

BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE

April 16, 2002

IN RE:

**COMPLAINT OF XO TENNESSEE,
INC. AGAINST BELL SOUTH
TELECOMMUNICATIONS, INC.**

and

**COMPLAINT OF ACCESS INTEGRATED
NETWORKS, INC. AGAINST
BELL SOUTH TELECOMMUNICATIONS,
INC.**

**DOCKET NO.
01-00868**

INITIAL ORDER

This docket came before the Hearing Officer for hearing on the *Complaint of XO Tennessee, Inc.* and the *Complaint of Access Integrated Networks, Inc.* against BellSouth Telecommunications, Inc. ("BellSouth").

I. PROCEDURAL HISTORY

Access Integrated Networks, Inc. ("AIN") filed a complaint against BellSouth Telecommunications, Inc. ("BellSouth") with the Tennessee Regulatory Authority ("TRA" or "Authority") on September 18, 2001. The Executive Secretary's office assigned the complaint to Docket No. 01-00808. According to the complaint, on August 27, 2001, a representative of Berry Direct, acting on behalf of BellSouth, offered a customer three free months of service in exchange for enrolling in the "BellSouth Key Business Discount Program." AIN further alleged that the tariff applicable to the "BellSouth Key Business Discount Program" does not include

three free months of service.¹ AIN asserted that this offer violates Authority Rule 1220-4-8-.09(2)(c)(3) and the discriminatory pricing provisions of Tenn. Code Ann. § 65-4-122 and, therefore, requested the Authority issue a show cause order pursuant to Tenn. Code Ann. § 65-2-106.²

At the September 25, 2001 Authority Conference, the Directors ordered BellSouth to respond to AIN's complaint by October 2, 2001.³ BellSouth filed its answer to AIN's complaint as ordered and admitted that it engaged Berry Direct to market the "BellSouth 2001 Key Business Discount Program."⁴ BellSouth further admitted that a representative of Berry Direct sent the customer a fax, the cover sheet of which stated: "This will also give you three mos, 1st – 6th – 12th, no charge in each business – Fax right back!"⁵ BellSouth also admitted three free months of service is not within the "BellSouth 2001 Key Business Discount Program."⁶ In further answering the complaint, BellSouth stated that it is the policy of BellSouth to offer services in conformance with tariffs and that it has suspended all marketing by Berry Direct.⁷

XO Tennessee, Inc. ("XO") filed its complaint against BellSouth on October 9, 2001. The Executive Secretary's office assigned this complaint to Docket No. 01-00868. XO alleged that on September 5, 2001 a BellSouth Senior Account Executive offered to provide a customer with service pursuant to the "BellSouth Key Business Discount Program" and to include three free months of service.⁸ As in AIN's complaint, XO asserted that this offer violates Authority Rule 1220-4-8-.09(2)(c)(3) and the discriminatory pricing provisions of Tenn. Code Ann. § 65-4-

¹ Docket No. 01-00808, *Complaint of Access Integrated Networks, Inc.*, paras. 4 & 5 (Sept. 18, 2001).

² See *id.* at paras. 6 & 7.

³ See Docket No. 01-00808, *Order Directing Filing of Response* (Nov. 28, 2001).

⁴ See Docket No. 01-00808, *Answer of BellSouth Telecommunications, Inc.*, para. 3 (Oct. 2, 2001).

⁵ *Id.* at para. 4.

⁶ See *id.* at para. 5.

⁷ See *id.* at para. 4.

⁸ See Docket No. 01-00868, *Complaint of XO Tennessee, Inc.*, para. 4 (Oct. 9, 2001).

122 and, therefore, requested the Authority issue a show cause order pursuant to Tenn. Code Ann. § 65-2-106.⁹

At the October 23, 2001 Authority Conference, the Authority considered XO's complaint. The Authority appointed General Counsel or his designee to act as the hearing officer to determine the merits of XO's complaint, directed the hearing officer to determine whether Docket Nos. 01-00808 and 01-00868 should be consolidated, instructed the hearing officer to attempt to resolve XO's complaint within sixty (60) days of the file date, and ordered BellSouth to respond to XO's complaint by October 25, 2001.¹⁰

BellSouth filed a timely answer to XO's complaint. BellSouth admitted that its representative contacted the customer in question on September 5, 2001 and sent the customer a fax that contained language regarding three free months of service.¹¹ BellSouth denied that the Authority should issue a show cause order citing the fact that BellSouth has suspended "all of these sales activities by Berry Direct and BellSouth to Tennessee customers."¹²

In the midst of the complaint and answer process, AIN filed a *Motion to Open Show Cause Proceeding* in Docket No. 01-00808. In the motion, AIN referenced its complaint filed in Docket No. 01-00808, the complaint filed in Docket No. 01-00868, and a third instance of misconduct that allegedly occurred in Southhaven, Mississippi.¹³ AIN argued that the Authority has a legal duty to enforce laws under its jurisdiction and has not previously hesitated to open show cause proceedings and impose sanctions.¹⁴ AIN concluded by asserting that this "matter is far broader than a dispute between BellSouth and a competing carrier."¹⁵

⁹ See *id.* at paras. 6 & 8.

¹⁰ See Docket No. 01-00868, *Order Appointing Hearing Officer* (Nov. 7, 2001).

¹¹ See Docket No. 01-00868, *Answer of BellSouth Telecommunications, Inc.*, para. 3 (Oct. 25, 2001).

¹² *Id.* at para. 8.

¹³ See Docket No. 01-00808, *Motion to Open Show Cause Proceeding*, p. 1 (Oct. 16, 2001).

¹⁴ See *id.* at 3-4.

¹⁵ *Id.* at 5.

BellSouth filed its response to the *Motion to Open Show Cause Proceeding* on October 24, 2001. BellSouth asserted that the motion should be dismissed because the allegations set forth in the motion are the subject of XO's and AIN's complaints and explained that there is nothing to gain from convening another docket.¹⁶ Also, on October 24, 2001, the Consumer Advocate filed petitions to intervene in both dockets asserting that its intervention is on behalf of Tennessee consumers who will be adversely affected by price discrimination.¹⁷

On October 26, 2001, BellSouth filed its non-proprietary responses to the Authority's data requests issued on October 12, 2001. BellSouth explained that it would file its proprietary responses upon the entry of a protective order. On October 31, 2001, AIN and XO filed a letter stating that they believed the proposed protective order entered should be amended to permit the distribution of proprietary information to "other, appropriate state and federal agencies."¹⁸ BellSouth filed a responsive letter on October 31, 2001 urging the Hearing Officer to enter the standard protective order.¹⁹

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.²⁰ BellSouth filed its response to the motions on November 2, 2001 objecting to the ten-day response period.²¹

On November 6, 2001 the Hearing Officer entered an order addressing the Authority's directive of September 25, 2001 and many of the above-mentioned filings. The Hearing Officer

¹⁶ See Docket No. 01-00808, *BellSouth's Response to Access Integrated Network, Inc.'s Motion to Open Show Cause Proceedings*, pp. 1-2 (Oct. 24, 2001).

¹⁷ See Docket Nos. 01-00808 & 01-00868, *Attorney General's Petition to Intervene*, p. 1 (Oct. 24, 2001).

¹⁸ Docket Nos. 01-00808 & 01-00868, Letter of AIN and XO, p. 1 (Oct. 26, 2001).

¹⁹ See Docket Nos. 01-00808 & 01-00868, Letter of BellSouth, p. 1 (Oct. 31, 2001).

²⁰ See Docket Nos. 01-00808 & 01-00868, *Motion to Take Discovery*, p. 1 (Nov. 1, 2001).

²¹ See Docket Nos. 01-00808 & 01-00868, *BellSouth Telecommunications Inc.'s Objection to Discovery Response Deadline Sought by Access Integrated Network, Inc.*, p. 2 (Nov. 2, 2001).

decided to consolidate the dockets and ordered that all future filings be entered under Docket No. 01-00868. The Hearing Officer also granted the intervention of the Consumer Advocate, ordered the parties to file a protective order without the additional language requested by AIN and XO, and directed BellSouth to respond to AIN's and XO's discovery requests by November 16, 2001. Thereafter, the Hearing Officer determined that the actual remedy available as a result of the filing of the complaints and the *Motion to Open a Show Cause Proceeding* is the opening of an investigation. The Hearing Officer also ordered AIN and XO to file a more definite statement enumerating the specific statutes and/or Authority rules allegedly violated by BellSouth and requested that the parties file briefs on the issue of whether the Authority is a court for the purposes of Tenn. Code Ann. § 65-4-122. Lastly, the Hearing Officer set forth a procedural schedule which provided that the Hearing would commence on December 3, 2001.²²

On November 8, 2001, ITC^DeltaCom filed a *Petition to Intervene*. On November 13, 2001, the Hearing Officer issued a *Notice of Filing* requiring that parties file responses to the petition by November 14, 2001. At the request of BellSouth, the Hearing Officer extended this time to November 16, 2001. No responses having been filed, the Hearing Officer granted the petition.²³

On November 9, 2001, BellSouth filed a *Motion to Convene Mediation Conference*. Although the other parties did not object to participating in mediation, AIN, XO, and the Consumer Advocate requested that BellSouth first be required to respond to the discovery

²² See Docket Nos. 01-00808 & 01-00868, *Order*, pp. 5-12 (Nov. 6, 2001).

²³ See Docket No. 01-00868, *Order Granting Intervention* (Nov. 19, 2001).

requests.²⁴ The Hearing Officer granted the motion and entered an order scheduling the mediation for November 28, 2001.²⁵

On November 13, 2001, AIN and XO filed a *Memorandum Concerning Jurisdiction, Potential Violations and Proposed Relief*. On that same day, BellSouth filed *BellSouth Telecommunications, Inc.'s Brief Addressing Section 65-4-122*.

BellSouth filed discovery responses on November 16, 2001, and again on November 19, 2001, after the entry of the *Protective Order*. On November 20, 2001, AIN and XO filed a *Motion to Compel Responses to Discovery* requesting that the Hearing Officer compel BellSouth to respond fully to Interrogatory No. 10, which states: "List, on a customer by customer basis, all goods services or benefits of any kind provided by BellSouth Select, Inc. to any Tennessee customer. In your response, provide the estimated monetary value of those benefits to each customer."²⁶ The Hearing Officer granted the motion in part by directing BellSouth to "list, if it has not done so already, on a customer by customer basis, all goods, services or benefits of any kind provided by BellSouth Select, Inc. to any Tennessee customer in exchange for purchasing services through the Key Business Discount Program."²⁷ On November 26, 2001, BellSouth filed a letter, which among other things, explained that BellSouth had previously provided the information included within the Hearing Officer's order.²⁸

On November 26, 2001, the Hearing Officer issued a *Notice of Filing* as a reminder that the Pre-Hearing Conference was scheduled for November 30, 2001 and the Hearing was scheduled to begin on December 3, 2001. The *Notice of Filing* also requested that the parties file

²⁴ See Docket Nos. 01-00808 and 01-00868, *Response of XO Tennessee, Inc. and Access Integrated Network, Inc. to BellSouth Telecommunications, Inc.'s Mediation Proposal*, p. 1 (Nov. 13, 2001); Docket No. 01-00868, Letter of Consumer Advocate, p. 1 (Nov. 14, 2001).

²⁵ See Docket No. 01-00868, *Order Granting Motion to Convene Mediation Conference* (Nov. 19, 2001).

²⁶ Docket No. 01-00868, *Motion to Compel Responses to Discovery*, p. 1 (Nov. 20, 2001).

²⁷ See Docket No. 01-00868, *Order Granting In Part Motion to Compel Responses to Discovery* (Nov. 21, 2001).

²⁸ See Docket No. 01-00868, Letter of BellSouth, p. 2 (Nov. 26, 2001).

any pre-hearing motions by November 29, 2001. Thereafter, AIN, XO and ITC^DeltaCom filed a *Motion for Continuance of Hearing* on November 27, 2001, AIN and XO filed a *Motion to Amend Complaints* and *Motion to Compel the Testimony of Witnesses* on November 29, 2001, and BellSouth filed *BellSouth Telecommunications, Inc.'s Response to Motion for Continuance of Hearing* on November 29, 2001. In the *Motion to Amend Complaints*, AIN and XO asserted that the alleged misconduct is “part of a region-wide marketing plan called BellSouth Select that began in 1999” and requested that they be permitted to amend their complaints to add eight paragraphs related to the BellSouth Select Program.²⁹

AIN and XO filed a *Motion to Make Documents Public* on the morning of November 30, 2001. 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.³⁰

As scheduled, the Hearing Officer convened the Pre-Hearing Conference on November 30, 2001. During the Conference, the Hearing Officer deferred decision on the *Motion to Make Documents Public* pending the filing of responses. Upon finding that it would be more efficient to resolve the broader allegations as to the BellSouth Select Program in this proceeding rather than separating out the Key Business Discount Program, the Hearing Officer granted the *Motion to Amend Complaints*. Thereafter, the Hearing Officer found that there was a need for additional pre-hearing preparation in light of the amended complaints and, therefore, granted the *Motion for Continuance of Hearing*. As a result of these rulings, the Hearing Officer dismissed without

²⁹ Docket No. 01-00868, *Motion to Amend Complaints*, p. 1 (Nov. 29, 2001).

³⁰ See Docket No. 01-00868, *Motion to Make Documents Public*, p. 1 (Nov. 30, 2001).

prejudice the *Motion to Compel the Testimony of Witnesses* and set out a procedural schedule established with the cooperation of the parties.³¹

In addition, during the Conference, the Consumer Advocate requested the opportunity to file a response to *BellSouth Telecommunications, Inc.'s Brief Addressing Section 65-4-122* filed on November 13, 2001. BellSouth did not object, provided it would be afforded an opportunity to reply if it deemed such necessary. The Hearing Officer granted the Consumer Advocate's request.³²

Late in the day on November 30, 2001, Cinergy Communications Company ("Cinergy") filed a *Petition to Intervene*. After permitting a sufficient amount of time to pass for the filing of responses, the Hearing Officer found that the petition met the requirements of Tenn. Code Ann. § 4-5-310(a) and granted the petition.³³

On December 7, 2001, BellSouth filed a response to the *Motion to Make Documents Public* and an answer to the amended complaints. On that same day, the Consumer Advocate filed comments on *BellSouth Telecommunications, Inc.'s Brief Addressing Section 65-4-122*. On December 18, 2001, AIN and XO filed a second set of discovery requests. BellSouth filed responses to the requests on January 15, 2002.

