BELLSOUTH

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July 25, 2002

VIA HAND DELIVERY

The Honorable Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

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 Chairman Kyle:

Enclosed please find the original and fourteen copies of BellSouth Telecommunications, Inc.'s Response to Petition to Reconsider. Copies of the enclosed have been provided to counsel of record.

Very truly yours,

Guy M. Hicks

GMH/jej

Enclosure

456302

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 RESPONSE TO PETITION TO RECONSIDER

BellSouth Telecommunications, Inc. ("BellSouth") files its Response to the Petition to Reconsider filed by XO Tennessee, Inc., Access Integrated Networks, Inc., and ITC^DeltaCom, Inc. (collectively "the Complainants") and respectfully urges the Tennessee Regulatory Authority to reject the Petition to Reconsider for the reasons discussed below.

Complainants' Petition to Reconsider attempts to conflate two issues into one. Complainants urge that, because the Authority found that BellSouth violated its tariffing rules, it necessarily follows that BellSouth has also violated T.C.A. § 65-4-122(a), which prohibits unjust discrimination. As the Authority correctly determined, however, a finding that BellSouth failed to tariff the Select Program does not, in and of itself, constitute proof that BellSouth committed an act of unjust discrimination. The Authority was correct in its determination that the issue of unjust discrimination is separate and distinct from the issue of tariffing the Select Program. Moreover, the Authority was correct in its determination that there was no evidence in the record that any customer who met the criteria required for enrollment in the Select Program was denied the opportunity to enroll in that program. As discussed more thoroughly below, the cases cited by the Complainants in the Petition for Reconsideration do not establish that these two issues can be conflated into one issue under Tennessee law. Moreover, the Tennessee Court of Appeals has recently observed that the statutes only prohibit discrimination that is unjust or unreasonable or

preferences that are undue or unreasonable. It is this requirement, that the disparity be "for any service of a like kind under substantially like circumstances and conditions," which the Court of Appeals has characterized as the "operative language" in T.C.A. § 65-4-122. *Consumer Advocate Division v. Tennessee Regulatory Authority,* 2002 WL 1579700, at *6 (Tenn. Ct. App., Jul. 18, 2002).

PROCEDURAL OVERVIEW

Complainants' Petition to Reconsider paints an inaccurate picture of the procedural outcome of this docket, suggesting that the Authority has failed to adequately enforce its own rules and even somehow undermined the criminal law. While Complainants' petition urges that the Order of the Authority disregards the unjust discrimination statute and nullifies state criminal law, actual review of the record in this case demonstrates that, to the extent BellSouth has been found to have acted in violation of Authority rules, the Authority has penalized BellSouth for those actions. Specifically, BellSouth was fined $169,200, pursuant to T.C.A. § 65-4-120, for the failure to tariff the Select Programs. BellSouth remitted that amount to the Authority on May 16, 2002. In short, in contrast to the Complainants' distorted version of events, BellSouth has been fined significantly in relation to the violation of Authority rules found by the Hearing Officer and sustained by the Authority. Moreover, BellSouth has discontinued the Select Program in Tennessee unless and until a tariff goes into effect in accordance with the Authority's June 28, 2002 Order.

DISCUSSION OF AUTHORITY

As BellSouth has maintained in this docket, and as the Authority held in its June 28 Order, the Hearing Officer erred in finding that BellSouth's participation in the Select Program constituted unjust discrimination in violation of T.C.A. § 65-4-122(a). Section 65-4-122(a) does not define "unjust discrimination" merely as the use of a "special rate, rebate, drawback, or other

device." Instead, 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 receiv[ed] from any other person for services of a like kind under substantially like circumstances and conditions." Tennessee Code Annotated § 65-4-122(a) (emphasis added). The Complainants' Petition to Reconsider simply ignores the operative language of the statute and impermissibly attempts to recast the statute as one that presumes unjust discrimination to exist in all instances in which a preference, rebate, device, or discriminate treatment is found. As the Tennessee Court of Appeals has explained, however, in contrast to Complainants' contentions, T.C.A. § 65-4-122 does not prohibit all rebates or even all discrimination. Rather it prohibits ***only*** discrimination and preferences that are ***undue*** or ***unreasonable***. *Consumer Advocate Division,* 2002 WL 1579700 at *6. The Authority ruled correctly that the Hearing Officer's finding that BellSouth violated T.C.A. § 65-4-122 was not supported by competent evidence in the record.

