

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 21, 2010

IN RE:

BELLSOUTH TELECOMMUNICATIONS, INC.  
D/B/A AT&T TENNESSEE PETITION TO EXTEND  
MARKET REGULATION TO RATE GROUPS 1 AND 2

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DOCKET NO.  
10-00108

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ORDER GRANTING PETITION TO EXTEND MARKET REGULATION

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This matter came before Chairman Mary W. Freeman, Director Eddie Roberson and Director Sara Kyle of the Tennessee Regulatory Authority (“Authority” or “TRA”), the voting panel assigned to this docket, at a Hearing held on August 23, 2010 for consideration of the *Petition to Extend Market Regulation to Rate Groups 1 and 2* (“*Petition*”) filed by BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee (“AT&T Tennessee”).<sup>1</sup> Based upon the record in this matter and the arguments of the parties, the Authority determined that the statutory criteria of Tenn. Code Ann. § 65-6-109(o) for extending market regulation had been met and granted AT&T Tennessee’s *Petition*.

**THE PETITION**

AT&T Tennessee filed its *Petition* on May 28, 2010 pursuant to Tenn. Code Ann. § 65-5-109(o) of the Market Regulation Act of 2009 (“*Act*”).<sup>2</sup> The *Petition* seeks to extend the application of market regulation to residential local exchange telecommunications services where AT&T Tennessee offers single, individually-priced services at rate-group specific prices in Rate Groups 1 and 2.<sup>3</sup> The filings, presented with the *Petition*, included the identification of at least two non-affiliated telecommunications providers offering service in the base rate and zone rate areas of each

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<sup>1</sup> *Petition*, p. 1 (May 28, 2010).

<sup>2</sup> Tenn. Code Ann. § 65-5-109.

<sup>3</sup> *Petition*, p. 1 (May 28, 2010).

exchange designated as Rate Groups 1 or 2.<sup>4</sup> According to the *Petition*, at least one provider is facilities-based and currently serves residential customers. AT&T Tennessee contends that the filings together with its *Petition* establish a rebuttable presumption that AT&T has met the competition standard as set forth in the *Act*. AT&T Tennessee submits that its filing is timely, because the *Act* permits such a petition to be filed no earlier than one year from May 21, 2009.

#### **TRAVEL OF THE CASE**

On June 14, 2010, the Consumer Advocate and Protection Division of the Office of the Attorney General (“Consumer Advocate”) filed a *Petition to Intervene*. At a regularly scheduled Authority Conference held on June 21, 2010, the panel voted unanimously to convene a contested case proceeding and to appoint Director Eddie Roberson as Hearing Officer for the purpose of preparing this matter for hearing.

As the Hearing Officer, Director Roberson proceeded to convene a Status Conference on June 21, 2010 to consider the Consumer Advocate’s *Petition to Intervene*, to coordinate the preparation of a protective order and an expedited procedural schedule, and to discuss discovery in this docket. Applying the standards set forth in Tenn. Code Ann. § 4-5-310(a) and hearing no opposition from AT&T Tennessee, the Hearing Officer granted the *Petition to Intervene*. The Hearing Officer then directed AT&T Tennessee and the Consumer Advocate to work together to submit a joint procedural schedule by June 28, 2010. The Hearing Officer further directed counsel for AT&T Tennessee to prepare a proposed protective order and share that proposed order with the Consumer Advocate by June 28, 2010. Even though as of the date of the Status Conference the Consumer Advocate had made no decision regarding discovery in this docket, the Consumer Advocate was permitted to propound the requisite number of questions provided for in TRA Rule 1220-01-02-.11(5)(a).<sup>5</sup>

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<sup>4</sup> *Petition to Extend Market Regulation to Rate Groups 1 and 2* (“*Petition*”), Weed Affidavit, (May 28, 2010).

<sup>5</sup> *Order Granting Petition to Intervene and Reflecting Action Taken at June 21, 2010 Status Conference* (June 23, 2010).

