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May 10, 1999

VIA HAND DELIVERY

Mr. David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37245

Re: *BellSouth Telecommunications, Inc.'s Tariff Filing to Offer LATA Wide Area Plus Service*
Docket No. 98-00634

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Reply Memorandum in Support of Motion to Compel. Copies of the enclosed are being provided to counsel of record for all parties.

Very truly yours,

Guy M. Hicks

GMH/jem

Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: ***BellSouth Telecommunications, Inc.'s Tariff Filing to Offer LATA Wide Area Plus Service***

Docket No. 98-00634

BELLSOUTH TELECOMMUNICATIONS, INC.'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO COMPEL

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this reply in support of its motion to compel AT&T Communications of the South Central States, Inc. ("AT&T") to answer fully and completely BellSouth's data requests. Even though it took AT&T almost two months to even respond to BellSouth's motion, AT&T's response amounts to little more than a continuation of its "hide the ball" strategy. AT&T's objections to relevant discovery requests and its continued refusal to disclose its position on the issues it has raised in this case (other than to refer to its petition to intervene and the prefiled testimony of its witness) circumvents the very purpose of discovery. Accordingly, the Authority should grant BellSouth's motion to compel and direct that AT&T promptly answer BellSouth's data requests.

II. DISCUSSION

Data Request 1 and 2

AT&T continues to object to providing any information about the other states in which AT&T is competing against a plan similar to BellSouth's LATA Wide Area Plus® plan. Although AT&T claims that such information "is not relevant to the question of whether BellSouth's tariff violates Tennessee law," AT&T Response at 2, it is relevant to AT&T's contention that BellSouth's LATA Wide Area Plus® plan would "effectively foreclose

competition in the market for intraLATA toll services in Tennessee." King Direct Testimony at 5. BellSouth is entitled to test the veracity of Mr. King's testimony by ascertaining the extent to which AT&T is able to compete in other intraLATA toll markets against an incumbent offering a service similar to that proposed by BellSouth in Tennessee. If AT&T is able to compete in other states against incumbents offering a similar LATA wide intraLATA toll calling plan, AT&T should be able to do so in Tennessee as well. While AT&T may not agree with this argument, AT&T Response at 1, this goes to the weight of the evidence, not its relevancy.

AT&T's insistence that "the burden to obtain such information is the same for BellSouth as AT&T" misses the mark entirely. AT&T Response at 2. First, while relying upon Rule 33.03 of the Tennessee Rules of Civil Procedure, which gives a party the option to produce its business records in answer to an interrogatory under certain circumstances, AT&T cannot satisfy the rule's threshold requirement -- that "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served." Presumably, some AT&T employees know the states in which AT&T is providing intraLATA services and the types of offering against which AT&T must compete. The idea that this country's largest long distance carrier and wireless provider (and soon to be largest cable operator) does not have such competitive information readily available fails the straight face test, particularly if LATA-wide calling plans are so detrimental to intraLATA toll competition, as AT&T alleges here.

Second, even assuming AT&T could satisfy the threshold requirement of Rule 33.03, AT&T has utterly failed to comply with the other requirements of the rule. Specifically, Rule 33.03 requires the answering party to: (1) "specify the records from which the answer may be derived or ascertained"; (2) afford the requesting party "reasonable opportunity to examine, audit

or expect such records and to make copies, compilations, abstracts or summaries"; and (3) provide "sufficient detail" to permit the requesting party "to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained." AT&T's response that the information BellSouth seeks is contained in "ILEC tariffs" does not suffice.

Finally, AT&T does not have the option under Rule 33.03 of designating "ILEC tariffs" in lieu of answering BellSouth's data requests. The rule speaks solely in terms of making available "business records of the party upon whom the interrogatory has been served ...." The tariffs of other incumbents are not AT&T's "business records." *See, e.g., Davis v. Fendler,* 650 F.2d 1154, 1158 n.3 (9th Cir. 1981) (rejecting defendant's attempt to invoke federal equivalent of Rule 33.03 by referencing records held by state agencies, noting that "[a] party cannot, under the guise of Rule 33(c), resort to such tactics"); *Continental Illinois National Bank & Trust Co. v. Caton,* 136 F.R.D. 682, 687 (D. Kan. 1991) (materials such as deposition transcripts and other items generated through litigation are not the kind of records the rule allows a responding party to designate). Because AT&T does not have the option to produce "ILEC tariffs" instead of responding to BellSouth's data requests, AT&T must provide the requested information.

