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VIA HAND DELIVERY

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Hon. Mary Freeman, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *BellSouth Telecommunications, Inc. dba AT&T Tennessee Petition to Extend Market Regulation to Rate Groups 1 and 2*
Docket No. 10-00108

Dear Chairman Freeman:

Enclosed for filing in the referenced docket are the original and four copies of the AT&T Tennessee's *Position Brief*.

A copy is being provided to counsel of record.

Very truly yours,

Joelle Phillips

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth Telecommunications, Inc. dba AT&T Tennessee Petition to Extend Market Regulation to Rate Groups 1 and 2*

Docket No. 10-00108

POSITION BRIEF OF AT&T TENNESSEE

BellSouth Telecommunications, Inc., dba AT&T Tennessee ("AT&T") submits this Position Brief to set forth the reasons why the Tennessee Regulatory Authority ("TRA" or "Authority") must grant the pending petition to extend "market regulation" to Rate Groups 1 and 2. As discussed in more detail below:

(1) AT&T's petition supplied voluminous evidence demonstrating that the competition in Rate Groups 1 and 2 exceeds that required by the Market Regulation Act's competitive test. In fact, the only intervening party in this ***docket has stipulated that the Market Regulation Act's competitive test has been satisfied by AT&T's evidence in this docket***;

(2) The ***Market Regulation Act does not authorize the TRA to consider any other factors*** except for the competitive test, and, consistent with the canon of statutory construction *expressio unius exclusio alterius*, the Market Regulation Act's mandate must be interpreted to prohibit consideration of factors other than the competitive test; and

(3) The Consumer Advocate & Protection Division's ("Consumer Advocate") argument that the TRA should consider additional factors, which are not prescribed by the Market Regulation Act is based only on that statute's use of the term "may" and is not sufficient to overcome ***the clear evidence of legislative intent to make the competitive test the only factor the TRA to is authorized consider in this docket***.

Further, even if the TRA had statutory authorization to consider other factors (which it does not), that would not change the proper outcome here. Indeed, the existence of poverty or

unemployment in Tennessee are reasons for the state to continue to embrace the policy of encouraging investment to aid the state's economy by reducing out-dated regulation. Moreover, the Market Regulation Act was carefully crafted by the General Assembly to ***preserve the powers of the TRA that are most closely linked to these issues*** – specifically, the preservation of the TRA's consumer complaint authority, the preservation of the TRA's jurisdiction regarding Lifeline and Link-Up, the preservation of the TRA's powers relating to slamming and cramming, and the preservation of the TRA's powers relating to the requirements of the small and minority business plans.

Discussion and Legal Authority

I. **The only intervening party in this docket has stipulated that AT&T's evidence has satisfied the Market Regulation Act's competitive test. The only dispute is whether the TRA is permitted to require more than the standard established in the Market Regulation Act.**

On May 28, 2010, AT&T filed a petition seeking to extend market regulation to its Rate Groups 1 and 2. That petition was accompanied by an extensive report of AT&T's witness David Weed. In his report, Mr. Weed identified numerous competitors in each wire center who were offering service to customers. This extensive 1228-page report far exceeded the requirements of T.C.A. § 65-5-109(o), which establishes the following competitive test for such petitions:

> (i) Upon petition by a market regulated provider, the authority may order that such services shall be subject to the limitations on jurisdiction in subsection (n) by showing that each exchange has at least two (2) non-affiliated telecommunications providers that offer service to customers in each zone rate area of each exchange.
>
> (ii) When counting the number of providers for the purpose of evaluating the competition standard in subsection (o)(i), cable television providers that offer telephone and broadband services to residential customers may be included. Non-affiliated providers of wireless service may be included in the count of providers but shall only count as one (1) provider regardless of the number of wireless providers. Non-affiliated providers of Voice over Internet Protocol service shall not be counted for the purpose of evaluating the competitive exemption for residential service unless the carrier seeking exemption offers a data service capable of supporting Voice over Internet Protocol service and does not

require the purchase of voice telephony products to buy the data service. At least one (1) provider must be facilities-based and currently serving residential customers.

(iii) When the petitioning party shows facts satisfying the competition standard set forth in subsection (o)(i), the petitioner shall be entitled to a rebuttable presumption that the competition standard established in this act is satisfied.

(iv) Such petition shall be subject to an accelerated schedule. The authority must issue its decision on the petition, including its reasons, within ninety (90) days of the filing of the petition.

