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July 17, 2003

VIA HAND DELIVERY

Hon. Deborah Taylor Tate, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

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

Dear Chairman Tate:

Enclosed please find an original and thirteen copies of BellSouth's Response to Comments. A copy of the enclosed has been provided to counsel of record for the opposing parties.

Very truly yours,

Guy M. Hicks

GMH/mts

Enclosure

498521

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

IN RE:	)	
	)	
DOCKET TO DETERMINE THE	)	
COMPLIANCE OF BELLSOUTH	)	
TELECOMMUNICATIONS, INC.'S	)	**DOCKET NO.**
OPERATIONS SUPPORT SYSTEMS WITH	)	
STATE AND FEDERAL REGULATIONS	)	**01-00362**

BELLSOUTH'S RESPONSE TO COMMENTS OF AT&T, MCI & SECCA ON PROPOSED SETTLEMENT

BellSouth Telecommunications, Inc. ("BellSouth") hereby files its Response in opposition to the Comments filed on July 15, 2003, by AT&T Communications of the South Central States, LLC, TCG MidSouth, Inc., MCI WorldCom, Inc., and the Southeastern Competitive Carriers Association ("the CLECs"). BellSouth requests that the Tennessee Regulatory Authority ("the Authority") approve the Settlement Agreement executed by BellSouth and the General Counsel of the Authority and vacate the June 28, 2002 Order Imposing Sanctions in its entirety as contemplated by the Settlement Agreement.

The Settlement Agreement provides that BellSouth will withdraw its appeal and pay all costs of the appeal assessed by the Tennessee Court of Appeals in exchange for the Authority vacating the June 28, 2002 Order. BellSouth will also agree not to seek reimbursement of the $1,054.00 previously paid to the Authority as a result of the June 28, 2002 Order. The Settlement Agreement further provides that BellSouth and the Authority will jointly ask the Court for permission to return jurisdiction in this Docket to

the Authority for the purpose of enabling the Authority to issue an Order vacating its June 28, 2002 Order.[1] By Order dated May 29, 2003, the Court of Appeals granted the parties' joint motion and remanded the appeal to the Authority for the purpose of conducting a proceeding pursuant to the Settlement Agreement entered into between the parties.[2]

While not objecting to the Settlement Agreement insofar as it would result in vacating the ordering paragraphs of the June 28, 2002 Order, the CLECs take the curious position that the ordering paragraphs alone should be vacated while the remainder of the Order should remain in place. This is contrary to the clear terms of the Settlement Agreement and would achieve no useful purpose. It was agreed in the Settlement Agreement that the Order itself, not merely the ordering clauses on the last page of the Order, would be vacated.

As justification for their comments the CLECs claim that "...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 records of these proceedings as a deterrent for future misconduct." The CLECs further claim that "the proposed settlement threatens to excise the full record of what occurred in this case."[3] This purported justification lacks any merit whatsoever.

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[1] A copy of the Settlement Agreement is attached as Exhibit 1.

[2] See Order of Tennessee Court of Appeals filed May 29, 2003, in Docket No. M2002-069-COA-R12-CV, a copy of which is attached as Exhibit 2. The Court further stated that upon the vacating of the June 28, 2002 Order by the Authority, the parties shall file a stipulation for dismissal of the appeal and for the assessment of accrued costs. If for any reason, the Settlement is not culminated, the case will be reinstated on the Court's Docket for oral argument.

[3] See CLEC Comments at Page 3 and 5.

BellSouth is not requesting that the June 28, 2002 Order be expunged from the record. BellSouth is simply asking that the Settlement Agreement be approved. Accordingly, BellSouth would expect that if the Settlement Agreement is approved that the TRA's official record of the proceedings would include both the June 28, 2002 Order and an Order approving the Settlement Agreement and vacating the June 28, 2002 Order. This will provide a clear history of what happened in the proceeding and clearly addresses the CLEC's speculative concern about "leaving intact the public records of these proceedings...".[4] Indeed, an Order with its ordering provisions vacated, but its narrative remaining on the record is far more likely to cause confusion than the result contemplated by the Settlement Agreement, which would be to have a public record containing both the June 28, 2002 Order and the Order vacating it, which would provide a clear road map as to the history of the proceeding.

