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May 6, 1999

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37238

Re: *Consumer Advocate Division vs. BellSouth Telecommunications, Inc.*
Docket No. 99-00246

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth Telecommunications, Inc.'s Motion to Dismiss.

Very truly yours,

Guy M. Hicks

GMH/jem

Enclosure

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

Consumer Advocate Division	)	
	)	
v.	)	**Docket No. 99-00246**
	)	
BellSouth Telecommunications, Inc.	)	

BELLSOUTH TELECOMMUNICATIONS, INC.'S MOTION TO DISMISS

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully moves to dismiss the complaint filed by the Consumer Advocate Division ("CAD"), which purports to challenge every BellSouth contract service arrangement (CSA) approved since 1991 as well as every CSA currently pending before the Tennessee Regulatory Authority ("Authority"). The CAD's complaint should be dismissed because: (1) the CAD has violated the Authority's rules governing the form and content of written complaints by failing to allege any facts to support its claims; (2) the CAD's principal claim -- that BellSouth has engaged in price discrimination by selling products at different prices when it costs allegedly are the same -- rests on a legal theory that cannot be reconciled with the law; and (3) the CAD's claim that the termination provisions in BellSouth's CSAs are "anti-competitive" is currently pending in Docket No. 98-00559, and thus the CAD is barred from pursuing the same claim in this proceeding.

II. DISCUSSION

A. The CAD's Complaint Should Be Dismissed Because It Does Not State Any Facts Upon Which Its Claims Are Based As Required By The Authority's Rules

The CAD's complaint is long on rhetoric but short on facts. A good example is the CAD's allegation that "BellSouth is discriminating against other similarly situated customers,

communities and localities it does not prefer by failing or refusing to charge the similarly situated customers, communities and localities the same discounted or rebated rates, even though the customers, communities and locations purchased the same services provided in the secret, special contracts." Complaint ¶ 3. The CAD offers no facts to support this allegation. For example, who are these alleged "similarly situated customers, communities and localities" who the CAD contends are the victims of unlawful price discrimination? Which "services" are being purchased by these customers which the CAD contends are also being purchased by CSA customers? The complaint does not say, and BellSouth and the Authority are left only to speculate as to who and what the CAD has in mind.[1]

Likewise, the CAD alleges that "BellSouth issues special contracts in conjunction or partnership with other regional Bell operating companies (RBOC(s)) and further that BellSouth unlawfully discriminates against Tennessee consumers by granting some consumers CSA discounts in part because the consumer(s) have contracts with other RBOC's [sic]." Complaint ¶ 11. The CAD does not offer any facts to support this allegation, such as identifying the CSAs at issue or giving any indication as to which customers allegedly receive "discounts" from BellSouth by virtue of contracts with other RBOCs. The CAD's allegations concerning alleged "predatory prices," "illegal tying arrangements," and "preferences to competitive services or affiliated entities" also omit the facts upon which such allegations are based. Complaint ¶ 15.

[1] BellSouth adamantly denies that its CSAs are "secret." The applicable rates and services under the CSA are set forth in BellSouth's tariffs, which are available to any member of the public. While the CSA documents themselves are treated as proprietary, this is consistent with Tennessee law. *See* Tenn. Code Ann. § 65-3-109 (prohibiting the Authority from giving "publicity to any contract, leases, or engagements obtained by it in its official capacity, if the interests of any company would thereby be injuriously affected, unless, in the judgment of the department, the public interest requires it"). However, as BellSouth's tariffs expressly provide, any "interested customer" can obtain a copy of the terms and conditions of a CSA upon request from BellSouth, which hardly makes the CSAs "secret" as the CAD contends.

The Tennessee Rules of Civil Procedure require that a party plead the factual basis of its claims. *See W & O Construction Co., Inc. v. Smithville,* 557 S.W.2d 920 (Tenn. 1977) (affirming dismissal of complaint that failed to state the facts upon which claims for relief were based); *Smith v. Lincoln Brass Works, Inc.,* 712 S.W.2d 470 (Tenn. 1986) (affirming dismissal of complaint that lacked any "averments of fact"). As the Tennessee Supreme Court has held, "a mere listing of a series of theories of recovery does not, in and of itself, state a cause of action." 557 S.W.2d at 922.

The Authority's rules embody these pleading requirements. The Authority's rules expressly provide that formal complaints "must contain in clear and logical form the allegations, statements *and facts relied upon, the fact or thing done or omitted,* together with a citation to any statutory, order or rules and regulations of this [Authority] ...." Rule 1220-1-1-.05(1) (emphasis added). The CAD's complaint blatantly disregards these rules by failing to allege any facts in support of its claims. While containing conclusory allegations and passing references to the Tennessee Code, the CAD's complaint is nothing more than "a mere listing of a series of theories of recovery," which requires that the CAD's complaint be dismissed.

