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**

COMMENTS OF AT&T, MCI AND SECCA ON PROPOSED SETTLEMENT

BellSouth Telecommunications, Inc. ("BellSouth") and the General Counsel of the Tennessee Regulatory Authority have proposed a Settlement Agreement to bring the above-captioned proceeding to a close. Besides BellSouth, the other parties to this proceeding are AT&T Communications of the South Central States, LLC, TCG MidSouth, Inc., MCI WorldCom, Inc., and the Southeastern Competitive Carriers Association ("SECCA").[1] These parties (collectively, "the Intervenors") submit the following comments concerning the proposed Settlement Agreement.[2]

Summary

The proposed Settlement provides that the Authority will vacate its Order dated June 28, 2002 ("the Order"), in which the agency admonished BellSouth and directed that the

[1] The members of SECCA are US LEC of Tennessee, Inc., XO Tennessee, Inc., Time Warner Telecom, Network Telephone, ICG, and KMC.

[2] The Intervenors appreciate the opportunity to comment on the proposed settlement and respectfully suggest that the Intervenors should have been parties to the settlement discussions. The Intervenors have played an active role throughout these proceedings and have a strong interest in the proposed settlement. It was a discovery request issued to BellSouth by AT&T that led to the Authority's decision to sanction BellSouth. All of the Intervenors urged the Authority to fine BellSouth for the company's failure to abide by the Authority's rules and orders, and AT&T intervened as a party in the appeal of the Authority's decision and filed a brief in support of the Authority's Order.

company be fined for its "repeated failure" to abide by the TRA's rules and orders. The Intervenors do not oppose settling this matter in an appropriate manner. Instead of vacating the entire Order, however, the Authority should vacate only the "ordering" clauses, i.e., the language following "It is therefore ordered that." Legally, this will accomplish the same result while leaving intact the public record of these proceedings as a deterrent to future misconduct.

Background

As recited in the proposed Settlement Agreement, this docket was opened two years ago to investigate whether BellSouth's procedures for processing service orders (known as BellSouth's "Operations Support Systems" or "OSS") could also be used by competitors to order dial tone and various network elements on a wholesale basis. The purpose of the investigation was to gather information to submit to the Federal Communications Commission to assist that agency in ruling upon whether BellSouth had complied with the conditions set forth in 47 U.S.C. § 271 and was therefore eligible to offer interLATA telephone service in Tennessee. Late last year, the FCC ruled that BellSouth met the criteria set forth in § 271 and could begin offering interLATA service in this state.

The one remaining issue in this docket stems from a discovery dispute over an interrogatory filed by AT&T during the Authority's investigation of BellSouth's OSS. In the interrogatory, AT&T asked BellSouth to provide a state-by-state comparison of BellSouth's ordering processes so that the Authority could determine whether, as BellSouth claimed, the systems worked essentially the same throughout the BellSouth region. After initially denying that such information was available on a state-specific basis, BellSouth later acknowledged that it was available and that BellSouth was providing similar information to the FCC. Even then, BellSouth did not provide the information to AT&T or the TRA until after being ordered several times to do so and finally produced the information well after the last deadline set by the

Authority. Following a hearing on BellSouth's conduct, the Authority imposed a fine of $1,050 against the company for "failure to conform its conduct to the Tennessee Rules of Civil Procedure, the TRA Rules and the lawful orders of this agency" and "admonished" BellSouth that "good faith is expected in its conduct of matters before this agency." Order at p. 17. BellSouth subsequently filed an appeal of the agency's decision with the Tennessee Court of Appeals.

Pursuant to the proposed Settlement Agreement, the General Counsel and BellSouth now ask the Authority to vacate the Order sanctioning BellSouth. In exchange, BellSouth will withdraw its appeal,[3] pay the court costs, and allow the agency to keep the $1,050 fine.

Argument

In light of the FCC's decision granting BellSouth's petition to offer interLATA services, the proposed Settlement Agreement resolves this last, remaining issue and avoids spending further resources litigating a discovery dispute in a case that is now over. The Intervenors submit, however, that this matter should be settled in a way which terminates the controversy but does not sacrifice the deterrent effect of the TRA's Order. Although the OSS investigation is over, the Order memorializes the record of BellSouth's misconduct and the Authority's response. That record should be preserved. First, it should be preserved to insure that, if BellSouth once again fails to respond to an Authority order, there will be a record of the earlier proceeding to demonstrate that such behavior is not an isolated incident. Second, the record should be preserved to serve as a warning to all parties which appear before the Authority that they can and will be sanctioned if they fail to obey the agency's rules and orders.

