BELLSOUTH

BellSouth Telecommunications, Inc.
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

joelle.phillips@bellsouth.com

Joelle J. Phillips
Attorney

615 214 6311
Fax 615 214 7406

January 26, 2005

Momentum Business Solutions, Inc.
C T Coproration System
800 S. Gay Street, #2021
Knoxville, TN 37929-9710

Re: *BellSouth's Motion For The Establishment Of A New Performance Assurance Plan*
Docket 04-00150

Dear Registered Agent:

Attached is a Subpoena *Duces Tecum* for Deposition issued by the Tennessee Regulatory Authority. Also attached is a Protective Order entered by the Tennessee Regulatory Authority in this proceeding. Paragraph 13 of the Protective Order provides that:

> 13. Non-party witnesses shall be entitled to invoke the provisions of this Order by designating information disclosed or documents produced for use in this action as CONFIDENTIAL in which event the provisions of this Order shall govern the disclosure of information or documents provided by the non-party witness. A non-party witness' designation of information as confidential may be challenged under Paragraph 11 of this Order.

If the recipient of this Subpoena provides information which is fully and completely responsive to the Subpoena by BellSouth by February 14, 2005, BellSouth will agree to dispense with the oral deposition. Please contact Carolyn Hanesworth at 615/214-6324 to make any necessary arrangements regarding the scheduling of depositions.

Cordially,

Joelle Phillips

JJP:ch

568477

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth's Motion For The Establishment Of A New Performance Assurance Plan*

Docket 04-00150

SUBPOENA DUCES TECUM FOR DEPOSITION

To: Momentum Business Solutions, Inc., C T Coproration System, 800 S. Gay Street, #2021, Knoxville, TN 37929-9710

YOU ARE COMMANDED to appear before a person authorized by law to take depositions at the offices BellSouth Telecommunications, Inc., 333 Commerce Street, Suite, 2101, Nashville, TN 37201 on Monday, February 14, 2005, at 4:00 p.m. to testify in this action, and to have with you at that time and place the following:

1. Documents reflecting your ownership and use of switches; including switches that may be used to provide service to retail customers in Tennessee and switches that might be used by other carriers to provide service to customers in Tennessee.

2. All information set forth in the Attachment, "Matters upon which examination is requested per T.C.A. §§ 4-5-311 and 65-2-102."

These items will be inspected and may be copied at that time. You will not be required to surrender the original items.

YOU ARE SUBPOENAED to appear by the following attorney(s) and, unless excused from this subpoena by these attorney(s) or the Authority you shall respond to this subpoena as directed.

Guy M. Hicks
Joelle J. Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

Date of Issuance: 1-26-05

Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

568273

MATTERS UPON WHICH EXAMINATION IS REQUESTED PURSUANT TO T.C.A. §§ 4-5-311 and 65-2-102

Examination is requested upon each interrogatory and request for production of documents in the attached discovery request, which was served in the above-referenced docket on December 15, 2004.

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *BellSouth's Motion For The Establishment Of A New Performance Assurance Plan*

Docket 04-00150

BELLSOUTH TELECOMMUNICATIONS, INC.'S FIRST INTERROGATORIES TO MOMENTUM TELECOM, INC.

BellSouth Telecommunications, Inc. ("BellSouth"), hereby requests Momentum Telecom, Inc. ("Momentum") to provide answers in response to the following discovery requests in the time established by the Procedural Schedule in this docket.

DEFINITIONS

1. "BellSouth" means BellSouth Telecommunications, Inc., and its subsidiaries, their present and former officers, employees, agents, representatives, directors, and all other persons acting or purporting to act on behalf of BellSouth Telecommunications, Inc.

2. The terms "you" and "your" refer to Momentum.

3. "Plan" means the Tennessee Performance Assurance Plan.

4. "Momentum" means Momentum Telecom, Inc., and its subsidiaries, their present and former officers, employees, agents, directors, and all other persons acting or purporting to act on behalf of Momentum.

5. The term "person" means any natural person, corporation, corporate division, partnership, other unincorporated association, trust, government agency, or entity.

6. The term "document" shall have the broadest possible meaning under applicable law. "Document" means every writing or record of every type and description that is in the possession, custody or control of Momentum, including, but not limited to, correspondence, memoranda, drafts, work papers, summaries, stenographic or handwritten notes, studies, publications, books, pamphlets, reports, surveys, minutes or statistical compilations, computer and other electronic records or tapes or printouts, including, but not limited to, electronic mail files; and copies of such writings or records containing any commentary or notation whatsoever that does not appear in the original. The term "document" further includes, by way of illustration and not limitation, schedules, progress schedules, time logs, drawings, computer disks, charts, projections, time tables, summaries of other documents, minutes, surveys, work sheets, drawings, comparisons, evaluations, laboratory and testing reports, telephone call records, personal diaries, calendars, personal notebooks, personal reading files, transcripts, witness statements and indices.

7. The term "communication" means any oral, graphic, demonstrative, telephonic, verbal, electronic, written or other conveyance of information, including, but not limited to, conversations, telecommunications and documents.

