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U.S. DISTRICT COURT

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

OCT 22 2003

LUTHER... Clerk
By: *[Signature]* Deputy Clerk

BELLSOUTH TELECOMMUNICATIONS, INC.,)

Plaintiff,)

v.)

THE GEORGIA PUBLIC SERVICE)
COMMISSION; ROBERT B. BAKER, in his)
official capacity as Chairman of the Georgia)
Public Service Commission; DAVID)
BURGESS, in his official capacity as)
Commissioner of the Georgia Public Service)
Commission; H. DOUG EVERETT, in his)
official capacity as Commissioner of the)
Georgia Public Service Commission;)
ANGELA E. SPEIR, in her official capacity)
as Commissioner of the Georgia Public)
Service Commission; STAN WISE, in his)
official capacity as Commissioner of the)
Georgia Public Service Commission; SPRINT)
COMMUNICATIONS CO., L.P.; ACCUTEL)
OF TEXAS, L.P. d/b/a 1-800-4-A-PHONE;)
CBeyond COMMUNICATIONS, L.L.C.;)
AT&T COMMUNICATIONS OF THE)
SOUTHERN STATES, L.L.C.; BIRCH)
TELECOM OF THE SOUTH, INC.; US LEC)
OF GEORGIA, INC.; NEWSOUTH)
COMMUNICATIONS CORP.; ACCESS)
INTEGRATED NETWORKS, INC.;)
WORLDCOM, INC.; ALLEGIANCE)
TELECOM OF GEORGIA, INC.;)
ITC^DELTA COM COMMUNICATIONS,)
INC.; DIECA COMMUNICATIONS, INC.)
d/b/a COVAD COMMUNICATIONS CO.;)

Civil Action No.:

1:03-CV-3222

ASSOCIATION OF COMMUNICATIONS)
ENTERPRISES; CABLE TELEVISION)
ASSOCIATION OF GEORGIA; and TALK)
AMERICA, INC.,)
)
)
Defendants.)

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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October 22, 2003

Plaintiff BellSouth Telecommunications, Inc. (“BellSouth”), by its attorneys, alleges for its complaint:

Nature of the Action

1. BellSouth challenges the Georgia Public Service Commission’s (“PSC”) unlawful establishment of the wholesale rates that BellSouth may charge to its competitors for access to individual piece-parts of BellSouth’s network, which are known as unbundled network elements, or “UNEs.”

2. Under the federal Telecommunications Act of 1996 (“1996 Act”), UNE rates are set by state commissions under a methodology known as Total Element Long-Run Incremental Cost (“TELRIC”) established by the Federal Communications Commission (“FCC”).

3. The PSC has previously set lawful TELRIC rates for the use of BellSouth’s facilities, as the FCC itself has confirmed in rejecting claims that those rates were too high. In this case, the PSC has sought to replace those rates with new ones. In so doing, the PSC has made significant legal errors.

4. First, the PSC established and applied a cost input to all UNE rates in Georgia known as the “cost of capital,” which represents the risk faced by BellSouth in the market as perceived by investors. The FCC’s TELRIC methodology assumes a hypothetical, ideally competitive market, where there are

many providers of UNEs in competition with each other. Accordingly, the FCC has explained, TELRIC necessarily and logically requires that the cost of capital, like other inputs to UNE rates, *must* reflect those same hypothetical assumptions and may *not* be based on actual market risk. The PSC, however, unlawfully ignored the FCC's binding requirement and applied a cost of capital that purportedly reflects BellSouth's actual market risk.

5. Second, the PSC established and applied another cost input to all UNE rates in Georgia for depreciation, pursuant to which the PSC was supposed to determine the useful lives of the assets that BellSouth uses to provide UNEs. In so doing, the PSC acted contrary to the record, federal law, and principles of reasoned decision-making by, among other things, ignoring BellSouth's evidence and improperly relying on depreciation lives set by the FCC eight years ago, in 1995.

6. Third, and independently, the PSC also erred in establishing a "growth adjustment" cost input to rates both for the UNEs known as "loops," which are the wires that connect end-users' premises to BellSouth's network, and for loop-related UNEs. No state commission in BellSouth's nine-state region has ever imposed such a growth adjustment, and the PSC's decision to do so here is unsound. The PSC ignored the obvious fact that, where BellSouth's customer base is growing, it often incurs added costs to serve new customers. To choose a simple

example, every time a new subdivision is built in the outskirts of Atlanta, BellSouth incurs significant new costs to deploy facilities to that subdivision. The PSC's decision irrationally assumes, however, that such expansion is costless. In addition, the PSC also ignored 2002 data that showed that BellSouth's customer base is not growing in the manner that the PSC predicted.

