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May 29, 2002

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc.*

Complaint of Access Integrated Networks, Inc. Against BellSouth Telecommunications, Inc.

Docket No. 01-00868

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Brief Addressing Issues for Review of Initial Order Raised by Authority. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

Joelle Phillips

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: ***Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc.***

Complaint of Access Integrated Networks, Inc. Against BellSouth Telecommunications, Inc.

Docket No. 01-00868

BELLSOUTH TELECOMMUNICATIONS, INC.'S BRIEF ADDRESSING ISSUES FOR REVIEW OF INITIAL ORDER RAISED BY AUTHORITY

On May 21, 2002, the Authority gave oral notice of its intent to review the Initial Order entered in this docket on April 16, 2002. The Authority explicitly limited its review to two issues:

1. Whether there is sufficient evidence in the record to support the Hearing Officer's finding that [BST] is guilty of unjust discrimination under Tenn. Code Ann. § 65-4-122(a); and

2. If Issue #1 is answered in the affirmative, whether the district attorney is the proper party to pursue a violation of Tenn. Code Ann. § 65-4-122(a).

In conjunction with its review, the Authority directed the parties to file briefs on these issues. In compliance with that directive, BellSouth Telecommunications, Inc. ("BST") respectfully submits this Brief, which explains that: (1) the record lacks sufficient evidence to support the Hearing Officer's finding that BST violated section 65-4-122(a); and (2) the Authority is not a court and therefore may not hear any action or issue findings regarding the alleged violation of section 65-4-122; even if the Authority had jurisdiction to issue such a finding, referral of the finding to the district attorney is not authorized by controlling law; and section 65-

4-122(e) states that an action for violation of section 65-4-122 "may be brought by any person . . . before any court having jurisdiction to try the same."

I. WHETHER THERE IS SUFFICIENT EVIDENCE IN THE RECORD TO SUPPORT THE HEARING OFFICER'S FINDING THAT BST IS GUILTY OF UNJUST DISCRIMINATION UNDER TENN. CODE ANN. § 65-4-122(a)

Section 65-4-122(a) defines "unjust discrimination" as the use of a "special rate, rebate, drawback, or other device" to "charge[], demand[], collect[], or receive[] from any person a greater or less compensation" than what is "charge[d], demand[ed], collect[ed], or receive[d] from any other person for service of a like kind under substantially like circumstances and conditions." Tenn. Code Ann. § 65-4-122(a).

The Hearing Officer's finding that BST violated section 65-4-122 is not supported by competent evidence. First, the record contains no evidence that the Select Program actually was used as a "device" to collect a greater or less compensation for regulated service from any one customer as compared to that collected from any other customer. Second, even assuming that the program did constitute a device to collect greater or less compensation for regulated services (which BST strongly denies), the record contains no evidence that the Select Program resulted in discrimination among similarly situated customers.

A. BST charged, demanded, collected, or received the tariff rate from all customers

The Hearing Officer, while declining to address whether operation of the Select Program constituted a "rebate" as used in section 65-4-122(a), opted to find

that the program constituted a "device" used by BST to charge or receive different rates from persons receiving the same services. Initial Order at 30. In so finding, the Hearing Officer specifically rejected uncontroverted evidence from BST that both Select members and non-members were in fact charged and billed tariffed rates and that BST did not return these tariffed rates that were collected to any customer. *See* Docket No. 01-00868, Post-Hearing Brief of BST, pp. 25-28 (Mar. 4, 2002) (citing to testimony from various witnesses). Moreover, despite the fact that all customers were actually charged the same rate for regulated services and that the tariffed rates which BST billed and collected for regulated services were recorded by BST in regulated accounts, the Hearing Officer found that the controlling factor in the analysis was the perspective of the customer. Initial Order at 29-30. Because a customer mistakenly could assume that any credit earned applied to regulated services, the Hearing Officer reached the conclusion that the Program actually resulted in customers being charged different rates for the same regulated services. *Id.*