The proposed settlement threatens to excise the full record of what occurred in this case. It calls for the Authority to "vacate" the Order. When an order of a court is vacated or set aside,

[3] BellSouth's agreement to drop the appeal is meaningless since, once the Order is vacated, there would be nothing left to appeal.

"the result is the destruction of the Order in its entirety ... and the effect is the same as though such order had never existed." 60 C.J.S. "Motions and Orders" § 62 (6); see In re King, 11 F. Supp. 351,356 (W.D. Tenn., 1935). If the Order "never existed," BellSouth could conceivably ask at some time in the future that the order be removed from the Authority's public files. Thus, part of the public record would disappear.

Such drastic action is unnecessary. This matter can be resolved and the record preserved intact simply by vacating the language which follows "IT IS THEREFORE ORDERED THAT" on page seventeen of the Order. If these "ordering" paragraphs are deleted, the legal impact would be the same as if the Authority vacated the entire Order.[4] The case would still be over, but the body of the Order would remain as a record of what occurred and as a deterrent to future misconduct by BellSouth or by any other regulated carrier.[5]

The importance of keeping the record intact and in deterring future misconduct is highlighted by the statements of Chairman Kyle concerning BellSouth's conduct. Believing that BellSouth's failure to produce the requested information in a timely fashion was an "isolated incident," she encouraged BellSouth not to let this happen again and "to keep this an isolated incident." Order at fn. 39. Finding that BellSouth had not chronically abused discovery, she

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[4] See 49 C.J.S. Judgments § 71 ("Only the decretal part of the decree determines the rights of the parties and constitutes the final judgment in the case."); see Sussman v. Sussman, 163 S.E. 69, 70-71 (Virginia Supreme Court, 1932), ("To constitute a judgment by decree, the legal terms, 'adjudged, ordered and decreed,' must precede the final action of the court.").

[5] The remaining part of the Order, which includes a recitation of the facts and the Authority's reasons for deciding to impose sanctions, would not be subject to appeal. See National Health Corp. v. Snodgrass, 555 S.W. 2d 403,405 (Tenn. 1977). In the National Health Corp. case, the Tennessee Supreme Court held that an unfavorable audit by the State Comptroller is "merely a report of factual material, with recommendations of the auditor" and is not subject to appeal under the Tennessee's Uniform Administrative Procedure Act. The Court reasoned that, even though the audit contained findings and recommendations unfavorable to National Health Corp., findings which might later be used as the basis for taking action against the company, the audit, "in and of itself, does not determine any legal rights, duties, or privileges of any party." *Id.* Similarly, if the ordering clauses in the Order are vacated but the rest of it remains intact, the result would be a document much like an audit report. The report would describe the conduct of BellSouth and make recommendations but, without the ordering clauses, there would be no adverse determination of the "legal rights, duties or privileges" of BellSouth and nothing upon which to base an appeal.

dissented from the majority view because, "Courts don't sanction unless there is a chronic problem. This was an isolated incident. It's time to go on." *Id.* Removing the "ordering" clauses from the Order, as proposed by the Intervenors, would have the same effect as if Chairman Kyle's position had been adopted by the majority. If her position had prevailed, the final order would have presumably recounted BellSouth's actions and warned the company not to repeat that misconduct in the future. The order, however, would not have imposed any sanctions for this incident. That will also be the result if the Authority adopts the Intervenors' proposal.

The best way to ensure that such incidents are not repeated is to keep a record of them. A warning to do better in the future only works if all parties remember what occurred in the past. If the entire Order is vacated and the full account of this incident erased, any future misconduct by BellSouth might once again be characterized as merely an isolated incident. On the other hand, if only the ordering paragraphs are vacated, the Order will service as an incentive for BellSouth and all carriers to respect the TRA's discovery rules and orders.

Conclusion

The Intervenors do not object to vacating the ordering clauses of the Order. In those clauses, the Authority renders a judgment against BellSouth for the company's conduct. If those clauses are vacated, what remains is a sixteen page description of the procedural history of the case and the oral deliberations of the Directors. The Order would no longer impose any judgment against BellSouth. The case would be over.

The Intervenors do, however, object to any action by the Authority which would strip from the record the entire Order as if it had never existed. To encourage parties to comply with the TRA's rules and orders, it is in the best interest of both this agency and the carriers it regulates to preserve intact the documentation of everything that has occurred in this case.

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CERTIFICATE OF SERVICE

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