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October 4, 2001

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*
Docket No. 01-00362

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Response to the Motion of AT&T Communications of the South Central States, Inc.; TCG MidSouth, Inc.; and the Southeastern Competitive Carriers Association to Compel Responses by BellSouth Telecommunications, Inc. to Their First Set of Interrogatories and First Set of Requests for Production of Documents to BellSouth. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH:ch
Enclosure

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*

Docket No. 01-00362

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO THE MOTION OF AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC., TCG MIDSOUTH, INC., AND THE SOUTHEASTERN COMPETITIVE CARRIERS ASSOCIATION TO COMPEL RESPONSES BY BELLSOUTH TELECOMMUNICATIONS, INC. TO THEIR FIRST SET OF INTERROGATORIES AND FIRST SET OF REQUESTS FOR PRODUCTION OF DOCUMENTS TO BELLSOUTH

BellSouth Telecommunications, Inc. ("BellSouth") hereby responds to AT&T's Motion to Compel and states as follows:

GENERAL RESPONSE

Despite the intervening carriers' assertions, the bounds of discovery in Tennessee are not limitless. "The scope of discovery, while broad, is not unlimited." *Steinkerchner v. Provident Life & Accident Insur. Co.*, 1999 Tenn. App. LEXIS 639 at *5-6 (Tenn. Ct. App. Sept. 22, 1999); *see also Hickman v. Taylor*, 329 U.S. 495, 508 (1947) ("But discovery, like all matters of procedure, has ultimate and necessary boundaries . . . limitations come into existence when the inquiry touches upon the irrelevant or encroaches upon the recognized domains of privilege."); *Micro Motion, Inc. v. Kane Steel Co., Inc.*, 894 F.2d 1318, 1322 (Fed. Cir. 1990) (citing *Hickman v. Taylor*, 329 U.S. 495, 507 (1947)) ("While the

Federal Rules of Civil Procedure unquestionably allow broad discovery, a right to discovery is not unlimited"). Important discovery limitations appear on the face of the rules governing discovery. Rule 26.02(1) requires that the matters sought to be discovered must be relevant to a claim or defense in the litigation. Tenn.R.Civ.P. 26.02(1). Rule 26.02 also provides that the court may limit the frequency or extent of use of discovery "if it determines that: . . .the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." Tenn.R.Civ.P. 26.02(1)(iii). Significantly, Rule 26.07 requires the party or the attorney of record seeking discovery to certify that a "reasonable inquiry" has been made that, *inter alia*, the discovery is not to harass, needlessly increase the cost of litigation, or cause unreasonable or undue burden or expense. Tenn.R.Civ.P. 26.07.

Courts across the country consistently have blocked efforts by parties seeking to discover items outside the permissible scope of discovery. *See, e.g., Zuk v. Eastern Pa. Psychiatric Inst. of Med. College of Pa.*, 103 F.3d 294, 299 (3d Cir. 1996) ("Discovery is not intended as a fishing expedition permitting the speculative pleading of a case first and then pursuing discovery to support it; the plaintiff must have some basis in fact for the action."); *Micro Motion, Inc.*, 894 F.2d at 1327 ("The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable without discovery, not to find out if it has any basis for a claim. That the discovery might uncover evidence showing that a

plaintiff has a legitimate claim does not justify the discovery requests.") (citations omitted); *Strait v. Mehlenbacher*, 526 F.Supp. 581, 584 (W.D.N.Y. 1981) ("It appears that defendants are attempting to utilize the discovery rules as a 'fishing expedition' to find some basis of their civil rights claim. This is plainly in violation of the Federal Rules."); *LaMar Printing Inc. v. Minuteman Press Int'l, Inc.*, 1981 U.S. Dist. LEXIS 12490 at * 8 (N.D.Ga. May 14, 1981) ("Discovery under the Federal Rules of Civil Procedure is intended to narrow the scope of the issues and to prevent surprise at trial; it is not intended to allow a plaintiff to go on a fishing expedition to see if the speculative complaint that he has filed has any basis in fact."). The Court of Appeals of Missouri has stated:

> Discovery is not a matter of right. Despite the liberality with which this rule should be construed, we do not think that the granting of the order requested follows as a matter of course and is a mere automatic procedure; nor was the rule intended to approve indiscriminate inspection of papers and records of the opposing party. The rule obviously contemplates an exercise of judgment by the court.

Black & White Cabs of St. Louis, Inc. v. Smith, 370 S.W.2d 669, 677-78 (Mo. Ct. App. 1963) (citations omitted).

As outlined in Rule 26.02(1) of the Tennessee Rules of Civil Procedure, discovery is only permissible as to relevant matters. It has been widely recognized that "[w]hile the standard of relevancy is a liberal one, it is not so liberal as to allow a party to roam in shadow zones of relevancy and to explore matter which does not appear germane merely on the theory that it might become so." *In Re*

Fontaine, 402 F.Supp. 1219, 1221 (E.D.N.Y. 1975) (internal quotations and citations omitted).

