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June 6, 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.

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

Docket No. 01-000868

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of the Attorney General's Response to BellSouth's Petition for Appeal from Initial Order of Hearing Officer. Copies of the enclosed are being provided to counsel of record.

Very truly yours,

CHRIS ALLEN
Assistant Attorney General

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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 AGAINST BELLSOUTH TELECOMMUNICATIONS, INC.	)	

ATTORNEY GENERAL'S
BRIEF IN RESPONSE TO AN APPEAL OF THE INITIAL ORDER
BY BELLSOUTH TELECOMMUNICATIONS, INC.

Comes the Tennessee Attorney General, through the Consumer Advocate and Protection Division ("Attorney General"), and hereby files this response to the appeal of the Initial Order of the Hearing Officer by BellSouth Telecommunications, Inc. ("BellSouth") according to the time frame for doing so set forth by the Tennessee Regulatory Authority ("TRA"). In this Brief, the Attorney General will address the roles of the TRA and the district attorney in making findings, imposing fines, and collecting those fines under Tenn. Code Ann. § 65-4-122. The TRA is required to make findings and refer violations of unjust discrimination to the district attorney general pursuant to Tenn. Code Ann. § 65-3-120(c) and it is the duty of the district attorney general to recover any penalty pursuant to Tenn. Code Ann. § 65-3-119(a). Additionally, the Program was not available to all similarly situated customers. Members and non-members could

be purchasing the same volume of services, but the non-members do not receive the benefits of the Program simply because they do not also subscribe to a non-regulated service. Consequently, the Program functions as a device to perpetuate unjust discrimination. And finally, the Program is not an example of the unregulated operations of BellSouth pricing its unregulated products and services as it deems appropriate. It is clear from the record that the regulated and non-regulated components of the Program are inexorably intertwined.

A. The TRA is required to make findings of fact with respect to unjust discrimination under Tenn. Code Ann. § 65-4-122 and refer them to the district attorney general.

This requirement is set forth in Tenn. Code Ann. § 65-3-120(c) which states: "The **department** shall report all such **violations** with the facts in its possession to such district attorney general and request the district attorney general to institute the proper proceedings." (Emphasis added).

Clearly the term "department" means the applicable regulatory body. This conclusion is based on the fact that the statute in subsection (a) cross references this chapter (chapter 3) and chapter 5. While "department" refers to the state Department of Transportation in chapter 3, clearly it taken to its logical conclusion refers to the TRA with respect to chapter 5, which pertains exclusively to the regulation of rates of public utilities. Thus, to this extent it is the TRA that should report violations to the district attorney general.

Likewise, the reference to "violations" is probative in resolving the issues before the TRA. BellSouth submits that the TRA, to the extent required to make a referral to the district attorney general, is not allowed to make findings of fact. Rather, BellSouth argues that the referral is to consist of only "alleged violations". Clearly by requiring the TRA to "report all

such violations" pre-supposes that the TRA has reviewed the evidence and found such violations to exist.[1]

BellSouth also argues that Tenn. Code Ann. § 65-3-120 does not apply simply because the cross-reference contained in the statute is to chapter 5 and not chapter 4 which is the present location of Tenn. Code Ann. § 65-4-122, the unjust discrimination statute. This argument taken on its face means that BellSouth does not dispute the application of 65-3-120 to 65-5-110 thru 65-5-113 and 65-5-115 (the "former discrimination statutes") under prior law. BellSouth's argument must fail because the only legislative action taken was the combination and movement of the former discrimination statutes to Tenn. Code Ann. § 65-4-122. BellSouth cannot cite any reason other than mere oversight to explain the failure to amend 65-3-119 and 65-3-120 to reflect moving the discrimination statute from chapter 5 to chapter 4. The fact that it was purely attributable to oversight cannot be refuted given the long and close relationship between the two bodies of law. Both were enacted in 1897 in the same chapter and, according to the logical extension of BellSouth's argument, functioned in tandem effectively for almost 100 years before being derailed through oversight. Thus, chapter 4 should be read into 65-3-120 and its companion 65-3-119 consistent with legislative history and the long standing relationship between the two bodies of law. Thus, the TRA is required to make findings of fact and then turn over its findings to the district attorney general.