8. The term "referring or relating to" means consisting of, containing, mentioning, suggesting, reflecting, concerning, regarding, summarizing, analyzing, discussing, involving, dealing with, emanating from, directed at, pertaining to in any way, or in any way logically or factually connected or associated with the matter discussed.

9. "And" and "or" as used herein shall be construed both conjunctively and disjunctively and each shall include the other whenever such construction will serve to bring within the scope of these discovery requests any information that would otherwise not be brought within their scope.

10. The singular as used herein shall include the plural, and vice versa, and the masculine gender shall include the feminine and the neuter.

11. "Identify" or "identifying" or "identification" when used in reference to a natural person means to state:

a) the full legal name of the person;

b) the name, title and employer of the person at the time in question;

c) the present or last known employer of such person;

d) the present or last known home and business addresses of the person; and

e) the present home address.

12. "Identify" or "identifying" or "identification" when used in reference to a person other than a natural person means to state:

a) the full name of the person and any names under which it conducts business;

b) the present or last known address of the person; and

c) the present or last known telephone number of the person.

13. "Identify" or "identifying" or "identification" when used in reference to a document means to provide with respect to each document requested to be identified

by these discovery requests a description of the document that is sufficient for purposes of a request to produce or a subpoena duces tecum, including the following:

a) the type of document (e.g., letter, memorandum, etc.);

b) the date of the document;

c) the title or label of the document;

d) the Bates number or other identifier used to number the document for use in litigation;

e) the identity of the originator;

f) the identity of each person to whom it was sent;

g) the identity of each person to whom a copy or copies were sent;

h) a summary of the contents of the document;

i) the name and last known address of each person who presently has possession, custody or control of the document; and

j) if any such document was, but is no longer, in your possession, custody or control or is no longer in existence, state whether it: (1) is missing or lost; (2) has been destroyed; or (3) has been transferred voluntarily or involuntarily, and, if so, state the circumstances surrounding the authorization for each such disposition and the date of such disposition.

14."Identify," "identifying" or "identity" when used in reference to a communication means to state the date of the communication, whether the communication was written or oral, the identity of all parties and witnesses to the

communication, the substance of what was said and/or transpired and, if written, the identity of the document(s) containing or referring to the communication.

15. "Business case" refers to any undertaking that analyzes or evaluates, among other things, the business value to be realized, the tangible and intangible benefits, the effect on business processes and people's jobs, the financials, the technology to be applied, and the risks, potential problems and rewards of a particular course of action. It is the process that would be undertaken prior to going into a particular business, or before undertaking a particular course of action in order to determine whether the actions taken would provide a positive business benefit, when balanced against the potential problems that might be incurred.

GENERAL INSTRUCTIONS

1. If you contend that any response to any Interrogatory may be withheld under the attorney-client privilege, the attorney work product doctrine or any other privilege or basis, please state the following with respect to each such response in order to explain the basis for the claim of privilege and to permit adjudication of the propriety of that claim:

a) the privilege asserted and its basis;

b) the nature of the information withheld; and

c) the subject matter of the document, except to the extent that you claim it is privileged.

2. These discovery requests are to be answered with reference to all information in your possession, custody or control or reasonably available to you. These discovery requests are intended to include requests for information, which is physically within your possession, custody or control as well as in the possession,

custody or control of your agents, attorneys, or other third parties from which such documents may be obtained.

3. If any Interrogatory cannot be answered in full, answer to the extent possible and specify the reasons for your inability to answer fully.

4. These interrogatories are continuing in nature and require supplemental responses should information unknown to you at the time you serve your responses to these interrogatories subsequently become known.

5. For each Interrogatory, provide the name of the company witness(es) or employee(s) responsible for compiling and providing the information contained in each answer.

6. To the extent Momentum has previously provided a response to any Interrogatory, which prior response is responsive to any of the following Interrogatories, in Tennessee or any other state in proceedings in which BellSouth and Momentum are parties, Momentum need not respond to such Interrogatory again, but rather may respond to such Interrogatory by identifying the prior response to such Interrogatory by state, proceeding, docket number, date of response, and the number of such response. If such prior response does not respond to the Interrogatory contained below in its entirety, you should provide all additional information necessary to make your answers to these Interrogatories complete.

INTERROGATORIES

1. State each example of BellSouth's performance in its wholesale service of any kind that you will contend in this docket has declined in quality since BellSouth obtained 271 relief in Tennessee. For each such example, provide the basis for your

contention, including all examples of specific instances of performance issues of which you are aware, and, if your contention is based on any fact other than your company's own experience, state the source of such information, including the company involved.

2. Identify each SEEM penalty payment you have received in the last twelve months, and, for each payment, describe in detail how such payment relates to actual harm sustained by your company as a result of the wholesale service measured by the particular benchmark for which the SEEM payment was provided.

3. State the percentage of your company's Tennessee (intra-state) revenue represented by Tennessee SEEM payments for each calendar year beginning in 2002.

4. Identify all CLEC customers (if any) that you contend you have lost as a result of the quality of wholesale service provided by BellSouth, and for each such customer, identify the service issue you believe caused the loss.

