

**BEFORE THE TENNESSEE REGULATORY AUTHORITY**  
**Nashville, Tennessee**

In Re: *Petition for Regulatory Exemption Pursuant to T.C.A. § 65-5-108(b) to Increase Regulatory Parity and Modernization*

Docket No. 08-00192

**COMPSOUTH PROPOSED ISSUES LIST**

In accordance with the *Order Granting Petitions to Intervene and Establishing a Preliminary Procedural Schedule*,<sup>1</sup> CompSouth hereby files its Proposed Issues List.

**INTRODUCTION**

On October 9, 2008, AT&T requested the complete deregulation of its exchange and private line services in its more populated exchanges, as well as the deregulation of bundles, promotions and business services statewide.<sup>2</sup> Based on the limited information in the petition, AT&T offers no factual support for its request. In the list below, CompSouth identifies issues that will enable the Authority to analyze the substance of AT&T's claim that the deregulation it seeks is in the public interest. In addition to a number of specific legal questions, CompSouth recommends that the Authority investigate and add as specific issues:

1. What evidence supports AT&T's assertions regarding the extent of competition and its claim that asymmetric regulation is retarding investment in Tennessee?
2. What would be the consequences for Tennessee consumers, competitors and the public interest if the *AT&T Deregulation Petition* is granted?

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<sup>1</sup> *Order Granting Petitions to Intervene and Establishing a Preliminary Procedural Schedule*, December 4, 2008 ("Procedural Order").

<sup>2</sup> *Petition for Regulatory Exemption Pursuant to T.C.A. §65-5-108(b) to Increase Regulatory Parity and Modernization*, October 9, 2008 ("*AT&T Deregulation Petition*").

3. What conditions should the TRA adopt to ensure competition is sustainable and an effective regulator of AT&T's prices?

Collectively, these issues go to the core of AT&T's request - that sweeping deregulation of its exchange, private line, bundles, promotions and business services is in the public interest in Tennessee.<sup>3</sup>

### LEGAL ISSUES

*AT&T's Deregulation Petition* raises a number of preliminary legal questions for the parties, and ultimately the Authority to address.

First, T.C.A. §65-5-108(b) states that the TRA "shall exempt a telecommunications service for which existing and potential competition is an effective regulator of the *price* of those services."<sup>4</sup> It is certainly not clear what constitutes "effective" regulation of "price." Does that mean the existing price of a service? Does this language imply that the agency is required to exempt a service only where it can reasonably conclude that competition is sufficient to protect consumers from rate increases?

Second, AT&T has requested deregulation pursuant to §65-5-108(b). That statute provides that the TRA may exempt telephone services "from all or a portion of the requirements of this "part." This "part" refers to Part 1 of Chapter 5 of Title 65. AT&T, however, seeks relief not only from the requirements of Part I but also from the requirements of T.C.A. §65-37-103(f) regarding AT&T's price regulation plan as it is applied to bundles and promotions. Those requirements are not in the same "part" or even

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<sup>3</sup> Tenn. Code Ann. §65-5-108(b).

<sup>4</sup> Tenn. Code Ann. §65-5-108(b). Emphasis added.

in the same chapter as Section 108(b). Therefore the TRA must consider whether the agency has jurisdiction to exempt AT&T from the statutory requirement that bundles and promotions must be included in AT&T's price cap calculations.

Third, it is not clear whether AT&T seeks relief from the provisions of Section 65-5-108(c) and, if so, how that might be accomplished. Under that section, the legislature directed that incumbent local exchange carriers, such as AT&T, must abide by "a price floor for its competitive services." The Authority may exempt a telephone service from the price floor requirement when such relief is "shown to be in the public interest." It is not clear from the petition whether AT&T seeks relief from the price floor requirement and, if so, whether the "public interest" test in section (c) is different from the findings which the agency is required to make under section (b). The fact that each section contains a separate provision concerning the granting of an exemption implies that these are separate tests and that a party seeking relief from the price floor must demonstrate that the public interest favors such relief without regard to the findings the agency has made regarding a request for relief under section (b). Furthermore, section (e) is aimed at protecting competing carriers who are both wholesale customers and retail competitors or AT&T. When CompSouth raised a concern in its petition to intervene that AT&T's request might undercut the Authority's jurisdiction to protect competition in the wholesale market, AT&T responded (letter from Guy Hicks to Chairman Tre Hargett, October 24, 2008) that "AT&T does not seek relief from any of its wholesale obligations." AT&T's statement implies that it is not seeking an exemption from the price floor provisions of section (c), which could be seen as inconsistent with its petition.

Finally, there is a legal question whether the Authority has the power to waive the legislative command in section (c) that the agency “shall, as appropriate, also adopt other rules or issue orders to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing, price squeezing, price discrimination, tying arrangements or other anti-competitive practices.” Since this section does not impose regulatory requirements upon any telephone “service,” but rather prescribes specific actions that the authority must undertake, it does not appear that the exemption provision for “services” described in section (b) was intended to apply to the prohibitions against anti-competitive conduct, pricing, and practices contained in section (c). It is, moreover, highly unlikely that the legislature intended to allow a carrier to seek exemption from a prohibition against anti-competitive conduct, pricing, or practices or to allow the agency to shed its obligations to maintain rules, issue orders, or to hear and resolve complaints of anti-competitive behavior.