Moreover, both state and federal law favor and encourage settlements. The CLECs, who are not even parties to the June 28, 2002 Order, should not be permitted to interfere with a good faith settlement. Settlements of litigation are to be encouraged. *Alexander v. Rhodes*, 474 S.W. 2d 655, 63 Tenn. App. 452 (1971). Settlements are favored and there is a presumption that parties to a compromise possess the right to settle their litigation. *Milwee v. Peachtree Cypress Investment Co.*, 510 F. Supp., 279 (E.D. Tenn. 1977).

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[4] The CLECs also suggest that "BellSouth could conceivably ask that at some time in the future that the Order be removed from the Aurthority's public files. This part of the public record would disappear." (See Comments at pp 4.) BellSouth has no intention of requesting that the June 28, 2002 Order be removed from the Authority's public files, assuming the Settlement Agreement is approved, and the Settlement Agreement does not provide for any such removal. This sort of "what if" argument is simply not ripe.

A party attacking a settlement agreement bears the burden of proving its invalidity and unenforceability. *In The Astroglass Boat Co., Inc.*, 32 B.R. 538 (Bankruptcy, M.D. Tenn. 1983). Here, the CLECs have not even attempted to claim that the Settlement Agreement is invalid or unenforceable. Rather, they have merely offered editorial comments that are neither meaningful nor constructive and which appear to be intended merely to undermine the Settlement Agreement.

The CLECs Comments also mischaracterize the position taken by then Chairman Kyle on the matter. The CLECs state that "...if her [Chairman Kyle's] 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".[5] This is absurd.

It defies logic to assume, as the CLECs claim, that Chairman Kyle would have agreed to all of the language in the June 28, 2002 Order, except for three ordering paragraphs. Chairman Kyle dissented from the entire Order imposing sanctions. Contrary to the CLECs' suggestion, therefore, it is their Comments, not the Settlement Agreement, that are inconsistent with Chairman Kyle's vote on the issue. The Settlement Agreement is fully consistent with her vote.

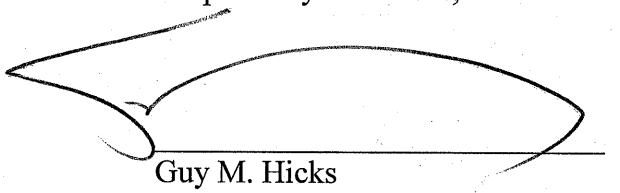
Finally, the CLECs lack standing to interfere with the Settlement Agreement between the two parties affected by the June 28, 2002 Order, BellSouth and the Authority. Review of a final order or judgment of any board of commission functioning under the laws of Tennessee is limited to those "aggrieved" by the decision. *Roberts v. State Board of Equalization*, 557 S.W. 2d 502 (Tenn. 1997). Federal law similarly requires an injury to support standing. Fundamental prerequisites for standing when

[5] See CLEC Comments at Page 5.

challenging a federal administrative action are that challenged activity has caused plaintiff injury in fact. *Knoxville Progressive Christian Coalition v. Testerman*, 404 F. Supp. 783 (D.C. Tenn. 1975). The June 28, 2002 Order was between the Authority and BellSouth. The Settlement Agreement does not request that any orders involving AT&T or the other CLECs be vacated. It merely provides that the June 28, 2002 Order imposing sanctions on BellSouth be vacated. AT&T and the other CLECs have not alleged any harm or injury resulting to them as a result of this Settlement. Nor did they even file a motion asking for any particular relief. All they have done is file comments offering suggestions on how other parties should settle litigation. Indeed, only AT&T even sought to participate in BellSouth's appeal of the June 28, 2002 Order. Merely because the Authority, out of an abundance of caution, allowed AT&T to file comments, does not mean, by any stretch, that the CLECs have legal standing to attack to Settlement Agreement.

WHEREFORE, BellSouth requests that the Authority approve the Settlement Agreement as executed.