5. Do you contend that your company has sustained harm to its reputation as a quality local service provider as a result of BellSouth's wholesale performance. If your answer is anything other than an unqualified "no", then state all facts, including all specific customer information, on which your contention is based.

6. If you contend that there have been instances where BellSouth erroneously reported that a trouble has been repaired and the trouble ticket closed, yet your customer still did not have service, please provide the trouble ticket number, date of ticket closure and line or circuit identifier for each instance.

7. Identify all damages (if any) you have sustained that arise out of the quality of wholesale service provided by BellSouth pursuant to the Plan.

8. Quantify all damages (if any) you have sustained that arise out of the quality of wholesale service provided by BellSouth pursuant to the Plan.

9. Describe in detail all examples of CLEC customers that you contend have been negatively impacted by service provided by BellSouth for each SEEM submetric that is associated with:

(i) Troubles Within 30 days of Provisioning

(ii) Repeat Troubles Within 30 Days

(iii) Customer Trouble Report Rate

(iv) Missed Repair Appointments

(v) Inability To Test Line Shared Loops

(vi) Premature Trouble Closure

(vii) Any other measure (list specific measure)

10. Describe in detail all examples of CLEC customers that you contend have been negatively impacted by service provided by BellSouth in any function not currently reflected in the SQM or SEEM.

11. If you contend that BellSouth is "backsliding" (providing service inferior to that service provided when BellSouth received 271 relief) in the quality of wholesale service in Tennessee, describe in detail all such instances you contend to be examples of "backsliding".

12. Identify each specific provision of BellSouth's SQM and SEEM proposal filed on May 13, 2004 to which you object and the nature and reason for the objection.

13. If you contend that the Plan's scope should be extended beyond ensuring BellSouth's continued compliance with obligations arising under Section 251, please

Identify all legal authority, including but not limited to case law, orders, and statutes, that supports your contention.

14. Have you developed an alternative performance assessment plan for BellSouth in Tennessee? If so, please provide all information that describes the alternative plan.

15. Identify all amounts that you have paid to any customer as a result of service issues you contend to have arisen out of quality of wholesale service provided by BellSouth pursuant to the Plan.

16. Do you agree that an enforcement plan should have both positive incentives and negative consequences? If not, why not?

17. Compare the amounts paid to you under the Tennessee SEEM plan to the amounts paid in each other state outside of BellSouth's region where you have operations. The amounts should be stated in total and per access line you serve in that state.

REQUESTS FOR PRODUCTION OF DOCUMENTS

1 Produce any documents relied upon in responding to First Set of Interrogatories.

2. Produce any documents identified in responses to BellSouth's First Set of Interrogatories.

3. Produce all documents in your possession relating to SEEM penalties received by your company since the adoption of the Tennessee plan, including but not limited to any budgeting or financial planning documents or forecasting materials.

4. Produce all internal communications discussing or relating in any way to BellSouth's wholesale performance.

5. Identify and produce all correspondence in your possession regarding BellSouth's wholesale performance from 2002 to present.

6. Produce any alternative performance assessment plan or recommendations that you have developed.

7. Produce any draft or partial alternative performance assessment plan that you have discussed or considered in any of Bellsouth's region (Tennessee, Florida, Georgia, Kentucky, North Carolina, South Carolina, Alabama, Louisiana and Mississippi).

8. Produce all contract and tariff provisions that relate to your company's obligations (if any) in the event that your customer sustains a service interruption or otherwise sustains a derogation of service.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

Guy M. Hicks
Joelle J. Phillips
333 Commerce Street, Suite 2101
Nashville, TN 37201-3300
615/214-6301

R. Douglas Lackey
Robert Culpepper
675 W. Peachtree St., NE, Suite 4300
Atlanta, GA 30375

CERTIFICATE OF SERVICE

I hereby certify that on December 15, 2004, a copy of the foregoing document was served on the parties of record, via the method indicated:

[ ] Hand
[ ] Mail
[ ] Facsimile
[ ] Overnight
[✓] Electronic

Henry Walker, Esquire
Boult, Cummings, et al.
1600 Division Street, #700
P. O. Box 340025
Nashville, TN 37203
hwalker@boultcummings.com

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ORIGINAL

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

RECEIVED
2004 DEC 16 PM 1:03
T.R.A. DOCKET ROOM

In Re: *BellSouth's Motion For The Establishment Of A New Performance Assurance Plan*

Docket 04-00150

PROTECTIVE ORDER

To expedite the flow of filings, exhibits and other materials, and to facilitate the prompt resolution of disputes as to the confidentiality of such material, adequately protect material entitled to be kept confidential and to ensure that protection is afforded only to material so entitled; the Tennessee Regulatory Authority ("TRA") hereby orders that:

1. For the purpose of this Protective Order (the "Order"), proprietary or confidential information, hereinafter referred to as "CONFIDENTIAL INFORMATION" shall mean documents and information in whatever form which the producing party in good faith deems to contain or constitute trade secrets, confidential research, development, financial statements or other commercially sensitive information, and which has been so designated by the producing party. A "producing party" is defined as the party creating the confidential information as well as the party having actual physical possession of information produced pursuant to this Order. All summaries, notes, extracts, compilations or other direct or indirect reproduction from or of any protected materials, shall be entitled to protection under this Order, and shall be stored, protected and maintained at the law offices of parties' counsel of record until such time that said material shall be returned or destroyed, as provided

for in paragraph 16. Documents containing CONFIDENTIAL INFORMATION shall be specifically marked as confidential on the cover. Any document so designated shall be handled in accordance with this Order. The provisions of any document containing CONFIDENTIAL INFORMATION may be challenged under Paragraph 11 of this Order.