On January 8, 2002, the Hearing Officer issued a *Notice of Oral Argument* scheduling argument on the *Motion to Make Documents Public* 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 Motion to Quash, BellSouth moved the Hearing Officer to enter a

³¹ See Docket No. 01-00868, *Order from November 30, 2001 Pre-Hearing Conference*, pp. 8-9 (Dec. 31, 2001).

³² See *id.* at Procedural Schedule, fn. 2.

³³ See Docket No. 01-00868, *Order Granting Intervention*, p. 1-2 (Dec. 31, 2001).

protective order in regard to the location of the depositions, order and scheduling of the deponents, designations pursuant to Rule 30.02(6) of the Tennessee Rules of Civil Procedure, and unaffiliated third parties.³⁴ In addition, BellSouth requested that the Hearing Officer hear the motion during the January 10, 2002 oral arguments.³⁵

On January 10, 2002, the Hearing Officer heard oral arguments on the *Motion to Make Documents Public*. Thereafter the Hearing Officer took the motion under advisement and turned to the Motion to Quash. Through earlier agreements between AIN, XO and BellSouth and additional agreements reached that morning, AIN, XO and BellSouth resolved all points of contention raised in the Motion to Quash.

On January 15, 2002, the Consumer Advocate filed a *Motion to Take Discovery*. The Consumer Advocate requested that the Hearing Officer order BellSouth to respond to the attached interrogatories by January 25, 2002.³⁶ Relying on the previously established procedural schedule and the attached interrogatories, the Hearing Officer directed the Consumer Advocate to provide by January 17, 2002 justification for its motion and verification that BellSouth had not previously provided the requested information. The Hearing Officer further ordered that if the Consumer Advocate failed to file the supplemental information, then the *Motion to Take Discovery* would be deemed denied.³⁷ The Consumer Advocate did not supplement its motion.

On January 16, 2002, the Hearing Officer issued an *Order Granting In Part Motion To Make Documents Public*. The Hearing Officer ordered BellSouth to file a public version of BellSouth's responses to Authority Interrogatory No. 7 and AIN/XO Interrogatory No. 5. The

³⁴ See Docket No. 01-00868, *Emergency Motion to Quash or, in the Alternative, Emergency Motion for Protective Order*, p. 1 (Jan. 9, 2002).

³⁵ See *id.* at 2 & 10.

³⁶ See Docket No. 01-00868, *Motion to Take Discovery*, p. 1 (Jan. 15, 2002).

³⁷ See Docket No. 01-00868, *Order on Motion to Take Discovery*, p. 2 (Jan. 16, 2002).

Hearing Officer permitted BellSouth to redact all information except that which was conveyed to or which BellSouth 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.³⁸

On January 23, 2002, the Hearing Officer convened a Status Conference for the purposes of discussing the need for a formal hearing, potential witnesses, and the status of stipulations of fact. At the start of the Conference, the parties confirmed that they had not entered into stipulations of fact and did not expect to do so. Next, through discussions with counsel, the Hearing Officer determined that a formal hearing was necessary. Counsel for AIN and XO and counsel for the Consumer Advocate indicated that each might call BellSouth Select, Inc. and BellSouth employees as hostile witnesses.³⁹ Thereafter, BellSouth requested a ruling as to whether BellSouth had to produce these witnesses. Hearing no substantive arguments as to why BellSouth should not produce the witnesses, the Hearing Officer issued an oral ruling requiring their appearance. The Hearing Officer entered an order on February 1, 2002 memorializing these events.⁴⁰

On January 25, 2002, the parties filed pre-filed direct testimony. AIN filed the testimony of Rodney Page and Joseph Gillan. The Consumer Advocate filed the testimony of Stephen Brown and Mark H. Crocker. BellSouth filed testimony on behalf of Thomas Lohman, Ena Shaw, Richard Tice, and Donald Livingston. The Consumer Advocate filed the pre-filed rebuttal testimony of Stephen Brown on January 30, 2002. BellSouth filed pre-filed rebuttal testimony

³⁸ See Docket No. 01-00868, *Order Granting In Part Motion To Make Documents Public*, p. 10 (Jan. 16, 2002).

³⁹ The specific employees listed were Richard Tice, Scott Johnson, Jeffery White, Don Livingston, and Scott Davis. Don Livingston was employed by BellSouth Telecommunication Inc.'s Small Business Services, but is now employed by BellSouth Affiliate Services Corporation. See Docket No. 01-00868, Don Livingston, Pre-Filed Direct Testimony, p. 1 (Jan. 25, 2002).

⁴⁰ See Docket No. 01-00868, *Order From January 23, 2002 Status Conference and February 1, 2002 Pre-Hearing* (Feb. 1, 2002).

on behalf of Scott S. Davis, Ena Shaw, Thomas Lohman, Donald Livingston, and Aniruddha Banerjee on that same day.

On February 1, 2002, the Hearing Officer convened a Pre-Hearing Conference. During the Conference, BellSouth confirmed that a medical condition prevented Dr. Banerjee from attending the hearing, but stated that he could testify telephonically. AIN, XO, Cinergy, ITC^DeltaCom, and the Consumer Advocate agreed to waive cross-examination of Dr. Banerjee, to permit his pre-filed rebuttal testimony to be entered into the record, and to solicit any testimony with regard to Dr. Banerjee's pre-filed rebuttal testimony from their own witnesses. BellSouth agreed to this arrangement. The parties next agreed to ten-minute opening arguments and the filing of post-hearing briefs. The Hearing Officer entered an order on February 1, 2002 memorializing these events.⁴¹

The Hearing Officer convened the Hearing as scheduled on February 4, 2002. At the outset, counsel for AIN, XO, and Cinergy moved into evidence all responses to discovery and the depositions of Michael Sisk, Kathleen Finn, Richard Tice, Robin Porter, and Don Livingston. Thereafter, the parties presented their opening arguments, and AIN called Rodney Page and Joseph Gillan to testify. The Consumer Advocate followed by calling Stephen Brown. The Consumer Advocate chose not to call Mark H. Crocker or enter his pre-filed direct testimony into the record. BellSouth then called Richard Tice, Don Livingston, and Scott S. Davis to testify. Prior to calling Mr. Davis, BellSouth notified the Hearing Officer that the parties had agreed to enter into the record the pre-filed direct and rebuttal testimony of Ena A. Shaw, the pre-filed direct testimony of Thomas F. Lohman, and the pre-filed rebuttal testimony of Aniruddha Banerjee without calling the witnesses to orally testify. Upon the conclusion of the

⁴¹ See *id.*

testimony, the parties agreed to file post-hearing briefs by February 18, 2002⁴² and the Hearing Officer adjourned the hearing. AIN, XO, ITC^DeltaCom, the Consumer Advocate and BellSouth filed post-hearing briefs on February 19, 2002.

On April 1, 2002, AIN, XO, and ITC^DeltaCom filed a *Motion to Submit Supplemental Authority* in which the parties requested that the Hearing Officer consider an order of the Washington Utilities and Transportation Commission in Docket No. UT-011329, other filings in that docket, and a news article regarding the subject of the docket. BellSouth filed its opposition to the motion on April 4, 2002 claiming that the order does nothing more than approve a settlement and is not, by its own terms, authority. BellSouth also argues that the facts underlying the docket are distinguishable from the facts of this case.⁴³

II. FINDINGS OF FACT

BellSouth, BellSouth Select, Inc., and BellSouth Advertising and Publishing Company ("BAPCO") are wholly owned subsidiaries of BellSouth Corporation.⁴⁴ BellSouth Select, Inc. manages a program, hereinafter generally referred to as the "Select Program," which involves the provisioning of regulated and unregulated services to customers by the "BellSouth family of companies."⁴⁵ BAPCO and BellSouth share the administrative costs of the Select Program.⁴⁶

The Select Program has taken many forms since its inception in early 1999. BellSouth Select, Inc., BAPCO and BellSouth jointly created the various forms of the Select Program,

⁴² The briefs were actually due on February 19, 2002 because February 18, 2002 was a state holiday.

⁴³ The Hearing Officer finds that the *Motion to Submit Supplemental Authority* should be granted in part. The Hearing Officer will review and consider the *Fifth Supplemental Order Approving and Adopting Settlement Agreement* of the Washington Utilities and Transportation Commission in Docket No. UT-011329 and give the order the force and effect it is due.

⁴⁴ See Docket No. 01-00868, Richard E. Tice, Pre-Filed Direct Testimony, p. 1 (Jan. 25, 2002); Docket No. 01-00868, *BellSouth Telecommunications, Inc.'s Answer to Supplemental Paragraphs to Complaints*, para. 1 (Dec. 7, 2001).

⁴⁵ Docket No. 01-00868, BellSouth's Response to Staff's First Data Requests, Item No. 1, p. 1 (Oct. 26, 2001).

⁴⁶ See Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item. No. 7, p. 1 (Jan. 15, 2002).

which are referred to in this Order as the Select Consumer Program, the Select Business Program, the Select Silver Program, the Select Gold Program, and the Select Platinum Program.⁴⁷ Since the inception of the Select Program, BellSouth Select, Inc., BAPCO and BellSouth have offered the program to consumers through various marketing activities, including direct mailings, outbound telemarketing efforts, and offers made at the time of inbound calls.⁴⁸

With the exception of the Select Consumer Program, the Select Program generally offers consumers standard points and bonus points in exchange for the purchase of regulated and unregulated services. Consumers can redeem points for products, services or credits. The value of one point is 2.5 cents.⁴⁹ BellSouth Select, Inc. awards consumers standard and bonus points, while BellSouth awards consumers bonus points only.⁵⁰ At various times, BellSouth and BellSouth Select, Inc. have combined the Select Program with various other promotions.

A. Forms of the Select Program

1. The Select Consumer Program

The Select Consumer Program began in March 1999. At the start of the program, residential customers that had a combined monthly expenditure between BellSouth and BellSouth Mobility of \$70.00 and that subscribed to at least one unregulated service qualified for the program.⁵¹ In January of 2000, the combined expenditure minimum increased to \$125.00 per month. One year later the criteria changed again to a minimum expenditure of \$50.00 a month on

⁴⁷ See Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, p. 179 & 191 (cross-examination of Richard E. Tice) & Exh. 3 (Transcript of Deposition, Jan. 16, 2002, p. 27 (deposition of Richard E. Tice)).

⁴⁸ See *id.* at Exh. 3 (Transcripts of Depositions, Jan. 16, 2002, p. 25 (deposition of Richard E. Tice), pp. 8-9 (deposition of Robin L. Porter), pp. 6-7, 37-38 (deposition of Don Livingston)).

⁴⁹ See *id.* at Exh. 6 (sample quarterly statement).

⁵⁰ See *id.* at 172, 174, & 176 (cross-examination of Richard E. Tice).

⁵¹ See Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item No. 6, p. 2 (Jan. 15, 2002); Docket No. 01-00868, Richard E. Tice, Pre-Filed Direct Testimony, p. 11 (Jan. 25, 2002) (describing this program as the "Select Residential Program.")

BellSouth services, including at least one unregulated service.⁵² The benefits available to consumers changed throughout the duration of the Select Consumer Program. In varying combinations depending on the date, Select Consumer Program members could receive the following benefits: 1) a coupon book; 2) the BellSouth Select Newsletter; 3) BellSouth Select Living magazine; 4) access to the HomeOwner Hotline service; 5) a 25% discount on BellSouth Mobility accessories; 6) a 20% discount on BellSouth home phone equipment; 7) access to BellSouth's "All-in-One" call center; 8) movie tickets; and 9) discounted roadside assistance.⁵³

In 2001, the consumer marketing organization, a part of BellSouth, determined there was no need to continue the Select Consumer Program due in part to the lack of competition in the residential markets. Therefore, the program ended on December 31, 2001.⁵⁴ Prior to the program's termination there were 40,562 Tennessee members.⁵⁵

2. The Select Business Program

The Select Business Program began in Tennessee late in 1999.⁵⁶ The program targeted BellSouth business customers with a regulated and unregulated minimum monthly expenditure of \$500.00 and BAPCO "major account customers"⁵⁷ that would agree to waive access to their

⁵² See Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item No. 6, p. 2 (Jan. 15, 2002); Docket No. 01-00868, Richard E. Tice, Pre-Filed Direct Testimony, p. 11 (Jan. 25, 2002).

⁵³ See Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item No. 1, p. 1; Item No. 6, p. 2 (Jan. 15, 2002). The discounted roadside assistance was only available to consumers who purchased services through BellSouth Mobility, Inc.

⁵⁴ See Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, Exh. 3 (Transcript of Deposition, Jan. 16, 2002, p. 31, 67 (deposition of Richard E. Tice)); Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item No. 6, p. 1 & 2 (Jan. 15, 2002).

⁵⁵ See Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item No. 6, p. 1 & 2 (Jan. 15, 2002).

⁵⁶ See *id.* at 3.

⁵⁷ See *id.* It is unclear what constitutes a BAPCO "major account customer."

CPNI information.⁵⁸ Members of the Select Business Program earned one standard point for each dollar spent on BellSouth and BAPCO services. Customers could redeem points for a credit on their BellSouth bill, prepaid phone cards, and phone equipment.⁵⁹ This program terminated in May 2000 after having accumulated 646 Tennessee members.⁶⁰

3. The Select Gold Program

The Select Gold Program began in September of 1999. The program targeted business customers who had a minimum monthly expenditure of \$250.00 on BellSouth services, including at least one unregulated service, and who would agree to waive access to their CPNI information.⁶¹ Members received one standard point per dollar spent on BellSouth services and could redeem points for a credit on their BellSouth bill, prepaid phone card, and phone equipment.⁶² Seven hundred and twenty Tennessee consumers became members of this program which ended in May 2000.⁶³

4. The Select Silver Program

The Select Silver Program began in June 2000.⁶⁴ This program targeted business customers who had a monthly expenditure between \$100.00 and \$250.00 on BellSouth services,

⁵⁸ See Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, p. 163 (cross-examination of Richard E. Tice). CPNI, Customer Proprietary Network Information, is:

(A) information that relates to the quantity, technical configuration, type, destination, location, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the carrier-customer relationship; and

(B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information.

47 U.S.C. § 222(h)(1) (Supp. 2000).

⁵⁹ See Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item No. 6, pp. 2-3 (Jan. 15, 2002).

⁶⁰ See *id.* at 1.

⁶¹ See *id.* at 3; Docket No. 01-00868, Transcript of Proceeding, Feb. 4, 2002, p. 163 (cross-examination of Richard E. Tice).