**WHAT EVIDENCE SUPPORTS AT&T’S ASSERTIONS  
REGARDING THE EXTENT OF COMPETITION AND ITS  
CLAIM THAT ASYMMETRIC REGULATION IS RETARDING  
INVESTMENT IN TENNESSEE?**

AT&T’s Petition for Deregulation effectively rests on three claims. First, AT&T claims that competition is fierce for all of its exchange and private line services in Rate Groups 3, 4 and 5, as well as all of its promotions, bundles and business services statewide. Second, AT&T alleges that it is regulated differently than its cable and wireless competitors, at least with respect to the services that they offer in common. And third, AT&T asserts that this asymmetric regulation retards investment and innovation in Tennessee (presumably by AT&T). If AT&T’s claims are to be believed and form the

basis for any exemption, then AT&T must be required to provide facts and credible and detailed evidence that support its assertions. Thus far, however, AT&T has provided no evidence in support of any of its individual claims, much less all three.

As a threshold matter, the Authority should determine the relative market share of AT&T and its competitors for the services that AT&T seeks deregulation. Specifically, the Authority should determine AT&T's share of the market for:

- a. Stand-alone residential voice services in rate groups 3, 4 and 5.
- b. Bundled residential voice services in rate groups 3, 4 and 5.
- c. Business voice services in Tennessee statewide.<sup>5</sup>
- d. Business data services in Tennessee statewide.
- e. Private line services in rate groups 3, 4 and 5.
- f. Wireless business services in Tennessee.
- g. Wireless residential services in Tennessee.<sup>6</sup>

Moreover, the Authority should determine the extent to which the observed level of retail competition is dependent upon network facilities provided by AT&T. It is particularly important that the Authority separately determine whether the wholesale market is competitive and, to the extent that it is not, the Authority should consider

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<sup>5</sup> As AT&T acknowledges, contract services are already largely deregulated in Tennessee. *AT&T Deregulation Petition* at 6. The Authority should determine what percentage of the business market is served by such arrangements and, in particular, what percentage of the business market is served under offerings/contracts that cover multiple locations throughout the state. One of AT&T's key competitive advantages in the business market is its unique ability to leverage its broad geographic footprint to meet a customer's needs across Tennessee (as well as other states served by AT&T) under a single contract/tariff. To be meaningful, any evaluation of AT&T's competitive position in the business market must be structured to identify and measure the advantages of AT&T's footprint to serving multi-location business customers.

<sup>6</sup> Although CompSouth does not agree with AT&T's claim that wireless services should be considered substitutes for wireline services, to the extent that AT&T continues with this assertion, the Authority must include in its investigation the relative share and market advantages enjoyed by AT&T's wireless affiliate in Tennessee.

conditioning any grant of deregulation with provisions that ensure that AT&T network facilities are available to competitors at reasonable terms, conditions and prices.<sup>7</sup>

Although the measures of competition identified above are necessary to the Authority's analysis, *AT&T's Deregulation Petition* raises other questions that the Authority should also consider. For instance, AT&T claims that its services are regulated differently than those of its competitors and that this asymmetric regulation makes Tennessee less attractive for investment.<sup>8</sup> The Authority should specifically investigate whether there is any factual basis to this claim. To begin, AT&T operates in a number of states and the AT&T should be able to demonstrate that its investment decisions have been affected by the differing levels of regulation applied to it. (That is, if Tennessee is relatively less regulatory than other states, then Tennessee should already be benefiting from this relaxed regulation with greater investment; alternatively, if other states are more deregulatory than Tennessee, then AT&T should be able to demonstrate that those states have attracted more investment).

More fundamentally, the Authority should examine whether AT&T is, in fact, subject to differing levels of regulation for like-services. For instance, AT&T is deploying network facilities to compete directly with cable providers that it calls Uverse. Are the services AT&T offers over Uverse regulated differently than similar services offered by cable companies? Is AT&T delaying its Uverse deployment in Tennessee because of regulation by the Authority? To what extent is AT&T Tennessee's

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<sup>7</sup> Without prejudging what findings a factual examination of competitive conditions in Tennessee may reveal, CompSouth does believe that the Authority should include a specific issue in this proceeding that considers protective measures to preserve competition.

<sup>8</sup> *AT&T Deregulation Petition* at 2.

commitment that it would invest approximately \$400 million to deploy Uverse in Tennessee (made upon passage of the statewide franchising law) now contingent upon achieving the deregulation requested by its Petition?<sup>9</sup>

In summary, the Authority should both investigate AT&T's claims regarding the *level* of competition, as well as AT&T's claims regarding the *consequences* of continuing the Authority's oversight for investment and innovation that forms the basis of its public interest argument.