2. Any individual or company subject to this Order, including producing parties or persons reviewing CONFIDENTIAL INFORMATION, shall act in good faith in discharging their obligations hereunder. Parties or nonparties subject to this Order shall include parties which are allowed by the TRA to intervene subsequent to the date of entry of this Protective Order.

3. CONFIDENTIAL INFORMATION shall be used only for purposes of this proceeding and shall be disclosed only to the following persons:

(a) counsel of record for the parties in this case and associates, secretaries, and paralegals actively engaged in assisting counsel of record in this and the designated related proceedings;

(b) TRA Directors and members of the staff of the TRA;

Under no circumstances shall any CONFIDENTIAL INFORMATION or copies therefore be disclosed to or discussed with anyone associated with the marketing of services in competition with the products, goods or services of the producing party. Counsel for the parties are expressly prohibited from disclosing CONFIDENTIAL INFORMATION produced by another party to their respective clients, or to any other person or entity that does not have a need to know for purpose of preparing for or participating in this proceeding. Whenever an individual, other than counsel, is

designated to have access, then notice (by sending a copy of the executed affidavit) must be given to adversary counsel prior to the access being given to that individual and that individual, prior to seeing the material, must execute an affidavit that the information will not be disclosed and will not be used other than in this proceeding.

4. Prior to disclosure of CONFIDENTIAL INFORMATION to any employee or associate counsel for a party, officer or director of the parties, including any counsel representing the party who is to receive the CONFIDENTIAL INFORMATION, shall provide a copy of this Order to the recipient employee or associate counsel who shall be bound by the terms of this Order.

5. If any party or non-party subject to this Order inadvertently fails to designate documents as CONFIDENTIAL in accordance with the provisions of this Order when producing such documents, such failure shall not constitute a waiver of confidentiality; provided the party or non-party who has produced the document shall notify the recipient of the document in writing within five (5) days of discovery of such inadvertent failure to designate the document as CONFIDENTIAL. At that time, the recipients will immediately treat the subject document as CONFIDENTIAL. An inadvertent failure to designate a document as CONFIDENTIAL shall not, in any way, affect the TRA's determination as to whether the document is entitled to CONFIDENTIAL status.

6. If any party or non-party subject to this Order inadvertently fails to designate documents as CONFIDENTIAL in accordance with the provisions of this Order when producing such documents and such failure is not discovered in time to

provide five (5) day notification to the recipient of the confidential nature of the documents referenced in the paragraph above, the failure shall not constitute a waiver of confidentiality and a party by written motion or by oral motion at a Pre-Hearing Conference called for the purpose or at the Hearing on the merits may request designation of such documents as CONFIDENTIAL, and if the motion is granted by the Pre-Hearing Officer, Administrative Law Judge, or the Authority, the recipients shall immediately treat the subject documents as CONFIDENTIAL. The Tennessee Regulatory Authority, the Pre-Hearing Officer or Administrative Law Judge may also, at his or her discretion, either before or during the Pre-Hearing Conference or hearing on the merits of the case, allow information to be designated CONFIDENTIAL and treated as such in accordance with the terms of this Order.

7. Any papers filed in this proceeding that contain, quote, paraphrase, compile or otherwise disclose documents covered by the terms of this Order, or any information contained therein, shall be filed and maintained in the TRA Docket Room in sealed envelopes marked CONFIDENTIAL and labeled to reflect the style of this proceeding, the docket number, the contents of the envelope sufficient to identify its subject matter, and this Protective Order. Such envelopes shall be maintained in a locked filing cabinet. The envelopes shall not be opened or their contents reviewed by anyone except upon order of the TRA, Pre-Hearing Officer, or Administrative Law Judge after due notice to counsel of record. Notwithstanding the foregoing, the Directors and the Staff of the TRA may review any paper filed as CONFIDENTIAL without obtaining an order of the TRA, Pre-Hearing Officer or Administrative Law

Judge, provided the Directors and Staff maintain the confidentiality of the paper in accordance with the terms of this Order.

8. Documents, information and testimony designated as CONFIDENTIAL, in accordance with this Order, may be disclosed in testimony at the hearing of this proceeding and offered into evidence used in any hearing related to this action, subject to the Tennessee Rules of Evidence and to such future orders as the TRA, the Pre-Hearing Officer, or the Administrative Law Judge may enter. Any party intending to use documents, information, or testimony designated CONFIDENTIAL shall inform the producing party and the TRA, the Pre-Hearing Officer, or the Administrative Law Judge, prior to the hearing on the merits of the case in the manner designated previously in this Order, of the proposed use; and shall advise the TRA, the Pre-Hearing Officer, or the Administrative Law Judge, and the producing party before use of such information during cross-examination so that appropriate measures can be taken by the TRA, the Pre-Hearing Officer, or the Administrative Law Judge, and/or requested by the producing party in order to protect the confidential nature of the information.