⁶² See Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item No. 6, p. 3 (Jan. 15, 2002).

⁶³ See *id.* at 1.

⁶⁴ See *id.* at 3.

including at least one unregulated service, and who would agree to waive access to their CPNI information.⁶⁵ Members received 500 bonus points for enrolling in the program. Additionally, members received bonus points for the purchase of certain services on the condition that the customer subscribe to the service for a minimum of six months.⁶⁶ Members could redeem points for a credit on their BellSouth bill, prepaid phone card, and phone equipment.⁶⁷ In addition to being able to redeem points for a benefit, members received benefits in the form of discounts on a variety of products offered by other companies. The discounts included, but were not limited to, an 80% discount off the cover price of Business Week Magazine, discounts on certain COMP USA[®] products, and a 10% discount off Viking Office Products[®] orders.⁶⁸ Members of the Select Silver Program who increased their monthly spenditure to more than \$250.00 were automatically upgraded to the Select Platinum Program.⁶⁹ Three hundred and thirty-one Tennessee consumers joined the Select Silver Program before BellSouth terminated the program in September 2001.⁷⁰

5. The Select Platinum Program

The Select Platinum Program also began in June 2000. This program targeted business customers, particularly former BellSouth customers, who had a minimum monthly spenditure of \$250.00 on BellSouth services, including at least one unregulated service. In addition, customers had to agree to waive access to their CPNI information.⁷¹ At the inception of this program

⁶⁵ See Docket No. 01-00868, Transcript of Proceeding, Feb. 4, 2002, Exh. 7 (document Bate stamped "1183" (redacted version)).

⁶⁶ See Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item No. 6, p. 3 (Jan. 15, 2002); Docket No. 01-00868, BellSouth Response to XO and AIN First Data Requests, Supplemental Response Item No. 5, Online Customer Retention Action, October 2000, version Oct. 9, 2000, p. 21 (Jan. 24, 2001) (redacted version).

⁶⁷ See Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item No. 6, p. 3 (Jan. 15, 2002).

⁶⁸ See Docket No. 01-00868, BellSouth Response to XO and AIN First Data Requests, Supplemental Response Item No. 5, Online Customer Retention Action, October 2000, version Oct. 9, 2000, p. 20 (Jan. 24, 2001) (redacted version).

⁶⁹ See Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item No. 6, p. 3 (Jan. 15, 2002).

⁷⁰ See *id.* at 1.

⁷¹ See Docket No. 01-00868, Transcript of Proceeding, Feb. 4, 2002, Exh. 7 (document Bate stamped "1183" (redacted version)) & p. 279 (cross-examination of Scott S. Davis).

existing Select Business Program and Select Gold Program members were upgraded to the Select Platinum Program.⁷² Members received one standard point per \$1.00 spent on BellSouth services, \$1.00 spent on Cingular Wireless LLC⁷³ services reflected on a BellSouth bill, and \$3.00 spent on BAPCO services.⁷⁴ In addition, BellSouth Select, Inc. awarded bonus points to customers as goodwill gestures, to bring a customer back to BellSouth, or for other reasons including filling out a customer satisfaction survey, reaching an anniversary date, or purchasing certain services.⁷⁵

Members could redeem points for a credit on their BellSouth bill, discounts on unregulated products and services, and phone equipment.⁷⁶ As with the Select Silver Program, members could also obtain discounts on products offered by other companies.⁷⁷ Members of the Select Platinum Program also received access to a "Select Service Manager."⁷⁸ The Select Service Manager is responsible for handling repair escalations, providing second tier support for customers dissatisfied as a result of a repair issue, and providing status reports to customers. In addition, Select Service Managers are available twenty-four hours a day, seven days a week.⁷⁹ BellSouth utilized the fact that Select Service Managers were part of the Select Program in order to entice customers to join the program.⁸⁰

⁷² See Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item No. 6, p. 3 (Jan. 15, 2002).

⁷³ Cingular Wireless LLC "now operates wireless properties formerly operated by BellSouth Mobility, Inc." Docket No. 01-00868, Richard E. Tice, Pre-Filed Direct Testimony, p. 4 n.1 (Jan. 25, 2002).

⁷⁴ See Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item No. 6, p. 3 (Jan. 15, 2002); Docket No. 01-00868, Richard E. Tice, Pre-Filed Direct Testimony, p. 3 (Jan. 25, 2002).

⁷⁵ See Docket No. 01-00868, Richard E. Tice, Pre-Filed Direct Testimony, p. 3 (Jan. 25, 2002); Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, p. 266-67 (cross-examination of Scott S. Davis), p. 223 (cross-examination of Don L. Livingston).

⁷⁶ See Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item No. 6, p. 3 (Jan. 15, 2002).

⁷⁷ See Docket No. 01-00868, BellSouth Response to XO and AIN First Data Requests, Supplemental Response Item No. 5, Online Customer Retention Action, October 2000, version Oct. 9, 2000, p. 20 (Jan. 24, 2001) (redacted version); Docket No. 01-00868, Richard E. Tice, Pre-Filed Direct Testimony, p. 6 (Jan. 25, 2002).

⁷⁸ See Docket No. 01-00868, Transcript of Proceeding, Feb. 4, 2002, Exh. 4 (document titled "Select Service Manager").

⁷⁹ See *id.*

⁸⁰ See *id.* at Exh. 3 (Transcript of Deposition, Jan. 16, 2002, pp. 23-24 (deposition of Robin L. Porter)).

In September 2001 simultaneously with the termination of the Select Silver Program, the criteria for the Select Platinum Program changed such that business customers were eligible for the program if they had a minimum monthly expenditure of \$100.00 for either BellSouth or BAPCO services.⁸¹ Given the decrease in the required monthly expenditure, existing Select Silver Program members were switched to the Select Platinum Program. Also in September 2001, products such as palm pilots were added as redemption options⁸² and bonus points were no longer awarded in connection with the purchase of regulated services.⁸³ Members could no longer redeem points for credits on a bill as of November 1, 2001. Instead, in order to avoid confusion as to whether the credit applied to regulated services, members were given the option of receiving a check from BellSouth Select, Inc. for the redemption amount, that is 2.5 cents per point.⁸⁴

As of January 1, 2002, given the termination of the Select Silver Program in September 2001 and the Consumer Select Program in December 2001, the only remaining form of the Select Program still in existence was the Select Platinum Program. Most recently, BellSouth Select, Inc. instituted a restriction preventing members from redeeming points the value of which equals an amount in excess of the customer's aggregate, unregulated spending since joining the program less the value of the points the customer has already redeemed.⁸⁵ At the time of the Hearing there were approximately 11,500 members of the Select Platinum Program in

⁸¹ See Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item No. 6, p. 4 (Jan. 15, 2002); Docket No. 01-00868, Richard E. Tice, Pre-Filed Direct Testimony, p. 3 (Jan. 25, 2002).

⁸² See Docket No. 01-00868, BellSouth's Response to XO's Second Data Requests, Item No. 6, p. 4 (Jan. 15, 2002).

⁸³ See Docket No. 01-00868, Richard E. Tice, Pre-Filed Direct Testimony, p. 10 & 186 (Jan. 25, 2002).

⁸⁴ See *id.* at 6; Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, Exh. 3 (Transcript of Deposition, Jan. 16, 2002, p. 41 (deposition of Richard E. Tice)).

⁸⁵ See Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, pp. 139-40 (direct examination of Richard E. Tice).

Tennessee, including the 331 Select Silver Program members,⁸⁶ and approximately 112,000 members in BellSouth's nine-state region.⁸⁷

B. Combination Offerings

By its very nature, the Select Program involves the purchase of tariffed services; that is, most Select Program members purchased regulated services.⁸⁸ In two particular situations, however, BellSouth actively promoted the Select Program to consumers in conjunction with a particular tariffed discount offer. In these situations, consumers were enticed with the discount provided through the tariffed offer as well as the benefits of the Select Program.

1. The Key Business Discount Program Combination

At a regularly scheduled Authority Conference on June 20, 2000, a majority of the Directors⁸⁹ approved BellSouth's Tariff to Introduce the Key Business Discount Program.⁹⁰ Customers eligible to purchase services through this tariff included new and existing customers in rate groups four and five with monthly-billed revenues at each of their locations of between \$150.00 and \$6,000.00.⁹¹ In order to receive discounts on BellSouth regulated services ranging between 5% and 16%, BellSouth required customers to agree to a one, two or three year contract.⁹² The enrollment period for the program ran from June 26, 2000 through December 25, 2000.⁹³ The tariff also provided that the Program is available for resale during the enrollment period.⁹⁴

⁸⁶ See *id.* at 177 & 181 (cross-examination of Richard E. Tice).

⁸⁷ See *id.* at 171 (cross-examination of Richard E. Tice).

⁸⁸ Only two members of the BellSouth Select Programs that have redeemed points have never purchased regulated services. See Docket No. 01-00868, Late-Filed Exhibit, p. 3 (Feb. 15, 2002).

⁸⁹ Director Malone, who was sitting as Chairman at the time, did not vote with the majority.

⁹⁰ *In re: BellSouth Telecommunications, Inc. Tariff to Introduce the Key Business Discount Program*, Docket No. 00-00436, *Order Approving Tariff* (Jul. 2, 2001).

⁹¹ See *In re: BellSouth Telecommunications, Inc. Tariff to Introduce the Key Business Discount Program*, Docket No. 00-00436, Tariff, sec. A13.78.3, para. A.1. (Jun. 20, 2000) (attached hereto as Attachment A).

⁹² See *id.* at Tariff, sec. A13.78.3, para. A.3., 5. & B.1.

⁹³ See *id.* at Tariff, sec. A13.78.3, para. A.5.

⁹⁴ See *id.*

At a regularly scheduled Authority Conference on November 7, 2000, a majority of the Directors⁹⁵ approved BellSouth's Tariff to Offer an Extension of the Key Business Discount Program.⁹⁶ This tariff merely extended the enrollment period of the Tariff to Introduce the Key Business Discount Program to June 25, 2001.⁹⁷

A majority of the Directors⁹⁸ next approved BellSouth's Tariff to Introduce 2001 Key Business Discount Program.⁹⁹ The enrollment period for this program runs from June 26, 2001 through June 25, 2002.¹⁰⁰ Under this tariff, eligible customers include new and existing customers with monthly-billed BellSouth revenues between \$100 and \$3,000 at one location.¹⁰¹ If a customer qualifies, they may receive discounts on BellSouth regulated services ranging from 6% to 18% after agreeing to an eighteen or thirty-six month term agreement.¹⁰² In addition, the tariff states that the program is available for resale for the duration of the enrollment period.¹⁰³

In April 2001, on a trial basis in Memphis, BellSouth began offering to enroll customers in the Select Program¹⁰⁴ at the time the customer subscribed to regulated BellSouth services through the 2000 Key Business Discount Program.¹⁰⁵ In late April, for reasons not apparent from the record, BellSouth suspended the trial program. At a later date, presumably upon approval of the 2001 Key Business Discount Program, BellSouth lifted the suspension and began offering to

⁹⁵ Director Malone did not vote with the majority.

⁹⁶ See *In re: BellSouth Telecommunications, Inc. Tariff to Offer an Extension of the Key Business Discount Program*, Docket No. 00-00903, *Order Approving Tariff* (Jun. 12, 2001).

⁹⁷ See *In re: BellSouth Telecommunications, Inc. Tariff to Offer an Extension of the Key Business Discount Program*, Docket No. 00-00903, Tariff, sec. A13.90.3, para. A. (Oct. 26, 2000) (attached hereto as Attachment B).

⁹⁸ Director Malone did not vote with the majority and filed a separate dissent.

⁹⁹ See *In re: BellSouth Telecommunications, Inc. Tariff to Introduce 2001 Key Business Discount Program*, Docket No. 01-00461, *Order Approving Tariff*, (Feb. 8, 2002); see also Don L. Livingston, Pre-Filed Direct Testimony, Exh. DL-1, Tariff (Jan. 25, 2002).

¹⁰⁰ See Docket No. 01-00868, Don L. Livingston, Pre-Filed Direct Testimony, Exh. DL-1, Tariff, sec. A13.90.6, para. A. (Jan. 25, 2002).

¹⁰¹ See *id.* at para. A.1.

¹⁰² See *id.* at para. A.5. & B.1.

¹⁰³ See *id.* at para. A.5.

¹⁰⁴ It is unclear from the record whether this offering applied to all of the Select Programs.

¹⁰⁵ See Docket No. 01-00868, Don L. Livingston, Pre-Filed Direct Testimony, pp. 4-5 (Jan. 25, 2002).

enroll customers throughout Tennessee in the Select Program in conjunction with the 2001 Key Business Discount Program.¹⁰⁶ Sixty-three Tennessee consumers accepted these combined offers.¹⁰⁷

Depending on the length of the term of the Key Business Discount Program elected by the customer, the customer received bonus points through the Select Program equal in value to up to three months of the customer's total BellSouth charges, including both regulated and unregulated charges.¹⁰⁸ It is clear from the testimony and BellSouth's answers to the complaints that the benefits of the combined offering were described to consumers, at least in some instances, as receiving free service. Specifically, BellSouth admitted that the customers referenced in AIN's and XO's complaints were told that they would receive three free months of service.¹⁰⁹ Further, in its pre-filed testimony, BellSouth stated that "certain sales personnel described the offer as including 'free' or 'complimentary' months of local service."¹¹⁰

2. BellSouth Connect and Grow Program

From May 8, 2000 through August 11, 2000, BellSouth offered a combination of the Select Silver Program and the Complete Choice for Business Program called the BellSouth Connect and Grow Program.¹¹¹ Under the Complete Choice For Business tariff, customers with multiple lines received a discount on the monthly rates in exchange for agreeing to a twenty-four or thirty-six month contract.¹¹² The combination program was only available to Tennessee

¹⁰⁶ See *id.* at 5.

¹⁰⁷ See Docket No. 01-00868, Richard E. Tice, Pre-Filed Direct Testimony, p. 8 (Jan. 25, 2002).

¹⁰⁸ See Docket No. 01-00868, Don L. Livingston, Pre-Filed Direct Testimony, p. 3 (Jan. 25, 2002); Docket No. 01-00868, Richard E. Tice, Pre-Filed Direct Testimony, p. 7 (Jan. 25, 2002).

