BOULT ▪ CUMMINGS
CONNERS ▪ BERRY PLC

Henry Walker
(615) 252-2363
Fax: (615) 252-6363
Email: hwalker@boultcummings.com

August 16, 2002

Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243-0505

Re: *Complaint of Access Integrated Network, Inc. Against BellSouth Telecommunications, Inc., and*
Complaint of XO Tennessee, Inc. Against BellSouth Telecommunications, Inc.

Docket No. 01-00868

Dear Chairman Kyle:

Please accept for filing the original and fourteen copies of a Reply Brief filed on behalf of Complainants in the above-captioned proceeding. This matter is on the agenda for the Tennessee Regulatory Authority's conference on Monday, August 19, 2002. Copies have been forwarded to parties.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Henry Walker

HW/nl
c: Guy Hicks, Esq.
Parties

LAW OFFICES
414 UNION STREET ▪ SUITE 1600 ▪ P.O. BOX 198062 ▪ NASHVILLE ▪ TN ▪ 37219
TELEPHONE 615.244.2582 FACSIMILE 615.252.6380 www.boultcummings.com

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.	)	

COMPLAINANTS' REPLY BRIEF ON PETITION TO RECONSIDER

XO Tennessee, Inc., Access Integrated Networks, Inc. and ITC Delta^Com, Inc. (the "Complainants") submit the following reply brief concerning the Petition to Reconsider.

ARGUMENT

On June 28, 2002, the Tennessee Regulatory Authority ("TRA") issued a Final Order in the above-captioned proceeding. The Authority affirmed the conclusions of the Hearing Officer that BellSouth Telecommunications, Inc. ("BellSouth") had illegally charged some customers less than the tariffed rate for regulated telephone services. The Authority found that this practice violated the agency's rules and ordered BellSouth to pay a substantial fine. By a two-to-one vote, however, the Authority reversed the Hearing Officer's conclusion that BellSouth had also violated T.C.A. § 65-4-122(a) which prohibits a utility from using rebates to charge some customers less than others for the same service.

Believing that the Authority had misconstrued the plain language of the anti-rebate statute, the Complainants filed a Petition to Reconsider that portion of the Final Order. The Consumer Advocate Division of the Office of the Attorney General filed a brief in support of the Complainants' Petition.

BellSouth filed a response opposing the Petition to Reconsider. Essentially, BellSouth argued that, in order to prove a violation of the anti-rebate statute, the Complainants not only have to prove that some customers received rebates and others did not (which BellSouth admits)

but must also prove that some customers who did not receive rebates had tried to get them and had been refused. As BellSouth wrote (at 10), "Because the record is devoid of evidence that any customer that wanted to enroll in the [rebate] 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."

In the Petition to Reconsider, the Complainants pointed out that there is no such requirement in the statute and that both the Supreme Court of the United States and the Supreme Court of Tennessee have considered and rejected BellSouth's interpretation of the anti-rebate statute. If a carrier is found to have given a non-tariffed rebate to one shipper, it is no defense for the carrier to argue that the same rebate would also have been given to any other shipper who requested it. *See Armour Packing v. United States*, 209 U.S. 56, 28 S. Ct. 428, 435 (1908) and *New River Lumber Co. v. Tennessee Railway Co.*, 238 S.W. 867 (Tenn. 1922). Both cases hold that it is a *per se* violation of the anti-rebate statute to charge any shipper less than the tariffed rate and that it does not matter whether or not other shippers could have asked for and received the same rebates.

BellSouth has also argued that, even though its rebate program charged some customers less than others for the same service, there were valid reasons to charge different rates to each group. Therefore, according to BellSouth, the difference in rates may have been discriminatory but it was not "unjust" discrimination and not a violation of the statute.

The U.S. Supreme Court addressed this argument in another case interpreting the federal anti-rebate statute.[1] In *Pennsylvania Railroad Co. v. International Coal Mining Co.,* 230 U.S.

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[1] Section 2 of the Interstate Commerce Clause is virtually identical to the language of T.C.A. § 65-4-122(a) and the Tennessee courts have held that legal decisions interpreting the federal statute apply equally to Tennessee's anti-rebate statute.

184, 33 Sup. Ct. 893, 896 (1913), the Court described a situation in which a railroad had tariffed rates for the shipment of coal but had made non-tariffed rebates to some shippers (those who shipped "contract" coal) but not to others (those who shipped "free" coal). The railroad argued that, even though no tariffs had been filed distinguishing between "contract" coal and "free" coal, that such a distinction was reasonable and, therefore, did not violate the anti-rebate statute.

The Court disagreed. It does not matter, the Court found, whether or not such a distinction could be justified because "none was made in the only way in which it could have lawfully been done," *i.e.*, through the filing of a tariff. There was only one lawfully approved rate for carrying coal and, therefore, "only that single rate could be charged." Any subsequent rebate, whether paid "to one shipper or to every shipper" (emphasis added) would violate Section 2 of the Interstate Commerce Act, the federal anti-rebate statute which is identical to T.C.A. § 65-4-122(a).

Here, it is undisputed that customers who were members of the "Select Program" received 2½ % rebates on the purchase of regulated telephone services. Other customers who subscribed to the identical services but were not members of the program received no rebates. As the Court said in *Armour Packing*, it is irrelevant whether or not other customers could also have joined the program. Similarly, as the Court said in *Pennsylvania Railroad*, it is irrelevant whether or not BellSouth could have filed a tariff justifying the rebates.