The Hearing Officer's determination that "customer perspective" controls the analysis of whether a common carrier has charged similarly situated customers different rates for the same regulated services is not supported by law. When interpreting statutes, "legislative intent should be determined from the plain language of the statute, 'read in context of the entire statute, without any forced or subtle construction which would extend or limit its meaning.' " Initial Order at 25 (quoting *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)). Under the plain language of section 65-4-122, unjust discrimination consists of a common carrier collecting or receiving from one person a greater or less compensation than that received from a similarly situated person. Nothing on the face of the statute (or the hundred years plus body of case law interpreting the statute) suggests that "customer perspective" can or should be substituted for actual proof that one customer was charged more than another for the same regulated service. Insertion of this factor into the statutory analysis results in an improper extension of the statute's meaning.

Furthermore, even assuming that the customer perspective is an appropriate factor to consider in determining whether a violation of section 65-4-122(a) has occurred, the record does not contain sufficient evidence from any customer regarding his or her perspective with respect to points redeemed under the Select Program. Neither the private complainants nor the CAPD introduced testimony of customers affected by the Select Program. Lacking factual evidence from any affected customer, the Hearing Officer cites to testimony from BST's expert witness, Aniruddha Banerjee, that a customer "may perceive" a reduction of the tariffed amount. Initial Order at 29-30 (citing Banerjee Pre-Filed Rebuttal Testimony, p.5 (Jan. 20, 2002)). However, the statement cited by the Hearing Officer is taken out of context and overlooks Mr. Banerjee's actual testimony that while a customer "may perceive [such a reduction], that would not change the fact that the full tariffed rate is being recorded on BST's regulated books of account."

Banerjee Pre-Filed Rebuttal Testimony, p.5 (Jan. 20, 2002). In sum, the Hearing Officer's conclusory determination as to what was or was not reasonable for customers to perceive is simply speculation that is unsupported by the factual evidence in the record. Accordingly, the Hearing Officer's finding that the Select Program involved the use of a device that violated section 65-4-122(a) must be rejected.

B. The Record Contains No Evidence That the Select Program Unjustly Discriminated Between Similarly Situated Customers

Even if the Hearing Officer's finding that the Select Business Program operated as a device used to charge different rates for the same tariffed services (which it clearly does not), the Select Program does not violate section 65-4-122(a) because the Program did not unjustly discriminate among similarly-situated customers.

1. Section 65-4-122(a) only prohibits discrimination that is "unjust"

Section 65-4-122(a) was modeled upon, and is nearly identical to, the Interstate Commerce Act of 1887 ("ICA"). *See Southern Ry. Co. v. Pentecost*, 330 S.W.2d 321, 323-25 (Tenn. 1959) (citing to cases construing ICA for purposes of interpreting Tennessee unjust discrimination statute). Federal courts interpreting the ICA have made clear that the mere use of a rebate or special rate to charge one customer less than it charges another does not, in and of itself, violate the statute. That is, "[e]very rate which gives preference or advantage to certain persons . . . is discriminatory . . . . But discrimination is not necessarily

unlawful." *Nashville, C. & St. L. Railway v. Tennessee*, 262 U.S. 318, 322 (1923). Rather, "only that discrimination which is unreasonable, undue, or unjust" is prohibited by the statute. *Id.*

In examining what constitutes "unreasonable, undue, or unjust" discrimination, the United States Supreme Court has held that common carriers are "only bound to give the same terms to all persons alike under the same conditions and circumstances, and any fact that produces an inequality of condition and a change of circumstances justifies an inequality of charge." *Interstate Commerce Commission v. Baltimore & Ohio R. Co.*, 145 U.S. 263, 283-84 (1892). Accordingly, in *Baltimore & Ohio R. Co.*, the Supreme Court held that a railway company did not commit unjust discrimination by its use of "party rates" whereby parties of ten or more persons traveling together on one ticket could obtain cheaper rates than the rate charged to individual customers. *Id.* at 284. That is, volume discounts do not constitute unjust discrimination. *Id.* at 281-82 ("To bring the present case within the words of this section, we must assume that the transportation of ten persons on a single ticket is substantially identical with the transportation of one, and, in view of the universally accepted fact that a man may buy, contract, or manufacture on a large scale cheaper proportionately than upon a small scale, this is impossible.").