¹⁰⁹ See Docket No. 01-00868, *Answer of BellSouth Telecommunications, Inc.*, para. 3 (Oct. 25, 2001); Docket No. 01-00808, *Answer of BellSouth Telecommunications, Inc.*, para. 4 (Oct. 2, 2001).

¹¹⁰ Docket No. 01-00868, Don L. Livingston, Pre-Filed Direct Testimony, p. 4 (Jan. 25, 2002).

¹¹¹ See Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, Exh. 7 (document Bate stamped "0581" (redacted version)) & pp. 205-06 & 246-49 (cross-examination of Don L. Livingston).

¹¹² See *In re: BellSouth Communications, Inc. Tariff to Introduce a Term Plan for Complete Choice for Business Customers*, Docket No. 00-00180, Tariff, sec. A3.45.2 – A3.45.4 (Mar. 20, 2000) (attached hereto as Attachment C).

consumers in rate group five. In order to qualify for the combination program, the customer had to upgrade to a Complete Choice for Business four-line package and agree to a two or three year contract. In exchange, BellSouth waived certain line charges and enrolled the customer in the Select Silver Program.¹¹³

C. BellSouth's Billing and Accounting

Select Program members receive quarterly accountings of their standard and bonus point accumulation from BellSouth Select, Inc. This statement does not differentiate between points deriving from regulated versus unregulated services.¹¹⁴ When a customer redeems standard or bonus points, BellSouth debits the cost of the points redeemed to its unregulated accounts only.¹¹⁵ BellSouth has utilized this procedure since the inception of the Select Program.¹¹⁶ The bill received by the customer reflects the total dollar value of the points redeemed in the "Other Charges and Credits" section of the bill.¹¹⁷ There is no accounting on the bill of which portion of the "Other Charges and Credits" amount applies to the purchase of regulated versus unregulated services; there is simply a deduction from the total bill.¹¹⁸

In the case of the Key Business Discount Program Combination, BellSouth bills customers the full tariff rate for regulated services purchased through the 2001 Key Business Discount Program and credits BellSouth's regulated accounts for the full tariff rate.¹¹⁹ Likewise, BellSouth bills unregulated services at the full rate.¹²⁰

¹¹³ See Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, Exh. 7 (document Bate stamped "0581" (redacted version)) & pp. 246-49 (cross-examination of Don L. Livingston).

¹¹⁴ See *id.* at 188 & Exh. 6 (sample quarterly statement).

¹¹⁵ See Docket No. 01-00868, Thomas F. Lohman, Pre-Filed Direct Testimony, p. 4 (Jan. 25, 2002).

¹¹⁶ See *id.* at 6.

¹¹⁷ *Id.* at 5.

¹¹⁸ Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, Exh. 3 (Transcript of Deposition, Jan. 16, 2002, pp. 43-46 (deposition of Richard E. Tice)).

¹¹⁹ See Docket No. 01-00868, Thomas F. Lohman, Pre-Filed Direct Testimony, p. 3, 5 (Jan. 25, 2002).

¹²⁰ See *id.* at 4.

As to the “free” service offer, BellSouth Select, Inc. credited the awarded bonus points to the customer’s Select Program account in the first, sixth, and twelfth months of membership depending on the number of bonus points awarded. The bonus points were then redeemed, apparently without the customer’s participation, as a credit against the customer’s bill for the month the points were awarded.¹²¹ The bonus points received by the customer under the representation of free service are charged entirely to BellSouth’s unregulated accounts.¹²²

BellSouth and BAPCO also pay for the administration of the Select Program and, therefore, BellSouth incurs administrative costs for which it must account.¹²³ Specifically, BellSouth Select, Inc. bills BellSouth for a portion of the cost of administering the Select Program, including the Select Consumer Program.¹²⁴ Initially, BellSouth allocated these costs to both regulated and unregulated accounts, but in 2001 BellSouth began allocating these expenses entirely to unregulated accounts.¹²⁵

III. CONCLUSIONS

The first obstacle to overcome in this Order is to identify the alleged violations. The various parties have asserted numerous violations of state and federal statutes as well as Authority rules and orders. Moreover, the parties have relied on several statutes as providing potential remedies. After reviewing the filings¹²⁶ and record in this docket, it is the conclusion of

¹²¹ See Docket No. 01-00868, Don L. Livingston, Pre-Filed Direct Testimony, p. 3 (Jan. 25, 2002); Docket No. 01-00868, Richard E. Tice, Pre-Filed Direct Testimony, p. 7 (Jan. 25, 2002).

¹²² See Docket No. 01-00868, Thomas F. Lohman, Pre-Filed Direct Testimony, p. 5 (Jan. 25, 2002).

¹²³ See Docket No. 01-00868, BellSouth’s Response to XO’s Second Data Requests, Item No. 7, p. 1 (Jan. 15, 2002).

¹²⁴ Prior to 2001, BellSouth Select, Inc. billed these costs to BellSouth Corporation which then billed BellSouth. Starting in 2002, BellSouth Select, Inc. will bill BellSouth directly. See Docket No. 01-00868, BellSouth’s Response to XO’s Second Data Requests, Item No. 7, p. 1 (Jan. 15, 2002).

¹²⁵ See Docket No. 01-00868, Thomas F. Lohman, Pre-Filed Direct Testimony, p. 7 (Jan. 25, 2002).

¹²⁶ In particular the Hearing Officer reviewed the following: *Complaint of Access Integrated Networks, Inc.*, the *Complaint of XO Tennessee, Inc.*, the *Attorney General Petition to Intervene* filed in both dockets, the *Memorandum of Access Integrated Network, Inc. and XO Tennessee, Inc. Concerning Jurisdiction, Potential Violations, and Proposed Relief*, the *Motion to Amend Complaints*, and the post-hearing briefs.

the Hearing Officer that the parties have alleged that BellSouth committed unjust discrimination, violated Authority rules requiring the filing of tariffs, failed to charge customers the tariff rate, violated the Authority's reporting rules, and violated the Authority's *Final Order in Docket No. 96-01331*.¹²⁷ A further issue raised by the Consumer Advocate concerns "whether the wholesale discount for the Key Program needs to be increased given the retail discounts in order to comply with the TRA order in Docket No. 96-01331."¹²⁸ Each of these allegations and the Consumer Advocate's issue will be addressed below. In addition, the statutes relied upon as providing remedies will be addressed in Section IV of this Order.

A. Unjust Discrimination - Tennessee Code Annotated Section 65-4-122(a)¹²⁹

Tenn. Code Ann. § 65-4-122(a) declares unjust discrimination to be prohibited and unlawful.¹³⁰ Tennessee case law instructs decision-makers on how to interpret and construe statutory provisions. When construing a statute the decision-maker must "ascertain and give effect to the intent and purpose of the legislation, considering the statute as a whole and giving words their common and ordinary meaning."¹³¹ There exists a presumption that a statute says

¹²⁷ See *In re: The Avoidable Costs of Providing Bundled Service for Resale by Local Exchange Telephone Companies*, Docket No. 96-01331, *Final Order in Docket No. 96-01331* (Jan. 17, 1997).

¹²⁸ *Attorney General's Post-Hearing Brief Redacted Version*, p. 16 (Mar. 4, 2002).

¹²⁹ In their brief, XO, AIN, and ITC^DeltaCom assert that BellSouth violated Tenn. Code Ann. § 65-4-122(c) regarding undue or unreasonable preferences as well as subsection (a) regarding unjust discrimination. See Docket No. 01-00868, *Post Hearing Brief of XO Tennessee, Access Integrated Network, Inc. and ITC^DeltaCom*, pp. 8-9 (Feb. 19, 2002). None of these parties, however, alleged that BellSouth violated Tenn. Code Ann. § 65-4-122(c) prior to the hearing in this matter, although in their brief they explain that the conduct prohibited by subsection (c) is different than that prohibited by subsection (a). Any mention of "preference" in the pre-hearing filings and opening arguments was in regard to that term's relevance to Tenn. Code Ann. § 65-4-122(a). See Docket No. 01-00868, *Memorandum of Access Integrated Network, Inc. and XO Tennessee, Inc. Concerning Jurisdiction, Potential Violations, and Proposed Relief*, p. 3 (Nov. 13, 2001); Docket No. 01-00868, *Transcript of Proceedings*, Feb. 4, 2002, p. 14 (opening arguments). Given that BellSouth was provided no notice of this alleged violation, it would be prejudicial to BellSouth to address Tenn. Code Ann. § 65-4-122(c) in this proceeding.

¹³⁰ Tenn. Code Ann. § 65-4-122(a) (Supp. 2001).

¹³¹ *Consumer Adv. Div. v. Tennessee Reg. Auth.*, No. M1999-01699-COA-R12-CV, 2000 WL 1514324, *3 (Tenn. Ct. App. Oct. 12, 2001) (citing *Marion County Bd. of Comm'rs v. Marion County Election Comm'n*, 594 S.W.2d 681 (Tenn. 1980)); see *Consumer Adv. Div. v. Greer*, 967 S.W.2d 759, 761 (Tenn. 1998).

what it means and means what it says.¹³² “Whenever possible, legislative intent should be determined from the plain language of the statute, ‘read in the context of the entire statute, without any forced or subtle construction which would extend or limit its meaning.’”¹³³

The definition of unjust discrimination contained in this subsection is multifaceted, but unambiguous. Thus, breaking it down reveals that in order for unjust discrimination to occur the common carrier or public service company must:

- directly or indirectly use a device, such as a rebate,
- to charge, demand, collect or receive from any person
- a greater or less compensation
- for any service within the state
- than is charged, demanded, collected or received from any other person
- for service of a like kind
- under substantially like circumstances and conditions and
- make a preference between the parties.¹³⁴

AIN, XO, and ITC^DeltaCom contend that BellSouth violated § 65-4-122 by giving a rebate that “results in one customer paying more or less than another for the same regulated service.”¹³⁵ These parties emphatically assert that the Select Program is a rebate.¹³⁶ Lastly, AIN, XO, and ITC^DeltaCom conclude that by providing a rebate in exchange for the purchase of regulated services, BellSouth is manipulating rates in violation of § 65-4-122(a).¹³⁷

The Consumer Advocate asserts that the redemption of bonus points on regulated services is a rebate paid by BellSouth Select, Inc. acting as a conduit of BellSouth.¹³⁸ Next, the

¹³² See *Consumer Adv. Div. v. Tennessee Reg. Auth.*, 2000 WL 1514324 at *3 (citing *Worley v. Weigel's, Inc.*, 919 S.W.2d 589, 593 (Tenn. 1996)).

¹³³ *Kultura, Inc. v. Southern Leasing Corp.*, 923 S.W.2d 536, 539 (Tenn. 1996) (quoting *National Gas Distrib., Inc. v. State*, 804 S.W.2d 66, 67 (Tenn. 1991)); see *Consumer Adv. Div. v. Greer*, 967 S.W.2d at 761.

¹³⁴ Tenn. Code Ann. § 65-4-122(a) (Supp. 2001).

¹³⁵ Docket No. 01-00868, *Post-Hearing Brief of XO Tennessee, Access Integrated Network, Inc. and ITC^DeltaCom*, p. 7 (Feb. 19, 2002).

¹³⁶ See *id.* at 6.

¹³⁷ See *id.* at 8; Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, p. 106 (redirect examination of Joseph Gillan).

¹³⁸ See Docket No. 01-00868, *Attorney General's Post-Hearing Brief Redacted Version*, p. 5 & 10 (Mar. 4, 2002).

Consumer Advocate asserts that the rebate lowers the cost of service.¹³⁹ The Consumer Advocate then argues that the rebate is “being offered to less than all the customers who receive service under substantially like circumstances and conditions” and concludes that the rebate constitutes a preference.¹⁴⁰

BellSouth refutes the assertions that the Select Program provides a rebate that results in members paying less than non-members for regulated services.¹⁴¹ In support of this position, BellSouth argues that it does not hand back regulated revenues to customers and its accounting procedures make it clear that BellSouth sells its regulated services according to its tariffs.¹⁴² BellSouth next asserts that it did not commit unjust discrimination by offering the Select Program and Combination Offerings because the programs were and still are available to all BellSouth customers who meet the respective eligibility requirements.¹⁴³

Authority Rule 1220-4-2-.06(1) requires public utilities to file tariffs that explicitly set forth the rates for service. By filing tariffs utilities provide notice to all customers of the rates for and nature of the service tariffed. Thus, filing tariffs lessens the potential for discrimination and provides the Authority with a mechanism with which to determine whether discrimination has occurred. The United States Supreme Court has recognized the relationship between the notice provided through the filing of tariffs and discrimination. In 1906, the Court stated:

It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such

¹³⁹ See *id.* at 10.

¹⁴⁰ *Id.* at 10-11.

¹⁴¹ See Docket No. 01-00868, *Post-Hearing Brief of BellSouth Telecommunications, Inc.*, p. 26 (Feb. 19, 2002).

¹⁴² See *id.* at 26-27.

¹⁴³ See *id.* at 28-31.

tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination.¹⁴⁴

The Court has applied this same principle to the telecommunications industry.¹⁴⁵

By failing to file a tariff describing the Select Program or tariffs changing BellSouth's existing tariffs, BellSouth circumvented this notification process. Therefore, the analysis of this issue must begin with a determination of whether BellSouth provided notice to all customers. If the answer to this question is no, then the next task is to determine the effect caused by the failure to provide sufficient notification.

The record indicates that there were customers who did not receive notification of the Select Program and, therefore, could not become or seek to become members. In order to join the Select Program, customers had to learn of the program, meet the eligibility criteria, and, in some manner, inform BellSouth that the customer wanted to join the program. In other words, BellSouth did not automatically enroll customers as they became eligible.

There is testimony in the record indicating that the methods used by BellSouth to notify customers of the Select Program did not ensure that all customers received notification or even that all eligible customers received notice. Richard E. Tice, President of BellSouth Select, Inc., testified as follows:

In 1999, for instance, BSSI sent materials to all potentially eligible customers by direct mail. Additionally, the program is described on the Internet at www.bellsouthselectbusiness.com. BAPCO representatives also inform their potential eligible customers of the program, and BellSouth's efforts to inform its potentially eligible customers of the program are explained in the pre-filed direct testimony of Mr. Livingston. Finally, I have recently confirmed that enrollment in the Select Business Program is offered to eligible customers during **certain**

¹⁴⁴ *New York, New Haven, & Hartford R.R. Co. v. Interstate Comm. Comm'n*, 200 U.S. 361, 390, 26 S.Ct. 272, 277 (1906) (cited in *Louisville & N.R. Co. v. Hardiman*, 5 Tenn. App. 289, 1927 WL 2133, *3 (1927)).

