BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

January 16, 2002

IN RE:	)	
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COMPLAINT OF XO TENNESSEE, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC.	)	**DOCKET NO. 01-00868**

ORDER GRANTING IN PART MOTION TO MAKE DOCUMENTS PUBLIC

This docket came before the Hearing Officer for consideration of the *Motion to Make Documents Public* filed by Access Integrated Network, Inc. ("AIN") and XO Tennessee, Inc. ("XO") and the *Emergency Motion to Quash or, in the Alternative, Emergency Motion for Protective Order* filed by BellSouth Telecommunications, Inc. ("BellSouth").

I. Relevant Procedural History

On October 12, 2001, the Tennessee Regulatory Authority ("Authority") issued data requests to BellSouth. BellSouth filed its non-proprietary responses to the Authority's data requests on October 26, 2001. BellSouth explained that it would file its proprietary responses upon the entry of a protective order.

On October 26, 2001, AIN and XO filed a letter stating that they believed the protective order should permit the distribution of proprietary information to "other, appropriate state and federal agencies."[1] BellSouth filed a responsive letter on October 31, 2001. BellSouth disagreed with AIN and XO's request and asked that the Authority enter the standard protective order.

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[1] Letter of AIN and XO, p. 1 (Oct. 26, 2001).

On November 1, 2001, AIN and XO filed motions to take discovery. AIN and XO attached identical requests to their respective motions. In addition, both complainants requested that the Authority order BellSouth to respond within ten days. BellSouth filed its response to the motions on November 2, 2001 objecting to the ten-day response period requested by AIN and XO.

On November 6, 2001 the Hearing Officer entered an *Order* directing the parties to file a proposed protective order without the additional language requested by AIN and XO and ordering BellSouth to respond to AIN's and XO's discovery requests by November 16, 2001.[2] BellSouth filed discovery responses on November 16, 2001 and again on November 19, 2001, after the entry of the *Protective Order*.

On November 30, 2001, AIN and XO filed their *Motion to Make Documents Public* ("Motion"). AIN and XO requested that BellSouth's responses to Authority Interrogatory No. 7 and AIN/XO Interrogatory No. 5 be made part of the public record, but did not object to the redaction of customer names and telephone numbers.[3] As to AIN/XO Interrogatory No. 7, AIN and XO asserted that "training materials describing the offering of two and three months of free telephone service, contract forms, completed contracts and letters and emails sent to potential customers describing the offer of free service" are not "proprietary" as that term is used in the *Protective Order*.[4] AIN and XO also argued that the offer of free service is an illegal activity and BellSouth should not be permitted to cover up evidence of such illegal activity by

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[2] *See Order*, p. 6-9 (Nov. 6, 2001).

[3] *See Motion to Make Documents Public*, p. 1 (Nov. 30, 2001). AIN and XO filed the Motion pursuant to paragraph 11 of the *Protective Order*, which provides, in part: "Any party may contest the designation of any document or information as CONFIDENTIAL by applying to the TRA, Pre-Hearing Officer, Administrative Law Judge or the courts, as appropriate, for a ruling that the documents information, or testimony should not be so treated. All documents, information and testimony designated as CONFIDENTIAL, however, shall be maintained as such until the TRA, the Pre-Hearing Officer, the Administrative Law Judge, or a court orders otherwise." *Protective Order*, para. 11, pp. 6-7 (filed Nov. 15, 2001, entered by Hearing Officer Nov. 19, 2001).

[4] *Motion to Make Documents Public*, p. 1 (Nov. 30, 2001).

categorizing the information as confidential.[5] As to AIN/XO Interrogatory No. 5, AIN and XO argued that the information in BellSouth's response has been or could be shared with the public and is, therefore, not proprietary.[6]

Also on November 30, 2001, the Hearing Officer conducted a previously scheduled Pre-Hearing Conference. During the Conference, the Hearing Officer deferred decision on the *Motion to Make Documents Public* pending the filing of responses. The Hearing Officer further stated that after reviewing the responses she would determine whether a status conference was necessary prior to disposing of the Motion.[7]

