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May 29, 2002

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

Re: Complaint of XO Tennessee, Inc. Against
BellSouth Telecommunications, Inc.
Docket No. 01-000868

Dear Mr. Waddell:

Enclosed is an original and thirteen copies of the corrected transmittal letter associated with the Attorney General's Second Post-Hearing Brief in the above-referenced matter which was filed on May 29, 2002 with your office. Copies are being furnished to counsel of record for interested parties.

A paragraph was inadvertently included indicating the Brief was being filed under seal. This is not the case. I apologize for the confusion.

Sincerely,

CHRIS ALLEN
Assistant Attorney General

cc: Counsel of Record
55452

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Re: Complaint of XO Tennessee, Inc. Against
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Docket No. 01-000868

Dear Mr. Waddell:

Enclosed is an original and thirteen copies of the Attorney General's Second Post-Hearing Brief in the above-referenced matter. Copies are being furnished to counsel of record for interested parties.

The Brief is being submitted under seal pursuant to a protective order and should be treated consistent with the protective order as entered by the Hearing Officer on November 19, 2001.

Sincerely,

CHRIS ALLEN
Assistant Attorney General

cc: Counsel of Record
55452

IN THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

IN RE: COMPLAINT OF XO TENNESSEE, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC.	)	
And	)	DOCKET NO. 01-00868
COMPLAINT OF ACCESS INTEGRATED NETWORK, INC. AGAINST BELLSOUTH TELECOMMUNICATIONS, INC.	)	

ATTORNEY GENERAL'S
SECOND POST-HEARING BRIEF

Comes the Tennessee Attorney General, through the Consumer Advocate And Protection Division ("Attorney General"), and hereby files a Second Post-Hearing Brief pursuant to the request of the Tennessee Regulatory Authority ("TRA"). In this Brief, the Attorney General will address two issues: (1) whether there is sufficient evidence in the record to support the Hearing Officer's finding that BellSouth Telecommunications, Inc. ("BellSouth") is guilty of unjust discrimination under Tennessee Code Annotated, Section 65-4-122(a); and if so, (2) whether the District Attorney is the proper party to pursue a violation of Tennessee Code Annotated, Section 65-4-122(a).

The Attorney General's position on these issues is (1) there is sufficient evidence in the record to support the Hearing Officer's finding that BellSouth is guilty of unjust discrimination under Tennessee Code Annotated, Section 65-4-122(a); and (2) the District Attorney is one of

two parties that may pursue a violation of Tennessee Code Annotated, Section 65-4-122(a), the other party being the TRA.

ISSUES

1. There is sufficient evidence in the record to support the Hearing Officer's finding that BellSouth is guilty of unjust discrimination under Tennessee Code Annotated, Section 65-4-122(a)

The Hearing Officer's Initial Order is supported by sufficient evidence in the record and for that reason we believe stands on its own. Notwithstanding, three points are worth making as a means to clarify the opinion.

First, notice is not required to find a violation of Tennessee Code Annotated, Section 65-4-122(a). BellSouth's customer does not have to know that it is paying more or less than others for a service of a like kind under substantially like circumstances and conditions. The fact that it is actually paying more or less for the service is sufficient enough in and of itself.[1]

Second, it is important to note the approach taken by the Hearing Officer. She focuses on the issue of notice. Notice is the only means by which the consumer may become aware of the terms that apply to service from any telecommunications carrier. It is these terms of which the consumer has notice which it uses to evaluate its alternatives to meet its telecommunication needs. Thus, only known terms can drive its selection of a telecommunications carrier. Accordingly, competition from the consumer's perspective is driven by these known terms.

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[1] The Hearing Officer's focus on "notice" is significant. BellSouth's failure to publish the terms of the BellSouth Business Select Program ("the program") in an effective manner further limited the class of customers who enjoyed these special rates to the detriment of the remaining Tennessee small business customers who were not "invited" to participate.

Thus, notice to consumers is important in assessing the damage to competition.

