BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re: Complaint of Access Integrated Network, Inc. Against BellSouth Telecommunications, Inc.	)	
	)	
	)	Docket No. 01-00868
Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc.	)	
	)	
	)	
	)	

PETITION TO RECONSIDER

INTRODUCTION

Pursuant to T.C.A.§ 4-5-317, XO Tennessee, Inc. Access Integrated Networks, Inc. and ITC^DeltaCom, Inc. (collectively the "Complainants") respectfully request that the Tennessee Regulatory Authority reconsider, in part, the Authority's Final Order issued on June 28, 2002, in the above-captioned proceeding.

In that Order, the Authority affirmed the Initial Order of the Hearing Officer on all issues but one: the Authority ruled, by a two-to-one vote, that there was insufficient evidence in this case to demonstrate that the "Select" marketing program of BellSouth Telecommunications, Inc. ("BellSouth") violated the anti-rebate statute, T.C.A. § 65-4-122(a). In so ruling, the Authority disregarded both the plain language of the statute and prior case law interpreting the statute. Furthermore, the Authority created from whole cloth new requirements for proving a violation of the statute. Those new requirements will, as a practical matter, make it virtually impossible to ever demonstrate a statutory violation. In other words, the Authority has effectively nullified a state criminal law.

FACTS

The facts of this case are undisputed and fully described in the Initial Order at pages 12-22. In sum, BellSouth, for a three-year period, operated a region-wide marketing program called

"BellSouth Select." Under the program, which was not tariffed in any state, certain business customers received rebates and discounts in exchange for the purchase of regulated telephone services. In most cases, the customers received straight rebates of 2 ½ % on all purchases of BellSouth products. The rebates could be taken either in cash or as a credit on the customer's telephone bill. Customers could also be given "bonus" rebates for various reasons at the discretion of the company. Under one phase of the program, which was targeted at businesses that had switched their local telephone service to a competing carrier, BellSouth offered to give the customer a rebate of up to three months of free service if the customer would return to BellSouth and sign a long-term contract. Initial Order at 19-21.[1]

BellSouth has made a total of 4,581 rebates to Tennessee customers. The total value of those rebates is approximately $784,000. One customer received a rebate of $10,000. Tr. 273-274. About 10% of BellSouth's business customers were enrolled in the program. Tr. 177, 257. Of course, only members of the program received these rebates. All other business customers paid the full tariffed rates for telephone service but received no discounts, rebates, or months of free service. Initial Order, at l2-22.

ARGUMENT

T.C.A. § 65-4-122(a), explicitly prohibits using a "rebate" or "other device" to charge one telephone customer more than another for the same service. The practice of using rebates to give one customer a better rate than another is declared to be "unjust discrimination" and is "unlawful." In the exact words of the statute, "if any common carrier . . . by . . . rebate. . . or

[1] Even BellSouth did not attempt to defend the legality of the "three months free service" scheme, which the company suspended when these complaints were filed . At the hearing, the BellSouth employee responsible for that particular plan acknowledged that he had made a "mistake in judgment" and had been disciplined by the company. Tr.199.

other device . . . collects or receives from any person a greater or less compensation . . . than it . . . collects or receives from any other person for a like service . . . such common carrier . . commits unjust discrimination, which is prohibited and declared unlawful."[2]

The anti-rebate statute was enacted in 1897 as part of the original law creating the "Railroad Commission of the State of Tennessee," predecessor of the TRA. The language of the statute was copied from Section 2 of the Interstate Commerce Act of 1887 and has remained virtually unchanged for more than a century. Because of the similarity, in language and purpose, between the state and federal statutes, the Tennessee Supreme Court has held that "practically all the decisions" of the federal courts interpreting Section 2 of the Interstate Commerce Act "are authoritative" concerning the proper interpretation of Tennessee's anti-rebate statute. *New River Lumber Co. v. Tenn. Railway Co.*, 238 S.W. 867, 872 (Tenn. 1922). Consequently, there is considerable case law interpretating and applying the anti-rebate statute. Unfortunately, as will be discussed further below, the TRA's decision does not address any of those precedents but, in fact, is directly at odds with that case law, including decisions of the Supreme Court of Tennessee and the Supreme Court of the United States.

A rebate is a "return of part of a payment, serving as a discount or reduction." *Black's Law Dictionary*, 7th ed., 1999. In regulatory law a rebate is a "refunding or repayment by a common carrier of any portion of the rate, fair, or charge made to it in accord with the tariff schedule . . . ." *Ballentine's Law Dictionary*, Third Edition (1969), citing 13 Am Jur. 2d "Carriers," section 114.