¹⁴⁵ See *MCI Telecomm. Corp. v. American Tel. & Tel.*, 512 U.S. 218, 229, 114 S.Ct. 2223, 2231 (1994) (stating that the "tariff-filing requirement is, to pursue this analogy, the heart of the common carrier section of the Communications Act").

outbound calls initiated by BellSouth Small Business Services organization or its representatives.¹⁴⁶

Don Livingston, former Senior Director of Small Business Services, a division of BellSouth, testified as follows: “Yes, we will look in our database and see which customers are eligible for the program, and then we will **try** to invite them to the program, **could** be a direct mail piece or the sales force **could** mention it to the customer.”¹⁴⁷ Mr. Livingston later answered the question of “how does [BellSouth] inform potentially-eligible customers of the select business program” as follows:

There are several ways that is done. When a Small Business Services representative contacts a potentially-eligible customer, for instance, that representative **typically** will invite the customer to enroll in the Select Business Program. Similarly, the entities that make outbound telemarketing calls on behalf of [BellSouth] to small business customers also **typically** invite potentially-eligible customers to enroll in the program. Personnel who handle in-bound calls from small business customers **typically** invite potentially-eligible customers to enroll in the program during these calls.¹⁴⁸

The notification process described in this testimony focuses only on those customers who were eligible or potentially eligible. Moreover, the use of the words “certain,” “try,” “could” and “typically” indicate that even potentially eligible customers may not receive notice. Given this testimony, a finding that BellSouth failed to notify all customers of the Select Program is clearly supported.

Based on this finding, it is reasonable to conclude that BellSouth customers who purchased regulated services were not provided the opportunity to enroll in the program because they had no notice of the existence of the program. Because some of these customers purchased regulated services nonetheless, they presumably purchased those regulated services in

¹⁴⁶ Docket No. 01-00868, Richard E. Tice, Pre-Filed Direct Testimony, pp. 6-7 (Jan. 25, 2002).

¹⁴⁷ Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, Exh. 3 (Transcripts of Depositions, Jan. 16, 2002, p. 46 (deposition of Don Livingston)) (emphasis supplied).

¹⁴⁸ Docket No. 01-00868, Don Livingston, Pre-Filed Direct Testimony, p. 8 (Jan. 25, 2002) (emphasis supplied).

accordance with properly filed tariffs.¹⁴⁹ Therefore, these customers did not receive the value obtained in exchange for the purchase of regulated services received by those customers who were members of the Select Program.

By providing value in exchange for the purchase of regulated services, BellSouth received from or charged Select Program members less than the tariff rates charged to non-members. It is BellSouth's contention that there is no difference in the amount charged to members and non-members because it billed everyone the tariff rate and recorded the associated revenues in regulated accounts. This argument disregards the customer's perspective of the benefits obtained through membership in the Select Program. BellSouth Select, Inc. and BellSouth awarded points to customers. Those points have a value of 2.5 cents and customers can redeem the points for credits (now checks), products or services. In addition, members also received benefits including coupons, discounts, and movie tickets. These benefits also have value, although a specific "cash" value is not in the record. It is reasonable for a customer to conclude that, because it received value in exchange for purchasing regulated and unregulated services, the customer paid or was charged less for those regulated and unregulated services. This is further evidenced by the fact that when a customer redeemed points for a credit, the credit was specifically applied to regulated or unregulated services, but was simply applied to the total bill. From a customer's perspective, it is reasonable to assume that, because the customer obtained the credit through the purchase of both regulated and unregulated services, the credit likewise applied to both regulated and unregulated services. BellSouth's own expert witness, Aniruddha Banerjee, Ph.D., admitted that customers may perceive that they are receiving a

¹⁴⁹ This presumption is based on the assumption that there are no other BellSouth programs related to the purchase of regulated services in Tennessee that are not tariffed.

reduction of the tariffed amount.¹⁵⁰ Also, Mr. Richard E. Tice, President of BellSouth Select, Inc., testified that the change in redemption options from allowing a credit to allowing a check was implemented to avoid potential confusion as to whether the credit amount applies to regulated services.¹⁵¹ In an environment striving for competition, the customer's perception cannot be ignored.

It is the conclusion of the Hearing Officer that BellSouth's actions constitute unjust discrimination as defined by Tenn. Code Ann. § 65-4-122(a). Through its use of the Select Program, a device in and of itself,¹⁵² BellSouth charged or received from persons receiving the same services under the same circumstances and conditions different rates for those services and made a preference between the persons thereby committing unjust discrimination. The two groups of persons were members of the Select Program and non-members. The difference in the rates charged or received by BellSouth is the tariff rates for non-members and the tariff rates less the value received by Select Program members in exchange for the purchase of regulated services.

B. Tariffing Violations

1. Requirements to Tariff

Tenn. Code Ann. § 65-5-202 provides the Authority with the power to require public utilities to file tariffs containing information related to the classification of services and rates and charges.¹⁵³ Authority Rule 1220-4-2-.06 requires each telephone utility to file tariffs setting forth the "conditions and circumstances under which service will be furnished" in accordance with

¹⁵⁰ See Docket No. 01-00868, Aniruddha Banerjee, Ph.D., Pre-Filed Rebuttal Testimony, p. 5 (Jan. 30, 2002).

¹⁵¹ Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, Exh. 3 (Transcripts of Depositions, Jan. 16, 2002, p. 41 (deposition of Richard E. Tice)).

¹⁵² The parties hotly dispute whether the value provided to customers by BellSouth constituted a "rebate" as that term is used in Tenn. Code Ann. § 65-4-122(a). There is, however, no reason to specifically address this issue because the statute simply requires that the utility use a device.

¹⁵³ See Tenn. Code Ann. § 65-5-202 (Supp. 2001).

Rule chapter 1220-4-1.¹⁵⁴ Authority Rules 1220-4-1-.04 and .06 require public utilities, unless otherwise provided in the rules, to file tariffs containing changes in rates, rules, and regulations at least thirty (30) days prior to the effective date of such changes.¹⁵⁵ Authority Rule 1220-4-1-.03 requires that tariffs “explicitly state the rates and charges for each class of service rendered” and contain “rules and regulations of the utility that in any manner affects the rates charged.”¹⁵⁶

BellSouth contends that the Select Program is an unregulated service and, therefore, the pricing of the Select Program is not subject to the tariff requirements applicable to regulated services.¹⁵⁷ Further, it is BellSouth’s position that its customers do not receive a reduction of the tariff rate or a rebate and, therefore, BellSouth’s actions comply with its tariffs.¹⁵⁸ In support of its position, BellSouth relies on its assertion that the “entire cost of the program points is borne by the non-regulated lines of business.”¹⁵⁹

In contrast, AIN, XO, and ITC^DeltaCom argue that BellSouth’s use of the Select Program in conjunction with the sale of BellSouth regulated services results in either a direct or indirect rebate to the customer. According to these parties, such a result requires that the Select Program be described in a tariff pursuant to Authority Rule 1220-4-1-.03 because the “program affects the terms and conditions under which [BellSouth] sells regulated telecommunications services in Tennessee.”¹⁶⁰ AIN, XO, and ITC^DeltaCom also note that under the Key Business Discount Program Combination, customers received free service and that BellSouth admitted this offer was not consistent with its tariff.¹⁶¹

¹⁵⁴ See Tenn. R. & Reg. 1220-4-2-.06(1) (Rev. Sept. 2001).

¹⁵⁵ See *id.* 1220-4-1-.04 & .06 (Rev. Dec. 1984).

¹⁵⁶ *Id.* 1220-4-1-.03.

¹⁵⁷ See Docket No. 01-00868, *Post-Hearing Brief of BellSouth Telecommunications, Inc.*, p. 23 (Feb. 19, 2002).

¹⁵⁸ See *id.* at 25-26.

¹⁵⁹ *Id.* at 24.

¹⁶⁰ Docket No. 01-00868, *Post Hearing Brief of XO Tennessee, Access Integrated Networks, Inc. and ITC^DeltaCom*, pp. 10-11 (Feb. 19, 2001).

¹⁶¹ See *id.* at 10.

Similarly, the Consumer Advocate argues that the Select Program results in a rebate the impact of which “is to give a discount on the cost of regulated service.”¹⁶² Noting that BellSouth did not include this discount in any of its tariffs, the Consumer Advocate asserts that BellSouth has violated Authority Rule 1220-4-1-.03 because the discount affects the rates.¹⁶³

BellSouth’s arguments cannot withstand scrutiny. The evidence clearly indicates that BellSouth Select, Inc. in conjunction with BellSouth awarded points to BellSouth customers in exchange for the purchase of BellSouth regulated services. The evidence also clearly demonstrates that BellSouth awarded bonus points to its customers in exchange for the purchase of BellSouth regulated services.¹⁶⁴ Both standard and bonus points have a “cash” value equal to 2.5 cents.¹⁶⁵ Moreover, members received additional benefits in exchange for the purchase of BellSouth regulated and unregulated services. Thus, BellSouth and BellSouth Select, Inc. provided value to customers in exchange for the purchase of regulated services. The manner in which a customer obtained that value, whether as a credit, cash, product or service, is of no consequence.

It cannot be disputed that providing value in exchange for the purchase of a regulated service is a condition or circumstance under which BellSouth furnishes that regulated service. Therefore, pursuant to Authority Rules 1220-4-2-.06(1), BellSouth was required to file a tariff with the Authority regarding the terms of the Select Program. It failed to do so and, therefore, violated that Rule. In the alternative, BellSouth was required pursuant to Authority Rules 1220-4-1-.04 and .06 to file tariffs regarding any changes in rates, rules or regulations. For example,

¹⁶² Docket No. 01-00868, *Attorney General’s Post-Hearing Brief Redacted Version*, p. 15 (Mar. 4, 2002).

¹⁶³ *See id.*

¹⁶⁴ *See* Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, pp. 172, 174& 176 (cross-examination of Richard E. Tice); Docket No. 01-00868, BellSouth’s Response to XO’s Second Data Requests, Item No. 6 (Jan. 15, 2002).

¹⁶⁵ *See* Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, Exh. 6 (sample quarterly statement).

these Rules require that BellSouth file a tariff altering the terms of the Key Business Discount Program tariffs because those tariffs do not provide for three free months of service. BellSouth failed to file any such tariffs and, therefore, violated these Rules. Lastly, because BellSouth failed to file the requisite tariffs, it necessarily violated Authority Rule 1220-4-1-.03, which sets forth those items that must be included in a tariff. Therefore, the Hearing Officer finds that BellSouth violated Authority Rules 1220-4-2-.06(1) and 1220-4-1-.03, .04 and .06 by failing to file a tariff describing the Select Program or, in the alternative, by failing to file tariffs changing its existing tariffs.

2. Charging Tariff Rates

AIN, XO, and ITC^DeltaCom argue that BellSouth violated Tenn. Code Ann. § 65-5-201 and the “filed rate” doctrine because it provided regulated services to consumers through the Key Business Discount Program at rates less than those contained in the Key Business Discount Program tariffs.¹⁶⁶ These parties argue that Tenn. Code Ann. § 65-5-201 “requires that rates, once approved by the TRA, ‘shall be imposed, observed, and followed thereafter by any public utility.’”¹⁶⁷ BellSouth contends that its action did not result in a reduction of the tariff rates because it charged customers the full tariff rate and credited the full amount of the tariff rate to BellSouth’s regulated accounts.¹⁶⁸

“A public utility has the authority to set its own rates—subject to being regulated by the legislature or by a body delegated the legislative power.”¹⁶⁹ In Tennessee, public utilities may set

¹⁶⁶ See Docket No. 01-00868, *Post Hearing Brief of XO Tennessee, Access Integrated Network, Inc. and ITC^DeltaCom*, p. 10 (Feb. 19, 2002) (citing *Maislin Indus. v. Primary Steel, Inc.*, 497 U.S. 116, 110 S.Ct. 2759, 2766-68 (1990)).

¹⁶⁷ *Id.* (quoting Tenn. Code Ann. § 65-5-201).

¹⁶⁸ See Docket No. 01-00868, *BellSouth Telecommunications, Inc.*, pp. 25-27 (Nov. 13, 2001); Docket No. 01-008686, Thomas Lohman, Pre-Filed Direct Testimony, p.3 (Jan. 25, 2001).

¹⁶⁹ *Consumer Adv. Div. v. Bissell*, No. 01-A-01-9601-BC-00049, 1996 WL 482970, *1 (Tenn. Ct. App. Aug. 28, 1996).

their own rates¹⁷⁰ and do so by filing tariffs with the Authority.¹⁷¹ These tariffs will go into effect unless the Authority orders otherwise.¹⁷² In addition, the Authority may set rates under certain circumstances.¹⁷³ Tenn. Code Ann. § 65-5-201 sets forth the Authority's power to set rates. This section provides in pertinent part:

The Tennessee regulatory authority has the power after hearing upon notice, by order in writing, to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof, as well as commutation, mileage, and other special rates which shall be imposed, observed, and followed thereafter by any public utility as defined in § 65-4-101, whenever the authority shall determine any existing individual rate, joint rate, toll, fare, charge, or schedule thereof or commutation, mileage, or other special rates to be unjust, unreasonable, excessive, insufficient, or unjustly discriminatory or preferential, howsoever the same may have heretofore been fixed or established.¹⁷⁴

The plain language of Tenn. Code Ann. § 65-5-201 does not support AIN, XO, and ITC^DeltaCom's argument. Application of § 65-5-201 is limited to situations where the Authority convenes a hearing, determines that an existing rate is unjust, unreasonable, excessive, insufficient, or unjustly discriminatory or preferential, and sets a just and reasonable rate. It is that new, just and reasonable rate that § 65-5-201 requires the public utility to impose, observe, and follow pursuant to § 65-5-201.

Section 65-5-201 does not address the situation created by the Key Business Discount Program tariffs. In those cases, the Authority did not set the rate to be charged under the program pursuant to the procedure set forth in § 65-5-201. Instead, the Authority approved the

¹⁷⁰ See *id.* at *2; *Consumer Adv. Div. v. Tennessee Reg. Auth.*, No. 01-A-01-9708-BC-00391, 1998 WL 684536, *3 (Tenn. Ct. App. Jul. 1, 1998).

¹⁷¹ See Tenn. R. & Regs. 1220-4-2-.06 (Rev. Sept. 2001).

