BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

PETITION OF BELLSOUTH REQUESTING RELIEF FROM PAYING FINES ASSOCIATED WITH REPOSTING OF PERFORMANCE DATA	)	**DOCKET NO. 09-00083**

COMMENTS OF COMPSOUTH

The Competitive Carriers of the South, Inc. ("CompSouth"), an association of competitive, local exchange carriers operating in Tennessee and other southeastern states,[1] submits these comments in response to the Notice issued July 17, 2009, by the Tennessee Regulatory Authority. The Notice invited interested parties to comment upon the Petition filed June 11, 2009 by BellSouth Telecommunications, Inc., d/b/a AT&T Tennessee, "Requesting Relief from Paying Fines Associated with Reposting SQM Performance Data."

Summary

CompSouth opposes AT&T's request that the Authority forgive $32,500 in fines which AT&T owes the State of Tennessee for inaccurately reporting performance data over an eighty-eight day period.

Background

Following the court-supervised breakup of the AT&T system in the early 1990s, BellSouth and the other regional Bell carriers continued providing telephone service in their

[1] The members of CompSouth include: NuVox Communications, Inc., Sprint Nextel, tw telecom inc., XO Communications, Inc., Deltacom, Level 3 Communications, Access Point, Inc., Birch Communications (fka Access Integrated Networks, Inc)., Cavalier Telephone, Cbeyond Communications, Covad Communications Company

local communities but, because of their control over local bottleneck facilities, were prohibited from competing in the long distance business. Under the Federal Telecommunications Act of 1996, a Bell carrier could re-enter the long distance market in exchange for giving up its monopoly control over local telephone service and demonstrating to state and federal regulators that it had made its network available for use by competing local exchange carriers ("CLECs") such as the members of CompSouth.

In 2002, the Tennessee Regulatory Authority approved a settlement agreement between BellSouth and a coalition of competing local carriers which allowed BellSouth to re-enter the long distance market in Tennessee. As part of that settlement, BellSouth agreed to adopt a "performance measures and penalties plan" developed by the Florida Public Service Commission.[2] The purpose of the Plan, which was similar to plans adopted by many states at the recommendation of the FCC, was to insure that BellSouth treated competitors fairly and provided them with the same quality of network services that BellSouth provided to its own retail operations. See Amended Final Order, June 28, 2002, at 44; Docket 01-00193. To measure and compare the quality of BellSouth's retail and wholesale services, the Plan includes thirty-five "Service Quality Measurements" ("SQMs") which track the reliability and timelines of BellSouth's network services. When BellSouth's performance falls below a certain standard,

[2] The TRA had earlier adopted its own, "Tennessee Plan" of performance measures and penalties but, as part of the settlement agreement approved by the TRA in August, 2002, the parties and the TRA agreed to drop the Tennessee Plan and adopt the Florida Plan instead, effective December 1, 2002. (In the four month interval between the settlement and the Florida Plan, the TRA followed the Georgia Plan.) As the Florida Plan has been amended, from time to time, the TRA has elected to adopt those amendments as well. See TRA Docket 04-00150. At any time, however, the TRA could decide to adopt, in whole or in part, a Tennessee Plan or another state's plan.

automatic penalties kick in, requiring BellSouth to pay damages to the competing carriers (called "Tier I" payments) and fines to the state commission (called "Tier II" payments).[3] Id. at 46-47.

One of the most important elements of the Florida Plan is the requirement that BellSouth make accurate and timely reports of its performance data. By examining this data, competitors and state regulators can determine whether BellSouth is providing competitors with the same level of service as BellSouth provides itself. This data also allows competitors and regulators to identify which BellSouth systems are operating properly and which need improvements.

Because of the importance of this data, the Florida Plan includes a provision that BellSouth must pay a "Tier II" fine to the state of $400 per day if the carrier's performance data reports are materially inaccurate.[4] This requirement has been enforced many times. In November, 2002, BellSouth paid a fine of $15,000 to the TRA for reporting inaccurate data in August, 2002, the very first month the performance measures plan was in effect.[5] Last year, BellSouth (now doing business as AT&T Tennessee) paid $62,000 in fines to the TRA because of the inaccurate reporting of performance data. See Comments of AT&T, filed July 17, 2009, paragraph 3.

Discussion

AT&T now owes the TRA $35,200 for materially inaccurate reports which were not corrected for 88 days (88 times $400 = $35,200) in January, February, and March, 2009. AT&T asks that the fine be waived because the incorrect reporting does not affect its "Tier I" payments

[3] The provisions for Tier I and Tier II penalties are collectively referred to as "Self Effectuating Enforcement Mechanisms" or "SEEMs."

