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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 for filing are the original and 14 copies of the Attorney General's Comments on Complainant's Petition to Reconsider. Copies are being provided to counsel of record for each of the parties.

Sincerely,

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
COMMENTS ON COMPLAINANTS'
PETITION TO RECONSIDER

Comes the Tennessee Attorney General, through the Consumer Advocate and Protection Division ("Attorney General"), and hereby files these comments with respect to the petition to reconsider the Final Order of the Tennessee Regulatory Authority ("TRA") in this case filed by the Complainants ("Petition").

COMMENTS

Clearly in the context of this docket there are two elements to establish unjust discrimination under Tenn. Code Ann. Section 65-4-122(a) - 1) a preference in price between two groups of customers and 2) that both groups are purchasing a like service. Both these elements are met with regard to the BellSouth Select Program ("the Program") on the record in this docket.

First, the two groups consist of members and non-members of the Program in the capacity of each as purchaser of regulated services. Second, the preference is the 2.5 percent rebate offered exclusively to members of the Program. There can be no question both that the rebate was offered to members of the Program to the exclusion of non-members and that the rebate was on regulated service. This part of the *Initial Order* was affirmed.[1] Thus, the offering of the rebate on the purchase of regulated services to members to the exclusion of non-members constitutes, under any definition, a preference. Third, the preference relates to regulated services which both members and non-members purchase pursuant to the general tariffs, therefore, the services are of a like kind. It is important to realize that the Program does not constitute a service; rather, the Program is nothing more than a rebate on existing services purchased under the general tariffs.

The Attorney General maintains that the foregoing analysis establishes unjust discrimination. Based on the foregoing analysis and the following comments the Attorney General respectfully submits that the analysis on this issue in the *Final Order* is incorrect.

The TRA's analysis in the *Final Order* presumes the eligibility requirements of the Program sufficiently differentiate between members and non-members so as not to constitute unjust discrimination.[2] While it is evident that this is the conclusion reached by the majority of

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[1] See *Final Order* at page 4 which states in part: "As found in the Hearing Officer's *Initial Order*, the Select Program offered terms and conditions for purchasing regulated tariff services that were not presented to the Authority for approval as required under the Authority's existing rules." The 2.5 percent rebate was, if not solely, at least principally the term or condition being referred to in the foregoing and was thus the evidentiary basis for concluding that "[t]he evidentiary record in this matter clearly reveals that BellSouth violated Authority Rules ... through the failure to tariff the program ...".

[2] The basis for this conclusion is at page 5 of the *Final Order*, which states: "Based on the evidentiary record, the Authority is unable to conclude that any customer meeting the criteria for the Select Program was denied enrollment. Accordingly, while some customers may not have

Directors, there is no case authority cited to support such an interpretation of the statute. Moreover, the language "under substantially like circumstance and conditions" modifies "service".[3] While the eligibility requirements are conditions to membership in the Program, they do not constitute conditions on the underlying services which are purchased in accordance with the general tariffs.

The glaring problem with BellSouth's conduct is the fact that some of its customers were charged a different rate for the same service all as a result of a non-tariffed program. This approach is an obvious breach of the policy embodied in the filed rate doctrine. The filed rate doctrine stands for the proposition that the rate for telecommunication services should be published and that all consumers should be charged the same published rate for the same service - the tariff rate.[4] The purpose was to prevent favoritism represented by "secret departure from

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received the benefits that others enjoyed as a result of the Select Program, 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**." (emphasis added). The point is the analysis limits its consideration of unjust discrimination to the subset of customers who were eligible for the Program rather than the entire population of customers who are not members of the Program. Therefore, it is logical to assume that a majority of the Directors had no problem with the Program per se. The basis for such a position appears to come from the language "under substantially like circumstances and conditions" found in Tenn. Code Ann. Section 65-4-122(a).

[3] *Wright v. U.S.*, 17 S.Ct. 822, 824 (1897) (Cited in the Petition) corroborates a look at the underlying services for comparative purposes in holding it "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." (emphasis added). This should be distinguished from conditions on membership in the Program.

[4] See *Louisville & Nashville Railroad Co. v. Hardiman*, 1927 WL 2133, 1 (Tenn. Ct. App.) quoting *N.Y. N.H. & H.R.Co. v. Interstate Commerce Commission*, 200 U.S. 361 (1906). The filed rate doctrine was applied to telecommunication companies in *MCI Telecomm. Corp. v. American Tel. & Tel.*, 512 U.S. 218, 229 (1994) (stating that the "tariff-filing requirement is the heart of the common carrier section of the Communications Act").

such tariffs, and forbidding rebates, preference and all other forms of undue discrimination".[5] This is the very behavior at issue in this matter. The Program was not tariffed. The majority of members only learned of the Program when calling BellSouth to inquire about an unrelated matter. Clearly this amounts to a secret departure from the general tariffs under which both members and non-members purchased regulated services. Customers, who were both aware of the Program and qualified, received a 2.5 percent rebate on the purchase of regulated services. All other customers were excluded despite purchasing the same services under the same general tariffs.

BellSouth advocates that the Program is nothing more than an application of the time honored practice of giving a volume discount. The argument is that requiring members to purchase at least $100 of services a month is analogous to the circumstances under which volume discounts have been approved for some time. The problem with these analogy is that it compares "apples" to "oranges". The volume discounts that BellSouth refers to are part of a tariffed offering, but the Program, at issue here, was not tariffed. The analogy still would not apply even if the Program had been tariffed. As a point of fact, two customers purchasing the same volume of regulated services, are treated differently under the Program. The customer who did not take out a yellow pages ad was not eligible for the Program and thus, would not receive the rebate.

We should not lose sight of two recurring themes in this matter -1) that the Program was not tariffed and the majority of the members became members when they inquired of BellSouth about some unrelated matter, which falls within the "one rate for all" cases cited in the Petition,

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[5] See *N.Y. N.H. & H.R.Co. v. Interstate Commerce Commission*, 200 U.S. 361, 390 (1906).

and 2) the anti-rebate cases following *Wright v. U.S.*, 17 S.Ct. 822 (1897) which "forbid[s] [every carrier] by any device to enforce higher charges against one than another." The Attorney General fails to see how the majority of Directors would be able to reconcile an non-tariffed offering that charges members less than non-members for the same regulated services with these two bodies of law.

Respectfully submitted,

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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 first class mail:

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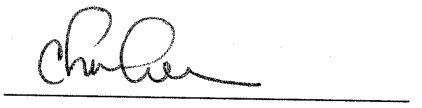

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