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February 4, 2005

Jean Stone, Hearing Officer
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37243

Re: ***BellSouth's Motion for the Establishment of New Performance Assurance Plan***
Docket Number: 04-00150

Dear Ms. Stone:

Enclosed are motions to quash or to modify sixteen subpoenas issued by BellSouth to members of CompSouth.[1] The subpoenas are all identical; a copy of one is attached to this cover letter. Although a few members report, as of yesterday, that they have not yet been served, these motions presume that each carrier has received its subpoena (or will soon receive it) and that each subpoena is identical.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____
Henry Walker

HW/djc
Attachment

[1] One CompSouth member, Birch Telecom, is responding separately

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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.

Network Telephone Corp. (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

By: _____

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P.O. Box 340025
Nashville, Tennessee 37203
(615) 252-2363

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 M. Walker KG