[4] In 2004, BellSouth persuaded the Florida Commission to amend the Plan so that the Tier II penalty would apply only if the reporting errors were greater than 2%. Tennessee agreed to that amendment.

[5] See Letter from BellSouth to Chairman Sara Kyle, November 21, 2002, in Docket No. 01-00193

to competitors. The company also asks that the fine be waived because enforcement of the rules in these circumstances would deter AT&T from voluntarily admitting its reporting errors. AT&T made the same arguments to the TRA in 2001 and 2002 before the carrier agreed to the Florida Plan.[6]

AT&T's request to waive the $32,500 fine owed to the state should be rejected. The company does not dispute that it violated the rules and owes the fine. To avoid the consequences of its actions, AT&T sets up a straw man by contending the purpose of the reporting requirement "is to encourage AT&T to correctly report data relied upon to calculate SEEMs payments." Petition, 3. That is not – and never was – the purpose of the reporting requirement. As the CLECs argued at the time, the purpose of the rule is not to allow competitors to calculate their Tier I damage payments but to make sure that regulators and competitors can accurately track BellSouth's performance and spot service problems.

In 2001, when BellSouth and competing carriers were arguing about the Tennessee Plan, the CLEC Coalition described the need to include a requirement for the accurate and timely reporting of performance data:

> One of the key functions of an effective remedy plan is to motivate an ILEC to provide parity service to CLECs. BellSouth's posted performance data and reports are the most effective means available to CLECs and this Authority to ensure that BellSouth is complying with designated performance standards and providing parity service to CLECs as required by the Act. BellSouth's posted performance data and reports are also the best means by which CLECS can identify issues regarding BellSouth's systems, processes and performance that need to be addressed. If this

[6] See Post-Hearing Brief of BellSouth filed October 9, 2001, in Docket 01-00193 at pp. 69-70, (arguing that there should be no penalty for late or inaccurate reports because these would be no harm to CLECs and arguing that applying a penalty "would seem to discourage such corrections." BellSouth added, however, that if the TRA disagreed with these arguments, a $400-a-day fine was more appropriate than the $1000-a-day fine advocated by the CLECs.

> information is not provided to CLEC's by the due date, or is incomplete or inaccurate when provided, the ability of the CLECs and the Authority to determine if BellSouth is providing parity service is hindered. Moreover, problems that affect a CLECs ability to service its customers cannot be detected or corrected in a timely manner.

Post-Hearing Brief of CLEC Coalition, Oct. 9, 2001, at 77, TRA Docket 01-00193.

In sum, the reporting requirement was not adopted so that competitors could double-check their penalty payments. It was adopted so that regulators and competitors could monitor BellSouth's performance without regard to Tier I payments.[7] Therefore, the fact that AT&T's errors did not affect payments to CLECs is no reason for the agency to waive the fines owed to the State of Tennessee. AT&T's Petition is simply repeating arguments BellSouth made eight years ago when the carrier was trying to persuade the TRA not to impose any penalties at all for inaccurate reporting. Those arguments became irrelevant once BellSouth agreed to the Florida Plan and the $400-a-day, Tier II fine for inaccurate reporting. That Plan and the reporting requirement still bind AT&T today.

Finally, CompSouth is concerned that AT&T's argument, i.e., the incorrect claim that Tier II payments are of no importance because they don't directly benefit CLECs, is a prequel to

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[7] Tier I and Tier II penalties serve very different purposes. Unlike a Tier I payment to a competing carrier, a Tier II fine cannot be bargained away by agreement between AT&T and competing carriers. Tier II fines have to be paid even if Tier I damage penalties are waived altogether. As the TRA wrote in 2002, the requirement that BellSouth report its performance data is important to CLECs and regulators whether or not the data is tied to a Tier I penalty payment:

> Tier 2 enforcement mechanisms represent a designated payment to the state resulting from BellSouth's systemic failure to provide adequate service to the CLEC community. Accordingly, the Tier 2 enforcement mechanisms rendered in this generic docket are mandatory and not subject to negotiation by parties. . . . Moreover, the continued requirement of collecting performance data for a CLEC opting out of Tier 1 payments still gives BellSouth the incentive to provide adequate service to that particular CLEC due to the presence [of (*sic*)] the Tier 2 enforcement mechanisms.

Final Order in Docket 01-00193, at 29. May 14, 2002; see also Amended Final Order, June 28, 2002, at 47.

arguing that Tier II penalties should be abolished altogether. This Petition appears to be the first step in that direction, a step the Authority should not take.

For all these reasons, AT&T's petition for relief should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served by placing it in the U.S. Mail, First Class, postage prepaid, on the following counsel of record, this the ___ day of _____, 2009.

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