On June 24, 2010, the parties filed their *Joint Agreed Proposal Regarding Schedule*. On June 29, 2010, the Hearing Officer held a telephonic conference with the parties and offered certain modifications to the jointly proposed schedule. Specifically, the hearing was set for August 9, 2010, and the parties agreed that post-hearing briefs would not be necessary. Regarding discovery, the parties stated that much of the discovery would be agreed upon. The parties stated further that because discovery responses were not likely to contain proprietary information and that much of the testimony is in the public domain, they did not see the need for entry of a protective order.<sup>6</sup>

On July 30, 2010, the Hearing Officer issued a *Notice* setting the Hearing in the matter for August 9, 2010 and a Status Conference for August 5, 2010. The Hearing Officer instructed the parties to set forth their position regarding whether there would be a live hearing on the merits or whether a determination may be made by the panel based on the filings in the docket file. On August 3, 2010, the parties filed a *Joint Stipulation of the Consumer Advocate and AT&T Recommending the Parties File Position Briefs in Lieu of a Hearing* (“*Joint Stipulation*”), which was addressed by the Hearing Officer during the Status Conference held on August 5, 2010.

At the August 5, 2010 Status Conference, the parties summarized the *Joint Stipulation* as reflecting an agreement between AT&T Tennessee and the Consumer Advocate that this matter did not present an evidentiary dispute but instead required a determination as to the differing positions of the parties with respect to their interpretations of Tenn. Code Ann. § 65-5-109(o). The Consumer Advocate acknowledged that AT&T Tennessee has submitted sufficient evidence to meet the requirements of Tenn. Code Ann. § 65-5-109(o)(1) and (2), but asserted that the granting of a petition filed pursuant to Tenn. Code Ann. § 65-5-109(o) is not mandatory because the TRA can and should consider policy implications in acting on such a petition. AT&T Tennessee argued that upon demonstrating that it had met the competitive standard in Tenn. Code Ann. § 65-5-109, its *Petition* should be granted.

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<sup>6</sup> *Order Establishing a Procedural Schedule* (July 6, 2010).

The parties agreed that live testimony and cross-examination of witnesses would not be necessary, because the pre-filed testimony and documentation submitted by the parties revealed that the underlying facts are not in dispute. For this reason, the parties advocated the filing of Position Briefs as the means of presenting their respective positions to the Authority for determination of whether the *Petition* filed by AT&T Tennessee should be approved. Along with its Position Briefs, each party would designate specific filings to be included in the record for consideration by the panel.

Based upon the *Joint Stipulation* and the comments of the parties during the Status Conference on August 5, 2010, the Hearing Officer determined that the Hearing on the *Petition* scheduled for August 9, 2010 should be cancelled and that the panel would convene a hearing during the Authority Conference on August 23, 2010 for the purpose of hearing public comments. At the outset of the Hearing each party would provide a brief summary of its position for the benefit of the Directors and any members of the public in attendance. The witnesses of the parties would be available to testify in the event the panel had questions of the parties. The panel would proceed to deliberate the merits of the *Petition* following the Hearing on August 23, 2010. As such, a *Notice Rescheduling Hearing* was issued on August 5, 2010.

The Hearing Officer issued his *Order Setting Procedure for Hearing on August 23, 2010 and for Filing Position Briefs* (“*Hearing Officer’s Order of August 6, 2010*”) on August 6, 2010. On August 11, 2010, AT&T Tennessee filed *Position Brief of AT&T Tennessee* and *AT&T Tennessee’s Designation of the Record*. Also on August 11, 2010, the Consumer Advocate filed its *Position Brief of the Consumer Advocate* as well as its *Consumer Advocate’s Designation of Filings to be Included in Record*.

#### **THE HEARING**

The Hearing in this matter was held before the voting panel on August 23, 2010. Participating in the Hearing were the following counsel for the respective parties:

AT&T Tennessee – **Guy M. Hicks, Esq.** and **Joelle Phillips, Esq.**, 333 Commerce Street, Suite 2101, Nashville, TN 37201-3300;

Consumer Advocate – **Vance Broemel, Esq.** and **Mary Leigh White, Esq.**, Office of the Attorney General, Consumer Advocate and Protection Division, P.O. Box 20207, Nashville, TN 37202-0207.

