BEFORE THE TENNESSEE REGULATORY AUTHORITY
AT NASHVILLE, TENNESSEE

IN RE: JOINT PETITION OF TEC COMPANIES AND THE CONSUMER ADVOCATE DIVISION FOR APPROVAL OF EARNINGS REVIEW SETTLEMENT	))))))	DOCKET NO. 99-00995

CONSUMER ADVOCATE DIVISION'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT DISMISSING AT&T'S COMPLAINT AGAINST TEC'S PROPOSED RATE DESIGN BECAUSE AT&T'S PROPOSED DESIGN IS NOT IN THE PUBLIC INTEREST OR, IN THE ALTERNATIVE, FOR TRANSFER TO THE ACCESS CHARGE REFORM DOCKET

The TEC Companies and the Consumer Advocate Division of the Office of Attorney General have submitted a proposed settlement to the Tennessee Regulatory Authority ("TRA") that would reduce TEC earnings and benefit TEC consumers. AT&T has sought to intervene in this matter in order to secure a reduction in the amount it pays to TEC in "access charges." Thus, AT&T alleges that the reduction in TEC earnings should include a reduction in access charges AT&T pays to TEC. Such a benefit to AT&T, however, is not in the public interest and cannot, as a matter of law, be "just and reasonable" as required under Tennessee law.

The Consumer Advocate Division has moved for summary judgment dismissing the complaint of AT&T on the following grounds:

1. There is no dispute of material fact that AT&T's proposed rate design benefits only AT&T and is not in the interest of TEC consumers . Accordingly, AT&T's proposed rate design is not "just and reasonable" as required under Tennessee law and is not in

the public interest and should be dismissed.

2. AT&T's claims are barred on the ground of unclean hands because even though AT&T has alleged that TEC's access rates are not "just and reasonable," there is no proof in the record that AT&T's own rates are just and reasonable or that AT&T's rate of return is unjust and unreasonable due to access charge payments to TEC. Unless and until AT&T can demonstrate to the TRA that its own rates are just and reasonable it should not be heard in its complaint that TEC's rates are not just and reasonable.

In the alternative, AT&T's complaint regarding access charges should be transferred to the Access Charge Reform Docket, No. 97-00889, which is now also being considered in the Universal Docket No. 97-00888.

STANDARD FOR SUMMARY JUDGMENT

When evaluating a motion for summary judgment, the TRA should consider "(1) whether a factual dispute exists; (2) whether the disputed fact is material to the outcome of the case; and (3) whether the disputed fact creates a genuine issue for trial." Byrd v. Hall, 847 S.W.2d 208, 214 (Tenn. 1993).

In the present case, the Affidavit of R. Terry Buckner of the Consumer Advocate Division establishes that there is no dispute as to the following material facts:

1. AT&T is not the only company paying access charges to TEC. BellSouth Telecommunications, Inc. ("BellSouth") paid approximately $3.6 million in intraLATA access and billing and collection charges to TEC in 1998 and TEC received $307,375 in interLATA access charge revenues for the year 1998 from AT&T and other companies.

2. If TEC's access charges were reduced 50% and AT&T flowed-through the reduction to its customers in Tennessee, the benefit would be only .16% off their interLATA long distance bill. To put this in perspective, for an AT&T customer to receive a one cent ("$.01") benefit, the customer would have to make $6.25 in interLATA long distance calls. To receive a $1.00 benefit, the customer would have to make $625 in interLATA long distance calls.

3. Under the TEC companies' Dialing Parity plans, access charges for interLATA and intraLATA long distance calls are the same. As a result of this equalization, the amount paid by BellSouth to the TEC companies for originating and terminating intraLATA long distance calls was reduced approximately $646,000 annually. BellSouth did not voluntarily reduce rates and the TRA did not order BellSouth to reduce rates to flow-through these savings to Tennessee customers.