The CAD cannot be excused from its failure to state the factual basis for its claims as required by the Authority's rules. First, the Tennessee Supreme Court recently made clear that the Authority's rules setting forth the requirements for formal complaints and petitions are mandatory. *See Consumer Advocate Division v. Greer*, 967 S.W.2d 759 (Tenn. 1998). The complaint provides insufficient notice of the facts at issue, and allowing this case to proceed based upon the "vague and nonspecific" allegations in the CAD's complaint would prejudice BellSouth. *See id.* at 763 (noting the "important function" served by the "specificity required of a complaint by the rules of the TRA"); *see also Jasper Engine & Transmission Service v. Mills,*

911 S.W.2d 719 (Tenn. Ct. App. 1995) ("The adverse party is entitled to have sufficient notice to inform him of the allegations he is called upon to answer").[2]

Second, the CAD has had ample opportunity to discover all relevant facts to support any complaint about BellSouth's CSAs. BellSouth has responded to voluminous requests for information from the CAD about BellSouth's CSAs, the first of which were served almost two years ago in Docket 97-01105. BellSouth also has filed written responses to multiple discovery requests and produced thousands of pages of documents concerning BellSouth's CSAs, in addition to producing the CSAs themselves, in Docket No. 98-00559. To the extent the CAD had uncovered any facts supporting its claims against BellSouth's CSAs, the CAD was required to state such facts in its complaint. Because the CAD did not do so, the CAD's complaint must be dismissed.

B. The CAD's Price Discrimination Claims Should Be Dismissed Because They Are Based On A Legally Flawed Theory.

The CAD's complaint is predicated on a legal theory of price discrimination that does not comport with the law. Specifically, according to the CAD, "price discrimination is the practice of selling the same product at two or more prices where the price differences do not reflect cost difference." Complaint ¶ 7. The CAD requests that the Authority declare as much and find that BellSouth has engaged in price discrimination by selling services at different prices based upon

[2] In this case, unlike in *Consumer Advocate Division v. Greer*, the burden of proof rests with the CAD, not BellSouth. *See Southern Railway Co. v. Seaboard Allied Milling Co.*, 442 U.S. 444, 454-55 (1979) (complainant bears the burden of proof when complaint is filed alleging that contract rates are discriminatory); *see also In re: Competition in the Interstate Interexchange Marketplace*, CC Docket 90-132, 6 FCC Rcd 5880, 5903 ¶ 131 (1991) (same). Nevertheless, the Court's concern that a "public utility must be specifically informed of the nature of the complaint ..." applies equally here, given that BellSouth must have adequate notice of the factual basis of the CAD's claims in order to prepare its defense. *See Jasper Engine & Transmission Service v. Mills,* 911 S.W.2d at 719.

"such considerations as competitive relationships, the technology used by the requesting carrier, the nature of the service the requesting carrier provides, or other unexplained factors not reflecting the cost of providing service." Complaint at p.6. Unfortunately for the CAD, BellSouth may lawfully offer different prices based upon factors other than cost.

As the CAD appears to acknowledge, Tennessee law does not prohibit a public utility from offering different prices; it only prohibits a utility from offering different prices to similarly situated customers. *See Smith v. Louisville Nashville Railway Co.*, 131 Tenn. 531, 175 S.W. 557 (1914) (recognizing that common carrier could charge different rates to differently situated customers); *Southern Railway v. Pentecost*, 205 Tenn. 716, 330 S.W.2d 321 (1959) (railway company did not violate Tenn. Code Ann. § 65-5-112 (as currently codified) when it charged customers in one shipping zone $18.00 per car, while charging the petitioner located outside of that zone $33.00 per car). That the law only prohibits discrimination between similarly situated customers is evident from the plain language of the statute upon which the CAD's price discrimination claims are based. *See* Tenn. Code Ann. § 65-4-122(a) (prohibiting a common carrier or public service company from charging, demanding, collecting or receiving "from any person for *service of a like kind under substantially like circumstances and conditions* ...") (emphasis added).

While the CAD contends that customers are similarly situated unless there is a difference in the cost of serving those customers, this contention cannot be reconciled with either the plain language of Section 65-4-122(a) or the Tennessee Supreme Court's holding in *Pentecost*. Section 65-4-122(a) requires that customers not pay different rates when they receive "service of a like kind under substantially like circumstances and conditions ..." Two customers are not receiving service "under substantially like circumstances and conditions" if one customer has a

competitive alternative which the other customer does not have or if the technology used to serve one customer or the services requested by that customer are different. *See, e.g., L.T. Barringer & Co. v. United States*, 319 U.S. 1, 13-14 (1943); *National Gypsum Co. v. United States,* 353 F. Supp. 941, 946-949 (W.D.N.Y. 1973) (citing cases which recognize "that the carriers necessity of meeting competitive conditions in order to retain business is an important consideration, which may provide a sufficient dissimilarity of conditions to warrant a reasonable difference in rates ...").