Pursuant to this reasoning, the mere fact that the Select Program was available only to customers who satisfied preset eligibility requirements does not constitute unjust discrimination. Even if BST is found to have offered Select-

eligible customers a lesser rate than that offered to non-Select-eligible customers, such discrimination is not unlawful because Select-eligible customers are not similarly situated to non-Select-eligible customers. That is, a customer who satisfies a minimum monthly spend requirement is not similarly situated to a customer who spends less than the minimum amount. Therefore, charging a customer who purchases a greater amount of a common carrier's services a lesser rate than that charged to other customers does not violate section 65-4-122.[1]

With respect to the similarly-situated customers, *i.e.*, all customers eligible for the Select Program, the evidence in the record shows that the Select Business Program was available to all BellSouth customers who met the eligibility requirements of the respective offerings.

2. The Select Business Program was available to all similarly-situated customers.

Richard Tice, President of BSSI, testified that "[i]n 1999, for instance, BSSI sent materials to *all potentially eligible customers* by direct mail" and also described the program on the company's Internet site. (Tice Direct at 6) (emphasis added). In addition to the direct mail campaign and the Internet posting, Tice noted that both BellSouth Advertising & Publishing Corporation ("BAPCO") representatives and

[1] Establishing volume and term eligibility requirements for offerings and making the offerings available only to those who meet those eligibility requirements is a time-honored and perfectly acceptable practice. In fact, AIN/DeltaCom witness Mr. Gillan acknowledged that volume and term contracts are authorized practices in Tennessee, and he acknowledged that volume and term requirements are not inherently discriminatory. He also acknowledged that if a customer did not meet the criteria for the Select program because it did not have $100 worth of BST services, that customer would be like a customer that did not meet the volume requirement in a volume and term contract. (Tr. at 61-62).

BST Small Business Services initiated efforts to inform potentially eligible customers of the program. *Id.* at 6-7.

Don Livingston, former Senior Director of BST Small Business Services, a division of BST, testified that all versions of the Select program were available to all customers who met the eligibility requirements. (Tr. at 210). Livingston testified that several methods were used to inform eligible customers of the program, including direct mailings, contacts by BAPCO representatives, in-bound calls,[2] out-bound calls, and a web site (*see* www.bellsouthselectbusiness.com). (Livingston Direct at 8.). Although AIN/DeltaCom witness Mr. Gillan made unsubstantiated and conclusory allegations that certain aspects of the Select Business Program could be discriminatory, he conceded that he is not aware of any customer that wished to participate in the Select Business Program and that was eligible to do so but that was denied the opportunity to participate. (Tr. at 61).

CAPD witness Dr. Brown also suggested that BellSouth did not make the Select Business Program available to some customers who are eligible for the program, but that suggestion clearly was based on a single excerpt from the deposition of Don Livingston. (Brown Direct at 10). On cross examination, however, Dr. Brown acknowledged that during his deposition, Mr. Livingston also stated that "[w]e look in our database and see which customers are eligible for the program, and then we try to invite them to the program. It could be a direct mail

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[2] A notation is placed on BellSouth's record of all customers that are eligible for the Select Business Program, and when an eligible customer places a call to a BST service representative, that representative typically invites the customer to join the Select Program. (Tr. at 160-61; 195).

piece, or the sales force could mention it to the customer." (Tr. at 124). When faced with this portion of Mr. Livingston's deposition, Dr. Brown claimed that it was "a contradiction, according to what Mr. Tice said, who said that we've had a rolling criteria." (*Id.*).

The fact that the eligibility requirements for various versions of the Select program changed over time, however, does not contradict the fact that each version of the program was available to all customers that met the eligibility requirements that were in effect at any given time. Moreover, no evidence in the record suggests that the Select program was not available to any customer that met the program's eligibility requirements.