(v) Unregulated providers of service shall not be required to participate in the authority's docket considering the petition, but, to the extent such competitors intervene, they shall be required to provide discovery responses regarding the activities of the unregulated provider in such rate groups or exchanges. To the extent the petitioner seeks but is unable to obtain discovery response from intermodal or unregulated providers regarding the competition present in such rate groups or exchanges, the petitioner shall be entitled to a rebuttable presumption that the unregulated provider is offering service in the area that is the subject of the petition.

(vi) Whether or not such a petition is filed or granted, the limitations on authority jurisdiction set forth in subsection (n) shall automatically become applicable to all services of a market regulated provider as of January 1, 2015.

(vii) The petition provided for in this subsection (o) shall be filed no earlier than one (1) year following the effective date of this act.

As early as the scheduling conference on June 29, 2010, the Consumer Advocate has been clear that it would not contest whether AT&T has satisfied the Market Regulation Act's competitive test. Instead, the Consumer Advocate has asserted other, social policy-based rationales for denying the relief sought by AT&T. Consistent with this position, the Consumer Advocate issued no discovery on the competitive data, submitted no testimony to refute or rebut AT&T's evidence on the competitive analysis, and entered into an ***explicit stipulation*** that AT&T had satisfied the Market Regulation Act's competitive test. Specifically, the Consumer

Advocate has stated that "it does not refute" that the statute's competition test has been met. The Consumer Advocate reiterated this position again during the status conference on August 5, 2010.

Although AT&T viewed the Consumer Advocate's discovery requests as irrelevant (because they did not pertain in any way to the Market Regulation Act's competitive test), AT&T answered those requests, and there have been no discovery disputes or other motions.[1] In short, it is ***undisputed*** that AT&T has satisfied the Market Regulation Act's competitive test, and, as discussed below, ***the only dispute is whether AT&T can be required to show something more than that in order to obtain this relief.*** Nothing about the law or facts relevant to this docket allows for any such additional requirements.

II. The Market Regulation Act sets forth a detailed competitive test - *and no other factors* - for the TRA to consider. Accordingly, consistent with the canon of statutory construction *expressio unius exclusio alterius*, the Market Regulation Act must be interpreted to prohibit consideration of other, unstated factors beyond the competitive test explicitly provided for in the Act.

As explained above, the sole dispute in this docket is whether the TRA can deny the petition despite the undisputed fact that ***AT&T has satisfied the statutory competition test***. The Consumer Advocate says "yes." Nothing in the Market Regulation Act, however, supports that position, and in the absence of clear statutory authority, the Consumer Advocate is asking the TRA to undertake an *ultra vires* act and to commit reversible error. It is well established in Tennessee Law that the TRA is a body of limited jurisdiction, which must act only as provided by the General Assembly. *See, for example,*

[1] AT&T responded to those discovery requests in the interest of avoiding discovery disputes that could delay the progress of this case, which is required to be concluded in ninety days by the terms of the Market Regulation Act. In its responses, however, AT&T preserved its objections on the basis of relevance. Accordingly, AT&T's decision to provide discovery responses does not constitute any waiver of those objections, which are expressly preserved.

Consumer Advocate v. TRA, M2004-01484-COA-R12-CV, 4-5 (August 2007) (reversing, observing "the Authority's discretion cannot extend beyond the boundaries established by the statutes and constitutional provisions that govern its actions").

In support of its position, the Consumer Advocate advances only one argument – namely, that the use of the word "may" in the statute changes things. The statute states "[u]pon petition by a market-regulated provider, the authority ***may*** order...." [emphasis added] On the basis of this one word, "may," the Consumer Advocate asserts that the TRA should disregard the evidence satisfying the Market Regulation Act's competitive test and deny the petition on the basis of other factors that are not provided for by the General Assembly in the statute. Because the word "may" was used rather than the word "shall," the Consumer Advocate seems to have concluded that the TRA has been granted the discretion to disregard the competitive test crafted by the General Assembly – and ***expressly included*** – in the statute and to instead decide this case on the basis of "policy considerations" – that were ***not included*** in the statute.[2]