9. Except for documents filed in the TRA Docket Room, all documents covered by the terms of this Order that are disclosed to the requesting party shall be maintained separately in files marked CONFIDENTIAL and labeled with reference to this Order at the offices of the requesting party's counsel of record and returned to the producing party or destroyed pursuant to Paragraph 16 of this Order.

10. Nothing herein shall be construed as preventing any party from continuing to use and disclose any information (a) that is in the public domain, or (b) that subsequently becomes part of the public domain through no act of such party, or (c) that is disclosed to it by a third party, where said disclosure does not itself violate any contractual or legal obligation, or (d) that is independently developed by a party, or (e) that is known or used by it prior to this proceeding. The burden of establishing the existence of (a) through (e) shall be upon the party attempting to use or disclose such information.

11. Any party may contest the designation of any document or information as CONFIDENTIAL by applying to the TRA, Pre-Hearing Officer, Administrative Law Judge or the courts, as appropriate, for a ruling that the documents information, or testimony should not be so treated. All documents, information and testimony designated as CONFIDENTIAL, however, shall be maintained as such until the TRA, the Pre-Hearing Officer, the Administrative Law Judge, or a court orders otherwise. A Motion to contest must be filed not later than ten (10) days prior to the Hearing on the Merits. Any Reply from the Company seeking to protect the status of their CONFIDENTIAL INFORMATION must be received not later than five (5)days prior to the Hearing on the Merits and shall be presented to the Authority at the Hearing on the merits for a ruling.

12. Nothing in this Order shall prevent any party from asserting any objection to discovery other than an objection based upon grounds of confidentiality.

13. Non-party witnesses shall be entitled to invoke the provisions of this Order by designating information disclosed or documents produced for use in this action as CONFIDENTIAL in which event the provisions of this Order shall govern the disclosure of information or documents provided by the non-party witness. A non-party witness' designation of information as confidential may be challenged under Paragraph 11 of this Order.

14. No person authorized under the terms herein to receive access to documents, information, or testimony designated as CONFIDENTIAL shall be granted access until such person has complied with the requirements set forth in paragraph 4 of this Order.

15. Any person to whom disclosure or inspection is made in violation of this Order shall be bound by the terms of this Order.

16. Upon an order becoming final in this proceeding or any appeals resulting from such an order, all the filings, exhibits and other materials and information designated CONFIDENTIAL and all copies thereof shall either be destroyed by counsel in possession of such documents within thirty (30) days or returned to counsel for the party who produced (or originally created) the filings, exhibits and other materials, within thirty (30) days. Counsel in possession of such documents shall certify to counsel for the producing party either that all the filings, exhibits and other materials, plus all copies or extracts from the filings, exhibits and other materials, and all copies of the extracts from the filing, exhibits and other materials thereof have been delivered to counsel for the producing party or destroyed.

17. After termination of this proceeding, the provisions of this Order relating to the secrecy and confidential nature of CONFIDENTIAL DOCUMENTS, information and testimony shall continue to be binding upon parties herein and their officers, employers, employees, agents, and/or others for five years unless this Order is vacated or modified.

18. Nothing herein shall prevent entry of a subsequent order, upon an appropriate showing, requiring that any documents, information or testimony designated as CONFIDENTIAL shall receive protection other than that provided herein.

Jean A. Howe
Hearing Officer

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

February 4, 2005

Re: BellSouth's Motion for the Establishment of New Performance Assurance Plan	)))	Docket No. 04-00150

MOTION TO QUASH, OR IN THE ALTERNATIVE, MODIFY, SUBPOENA ISSUED BY BELLSOUTH TELECOMMUNICATIONS, INC.

Access Point Inc. (hereinafter "the Company") respectfully submits the following in support of its Motion to Quash, or in the Alternative, Modify, Subpoena Issued by BellSouth Telecommunications, Inc. ("BellSouth").

I. Procedural Background

On or about January 26, 2005, the Tennessee Regulatory Authority ("TRA" or "Authority") issued a subpoena to the Company.[1] Except for an introductory question, the subpoena requires the Company to appear in Nashville at the BellSouth building on February 14, 2005, and to bring documents and submit to a deposition. The "questions" listed in the subpoena are identical to the discovery requests BellSouth previously filed in this docket and attempted to force non-parties, such as the Company, to answer. The questions contained in the subpoena fall generally into the following categories: (1) An introductory question about "ownership and use of switches," which appears to have nothing to do with this case; (2) "contention" questions, which include the phrases such as "do you contend" or "to which you object" and ask the

[1] The subpoenas were issued only to those CLECs that CompSouth identified as participating members. The subpoenas were issued by the TRA on January 26, 2005. As of this date, most, but not all, of the CLEC's to whom subpoenas were issued have received them. A copy of the subpoena received by the Company is attached.