BellSouth filed a response to the Motion on December 7, 2001. On December 12, 2001, BellSouth filed an affidavit in support of its response. BellSouth first contended that business customers' names, telephone numbers, and account information are confidential pursuant to 47 U.S.C. section 222(a) and (c).[8] BellSouth next argued that AIN and XO's use of the documents is not hampered by BellSouth's designation of the documents as proprietary and, therefore, the Motion should be denied.[9] Lastly, BellSouth argued that the training material and marketing scripts contain the type of material that is entitled to protection from public disclosure under Tennessee case law.[10]

On January 8, 2002, the Hearing Officer issued a *Notice of Oral Argument* scheduling argument on the Motion for January 10, 2002. AIN and XO filed a *Notice of Deposition* on January 7, 2002. Thereafter, on January 9, 2002, BellSouth filed an *Emergency Motion to Quash or, in the Alternative, Emergency Motion for Protective Order* ("Motion to Quash"). In the

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[5] *See id.* at 2.
[6] *See id.* at 3.
[7] *See Order from November 30, 2001 Pre-Hearing Conference*, p. 9 (Dec. 31, 2001).
[8] *See BellSouth Telecommunications, Inc.'s Response to Motion to Make Documents Public*, p. 2-3 (Dec. 7, 2001).
[9] *See id.* at 3.
[10] *See id.* at 4-5.

Motion to Quash, BellSouth moved the Hearing Officer to enter a protective order in regard to the location of the depositions, order and scheduling of the deponents, designations pursuant to Tennessee Rules of Civil Procedure Rule 30.02(6), and unaffiliated third parties.[11] In addition, BellSouth requested that the Hearing Officer hear the motion during the January 10, 2002 oral arguments.[12]

II. *Motion to Make Documents Public*

The issue presented by the Motion is whether the information provided by BellSouth in response to Authority Interrogatory No. 7 and AIN/XO Interrogatory No. 5 should be afforded protection as proprietary information. There are three arguments presented for consideration. First is the contention that the information is protected pursuant to the definition of "confidential information" in the *Protective Order*. Second is the assertion that the information cannot be proprietary because it either has been or could be disclosed to the public. Third is the argument that BellSouth cannot protect evidence of illegal activity by claiming it is confidential.

A. Protective Order and Public Information

Paragraph 1 of the *Protective Order* defines "confidential information," which includes proprietary or confidential information, as "documents and information in whatever form which the producing party in good faith deems to contain or constitute trade secrets, confidential research, development, financial statements or other commercially sensitive information, and which has been so designated by the producing party."[13] BellSouth asserts that the training materials and marketing scripts included in its responses contain trade secrets and, thus, are subject to the *Protective Order*. Noting that the training materials go beyond summarizing the

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[11] *See Emergency Motion to Quash or, in the Alternative, Emergency Motion for Protective Order*, p. 1 (Jan. 9, 2002).
[12] *See id.* at 2 & 10.
[13] *Protective Order*, para. 1, p. 1 (filed Nov. 15, 200, entered by Hearing Officer Nov. 19, 2001).

terms of the program, BellSouth asserts that the materials include "procedures for efficiently processing orders, and many of them include information about which internal BellSouth systems to use and which codes to use in processing orders."[14] BellSouth further explains that the training materials provide information on BellSouth's market share and its business plan and strategy.[15] As to the marketing scripts, BellSouth asserts that the trade secrets contained within the scripts include information on how to explain the program to consumers under various scenarios, anticipated consumer concerns and questions, and suggested responses to consumer concerns and questions.[16] In summarizing its position, BellSouth states that the training materials and marketing scripts "give [BellSouth] an opportunity to obtain an advantage over competitors who do not use them" and that BellSouth takes certain measures to protect information from public disclosure.[17]

During oral arguments, AIN and XO relied on the Tennessee Supreme Court's holding in *Loveall v. American Honda Motor Co.* that in order to obtain a protective order pursuant to Rule 26(c) of the Tennessee Rules of Civil Procedure the movant must demonstrate good cause and, "[w]hen confidential commercial information is involved, this standard requires a showing that disclosure will result in a clearly defined and very serious injury to the company's business . . . or, stated differently, great competitive disadvantage and irreparable harm."[18] AIN and XO then assert that the release of information regarding a "defunct" program does not meet the good cause standard requiring a clearly defined injury and that BellSouth has indiscriminately used the