Consistent with the *Hearing Officer's Order of August 6, 2010*, Ms. Phillips and Ms. White summarized the parties' respective positions and responded to questions from the panel. Further, the items designated by each party were admitted into record. No member of the public sought recognition during the Hearing to provide comments.

### **THE MARKET REGULATION ACT**

During the 2009 legislative session, the General Assembly amended Tenn. Code Ann. § 65-5-109 through Public Chapter 278 to establish market regulation for telecommunications service providers. Pursuant to Tenn. Code Ann. § 65-5-109(d)(1), telecommunications companies can elect to operate under market regulation by filing a notice with the Authority. The election is effective upon filing and subject only to specific jurisdictional elements retained by the Authority under Tenn. Code Ann. § 65-5-109(n). Tenn. Code Ann. § 65-5-109(o) sets forth the criteria to be determined and the procedure to be followed by the TRA in considering a petition seeking market regulation in areas having a limited number of access lines, as follows:

- (o) Incumbent local exchange providers that have elected market regulation shall not be entitled to the limitation on authority jurisdiction in subsection (n) with respect to those residential local exchange telecommunications services that are offered in exchanges with less than three thousand (3,000) access lines or, for carriers who serve more than one million (1,000,000) access lines in this state, those exchanges with access line counts and calling areas that would result in classification as rate group 1 or 2 under any such carrier's tariff in effect on January 1, 2009, and that are offered as single, individually priced services at a rate-group specific price rather than a state-wide or territory-wide price, except as follows:
  - (1) 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) nonaffiliated telecommunications providers that offer service to customers in each zone rate area of each exchange;
  - (2) When counting the number of providers for the purpose of evaluating the competition standard in subdivision (o)(1), cable television providers that offer telephone and

broadband services to residential customers may be included. Nonaffiliated 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. Nonaffiliated 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;

- (3) When the petitioning party shows facts satisfying the competition standard set forth in subdivision (o)(1), the petitioner shall be entitled to a rebuttable presumption that the competition standard is satisfied;
- (4) The 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;
- (5) 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;
- (6) 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; and
- (7) The petition provided for in this subsection (o) shall be filed no earlier than one (1) year following May 21, 2009.

#### **POSITION OF THE PARTIES**

**Consumer Advocate:** The Consumer Advocate argued that the Authority should refuse to grant AT&T Tennessee's *Petition*, because the areas under consideration for Market Regulation cannot afford price increases in the current economic climate. The Consumer Advocate submitted a summary of demographic characteristics for these areas, including unemployment rates, poverty levels and per capita income to demonstrate that they are less prosperous than the state as a whole.<sup>7</sup> The Consumer Advocate asserted that AT&T increased every one of its prices by more than 59% in

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<sup>7</sup> Direct Testimony of John Hughes, pp. 3-5 (July 15, 2010).

Rate Groups 3, 4, and 5 after it elected Market Regulation for those areas. The Consumer Advocate concluded that AT&T Tennessee would likely raise its prices for Rate Groups 1 and 2 upon being granted Market Regulation in those areas.<sup>8</sup>

The Consumer Advocate argued that the language of Tenn. Code Ann. § 65-5-109(o) is “permissive,” because instead of *requiring* the TRA to grant Market Regulation, it states that “...the authority may order that such services shall be subject to the limitations on jurisdiction in subsection (n)...”<sup>9</sup> The Consumer Advocate stated that the TRA should adopt an interpretation of Tenn. Code Ann. § 65-5-109(o) to the effect that the use of the word “may” rather than “shall” in the statute gives the TRA discretion to deny a petition to extend market regulation where there exist reasonable grounds for denial. According to the Consumer Advocate, the permissive language in Tenn. Code Ann. § 65-5-109(o) permits the TRA to consider factors beyond the competitive test, including public policy concerns such as whether extending market regulation would be a detriment to Tennessee consumers.<sup>10</sup> The Consumer Advocate urged the TRA to deny AT&T Tennessee’s *Petition*, because the areas under consideration are already destabilized by high unemployment and poverty.<sup>11</sup>