3. Conclusion

Without citation to any factual evidence in the record, the Hearing Officer found it "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." Initial Order at 28.[3] As set forth above, this assumption is not supported by the factual evidence in the record. Moreover, the Hearing Officer's reasoning improperly shifts the burden of proof to BST to prove a negative by showing that there was no customer who was not given notice of the program. The statute does not require BST to prove that all eligible customers received notice of the program. Rather, section 65-4-122(a) is violated only upon proof that similarly situated customers have been charged

different rates for the same service. Because the record is devoid of evidence that any customer that wanted to enroll in the program and that met the program's eligibility requirements was denied enrollment in the program, the Hearing Officer's finding must be rejected.

II. WHETHER THE DISTRICT ATTORNEY IS THE PROPER PARTY TO PURSUE A VIOLATION OF TENN. CODE ANN. § 65-4-122(a)

As explained above, BST strongly contests the Hearing Officer's finding that operation of the Select Program constituted unjust discrimination in violation of section 65-4-122(a). The Authority is not a court as that term is used in section 65-4-122(e) and, therefore, the Authority lacks jurisdiction to make findings regarding violation of section 65-4-122 or to impose fines for violation of the statute. Furthermore, the Authority is not authorized by law to refer findings of violation of section 65-4-122(a) to the district attorney general for prosecution. Finally, with respect to the proper party to bring an action for violation of section 65-4-122, subsection (e) provides that "any person" may bring an action under the statute.

A. The Authority is Not a Court as that Term is Used in Section 65-4-122(e)

Section 65-4-122 prohibits a common carrier or public service company from engaging in unjust discrimination, extortion, or the making or giving of undue preferences. *See* Tenn. Code Ann. § 65-4-122(a), (b), and (c). Subsection (d) directs that any corporation found guilty of the aforementioned prohibited conduct

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[3] Lack of notice is not mentioned in the Hearing Officer's exhaustive list of elements

"shall be fined" as set forth in the statute. *Id.* § 65-4-122(d). Lastly, subsection (e) directs that an action for the violation of section 65-4-122 "may be brought by any person . . . before any court having jurisdiction to try the same." *Id.* § 65-4-122(e).

The Authority "is an administrative agency exercising co-mingled legislative, executive, and judicial functions,"[4] and both the statutes governing the Authority[5] and the Uniform Administrative Procedures Act[6] clearly distinguish between the Authority and a court. The Authority, therefore, is not a court, and thus lacks jurisdiction to hear any action or issue findings regarding the alleged violation of section 65-4-122. Moreover, the Authority has no statutory power to impose a fine upon a public utility for having charged a rate that it determines is discriminatory or unduly preferential.[7]

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necessary to prove a violation of § 65-4-122. *See* Initial Order at 25 (setting forth elements).

[4] *Tennessee Cable Telev. Asss'n v. Public Serv. Comm'n*, 844 S.W.2d 151, 158 (Tenn. Ct. App. 1992).

[5] *See, e.g.,* Tenn. Code Ann. §§ 65-2-109(a) ("The authority shall not be bound by the rules of evidence applicable in a court . . . .").

[6] *See, e.g.,* Tenn. Code Ann. §§ 4-5-221(c) (setting forth the conditions under which the text of the rules appearing in the administrative code may be "used in all courts, agencies, departments, offices of and proceeding in the state of Tennessee"); 4-5-223(b) (an agency's declaratory order is binding between the agency and the parties "unless altered or set aside by the agency or a court in a proper proceeding").

[7] While section 65-4-120 generally allows the TRA to impose penalties of $50.00 per day for violation of "any lawful order, judgment, finding, rule or requirement of the authority," section 65-4-122 specifically addresses actions alleging extortion or unjust discrimination, and it provides that such actions are to be brought "before any court having jurisdiction to try the same." Under Tennessee law, a specific statutory provision will control over a more general statutory provision. *See Washington v. Robertson County*, 29 S.W.2d 466, 475 (Tenn. 2000). The specific statutory provisions of section 65-4-122, therefore, control over the general statutory provisions of section 65-4-120, and the TRA has no authority to impose fines for discrimination or extortion. If this were not the case, the Authority could enact a rule that says exactly what section 65-4-122 says, impose fines for a violation of that rule, and circumvent the statutory requirement that actions seeking such fines be brought before a court.