In *Pentecost* the Tennessee Supreme Court held that carriers "are only bound to give the same terms to all persons alike under the same conditions and circumstances, and *any fact that produces an inequality of condition and a change of circumstances justifies and inequality of charge.*" 330 S.W.2d at 325 (quoting *Interstate Commerce Commission v. Baltimore & Ohio Railway Co.*, 145 U.S. 263 (1945) (emphasis added). "Any fact that produces an inequality of condition and a change of circumstances" would necessarily include the very considerations the CAD claims BellSouth cannot use in deciding to charge different prices, such as "competitive relationships, the technology used by the requesting carrier, the nature of the service the requesting carrier provides, or other factors not reflecting the cost of providing service." Complaint at p.6.

As the Authority has recognized, CSAs represent BellSouth's response to a competitive marketplace. *Tennessee Regulatory Authority's Report to the Tennessee General Assembly on the Status of Telecommunications Competition in Tennessee,* 1995-1997, at 17 (June 5, 1997). BellSouth offers a CSA in order to customers in response to a particular competitive situation. *See* General Subscriber Services Tariff A5.6 and the Private Line Services Tariff, B5.7. Although the CAD refuses to admit it, the law is clear that differences in competitive

circumstances or conditions can justify charging customers different rates. *See, e.g., Eastern-Central Motor Carrier Association v. United States*, 321 U.S. 194 (1944); *L.T. Barringer & Co. v. United States*, 319 U.S. at 13-14 (existence of truck competition on one line was a dissimilar circumstance justifying a higher overall rate (through the imposition of a loading charge) on a different line which faced no competition); *MCI Telecommunications Corp. v. FCC*, 917 F.2d 30, 39 (D.C. Cir. 1990); *Dresser Industries, Inc. v. ICC*, 714 F.2d 588, 599-602 (5th Cir. 1983); *AT&T v. FCC*, 449 F.2d 439, 449-50 (2d Cir. 1971). Accordingly, the CAD's request that the Authority "declare" that only a difference in cost can justify a difference in price fails to state a claim upon which relief can be granted.[3]

C. The CAD's Claims Concerning Termination Charges Should Be Dismissed Because This Issue Is Pending In Docket No. 98-00559

The CAD complains about the termination provisions in BellSouth's CSAs, alleging that such provisions are "anti-competitive." Complaint ¶¶ 14-15. The Authority is considering this very issue in Docket 98-00559 in which the CAD is a party, and no useful purpose would be served in allowing the CAD to litigate the same issue in a second docket. Accordingly, consistent with the rationale underlying the "former suit pending" defense, the Authority should

[3] The CAD's request also ignores that administrative agencies have repeatedly considered the threat of competition to be a dissimilar circumstance that justifies a difference in price. *See, e.g., Huron Portland Cement Co. v. B&O Railway Co.*, 332 I.C.C. 655 (1968) (threatened construction of competiting coal-slurry pipeline was a dissimilar circumstance justifying lower rates); *Coal to New York Harbor Area*, 331 I.C.C. 355 (1960) (offshore fuel oil pipeline competiting with rail transport constitutes a dissimilar circumstance justifying different rates); *Coal to Kentucky, Virginia and West Virginia to Virginia*, 308 I.C.C. 99 (1959) (lower rates justified to meet competitive threat from mine generating plant). Indeed, the United States Supreme Court has even struck down a finding of unlawful discrimination by the Interstate Commerce Commission that appeared to be based upon an absolute rule that competitive conditions could never justify a rate differential. *See Eastern-Central Motor Carrier Association v. United States*, 321 U.S. 194 (1944).

dismiss the CAD's claims concerning termination charges. *See Metropolitan Development & Housing Agency v. Brown Stoveworks, Inc.*, 673 S.W.2d 876, 878 (Tenn. Ct. App. 1982) (noting that "the doctrine of former suit pending has prevailed in this jurisdiction for over 100 years," and requires "that a complaint seeking relief upon issues undetermined in a pending suit between the same parties must be dismissed upon the defendant's plea of former suit pending").

III. CONCLUSION

For the foregoing reasons, the Authority should dismiss the CAD's Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 6, 1999, a copy of the foregoing document was served on the parties of record, via U. S. Mail, postage pre-paid, addressed as follows:

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[ ] Mail
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