The law does not permit such a reading of this or any other statute. In fact, Tennessee courts consistently reinforce the doctrine of ***expressio unius exclusio alterius***, which is a Latin phrase meaning "the inclusion of one thing implies the exclusion of others." Using this well-established legal doctrine, courts routinely hold that when the legislature includes one thing but makes no mention of another, any item not mentioned has been purposefully and intentionally excluded. As applied to the Market Regulation Act, the fact that the General Assembly carefully set forth the competitive test – and yet did not include any reference to consideration of any other factors besides that test – means that the General Assembly purposefully intended to exclude any other factors from consideration. Having (expressly) included a test to be used in considering a petition to extend Market Regulation, and having

[2] As explained in Section III of this brief below, both the Tennessee Supreme Court and the office of the Tennessee Attorney General have observed that the word "may" must frequently be construed to mean "shall" in order to correctly construe statutory language in context. This is certainly true in the case of the Market Regulation Act as discussed below.

excluded any other tests or factors in that statute, it is clear that General Assembly meant for no other factors or tests to be used.

Courts follow this rule. *See, for example, City of Knoxville v. Brown*, 260 SW 2d 264, 268 (noting "the expression of one thing is the exclusion of another") (Tenn. 1953); *State of Tennessee v. Adler*, 92 SW 3d 397, 400 (observing "when interpreting statutes, this Court has routinely followed the Latin maxim of *expressio unius est exclusio alterius*, meaning the expression of one thing implies the exclusion of all things not mentioned") (Tenn. 2002). Likewise, Tennessee Attorneys General also rely upon this rule in issuing opinions about the meaning of statutes. *See, for example*, 1978 Op. Atty. Gen. Tenn. No. 78-292 at p 10 (relying upon the doctrine and noting that Tennessee courts also apply the doctrine in construing statutes). Legal treatises also recognize the doctrine and note its frequent application. See *Southerland Statutory Construction* (4th ed. CD Sands 1973).

If the TRA were to ignore this well-settled doctrine and consider other, social policy-based factors that were not included in the statute, then the TRA would be acting beyond the scope of its statutory authority and would commit clear and reversible error. *BellSouth Telecommunications v Greer*, 972 S.W.2d 663 (Tenn. Ct. App. 1997). As the Court of appeals explained in *Greer*:

> The Commission, like any other administrative agency, must conform its actions to its enabling legislation. *Tennessee Pub. Serv. Comm'n v. Southern Ry.*, 554 S.W.2d 612, 613 (Tenn. 1977); *Pharr v. Nashville, C. & St. L. Ry.*, 186 Tenn. 154, 161, 208 S.W.2d 1013, 1016 (1948). It has no authority or power except that found in the statutes. *Tennessee-Carolina Transp., Inc. v. Pentecost*, 206 Tenn. 551, 556, 334 S.W.2d. 950, 953 (1960). While its statutes are remedial and should be interpreted liberally, *see* Tenn. Code Ann. § 65-4-106 (Supp. 1996), they should not be construed so broadly as to permit the Commission to exercise authority not specifically granted by law. *Pharr v. Nashville, C. & St. L. Ry.*, 186 Tenn. at 161, 208 S.W.2d at 1016.

As in that case, again the TRA is faced with the decision of whether to act within the confines of what the Legislature has directed or to go beyond those directions. As in *Greer*, if the TRA were to go beyond the function defined in the statute, an appellate court would have to reverse that action.[3]

III. The fact that the statute includes the word "may" is not sufficient to overcome the clear evidence of legislative intent that the competitive test is the sole matter for the TRA to consider in this docket.

Tennessee courts have frequently concluded that the term "may" does not always indicate that a statute is permissive in nature. *See* 2003 Op. Atty. Gen. Tenn. No. 03-156 at 4-6 (noting that courts have concluded that words of permissive nature, such as "may", are to be given mandatory significance to effectuate legislative intent and construe such terms in context.).

As the Tennessee Supreme Court has observed, the word "may" must frequently be construed to mean "shall" in order to correctly construe the statutory language in context. *See, for example, Fisk v. Grider*, 106 S.W.2d 553 (Tenn. 1937); *Baker v. Seal*, 694 S.W.2d 948, 915 (1984) (citing *Fisk*). *See also, Burns v. Duncan*, 133 S.W.2d 1000 (Tenn. Ct. App. 1940). Even *Black's Law Dictionary*, 7th Ed. 1999, notes that "in dozens of cases, courts have held 'may' to be synonymous with 'shall' or 'must', usually in an effort to effectuate legislative intent." *Black's* defines "shall" as, "has a duty to; more broadly, is required to; should; ***may*** ...." (emphasis added). All of these varied legal authorities make clear that an evaluation of the statute's meaning cannot end with the consideration of the word "may" alone. Rather, a basic principle of statutory construction is to ascertain and give effect to legislative intent