¹⁷² See *Consumer Adv. Div. v. Bissell*, 1996 WL 482970 at *2; Tenn. Rules & Reg. 1220-4-1-.04 (Rev. Dec. 1984).

¹⁷³ See *id.* at *2.

¹⁷⁴ Tenn. Code Ann. § 65-5-201 (Supp. 2001).

rate proposed by BellSouth.¹⁷⁵ Therefore, Tenn. Code Ann. § 65-5-201 does not specifically apply. This conclusion, however, does not end the inquiry.

Although the language in § 65-5-201 requiring a company to impose rates set by the Authority does not specifically appear in any other statute or rule, such a requirement is implicit in many of the rules adopted by the Authority. Moreover, lack of such a requirement would undermine one of the primary purposes of tariffs, which is to prevent discrimination.

The rules at issue are many of those described in the previous section. These rules require public utilities to file tariffs setting forth rates of service and rules and regulations affecting the rates or the character of the service.¹⁷⁶ Moreover, Authority rules require that changes to tariff rates and conditions be filed with the Authority.¹⁷⁷ Lastly, public utilities are required by rule to file any special contracts between the utility and certain customers “prescribing and providing, rates, services and practices not covered by or permitted in the general tariffs, schedules or rules filed by such utilities.”¹⁷⁸ Considering these rules along with the relationship between the filing of tariffs and the prevention of discrimination, one can only conclude that public utilities are required by these rules to charge only those rates and to provide service consistent with only those rules and regulations contained in the utilities’ tariffs. If utilities were permitted to provide service in a manner that was not consistent with their tariffs,

¹⁷⁵ See *In re: BellSouth Telecommunications, Inc. Tariff to Introduce the Key Business Discount Program*, Docket No. 00-00436, *Order Approving Tariff* (Jul. 2, 2001); See *In re: BellSouth Telecommunications, Inc. Tariff to Offer an Extension of the Key Business Discount Program*, Docket No. 00-00093, *Order Approving Tariff* (Jun. 12, 2001); See *In re: BellSouth Telecommunications, Inc. Tariff to Introduce 2001 Key Business Discount Program*, Docket No. 01-00461, *Order Approving Tariff* (Feb. 8, 2002).

¹⁷⁶ See Tenn. R. & Reg. 1220-4-2-.06 (Rev. Sept. 2001); 1220-4-1-.03 (Rev. Dec. 1984).

¹⁷⁷ See *id.* 1220-4-1-.04 & 06 (Rev. Dec. 1984).

¹⁷⁸ *Id.* 1220-4-1-.07 (Rev. Jul. 1985).

there would be no reason to require the filing of tariffs and the Authority would have no mechanism for preventing discrimination. The United States Supreme Court recently affirmed this concept in relation to the Interstate Commerce Act in *Maislin Industries v. Primary Steel, Inc.* In that case, the Court, quoting an earlier opinion, stated: ““The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier This stringent rule prevails, because otherwise the paramount purpose of Congress-- prevention of unjust discrimination-- might be defeated.””¹⁷⁹

It is BellSouth’s position that it charged and received the tariff rates for the regulated services provided to Select Program members. This position was rejected earlier in this Order.¹⁸⁰ Therefore, it is the finding of the hearing officer that by failing to charge the Select Program members the tariff rates for regulated services, BellSouth violated the Authority’s rules, specifically, Authority Rules 1220-4-2-.06(1) and 1220-4-1-.03, 04, and .06.

C. Reporting Violations - Authority Rules 1220-4-1-.10(2)(a)(1) & 1220-4-1-.11(1)(a)

Rule 1220-4-1-.10(2)(a)(1) requires public utilities, such as BellSouth, to submit “Commission Monthly Report Form 3.01 within sixty (60) days after the end of the month covered by the report.”¹⁸¹ Along these same lines, Authority Rule 1220-4-1-.11(1)(a) requires BellSouth to use the Uniform System of Accounts as adopted and amended by the Federal Communications Commission when filing periodic reports with the Authority.¹⁸² AIN and XO assert: “Based on the information provided by BellSouth to the TRA staff, it appears that the investment, revenues, and expenses associated with the BellSouth Select program are not

¹⁷⁹ See *Maislin Indus. Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126, 110 S.Ct. 2759, 2766 (1990) (quoting *Keogh v. Chicago & Northwestern R. Co.*, 260 U.S. 156, 163, 43 S.Ct. 47, 49, 67 L. Ed. 183 (1922)).

¹⁸⁰ See *supra* discussion at pp. 29-30.

¹⁸¹ Tenn. Rules & Reg. 1220-4-1-.10(2)(a)(1) (Rev. Nov. 2001).

¹⁸² See *id.* 1220-4-1-.11(1)(a) (Rev. Nov. 2001). This section applies to Class A and B telephone companies. BellSouth is a Class A telephone company. See 47 C.F.R. § 32.11.

recorded as part of the regulated operations of BellSouth Telecommunications, Inc. Therefore, BellSouth may have violated the TRA's rules regarding financial reporting."¹⁸³ None of the parties addressed this issue in their post-hearing briefs.

The evidence and testimony presented during the hearing fails to establish that BellSouth violated Authority Rules 1220-4-1-.10(2)(a)(1) or 1220-4-1-.11(1)(a). Moreover, the evidence and testimony do not provide sufficient proof to cause the Hearing Officer to order that the Authority initiate an investigation to determine whether a show cause is necessary. In fact, Thomas F. Lohman, Senior Director in the Finance Department of BellSouth, provided pre-filed testimony explaining the accounting procedures used by BellSouth with respect to the Select Program. In certain instances, Mr. Lohman testified that BellSouth's procedures complied with the Generally Accepted Accounting Principles and BellSouth's Cost Allocation Manual.¹⁸⁴ This testimony was not challenged. Therefore, the Hearing Officer finds that AIN and XO's allegations as to Authority Rules 1220-4-1-.10(2)(a)(1) and 1220-4-1-.11(1)(a) cannot be sustained and further investigation is not warranted by the facts in this record.

D. Violations of the Authority's *Final Order in Docket No. 96-01331*

In the *Final Order in Docket No. 96-01331*, the Authority recognized that pursuant to "Section 251(c)(4) of the [Telecommunications Act of 1996], incumbent local exchange carriers are required 'to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers.'"¹⁸⁵ Thereafter, the Authority ordered that "one wholesale discount shall apply to all services subject to resale" and

¹⁸³ Docket No. 01-00868, *Memorandum of Access Integrated Networks, Inc. and XO Tennessee, Inc. Concerning Jurisdiction, Potential Violations, and Proposed Relief*, p. 4 (Nov. 13, 2001).

¹⁸⁴ See Docket No. 01-00868, Thomas Lohman, Pre-Filed Direct Testimony, pp. 4 & 7 (Jan. 25, 2002).

¹⁸⁵ *In re: The Avoidable Costs of Providing Bundled Service for Resale by Local Exchange Telephone Companies*, Docket No. 96-01331, *Final Order in Docket No. 96-01331*, p. 4 (Jan. 17, 1997) (quoting 47 U.S.C. § 251(c)(4)).

determined the wholesale discount applicable to BellSouth's retail services to be sixteen percent.¹⁸⁶

AIN, XO, and ITC^DeltaCom assert that BellSouth offers the Select Program only to its retail customers and that wholesale purchasers of BellSouth's services have never received the discounts and rebates offered to Select Program members.¹⁸⁷ BellSouth does not dispute that the Select Program was not available to wholesale customers.¹⁸⁸ Instead, BellSouth argues only that the Select Program is an unregulated operation that prices BellSouth's unregulated products and services and, therefore, is not subject to resale under the Telecommunications Act of 1996.¹⁸⁹

The Hearing Officer has rejected BellSouth's argument in earlier sections of this Order. As previously determined, by giving customers value in the form of points and benefits in exchange for the purchase of regulated services, the Select Program impacts not only BellSouth's unregulated services, but its regulated services as well. The Select Program impacts the conditions and circumstances under which BellSouth provides regulated services.¹⁹⁰ Additionally, the value received by members of the Select Program lowers the rate charged to or paid by the customer for regulated services.¹⁹¹

BellSouth failed to provide any other argument explaining why the Select Program should not have been made available to wholesale customers. Moreover, other tariffs discounting regulated services, such as BellSouth's Key Business Discount Program tariffs,

¹⁸⁶ *Id.* at 6 & 10.

¹⁸⁷ See Docket No. 01-00868, *Post Hearing Brief of XO Tennessee, Access Integrated Network, Inc. and ITC^DeltaCom*, p. 11 (Feb. 19, 2002).

¹⁸⁸ See Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, p. 250 (cross-examination of Don Livingston).

¹⁸⁹ See Docket No. 01-00868, *Post-Hearing Brief of BellSouth Telecommunications, Inc.*, p. 39 (Feb. 19, 2002).

¹⁹⁰ See *supra* discussion on pp. 32-33.

¹⁹¹ See *supra* discussion on pp. 29-30.

contain provisions making the programs available to resellers.¹⁹² Having heard no arguments as to why the discount should not apply to the Select Program other than the one argument rejected herein, the Hearing Officer finds that the BellSouth violated the Authority's *Final Order in Docket No. 96-01331* by failing to make the Select Program available to resellers at the ordered wholesale discount rate.

E. Whether the wholesale discount for the Key Program needs to be increased given the retail discounts in order to comply with the TRA order in docket No. 96-01331

The Consumer Advocate asserts that the wholesale discount applicable to the Key Business Discount Program tariff must be applied to the discounted retail tariff rate.¹⁹³ In support of this argument, the Consumer Advocate notes that BellSouth does not avoid any costs when it sells regulated services at a discount, instead, BellSouth only avoids costs when it resells a regulated service to a reseller.¹⁹⁴ Additionally, the Consumer Advocate argues that the wholesale discount must be applied to the discounted retail tariff rate because otherwise instances could arise where the wholesale discounted rate exceeds the retail discounted rate. Such a result, contends the Consumer Advocate, is contrary to the Authority's intent as expressed in the *Final Order in Docket No. 96-01331* and 47 C.F.R. 51.607.¹⁹⁵ The Consumer Advocate then goes a step further and argues that, because "avoided costs is a constant amount, it will be under-calculated when the wholesale discount of 16 percent is applied to the discounted retail charges."¹⁹⁶ Lastly, the Consumer Advocate asserts that the Hearing Officer is able to order the

¹⁹² See Docket No. 01-00868, Don L. Livingston, Pre-Filed Direct Testimony, Exh. DL-1, Tariff, sec. A13.90.6, para. A.5. (Jan. 25, 2002); *In re: BellSouth Telecommunications, Inc. Tariff to Offer an Extension of the Key Business Discount Program*, Docket No. 00-00903, Tariff, sec. A13.90.3, para. A.5. (Oct. 26, 2000); *In re: BellSouth Telecommunications, Inc. Tariff to Introduce the Key Business Discount Program*, Docket No. 00-00436, Tariff, sec. A13.78.3, para. A.5. (Jun. 20, 2000).

¹⁹³ See *Attorney General's Post-Hearing Brief Redacted Version*, p. 19 (Mar. 4, 2002).

¹⁹⁴ See *id.* at 19-20.

¹⁹⁵ See *id.* at 20-21.

¹⁹⁶ *Id.* at 23.

requested changes to the wholesale discount rate without additional cost information being filed and suggests that the discounts to the retail rates must be further adjusted to account for the Select Program's impact on the Key Business Discount Program rates before applying the wholesale discount.¹⁹⁷

Although the other parties to this docket do not specifically address the Consumer Advocate's issue, BellSouth did attempt to undercut the testimony of Stephen Brown, Ph.D., the Consumer Advocate's expert witness. BellSouth asked Dr. Brown whether he was suggesting that the Hearing Officer adjust the sixteen percent discount and whether to do so would require one to review Tennessee costs and revenues. Dr. Brown responded affirmatively to both questions.¹⁹⁸

The issue raised by the Consumer Advocate may be one of interest to the Authority, but it has not been fully developed in this docket and, arguably, falls outside the scope of this docket. To explain, the evidence reveals that the Key Business Discount Program is available for resale.¹⁹⁹ The Consumer Advocate has not produced any evidence demonstrating or suggesting that BellSouth has failed to appropriately apply the wholesale discount adopted in the *Final Order in Docket No. 96-01331*. In fact, one could speculate that BellSouth applies the wholesale discount in the exact manner described by the Consumer Advocate in its post-hearing brief. Moreover, based on Dr. Brown's testimony, it is possible that cost studies might be necessary to answer the issue raised by the Consumer Advocate and no such information is contained in this record. Lastly, the answer to the issue raised by the Consumer Advocate necessarily involves a

¹⁹⁷ See *id.* at 24-27.

¹⁹⁸ See Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, p. 119-20 (cross-examination of Dr. Stephen Brown).

¹⁹⁹ See Docket No. 01-00868, Don L. Livingston, Pre-Filed Direct Testimony, Exh. DL-1, Tariff, sec. A13.90.6, para. A. (Jan. 25, 2002).

clarification or further explanation of the Authority's *Final Order in Docket No. 96-01331*. Such a decision goes beyond the scope of this docket, which is to determine wrongdoing on the part of BellSouth, and exceeds the authority granted the Hearing Officer to render an initial order on the merits of AIN's and XO's complaints. For the foregoing reasons, the Hearing Officer finds that the Consumer Advocate has failed to provide sufficient evidence to determine the issue presented, to establish that BellSouth violated the Authority's *Final Order in Docket No. 96-01331* with regard to the Key Business Discount Program or to establish that further investigation is warranted by the facts in this record.

IV. REMEDIES

AIN, XO, and ITC^DeltaCom request the following remedies be granted. First, they argue that the violation of § 65-4-122 must be reported to the District Attorney General pursuant to Tenn. Code Ann. § 65-3-119 through 121. The parties next assert that BellSouth's failure to tariff the Select Program and its failure to offer the Select Program for resale should result in the imposition of fines pursuant to Tenn. Code Ann. § 65-4-120. Additionally, the parties contend that, pursuant to Tenn. Code Ann. § 65-4-115, BellSouth should be directed to immediately discontinue the Select Program and, pursuant to Tenn. Code Ann. § 65-5-208(c), ordered to pay 2.5 percent rebates on the purchase of all BellSouth services to every BellSouth business line customer who was not enrolled in the Select Program retroactive to May 1999. Lastly, AIN, XO, and ITC^DeltaCom also state that BellSouth should be ordered to pay 2.5 percent rebates to all carriers who have purchased wholesale services from BellSouth since May 1999 in order to eliminate the effect of BellSouth's illegal conduct.²⁰⁰

²⁰⁰ See Docket No. 01-00868, *Post Hearing Brief of XO Tennessee, Access Integrated Network, Inc., and ITC^DeltaCom*, pp. 12-13 (Feb. 19, 2002).