**AT&T Tennessee:** AT&T Tennessee argued that the Consumer Advocate has overstated the extent to which AT&T Tennessee raised prices in Rate Groups 3, 4 and 5 after it elected Market Regulation. According to AT&T Tennessee, the Consumer Advocate considered a subset of only forty-seven services out of the hundreds of services that AT&T Tennessee offers, and most of those services were business services or optional discretionary features, none of which are required for basic telephone service.<sup>12</sup> AT&T Tennessee contended that the Consumer Advocate overstated the way in which these price increases impact customers. For example, if a customer’s total monthly bill

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<sup>8</sup> *Id.*, p. 6.

<sup>9</sup> *Id.*, pp. 2-3. Emphasis added by Consumer Advocate.

<sup>10</sup> Position Brief of the Consumer Advocate, pp. 3-5 (August 11, 2010).

<sup>11</sup> Direct Testimony of John Hughes, pp. 6-7 (July 15, 2010).

<sup>12</sup> Rebuttal Testimony of Paul Stinson, pp. 1-2 (July 22, 2010).

is \$30, and if AT&T Tennessee raised the price of an optional additional service included in that total from \$1.00 to \$2.00 (a 100% increase), the customer's overall bill would increase from \$30 to \$31, which represents a total increase of only 3.33%. AT&T Tennessee maintains that the Consumer Advocate would describe this change as a 100% increase.<sup>13</sup> AT&T Tennessee then presented a list of local exchange services in Rate Groups 3, 4 and 5 for which prices were not increased<sup>14</sup> along with a list of services for which AT&T lowered the price.<sup>15</sup> AT&T Tennessee further argued that customers can avoid price increases by purchasing bundled services or by purchasing service from a competitive provider.<sup>16</sup>

Notwithstanding these arguments, AT&T Tennessee maintained that the General Assembly established a competitive test rather than a policy evaluation for extending Market Regulation, and therefore the Consumer Advocate's arguments regarding poverty and unemployment are irrelevant to this case.

AT&T Tennessee argued that Tennessee law does not permit a reading of Tenn. Code Ann. § 65-5-109(o) as suggested by the Consumer Advocate. Relying upon a doctrine of statutory construction,<sup>17</sup> AT&T Tennessee stated that, by not including a reference to any other factors besides the competitive test, the General Assembly intentionally excluded other factors, such as policy consideration, from a determination of a request to extend market regulation. In support of its position, AT&T Tennessee also relied on letters in the record. Rep. Gerald McCormick and Rep. Mike Turner both asserted that the Market Regulation Act was intended to create a competitive analysis or market test, which if met by the applicant, then the TRA must grant the application.<sup>18</sup>

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<sup>13</sup> *Id.*, p. 2.

<sup>14</sup> *Id.*, pp. 3-4. Services not experiencing price increases include Basic Residential Service, Measured Service, Message Rate Service and 16 other retail services.

<sup>15</sup> *Id.*, p. 5-6.

<sup>16</sup> *Id.*, p. 5.

<sup>17</sup> AT&T Tennessee argued that the doctrine of "expressio unius exclusio alterius" ("the inclusion of one thing implies the exclusion of others") must be applied in interpreting the test for complying with Tenn. Code Ann. § 65-5-109(o). AT&T Tennessee's Position Brief, p. 5 (August 11, 2010).

<sup>18</sup> AT&T Tennessee's Position Brief, pp. 8-10 (August 11, 2010). *See also* Letter of Rep. Gerald McCormick (July 21, 2010) and Letter of Rep. Mike Turner (August 3, 2010).