[3] It is undisputed that the policy arguments raised by the Consumer Advocate are irrelevant to the competitive test in the statute. Similarly, in *BellSouth v. Bissel*, Tenn. Ct of Appeals 01-A01-9508-BC-00400 (Tenn. Public Service Comm'n Docket No. 95-01050) (Oct. 2, 1996), the parties addressed a PSC action that the parties also all acknowledged was irrelevant to the rate issue in that case. Because of the lack of connection between the PSC's action and the statutory requirements of Price Regulation, the Court of Appeals again noted:

> We think the PSC's decision to continue the investigation is simply arbitrary, a decision 'that is not based on any course of reasoning or exercise of judgment.' *See Jackson Mobilphone v. Tennessee PSC*, 876 S.W.2d 106 at 111 (Tenn. App. 1993). An agency's arbitrary decision – even a preliminary, procedural, or intermediate one – may be reversed by the reviewing court. Tenn. Code Ann. § 4-5-322(a)(1),(h)(4).

without unduly restricting or expanding the intended scope of a statute. *State v. Garrison*, 40 S.W.3d 426, 433 (Tenn. 2000). *See also Washington v. Robertson County,* 29 S.W.3d 466 471 (Tenn. 2000). Such intent is to be found from a reading of the statute as a whole in light of legislative purpose. *Seiber v. Greenbrier*, 906 S.W.2d 444, 447 (Tenn. 1995). "In interpreting statutes, the Supreme Court is required to construe them as a whole, read them in conjunction with their surrounding parts, and view them consistently with the legislative purpose." *Scott v. Ashland Healthcare Center, Inc.,* 49 S.W.3d 281, 286 (Tenn. 2001).

In this case, there is strong evidence of the actual legislative intent that is contrary to what is being urged by the Consumer Advocate. The record of debates regarding the Market Regulation Act clearly demonstrates that the General Assembly's reason for treating Rate Groups 1 and 2 differently from other areas of the state was the fact that some parties questioned whether the competition (well-recognized throughout most of the state) had also taken hold in these areas. In fact, witnesses testified during legislative committee hearings regarding the fear that, in these areas, competition might be less developed. According to one witness:

> One of the big concerns that we have had with this bill is, I can't (say) being in the field for almost 34 years, I can't assume that the level of competition is consistent within the state. Is it strong within Davidson County? I believe it is but is it strong in the rural areas of the state I can't judge that. I don't know. We get calls at the TRA, today I just asked with one of my staff, we get about 15 calls a month from residential customers in the rural areas wanting to know about DSL services the broadband services. So I can't stand up here and say confidently that I believe there is competition in the rural areas. What I believe this bill, this amendment does and again we just got this late, the final draft of it late yesterday afternoon even though we have been working on it. It would carve out the rural areas of the state and would require for deregulation for the rural areas that they would have to come to the TRA for a process a administrative process and would have to prove that there is sufficient competition in the rural areas of the state.
>
> (Director Eddie Roberson, Utilities and Banking Sub Committee, March 10, 2009, Begins at 30:08.
> http://tnga.granicus.com/MediaPlayer.php?view_id=78&clip_id=504&meta_id=3962)

Notably, this explanation clarifies that the amended language (which became the competitive test in subsection (o)) was intended to focus on an analysis of the competition in these areas, not on any analysis of the type of economic data contained in the Consumer Advocate's testimony. As explained to the committee, the only regulatory requirement in order for a petitioner to extend market regulation to Rate Groups 1 and 2 was for the petitioner "to ***prove that there is sufficient competition*** in the rural areas of the state."