The Consumer Advocate also argues in favor of imposing fines on BellSouth for its violations of the Authority's rules. In addition, the Consumer Advocate asserts that the Authority may impose fines for violations of Tenn. Code Ann. § 65-4-122. The Consumer Advocate also submits that BellSouth should be ordered to cease offering the Select Program in Tennessee.²⁰¹

BellSouth opposes the requested remedies. BellSouth's primary argument is that the Hearing Officer's November 6, 2002 Order limited the relief available to the opening of an investigation. BellSouth argues that the relief requested by AIN, XO, ITC^DeltaCom, and the Consumer Advocate exceeds the Hearing Officer's decision. BellSouth next argues that it should not be ordered to return 2.5 percent of purchased services to non-members, but, instead, ordered to collect the full tariffed rate from members. BellSouth also asserts that this agency can not even determine whether a utility violated Tenn. Code Ann. § 65-5-122(a) because the only authority to make such determinations is vested in Tennessee's courts.²⁰²

A. Availability of Remedies in General

BellSouth's argument limiting the available remedies to the opening of an investigation fails to recognize that AIN and XO requested additional relief in the complaints and in later pleadings. In their complaints, AIN and XO requested that the Authority open a show cause pursuant to Tenn. Code Ann. § 65-2-106 and "take such other action as the Authority finds necessary and appropriate."²⁰³ Later, in the *Memorandum of Access Integrated Network, Inc. and XO Tennessee, Inc. Concerning Jurisdiction, Potential Violations and Proposed Relief*, filed pursuant to the Hearing Officer's directive in the November 6, 2001 Order, AIN and XO asserted

²⁰¹ See Docket No. 01-00868, *Attorney General's Post Hearing Brief Redacted Version*, pp. 29-30 (Mar. 4, 2002).

²⁰² See Docket No. 01-00868, *Post-Hearing Brief of BellSouth Telecommunications, Inc.*, pp. 35-39 (Feb. 19, 2002).

²⁰³ See, e.g., Docket No. 01-00868, *Complaint of XO Tennessee, Inc.*, para. 8 (Oct. 9, 2002).

that the Authority could prohibit BellSouth's conduct pursuant to Tenn. Code Ann. § 65-5-208(c), impose penalties pursuant to Tenn. Code Ann. § 65-4-120, and notify the District Attorney General of possible additional violations pursuant to Tenn. Code Ann. § 65-3-120(c). BellSouth did not object to this filing.

Moreover, BellSouth's reliance on the November 6, 2001 Order is misplaced. In that order, the Hearing Officer recognized what appeared to be an inconsistency between AIN and XO's complaints, AIN's *Motion to Open Show Cause Proceeding*, and Tenn. Code Ann. § 65-2-106. In the complaints, AIN and XO requested the issuance of a show cause order. In the motion, AIN requested the Authority open a show cause to investigate BellSouth's conduct. Lastly, Tenn. Code Ann. § 65-2-106 requires an investigation by the Authority prior to the issuance of a show cause order. It was this inconsistency the November 6, 2002 Order sought to resolve.

The Hearing Officer finds that it is consistent with the pleadings and allegations in this docket as well as general principles of efficiency to open an investigation where the proof presented fails to establish either the validity or invalidity of a particular allegation; otherwise, a decision on the merits should be rendered. In only two instances, that is, the determinations of whether BellSouth inappropriately applied the wholesale discount and whether BellSouth violated the reporting rules, was the Hearing Officer faced with the decision of whether to open an investigation. As to all other allegations, such a determination was not necessary. The parties' zeal to present the Authority with a wealth of information enabled the Hearing Officer to weigh the evidence and issue findings and conclusions.

B. Fines – Tennessee Code Annotated Section 65-4-120

Tenn. Code Ann. § 65-4-120 permits the Authority after a hearing upon complaint to impose a fine on public utilities for violating or failing to comply with any lawful order or rule. The fine imposed shall in the discretion of the Authority be fifty dollars a day for each day of the violation or failure.²⁰⁴ A hearing was held in this matter on February 4, 2002 upon the filing of complaints by AIN and XO. The evidentiary record developed through the hearing reveals that BellSouth violated Authority Rules 1220-4-2-.06(1) and 1220-4-1-.03, .04, and .06 and the Authority's *Final Order in Docket No. 96-01331* through its failure to tariff the program, failure to charge customers tariff rates, and failure to provide the Select Program for resale. There being sufficient evidence in this record to make a determination, the opening of an investigation is unnecessary and would result only in duplicitous proceedings. Therefore, the Hearing Officer finds that BellSouth should be fined \$169,200 in accordance with Tenn. Code Ann. § 65-4-120. This fine is calculated by multiplying the number of days during which BellSouth offered any Select Program, March 15, 1999 through April 15, 2002,²⁰⁵ by fifty dollars and multiplying the total by the three offending actions, that is, BellSouth's failure to tariff the program, failure to charge customer's the tariff rate, and failure to provide the Select Program for resale.

C. Remedy Available Pursuant to Tennessee Code Annotated Section 65-4-122

Section 65-4-122(e) provides that an action alleging a violation of Section 65-4-122 "may" be brought before "any court having jurisdiction."²⁰⁶ During the preliminary stages of this docket, the Hearing Officer requested the parties to brief the issue of whether the Authority is a

²⁰⁴ See Tenn. Code Ann. § 65-4-120 (Supp. 2001).

²⁰⁵ The Consumer Select Program was the first program and began in March 1999. The evidence does not reveal the exact start date, therefore, to avoid any prejudice the assumption is that the program started on March 15, 1999. Therefore, the actual number of days is 1,128.

²⁰⁶ Tenn. Code Ann. § 65-4-122(e) (Supp. 2001).

“court” as that term is used in § 65-4-122(e). All parties agreed that the term “court” did not include the Authority,²⁰⁷ but the parties did not agree on the impact of this conclusion.

BellSouth argues that by using the term “court,” the General Assembly precluded the Authority from determining whether a utility committed unjust discrimination and from imposing fines for violations of Section 65-4-122.²⁰⁸ AIN, XO, and ITC^DeltaCom do not question whether the Authority can make a finding as to discrimination under Section 65-4-122, but conclude that the Authority’s obligation is to notify the District Attorney General of any violations of Section 65-4-122 pursuant to Tenn. Code Ann. §§ 65-3-119 through 121.²⁰⁹ The Consumer Advocate asserts that the Authority may not only determine whether unjust discrimination occurred, but it may also impose fines for such occurrences.²¹⁰

The interpretation of AIN, XO, and ITC^DeltaCom is consistent with Tenn. Code Ann. § 65-4-122 and other statutes. Tenn. Code Ann. § 65-4-122(a), (b), and (c) set forth the illegal actions: discrimination, extortion, and preferences or prejudices. Subsection (d) then sets forth a mandatory penalty of no less than \$500 and no more than \$2000 for committing any of the illegal acts. Lastly, subsection (e) permits any person to initiate a cause of action under this statute in any “court having jurisdiction to try the same.”²¹¹ Tenn. Code Ann. § 65-3-120 further

²⁰⁷ See Docket No. 01-00868, *BellSouth Telecommunications, Inc.’s Brief Addressing Section 65-4-122*, p. 2 (Nov. 13, 2001); Docket No. 01-00868, *Memorandum of Access Integrated Networks, Inc. and XO Tennessee, Inc. Concerning Jurisdiction, Potential Violations, and Proposed Relief*, p. 5n.1 (Nov. 13, 2001).

²⁰⁸ See Docket No. 01-00868, *BellSouth Telecommunications, Inc.’s Brief Addressing Section 65-4-122*, pp. 2-3 (Nov. 13, 2001).

²⁰⁹ See Docket No. 01-00868, *Memorandum of Access Integrated Networks, Inc. and XO Tennessee, Inc. Concerning Jurisdiction, Potential Violations, and Proposed Relief*, p. 5 (Nov. 13, 2001); See Docket No. 01-00868, *Post Hearing Brief of XO Tennessee, Access Integrated Network, Inc., and ITC^DeltaCom*, p. 12 (Feb. 19, 2002).

²¹⁰ See Docket No. 01-00868, *Attorney General’s Post-Hearing Brief Redacted Version*, pp. 12-14 (Mar. 4, 2002).

²¹¹ Tenn. Code Ann. § 65-4-122 (Supp. 2001).

addresses the role of Tennessee courts. This section provides:

The circuit, chancery courts and courts of general sessions have jurisdiction of all suits of a civil nature arising under the provisions of this chapter and chapter 5²¹² of this title, according to the nature of the suit and the amount involved, and the circuit and criminal courts have jurisdiction of all criminal proceedings so arising.²¹³

Tenn. Code Ann. § 65-3-119 and 120(b) also provide that it is the duty of the District Attorney General to prosecute violations of § 65-4-122 in the name of the State of Tennessee and to recover any penalty imposed by that statute. Therefore, pursuant to Tenn. Code Ann. §§ 65-3-119 and 120, the Hearing Officer finds that the District Attorney General is the proper party to institute a proceeding for a violation of Tenn. Code Ann. § 65-4-122(a) and further directs that the findings contained in this *Initial Order* should be transmitted to the District Attorney General for the 20th Judicial District.

D. Prohibition of Future Conduct

The Authority has the power to prohibit future conduct of a public utility. Tenn. Code Ann. § 65-4-115 provides: “No public utility shall adopt, maintain, or enforce any regulation, practice, or measurement which is unjust, unreasonable, unduly preferential or discriminatory . . . when ordered by the authority.”²¹⁴ Tenn. Code Ann. § 65-5-208(c) provides that the Authority shall issue orders to prohibit price discrimination.²¹⁵ Pursuant to these sections, the Hearing Officer finds that BellSouth should be prohibited from operating any portion of the Select

²¹² As noted by AIN, XO, and ITC^DeltaCom, there appears to have been an omission made when the extensive changes to Title 65, chapters 4 and 5 were codified. Tenn. Code Ann. §§ 65-3-119, 120 and 121 explicitly apply to violations of chapters 3 and 5. The unjust discriminatory subsection of Tenn. Code Ann. § 65-4-122 and the related penalty subsection were previously codified at 65-5-113 and 65-5-115 respectively. Thus, it follows that § 65-3-119, 120, and 121 should have also been revised to extend their applicability to § 65-4-122.

²¹³ Tenn. Code Ann. § 65-3-120(a) (Supp. 2001) (footnote 212 added).

²¹⁴ *Id.* § 65-4-115.

²¹⁵ *Id.* § 65-5-208(c).

Program that relates to or places any non-tariffed condition on regulated services, such as awarding points in conjunction with the purchase of regulated services.

E. Other Claims

AIN, XO, and ITC^DeltaCom argue that BellSouth should be ordered to pay 2.5 percent rebates to all business line and wholesale customers retroactive to May 1999.²¹⁶ The discounted rates provided under the Select Programs were not tariffed and, thus violated Authority Rules. Extending rates that have not been properly submitted or approved by the Authority to every business and wholesale customers merely compounds the violations. Also, although AIN, XO, and ITC^DeltaCom propose this remedy as a means to eliminate the effects of the discriminatory conduct, neither complainant sets forth a statute or rule providing the Authority such power. Neither Tenn. Code Ann. §§ 65-4-122, 64-4-115, nor 65-5-208 provide for such relief.

IT IS THEREFORE ORDERED THAT:

1. BellSouth Telecommunications is fined \$169,200 pursuant to Tenn. Code Ann. § 65-4-120 for its failure, as described herein, to tariff the Select Program, to charge customer's the tariff rate, and to provide the Select Program for resale. This fine shall be paid to the Tennessee Regulatory Authority by **Thursday, May 16, 2002.**

2. Pursuant to Tenn. Code Ann. §§ 65-3-119 and 120, the findings contained in this *Initial Order* shall be transmitted to the District Attorney General for the 20th Judicial District for consideration by that office.

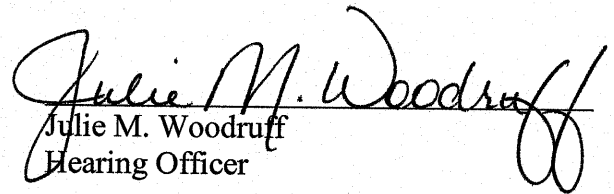
3. BellSouth Telecommunications, Inc. is ordered to cease operation of any portion of the Select Program that relates to or places any non-tariffed condition on regulated services,

²¹⁶ See Docket No. 01-00868, *Post Hearing Brief of XO Tennessee, Access Integrated Network, Inc., and ITC^DeltaCom*, p. 12 (Feb. 19, 2002).

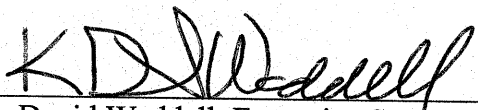
such as awarding points in conjunction with the purchase of regulated services, as of the entry of this Order.

4. Any party aggrieved by the decision of the Hearing Officer in this matter may file a Petition for Reconsideration with the Tennessee Regulatory Authority within fifteen (15) days from the date of this Order.

5. Any party aggrieved by the decision of the Hearing Officer in this matter may file a Petition for Appeal with the Tennessee Regulatory Authority within fifteen (15) days from the date of this Order.