B. The TRA does not have the authority to impose fines for the violation of Tenn. Code Ann. § 65-4-122.

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[1] Tenn. Code Ann. Section 65-3-120 (c) (Supplement 2001).

Notwithstanding Tenn. Code Ann. §§ 65-4-104 and 65-4-106, there can be no question that when the predecessors to Tenn. Code Ann. § 65-4-122 were enacted fines could only be recovered by an action through a court.[2] This based upon the fact that both 65-3-119 and the former discrimination statutes were enacted at the same time and were the exclusive means of enforcing the statute. Tenn. Code Ann. § 65-5-115 provided a private cause of action and the predecessor to 65-3-119(a) (codified in Tenn. Code Ann. § 65-321 (1976)) stated, "It is the duty of the district attorney to bring suit ... to recover **any** penalties imposed by the provisions of ... chapter 5 of this title."[3] The fact that the reference to chapter 5 includes the phrase "any" penalty seems conclusive. It appears to be mandatory with respect all penalties relating to unjust discrimination which, at that time, was found in chapter 5.

The question becomes in 1919, approximately 22 years after both the predecessor to the TRA and the above legislation were enacted, did the legislature pass Tenn. Code Ann. §§ 65-4-104 and 65-4-106 at least in part to confer jurisdiction on the predecessor to the TRA with respect to imposing fines for unjust discrimination. With respect to Tenn. Code Ann. § 65-4-104, at least by implication this question may reasonably be answered in the negative. Tenn. Code Ann. § 65-4-104 provides that the TRA "shall have general supervision and regulation of,

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[2] Since this is a view from a historical perspective, copies of the prior statutes are attached as Exhibit 1. The former discrimination statutes have not been amended since their enactment in 1897 so they are not included. On the other hand, 65-3-119 was amended in 1980 so attached please find a copy of the relevant portions of the 1976 Tenn. Code Ann. showing how the statutes appeared since 1897 and prior to being amended in 1980. The same is being provided relative to 65-3-120 as to show how it appeared since enactment and prior to being amended in 1979. These statutes are being provided for comparative purposes to establish only minor changes have been made since these two statutes were enacted. This may be confirmed by comparing how they read in 1976 with how they read today.

[3] See Tenn. Code Ann. Section 65-321 at the very top of page 1 of Exhibit 1.

jurisdiction, and control over, all public utilities ... so far as may be necessary for the purpose of carrying out the provisions **of this chapter**." It must be remembered that "this chapter" refers to chapter 4 and not chapter 5 where the former discrimination statutes were found prior to 1995. Thus, since Tenn. Code Ann. § 65-4-104 has referred to chapter 4 since its enactment, it is clear that it cannot be cited for authority for the proposition that the TRA has the power to impose fines for unjust discrimination. The legislature may not be said to be clairvoyant in intending the result of moving the unjust discrimination statute to chapter 4 which occurred approximately 76 years after the enactment of 65-4-104.

Next, the focus shifts to Tenn. Code Ann. § 65-4-106. A key phrase is "and any doubt as to the existence or extent of a power conferred on the authority ... shall be resolved in favor of the existence of the power."[4] The point is that there must be a doubt concerning another statute and the authority thereunder conveyed to the TRA before this statute becomes an issue. But there is no doubt with respect to Tenn. Code Ann. § 65-4-122. It has already been established that "all the bases were covered". Clearly before 1995 it was the duty of the district attorney general "to recover any penalty imposed by chapter 5".[5] The only power the predecessor to the TRA had was the obligation of making the findings and referring the matter then to the district attorney general.[6] Based on the preceding prior discussion, there is no rational reason why this changed simply because the former discrimination statutes were combined and moved to chapter 4.

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[4] Tenn. Code Ann. § 65-4-106 (Supplement 2001).

[5] Compare Tenn. Code Ann. § 65-321 under the 1976 Code with present day statute Tenn. Code Ann. § 65-3-119(a) (Supplement 2001). There is no difference on this point.

[6] Compare Tenn. Code Ann. § 65-327 under the 1976 Code with present day statute Tenn. Code Ann. § 65-3-120(c) (Supplement 2001). There is no difference on this point.