7. The PSC's orders violate federal law in other respects as well.

Accordingly, BellSouth is entitled to an injunction prohibiting the PSC from enforcing its newly established rates.

Parties

8. Plaintiff BellSouth is a Georgia Corporation with its principal place of business in Georgia. BellSouth provides local telephone service throughout much of the State of Georgia, and is an "incumbent local exchange carrier" within the meaning of the 1996 Act.

9. Defendant PSC is an agency of the State of Georgia. The PSC is a "State commission" within the meaning of the 1996 Act.

10. Defendants Robert R. Baker, David Burgess, H. Doug Everett, Angela E. Speir, and Stan Wise are Commissioners of the PSC, and are sued in their official capacities for declaratory and injunctive relief only.

11. Defendant Sprint Communications Company, L.P. is a Delaware

corporation with its principal place of business in Missouri, and is a “telecommunications provider” within the meaning of the 1996 Act. Defendant Sprint Communications Company, L.P. was a party to the proceeding before the PSC.

12. Defendant AccuTel of Texas, L.P. d/b/a 1-800-4-A-PHONE is a Texas corporation with its principal place of business in Texas, and, on information and belief, is a telecommunications carrier within the meaning of the 1996 Act. Defendant AccuTel of Texas, L.P. was a party to the proceeding before the PSC.

13. Defendant Cbeyond Communications, L.L.C. is a Delaware corporation with its principal place of business in Georgia, and, on information and belief, is a telecommunications carrier within the meaning of the 1996 Act. Defendant Cbeyond Communications, L.L.C. was a party to the proceeding before the PSC.

14. Defendant AT&T Communications of the Southern States, L.L.C. is a Delaware corporation with its principal place of business in New Jersey, and, on information and belief, is a telecommunications carrier within the meaning of the 1996 Act. Defendant AT&T Communications of the Southern States, L.L.C. was a party to the proceeding before the PSC.

15. Defendant Birch Telecom of the South, Inc. is a Delaware corporation with its principal place of business in Missouri, and, on information and belief, is a

telecommunications carrier within the meaning of the 1996 Act. Defendant Birch Telecom of the South, Inc. was a party to the proceeding before the PSC.

16. Defendant US LEC of Georgia, Inc. is a Delaware corporation with its principal place of business in North Carolina, and, on information and belief, is a telecommunications carrier within the meaning of the 1996 Act. Defendant US LEC of Georgia, Inc. was a party to the proceeding before the PSC.

17. Defendant NewSouth Communications Corp. is a Delaware corporation with its principal place of business in South Carolina, and, on information and belief, is a telecommunications carrier within the meaning of the 1996 Act. Defendant NewSouth Communications Corp. was a party to the proceeding before the PSC.

18. Defendant Access Integrated Networks, Inc. is a Georgia corporation with its principal place of business in Georgia, and, on information and belief, is a telecommunications carrier within the meaning of the 1996 Act. Defendant Access Integrated Networks, Inc. was a party to the proceeding before the PSC.

19. Defendant WorldCom, Inc. is a Georgia corporation with its principal place of business in Virginia, and, on information and belief, is a telecommunications carrier within the meaning of the 1996 Act. Defendant WorldCom, Inc. was a party to the proceeding before the PSC.

20. Defendant Allegiance Telecom of Georgia, Inc. is a Delaware corporation with its principal place of business in Texas, and, on information and belief, is a telecommunications carrier within the meaning of the 1996 Act. Defendant Allegiance Telecom of Georgia, Inc. was a party to the proceeding before the PSC.

21. Defendant ITC^DeltaCom Communications, Inc. is a Delaware corporation with its principal place of business in Georgia, and is a telecommunications carrier within the meaning of the 1996 Act. Defendant ITC^DeltaCom Communications, Inc. was a party to the proceeding before the PSC.

22. Defendant DIECA Communications, Inc. d/b/a Covad Communications Company is a Virginia corporation with its principal place of business in California, and, on information and belief, is a telecommunications carrier within the meaning of the 1996 Act. Defendant DIECA Communications, Inc. was a party to the proceeding before the PSC.

23. Defendant Association of Communications Enterprises is an association with its principal place of business in the District of Columbia. Defendant Association of Communications Enterprises was a party to the proceeding before the PSC.

24. Defendant Cable Television Association of Georgia is an association with its principal place of business in Georgia. Defendant Cable Television Association of Georgia was a party to the proceeding before the PSC.

25. Defendant Talk America, Inc. is a Pennsylvania corporation with its principal place of business in Pennsylvania, and, on information and belief, is a telecommunications carrier within the meaning of the 1996 Act. Talk America, Inc. was a party to the proceeding before the PSC.