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[14] *BellSouth Telecommunications, Inc.'s Response to Motion to Make Documents Public*, p. 3 (Dec. 7, 2001) (footnote omitted).
[15] *See id.* at 4.
[16] *See id.*
[17] *Id.*
[18] *See* Transcript of Proceeding, Jan. 10, 2002, pp. 4-6 (Oral Argument on *Motion to Make Documents Public*) (quoting *Loveall v. American Honda Motor Co.*, 694 S.W.2d 937, 939 (Tenn. 1985)).

proprietary designation.[19] AIN and XO further argue that BellSouth has not met its burden of establishing that the information is actually proprietary.[20]

In reply, BellSouth argued that the proprietary designation of the training materials and marketing scripts is not affected by the fact that BellSouth suspended the program.[21] BellSouth also asserts that the information meets the standard set forth in *Loveall* in that it is analogous to work product.[22] In general, BellSouth argues that the training materials and marketing scripts must be treated as a whole and cannot be taken apart line-by-line.[23]

In *Ballard v. Herzke*, the Tennessee Supreme Court addressed a case in which the trial court modified a protective order such that information originally afforded protection no longer received that consideration. The Court recognized:

> The appropriate procedure, following delivery of documents under a blanket protective order, is to allow the party seeking to maintain confidentiality an opportunity to indicate precisely which documents are alleged confidential. The party seeking to maintain the seal then has the burden of establishing good cause with respect to those documents.[24]

The Court also provided a detailed analysis of the standards governing a showing of good cause. Specifically, the Court set forth the standard for determining when good cause exists to grant a protective order as follows:

> To establish "good cause" under Rule 26(c), the moving party must show that disclosure will result in a clearly defined injury to the party seeking closure. "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning," do not amount to a showing of good cause. Mere conclusory allegations are insufficient. The burden of justifying the confidentiality of each and every document sought to be covered by a protective order is on the party seeking the order.
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> In determining whether good cause has been established for a protective order, it is important that trial courts balance one party's need for information

[19] *See id.* at 6-8.
[20] *See id.* at 7-8, 23.
[21] *See id.* at 17.
[22] *See id.* at 16-17.
[23] *See id.* at 18.
[24] *Ballard v. Herzke*, 924 S.W.2d 652, 660 (Tenn. 1996).

> against the injury that would allegedly result if disclosure is compelled. Factors in the balance weighing against a finding of good cause include: (1) the party benefitting from the protective order is a public entity or official; (2) the information sought to be sealed relates to a matter of public concern; and (3) the information sought to be sealed is relevant to other litigation and sharing it would promote fairness and efficiency.
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> On the other hand, factors in the balance weighing in favor of a finding of good cause include: (1) the litigation involves private litigants; (2) the litigation concerns matters of private concern or of little legitimate public interest; and (3) disclosure would result in serious embarrassment or other specific harm. No particular weight is assigned to any factor, and the balancing test allows trial courts to evaluate the competing considerations in light of the facts of each individual case. The ultimate decision as to whether or not a protective order should issue is entrusted to the sound discretion of the trial court and it will not be reversed on appeal, absent a showing of abuse of discretion.[25]

Next, the Court turned to modifications of existing protective orders and determined that a court should consider the good cause factors listed above along with the reliance of the parties on the original protective order when determining whether to modify a protective order.[26]

Applying the balancing test to the facts of this case, the Hearing Officer concludes that some of the information should be made part of the public record. The Hearing Officer finds that the party benefiting from the *Protective Order* is not a public entity, some of the information sought to be released is a matter of public concern, the information at issue is not relevant to other litigation before the Authority,[27] the litigation involves private litigants, the litigation involves matters of public concern, and disclosure of some of the information would result in specific harm to BellSouth.