To summarize, the Attorney General believes the application of Tenn. Code Ann. § 65-4-106 requires it to be read in the context of the other statutes at issue here. Only where there exists a doubt is it relevant. There is no doubt as to Tenn. Code Ann. § 65-4-122. Not only for the foregoing reasons, but support is found in the maxim of statutory construction when in doubt about a statute consider the circumstances contemporaneous with the statute's enactment.[7] As previously stated, the circumstances at the time the former discrimination statutes were enacted consisted of another statute which by reference applied to the former discrimination statutes and both statutes dealt with fines assailable through court actions. Interpreting Tenn. Code Ann. § 65-4-122 in this context leaves no question that penalties for unjust discrimination must be obtained through a court action.

C. The Select Business Program was not available to all similarly-situated customers.

First, to be available to all, Select-eligible customers had to be aware of the Select Business Program ("the Program"). At best the record is inconclusive. The Hearing Officer properly focuses on BellSouth's efforts to inform its customers of the Program. 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

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[7] *Still v. First Tenn. Bank, N.A.*, 900 S.W.2d 282, 284 (Tenn. 1995); *Mascari v. Raines*, 415 S.W.2d 874, 876 (1967); *Davis v. Aluminum Co. Of Am.*, 316 S.W.2d 24, 27 (1958).

could mention it to the customer."[8] Mr. Livingston later answered the question of "how does [BellSouth] inform potentially-eligible customers of the 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.[9]

The Hearing Officer properly concludes "the use of the words 'certain,' 'try,' 'could' and 'typically' indicate that even potentially eligible customers may not receive notice." Initial Order at 28. This point is further illustrated by the testimony of Richard Tice, President of BellSouth Select, Inc., the division of BellSouth that runs the Program. He states that most of the enrollment in the Program was the result of the customer calling in at which time it was invited to join the program.[10] The point is that but for the initiative of the customer it may not have been enrolled in the Program all together or later rather than sooner. Thus, the customer would been denied the benefits of the Program all together or for some period of time.

If BellSouth truly intended for membership in the Program to be available for all customers eligible then you would think they would make it as easy as possible. Instead of marking the customer's computer file to indicate they were eligible only to "try" to notify the

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[8]Docket No. 01-00868, Transcript of Proceedings, Feb. 4, 2002, Exh. 3 (Transcript of Depositions, Jan. 16, 2002, p. 46 (deposition of Don Livingston).

[9]Docket No. 01-00868, Don Livingston, Pre-Filed Direct Testimony, p.8 (Jan. 25, 2002).

[10] (Tr. at 161).

customer at some later date, why would not BellSouth make membership automatic, particularly after dispensing with the need to get a CPNI information waiver?[11] To the contrary, under the approach adopted by BellSouth, meeting the eligibility requirements was not enough, in and of itself; rather the customer had to be "invited" to join the Program.[12]

Second, a customer could satisfy the minimum monthly spend requirement and still not be eligible for the Program by not also subscribing to a non-regulated service. [13] Therefore, the volume eligibility requirement as a means of "justly" discriminating against the non-Select eligible customers misses the mark. Moreover, given the Hearing Officer's finding that BellSouth failed to notify other than eligible or potentially eligible customers (Initial Order at p. 28), these customers were denied the Program when all that would have been required was subscription in a non-regulated service to meet program eligibility requirements. It is very plausible that a number of customers fell within this classification given the low required minimum monthly spend of $100[14] compared to what the customer was already spending on a monthly basis for phone service.

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[11]As to the notation placed on BellSouth's record when an individual customer becomes eligible for the Program (Tr. at 160-61; 195). As to the fact that the CPNI information waiver is no longer a requirement see (Tr. at 163).

[12]That the customer had to be invited to join the Program is the label applied by BellSouth in footnote 3, p.9 of BellSouth's Petition for Appeal from Initial Order of Hearing Officer.

[13] It was confirmed with a BellSouth representative on June 6, 2002 that the basic rate for a small business with two lines runs $113 per month. While this information is outside the record it is readily available and thus is public information. Because of this it is believed that the TRA can take notice of this information in its deliberations.

[14]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).

Therefore, since BellSouth failed to prove it notified all Select-eligible customers and also failed to notify customers who satisfied the minimum monthly spend requirement to such extent warrants a finding that Select-eligible customers were similarly situated with non-Select-eligible customers.