First, the record contained 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 another customer. Second, even assuming that the program did constitute a device to collect greater or less compensation for regulated services, which BellSouth strongly denies, the record contains no evidence that the Select Program resulted in unjust or unreasonable discrimination among similarly situated customers. It is this requirement, that the disparity be "for any service of a like kind under substantially like circumstances and conditions," which the Court of Appeals has characterized as the "operative language" in T.C.A. § 65-4-122. Complainants' position simply ignores this operative language in the statute. *Consumer Advocate Division,* 2002 WL 1579700 at *7.

A. BellSouth 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 BellSouth 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 BellSouth that both Select members and non-members were in fact charged and billed tariffed rates and that BellSouth did not return these tariffed rates that were collected to any customer. *See* Docket No. 01-00868, Post-Hearing Brief of BellSouth, 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 BellSouth billed and collected for regulated services were recorded by BellSouth 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 resulted in an improper extension of the statute's meaning.

Furthermore, even assuming that 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 Consumer Advocate introduced testimony of any customers affected by the Select Program. Lacking factual evidence from any affected customer, the Hearing Officer cited to testimony from BellSouth'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 BellSouth'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 was 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) was wrong.

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

Notwithstanding 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 does not), the Authority correctly concluded that the record contained insufficient evidence to support a finding that BellSouth, by its use of the Select Program had violated the prohibition against unjust discrimination among similarly-situated customers in T.C.A. § 65-4-122(a).

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

As noted above, the Tennessee Court of Appeals has recently explained that T.C.A. § 65-4-122(a) only prohibits discrimination or preferences that are unjust or unreasonable. *Consumer Advocate Division,* 2002 WL 1579700 at *6. Citing the plain language of the statute, the Court of Appeals explained simply "[a]s we have seen, the statutes only prohibit discrimination that is unjust or unreasonable or preferences that are undue or unreasonable." *Id.* In this case, the Authority correctly concluded that the record lacked evidence showing undue or unreasonable discrimination. The Authority has correctly focused on what the Court characterized as the "operative language" of T.C.A. § 65-4-122(a). *Id.*

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). Like the Tennessee Court of Appeals in the case cited above, 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, the courts have concluded, as the Tennessee Court of Appeals has concluded, that "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."). Just as the Supreme Court did in the *Baltimore & Ohio* case, the Tennessee Court of Appeals has recently focused on the "similarly situated" language in T.C.A. § 65-4-122(a), characterizing it as the "operative language" in the statute. *Consumer Advocate Division,* 2002 WL 1579700 at *7.

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

Don Livingston, former Senior Director of BellSouth Small Business Services, a division of BellSouth, 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

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[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 BellSouth 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).

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).

Consumer Advocate 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 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.

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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 BellSouth service representative, that representative typically invites the customer to join the Select Program. (Tr. at 160-61; 195).

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] Looking to the "operative language" of the statute, however, the Authority correctly concluded that the record did not support this assumption. 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 Authority correctly ruled that an unjust discrimination had not been proven.

C. Complainants cite no case law that compels a conclusion other than that reached in the June 28 Order of the Authority.

Although Complainants accuse BellSouth of ignoring precedent regarding operation of the unjust discrimination statute, BellSouth's briefs in this docket and the Authority's Final Order both recognized the principle recently declared by the Tennessee Court of Appeals as the operative inquiry in determining whether the unjust discrimination statute has been violated: whether there existed any disparity among similarly situated customers for services of a like kind. *See Consumer Advocate Division*, 2002 WL 1579700 at *7. Lacking evidence of any unjust or unreasonable preference, Complainants attempt to manipulate the Authority's finding that BellSouth failed to tariff the Select Program into a finding that BellSouth violated the unjust discrimination statute. Complainants fail to cite to case law supporting their novel contention.

Complainants rely heavily upon *Armour Packing Co. v. United States*, 209 U.S. 56 (1908), a turn-of-the-century case holding that shippers violated the Elkins Act by privately

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[3] Lack of notice is not mentioned in the Hearing Officer's exhaustive list of elements necessary to prove a violation of § 65-4-122. *See* Initial Order at 25 (setting forth elements).

contracting with a railroad to carry goods at rates that deviated from published transport rates. *See id.* at 85. That case affirms a carrier's statutory duty under the ICA to file its rates with the Railroad Commission, and the Commission's authority to penalize carriers for failing to charge only those rates.[4] However, to the extent that Complainants assert that charging customers "less than the tariff rate is a *per se* violation" of the unjust discrimination statute, Complainants' Petition to Reconsider, at 5, neither *Armour Packing* nor any other case cited by the Complainants supports such assertion.