Company to state what contentions or objections the carrier intends to make in this proceeding (numbers 1, 4, 5, 6, 9, 10, 11, 12, 13, 14[2] and 16); (3) questions asking the Company to quantify the "actual harm" or "damages" the carrier has suffered as a result of BellSouth's wholesale performance (numbers 2, 7, and 8); and (4) questions asking the Company about penalty payments and to compare those payments to (a) the Company's intrastate revenue (b) what, if anything, the Company has paid to its customers, (c) amounts the Company has received in penalties in states outside the BellSouth region (numbers 3, 14, and 17). The Company sets forth below the applicable rules and case law regarding discovery and the issuance of subpoenas and then discusses specifically why those interrogatories and requests for the production of documents should be quashed, or in the alternative, modified.

II. Legal Support for Motion to Quash, or in the Alternative, Modify the Subpoena

Under Rule 1220-1-2-.13 of the TRA, subpoenas are to be issued in accordance with the Tennessee Rules of Civil Procedure ("TRCP"). Rule 45 of the TRCP provides for the issuance of subpoenas and also provides protections for persons issued such subpoenas. Specifically, under TRCP 45.02,

> [T]he court, upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things.

TRCP 45.02 does not define the meaning of "unreasonable and oppressive." Thus, one must look to the federal rules and cases applying such rules for guidance. As explained by the

[2] Question 14 asks if the Company has "developed an alternative performance measures plan" for Tennessee Since the Company does not intend to present evidence in this case, the Company does not intend to present any alternative plan to the Authority CompSouth has previously answered this question and referred BellSouth to the plan adopted by the Authority in Docket 01-00193

court in Isbell v. Travis Electric Co, "It is proper that Tennessee courts look to the interpretation given comparable federal rules by the federal courts." Isbell v. Travis Electric Co., 2000 WL 1817252 at *15 (Tenn. Ct. App.) (quoting Williamson County v. Twin Lawn Dev. Co., 498 S.W.2d 317, 320 (Tenn. 1973)).

The Federal Rules of Civil Procedure ("FRCP") describe circumstances in which courts may (or must) grant motions to quash subpoenas, including a specific directive requiring courts to quash (or modify) a subpoena if it "subjects a person to undue burden." [3] While the state rules use the standard of "unreasonable and oppressive" and the federal rules use the standard of "undue burden," courts often discuss the standards interchangeably. In WIWA v. Royal Dutch Petroleum Co., 392 F.3d 812, 818 (5th Cir. 2004) (internal footnotes omitted), the Court stated,

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[3] Federal Rule of Civil Procedure 45, provides.

> (3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it
>
> > (i) fails to allow reasonable time for compliance,
> >
> > (ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or
> >
> > (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or
> >
> > (iv) subjects a person to undue burden
>
> (B) If a subpoena
>
> > (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
> >
> > (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or
> >
> > (iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions

"Whether a burdensome subpoena is reasonable 'must be determined according to the facts of the case,' such as the party's need for the documents and the nature and importance of the litigation." Id. The Court then explained that,

> To determine whether the subpoena presents an undue burden, we consider the following factors: (1) relevance of the information requested; (2) the need of the party for the documents; (3) the breadth of the document request; (4) the time period covered by the request; (5) the particularity with which the party describes the requested documents; and (6) the burden imposed.

Id.

The Court in WIWA identified an additional factor to be considered in determining the reasonableness of a subpoena, which is highly pertinent to the case at hand. According to the Court, "if the person to whom the document request is made is a non-party, the court may also consider the expense and inconvenience to the non-party." Id. Many other courts have enforced this same point. In Katz v. Batavia Marine & Sporting Supplies, the Court stated that, "the fact of nonparty status may be considered by the court in weighing the burdens imposed in the circumstances." Katz v. Batavia Marine & Sporting Supplies, 984 F.2d 422, 424 (Fed. Cir. 1993) (citing American Standard Inc. v. Pfizer Inc., 828 F.2d 734 (Fed. Cir. 1987) (affirming district court's restriction of discovery where nonparty status "weigh[ed] against disclosure"); Solarex Corp. v. Arco Solar, Inc., 121 F.R.D. 163, 179 (E.D.N.Y. 1988) (nonparty status a significant factor in determining whether discovery is unduly burdensome), aff'd, 870 F.2d 642 (Fed. Cir. 1989); Richards of Rockford, Inc. v. Pacific Gas & Electric Co., 71 F.R.D. 388, 390 (N.D. Cal. 1976) (deponent's nonparty status considered in deciding motion to compel testimony and production of documents)).

