact, as the Directors have now observed in several dockets, imposing a rate for switching without regard for the FCC's decision that switching is a competitive service is not appropriate. As Director Kyle stated most recently in that last docket, "The FCC has told us that switching is competitive, so I am in agreement with closing the docket."[1]

[1] See Transcript of Authority Conference of January 23, 2007 at 24, Docket 06-00080.

I. Under Both State Law and Federal Law, the TRA Has Already Declined to Impose a Switching Rate.

The TRA has already considered all of the legal and practical considerations at issue in this docket during deliberations in the Generic Switching Docket. While Momentum seeks to distinguish its petition in this case from Docket 06-00080, the record in that docket is clear – both state and federal bases for establishing a rate were raised in that docket. [2] In the face of Momentum's arguments in that case, however, the TRA voted to close the Generic Switching Docket. There is no valid reason for the TRA to revisit that issue in this docket. Given that the Generic Switching Docket was opened in reliance on both state and federal law, the TRA has conclusively already decided that there is no need for a docket to mandate this rate.

II. The TRA's Decisions on Switching Consistently Emphasize the Importance of Commercial Negotiations and Agreements

At the heart of every TRA deliberation relating to imposing rates for switching has been the TRA's consistent efforts to support, rather than undermine, commercial negotiations. As Director Kyle explained in Docket 03-00460, in order to support the FCC's policy, the TRA must not be drawn into regulatory action when a party prefers to turn away from the negotiating table:

> I think it is not enough for state utility commissions to merely encourage negotiations and to hope that the parties will turn away from litigation and turn instead to working within the competitive marketplace – a competitive marketplace we have all worked so hard to bring about in Tennessee.

[2] Director Jones noted in Docket 06-00080 that both state law and federal law supplied the basis for opening that docket. *See* Transcript of Authority Conference of January 23, 2007 at 17.

> I think we must be prepared to back up our preference for negotiated business agreements with our actions as regulators. We must recognize that parties will not negotiate when they think they stand to gain more for the intervention of regulators. They will not get down to the business of negotiating rates when they believe that regulators are standing by ready to set rates for them as if we were still operating in an environment free from competition.[3]

Similarly, Director Miller's observations in Docket 06-00080 emphasized the importance of negotiated rates and recognized that imposing rates when rates are being successfully negotiated was not practical or logical:

> ... I agree with you that Momentum should not be marginalized because they're the only ones filing in this docket. However, the fact that they're the only ones filing in this docket would indicate to me that there are commercial agreements being signed out there, that that's going on and that I think the FCC has found that switching is competitive.
>
> And I also think that we both agree that Momentum has entered into a commercial agreement. And I think that's one of the criteria we set, and on that basis I think the docket ought to be closed , ...[4]

Additionally, Director Tate noted, on numerous occasions, her preference for commercial negotiations:

> Well, I'm just once again wishing, hoping, and reiterating that negotiations and commercial agreements do a much better job probably for all of you than we do up here.[5]

* * *

---

[3] *See* Transcript of Proceedings, March 30, 2004 at 10, Docket Nos. 03-00460, 03-00491, 03-00526, and 03-00527.

[4] *See* Transcript of Authority Conference of January 23, 2007, at 23, Docket No. 06-00080.

[5] *See* Transcript of Authority Conference of September 27, 2004, at 24, Docket No. 04-00381.

> You know, Mr. Walker, I'm sure you can appreciate the fact that, you know, I've been out there encouraging the parties to negotiate in the marketplace as well, and that's where I think really these negotiations ought to take place.[6]

Consistently, the TRA has recognized that, as a practical matter, it is not appropriate to prevail upon the parties to negotiate on the one hand and then engage in regulatory rate-making on the other. In this case, as in the last Docket, Momentum (but no other CLECs) again seeks to turn back the policy of encouraging commercial negotiations and return to the old path of regulation.

III. As a Legal Matter, Any State-law Argument to Undermine FCC Policy Must Fail on the Basis of Preemption.

In its Complaint, Momentum relies on a decision made by the TRA in 2004 setting an interim switching rate in Docket No. 03-00119. Momentum fails to point out that the TRA relied on Section 271 in setting the interim rate.[7] Since 2004, the federal courts have consistently ruled that state commissions lack such authority. Specifically, ten separate federal courts have concluded within the past several years that state commissions lack authority under federal law to set rates for §271 elements.[8] The only court to rule to the contrary was reversed by the

---

[6] *See* Transcript of Proceedings, March 22, 2004 at 7-8, Docket No. 03-00119.