B. The Authority Is Not Authorized to Refer Violations of Section 65-4-122(a) to the District Attorney General for Consideration By That Office

The Hearing Officer has directed that, pursuant to section 65-3-120, the findings of the Initial Order that BST violated section 65-4-122(a) be transmitted to the District Attorney General for consideration by that office. Initial Order at 47. Chapter 3 of Title 65 of the Tennessee Code contains three sections that address the authority of the Authority to refer alleged violations of chapter 3 (codifying regulation of railroads by the Department of Transportation) and chapter 5 (codifying regulation of rates by the Authority) to the district attorney general and the district attorney general's duty to prosecute such referrals. *See* Tenn. Code Ann. §§ 65-3-119, 120, and 121.[8]

Section 65-3-120(c) directs that violations of chapter 3 or chapter 5 of Title 65 and the facts in support of such violations must be reported to the district attorney general.[9] Tenn. Code Ann. § 65-3-120(c). Section 65-3-119(a), in turn, places upon the district attorney general the "duty" to bring suit in the name of the State on the relation of the Department of Transportation or the Authority to recover any penalty imposed by chapter 3 or chapter 5. All penalties and fines recovered must be paid into the state treasury. *See* Tenn. Code Ann. § 65-3-119(d). What is of controlling significance in this case is the fact that sections 65-

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[8] These statutes are applicable to the TRA because section 65-4-105 provides that the TRA possesses powers conferred by chapter 3 and chapter 5. *See* Tenn. Code Ann. § 65-4-105(a).

[9] Section 65-3-119(a) directs the TRA to turn over "facts" in support of alleged violations—not findings of facts contained in an agency order made after a hearing in a contested case.

3-119, 120, and 121 do *not* provide that their provisions are applicable to Chapter 4.

It is well established that "[w]hen a statute is unambiguous, it must be interpreted according to its plain meaning." *Atchley v. Life Care Center*, 906 S.W.2d 428, 431 (Tenn. 1995). Sections 65-3-119, 120, and 121 are clear and unambiguous. By their plain terms, these statutes apply only to violations of chapter 3 and chapter 5 of Title 65. Because section 65-4-122 is contained in neither chapter 3 nor chapter 5, the Authority lacks any legal basis for referring alleged violations of section 65-4-122 to the district attorney general for prosecution. Sections 65-3-119, 120, and 121, therefore, neither require nor permit the Authority to report violations of section 65-4-122 to the district attorney general. Nor do these sections place upon the district attorney general the duty to bring suit to recover any penalty imposed by section 65-4-122. Instead, as discussed above, the General Assembly has elected to allow a private party to bring an action for the violation of section 65-4-122 in court.

In sum, section 65-3-120 directs the Authority to refer alleged violations of chapter 3 and chapter 5 of Title 65 to the district attorney general, who, pursuant to section 65-3-119 and sections 65-3-121, may institute a legal action to recover penalties on behalf of the State. By their plain terms, these statutes do not apply to alleged violations of section 65-4-122, which is contained in chapter 4 of Title 65. Rather, section 65-4-122 specifically authorizes "any person" to bring an action against a corporation that allegedly has violated the statute. According to

the statutory authority, no legal basis supports the Authority's referral of alleged violations of section 65-4-122 to the district attorney general.

C. Section 65-4-122(e) Provides that "Any Person" May Bring an Action Under the Statute

With respect to the issue raised by the Authority of whether the district attorney is "the proper party" to pursue a violation of section 65-4-122(a), that statute states that an action for violation of section 65-4-122 "may be brought by any person . . . before any court having jurisdiction to try the same." BST is unaware of any caselaw that applies subsection (e).

CONCLUSION

For the reasons set forth above, BST respectfully requests the entry of a Final Order finding that the record does not contain sufficient evidence showing that BST violated section 65-4-122(a). Finally, according to section 65-4-122(e), "any person" may bring an action for violation of the statute.

Respectfully submitted,

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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 the method indicated:

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