Finally, AT&T Tennessee reminded the Authority that Market Regulation does not alter or reduce the TRA's jurisdiction over existing safety net services, such as Lifeline and LinkUp, nor does it alter the TRA's ability to consider consumer complaints.<sup>19</sup>

### **FINDINGS AND CONCLUSIONS**

Tenn. Code Ann. § 65-5-109(o)(1) requires AT&T to demonstrate “. . . that each exchange has at least two (2) nonaffiliated telecommunications providers that offer service to customers in each zone rate area of each exchange . . .” Tenn. Code Ann. § 65-5-109(o)(3) states that “[w]hen the petitioning party shows facts satisfying the competition standard set forth in subdivision (o)(1), the petitioner shall be entitled to a rebuttable presumption that the competition standard is satisfied . . .” A rebuttable presumption is created once certain facts are provided and establishes a conclusion that becomes conclusive if not overcome by the introduction of contrary evidence. The panel found that AT&T had presented the required evidence that demonstrated at least two competitive providers in each exchange and rate group under consideration, thereby establishing a rebuttable presumption under the statute.

AT&T submitted its required evidence in the form of a 1230-page Affidavit with attachments,<sup>20</sup> submitted by consultant David Weed, who identified each of 69 rate zone areas included in AT&T's Rate Groups 1 and 2. Mr. Weed identified an address located in each Base Rate and Zone Rate Area of each Rate Group, then verified through the providers' websites whether or not customers at each selected address can actually obtain service from the selected providers. Mr. Weed found that 59 of the 69 study areas had four (4) certificated competitive providers, and ten of the areas had three (3) certificated providers. Mr. Weed explained that each certificated competitive provider chosen<sup>21</sup> has applied for and been given a Certificate of Public Necessity and Convenience

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<sup>19</sup> Rebuttal Testimony of Paul Stinson, pp. 7-8 (July 22, 2010).

<sup>20</sup> Mr. Weed's Affidavit and its attachments are not available on the Intranet but are contained on a CD in the docket file.

<sup>21</sup> The competitive providers chosen by Mr. Weed for this analysis include dPi Teleconnect, MCI, Freedom Communications USA and Momentum Telecom.

(“CCN”) as a provider of facilities-based and resold telecommunications services in Tennessee by the Authority.<sup>22</sup> Mr. Weed’s Affidavit shows that all areas are also served by at least one wireless provider.<sup>23</sup>

By Joint Stipulation, the Consumer Advocate did not dispute this evidence but instead offered policy arguments as to why the Authority should not grant the *Petition*. The Consumer Advocate argued that the Authority can deny AT&T’s *Petition* even if it meets the competitive test, because the use of the word “may” rather than “shall” in the statute gives the TRA discretion to consider other factors.

The panel found that to prevail on its *Petition*, AT&T Tennessee must satisfy one statutory test – whether or not consumers can avail themselves of competitive alternatives for local telephone service. The panel further found that the evidence as presented demonstrates that customers can avoid price increases by purchasing bundled services from AT&T or by choosing among the available competitive alternatives.

The panel also found that while the use of the term “may” in Tenn. Code Ann. § 65-5-109(o)(1) indicates that the Authority has some discretion, that discretion is limited by other language in the statute which creates a rebuttable presumption upon a specific showing of specific facts. The panel noted that the statute contains no economic means test, nor does it allow the Authority to deny AT&T Tennessee’s *Petition* upon the expectation that it may raise rates. The General Assembly could have imposed a test of affordability if it wanted to in the passage of the Market Regulation Act, but it did not do so. The letters of Rep. McCormick and Rep. Turner provide additional support for the interpretation that the competitive test is the only criteria for determining whether to grant a petition requesting an extension of market regulation under Tenn. Code Ann. § 65-5-109(o). Based on the filings of the parties and these findings, the panel voted unanimously to grant the *Petition* of AT&T Tennessee.

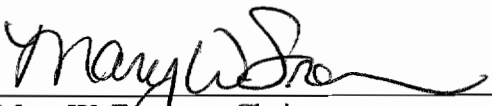
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<sup>22</sup> *Petition*, Weed Affidavit, p. 4 (May 28, 2010).


<sup>23</sup> The wireless providers include AT&T Wireless, Boost Mobile, Sprint and Verizon Wireless.

**IT IS THEREFORE ORDERED THAT:**

BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee's *Petition to Extend Market Regulation to Rate Groups 1 and 2* is hereby approved.

  
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Mary W. Freeman, Chairman

  
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Eddie Roberson, Director

  
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Sara Kyle, Director