Julie M. Woodruff
Hearing Officer

ATTEST:


K. David Waddell, Executive Secretary

EFFECTIVE: June 26, 2000

A13. MISCELLANEOUS SERVICE ARRANGEMENTS

A13.78 Business Programs (Cont'd)

A13.78.2 Competitive Response Program (Cont'd)

A. Rules and Regulations (Cont'd)

10. Customers that have changed locations since having their service with BellSouth are not eligible to participate in this Program and are considered new customers. (M)
11. Customers with total billed BellSouth revenue at Tennessee locations as defined in 1., 2., 3. and 4. preceding that exceeds \$150,000 annually are not eligible to participate in this Program even if some or all of their accounts meet the revenue criteria. (M)

B. Discount Schedule

1. Discounts applicable to the subscribers' total billed BellSouth revenue at Tennessee locations as defined in A.1., 2., 3. and 4., preceding are as follows: (M)

Monthly Total Billed Revenue	12 Month Term	24 Month Term	36 Month Term
\$5,500 - \$10,000	16%	17%	18%
\$3,000 - \$4,499.99	14%	15%	16%
\$1,500 - \$2,999.99	12%	13%	14%
\$500.00 - \$1,499.99	10%	11%	12%
\$70.00 - \$499.99	8%	9%	10%

2. If a Program participant purchases additional services during the 90-day enrollment period, line connection charges will be waived for those services ordered. (M)
3. For each month during which a contract which is signed under this Program is in effect, the customer will receive the discount associated with the customer's total billed BellSouth revenue at Tennessee locations as defined in A.1., 2., 3. and 4., preceding for that particular month. (M)
4. If a Program participant's total billed BellSouth revenue at Tennessee locations as defined in A.1., 2., 3. and 4. preceding for a given month falls below the minimum revenue per month, discounts will not be applied for that customer. (M)
5. The applied discounts will appear as a credit in the Other Charges and Credits (OC&C) section of the Program Participant's bill. (M)

A13.78.3 Key Business Discount Program

A. Rules and Regulations

Beginning June 26, 2000, and continuing until December 25, 2000, qualifying business customers with locations in Rate Groups 4 or 5 may enroll in this Program, which provides discounts on their billed BellSouth revenue as described below, by signing a one-year, two-year, or three-year term contract. (N)

1. In order to qualify for the Key Business Discount Program, new and existing BellSouth business customers with locations in Rate Groups 4 or 5 must have monthly total billed BellSouth revenue per each such location between \$150 and \$6,000. This Program is available to business customers only. Services at Program participant's locations that have monthly revenue outside this range are not eligible for the discounts. (N)
2. Qualifying Program participants must sign a term contract of one, two, or three years to receive the discounts that are detailed in B. following, Discount Schedule. (N)
3. Base discounts will be applied to billing for services in the Tennessee General Subscriber Services Tariff and the Tennessee Private Line Services Tariff. (N)
4. Discounts are based on end-user monthly total billed BellSouth revenue at Tennessee locations in Rate Groups 4 or 5 excluding:
 - Unregulated charges, taxes, late payment charges, charges billed pursuant to federal or state access service tariffs, charges collected on behalf of municipalities (including, but not limited to services for 911 service and dual party relay services), and charges for services provided by other companies. (N)
5. To participate in this Program, qualifying customers must sign a one, two, or three-year term contract between June 26, 2000, and December 25, 2000. Following this period, no subscribers may enroll in this Program. This Program is available for resale for the duration of this enrollment period. Following the expiration of this enrollment period, no new customers may enroll in the Program, but any contract established under this Program between BellSouth and its customers would continue to be available for resale for the remaining term of the existing contract. Aside from these resale situations, a customer may not assign its rights under any contract signed pursuant to this Program to another customer or to any other third party. (N)

EFFECTIVE: June 26, 2000

A13. MISCELLANEOUS SERVICE ARRANGEMENTS

A13.78 Business Programs (Cont'd)

A13.78.3 Key Business Discount Program (Cont'd)

A. Rules and Regulations (Cont'd)

6. Should a participating customer terminate a contract signed under this Program without cause, the customer must pay BellSouth a termination liability equal to the lesser of: (1) the discounts received during the term of the contract; or (2) the discounts received during the previous twelve months. In addition to the reimbursement of the discounts, tariffed termination liability charges for individual services will be applied, if applicable. (T)
7. The customer may renew the contract for another term under the same terms and conditions by providing BellSouth written notice of its intent to do so, thirty days in advance of the expiration of the initial term of the contract. (N)
8. Customers with aggregated state-wide location revenues that exceed \$150,000 annually are not eligible to participate in the Business Discount Program, even if some or all of their locations meet the revenue criteria. (N)
9. Customers with volume and term Contract Service Arrangements (CSAs) are not eligible for this Program. (N)
10. Customers participating in previous Key Customer Promotions, Business Discount Programs, the Hunting Term Promotion, Welcome Back! Win Back and/or any future versions of those promotions are not eligible for this Program. (N)
11. A customer which is currently participating in the Hunting Term Promotion and which wishes to participate in this program may terminate its Hunting Term Promotion contract without incurring termination liability if the term elected by the customer under this program equals or exceeds the remaining term of the customer's Hunting Term Promotion contract. (N)

B. Discount Schedule

1. Base discounts applicable to the subscribers' total billed revenue at Tennessee locations in Rate Group 4 or 5 as defined in A.1.; 2.; 3.; and 4., preceding are as follows: (N)

Monthly Total Billed Revenue	12 Month Term	24 Month Term	36 Month Term
\$4,500 - \$6,000	8%	12%	16%
\$3,000 - \$4,499.99	7%	11%	15%
\$1,500 - \$2,999.99	6%	10%	14%
\$150 - \$1,499.99	5%	9%	13%

2. If a Program participant orders additional services during the enrollment period, line connection charges will be waived for those services ordered. This waiver does not apply to BellSouth® Primary Rate ISDN Service and MegaLink® service. (N)
3. A bonus 6 percent discount in addition to the base discounts will apply to non-recurring, recurring and usage charges for BellSouth® Primary Rate ISDN Service and MegaLink® service. This bonus discount applies to existing services and to services ordered by a Program participant during the enrollment period. (N)
4. For each month during which a contract which is signed under this Program is in effect, the customer will receive the discount associated with the customer's total billed BellSouth revenue at a given Tennessee location as defined in A.1.; 2.; 3.; and 4., preceding for that particular month. (N)
5. If a Program participant's total billed BellSouth revenue at a given Tennessee location as defined in A.1.; 2.; 3.; and 4 preceding in a given month falls below the minimum revenue per month or above the maximum revenue per month, discounts will not be applied at that location for that month. (N)
6. The applied discounts will appear as a credit in the Other Charges and Credits (OC&C) section of the Program Participant's bill. (N)

EFFECTIVE: November 9, 2000

A13. MISCELLANEOUS SERVICE ARRANGEMENTS

A13.90 Business Programs (Cont'd)

A13.90.3 Key Business Discount Program (Cont'd)

A. Rules and Regulations (Cont'd)

5. To participate in this Program, qualifying customers must sign a one, two, or three-year term contract between June 26, 2000, and June 25, 2001. Following this period, no subscribers may enroll in this Program. This Program is available for resale for the duration of this enrollment period. Following the expiration of this enrollment period, no new customers may enroll in the Program, but any contract established under this Program between BellSouth and its customers would continue to be available for resale for the remaining term of the existing contract. Aside from these resale situations, a customer may not assign its rights under any contract signed pursuant to this Program to another customer or to any other third party. (C)
6. Should a participating customer terminate a contract signed under this Program without cause, the customer must pay BellSouth a termination liability equal to the lesser of: (1) the total of the repayment of discounts received during the previous twelve (12) months of service and the repayment of the prorated amount of any waived or discounted nonrecurring charges; or (2) six percent (6%) of the total contracted amount. In addition to the reimbursement of the discounts, tariffed termination liability charges for individual services will be applied, if applicable.
7. The customer may renew the contract for another term under the same terms and conditions by providing BellSouth written notice of its intent to do so, thirty days in advance of the expiration of the initial term of the contract.
8. Customers with aggregated state-wide location revenues that exceed \$150,000 annually are not eligible to participate in the Business Discount Program, even if some or all of their locations meet the revenue criteria.
9. Customers with volume and term Contract Service Arrangements (CSAs) are not eligible for this Program.
10. Customers participating in previous Key Customer Promotions, Business Discount Programs, the Hunting Term Promotion, Welcome Back! Win Back and/or any future versions of those promotions are not eligible for this Program.
11. A customer which is currently participating in the Hunting Term Promotion and which wishes to participate in this program may terminate its Hunting Term Promotion contract without incurring termination liability if the term elected by the customer under this program equals or exceeds the remaining term of the customer's Hunting Term Promotion contract.

B. Discount Schedule

1. Base discounts applicable to the subscribers' total billed revenue at Tennessee locations in Rate Groups 4 or 5 as defined in A.1.; 2.; 3.; and 4., preceding are as follows:

Monthly Total Billed Revenue	12 Month Term	24 Month Term	36 Month Term
\$4,500 - \$6,000	8%	12%	16%
\$3,000 - \$4,499.99	7%	11%	15%
\$1,500 - \$2,999.99	6%	10%	14%
\$150 - \$1,499.99	5%	9%	13%

2. If a Program participant orders additional services during the enrollment period, line connection charges will be waived for those services ordered. This waiver does not apply to BellSouth® Primary Rate ISDN Service and MegaLink® service.
3. A bonus 6 percent discount in addition to the base discounts will apply to non-recurring, recurring and usage charges for BellSouth® Primary Rate ISDN Service and MegaLink® service. This bonus discount applies to existing services and to services ordered by a Program participant during the enrollment period.
4. For each month during which a contract which is signed under this Program is in effect, the customer will receive the discount associated with the customer's total billed BellSouth revenue at a given Tennessee location as defined in A.1.; 2.; 3.; and 4., preceding for that particular month.
5. If a Program participant's total billed BellSouth revenue at a given Tennessee location as defined in A.1.; 2.; 3.; and 4 preceding in a given month falls below the minimum revenue per month or above the maximum revenue per month, discounts will not be applied at that location for that month.
6. The applied discounts will appear as a credit in the Other Charges and Credits (OC&C) section of the Program Participant's bill.

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® Registered Service Mark of BellSouth Intellectual Property Corporation

ISSUED: October 10, 2000
BY: President - Tennessee
Nashville, Tennessee

EFFECTIVE: November 9, 2000

A13. MISCELLANEOUS SERVICE ARRANGEMENTS

A13.90 Business Programs (Cont'd)

A13.90.2 Competitive Response Program (Cont'd)

A. Rules and Regulations (Cont'd)

10. Customers that have changed locations since having their service with BellSouth are not eligible to participate in this Program and are considered new customers.
11. Customers with total billed BellSouth revenue at Tennessee locations as defined in 1., 2., 3. and 4. preceding that exceeds \$150,000 annually are not eligible to participate in this Program even if some or all of their accounts meet the revenue criteria.

B. Discount Schedule

1. Discounts applicable to the subscribers' total billed BellSouth revenue at Tennessee locations as defined in A.1., 2., 3. and 4., preceding are as follows:

Monthly Total Billed Revenue	12 Month Term	24 Month Term	36 Month Term
\$5,500 - \$10,000	16%	17%	18%
\$3,000 - \$4,499.99	14%	15%	16%
\$1,500 - \$2,999.99	12%	13%	14%
\$500.00 - \$1,499.99	10%	11%	12%
\$70.00 - \$499.99	8%	9%	10%

2. If a Program participant purchases additional services during the 90-day enrollment period, line connection charges will be waived for those services ordered.
3. For each month during which a contract which is signed under this Program is in effect, the customer will receive the discount associated with the customer's total billed BellSouth revenue at Tennessee locations as defined in A.1., 2., 3. and 4., preceding for that particular month.
4. If a Program participant's total billed BellSouth revenue at Tennessee locations as defined in A.1., 2., 3. and 4. preceding for a given month falls below the minimum revenue per month, discounts will not be applied for that customer.
5. The applied discounts will appear as a credit in the Other Charges and Credits (OC&C) section of the Program Participant's bill.

A13.90.3 Key Business Discount Program

A. Rules and Regulations

Beginning June 26, 2000, and continuing until **June 25, 2001**, qualifying business customers with locations in Rate Groups 4 or 5 may enroll in this Program, which provides discounts on their billed BellSouth revenue as described below, by signing a one-year, two-year, or three-year term contract. (C)

1. In order to qualify for the Key Business Discount Program, new and existing BellSouth business customers with locations in Rate Groups 4 or 5 must have monthly total billed BellSouth revenue per each such location between \$150 and \$6,000. This Program is available to business customers only. Services at Program participant's locations that have monthly revenue outside this range are not eligible for the discounts.
2. Qualifying Program participants must sign a term contract of one, two, or three years to receive the discounts that are detailed in B. following, Discount Schedule.
3. Base discounts will be applied to billing for services in the Tennessee General Subscriber Services Tariff and the Tennessee Private Line Services Tariff.
4. Discounts are based on end-user monthly total billed BellSouth revenue at Tennessee locations in Rate Groups 4 or 5 excluding:
 - Unregulated charges, taxes, late payment charges, charges billed pursuant to federal or state access service tariffs, charges collected on behalf of municipalities (including, but not limited to services for 911 service and dual party relay services), and charges for services provided by other companies.

A3. BASIC LOCAL EXCHANGE

A3.45 BellSouth® Complete Choice® For Business Package (Cont'd)

A3.45.2 Complete Choice® For Business Package

A. Package Service

1. Complete Choice® for Business Package Option 1 which includes BellSouth Business Plus® service Calling Plan 1

	Monthly Rate	USOC
(a) Each 1-line package	\$81.00	COM11
(b) Each 2-line package	150.00	COM12
(c) Each 3-line package ¹	260.00	COM13
(d) Each 3-line package ²	258.00	COM1H

2. Complete Choice® for Business Package Option 2 which includes BellSouth Business Plus® service Calling Plan 2

(a) Each 1-line package	62.00	COMP1
(b) Each 2-line package	114.00	COMP2
(c) Each 3-line package ¹	203.00	COMP3
(d) Each 3-line package ²	197.00	COMP4

A3.45.3 Service Charges

- A. The service order charges specified in Section A4. of this Tariff are applicable for the installations of new lines at the subscriber's premises. These charges are not applicable for existing customers who wish to move from an existing line to a BellSouth Business Plus® service Calling Plan or a Complete Choice® for Business package.
- B. Service charges do not apply for transactions which only involve additions, deletions or changes to the service or features requested as part of BellSouth Business Plus® service with Complete Choice® for Business package service.

A3.45.4 Term Plan

- A. The Complete Choice® For Business package Term Plan is available for all business customers who subscribe to Complete Choice® For Business packages. (N)
- B. The Complete Choice® For Business package Term Plan offers discounts off rates shown in A3.45.2 of this Tariff. (N)
- C. A termination liability will be assessed to subscribers who terminate the service prior to the expiration of the term commitment. The amount to be assessed will be equal to the amount of the discounted charges that the Subscriber had received as a result of the Subscriber's participation in the Program (up to a maximum of the most recent 12 months' discounts). (N)
- D. The Complete Choice® For Business package Term Plan discounts are available as follows: (N)

Discount	Term
5%	24 Months
8%	36 Months

Note 1: This package can contain up to three lines in grouping. (N)

Note 2: This package can contain up to two lines in grouping. (N)