Jurisdiction and Venue

26. These claims arise under the 1996 Act, a law of the United States, and under the FCC's regulations implementing the Act. This Court has subject matter jurisdiction over the action pursuant to 47 U.S.C. § 252(e)(6), 28 U.S.C. §§ 1331 and 1367, and 42 U.S.C. § 1983. The Court is empowered to grant declaratory relief by 28 U.S.C. §§ 2201 and 2202.

27. Venue is proper in this District under 28 U.S.C. § 1391(b)(2) because a substantial part of the events giving rise to this action occurred in this District, in which the PSC sits and in which it conducted the proceedings below which produced the challenged PSC orders.

The 1996 Act

28. Prior to the 1990s, most local telephone service was provided in a given

area by a single, regulated company (such as BellSouth) that held an exclusive franchise to provide such service. In the 1996 Act, Congress replaced this exclusive franchise system with a “pro-competitive, de-regulatory” framework for the provision of telecommunications services. S. Conf. Rep. No. 104-230, at 113 (1996).

29. To achieve this goal, Congress preempted all state and local exclusive franchise arrangements, *see* 47 U.S.C. § 253, and also placed certain affirmative duties on incumbent local exchange carriers (“incumbent LECs” or “ILECs”) such as BellSouth to assist new entrants in entering the local market. Among those duties is the obligation to allow new entrants (“competitive LECs” or “CLECs”) to lease “unbundled network elements” at rates “based on . . . cost.” 47 U.S.C. § 251(c)(3), 252(d)(1). Those unbundled network elements, also known as “UNEs,” are piece-parts of BellSouth’s telephone network such as local loops (the wires strung on telephone poles or buried underground that connect individual customer locations to the network) and switches (devices for routing and connecting calls).

30. Soon after passage of the 1996 Act, the FCC issued its *Local*

*Competition Order*¹ implementing the Act's local competition provisions. The order included, among numerous other rules and regulations, a general methodology that state commissions are required to use when establishing rates for unbundled access. This methodology requires rates to be based on hypothetical forward-looking costs assuming use of TELRIC, "the most efficient technology [available]." *Local Competition Order* ¶¶ 672, 685 ("Total Elemental Long Run Incremental Cost"). In the FCC's view, this hypothetical approach "replicates, to the extent possible, the conditions of a competitive market." *Id.* ¶ 679. Thus, TELRIC assumes a hypothetical "fully competitive market."²

The PSC's UNE Rate Determinations

31. The PSC first established UNE rates in a generic ratemaking proceeding in 1997 (and concluded a related proceeding in 2000). Those rates were subsequently reviewed by the FCC as part of its consideration under 47 U.S.C. § 271 of whether BellSouth should be permitted to offer long-distance services originating in Georgia. As part of the section 271 process, the FCC rejected every CLEC challenge to those rates and held that, "[b]ased on the evidence in the

¹ First Report and Order, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499 (1999) ("*Local Competition Order*") (subsequent history omitted).

² Memorandum Opinion and Order, *Verizon New England, Inc.*, 16 FCC Rcd 8988, ¶ 42 (2002).

record, we find that BellSouth UNE rates in Georgia . . . are just, reasonable, and nondiscriminatory, and are based on cost plus a reasonable profit as required by section 252(d)(1).”³ No party sought judicial review of that FCC holding, as they were entitled by law to do. *See* 47 U.S.C. § 402(b)(6).

32. In 2001, the PSC opened a proceeding to re-examine UNE rates. After discovery and hearings, the PSC issued an order on June 24, 2003 adjusting some rates and leaving others unchanged. *See Order, Review of Cost Studies, Methodologies, Pricing Policies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications, Inc.’s Services*, Docket No. 14361-U (June 24, 2003) (“Order”) (App., Tab 1). The PSC subsequently granted in part and denied in part BellSouth’s petition for reconsideration. *See Second Order on Reconsideration, Review of Cost Studies, Methodologies, Pricing Policies, and Cost-Based Rates for Interconnection and Unbundling of BellSouth Telecommunications, Inc.’s Services*, Docket No. 14361-U (Sept. 22, 2003) (“Reconsideration Order”) (App., Tab 2).

33. The PSC’s Order and Reconsideration Order are unlawful. They conflict with the 1996 Act and the FCC’s implementing regulations, are arbitrary

³ Memorandum Opinion and Order, *Joint Application of BellSouth, et al.*, 17 FCC Rcd 9018, ¶ 28 (2002).

and capricious, are inconsistent with the record, are not supported by substantial evidence, and result from a failure of reasoned decisionmaking, in the following respects, among others.

