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OFFICE OF THE
EXECUTIVE SECRETARY
November 13, 2001

David Waddell, Esq.
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: *Complaint of XO Tennessee, Inc. Against BellSouth
Telecommunications, Inc.*
Docket No. 01-00868

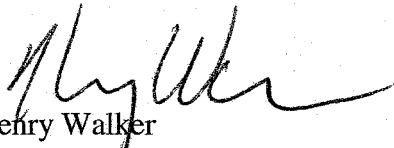
Re: *Complaint of Access Integrated Network, Inc. Against
BellSouth Telecommunications, Inc.*
Docket No. 01-00808

Dear David:

Please accept for filing an original and thirteen copies of a *Memorandum Concerning Jurisdiction, Potential Violations and Proposed Relief* filed on behalf of XO Tennessee, Inc. and Access Integrated Network, Inc. in the above-captioned proceeding.

Sincerely,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: 
Henry Walker

HW/nl
c: Guy Hicks
Tim Phillips

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

In Re: Complaint of Access Integrated)
Network, Inc. Against BellSouth)
Telecommunications, Inc.) Docket No. 01-00868
)
Complaint of XO Tennessee, Inc.)
Against BellSouth Telecommunications,)
Inc.)

**MEMORANDUM OF ACCESS INTEGRATED NETWORK, INC.
AND XO TENNESSEE, INC. CONCERNING JURISDICTION,
POTENTIAL VIOLATIONS, AND PROPOSED RELIEF**

Access Integrated Network, Inc. ("AIN") and XO Tennessee, Inc. ("XO") submit the following in response to the Hearing Officer's Order of November 6, 2001, requesting clarification of the Authority's jurisdiction over these complaints, the rules and statutes which may have been violated by BellSouth Telecommunications, Inc. ("BellSouth"), and the type of sanctions and other relief the TRA may impose.

I. Factual Allegations

According to the filings made thus far in this docket, it appears that BellSouth customers who participate in the "BellSouth Select" program are able to earn Select "points" through the purchase of BellSouth's regulated and unregulated services. The customers may then exchange those points for, among other things, a credit on the customer's bill. The credit is applied to the total bill, both regulated and unregulated services. Based on the examples supplied by the complainants, a BellSouth customer who purchases regulated telecommunications services under the Key Customer Program may receive enough Select points to receive a credit on his bill equal to the price of three months of service. There is no tariff or

promotion on file in Tennessee authorizing the Select program which is operated by BellSouth Select, Inc., a corporate affiliate of BellSouth Telecommunications, Inc. The revenues and expenses associated with the operations of BellSouth Select, Inc. do not appear on the regulated financial reports of BellSouth Telecommunications, Inc.

II. Jurisdiction

The Authority has statutory jurisdiction to hear these complaints pursuant to T.C.A. § 65-4-117(1) which gives the TRA the power to “investigate . . . upon complaint, any matter concerning any public utility.” The Authority also has jurisdiction under T.C.A. § 65-4-104 which states that the Authority has “general supervisory and regulatory power, jurisdiction and control over all purpose of carrying out the provisions of this chapter”. Finally, the Authority has jurisdiction under TRA Rule 1220-4-8-.09(b), which states “Upon the complaint of any interested party that any telecommunications service provider has violated any of the anti-competitive or discriminatory rate prohibition found in applicable rules or statutes, [the Authority] shall investigate the complaint and may convene a contested case proceeding if such complaint is found to have merit.”

III. Potential Violations

A. Tariff Violations

To the extent that BellSouth has provided regulated services to Tennessee customers at less than the tariffed rates, BellSouth appears to have violated T.C.A. § 65-5-201 and TRA rules 1220-4-1-.03 and 1220-4-8-.09(2)(c)(3).

Under T.C.A. § 65-5-202, the TRA has the power to require all public utilities to file “complete schedules of every classification and every individual . . . rate, toll, fare, or charge made or exacted by it for any product supplied or service rendered in this state.” Pursuant to that statute, the TRA’s rules require that incumbent, local exchange carriers file tariffs which

“explicitly state the rates and charges for each class of service” and which also set forth the applicable rules and regulations “that in any manner affects the rates charged or to be charged...” Rule 1220-4-1-.03. Once the tariffs have been approved by the Authority, the approved rates “shall be imposed, observed, and followed thereafter” by the utility. T.C.A. § 65-5-201. Finally, TRA Rule 1220-4-8-.09(2)(c)(3) specifically requires incumbent, local exchange carriers which are “subject to price cap regulation” to comply “with applicable tariff and special contract provisions.”

B. Pricing Violations

T.C.A. § 65-4-122 prohibits a utility from charging any customer “greater or less” compensation than another customer for the same service or to give one customer “any preference” over another. The statute specifically prohibits the use of any “rebate, drawback, or other device” by which a carrier “directly or indirectly” discriminates among similarly situated customers.

T.C.A. § 65-5-208(c) requires an incumbent local exchange carrier to “adhere to a price floor for its competitive services” and further requires the TRA to adopt rules or issue orders as necessary “to prohibit cross-subsidization, preferences to competitive services or affiliated entities, predatory pricing . . . price discrimination . . . or other anti-competitive practices.”