Case law subsequent to *Armour Packing* has noted that courts in the early twentieth century believed that charging different customers "separate contract rates would have inherently violated the principle of nondiscriminatory pricing." *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1316 (D.C. Cir. 1984) (specifically citing *Armour Packing*). However, later courts have recognized that, due to "subsequent developments in transportation ratemaking theory," *id.* at 1317, the "current case law no longer considers contract rates to be *per se* violations of the common carrier duty of nondiscrimination." *Id.* at 1316. That is, "contract rates can still be accommodated to the principle of nondiscrimination by requiring a carrier offering such rates to make them available to any shipper willing and able to meet the contract's terms." *Id.* at 1317. As one court concluded, in light of developments in transportation ratemaking theory, "we find the inference unjustified that the Supreme Court in *Armour Packing* intended to condemn the contract rates as inherently discriminatory." *Id.*

A similar rationale controls within the context of the Communications Act of 1934, which applies to interstate telephone services. For example, negotiation of individual service packages with separate customers does not violate Section 202(a) of the Communications Act—a

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[4] Likewise, in the instant case, because the Authority found that the Select Program was not tariffed, the Authority imposed a significant fine upon BellSouth for failure to tariff the

provision analogous to Tenn. Code Ann. § 65-4-122(a).[5] *See Competitive Telecommunications Ass'n v. FCC*, 998 F.2d 1058, 1063 (D.C. Cir. 1993). Rather, "if the package is made available to any customer who wants it upon the same terms, then there is no unlawful discrimination." *Id.*

As evident from case law interpreting both the ICA and the Communications Act, the issue of unjust discrimination is separate and distinct from the issue of tariffing. That is, a determination that BellSouth failed to tariff the Select Program does not automatically equate to a violation of the unjust discrimination statute. Complainants failed to prove that any customer who was eligible for the Select Program was not afforded notice of the Program. Mere invocation of tariff violations does not suffice to carry Complainants' burden of demonstrating actual proof that BellSouth violated § 65-4-122(a).

CONCLUSION

The Authority's June 28, 2002 Final Order Affirming in Part and Vacating in Part the Initial Order of the Hearing Officer was based on a sound evaluation of the record in the case and application of the plain language of T.C.A. § 65-4-122(a) in a manner consistent with the construction of that statute by the Court of Appeals. As demonstrated in their oral deliberation as well as the written order, Directors Kyle and Greer concluded that the evidentiary record was insufficient to support a factual finding of unjust discrimination.

Nothing in the Authority's ruling could be construed reasonably to undercut the application of Tennessee criminal law or "as a practical matter, make it virtually impossible to ever demonstrate a statutory violation" as urged by the Complainants. Rather, a violation of

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Program and failure to charge customers tariff rates. BellSouth has paid that fine.

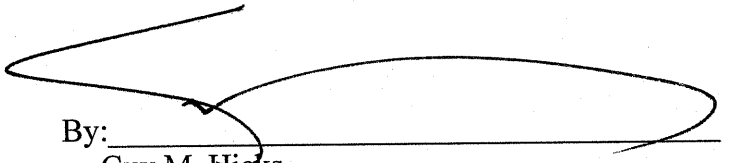
[5] The Communications Act provides an analogous framework to the Tennessee statutes at issue. Under the Communications Act, a common carrier must file a tariff with the Federal Communications Commission showing all charges for each telephone service it provides. *See* 47 U.S.C. § 203(a). Carriers are prohibited from providing communications services except pursuant to a filed tariff and may not charge a rate other than the rate listed in the applicable tariff. *See* 47 U.S.C. § 203(c). Finally, carriers are prohibited from unreasonably discriminating

T.C.A. § 65-4-122(a) can be shown when a party can be shown to have unjustly discriminated between similarly situated customers. No evidence in the record supported such a finding in this case, and the Authority's conclusion on this point is squarely consistent with the construction of the statutes endorsed by the Tennessee Court of Appeals.

For the foregoing reasons, BellSouth respectfully urges the Authority to reject the Petition for Reconsideration.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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between customers. *See* 47 U.S.C. § 202(a).

CERTIFICATE OF SERVICE

I hereby certify that on July 25, 2002, a copy of the foregoing document was served on the parties of record, via the method indicated:

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