As described above, to address this specific concern, the General Assembly included in the statute a process whereby a petitioner could demonstrate that the level of competition in these areas was sufficient to give consumers a choice if a particular provider's prices or terms were not satisfactory. That process is the competitive test found in section (o) of the Act. The sponsors described this part of the statute as follows:

> Rural areas have a special protection. Companies have to prove to the TRA that there is competition in rural areas before the TRA provides regulatory freedom in those rural areas. In other words let's say in Marion County they could not just go in and say ok we decided that it is competitive there. We're going to go out in Market Regulation. They have to go to the TRA and prove to the TRA that there truly is a competitive situation in Marion County or in Lauderdale County or whatever county it is.
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> (Rep. Gerald McCormick, House Commerce Committee, April 7, 2009, Begins at 30:40 http://tnga.granicus.com/MediaPlayer.php?view_id=78&clip_id=999&meta_id=10535)

In addition to the record of this type of discussion and debate in the General Assembly, the co-sponsors of the bill that became the Market Regulation Act in the House of Representatives have filed letters in this docket stating their intent that the competitive analysis contained in the Act was the sole matter to be considered in a docket such as this one. Those letters note that "it was ... the intent [of the

legislation] to create a market test for the applicant, and if the applicant meets the test, the TRA must grant the application for market regulation. Period."[4]

IV. The General Assembly preserved TRA jurisdiction over many areas related to low-income consumers.

Perhaps the strongest evidence of the intent of the General Assembly regarding the irrelevance of social policy considerations, such as poverty and unemployment, is the fact that the statute was crafted to ensure that the TRA would retain numerous regulatory powers aimed at protecting low-income consumers. Specifically, the TRA retains (even as to market-regulated areas) jurisdiction relating to:

- Any specific customer complaint regarding a residential telecommunications service (using all the powers that were available to the TRA prior to enactment of the Market Regulation Act);
- The Tennessee Relay Service Center and the Tennessee Devices Access Programs for disabled customers ;
- The Life Line or Link-Up programs for low income consumers;
- The Small and Minority-Owned Business Plan;
- Universal Service Funding to promote affordable telephone service; and
- Customer complaints regarding slamming and cramming.

Finally, any argument that the existence of economic hardship provides a reasonable basis to thwart the policy decided upon by the General Assembly is wholly unfounded. The legislative debates were filled with statements from legislators regarding the importance of encouraging investment by reducing out-dated regulations. While parties were free to raise policy considerations like those expressed by the Consumer Advocate's witness during the legislative debate, the Market Regulation Act passed, ***as written,*** with substantial majorities in both the Senate and the House, demonstrating that

[4] Letter of Rep. Gerald McCormick, dated July 21, 2010, p. 1; Letter of Rep. Mike Turner, dated August 3, 2010.

legislators who considered all of the policy arguments of proponents and opponents concluded that the best way to serve Tennesseans and promote a healthy state economy was by the reduction of regulation and the adoption of a more market-driven model for Tennessee's communications market.

Conclusion

It is undisputed that the sole test crafted by the General Assembly to determine whether to allow Rate Groups 1 and 2 to become subject to market regulation has been satisfied by the evidence AT&T has submitted in this docket. Consistent with Tennessee case law, well-established canons of statutory construction, legislative history, and the very words of the statute's bi-partisan House sponsors, it is clear that the only requirements have been met and the petition must be granted.

The General Assembly carefully debated the provisions of the Market Regulation Act and determined that the right policy for Tennessee was to update the regulatory model for the Tennessee telecommunications market. The General Assembly concluded that reduced regulation spurs investment in Tennessee's economy and encourages innovation by providers to the benefit of all Tennesseans, including those facing poverty and unemployment.

Those policy-driven decisions were not delegated to the Authority or the parties to this docket, and, in the absence of any such delegation of statutory authority, the TRA must grant the petition. To do otherwise would be reversible error.

Respectfully submitted,

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By: _____

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CERTIFICATE OF SERVICE

I hereby certify that on August 11, 2010, a copy of the foregoing document was served on the following, via the method indicated:

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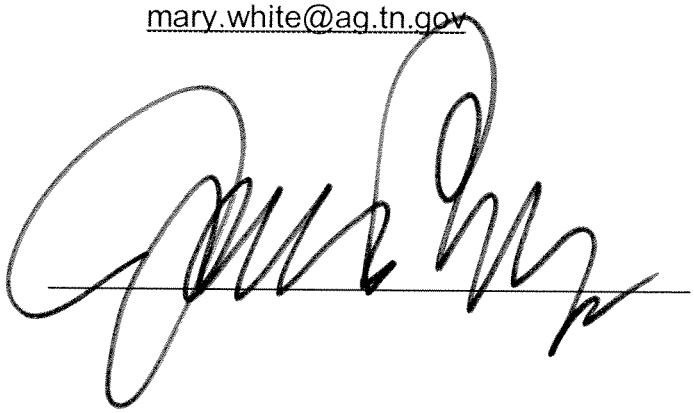

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