As to the finding that disclosure of some of the information would result in specific harm to BellSouth, further explanation is necessary. It is at this step of the balancing test that it is

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[25] *Id.* at 658-59.
[26] *See id.* at 660.
[27] In reaching this conclusion, the Hearing Officer considered whether the information was relevant to Docket No. 97-00309, *In Re: BellSouth Telecommunications Inc.'s Entry Into Long Distance (Interlata) Service in Tennessee Pursuant to Section 271 of The Telecommunications Act of 1996.* It is the Hearing Officer's opinion that the particular information at issue in this Docket is of little consequence to the issues in Docket No. 97-00309. Instead, it is the actual outcome of this action that may be of relevance to Docket 97-00309.

appropriate to consider whether BellSouth has met its burden of demonstrating a clearly defined injury. While it is true that BellSouth did not use the specific language found in either *Ballard* or *Loveall* to describe the injury involved, BellSouth did allege a specific injury, namely the loss of an advantage. In the uncontradicted affidavit of Ena A. Shaw, a Senior Director in Small Business Services, Ms. Shaw described the information BellSouth sought to protect as training materials and marketing scripts that include procedures for processing orders, market share information, BellSouth business plans and strategy, and advice on interacting with potential customers.[28] Ms. Shaw also explained that the training materials and marketing scripts give BellSouth "an opportunity to obtain an advantage over competitors" and, for that reason, BellSouth takes measures to protect the information from disclosure.[29] In addition to the affidavit, it is clear from a review of the responses that the instructional information contained therein concerns internal procedures and is a product of BellSouth's time and resources. It follows that, as with the research and development at issue in *Loveall*, BellSouth's competitors would benefit from access to such information.

Despite this finding, it is also clear that BellSouth provided many of the documents in its responses to customers.[30] It is also apparent from the text of the documents that BellSouth conveyed or intended that certain information would be conveyed to current or potential customers. For instance, some of the documents contain basic information on the terms and conditions of the plan. Certainly, BellSouth intended for current or potential customers to learn of these terms and conditions. Also, the marketing scripts contain instructions on what to say to customers given a particular set of circumstances. Clearly, BellSouth realized that this

[28] *See Affidavit of Ena A. Shaw*, para. 4-10 (Dec. 12, 2001).
[29] *Id.* at para. 11-12.
[30] *See id.* at para. 4.

information would or could be conveyed to the public. As such, BellSouth cannot sustain an argument that the information is proprietary or that harm would result from divulging the information. It is nonsensical for one to argue that information is proprietary, or stated otherwise, for the person's own use, when that information is provided to the public. Recognizing this reality, BellSouth argues that the documents must be viewed as a whole and not dissected line-by-line.[31] While there is merit to BellSouth's contention, it cannot be said that divulging only that information that BellSouth conveyed or could reasonably expect would be conveyed to consumers would provide competitors insight into the training and marketing strategies employed by BellSouth. Likewise, BellSouth has failed to establish that releasing information describing the type of document, for example, a training manual, would cause harm to BellSouth or provide an advantage to competitors.

Returning to the balancing test, the final factor for consideration is the reliance of the parties on the *Protective Order*. In this case, the *Protective Order* is a blanket order entered without review of specific documents. Also, the *Protective Order* explicitly provides for challenges to a proprietary designation.[32] In *Ballard*, the Court noted that although "blanket protective orders, are particularly useful in effecting cooperation and expediting the flow of pretrial discovery; however, they are also, by nature, over inclusive, less likely to induce reasonable reliance, and therefore, peculiarly subject to later modification."[33] In light of these considerations, the Hearing Officer finds that this factor is of no consequence to the disposition of the Motion.

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[31] *See* Transcript of Proceedings, Jan. 10, 2002, p. 18 (Oral Argument on *Motion to Make Documents Public*).
[32] *See Protective Order*, para. 11, pp. 6-7 (filed Nov. 15, 200, entered by Hearing Officer Nov. 19, 2001).
[33] *Ballard*, 924 S.W.2d at 660.