BellSouth’s non-tariffed, Select program allows participating BellSouth customers to purchase regulated services at substantially less than the tariffed rates while other customers are charged the tariffed rates for the same services. This program appears to violate T.C.A. § 65-4-122. Depending upon the agency’s findings, this program may also be evidence that BellSouth is engaged in predatory pricing, cross-subsidization, violation of the price floor, and other anti-competitive practices in violation of § 65-5-208(c).

C. Reporting Violations

The TRA's rules, 1220-4-1-10(2)(a) and 1220-4-1-11(1)(a), require BellSouth to file financial reports in accordance with the Uniform System of Accounts as adopted by the FCC. Based on information provided by BellSouth to the TRA staff, it appears that the investment, revenues, and expenses associated with the BellSouth Select program are not recorded as part of the regulated operations of BellSouth Telecommunications, Inc. Therefore, BellSouth may have violated the TRA's rules regarding financial reporting.

IV. Potential Remedies and Sanctions

The precise type of sanctions imposed or relief provided will depend upon the agency's findings and conclusions. Based on the allegations raised in this case, some or all of the following sanctions and remedies may apply.

To the extent the agency determines that BellSouth has engaged in cross-subsidization, preferences to competitive services, price discrimination, violation of the price floor, or other anti-competitive practices, as set forth in § T.C.A. 65-5-208(c), the Agency "shall . . . adopt other rules or issue orders" to prohibit such conduct.

A violation of a TRA order or rule, whether intentional or not, is subject to a penalty of fifty dollars per day. T.C.A. § 65-4-120. The penalty may be imposed directly by the Authority and would apply if the TRA found that BellSouth has violated the rules on tariffs or financial reporting.

If a company "knowingly" violates a regulatory statute, and a penalty is not otherwise provided, BellSouth is subject to a judicially imposed fine of \$500 to \$1000. T.C.A. § 65-3-119(b). The Authority is required "to report all such violations with the facts in its possession to such district attorney general to institute the proper proceedings." T.C.A. § 65-3-120(c). It is the duty of the district attorney general to initiate civil or criminal proceedings to collect those fines. T.C.A. § 65-3-199(a). This penalty may only be imposed by a court and would apply if

the TRA found that BellSouth had violated T.C.A. § 65-4-201 by not adhering to the company's tariffs.

If a carrier violates T.C.A. § 65-4-122, the carrier is guilty of "unjust discrimination" which "is prohibited and declared unlawful" and "shall be fined" from \$500 to \$2000. Here again, T.C.A. § 65-3-120(c) requires the TRA to report such violations to the District Attorney General who is then obliged to initiate appropriate civil or criminal proceedings under T.C.A. § 65-3-119. Unlike other statutory violations, Section 122 also creates a separate private right of action against the carrier. T.C.A. § 65-4-122(e). Like an enforcement proceeding filed by the District Attorney, a private lawsuit brought under Section 122(e) must be filed in a state court.¹

V. Show Cause Proceeding

The TRA has an affirmative obligation to ensure that regulated carriers "comply with all such regulations and order" as the agency may make. T.C.A. § 65-3-105. The TRA is also charged with the duty "to ensure that . . . all laws of this state over which they have jurisdiction are enforced and obeyed, that violations thereof are promptly prosecuted and all penalties due the state are collected." T.C.A. § 65-1-213.

If the TRA itself decides to impose sanctions, such as a fine, or initiate its own investigation of alleged, illegal conduct the TRA has typically done so through a "show cause" proceeding, initiated pursuant to T.C.A. § 65-2-106. Before opening a show cause docket, the agency must first undertake a "preliminary investigation . . . under the powers conferred upon [the agency] by law."

¹ AIN and XO do not believe that the TRA is a "court" for the purposes of § 65-3-122(e).

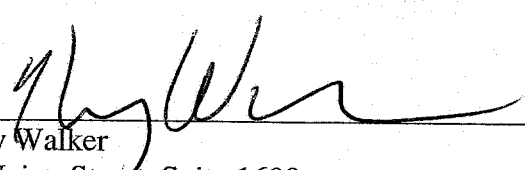
In this case, AIN and XO have asked that the TRA initiate a show cause proceeding for the purpose of imposing sanctions against BellSouth and for such other relief as the agency finds appropriate. In response, the Hearing Officer has stated that, in order to provide the requested relief, the agency must begin by "opening an investigation." The TRA staff has already submitted a list of questions to BellSouth concerning the allegations in the complaints. In responding to those questions, BellSouth has acknowledged the factual allegation upon which the complaints are based and which are described above.

Based on BellSouth's response to the staff's questions, AIN and XO submit that the agency has conducted a sufficient "preliminary investigation" to demonstrate that BellSouth has engaged in *prima facie* violations of the agency's rules and statutes and that the agency now has ample basis to open a show cause proceeding. Once such a proceeding is initiated, the agency staff will presumably continue its investigation, along with other interested parties, and these complaint cases can be consolidated into the show cause proceeding.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

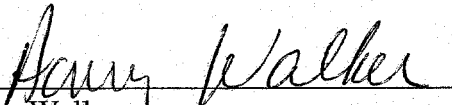
By: _____


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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via fax or hand delivery and U.S. mail to the following on this the 13th day of November, 2001.

Guy Hicks, Esq.
BellSouth Telecommunications, Inc.
333 Commerce St., Suite 2101
Nashville, TN 37201-3300


Henry Walker *HW*