Data Request No. 6

AT&T's claim that it has "fully responded to this data request," which asks how AT&T contends the price floor for BellSouth's LATA Wide Area Plus® service should be calculated, is laughable. AT&T Response at 3. AT&T has not provided the requested information, either in its discovery responses or in the prefiled testimony of its witness Jeffrey King, which AT&T inappropriately attempts to incorporate by reference.

In calculating the price floor, Tenn. Code Ann. § 65-5-208(c) requires a two step analysis: (1) identifying the "essential elements" and "the competitive elements" of the service;

and (2) calculating the "tariff rates for essential elements" and the "total long-run incremental cost of the competitive elements." Tenn. Code Ann. § 65-5-208(c). When asked what AT&T contends constitute the "essential elements" of BellSouth's LATA Wide Area Plus® service, AT&T responded as follows: "all access related charges BellSouth imposes on telecommunications carriers for intraLATA access (e.g., the RIC and CCL), as well as all network functionality carriers must purchase from BellSouth for intraLATA access (e.g., switching and transport)." AT&T Response at 3. Other than the RIC and CCL, does AT&T have any other "access related charges" in mind? Other than switching and transport, does AT&T contend that carriers must purchase other "network functionality" from BellSouth in order to provide intraLATA access? AT&T does not say in either its response or Mr. King's testimony, leaving both BellSouth and the Authority guessing as to how AT&T contends the price floor should be calculated. Such guesswork contravenes the very purpose of discovery.

While contending that it has "fully responded" to BellSouth's data request, AT&T's response for the first time identifies a list of "competitive elements" which AT&T now claims should be considered in calculating the price floor. AT&T Response at 4-5. However, according to AT&T, "This list may or may not be a comprehensive list of competitive elements for the service." AT&T Response at 5. None of these "elements" is mentioned anywhere in either AT&T's original discovery responses or in Mr. King's testimony. Thus, it appears that AT&T is attempting to supplement half-heartedly its discovery responses under the guise of opposing BellSouth's motion to compel (and only after it has had an opportunity to review BellSouth's prefiled testimony). AT&T should be directed to provide the "comprehensive list of

competitive elements" and the long-run incremental cost of these elements which AT&T contends must be considered in calculating the price floor, as BellSouth originally requested.[1]

Data Request Nos. 7-9

AT&T attempts to justify its continued refusal to disclose its position on the calculation of the price floor and the price ceiling by insisting that "BellSouth has failed its burden of proof" on these issues. AT&T Response at 5. However, as the Prehearing Officer in Docket 98-00559 correctly recognized, "While a party's position may change over the course of the proceeding, it is necessary for all intervenors to clearly articulate, to the best of their abilities during discovery, their positions on the threshold issues of this docket." Pre-Hearing Officer's Initial Order On Motions to Compel Outstanding Discovery, at 3 (March 25, 1999). This reasoning applies equally here, and is fatal to AT&T's theory that it can avoid articulating its position on the issues simply by virtue of the fact that BellSouth may have the burden of proof on such issues.

AT&T also attempts to avoid explaining its position on the price ceiling under Tenn. Code Ann. § 65-5-208(d), claiming that it is not privy "to BellSouth's internal cost structure for BellSouth's services." AT&T Response at 6. However, Data Request No. 8 merely asks AT&T to explain whether AT&T contends that BellSouth's price for its LATA Wide Area Plus® service exceeds the price ceiling and, if so, to state all facts and identify all documents supporting this contention. Data Request No. 9 requests that AT&T explain how AT&T contends the price ceiling should be calculated. AT&T does not need any "internal BellSouth