**WHAT WOULD BE THE CONSEQUENCES FOR TENNESSEE  
CONSUMERS, COMPETITORS AND THE PUBLIC INTEREST IF  
THE *AT&T DEREGULATION PETITION* IS GRANTED?**

AT&T's public interest claims are based on its view that there is harm from continued regulation if its Petition is denied. The Authority, however, should be equally (perhaps more) concerned with the potential consequences that would follow if the Petition were granted, particularly consequences relating to the existing network and AT&T's plans for that network.

For instance, AT&T has previously claimed that it intends to deploy its Uverse network in Tennessee. Even if its Uverse network is very successful, more Tennessee consumers are likely to *not* subscribe to Uverse services than will. What effect would granting *AT&T's Deregulatory Petition* have on AT&T's incentives to maintain its existing facilities? Would AT&T have the incentive to force-migrate its traditional (*i.e.*, non-Uverse) customers to its Uverse network to gain scale economies on Uverse? If so,

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<sup>9</sup> *U-verse for Tennessee*, TeleGeography CommsUpdate, July 4, 2008.

would the Authority have any say over this forced-migration if it were to approve the *AT&T Deregulation Petition*?

Similarly, what would be the effect on the Authority's ability to ensure that traditional copper facilities are available to customers and competitors in the future? New technologies are making it possible to use traditional copper plant to provide advanced broadband services. How would *AT&T's Deregulation Petition* affect the ability of competitors to bring such "investment and innovation" to Tennessee consumers and businesses?

In addition, if *AT&T's Deregulation Petition* were granted, how would the TRA enforce compliance with the requirement of §252(d)(3) of the federal Telecommunications Act that each of AT&T Tennessee's resale services are priced on the basis of the retail rate being charged by the AT&T. If AT&T no longer tariffed such services, how would the Authority (or a competitor for that matter) determine what price AT&T is charging at retail for each of its services?

The above questions are illustrative (not exhaustive) of the issues that the Authority should investigate fully before granting any of the relief that AT&T seeks. *AT&T's Petition for Deregulation* would permanently change the Authority's role and the Authority must ensure at the outset that it has fully investigated the potential consequences of its decision on consumers, competitors and the public interest.

**WHAT CONDITIONS SHOULD THE TRA ADOPT TO ENSURE  
COMPETITION IS SUSTAINABLE AND AN EFFECTIVE  
REGULATOR OF AT&T'S PRICES?**



The final issue recommended by CompSouth is that the Commission should specifically consider, in this proceeding, whether any conditions are necessary to ensure that whatever the level of competition in Tennessee exists today, that level can be expected to continue (and grow) in the future.<sup>10</sup> Consequently, CompSouth recommends that the Authority include the above issue to determine whether there are any conditions that the Authority could adopt to stabilize AT&T-Tennessee's wholesale offerings and to make sure that its interconnection policies will promote competition.

At the same time AT&T and other ILECs are seeking retail rate deregulation at the state level, they are also seeking wholesale deregulation at the federal level; objectives that are increasingly at odds with one another. In order for competition to be an effective regulator of rates in Tennessee, competitors must be able to obtain wholesale inputs at rates that permit them to offer competitive retail pricing and they must also be able to efficiently interconnect with the incumbent. The Authority should consider what steps may be taken to ensure competition is sustainable in Tennessee in the long-term. For instance, CompSouth urges the Authority to consider as a pre-condition to approval of AT&T's petition potential measures to ensure stability in wholesale pricing for AT&T facilities such as unbundled network elements and special access in Tennessee. The Authority should also consider measures to ease competitors' ability to seek interconnection agreements with AT&T, including permitting requesting carriers to start

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<sup>10</sup> As AT&T reminds the Authority in its *Proposed Issues List and Statement Regarding Standard for Finding Competition Sufficient to Exempt Services*, December 3, 2008 (at 4), the Authority (and the FCC) once found that "the Tennessee telecommunications market was irreversibly open to competition," only to later see the offerings that supported that competition withdrawn from the market, followed by the abandonment of consumer and small business customers by the (then) largest competitors, AT&T and MCI.

negotiations from their existing agreements (and not the AT&T template agreement) and providing requesting carriers with the option of automatically extending the term of their existing interconnection agreements.<sup>11</sup> Moreover, the Authority should consider a requirement that AT&T offer requesting carriers intercarrier compensation terms (at the sole discretion of the requesting carrier) that include bill and keep, 50/50 facilities sharing, and TELRIC-based transit rates. Other safeguards may also be appropriate. Our point is that the Authority should not only look at existing levels of competition, it should also consider steps that it can take to ensure that potential competition comes to fruition.

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<sup>11</sup> As the Authority is aware, AT&T has made a number of commitments in relation to the AT&T/BellSouth Merger designed to address competitive issues. These existing commitments, including enforcement of such commitments or extension of the term of those commitments may be an option in this proceeding. Although the context of the commitments is different (a merger as opposed to retail rate deregulation), the competitive issues addressed apply equally well to both circumstances.

Respectfully submitted,

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### CERTIFICATE OF SERVICE

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