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[2] The term "common carrier" as used in the statute includes telephone companies. See *Breeden v. Southern Bell*, 285 S.W. 2d 346, 349 (Tenn. 19955) holding that the Bell company is a "common carrier," comparable "to railroad companies and other similar utilities" and "cannot discriminate in favor of one of its patrons against another."

In one of the first Supreme Court cases interpreting the anti-rebate statute, *Wright v. United States*, 17 S.Ct. 822, 823 (1897), the Court held that the statute "was designed to compel every carrier to give equal rights to all shippers . . . . and to forbid it by any device to enforce higher charges against one than another.

In that case, a railroad offered one shipper a rebate of 3 ½ cents per hundredweight in order to obtain the shipper's business. The Court held this a violation of Section 2 of the Interstate Commerce Act which "prohibits any rebate or other device by which two shippers, shipping over the same line, the same distance, under the same circumstances of carriage, are compelled to pay different prices therefore." *Id*, at 824. The Supreme Court reiterated this language in *I.C.C. v. Alabama Midland Railroad Co.*, 168 U.S. 144, 18 S. Ct. 45 (1897) and again in *I.C.C. v. Delaware, Lackawanna & Western Railroad Company*, 220 U.S. 235, 31 S. Ct. 392, 398 (1911). In both cases, the Court held that the anti-rebate statute prohibited a carrier from charging one shipper more than another for the same service.

In *United States v. Lehigh Valley Railroad Company,* 222 F. 685 (S.D. N.Y., 1915) the District Court held that the payment of a commission by a railroad to a large shipper, where the commission was calculated as a percentage of the shipper's tariffed charges, was an illegal rebate in violation of Section 2. Though the railroad agreed that the commission was intended merely as payment to the shipper for referring business to the railroad, the court held that the commission was, nevertheless, an illegal rebate because the amount of the shipper's commission was calculated "by the freight value of his shipments." The Court continued. "[T]he abuse of granting commissions to any large shipper is so patent and so ancient as not to require further comment." *Id.*, at 686.

Rebates, of course, can also be given indirectly. The anti-rebate statute has been held to prohibit a carrier from selling property to a shipper for less than market rate, buying property at

more than market value, giving better service, faster service, or any other special advantage to favored shippers. *AT&T v. Central Office Telephone, Inc.*, 118 S. Ct. 1956, 1963 (1998). It is an illegal rebate for a carrier to give an expense-paid trip to the Kentucky Derby as a reward to an employee of a large shipper. *U.S. v. Key Line Freight*, 404 F. supp. 888 (W.D. Michigan, 1975). A carrier cannot disguise a rebate in the form of a discounted price on a non-regulated service. *New York, New Haven and Hartford Railroad v. I.C.C.*, 200 U.S. 361, 26 S. Ct. 272 (1906) (holding that a railroad may not sell coal to one shipper at a cheaper price than it sells it to another shipper). As one commentator explained, "[W]hen the purchaser is a user of the utility service, a concession to him in the price of the non-utility good is the same, in effect, as a concession to him in the rates for utility service." I. Lake, *Discrimination by Railroads and Other Public Utilities*, at p. 150 (1947).

The important, central holding of all these cases is that the use of a rebate or "other device" so as to charge some customers, but not others, less than the tariffed rate is a *per se* violation of the statute. Under the plain words of the statute and the holdings of all the cases, the act of giving a non-tariffed rebate to selected customers constitutes, by definition, "unjust discrimination."and a violation of the statute. To put it another way, there can be no such thing as a "just" rebate.

In this case, there can be no doubt that, under the Select Program, customers were given direct and indirect rebates in exchange for the purchase of regulated telephone services. There can be no doubt that, through this scheme, BellSouth collected less money from some customers than from others for "loke service." There can be no doubt that, under the plain words of Section 122(a), BellSouth's program constitutes "unjust discrimination" as it is defined in that statute.

The Authority, however, concluded that there was insufficient evidence in this case to establish a violation of Section 122(a). The Authority reasoned that, since BellSouth's other

business customers could, if they had wished, also have enrolled in the Select Program, the rebate scheme does not "rise to the level of unjust discrimination" under Section 122(a). As the Authority wrote, "there is no evidence in the record that any customer who otherwise met the criteria required for enrollment in the Select Program was denied the opportunity." Final Order, at 5.

If not changed, the Authority's ruling has, in effect, added a new requirement to the anti-rebate statute, a new requirement which, as a practical matter, will render the statute useless as an enforcement tool and as a deterrent against illegal conduct. Under the Authority's ruling, a complainant will have to show not only that some customers are being charged less than others for the same service but that at least one customer has requested a similar discount and was refused. BellSouth, or any other carrier, could adopt a plan of giving secret cash rebates to favored customers and effectively escape prosecution by simply paying a similar rebate to any customer who complained Thus, by compounding the illegality, BellSouth could avoid ever being prosecuted.