[1] Comparing AT&T's response to the motion to compel with the prefiled testimony of its witness Mr. King graphically illustrates the discovery games in which AT&T is engaged. On page 10 of his prefiled rebuttal testimony dated April 6, 1999, Mr. King complains that he could "find no evidence" that BellSouth included "in its price floor all total long run incremental costs of the copetitive [sic] elements of the service." Yet, Mr. King does not identify the long run incremental costs BellSouth allegedly omitted, and AT&T's response to the motion to compel is silent on this issue as well.

cost data" to respond to either of these requests. Furthermore, to the extent such data is relevant to these issues (which BellSouth denies), AT&T had ample opportunity to obtain through discovery from BellSouth any information AT&T believes is relevant to this case. If AT&T contends that BellSouth's LATA Wide Area Plus® service fails to comply with the requirements of Tenn. Code Ann. § 65-5-208(d), BellSouth is entitled to discover the factual basis for any such contention. If AT&T has no facts to support this contention, it should say so.

Data Request Nos. 10, 11, 12, 13, 15 and 16

In an unusual display of candor, AT&T does not claim that it has answered these data requests, which seek to discover the factual basis for various allegations in AT&T's Petition to Intervene. However, AT&T apparently contends that it should not have to do so because, according to AT&T, the information responsive to these requests allegedly can be found in its Petition to Intervene and the direct and rebuttal testimony of Mr. King. AT&T Response at 6. However, there are no facts alleged in and no documents attached to the Petition to Intervene which purportedly support AT&T's various allegations. Thus, AT&T cannot rely upon its prior pleading as a surrogate for responding to BellSouth's data requests.

The same is true for the prefiled testimony of Mr. King. Rather than responding to BellSouth's data requests, which were propounded by BellSouth prior to the filing of testimony consistent with the Authority's scheduling order, AT&T's original responses to those discovery requests simply referred to AT&T's Petition to Intervene. After the parties filed testimony and after being called on the carpet for its failure to answer BellSouth's data requests, AT&T now attempts to "supplement" its responses by referring to Mr. King's testimony. BellSouth was not aware that it had the option to use testimony as a surrogate for answering discovery. If the Authority condones such tactics, the only discovery parties can expect to receive in contested

cases before the agency in the future will be after the other party files testimony and be limited to matters contained in such testimony, which defeats the purpose of discovery.

Furthermore, notwithstanding AT&T's claims to the contrary, Mr. King's testimony is not responsive to, and does not even address, several of the issues upon which BellSouth has sought discovery. For example, Data Request No. 13 asked AT&T whether it contends that BellSouth's LATA Wide Area Plus® service "constitutes an unjust or unreasonable increase, change, or alteration of rates in violation of T.C.A. § 65-5-203," and, if so, to state all facts and identify all documents in support of this contention. Likewise, Data Request No. 15 asked AT&T whether it contends that BellSouth's proposed LATA Wide Area Plus Service "results in cross-subsidization, preferences to competitive services affiliated entities, predatory pricing or tying arrangement pursuant to TCA § 65-5-208(c)," and, if so, to state all facts and identify all documents in support of this contention." While AT&T answered both requests in the affirmative, it has failed to this day to provide any facts in support of such contentions either in its response or in Mr. King's testimony. Indeed, Mr. King's testimony makes no mention of "unjust or unreasonable increases, changes or alteration of rates," "cross-subsidization," "preferences to competitive services or affiliated entities," "predatory pricing," or "tying arrangements." Thus, AT&T's attempt to rely upon Mr. King's testimony in a futile effort to discharge its discovery obligations is seriously misplaced.

III. CONCLUSION

AT&T has made little or no effort to provide the information BellSouth requested during discovery. Rather, it has obfuscated and otherwise engaged in dilatory tactics in an attempt to deny BellSouth the ability to discover the basis for AT&T's challenge to its LATA Wide Area Plus® service, while AT&T continues to take intraLATA toll customers away from BellSouth.

The Authority should not allow AT&T to abuse the discovery process in this fashion. AT&T should be held to the same discovery standards to which BellSouth and the other parties in contested case proceedings before the Authority are held, which requires that BellSouth's motion to compel be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 10, 1999, a copy of the foregoing document was served on the parties of record, via the method checked, addressed as follows:

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