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March 23, 2000

VIA HAND DELIVERY

Mr. David Waddell
Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37201

In Re: *Joint Petition of Crockett Telephone, Inc., People's Telephone Company, West Tennessee Telephone Company, Inc. and the Consumer Advocate Division of the Office of the Attorney General for the Approval and Implementation of Earnings Review Settlement*
Docket No. 99-00995

Dear Mr. Waddell:

Enclosed for filing are the original and thirteen copies of the Reply of AT&T Communications of the South Central States, Inc. to "Consumer Advocate Division's 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." Copies are being served on counsel for parties of record.

Yours very truly,

Val Sanford

VS/ghc
Enclosures
cc: Vance L. Broemel
T. G. Pappas and R. Dale Grimes
James P. Lamoureux
Garry Sharp

127623.2

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: *Joint Petition of TEC Companies and the Consumer Advocate Division for Approval of Earnings Review Settlement*

Docket No. 99-00995

REPLY OF AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC. TO "CONSUMER ADVOCATE DIVISION'S 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"

AT&T Communications of the South Central States, Inc. ("AT&T), for its reply to the "Consumer Advocate Division's Motion for Summary 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" states that the motion of the Consumer Advocate Division ("CAD") is without merit and should be denied, on the grounds that: (1) as a matter of law, the filing of a "Motion for Summary Judgment" against an intervenor is not authorized in contested cases; (2) even if such a filing is authorized, the grounds stated by the CAD are without merit; (3) in any event, such a motion should not be considered until after AT&T has been afforded an opportunity to conduct and complete discovery; and (4) this case is separate and distinct from the generic access

charge reform case and should be decided independently of that case. Each of these grounds will be addressed in turn.

I. AS A MATTER OF LAW, THE FILING OF A "MOTION FOR SUMMARY JUDGMENT" AGAINST AN INTERVENOR IS NOT AUTHORIZED IN CONTESTED CASES BEFORE THE TENNESSEE REGULATORY AUTHORITY.

"Summary Judgment" is a procedure authorized pursuant to Rule 56 of the Tennessee Rules of Civil Procedure. Those rules apply to the trial of cases in the Circuit and Chancery Courts, or in courts exercising the jurisdiction of Circuit or Chancery Courts; Rule 1, Tennessee Rules of Civil Procedure. Rules 56.01 and 56.02 identify who can file such motions. Rule 56.03 requires the moving party to file a "separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial"; and requires the opposing party to file a response to that separate statement. Rule 56.04 provides that: "subject to the moving party's compliance with Rule 56.03, the judgment sought shall be rendered forthwith, if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."

The TRA is not a court and does not exercise the jurisdiction of a court. This proceeding is a contested case. The procedures in contested cases are governed by T.C.A. §§4-5-301 *et seq.* No statute, and no TRA rule, authorizes the filing of motions for summary judgment in contested cases.

The TRA does not render judgments, as a court does. The TRA enters "Final Orders" pursuant to T.C.A. §4-5-314. Final Orders must be based not only on conclusions of law and findings of fact, but also on "policy reasons"; T.C.A. §4-5-314(c). The TRA, as an administrative agency acting pursuant to the powers delegated to it by statute, implements general legislative policies. The procedures for trials in court, including motions for summary judgment, are not designed or appropriate for the determination of issues of administrative policy. Motions for summary judgment are no more appropriate than motions for a directed verdict.

There is no authority supporting the filing of a motion for summary judgment as filed by the CAD in this case.

II. EVEN IF THE FILING OF A MOTION FOR SUMMARY JUDGMENT WERE AUTHORIZED, THE GROUNDS STATED BY THE CAD ARE WITHOUT MERIT.

First, the CAD's Motion does not even purport to show that the CAD is entitled to judgment as a matter of law. Instead, the CAD asserts policy arguments as to why AT&T's "Proposal" should be denied.

AT&T has made no "Proposal." AT&T has sought, and been granted, intervention in this case pursuant to T.C.A. §4-5-310. In order to show that its legal rights, duties and other interests will be affected by the results of this proceeding, AT&T alleged that it pays access charges to each of the TEC Companies; that the access charges of the TEC Companies are greatly in excess of the costs of providing such services; that the rate design of the proposed settlement ignores the interests

of AT&T; and that no rational basis exists for imposing access charges at the rates imposed by the TEC Companies.

For some reason the CAD is desperately concerned to keep AT&T out of this case. First, the CAD filed a "Motion to Dismiss" AT&T's Petition for Intervention, which was denied. Then, the CAD filed this "Motion for Summary Judgment" focused on attacking AT&T.

Under Rule 56.04, summary judgment is to be granted when "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." (Emphasis added).

As the Court stated in Byrd v. Hall, 847 S.W.2d 208 (Tenn. 1993), at page 216:

> Preparing the moving and opposition documents will require the parties to analyze the case, define the legal and factual issues with a high degree of precision, and marshall the relevant evidence. However, in order to fulfill its intended utility, Rule 56 must be properly invoked by the parties and properly applied by the courts. Appropriate application of the Rule is more likely to be achieved if litigants and courts alike keep in mind that the purpose of a summary judgment proceeding is not the fining of facts, the resolution of disputed, material facts, or the determination of conflicting inferences reasonably to be drawn from those facts. "The purpose is to resolve controlling issues of law, and that alone." (Footnote omitted).

All the CAD's arguments in this regard, and Mr. Buckner's supporting affidavit, are based not on law, but on rate design policy under the general standard of "public interest." Indeed, rate design under rate base rate of return regulation is

largely a matter of sound regulatory judgment and discretion, to be exercised on the basis of all relevant circumstances shown by the record and the agency's own expertise, subject to any specific statutory limitations and to the general limitation that its decision must not be arbitrary or capricious, but must have a rational basis.

