BellSouth Ex Parte
on
Commercial Agreements

WC Dkts 01-338, 04-313 and 04-245

June 10, 2005

Commercial Agreement Framework

- The Telecommunications Act of 1996 granted the FCC authority to enforce the provisions of §271, but CLECs are pressuring states to step into that role

- Uncertainty is hampering the commercial agreement environment
  - Some CLECs continue to ride out the regulatory path hoping for relief at the states
  - ILECs and CLECs feel constrained in flexibility due to uncertainty of framework

- Establish a commercial framework to invigorate the commercial environment and eliminate uncertainty, or have to deal with preempting state decisions later made in the absence of clear FCC direction

What's the Problem?

Tennessee Preemption Petition

- WC Docket No. 04-245 filed July 1, 2004
  - Tennessee Regulatory Authority (TRA) set a market rate for unbundled switching provided "pursuant to §271"
  - TRA set up a generic docket to adopt a permanent rate for switching outside 251 requirements
  - FCC should preempt TRA's order:
    - Make clear that the FCC enforces the provisions of §271 and state commissions have no jurisdiction over elements for which there is no FCC impairment finding under §251
    - Make clear that the FCC has authority over rates, terms and conditions for §271 checklist items under §201 and 202 of the Act
  - FCC expressly invited aggrieved parties to file petitions for declaratory ruling where state commission determinations are contrary to the principles set for in the TRO at ¶195
  - TRA action brings uncertainty to the regulatory environment and terminates any incentive for carriers to enter commercial agreements

What's the Problem?

TRRO Change of Law Proceedings

- CLECs are requesting state commissions to set rates and obligations for non-251 services.
  - Georgia PSC has asserted jurisdiction to review and approve non-251commercial agreements.
  - Covad and Cinergy have asked Kentucky PSC to set rates and terms for section 271 services through section 252 arbitrations.
  - CLECs have asked several BellSouth state commissions to arbitrate rates and terms for switching (and other elements for which the FCC's TRRO Order eliminated unbundling obligations) under section 271 *and that "just and reasonable" rates under section 271 must be TELRIC!*

What's the Problem?

- **Other CLEC Issues Raised in Change of Law**
  - Asserting §271 items must be included in §252 agreements and commingled with wholesale services or combined with §251 UNES
  - Requesting state commissions to require BellSouth to continue providing line sharing to new customers after October 1, 2004 despite FCC and Court Orders
  - Seeking PSC setting and approval of rates, terms and conditions of non-251 network elements that BellSouth now provides under commercial agreements.
  - Seeking PSCs to require ILEC payment of SEEM penalties on network elements de-listed under §251 that are included in the commercial agreement

Why Now?

State Commission arbitrations about to begin in order to complete change of law process before FCC's March 10, 2006 TRRO deadline. FCC can clarify the rules now or deal with Pre-emption petitions later.

AL	Motions for Summary Judgment and Declaratory Ruling on these issues filed 6/2/05.
FL	Issues list for arbitrations related to TRRO before the Florida PSC - May 2, 2005. (7 related issues)
GA	MSJ and MFDR on these issues filed 6/1/05. Direct testimony files 7/19/05.
KY	MSJ and MFDR on these issues filed 6/2/05
NC	MSJ and MFDR on these issues filed 6/2/05. Direct testimony files August 1. Hearing begins September 19
TN	MSJ and MFDR on these issues filed 6/1/05. Direct Testimony files July 26. Hearing set for September 12-15

* Awaiting a procedural order setting controlling dates in remaining states

What's the Problem?

- Subjecting non-251 matters to Section 252 destroys the Commercial Agreement Framework envisioned by the FCC and the Act.
  - Eviscerates any distinction between Sections 251 and 271
  - Eliminates any incentive for CLECs to negotiate if they can re-fight the UNE battle before state commissions under guise of 271
  - Deters ILECs from considering proposals targeted to the needs of individual CLECs due to risk those contracts will be changed or rejected by state commissions

What needs to be done?

Commercial Agreements Petitions/TN Preemption Petition

- FCC must declare that state commissions have no jurisdiction over the rates, terms and conditions of elements provided pursuant to §271
- FCC should declare that separate agreements for the provision of services not required under §251 are not subject to the obligations in §252
- FCC should declare that such commercial agreements require compliance with §211 of the Act
- FCC should preempt inconsistent state actions and ensure that state commissions cannot attempt to regulate non-251 Agreements

Non-251 Services are Outside the Authority Given to the States Under Section 252

- Section 252(a) applies only to interconnection agreements negotiated after an ILEC receives "a request for interconnection, services, or network elements pursuant to Section 251."

- Section 251(c)(1) further provides that ILECs have a duty to negotiate "in accordance with Section 252 the particular terms and conditions of the agreements to fulfill the duties described in paragraphs (1) through (5) of subsection [251](b) and this subsection ."

- Accordingly, if the agreement falls outside the ILEC's duty to negotiate under Section 251 (b)(1-5) or 251 (c), it falls outside the ILEC's duty to negotiate under 252 and corresponding Section 252 filing and arbitration rules.

FCC Has Already Addressed These Issues

- **FCC's Qwest ICA Order**:
  - Found that Section 252 requires "*only* those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under [section 252(a)(1)."
  - "...contracts that do not affect an incumbent LEC's ongoing obligations relating to Section 251 need not be filed."

- Triennial Review Order (TRO)
  - "where there is no impairment under section 251 and a network element is no longer subject to unbundling, we look to section 271..."
  - "section 252(d)(1) provides the pricing standard 'for network elements for purposes of [section 251(c)(3)], and does not by its terms, apply to network elements that are required only under section 271."
  - ¶662 - "if a checklist network element does not satisfy the unbundling standards in §251(d)(2), the applicable prices, terms and conditions for that element are determined in accordance with §201(b) and §202(a)."
  - ¶664 - "whether a particular checklist element's rate satisfies the just and reasonable pricing standard of §201 and § 202 is a fact-specific inquiry that the Commission will undertake...."