Respectfully submitted,



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COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

CERTIFICATE OF SERVICE

I hereby certify that on July 17, 2003, a copy of the foregoing document was served on the parties of record, via method indicated:

[ ] Hand
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[X] Facsimile
[ ] Overnight
[ ] Electronic

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Boult, Cummings, et al.
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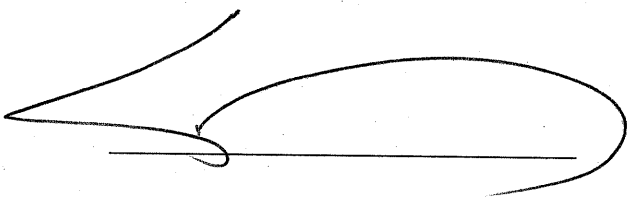
(615) 252-2363



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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**

SETTLEMENT AGREEMENT

Background

With the passage of the Telecommunications Act of 1996 (the "Act"), Congress adopted a pro-competitive policy that fundamentally restructured local telephone markets by ending the monopoly of local service held by the incumbent Bell operating companies ("BOCs").[1] The Act allows a BOC to enter the interLATA long distance market in a particular state only after establishing that the BOC has provided CLECs with nondiscriminatory access to local telephone networks.[2] To that end, before BOCs may enter the interLATA long distance market in a particular state, they must file for approval by the Federal Communications Commission ("FCC"), an application establishing that certain statutory criteria set forth in Section 271 of the Act have been satisfied.[3] This criteria includes a fourteen (14) point competitive checklist.[4] Checklist item (ii) requires proof that the BOC provides "Nondiscriminatory access to network

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[1] *See* 47 U.S.C. § 151 *et seq.; see also In the Matter of Bell Atlantic New York for Authorization under Section 271 of the Communications Act*, 220 F.3d 607, 611 (D.C. Cir. 2000).
[2] *See* 47 U.S.C. § 271.
[3] *See* 47 U. S .C. § 271. A consent decree arising from a 1982 antitrust suit brought by the Department of Justice permitted incumbents to provide local service in their respective regions, but barred them from providing long distance services. *See SBC Communications, Inc. v. FCC,* 138 F.3d 410, 412 (D.C. Cir. 1998).
[4] *See* 47 U.S.C. § 271(c)(2)(B)(i)-(xiv).

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elements in accordance with the requirements of 47 U.S.C. §§ 251(c)(3) and 252(d)(1)."[5] In effect, checklist item (ii) requires BOCs to provide nondiscriminatory access to their Operations Support Systems ("OSS") to CLECS.[6]

The docket at issue in this appeal, Docket No. 01-00362, *In re Docket to Determine the Compliance of BellSouth Telecommunications, Inc.'s Operations Support Systems with State and Federal Regulations*, arose in the context of Tennessee's Section 271 proceedings and the obligations of the Tennessee Regulatory Authority ("Authority" or "TRA") under state law to promote competition and prevent preferences. Docket No. 01-00362 was convened on February 21, 2001 in anticipation of BellSouth Telecommunications, Inc. ("BellSouth") filing its Section 271 application with the TRA. BellSouth did in fact file its Section 271 Application with the TRA on July 30, 2001, in Docket No. 97-00309. The purpose of Docket No. 01-00362 was to determine whether existing data or test results derived from OSS testing in other states was reliable and applicable to Tennessee and, in those instances where reliance on such testing was inappropriate, to conduct necessary testing.

During the course of discovery, in preparation for a Hearing, a discovery dispute arose between the parties. In an attempt to resolve the discovery dispute, the Pre-Hearing Officer appointed to this docket entered a series of orders directing BellSouth to provide specific information in advance of the Hearing. The information was not produced before the Hearing and so, during the Hearing, the Authority heard evidence from BellSouth as to why the imposed deadlines for producing the information were infeasible. BellSouth was directed to produce the

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[5] 47 U.S.C. § 271 (c)(2)(B)(ii).

[6] "[T]he term OSS refers to the computer systems, databases, and personnel that incumbent carriers rely upon to discharge many internal functions necessary to provide service to their customers." *In the Matter of Performance Measurements and Reporting Requirements for Operations Support Systems, Interconnection, and Operator Services and Directory Assistance*, FCC Docket No. 98-72, CC Docket No. 98-56; *Notice of Proposed Rulemaking*, 13 FCC Rcd. 12,817 (April 17, 1998) ¶9.

information within forty-five days. BellSouth stated at the Hearing that it could not meet that deadline and eventually produced the information after the imposed deadline expired.

Thereafter, the Authority held a hearing to determine whether BellSouth should be sanctioned. A majority of the Directors voted to impose a sanction of $1,054 against BellSouth for failing to generate and produce certain reports within the time period specified in the Authority order compelling discovery. BellSouth has filed an appeal from a 2-to-1 decision of the Tennessee Regulatory Authority (the "Authority") memorialized in an Order dated June 28, 2002.[7] The appeal of the Authority's order is now pending in the Tennessee Court of Appeals for the Middle Section (*See* Appeal No. M2002-02069-COA-R12-CV) (the "Appeal"). All Briefs have been filed by the parties. Oral argument has been scheduled by the Court for May 7, 2003.