Notice is also important from a regulatory perspective. Notice in this context occurs through the filing of tariffs as codified in TRA rule 1220-4-2-.061(1). We do not have to rely on the Hearing Officer for the conclusion as to the problem resulting from the failure to file a tariff.[2] The failure to tariff services hinders the TRA's efforts to prevent discrimination.

Additionally, the record in this case clearly reflects that the program was not tariffed so the only notice of governing terms to the individual consumer had to come directly from BellSouth.[3] Consequently, the Hearing Officer's focus on consumer perception is warranted.

Moreover, the record clearly supports the finding of the Hearing Officer with respect to the reality that the Program was a device within the context of Tennessee Code Annotated, Section 65-4-122(a). Membership was not automatic.[4] A consumer was not automatically

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[2]As quoted at the bottom of Page 26 and at the top of Page 27 of the Hearing Officer's Initial Order dated April 16, 2002 citing *New York, New Haven & Hartford R.R. Co. v. Interstate Comm. Comm'n*, 200 U.S. 361 (1906) (cited in *Louisville v. N.R. Co. v. Hardiman*, 5 Tenn. App. 289, 1927 WL 2133, *3 (1927)): "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 tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination". The United States Supreme Court has also applied this same principle to the telecommunications industry as pointed out by the Hearing Officer in *MCI Telecomm. Corp. v. American Tel. & Tel.*, 512 U.S. 218, 229 (1994) (stating that the tariff filing requirement is, to pursue this analogy, the heart of the common carrier section of the Communications Act").

[3]Docket No. 01-00868, Page 105, Line 25 through Page 106, Line 1 of the Transcript of the Proceedings, Feb. 4, 2002.

[4]Docket No. 01-00868, Don Livingston, Pre-Filed Direct Testimony, p.8 (Jan. 25, 2002) (That enrollment in the Program is not automatic is deduced from the testimony of Mr. Livingston as to how a consumer may be notified of eligibility for the Program once BellSouth determines the customer is eligible).

enrolled upon meeting the eligibility requirement of having monthly regulated spending of $100 and subscribing to a non-regulated service.[5] Either the consumer had to call and inquire about the program, which pre-supposes consumer knowledge of the program, or the consumer had to rely on an in-house determination by BellSouth that the particular consumer was eligible for the program and some kind of effective means of communication from BellSouth. The record reflects that this latter alternative was only attempted with respect to "potentially-eligible customers" and was not universal. These facts may be reasonably deduced from the following testimony of Don Livingston, former Senior Director of Small Business Services, a division of BellSouth: "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."[6] This passage supports the Hearing Officer's finding that usage of the words "try" and "could" indicate that even potentially eligible customers may not receive notice.[7] Moreover, this passage clearly establishes that BellSouth did not make an effort to advise all customers of the Program.

The effect of this gap in notice cannot be overestimated. Customers that were eligible, but not enrolled in the Program, were denied the 2.5 percent credit[8] on its total phone bill or, as

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[5]Docket No. 01-00868, Page 135, Line 22 through Page 136, Line 3 of the Transcript of Proceeding, Feb. 4, 2002.

[6]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).

[7]Docket No. 01-00868, Hearing Officer's Initial Order dated April 16, 2002 at page 28.

[8]Docket No. 01-00868, Page 5, Line 9 to the Direct Pre-Filed Testimony of Richard Tice.

later changed, denied the equivalent in cash back.[9] On the other hand, all other customers were denied knowledge of the program and the ability to modify their purchasing practices to avail themselves of the program. Due to the low threshold for membership, monthly spending on regulated services of just $100 and subscribing to one, non-regulated service, given the spending that may be reasonably attributed to a small business customer for phone service and an ad in the yellow pages, it is very plausible that many small business customers would have to only add a non-regulated service to meet the eligibility requirements of the program. By enrolling in the program, a customer could potentially expand his business, through the use of a non-regulated service, with little or no cost. This statement is based on the fact that a member may receive cash back up to the amount of spending on non-regulated services.[10]