4. If the TEC companies' access rates are reduced, as proposed by AT&T, there will be a much greater reduction in the amount billed to BellSouth and other non-parties for the origination and termination of intraLATA long distance calls. Based on the experience with the reduction that occurred when the Dialing Parity plans were adopted, there is no assurance that BellSouth or other non-parties to this proceeding will voluntarily or be required to flow-through any intraLATA access charge reduction to Tennessee customers.

5. Under current rates, the TEC companies will collect approximately $376,000 annually from AT&T and other carriers for interLATA access charges. If the interLATA access charges paid to TEC by AT&T were reduced by 50%, the impact would be a reduction

in AT&T's cost of approximately $188,000 and a forfeiture of nearly $1,000,000 of TEC's annual over-earnings to BellSouth and other non-parties. Consequently, the $1,000,000 of the reduction in the TEC companies' over-earnings would not benefit TEC's customers and would not immediately, if ever, benefit other consumers or the public interest.

Affidavit of R.Terry Buckner at Paragraphs 10-14, attached hereto as **Exhibit A**.

The Consumer Advocate Division and TEC have offered a Proposed Settlement that returns a portion of TEC's overearnings to TEC customers. In its complaint, AT&T proposes that the amount to be returned to the customers be used to reduce access charges paid by AT&T instead.

AT&T may dispute the amount of money at issue, that is, that the TEC overearnings are more or less than the amount stipulated in the Proposed Settlement. The amount that would go to either TEC customers or AT&T, however, is not material to the dispute over access charges and the relationship between the benefit to AT&T and the costs to consumers. Thus, whether the amount of money to go to TEC customers or AT&T is $1.4 million or $1.6 million makes no difference in determining whether the Consumer Advocate Division-TEC proposal or the AT&T proposal should prevail under the state law which requires that rates be just and reasonable and in the public interest. Accordingly, this issue is proper for summary judgment.

ARGUMENT

1. AT&T'S PROPOSED RATE DESIGN IS NOT "JUST AND REASONABLE" AND IS NOT IN THE PUBLIC INTEREST AS REQUIRED BY TENNESSEE LAW

In its Petition for Intervention, AT&T makes it clear that the relief it is seeking in this case is a reduction in access charges it pays to TEC:

> The access charges of the TEC Companies are greatly in excess of the cost of providing such services. Such charges cannot be justified as necessary for the support of residential services, or for any legitimate purpose. No rational basis exists for imposing such charges. Their imposition is an arbitrary exaction from the ratepayers of AT&T, serving only as a subsidy to TEC.

AT&T Petition for Intervention at Paragraph 3.

AT&T's proposed reduction of access charges, however, would be of no benefit to the customers of TEC. It is estimated that for this year TEC will receive a total of $376,000 in interLATA switched access charges. Affidavit of R.Terry Buckner at Paragraph 14, attached hereto as **Exhibit A**. If the access charges were reduced 50%, customers in **Tennessee** would receive a benefit of only .16% or less off their bill, or less than 2/10th of 1 cent for each dollar of their bill. Affidavit of R.Terry Buckner at Paragraph 11, attached hereto as **Exhibit A**. To put this in perspective, for an AT&T customer to receive a one cent ("$.01") benefit, the customer would have to make $6.25 in interLATA long distance calls. To receive a $1.00 benefit, the customer would have to make $625 in interLATA long distance calls. Affidavit of R.Terry Buckner at Paragraph 11, attached hereto as **Exhibit A**. The Consumer Advocate Division maintains that a rate design that is based on such a minuscule benefit to the customers of TEC and a higher cost to TEC consumers cannot be "just and reasonable" as required under Tennessee law.

Under Tennessee law, all tariffed rates must be "just and reasonable:"

> **65-5-201. Power to fix rates of public utilities.** --The Tennessee regulatory authority has the power after hearing upon notice, by order in writing, to fix <u>just and reasonable</u>

> individual rates, joint rates, tolls, fares, charges or schedules thereof, as well as commutation, mileage, and other special rates which shall be imposed, observed, and followed thereafter by any public utility as defined in § 65-4-101, whenever the authority shall determine any existing individual rate, joint rate, toll, fare, charge, or schedule thereof or commutation, mileage, or other special rates to be unjust, unreasonable, excessive, insufficient, or unjustly discriminatory or preferential, howsoever the same may have heretofore been fixed or established. In fixing such rates, joint rates, tolls, fares, charges or schedules, or commutation, mileage or other special rates, the authority shall take into account the safety, adequacy and efficiency or lack thereof of the service or services furnished by the public utility.