Terms and Conditions of Settlement Agreement

In recognition of certain risks and expenses that are attendant with this appeal and in order to avoid those risks and expenses, BellSouth and the Authority have reached the following agreement:

1. BellSouth agrees to withdraw its Appeal filed in the Court of Appeals in Appeal No. M2002-02069-COA-R12-CV and agrees to pay all costs of the Appeal assessed by the Court in exchange for the Authority vacating its "Order Imposing Sanctions on BellSouth Telecommunications, Inc. Pursuant to Tenn. Code Ann. §65-4-120."

2. The Authority agrees to vacate its "Order Imposing Sanctions on BellSouth Telecommunications, Inc. Pursuant to Tenn. Code Ann. §65-4-120" issued on June 28, 2002, in

[7] Chairman Kyle did not vote with the majority. The terms of the former Directors of the Authority expired on June 30, 2002. Chairman Kyle was re-appointed and commenced a new term as a Director of the Authority on July 1, 2002. Deborah Taylor Tate, Pat Miller, and Ron Jones began terms as Directors on July 1, 2002. Pursuant to the requirements of the amended provisions of Tenn. Code Ann. § 65-1-204, a three member voting panel consisting of Chairman Kyle and Directors Tate and Jones was randomly selected and assigned to Docket No. 01-00362.

Docket No. 01-00362 imposing sanctions against BellSouth, in exchange for BellSouth withdrawing its Appeal.

3. BellSouth and the Authority will jointly ask the Court of Appeals for permission to return jurisdiction in this docket to the Authority to enable it to issue an order vacating its "Order Imposing Sanctions on BellSouth Telecommunications, Inc. Pursuant to Tenn. Code Ann. §65-4-120" issued on June 28, 2002. Thereafter, BellSouth will withdraw its Appeal in this docket with the permission of the Court of Appeals.

4. If, for any reason, the Authority does not vacate its Order of June 28, 2002, BellSouth shall have no obligation to withdraw its Appeal or assume responsibility for the costs of the Appeal. If, for any reason, BellSouth fails to withdraw its Appeal, the Authority will act to reinstate its Order.

5. BellSouth agrees that it will not seek reimbursement of the $1,054 previously paid to the Authority as a result of the June 28, 2002 Order and states that it has no objection to the Authority retaining the $1,054 and using those monies for consumer education or any other lawful purpose.

6. This agreement is solely for the purpose of settling this matter and does not constitute an admission or concession of any legal position or argument made by either BellSouth or the Authority.

On behalf of
BELLSOUTH
TELECOMMUNICATIONS, INC.

Its: General Counsel - TN

On behalf of the
TENNESSEE REGULATORY
AUTHORITY

J. Richard Collier

Its: General Counsel

492829

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE

BELLSOUTH TELECOMMUNICATIONS, INC. vs. TENNESSEE REGULATORY AUTHORITY

Tennessee Regulatory Authority
No. 01-00362

FILED
MAY 29 2003
Clerk of the Courts

No. M2002-02069-COA-R12-CV

ORDER

In this case, the parties have filed a "Joint Motion To Return Jurisdiction To The Tennessee Regulatory Authority For The Purpose Of Conducting Proceedings Pursuant To The Settlement Agreement Between Petitioner And Respondent," stating, in substance, that the Authority will issue an order vacating the June 28, 2002 order, the order appealed, and, in return, BellSouth has agreed, among other things, to withdraw its appeal.

The parties move for the case to be remanded to the jurisdiction of the Authority for the purpose of conducting proceedings pursuant to the settlement agreement.

For good cause, IT IS ORDERED that this case be removed from the docket for oral argument on July 10, 2003, and be remanded to the Tennessee Regulatory Authority for the purpose of conducting a proceeding pursuant to the settlement agreement entered into between the parties. Upon the vacating of the June 28, 2002 order by the Authority, the parties shall file in this Court a stipulation for dismissal of the appeal and for the assessment of accrued costs of appeal. If, for any reason, the settlement is not culminated, the case will be reinstated on the docket for oral argument.

W. FRANK CRAWFORD, P.J., W.S.

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