The Company is not a party to this case. Its nonparty status is also relevant with regards to the costs of complying with the subpoena.[4] Should the TRA deny the motion to quash, and instead, modify the subpoena, under Rule 45.02, the Court may "condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or tangible things." To this end, courts have addressed the specific considerations related to the costs borne by nonparties in complying with subpoenas. The Court in Broussard v. Lemons, for example, discussed the unique concerns associated with imposing costs of litigation on nonparties stating that,

> Courts addressing the issue of how the costs of subpoena compliance should be allocated have consistently emphasized that non-parties who have no interest in a litigation should not be required to subsidize the costs of a litigation. See United States v. Columbia Broadcasting System, Inc., 666 F.2d 364, 371 (9th Cir.1982), cert. denied, 457 U.S. 1118, 102 S.Ct. 2929, 73 L.Ed.2d 1329 (1982); Linder v. Calero-Portocarrero, 183 F.R.D. 314 (D.D.C.Cir.1998) ("In addition to keeping nonparties from 'being forced to subsidize an unreasonable share of the costs of litigation to which they were not a party' United States v. Columbia Broadcasting Sys., Inc., supra, Rule 45's mandatory cost-shifting provisions promote the most efficient use of resources in the discovery process. When nonparties are forced to pay the costs of discovery, the requesting party has no incentive to deter it from engaging in fishing expeditions for marginally relevant material. Requesters forced to internalize the costs of discovery will be more inclined to make narrowly-tailored requests reflecting a reasonable balance between the likely relevance of the evidence that will be discovered and the costs of compliance."); In re Letters Rogatory, 144 F.R.D. 272, 278 (E.D.Pa.1992) ("... a witnesses' nonparty status is an important factor to be considered in determining whether to allocate discovery costs on the demanding or the producing party.").

Broussard v. Lemons, 186 F.R.D. 396, 398 (W.D. La. 1999).

[4] One CLEC has estimated that the costs, at a minimum, would be approximately $4,500

The court in McCabe v. Ernst & Young, 221 F.R.D. 423, 427 (N.J. 2004), discussed other cases holding that nonparties were entitled to reimbursement of costs, including legal fees, in complying with subpoenas: "In Kisser v. Coalition for Religious Freedom, a non-party, who moved to quash or modify a subpoena prior to compliance, was entitled to reimbursement. 1995 WL 590169 (E.D. Pa. 1995). In Mycogen Plant Science, Inc. v. Monsanto Co., non-parties, who moved to quash subpoenas and for a protective order prior to compliance, were entitled to reimbursement. 164 F.R.D. 623 (E.D. Pa. 1996)." In other words, if the Hearing Officer compels the Company to comply with all or part of the subpoena, the Company asks that such compliance be conditioned upon the payment of the Company's costs, including legal fees, of compliance.

III. Objections

a. Based on the foregoing legal authority, the Company objects to each of the questions submitted by BellSouth for the following reasons.

Category 1: The initial question about "ownership and use of switches" is apparently copied from a subpoena issued in another proceeding and has no relevance to this case.

Category 2 ("contention" questions). Since the Company is not a party to this proceeding, the Company does not intend to make any "contentions" or raise any "objections" in this case. None of these contention questions are applicable to a nonparty.

Category 3. Questions asking the Company to quantify its "damages" as a result of BellSouth's wholesale performance are irrelevant to this proceeding and are not likely to lead to the discovery of any relevant evidence.

BellSouth is obligated to provide non-discriminatory performance to CLECs, at parity with its own performance, pursuant to 47 U.S.C. § 271. See, e.g., In the Matter of Application of

BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Authorization to Provide In-Region, InterLATA Services in Florida and Tennessee, WC No. 02-307, Memorandum and Order, FCC 02-331 (rel. December 19, 2002), ¶ 98 ("where a retail analogue exists, a BOC must provide access that is equal to (i.e., substantially the same as) the level of access the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness"). Consequently, parity with BellSouth's performance, not the "actual harm" or "loss" to CLECs, is the relevant test in this case. Indeed, the reason for such plans is that CLECs will seldom know why they have lost customers or otherwise suffered damages as a result of ILEC nonfeasance or wrongdoing. Thus, whether or not the CLECs present "proof" of "lost customers," "damages" or other "harm," is irrelevant to whether the Authority should abandon the current plan or to make sweeping modifications to weaken its provisions. Indeed, the very existence of an adequate plan, with appropriate metrics and penalties is itself a critical deterrent to "backsliding."

BellSouth, not the CLECs, has the burden of proof and the burden of going forward with evidence that demonstrates that the Authority, consistently with the dictates of state and federal law, including 47 U.S.C. § 271, should adopt BellSouth's proffered new performance measurements and penalty plan. See In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan, CC No. 97-137, Memorandum Opinion and Order, FCC 97-298 (rel. August 19, 1997), ¶ 158. BellSouth's questions in Category 3 (nos. 2, 7, and 8) seek information that attempts to shift the burden to the CLECs to demonstrate facts or opinions that are irrelevant to the parity of performance or to the merits of BellSouth's proposed plan, and

ignore one of the principle purposes of performance metrics and corresponding penalties for non-conformance, which is that CLECs cannot be expected to demonstrate actual losses or harm.