Tenn. Code Ann. § 65-5-201(emphasis added).

In addition, the Tennessee Legislature declared in Tenn. Code Ann. Section 65-4-123 ("Declaration of Telecommunications Services Policy") that TRA regulation "shall protect the interests of consumers:"

> To that end, the regulation of telecommunications services and telecommunications service providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider . . . .

This directive from the Legislature requires, in effect, that all regulation, including the approval of TEC's rate design, be in the public interest. AT&T's proposal to reduce access charges, however, benefits only AT&T and certain non-parties. Accordingly, it is not in the public interest.

Furthermore, AT&T is not the only company paying access charges to TEC. In 1998 BellSouth Telecommunications, Inc. ("BellSouth") paid approximately $3.6 million to TEC in intraLATA access charges and billing and collection charges. Affidavit of R. Terry Buckner at Paragraph 10. Thus, if interLATA access charges received by TEC were reduced 50% to AT&T, approximately an additional $1 million of TEC's overearnings would be forfeited to BellSouth or other non-parties through reduced intraLATA access charges. Affidavit of R. Terry Buckner at

Paragraph 13-14. In addition, over-earnings paid out to BellSouth or other non-parties would be money not paid out to TEC customers. Id. In their proposed settlement agreement, the Consumer Advocate Division and TEC stipulated that TEC's overearnings are $6.4 million. Obviously, AT&T's proposed plan would take a significant portion of the amount available to TEC customers.

Moreover, it is possible that BellSouth may argue that it does not have to flow-through the access charge reduction to Tennessee consumers. Affidavit of R. Terry Buckner at Paragraph 12. TEC has reduced the amount that it collects from BellSouth when Dialing Parity rates were adopted ("$646,260 per year") and the TRA did not require BellSouth to reduce its intraLATA long distance rates to reflect the reduction. Id. The Consumer Advocate Division would dispute that position, but it nevertheless is a factor to be considered when evaluating the impact of an access charge reduction.

The settlement agreement as proposed by the Consumer Advocate Division and TEC would return all of the $6.4 million of overearnings to TEC customers or assumes that they will otherwise benefit. AT&T's plan would return $00.00 to each TEC customer. Any rate that provides such a minuscule return to Tennessee customers as AT&T proposes cannot be just and reasonable or in the public interest and cannot serve as a basis for any claim in the present action.

2. AT&T'S CLAIMS ARE BARRED ON THE GROUND OF UNCLEAN HANDS BECAUSE AT&T HAS SUBMITTED NO PROOF THAT ITS OWN RATES ARE JUST AND REASONABLE

Under Tennessee law, a party's claims may be denied if that party appears before the court with unclean hands. Southern Coal & Coke Co. v. Beech Grove Mining Co., 381 S.W.2d 299, 303 (Tenn. App. 1963). In the present case, AT&T is appearing before the TRA with

unclean hands because even though AT&T has alleged that TEC's access rates are not "just and reasonable," there is no proof in the record that AT&T's own rates are just and reasonable. In particular, in a recent case before this Authority concerning AT&T's directory assistance charge, AT&T explicitly refused to provide the Consumer Advocate Division with any information concerning the justness and reasonableness of the proposed charge. Accordingly, the TRA should dismiss AT&T's complaint.

Before the present docket, No. 99-00995, was convened, AT&T filed a Petition for the Convening of a Contested Case Concerning the Regulation of the TEC Companies, December 10, 1999, in which AT&T alleged that the TEC access rates were not just and reasonable:

> 26. The existing and proposed access charges of the TEC Companies are not just and reasonable, but are greatly in excess of the cost of providing such services and are not necessary or appropriate for any purposes but merely constitute a subsidy to TEC.