34. The cost of capital input used by the PSC to establish UNE rates is unlawful. Among other things, in determining the appropriate cost of capital input used to calculate all UNE rates, the PSC applied a risk factor based on its assessment of the actual market risk faced by BellSouth – indeed, the actual market risk that BellSouth faced many years ago. The PSC inexplicably and unlawfully disregarded the FCC’s recent clarification in its *Triennial Review Order* that the cost of capital input to TELRIC, which state commissions are bound by federal law to apply, must incorporate the added risks incumbents would face in the hypothetical, ideally competitive market on which the TELRIC rate-setting methodology is based, rather than the lower risks that may actually exist currently in the market today.⁴ Even if an actual cost of capital were appropriate (it is not), the PSC’s decision is nevertheless arbitrary and inconsistent with the record and

⁴ See Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket Nos. 01-338, *et al.*, FCC 03-36, ¶¶ 677-82, 2003 WL 22175730 (FCC) (rel. Aug. 21, 2003) (“*Triennial Review Order*”), *petitions for review pending*, *United States Telecom Ass’n v. FCC*, Nos. 03-1310 *et al.* (D.C. Cir.).

federal law.

35. Second, the depreciation input used by the PSC to calculate UNE rates is unlawful. Among other things, the PSC refused to make an independent determination of depreciation lives based on the record evidence (instead it reimposed outdated depreciation lives) and ignored BellSouth's evidence that CLECs themselves are using depreciation lives comparable to the lives advocated by BellSouth. Certainly the lives actually used by BellSouth's competitors "closely reflect[] the actual useful life of an asset that would be anticipated in a competitive market." *Triennial Review Order* ¶ 688; *see also* 47 C.F.R. § 51.505(b)(3) ("The depreciation rates used in calculating forward-looking economic costs of elements shall be economic depreciation rates.").

36. Third, the PSC applied an unlawful "growth adjustment" factor to all rates for loops and loop-related UNEs. In a fundamental mistake, the PSC assumed that any future growth would be entirely costless. It did so despite the obvious fact that growth into newly built subdivisions, office parks, and other previously undeveloped areas would quite obviously require BellSouth to extend its network from scratch to reach them. The PSC's decision is also unlawful because it used historical data to calculate projected line growth for 2002 despite having actual data for that year in the record – data that showed a far smaller rate

of line growth than the PSC's methodology projected. The PSC then compounded its error by using this faulty methodology to predict line growth for 2003 and 2004, despite the fact that the same methodology had failed to predict 2002 counts with any reasonable accuracy, and despite the fact that a bureau of the FCC had specifically rejected the *same methodology* used by the PSC in projecting future line growth. The PSC did not use a growth adjustment at all when it initially set UNE rates in 1997, nor has any other state commission in BellSouth's nine-state region.

CLAIM FOR RELIEF

37. BellSouth restates and incorporates by reference each and every allegation in paragraphs 1 through 36 as if fully set forth here.

38. The PSC's determinations result in rates that are not based on cost, in violation of 47 U.S.C. §§ 251(c)(3) and 252(d)(1).

39. The PSC's determinations are also inconsistent with the FCC's pricing rules, 47 C.F.R. §§ 51.503, 51.505, & 51.511.

40. The PSC's determinations are arbitrary and capricious, fail to exhibit reasoned decisionmaking, and are otherwise contrary to law.

41. BellSouth has no adequate remedy at law for these violations.

42. BellSouth is entitled to an injunction enjoining the enforcement of the

unlawful portions of the PSC's orders.

RELIEF REQUESTED

WHEREFORE, as relief for the harms alleged herein, BellSouth, as an aggrieved party, respectfully requests that this Court:

a. declare that the PSC's Order and Reconsideration Order are invalid for the reasons discussed above;

b. grant BellSouth declaratory and injunctive relief to prevent all defendants and anyone acting in concert with them from enforcing or attempting to enforce the PSC's Order and Reconsideration Order to the extent they require BellSouth to provide access to its network at rates that are inconsistent with the terms of the 1996 Act;

c. grant BellSouth declaratory and injunctive relief to prevent all defendants and anyone acting in concert with them from enforcing or attempting to enforce the PSC's Order and Reconsideration Order to the extent they require BellSouth to provide access to its network at rates that are inconsistent with FCC orders and regulations implementing the 1996 Act;

d. grant BellSouth declaratory and injunctive relief to prevent all defendants and anyone acting in concert with them from enforcing or attempting to enforce the PSC's Order and Reconsideration Order to the extent they are arbitrary

and capricious or result from a failure to engage in reasoned decisionmaking; and

e. grant BellSouth such further relief as the Court may deem just and equitable.

Respectfully submitted:



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