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October 11, 2011

Filed electronically in
TRA Docket Room
10/11/2011

VIA HAND DELIVERY

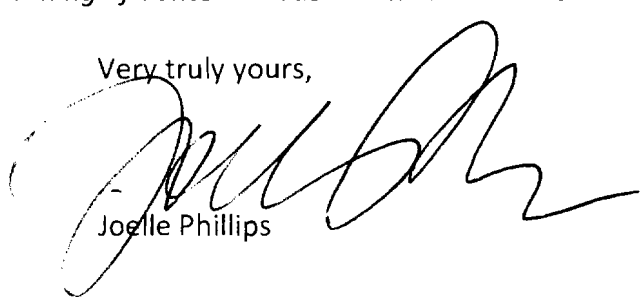
Hon. Kenneth C. Hill, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Complaint of Access Point, Inc. against AT&T Tennessee and AT&T Long
Distance Service for Unreasonable and Anti-Competitive Conduct*
Docket No. 11-00141

Dear Chairman Hill:

Enclosed are the original and four copies of AT&T's *Motion to Dismiss the Complaint
of Access Point and Opposition to Convening of Contested Case* in the referenced matter.

Very truly yours,


Joelle Phillips

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Complaint of Access Point, Inc. against AT&T Tennessee and AT&T Long Distance Service for Unreasonable and Anti-Competitive Conduct*

Docket No. 11-00141

**AT&T TENNESSEE'S MOTION TO DISMISS THE COMPLAINT OF
ACCESS POINT AND OPPOSITION TO CONVENING OF CONTESTED CASE**

AT&T Tennessee files this *Motion to Dismiss the Complaint of Access Point and Opposition to Convening of Contested Case* and respectfully shows the Authority as follows:

Overview of Case

On August 25, 2011, Access Point filed its *Complaint for Unreasonable and Anti-Competitive Conduct* in this matter, and AT&T filed its *Answer* on September 26, 2011. On October 10, 2011, the Authority added this matter to the agenda for its scheduled conference on October 17 for the purpose of considering whether to appoint a hearing officer. For the reasons discussed below, AT&T urges the Authority to decline to convene a contested case and instead dismiss the complaint.

Argument and Authority

Access Point purports to base its complaint on Tenn. Code Ann. §§ 65-5-104, 65-4-119, and 65-5-109(m). As a market regulated entity, AT&T is not subject to TRA authority premised upon either § 65-5-104 or § 65-4-119, which relate to authority jurisdiction over rates and

complaints and which were not preserved pursuant to the Market Regulation Act as applied to Market Regulated entities. The relevant section of § 65-5-109(m) states that the TRA “shall continue to exercise its jurisdiction in its role as a dispute resolution forum to hear complaints between certificated carriers.” By using the term “continue,” the General Assembly has made clear its intent that the act did not impart new or expanded jurisdiction in this regard, and, accordingly, the TRA’s handling of such carrier-to-carrier complaints should continue in a manner that is consistent with existing precedent.

Consistent with the established precedent, parties filing complaints before the Authority are not automatically entitled to a contested case proceeding. The Tennessee Supreme Court has found instead that the Authority has the discretion to choose whether or not to convene a contested case when a party brings a complaint. Specifically, the Court has stated “that the TRA has the power to convene a contested case hearing ***if it chooses to exercise the authority.***”¹ The Court has further held that “§ 65-5-203(a) does not impose a mandatory duty upon the TRA to convene a contested hearing in every case upon the filing of a written complaint.”²

For the reasons noted in AT&T’s *Answer*, Access Point’s complaint is without any legal merit. Rather, the complaint appears calculated solely as a tactic to pressure AT&T to bear the responsibility and burden of correcting a mistake that Access Point has admitted to making when it selected service for its end user. The complaint is so baseless that it does not warrant the investment of TRA resources.

¹ *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 763 (Tenn. 1998) (construing statutes later renumbered and included within Part 1 of Chapter 5 of Title 65).

² *Id.* at 764.

As the Supreme Court has explained in the case cited above, the TRA is the master of its resources – not complaining parties. The TRA is free, either in response to a motion such as this or on its own initiative, to refuse to convene a contested case. This case presents just such a case in which the Authority should exercise its discretion to refuse to convene a case. By doing so the Authority will preserve resources for actions that warrant the agency's attention and will send the message that parties will not obtain bargaining leverage merely by filing a complaint – especially when such complaint is baseless.

Finally, under Tennessee Rule of Civil Procedure 12.02(6), a motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint itself, and it is appropriate to dismiss a case when the allegations, even if taken as true, do not state a claim.³ This is certainly the case here, where Access Point alleges only that AT&T did not correct a mistake that Access Point made in selecting service. Even if that allegation was accepted as true for purposes of determining whether to dismiss the complaint, the allegation does not rise to the level of anticompetitive behavior, and Access Point can cite no authority under which the alleged actions could be found to present any claim.

Conclusion

Based on all of the foregoing grounds, AT&T Tennessee respectfully urges the Authority to refuse to convene a contested case and instead dismiss the complaint.

³ See, for example, *Lord v. Meharry Med. College Sch. of Dentistry*, 2005 Tenn. App. LEXIS 486 (Student's case seeking to have court change a failing grade was dismissed for failure to state a claim upon which relief could be granted).

Respectfully submitted,

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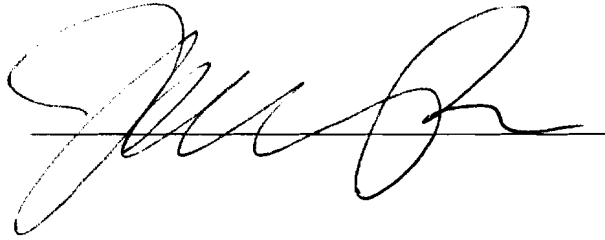
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CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2011, a copy of the foregoing document was served on the following, via the method indicated:

- ☐ Hand
- ☐ Mail
- ☐ Facsimile
- ☐ Overnight
- ☒ Electronic

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A handwritten signature in black ink, appearing to read "H. Walker", is written over a horizontal line.