Third, BellSouth argues that there can be no unjust discrimination in that the program is available to all of its customers that meet the eligibility requirements.[11] This misses the mark. The point is that the program itself represents discrimination to the extent that members, to the exclusion of non-members, receive value in return for the purchase of regulated services. The result is that members, by receiving this value, pay less than full tariff rates while non-members pay the higher full tariff rates. Accordingly, the issue is not the general availability, but rather the effect the program has on rates paid for regulated service. It is reasonable to presume that there

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[9]Docket No. 01-00868, Page 6, Lines 13 through 16, of the Pre-Filed Direct Testimony of Richard Tice as to select points. Exhibit RET-1 to the Pre-Filed Direct Testimony of Richard Tice as to bonus points.

[10]Docket No. 01-00868, Page 10, Lines 19 through 22 to the Pre-Filed Direct Testimony of Richard Tice.

[11] Docket No. 01-00868, Initial Order of the Hearing Officer, April 16, 2002, p.26.

will always be customers who, for one reason or another, do not qualify for the program and it is the difference in the rates paid by members and non-members which is the issue.

2. The District Attorney is one of two parties that may pursue a violation of Tennessee Code Annotated, Section 65-4-122(a), the other party being the TRA.

The Hearing Officer is correct that Tennessee Code Annotated, Section 65-4-122 is the product of the codification of predecessor statutes Tennessee Code Annotated, Sections 65-5-110, 65-5-111, 65-5-112, 65-5-113, and 65-5-115 ("former statutes") and that Tennessee Code Annotated, Section 65-3-119 *Penalties generally*-(a) applied to those former statutes and there appears to be no reason why 65-3-119 would not continue to apply after the codification given the foreseeable potential for oversight in failing to update 65-3-119 to refer to new chapter 4 in replacement of old chapter 5.[12] Tennessee Code Annotated, Section 65-3-119(a) states, in part "It is the duty of the district attorneys general to bring suit in the name of the state on the relation of the department, in any court having jurisdiction thereof, to **recover any penalty imposed** by the provisions of this chapter [3] and chapter 5 of this title.[13] The heading addresses penalties generally and there is no legislative history to suggest that the General Assembly wanted to change the applicability of this means of enforcement simply because the statutes were combined and moved from chapter 5 to chapter 4. Therefore, there is no perceived basis for concluding other than that the District Attorney would have jurisdiction over violations of Tennessee Code Annotated, Section 65-4-122.

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[12] Docket No. 01-00868 Initial Oder of the Hearing Officer, dated April 16, 2002 on page 46.

[13] Tennessee Code Annotated, Section 65-3-119(a) (Supp. 2001) (emphasis added).

Notwithstanding, the TRA also has jurisdiction the basis of which also relates back to prior law. We still had the overlap under prior law. Tennessee Code Annotated, Section 65-4-106 under prior law and, as it reads today, refers both to both chapter 4 and chapter 5. The point is that even prior to the codification of the former statutes the TRA had, and still has, jurisdiction in matters of unjust discrimination "to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction".[14] A second point is that just as tariffs are fundamental to avoidance of discrimination so too is the role of the TRA when it finds that a public utility has violated the discrimination statute. We submit that the TRA has the authority on its own accord to fine BellSouth for violation of Tennessee Code Annotated 65-4-122(a).

Hence, it is the position of the Attorney General that the TRA has concurrent jurisdiction with the District Attorney.

Respectfully submitted,

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[14] Tennessee Code Annotated, Section 65-4-106 (Supp. 2001) (No difference between the language in current and prior law with the exception of deleting references to the commission and replacing each reference with the authority.

CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2002, a copy of the foregoing document was served on the parties of record via first class mail:

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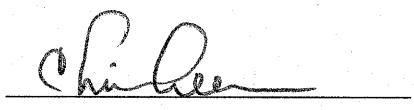

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