A direct consequence of such a finding is that the Program functioned as a device to charge non-members of the Program more that members for regulated services. Non-members paid full tariff rates while members paid 2.5 percent less.[15]

This gives some insight into how important notice is. Because BellSouth failed to provide notice to all their customers, those eligible for the Program were denied a check back for 2.5 percent of their regulated service purchases. Those on the cusp of eligibility were denied the opportunity of modifying their purchasing practices to avail themselves of the Program. Accordingly, because of inadequate notice this justified Hearing Officer's order that non-members and members were similarly situated and thus, that the Program functioned as a device.

D. The Select Program is not an example of the unregulated operations of BellSouth pricing its unregulated products and services as it deems appropriate.

The Select Program is not an "example of the unregulated operations of BellSouth...." BellSouth's approach continues to ignore the fact that Select Program incorporates elements of unregulated and regulated service. The eligibility of customers involved is evaluated based in part on their volume of regulated service. The rebates are based in large part on the volume of

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[15] (Tr. at 140).

regulated services. Consequently, the cases cited by BellSouth are inconsistent with its assertion regarding this issue.

It is important to note that the general principle set down in *Memphis News Pub. Co. v. Southern Ry. Co., 75 S.W. 941, 946 (Tenn. 1903)* disfavors the discriminatory practices of BellSouth. In the *Memphis News* case the Tennessee Supreme Court held that a railroad, as a common carrier, could not carry the newspapers of one publishing company and refuse to carrier the newspapers of another publishing company. *Id.* Under *Memphis News* BellSouth's attempt to discriminate among its customers is prohibited. The section of the opinion cited by BellSouth at page 16 of their Petition for Appeal refers to the arguments offered in the *Memphis News* case in which the railroad company tried to bring its practice within the exception to the general rule. *Id.* BellSouth cannot rely on the *Memphis News* case as prevailing authority in support of its assertion as there is no real difference between the class of customers BellSouth wishes to favor over another.

For the same reason, BellSouth's reliance on *Smith v. Southern Bell Telephone And Telegraph Company,* 364 S.W.2d 952 (Tenn. App. 1962) is misplaced. The *Smith* decision actually highlights the problem with BellSouth's assertion. In *Smith* the Tennessee Court of Appeals held that the service the plaintiff contracted for was nothing more than "classified advertisement" and therefore not a regulated service. *Id. at 956.* As outlined above, it is clear from the facts presented at the hearing of this matter that the regulated and unregulated components of the Select Program are inexorably intertwined.

CONCLUSION

The Attorney General requests the entry of a Final Order upholding the Hearing Officer's finding that BellSouth violated § 65-4-122(a) because the record contains sufficient evidence to support that finding. Additionally, the TRA should rule that the TRA is required by § 65-3-120(c) to make findings and refer those findings to the district attorney general. Furthermore, the TRA should uphold the Initial order as it relates to fining BellSouth for failure to tariff the Program, failure to charge tariff rates, and the failure to offer the Program for resale.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2002, a copy of the foregoing document was served on the parties of record via first class mail:

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1977 T.C.A.

65-3-119(a)

65-321. Suits for penalties brought by district attorneys. — It shall be the duty of the district attorneys to bring suit in the name of the state on the relation of the commissioners, in any court having jurisdiction thereof, to recover any penalty imposed by the provisions of this chapter and chapter 5 of this title. [Acts 1897, ch. 10, § 20; Shan., § 3059a46; Code 1932, § 5422.]

65-3-119(b)

65-322. Penalties for violations not otherwise provided. — If any such company, corporation, or lessee shall willfully violate any of the provisions of this chapter or chapter 5 of this title, or shall do any act prohibited therein, or shall fail or refuse to perform any duty enjoined upon it by the provisions of this chapter or chapter 5 of this title for which penalty has not therein been provided, for each and every such act of violation it shall pay to the state of Tennessee a penalty of not less than fifty dollars ($50.00) nor more than one hundred dollars ($100). [Acts 1897, ch. 10, § 25; Shan., § 3059a55; Code 1932, § 5431.]