Category 4. Similarly, questions about the Company's penalty payments in relation to the Company's intrastate revenues, payments to customers, and payments received in other states are also irrelevant to the Authority's determination of the impact of the penalties on BellSouth i.e., the Authority's determination of what level of penalties will effectively deter BellSouth from backsliding and provide the Company an incentive to improve its wholesale performance. The extent to which BellSouth contends that CLECs pay or do not pay penalties to end users and that this is somehow a measurement of how the penalty affects BellSouth, or the argument that payments received by CLECs in Tennessee are less or more than payments made to other states, or that CLECs receive penalty payments disproportionate in relation to total CLEC revenues, are all irrelevant. What is relevant here is the extent to which a performance plan represents parity of performance and prevents "backsliding" by BellSouth.

When CompSouth raised these objections earlier, the Association noted that the Authority had spent two years developing a performance measure and penalties plan for Tennessee without any evidence of "actual damages" to CLECs, payments to CLEC customers, or damages paid by other Bell companies in other states. Moreover, as CompSouth pointed out, BellSouth itself has already developed and filed a new proposed plan and a new penalty schedule and will shortly be filing testimony in support of that plan without any of the CLEC-specific information BellSouth claims to need.

In response to CompSouth's objections, BellSouth now contends (letter to Hearing Officer, January 26, 2005) that "[r]elevance is not defined solely by the direct testimony that parties will choose to provide" but instead "turns on the ultimate issues to be described by the

Authority." The Authority "is not limited in the factors it may consider" in establishing a new performance measure and penalties plan. (Emphasis in original.)

This is a very curious argument. In making it, BellSouth seems to concede that these questions about CLEC damages are not, in fact, relevant to any of the testimony that the parties intend to present in this case. Nevertheless, BellSouth contends that all the non-party CLECs should answer these questions about damages solely on the possibility that the Authority will later decide that such information might be useful.

By that standard, any information would be relevant if the Authority decides to make it so, regardless of the issues presented in the record. That is no standard at all. If, on the other hand, the Authority decides that it does need additional information to supplement the record, the Authority is certainly able to send (and often does send) data requests both to parties and non-parties. In that situation, the Authority would presumably make the same request of all CLECs and would not, as BellSouth has done here, ask questions only of those CLECs who happen to belong to CompSouth. BellSouth's selective use of the subpoena power in this case certainly appears to be designed to punish those CLECs who support CompSouth and is not intended, as BellSouth claims, to gather information from the broader CLEC community for the benefit of the Authority.

b. In light of the legal standards discussed earlier, the Company also objects to the Requests for Production of Documents for the reasons set forth below.

Request 1. Produce any documents relied upon in responding to First set of Interrogatories.

Request 2. Produce any documents identified in response to BellSouth's First Set of Interrogatories.

Response/Objection: Both Requests hinge upon the Hearing Officer's Ruling on the objection to the Interrogatories.

Request 3. Produce all documents in your possession relating to SEEM penalties received by your company since the adoption of the Tennessee plan, including but not limited to any budgeting or financial planning documents or forecasting materials.

Response/Objection: This Request is both irrelevant, for the reasons explained above, and overly burdensome, especially to a non-party. To produce "all documents related to SEEM penalties" since August, 2001 is clearly unreasonable and well beyond the scope of any issue raised, or likely to be raised, by any party in this case.

Request 4. Produce all internal communications discussing or relating in any way to BellSouth's wholesale performance.

Response/Objection: Similarly, it is unreasonable to expect a non-party to produce "all internal communication discussing or relating in any way to BellSouth's wholesale performance." The question has no temporal or geographic limitations nor is it relevant to BellSouth's continuing obligations under state and federal law to treat CLECs in a non-discriminatory manner.

Request 5. Identify and produce all correspondence in your possession regarding BellSouth's wholesale performance from 2002 to present.

Response/Objection: See Response to Request no. 4.

Request 6. Produce any alternative performance assessment plan or recommendations that you have developed.

Response/Objection: See Response to Interrogatory 14. Furthermore, since the Company is not a party to this proceeding and does not intend to present evidence about any

alternative plant or make any such recommendations, this Request is irrelevant to this proceeding.

Request 7. Produce any draft or partial performance assessment plan that you have discussed or considered in any of BellSouth's region (Tennessee, Florida, Georgia, Kentucky, North Carolina, South Carolina, Alabama, Louisiana, and Mississippi).

Response/Objection: See Response to Interrogatory 14 and Request 6.

Request 8. Produce all contract and tariff provisions that relate to your company's obligations (if any) in the even that your customer contains a service interruption or otherwise sustains a derogation of service.

Response/Objection: See Response to Category 3 of the Interrogatories.

IV. Conclusion

Decisions to quash subpoenas are within the sound discretion of the court. See Ogrodowczyk, D.C. v. Tennessee Bd. for Licensing Health Care Facilities, 886 S.W.2d 246, 252 (Tenn. Ct. App. 1994). For the reasons stated, the Company's subpoena should be quashed. Should the TRA deny the motion to quash, and instead, modify the subpoena, the Company respectfully requests that the Authority order BellSouth to advance the costs, including reasonable legal fees, of complying with the modified subpoena in accordance with TRCP 45.02.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via U.S. Mail, postage prepaid, to Guy Hicks, BellSouth Telecommunications, 333 Commerce Street, Nashville, TN 37201-3300 on this the 4th day of February, 2005.

Henry Walker TCG

Henry M. Walker