With the exception of information that BellSouth conveyed or could have reasonably expected would be conveyed to consumers and information describing the type of document, the balancing factors weigh in favor of sustaining the protection currently afforded the responses. The only factors weighing in favor of lifting the *Protective Order* are that some of the information is of public concern and the litigation involves matters of public concern. The information and litigation are of public concern to the extent that they address the factual issue of whether BellSouth offered consumers free telephone service. Due consideration will be afforded these factors, however, if BellSouth is required to divulge any information that BellSouth conveyed or could reasonably have expected would be conveyed to consumers by BellSouth representatives or agents.

Based on the foregoing, the Hearing Officer finds that BellSouth should be required to file a public version of its responses to Authority Interrogatory No. 7 and AIN/XO Interrogatory No. 5. BellSouth may redact all information except information that it conveyed or could reasonably have expected would be conveyed to consumers by BellSouth representatives or agents, information regarding the type of document, or information regarding the services purchased by a particular consumer.[34]

B. Evidence of Illegal Activity

AIN and XO rely on Tenn. Code Ann. section 65-3-109 for the proposition that BellSouth may not "cover up an apparently illegal marketing plan by arguing that the documents describing the plan are 'commercially sensitive'."[35] BellSouth responds to this argument by

[34] Both sides agreed that it is not necessary to redact the services to which a particular customer subscribes as long as the customer's name, address and telephone number are redacted. This agreement renders moot BellSouth's argument that some of the information is protected pursuant to 47 U.S.C. section 222(a) and (c). *See* Transcript of Proceedings, Jan. 10, 2002, pp. 8 and 13 (Oral Argument on *Motion to Make Documents Public*).
[35] *Motion to Make Documents Public*, p. 2 (Nov. 30, 2001).

contending that the Hearing Officer cannot sustain AIN and XO's argument without determining whether BellSouth engaged in illegal activity and such a determination is premature.[36]

The above ruling renders this argument moot. Tenn. Code Ann. section 65-3-109 permits the Authority to publicize contracts, leases or engagements when the public interest requires disclosure.[37] Pursuant to the ruling in subsection "A" above, any contracts between BellSouth and customers will be made public with the exception of the customer's name, address, or phone number. Thus, a determination of whether Tenn. Code Ann. section 65-3-109 requires disclosure of the information is unnecessary.

III. *Emergency Motion to Quash or, in the Alternative, Emergency Motion for Protective Order*

After hearing oral arguments on the *Motion to Make Documents Public*, the Hearing Officer turned to the Motion to Quash. Through earlier agreements between AIN, XO and BellSouth and additional agreements reached during oral arguments, AIN, XO and BellSouth resolved all points of contention raised in the Motion to Quash.[38] In light of these agreements, the Hearing Officer finds that the Motion to Quash is moot and, therefore, is dismissed.

IT IS THEREFORE ORDERED THAT:

1. The *Motion to Make Documents Public* filed by Access Integrated Networks, Inc. and XO Tennessee, Inc. on November 30, 2001 is granted in part. BellSouth shall file with the Tennessee Regulatory Authority and serve on all parties of record no later than **Thursday, January 24, 2002**, a public version of BellSouth's responses to Authority Interrogatory No. 7 and AIN/XO Interrogatory No. 5. BellSouth may redact all information except information that it conveyed or could reasonably have expected would be conveyed to consumers by BellSouth

[36] *BellSouth Telecommunications, Inc.'s Response to Motion to Make Documents Public*, pp. 5-6 fn. 5 (Dec. 7, 2001).
[37] *See* Tenn. Code Ann. § 65-3-109 (Supp. 2001).
[38] *See* Transcript of Proceedings, Jan. 10, 2002 , pp. 39-41 (Oral Argument on *Motion to Make Documents Public*).

representatives or agents, information regarding the type of document, or information regarding the services purchased by a particular consumer. The public version of the responses shall be organized such that complete, single documents are identifiable.

2. The *Emergency Motion to Quash or, in the Alternative, Emergency Motion for Protective Order* filed by BellSouth Telecommunications, Inc. is dismissed.

3. Any party aggrieved by this Order may file a Petition for Reconsideration with the Hearing Officer pursuant to Authority Rule 1220-1-2-.20(1) within fifteen (15) days of the entry of this Order.

Julie M. Woodruff
Hearing Officer

ATTEST:

K. David Waddell, Executive Secretary