65-3-119(c)

65-323. Penalties recovered by state. — All penalties provided for in this chapter or chapter 5 of this title shall be recovered, and suit thereon shall be brought, in the name of the state of Tennessee. [Acts 1897, ch. 10, § 26; Shan., § 3059a59; Code 1932, § 5435.]

65-3-119(d)

65-324. Disposition of penalties and fines. — All penalties and fines recovered shall be paid into the state treasury. [Acts 1897, ch. 10, § 26; Shan., § 3059a60; Code 1932, § 5436.]

65-3-120(a)

65-325. Jurisdiction of suits, civil and criminal. — The circuit and chancery courts and justices of the peace shall have jurisdiction of all suits of a civil nature arising under the provisions of this chapter and chapter 5 of this title, according to the nature of the suit and the amount involved; and the circuit and criminal courts shall have jurisdiction of all criminal proceedings so arising. [Acts 1897, ch. 10, § 26; Shan., § 3059a56; mod. Code 1932, § 5432.]

65-3-120(b)

65-326. District attorneys to prosecute suits for state. — The district attorney of the judicial circuit in which the suit is to be instituted shall prosecute suits so brought in the name of the state. [Acts 1897, ch. 10, § 26; Shan., § 3059a61; Code 1932, § 5437.]

65-3-120(c)

65-327. Commission to report violations to district attorney, and request suit. — Said commission shall report all such violations with the facts in their possession to such district attorney and request him to institute the proper proceedings. [Acts 1897, ch. 10, § 27; Shan., § 3059a63; Code 1932, § 5439.]

65-3-120(d)

65-328. Suits given preference — Advancement. — All suits between the state and any such company shall have precedence in all courts over all

other suits pending therein, and the judges of the said courts are directed to advance such suits on their dockets. [Acts 1897, ch. 10, § 27; Shan., § 3059a64; Code 1932, § 5440.]

65-329. Indictments — Request of commission — Prosecution. — Indictments or presentments under this chapter and chapter 5 of this title shall be only upon recommendation or request of the commission, filed in the court having jurisdiction of the offense. And the commission or any member thereof, or any person authorized by law to prosecute criminal cases, may be prosecutor. [Acts 1897, ch. 10, § 26; Shan., § 3059a57; Code 1932, § 5433.]

65-330. Limitation of actions. — All prosecutions or actions under this chapter and chapter 5 of this title shall be commenced within one (1) year after the offense shall have been committed or the cause of action shall have accrued, or the same shall be barred. [Acts 1897, ch. 10, § 26; Shan., § 3059a58; Code 1932, § 5434.]

NOTES TO DECISIONS

1. Application of Limitation Provision.

The limitation of this section only has application to suits brought by any person against a public utility company for violation of the provisions of this chapter or by district attorney general in the name of the state on relation of the commission to recover any penalty imposed by the chapter. Gulf, M. & N. R. Co. v. Hunt Bros. Furn. Co. (1938), 173 Tenn. 327, 117 S.W. 2d 12.

2. Suit by Railroad to Recover Undercharge.

In a suit by a railroad to recover for an undercharge on an intrastate shipment the six year statute of limitations, as set out in § 28-309, was controlling, and not the one year limitation of this section. Gulf, M. & N. R. Co. v. Hunt Bros. Furn. Co. (1938), 173 Tenn. 327, 117 S.W. 2d 12.

65-331. Commission to inspect, and abate dangerous or unhealthy conditions, on trains, in yards, and along rights of way, of railways and street railways. — The Tennessee public service commission shall have the power and authority to inspect the conditions existing on trains or along the rights of way, yards and terminals of all commercial railroads, interurban railroads and street railroads, to the end that safety, health and comfort of the general public and employees may be preserved and that dangerous or unhealthy conditions on trains or along the rights of way, yards and terminals, if found to exist, may be abated and removed by the order of the commission.

The commission, on its own motion or on the petition of any citizen, shall have a hearing on the question embraced within this section, as to the presence of dangerous or unhealthy conditions of trains or along the rights of way, yards and terminals of all commercial railroads and street railroads.

It shall be the duty of the commission, after the hearing, to order the abatement and removal of any dangerous or unhealthy condition, if found to exist, and to order improvements to be made remedying same, when such conditions are shown to be dangerous to the health and safety of the general