There is nothing in the language of the statute or the case law to support the Authority's position that, in order to find a rebate illegal, one must first produce a customer who asked for one and was refused.

To the contrary, the case law holds just the opposite. In one of the most famous cases concerning the meaning of the anti-rebate statute, the United States Supreme Court addressed the very issue raised in this case: If a carrier, through a private, non-tariffed arrangement, agrees to charge one shipper less than the tariffed rate but the carrier would presumably make the same offer to any similarly situated shipper who requested it, has the carrier violated the anti-rebate statute?

In *Amour Packing v. United States*, 209 U.S. 56, 28 S. Ct. 428 (1908), the Supreme Court definitively answered that question. The Court's holding has been subsequently applied to telephone rates and has been explicitly adopted by the Tennessee Supreme Court.

In *Armour*, a shipper privately contracted with a railroad to carry goods at less than the railroad's tariffed rate. The shipper was subsequently indicted for violation of the anti-rebate statute. Among other things, the defendant argued that, since the railroad was willing to sign a contract to offer a discount to one shipper, the "effect would be to make the [discounted] rate available to all other shippers," since other shippers could presumably request and receive the same treatment. The Court squarely rejected that argument, holding (28 S.Ct. at 435):

> It is said that if the carrier saw fit to change the published rate by contract the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be while in force the only legal rate. Any other construction of the statute opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish.

The Court's language has been cited and adopted in many subsequent cases. *See, eg. American Broadcasting Company v. FCC*, 643 F.2d 818, 826 (D.C. Cir., 1980), which applied the holding in *Armour* to a communications carrier.

More significantly, the language in *Armour* was adopted verbatim by the Tennessee Supreme Court in *New River Lumber Co. v. Tennessee Railway Co., supra.* 238 S.W. at 873. In that case, a railroad had signed a private contract with a shipper agreeing to charge less than the tariffed rate. There was no evidence, one way or the other, that the railroad would not have offered the same discount to anyone who asked. Nevertheless, the Court held that the contract violated the anti-rebate statute and that "both carrier and shipper would be indictable if they

adhered to the contract." To support that conclusion, the Tennessee Court quoted at length from the *Armour* opinion:

> There is no provision excepting special contracts from the operation of the law. One rate is to be charged, and that the one fixed and published in the manner pointed out in the statute, and subject to change in the only way open by the statute. There is no provision for the filing of contracts with shippers, and no method of making them public defined in the statute. If the rates are subject to secret alteration by special agreement, then the statute will fail of its purpose to establish a rate duly published, known to all, and from which neither shipper nor carrier may depart. It is said that, if the carrier saw fit to change the published rate by contract, the effect will be to make the rate available to all other shippers. But the law is not limited to giving equal rates by indirect and uncertain methods. It has provided for the establishing of one rate, to be filed as provided, subject to change as provided, and that rate to be, while in force, the only legal rate. Any other construction of the statutes opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish. [Emphasis added.]

In this case, BellSouth argued – and the Authority agreed -- that there could be no violation of the statute as long as the non-tariffed Select Program was open to any eligible customer who happened to hear about the program[3] and asked to join. But the courts have declared such "indirect and uncertain methods" of giving equal rates to be an insufficient defense. There is only one method of declaring a rate, *i.e.*, filing a tariff, that is available for all. As the courts held, the kind of loophole opened by holding that there is no discrimination if the non-tariffed rebate is theoretically available to anyone who asks for it "opens the door to the possibility of the very abuses" the statute is intended to prohibit.

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[3] Most of the Select members were enrolled when they happened to contact BellSouth for unrelated reasons and, if they met the membership criteria, were invited to join. Tr. 160-161.

By focusing on the term "unjust discrimination" and disregarding the rest of the language in Section 122(a), the Authority has unintentionally done exactly what the courts warned against and has effectively rendered the statute useless as a deterrent against illegal rebates.[4]

The Authority's decision is inconsistent with the plain language of the anti-rebate statute and with rulings of the United States Supreme Court and the Tennessee Supreme Court interpreting that statute. For these reasons, the Complainants respectfully request that the Authority reconsider its Final Order and declare that there is, in fact, sufficient and undisputed evidence in the record to establish a violation of Section 122(a).

Respectfully submitted,

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[4] In other statutes, which are more commonly applied by the Authority, the terms "unjust" and "discriminatory" are not explicitly defined and, therefore, are presumably subject to interpretation by the Authority. *See* T.C.A. § 65-4-115.. In contrast, Section 122(a) specifically defines "unjust discrimination," as using rebates to charge one customer less than another for the same service, a definition which the Authority is not free to ignore.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via fax or hand delivery and U.S. mail to the following on this the 15th day of July, 2002.

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