Petition for the Convening of a Contested Case at Paragraph 26 (consolidated with Docket 99-00995 on February 1, 2000).

In a recent case, TRA Docket No. 99-00757 (AT&T's Tariff to Implement $1.40 Directory Assistance Charge), the Consumer Advocate Division sought to determine the justness and reasonableness of AT&T's proposed $1.40 directory assistance charge, particularly in light of the fact that AT&T is charging $0.99 for directory assistance in other instances. AT&T, however, refused to provide proof of the justness and reasonableness of the proposed charge.

It is a maxim of equity that those who ask that equity be done must first do equity themselves. Gibson's Suits in Chancery, Sixth Edition (Inman), Sections 42 and 51. AT&T, however, has not shown that its own rates do not greatly exceed cost, particularly its directory assistance rate. Before the TRA hears AT&T's complaint that TEC's rates exceed cost, AT&T

must first make sure that its own house is in order. Accordingly, the TRA should dismiss AT&T's complaint on the ground of unclean hands.

3. IN THE ALTERNATIVE, AT&T's COMPLAINT REGARDING ACCESS CHARGES SHOULD BE TRANSFERRED TO THE ACCESS CHARGE REFORM DOCKET

From AT&T's complaint as set forth in its Petition for Intervention, it is clear that AT&T's purpose in intervening is to reduce the access charges it pays to TEC. This access charge issue, however, would be better handled in the Access Charge Reform Docket, No. 97-00889, where all access charges, not just those involving one company, are at issue. Significantly, this Access Charge Reform Docket was initiated by AT&T and bears the caption: Petition of AT&T Communications of the South Central States, Inc. for the Convening of a Generic Contested Case for the Purpose of Access Charge Reform. Clearly, AT&T has recognized that access charges are best addressed on a state-wide rather than a piecemeal basis.

By an Order dated May 25, 1999, the TRA ordered that certain issues in the Access Charge Reform Docket should be considered in Universal Service Docket, No. 97-00888. A copy of the Order of May 25, 1999 is attached hereto as **Exhibit B**. Thus, the TRA has already recognized that changing access rates has an impact on other broader issues.

If the TRA follows AT&T's plan and reviews access charges in the present docket, there is a strong likelihood that precedents may be set with regard to access charges that would prejudice companies not parties to the present case.

In addition, hearing the access charge issue would interject a new, complicated matter into the present case. In particular, AT&T's complaint is aimed at determining the cost of providing access charges. If, therefore, AT&T's complaint is allowed this case will have to

involve extensive evidence on the cost of specific telephone services, an area of proof completely extraneous to the issue of TEC's overearnings.

Accordingly, if AT&T's access charge claim is not dismissed, it should be transferred to the Access Charge Reform Docket, No. 97-00889, which is now also being considered in the Universal Docket No. 97-00888.

CONCLUSION

For the foregoing reasons, the TRA should dismiss AT&T's complaint that TEC's access charges should be reduced in order to benefit AT&T. In the alternative, if AT&T's access charge claim is not dismissed, it should be transferred to the Access Charge Reform Docket, No. 97-00889.

Respectfully submitted,

Vance L. Broemel

Vance L. Broemel, 11421
Consumer Advocate Division
Office of the Attorney General & Reporter
425 Fifth Avenue North, Second Floor
Nashville, TN. 37243-0500
615-741-8700

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Memorandum in Support of Motion for Summary Judgment has been faxed and or mailed postage prepaid to the parties listed below this 7th day of March, 2000.

Val Sanford, Esq.
Gullett, Sanford, Robinson & Martin, PLLC

230 Fourth Avenue North, 3rd Floor
P.O. Box 198888
Nashville, Tennessee 37219-8888

T.G. Pappas, Esq.
Dale Grimes, Esq.
Bass, Berry & Sims PLC
2700 First American Center
Nashville, Tennessee 37238

Vance L. Broemel

Vance L. Broemel