Instead of directly addressing this line of court decisions, BellSouth has tried to change the issue. In response to the Petition to Reconsider, BellSouth argued that the *Armour Packing* case is based on the assumption that all "contract rates" are inherently discriminatory but that subsequent case law holds that contract rates are legal if they are "made available to all similarly situated shippers." BellSouth cites *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311 (D.C. Cir.1984) and *Competitive Telecommunications Association v. FCC*, 998 F.2d 1048 (D.C. Cir.

1993) in support of the company's position that contract rates are not discriminatory if made available to all.

First of all, this case is not about "contract rates." Customers joining the Select Program were under no contractual obligation to BellSouth. The program was nothing more than a marketing scheme to reward customers who stayed with, or returned to, BellSouth by giving them rebates.

More importantly, BellSouth neglected to mention that in both the *Sea-Land Service* case and the *Competitive Telecommunications* case, the "contract rates" at issue had been properly filed with the appropriate regulatory bodies so that other shippers could learn of the contract rates and ask for them. The Select Program, on the other hand, was not tariffed and, therefore, never legally offered to anyone.

Contrary to BellSouth's argument, the Complainants do not cite *Armour Packing* for the proposition that all contract rates are inherently discriminatory. Contract rates are recognized as legal – as long as they are filed with state and federal regulators. The Complainants rely on *Armour Packing* for the proposition that one cannot evade the anti-rebate statute by claiming that the illegal rebates are theoretically available to any shipper who requests one. That was the law in 1908 and is still the law today. BellSouth has yet to answer that point or cite any case law holding otherwise.

Finally, BellSouth cites repeatedly (a total of seven times) a recent, *per curiam* decision of the Tennessee Court of Appeals, *Consumer Advocate Division v. Tenn. Regulatory Authority*, 2002 WL 1579700 (Tenn. Ct. App., July 18, 2002). In that case, the Court held that it was not discriminatory for United Telephone to "grandfather" existing customers and continue offering them "ABC Service" while requiring new customers to subscribe to a similar, but slightly different service called "Centrex." After examining the language of T.C.A. § 65-4-122(a), the

Court focused on the "operative language" of the statute (a) *i.e.*, a carrier cannot charge one customer more or less than another "for any service of a like kind under substantially like circumstances and conditions." In this case, the Court found that "there are differences" between "ABC Service" and "Centrex." Therefore, they are not "like" services and the statute did not apply.

It is hard to see how this decision lends any support to BellSouth's argument. There is no dispute in this case that all customers were receiving the same regulated services from BellSouth. All were supposed to be charged the same tariffed rates, nothing less and nothing more. By giving Select members non-tariffed rebates, BellSouth clearly violated the statute.

At bottom, BellSouth continues to insist that, even though it was giving secret rebates to selected customers, those rebates did not constitute "unjust discrimination." In other words, according to BellSouth, some secret rebates may be "just," while others may be "unjust." But, as the Complainants discussed at length in the Petition to Reconsider, the anti-rebate statute makes no such distinction. The use of a rebate to collect less from one customer than another "for service of a like kind" is "unjust discrimination" by definition and "is prohibited and declared unlawful." T.C.A. § 65-4-122(a).

By contrast, T.C.A. § 65-4-122(c) states that it is unlawful for a carrier to give an "undue or unreasonable preference or advantage" to any person or locality. Unlike subsection (a), subsection (c) does not prohibit all preferences, only those that are "undue" or "unreasonable." Consequently, the courts have interpreted those two sections differently. One section flatly prohibits non-tariffed rebates, the other section permits preferences that are "reasonable." *See Southern Railway Co. v. Pentecost*, 1330 S.W. 2d 331, 335 (Tenn. 1959) and *see I.C.C. v. Alabama Midland Railroad Co.*, 168 U.S. 144, 18 S.Ct. 45, 49 (1897) (explaining the difference between the anti-rebate statute and the related, but different, statute which prohibits "undue"

preferences). This case is about subsection (a), the anti-rebate statute, not subsection (c), the "undue" preference statute. The two statutes, both copied from the 1887 Interstate Commerce Act, have different purposes and, depending upon the facts of each case, different results. BellSouth should not be allowed to confuse them.

CONCLUSION

For three years, BellSouth made secret rebates to 10% of its business customers. As a result of those rebates, some businesses were charged less than the tariffed rates while others paid the full price for the same services. T.C.A. § 65-4-122(a) prohibits a carrier from using a rebate to charge one customer less than another for the same service. The case law holds that it is no defense for a carrier to argue that other customers could have asked for and received the same rebates. "[T]he law is not limited to giving rates by indirect or uncertain methods." *Armour Packing, supra*, 28 S. Ct. at 435. Nor does it matter that the program, if tariffed, might have been found reasonable since no such effort was made "in the only way in which it could have lawfully been done." *Pennsylvania Railroad, supra*, at 896. A non-tariffed rebate, is by definition, discriminatory and a violation of the anti-rebate statute.

If the Select Program does not violate the anti-rebate statute, then the statute – for regulatory purposes – is a dead letter.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

Henry Walker
414 Union Street, Suite 1600
P.O. Box 198062
Nashville, Tennessee 37219
(615) 252-2363

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was faxed and/or mailed, postage prepaid, to the following this 16th day of August , 2002.

Guy Hicks, Esq.
BellSouth Telecommunications, Inc.
333 Commerce St., Suite 2101
Nashville, TN 37201-3300

Chris Allen, Esq.
Tennessee Attorney General's Office
Consumer Advocate and Protection Division
P.O. Box 20207
Nashville, TN 37202

Nanette Edwards, Esq.
ITC^DeltaCom, Inc.
4092 South Memorial Blvd.
Huntsville, AL 35802

Bob Bye, Esq.
Cinergy Communications, Inc.
8829 Bond St.
Overland Park, KS 66214

Henry Walker