[7] *See Final Order of Arbitration Award* entered October 20, 2005, Docket No. 03-03-00119, at 37.

[8] *See Verizon New England, Inc. v. Maine Pub. Utils. Comm'n,* 509 F.3d 1 (1st Cir.), *order on reh'g*, 509 F.3d 13 (1st Cir. 2007); *Illinois Bell Tel. Co. v. Hurley*, No. 05-1149, 2008 U.S.Dist. LEXIS 6326 (N.D. Ill. Jan. 28, 2008), *appeal pending*, Nos. 08-1489, 08-1494 (7th Cir. Consolidated Mar. 3, 2008); *Michigan Bell Tel. Co. v. Lark*, No. 06-11982, 2007 WL 2868633 (E.D. Mich. Sept. 26, 2007), *appeal pending* Nos. 07-2469, 07-2473 (6th Cir.); BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n, No. 06-65-KKC, 2007 WL 2736544 (E.D. Ky. Sept. 18, 2007): *Qwest Corp. v. Arizona Corp. Comm'n*, 496 F. Supp. 2d 1069, 1077-79 (D. Ariz. 20007); *Dieca Communications, Inc. v. Florida Pub. Serv. Comm'n*, 447 F. Supp. 2d 1281, 1285-86 (N.D. Fla. 2006); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1066-69 (E.D. Mo. 2006), *appeals pending*, Nos. 06-3701, 06-3726, 06-3727 (8th Cir. Filed

First Circuit. As the First Circuit and nine federal district courts have concluded, Congress gave state commissions no authority to implement §271. Likewise, states do not have some amorphous authority under any federal or state law to defy federal law and mandate the switching rate that Momentum seeks.

In each instance, whether a state agency can implement a provision of the 1996 Act is a question of federal statutory interpretation. The FCC has made clear on repeated occasions that the "just and reasonable" standard is equivalent to the "market price," rather than state-regulated rates. Thus any attempt to impose state regulation on switching prices inevitably conflicts with, and is preempted by, that binding conclusion of federal law.[9]

The FCC has held that a carrier may satisfy the "just and reasonable" standard either by showing that it "offers comparable functions to similarly situated purchasing carriers under its interstate access tariff," or by "showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate." *Triennial Review Order*, 18 FCC Rcd at 17389, ¶664. Indeed, under the "just and reasonable" standard, the FCC has determined that "the *market* price should prevail, *as opposed to a regulated rate*." *UNE Remand Order*, 15 FCC Rcd at 3906, ¶473 (emphases added).

Oct. 26, 2006); Verizon New England, Inc. v. New Hampshire Pub. Utils. Comm'n, No. 05-cv-94, 2006 WL 2433249, at *8 (D.N.H. Aug. 22, 2006), aff'd, 509 F.3d 1; *BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n*, 368 F. Supp. 2d 557, 565-66 (S.D. Miss. 2005).

[9] AT&T Tennessee recognizes that the TRA has held that it has authority under Section 271 to set wholesale switching rates. *See*, for example, *Order* entered November 28, 2007 in Docket No. 04-00381, at 45. That Order is now on appeal in Federal Court in Nashville. See *BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee v. The Tennessee Regulatory Authority, et al.*, Docket No. 3:08-00059, USDC, MDTN. Moreover, the TRA rendered its decision before a number of federal courts ruled uniformly that state commissions lack such authority.

Those repeated FCC holdings do not allow a state commission to second-guess the arms-length agreements or the market price at issue here. In light of these definitive FCC pronouncements, any state commission's attempt to impose a "regulated rate"—regardless whether the claim is that the regulated rate is "just and reasonable"—squarely contradicts the deregulatory purposes of federal law and is accordingly preempted. *See, e.g. Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 368-69, 106 S. Ct. 1890, 1899 (1986) (state law is preempted where it "stands as an obstacle to the accomplishment and execution of the full objectives of Congress").

Furthermore, state decisions that conflict with the 1996 Act or the FCC regulations under that statute are preempted, without any need for express preemption language in a specific statutory section. *See BellSouth Telecommunications., Inc. v. MCImetro Access Transmission Servs., LLC*, 425 F.3d 964 at 968 (11th Cir. 2005); *see also Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493 at 497 (7th Cir. 2004).