Thus, in this case, in order to test the soundness of the rate design proposed in the Settlement Agreement between the CAD and TEC Companies, it is necessary to consider all relevant circumstances, not just the circumstances set forth in Mr. Buckner's affidavit. For example, it will be necessary to consider the basis for access charges imposed on IXCs by the TEC Companies, including the Megacom adjustment; the basis for the treatment of compensation to the TEC Companies for intraLATA calls; the scope and extent of the requirements for dialing parity; the cost of the services of the TEC Companies; the basis for the CAD's position; and many other circumstances.

The TRA's decision in this case must be based on a full and complete record, justifying not only appropriate conclusions of law and findings of fact, but also appropriate, sound policy reasons. The CAD's efforts to prevent the TRA from having such a full and complete record before it are without merit and should be denied.

Second, the CAD's argument that "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'" is frivolous. No statute, rule, policy or principle requires AT&T to show that its rates are "just and reasonable" in order for it to intervene in a

contested case. The CAD's argument in this regard is based on the failure of the CAD, once again, to recognize that regulatory procedures are not the sole, or even the preferable way to determine that rates are just and reasonable. The TRA rejected the CAD's arguments in the Directory Assistance case, as the TPSC rejected essentially the same arguments in the adoption of the IXC Rules. Regulatory procedures are a substitute for competition, and competition is the preferable way of assuring that rates or prices are "just and reasonable."

Indeed, the only case the CAD cites in this regard, Southern Coal & Coke Co. v. Beech Grove Mining Co., 53 Tenn. App. 108, 381 S.W.2d 289 (1963) shows that the CAD has not correctly stated the law as to the equitable defense of unclean hands. For a litigant to have unclean hands requires unconscientious conduct, bad faith or a wrong in the particular transaction. Nothing the CAD alleges rises to that level. AT&T does not have "unclean hands."

III. IN ANY EVENT A MOTION FOR SUMMARY JUDGMENT SHOULD NOT BE CONSIDERED UNTIL THE OPPOSING PARTY HAS HAD THE OPPORTUNITIY TO COMPLETE DISCOVERY.

Here, a pre-hearing officer has been designated, but no pre-hearing conference has been held. No issues have been defined. No discovery schedule has been set, and no discovery completed.[1] The filing of a motion for summary judgment at this stage of this proceeding, assuming that such a procedure was proper at all, is premature.

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[1] A pre-hearing conference was set for March 17, 2000, but has been postponed. In order to expedite the progress of the case, AT&T is serving contemporaneously its first discovery requests.

IV. THIS CASE IS SEPARATE AND DISTINCT FROM THE GENERIC ACCESS CHARGE REFORM CASE AND SHOULD BE DECIDED INDEPENDENTLY OF THAT CASE.

This case involves the review of the earnings of the three TEC Companies. The CAD and the TEC Companies asked that the earnings review be resolved by the approval of an agreement they have reached. There is no question but that the TEC Companies have been earning well in excess of their authorized rate of return for the years 1996, 1997 and 1998; and were forecast to continue to overearn during 1999, 2000 and 2001. The CAD and the TEC Companies have agreed on a rate of return and on the total amount of the forecast overearnings of the TEC Companies. They have further agreed on a rate design to make revenue adjustments to bring the forecast earnings of the TEC Companies down to the forecast proper rate of return. That proposed rate design does not reduce the access charges paid by AT&T to the TEC Companies, even though those charges are far above the cost of providing such services.[2]

Thus, this case relates only to the specific circumstances of the TEC Companies pertinent to this earnings review proceeding. AT&T's interest in this proceeding is the same as it would be were there no other proceeding involving access charges. This proceeding relates only to the TEC Companies, a proper forecast rate of return, their overearnings and a proper rate design to adjust revenues for such overearnings.

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2 The CAD does not purport to justify the level of access charges.

The Generic Access Charge Proceeding, Docket No. 97-00889, is concerned with general policies applicable to all LECs, not to the overearnings of any particular LEC. The TRA's Order in that proceeding, dated May 25, 1999 and filed as an Exhibit to the CAD's Motion, holds that any general reduction in access charges should be done in the rate rebalancing phase of the generic universal service proceeding, along with all other potential sources of universal service support.

Nothing in that Order, or in any other Order precludes the reduction of the access charges of any specific LEC outside the generic access charge proceeding. In fact, the access charges of BellSouth Telecommunications, Inc. have been reduced significantly. This proceeding and the generic access charge proceeding have different purposes, involve different parties, and raise different issues.

The only effect a decision in this case may have on a decision in the generic access charge reform case is that if the settlement agreement is approved and rates for "business access line" service and "residence access line" service are reduced as proposed, then rebalancing for the purpose of a universal service mechanism would be more drastic with respect to the TEC Companies' customers. That fact is particularly relevant as to the rate design aspect of this case.

What would be a proper rate design for the TEC Companies to adopt for the adjustment of their overearnings and whether the access charges of the TEC Companies should be reduced in this case on the basis of the facts and circumstances of this case are issues to be decided in this case. Indeed, refusing to

consider access charges in the rate design aspect of this case would be a decision on the merits of this case. If such a decision were to be made, AT&T could not contend in the generic access charge reform case that the decision in this case was wrong; and AT&T would be precluded from ever obtaining a determination of the particular issues arising on this earnings review. By the alternative relief it seeks, the CAD is simply pursuing its goal of precluding AT&T from participating in this case.

The alternative relief sought by the CAD should be denied.

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CERTIFICATE OF SERVICE

I, Val Sanford, hereby certify that I have on this 27th day of March, 2000 served a copy of the foregoing Reply of AT&T Communications of the South Central States, Inc. on the following persons, via Hand Delivery or First Class Mail, postage pre-paid, addressed as follows.

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