Contrary to the intervening carriers' proposition and the federal cases they cite, Tennessee requires the party who is seeking discovery to demonstrate that the items sought are relevant. In *Roberts v. Blount Memorial Hospital*, 963 S.W.2d 744 (Tenn. Ct. App. 1997), the Tennessee Court of Appeals rejected the plaintiff's contention that the trial court should have compelled responses to the plaintiff's discovery requests: "[W]e are of the opinion that the plaintiff failed to demonstrate that such discovery is within the purview of Rule 26.02(1) since no relevance to the case or claim under consideration has been shown." *Id.* at 747. Under this authority, it is not BellSouth's burden to establish non-relevance, rather the intervening carriers bear the burden of demonstrating that the items it seeks are relevant.

The case primarily relied upon by the intervening carriers to falsely suggest that BellSouth must bear the burden of proving irrelevance, *Teichgraeber v. Memorial Union Corp.*, 932 F.Supp. 1263, 1265 n. 1 (D. Kan. 1996), admits that there are multiple approaches on the burden of proving relevance in discovery disputes and expressly declined to adopt one approach. One of the approaches outlined by the Kansas federal court is the burden-shifting approach endorsed in Tennessee in *Roberts* where, after an objection has been made to discovery, the burden is on the party who is seeking discovery to demonstrate relevance. *Id.* (citing *Republic Envir. Systems, Inc. v. Reichhold Chemicals, Inc.*, 157 F.R.D. 351,

352 (E.D.Pa. 1994). Other courts also have adopted the burden-shifting approach used by Tennessee. *See, e.g., Black & White Cabs of St. Louis, Inc.*, 370 S.W.2d at 678 ("[T]he movant, before he is entitled to a sweeping discovery, must show in his motion or otherwise reasonable grounds to believe that the records sought are relevant to the subject matter involved in the pending action."). The Court of Appeals for the Eighth Circuit has opined: "While the standard of relevance in the context of discovery is broader than in the context of admissibility . . . , this often intoned legal tenet should not be misapplied so as to allow fishing expeditions in discovery. Some threshold showing of relevance must be made before parties are required to open wide the doors of discovery and to produce a variety of information which does not reasonably bear upon the issues in the case." *Hofer v. Mack Trucks, Inc.*, 981 F.2d 377, 380 (8th Cir. 1992) (citations omitted).

Tennessee also recognizes that some discovery requests may be unduly burdensome and parties deserve protection from such requests. Tenn.R.Civ.P. 26.02 (1); *see also Duncan v. Duncan*, 789 S.W.2d 557, 560-61 (Tenn. Ct. App. 1990) ("A trial court should balance the competing interests and hardships involved when asked to limit discovery and should consider whether less burdensome means for acquiring the requested information are available."). Rule 26.02(1) sets forth a balancing test wherein the court must weigh the burdens and expense of responding to discovery against the needs of the case, the amount in controversy and the importance of the issues to which the discovery relates. Tenn.R.Civ.P. 26.02(1). As stated by the Federal Circuit Court, "*[e]ven if relevant*, discovery is

not permitted where no need is shown, or compliance would be unduly burdensome, or where harm to the person from whom discovery is sought outweighs the need of the person seeking discovery of the information." *MicroMotion, Inc.*, 894 F.2d at 1323 (emphasis in original). Courts do not hesitate to limit discovery where the cost or volume of the production would outweigh the benefit gained. *Munoz-Santana v. U.S. I.N.S.*, 742 F.2d 561, 563-64 (9th Cir. 1984) (district court abused its discretion in entering discovery order in light of cost of further production of requested materials because cost of further discovery outweighed need for information); *Rodriguez v. American Telephone & Telegraph Co.*, 1990 U.S. Dist. LEXIS 18408 at * 4 (D.N.J. Oct. 1, 1990) ("unbridled production, especially on a company-wide basis, would be unduly burdensome to the defendant."); *Berg v. Des Moines General Hospital Co.*, 456 N.W.2d 173, 177 (Iowa 1990) ("[W]here the nature and complexity of the inquiry show compliance with the discovery request would require an unreasonable amount of time and an unreasonable expenditure of money, a protective order is appropriate."). Accordingly, the Tennessee Regulatory Authority has the responsibility and duty to determine whether the discovery requests are so onerous as to outweigh any benefits that may be gained, considering the importance of the issues that would be affected by the production of materials.

SPECIFIC OBJECTIONS

Interrogatory No. 3:

BellSouth continues to object to Interrogatory No. 3 on the grounds that it is overly broad and unduly burdensome. In the spirit of good faith and compromise, however, BellSouth is willing to respond to a more narrow request and provide the name of the subject matter experts that are structurally one level below Mr. Milton McElroy and Ms. Kathy Wilson-Chu. Apparently recognizing that its Request was overbroad, AT&T agreed to narrow its response in precisely this manner in North Carolina. *See* Letter from Tracy Vanek to Lisa Foshee, 8/10/01, p. 3, bullet 2).[1] It is disingenuous for AT&T to now complain to this Authority that BellSouth's answer is insufficient.