AT&T Tennessee is properly providing Momentum with switching services at a market based rate. The relief that Momentum seeks is preempted by federal law and should therefore be denied.

AT&T's ANSWER TO NUMBERED ALLEGATIONS

1. Paragraph 1 of the Complaint requires no response from AT&T Tennessee.

2. The allegations set forth in Paragraph 2 of the Complaint are admitted, except that AT&T Tennessee denies that the TRA has jurisdiction to set rates in violation of state and federal law.

3. The allegations contained in the first two sentences in Paragraph 3 of the Complaint are admitted. The remaining statements contained in Paragraph 3 contain characterizations that require no response from AT&T Tennessee.

4. The provisions set forth in Paragraph 4 of the Complaint speak for themselves, and AT&T Tennessee respectfully refers the Authority to those statutory citations for their content, and denies all inconsistent allegations or characterizations.

5. The provisions set forth in Paragraph 5 of the Complaint speak for themselves, and AT&T Tennessee respectfully refers the Authority to those statutory citations for their content, and denies all inconsistent allegations or characterizations.

6. The cases cited in Paragraph 6 of the Complaint speak for themselves, and AT&T Tennessee respectfully refers the Authority to those citations for their content, and denies all inconsistent allegations or characterizations. AT&T Tennessee further states that the 1988 and 1992 state court decisions referenced by Momentum pre-date and are superseded by the FCC orders and federal court decisions cited herein by AT&T Tennessee.

7. The statutes and court decisions cited in the Complaint and referred to in Paragraph 7 speak for themselves, and AT&T Tennessee respectfully refers the

Authority to those statutory and court decision citations for their content, and denies all inconsistent allegations or characterizations. AT&T Tennessee further states that under federal law, the TRA lacks jurisdiction to set switching rates.

8. The docket cited in Paragraph 8 speaks for itself and AT&T Tennessee respectfully refers the Authority to the record in that docket, and denies all inconsistent allegations or characterizations. AT&T Tennessee further states that its appeal in Docket No. 04-00381, which includes the issue of whether the TRA has jurisdiction to set rates under Section 271, is currently pending in federal court in Nashville.[10]

9. The allegations set forth in Paragraph 9 of the Complaint are admitted, except that AT&T Tennessee further states that its appeal in Docket No. 04-00381, which includes the issue of whether the TRA has jurisdiction to set rates under Section 271, is currently pending in federal court in Nashville.[11] Moreover, because BellSouth (now AT&T Tennessee) and DeltaCom successfully concluded negotiations for a commercial agreement, the parties did not submit an interconnection agreement to the TRA for approval. Under federal law, the appeal deadline does not begin running on a state commission arbitration decision until the resulting interconnection agreement has been approved by the state commission.

---

[10] *BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee v. The Tennessee Regulatory Authority, et al.*, Docket No. 3:08-00059, USDC, MDTN

[11] *Id.*

10. The docket cited in Paragraph 10 speaks for itself and AT&T Tennessee respectfully refers the Authority to the record in that docket, and denies all inconsistent allegations or characterizations.

RELIEF SOUGHT

Responding to the relief sought in Paragraphs 11-14, AT&T Tennessee denies that Momentum is entitled to any relief whatsoever and its complaint should be dismissed.

AFFIRMATIVE DEFENSES

15. Under federal law, the TRA lacks jurisdiction to set a switching rate.

16. Momentum has failed to state a claim upon which relief can be granted.

17. Momentum's claims are barred by the doctrines of laches, estoppel, and waiver.

WHEREFORE, having responded to the Complaint, AT&T Tennessee respectfully requests that the Authority issue an Order denying the Complaint for all of the reasons set forth above. The TRA has already considered – and declined to provide – what Momentum seeks. Momentum's remedy is to do as all other competitors in the marketplace have done. Momentum can negotiate to obtain switching from another service provider, it can deploy its own facilities, or it can negotiate a rate with AT&T.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.
DBA AT&T TENNESSEE

By: _____

Guy M. Hicks
Joelle J. Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

Lisa S. Foshee
John T. Tyler
675 W Peachtree Street, NE, Suite 4300
Atlanta, GA 30375

CERTIFICATE OF SERVICE

I hereby certify that on June 16, 2008, a copy of the foregoing document was served on the following, via the method indicated:

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[X] Electronic

Henry Walker, Esquire
Boult, Cummings, et al.
1600 Division Street, #700
Nashville, TN 37219-8062
hwalker@boultcummings.com