In addition, AT&T's Motion to compel on this request violates the Agreement between BellSouth and AT&T on discovery. Specifically, the parties agreed as follows:

> In exchange for BellSouth's agreement to stipulate to the admission of its discovery responses in any of the nine states in BellSouth's region, AT&T agreed not to serve identical discovery requests in all nine states. AT&T and BellSouth agreed that AT&T will serve specific discovery requests it deems appropriate in specific states.

There is nothing Tennessee-specific about this Request. In fact, as stated above, it is the identical request on which the parties reached agreement in North Carolina.

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[1] The agreement between the parties reads as follows: "AT&T agreed to limit the scope of sections d-h of Interrogatory No. 7, requesting that BellSouth identify subject matter experts that are structurally one level below Mr. McElroy and Ms. Wilson-Chu in the tests and describe the nature and time period of their involvement in the specified tasks. BellSouth agreed to supplement its response."

AT&T should not be permitted to breach its agreements under the guise of a motion to compel.

Finally, the request is overbroad. It would require BellSouth to reconstruct a myriad of names over an extended period of time. This is not information BellSouth maintains in any centralized way. It is overburdensome to ask BellSouth to reconstruct this information, particularly in light of its questionable relevance. Many people joined for only one call on a particular topic, and thus have very limited knowledge of the test. The names BellSouth already agreed to provide are the people with the most knowledge on their specific area of the test. The other names sought by AT&T are not relevant, and BellSouth should not be required to compile them.

Interrogatory No. 7:

BellSouth continues to object to this Request as overbroad and unduly burdensome in that BellSouth should not be required to undertake a comparison that AT&T can do itself from the publicly available documents. AT&T's position that BellSouth has unique information about "how the differences are meaningful as they relate to data reporting and test results" makes no sense. Not surprisingly, AT&T offers no explanation as what exactly "data reporting and test results" means, most likely because the phrase is meaningless. To the extent AT&T is interested in the results of the test, the data collected during the tests and the results of the tests are public documents that AT&T can review itself. If AT&T believes there is some correlation between differences between the Florida and

Georgia tests on the test results, AT&T can look at the public documents and make that argument. The discovery rules do not in any way obligate BellSouth to create documents or comparisons simply because AT&T does not want to spend the time looking at the test plans itself. AT&T's request is utterly outside the scope of permissible discovery.

Interrogatory Nos. 21 and 23:

BellSouth objects to these interrogatories on the grounds that AT&T served these interrogatories (as AT&T admits in its Motion) in violation of its agreement with BellSouth described above. That being said, BellSouth will respond to AT&T by referencing its responses to NC Requests 30 and 35.

Interrogatory No. 53:

BellSouth continues to object to this Request on the grounds that it is not relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. BellSouth admits that it paid PWC for its work on BellSouth's behalf. The amounts BellSouth paid are not relevant. If AT&T wants to make the ridiculous argument that because BellSouth paid PWC, PWC is somehow biased, AT&T can do so. The argument is not dependent, however, on the amount BellSouth paid PWC.

Request for Production 2:

BellSouth continues to object to this Request on the grounds that it is not relevant to this proceeding nor reasonably calculated to lead to the discovery of admissible evidence. BellSouth admits that it paid KPMG for its work on

BellSouth's behalf. The amounts BellSouth paid are not relevant. If AT&T wants to make the ridiculous argument that because BellSouth paid KPMG, KPMG is somehow biased, AT&T can do so. The argument is not dependent, however, on the amount BellSouth paid KPMG.

Request for Production 6:

BellSouth continues to object to this request on the grounds that it is overbroad and unduly burdensome. While AT&T contends that it "narrowed" the request, the request is still voluminous. AT&T has a list of the documents that BellSouth provided to KPMG. If AT&T identifies the documents it wishes to review, BellSouth will make them available for inspection. It is unreasonable, however, to ask BellSouth to produce thousands of pages of documents in response to such a broad request.

Request for Production No. 7:

Once again, AT&T served this discovery request in breach of the parties' Agreement. It is improper for AT&T to waste this Authority's time on a matter about which the parties had an agreement. BellSouth will respond to this request by referencing its response to NC POD number 7.

Request for Production No. 8:

Once again, AT&T served this discovery request in breach of the parties' Agreement. It is improper for AT&T to waste this Authority's time on a matter about which the parties had an agreement. BellSouth will respond to this request by referencing its response to NC POD number 7.

Request for Production Nos. 12 and 14:

Once again, AT&T served these discovery request in breach of the parties' Agreement. It is improper for AT&T to waste this Authority's time on a matter about which the parties had an agreement. With respect to Number 12, the parties agreed that "AT&T agreed to reexamine the request to determine whether it is possible to limit it." AT&T has not done so. BellSouth maintains its objection that these requests are overbroad in that they seek every piece of paper over more than a year of conference calls from a myriad of different people. The burden of conducting such a search far outweighs the relevance of such documents, particularly when there were minutes taken of the calls.

Request for Production No. 46:

BellSouth withdraws its objection to this Request.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2001, a copy of the foregoing document was served on counsel for known parties, via the method indicated, addressed as follows:

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