

A. Well, the entire phrase says, “might satisfy the standard.” It doesn’t indicate what conditions would be needed for it to be able to satisfy it

Q. And what that goes to, Mr. Gillan, is the question of whether they are arm’s length agreements, right?

A. I think it partially goes to that. But the FCC doesn’t say, “might satisfy this standard, but it has to be -- it all hinges on whether it’s arms length.” I mean, certainly that’s part of what it would have to be. But I think it goes beyond. I mean, and part of arm’s length requires that carriers, purchasers have choices and alternatives. **So it essentially we might be saying the same thing.**

Transcript, at 217-218 (emphasis added).

The Commission should reject Mr. Gillan’s premise that the commercial agreements are not arms-length agreements. First, and critically, while Mr. Gillan claimed to be representing “all the active CLECs in the regulatory arena in -- in Georgia,” *Transcript*, at 223, he didn’t know which of his actual clients (those who are members of CompSouth) had signed a commercial agreement. *Transcript*, at 201. Indeed, Mr. Gillan does not even know how many CLECs are currently members of CompSouth. *Transcript*, at 201. This is relevant because while Mr. Gillan claimed that the CLECs who signed commercial agreements did so because they had no other alternative, not one of the eight individual CompSouth companies identified as participating in this docket filed testimony claiming that it signed a commercial agreement that it believed to be unjust and unreasonable. Second, counsel for CompSouth informed counsel for BellSouth after the hearing that there are four additional members of CompSouth, at least one of whom has signed a commercial agreement, who are not even participating in the docket.

Mr. Gillan tried to bolster his argument that the commercial agreements are not indicative of a just and reasonable rate because he is “not aware of anybody who’s using the commercial agreement in an attempt to actually survive in the market.” *Transcript*, at 210. He admitted on cross-examination, however, that he was not authorized to state that the 8 CompSouth members

with commercial agreements were exiting the local market, *Transcript*, at 210, and in fact that he had “not gone through the list for all eight” to determine whether those carriers were, in fact, exiting the local market in Georgia. *Transcript*, at 208. Upon further cross-examination he finally admitted that “some of these carriers may not be exiting the market -- the market in total.” *Transcript*, at 209.

Mr. Gillan further argued that the agreements were not arms-length because there are no other providers of wholesale switching in Georgia. *See e.g. Transcript*, at 207. This argument, of course, utterly ignores the critical FCC conclusions about self-deployment. *See Transcript* (Gillan), at 219 (“I’m ignoring self-deployment for purposes of establishing a market price for switching for carriers that are looking for a wholesale provider.”) Mr. Gillan argued that ignoring self-deployment of switching was the right thing to do because “**I don’t believe** that self-deployment is at all sufficient to justify -- to constrain you from charging unreasonable prices” and “**I don’t think** it’s plausible at all to believe that the threat that someone will go out and self-deploy a switch is sufficient to police [BellSouth] from charging unreasonable rates for switching.” *Transcript*, at 220.

Unfortunately for Mr. Gillan, his opinions are not particularly relevant given that the FCC concluded differently. In the Triennial Review Remand Order (“*TRRO*”), the decision in which the FCC concluded that CLECs were not impaired without unbundled local switching, the FCC held that

we conclude, based on the record here, and the reasonable inferences we draw from it, that competitive LECs not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets.

TRRO, at 199. The FCC specifically based its impairment decision on “*USTA II*’s instruction to draw appropriate inferences about potential competition in one market from evidence of competitive deployment in another market.” *Id.*

Whether or not there are wholesale switching alternatives (and BellSouth does not concede that there are not), the FCC has held that “we determine not only that competitive LECs are not impaired in the deployment of switches, but that it is feasible for competitive LECs to use competitively deployed switches to serve mass market customers throughout the nation.” *TRRO*, at 204. Given this finding, the Commission must conclude that the ability of CLECs to self-deploy switching constitutes sufficient competition in the switching market to make BellSouth’s commercial agreements arms-length.⁵

Moreover, from a public policy standpoint, Mr. Gillan’s refusal to consider self-deployment flies directly in the face of the FCC’s stated goal of encouraging facilities-based competition. One of the critical factors in the FCC’s switching impairment analysis was that continued unbundling would deter CLECs from deploying their own facilities.

Moreover, regardless of any limited potential impairment requesting carriers may still face, we find that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and therefore we conclude not to unbundled pursuant to section 251(d)(2)’s ‘at a minimum’ authority.

TRRO, at 199. Benchmarking the commercial agreement rate against self-deployment is entirely consistent, if not mandated, by the FCC’s policy that investment in facilities is the preferred mode of competition.

Finally, it is just common sense that any provider would compare the cost it would incur to purchase local switching from a third party versus the costs it would incur in deploying the

⁵ As discussed above, BellSouth looked at CLEC cost-to-build when setting the commercial rate for local switching. *Transcript*, at 167-168. This factor is particularly relevant in Georgia where CLECs have deployed more than 80 switches and/or switch nodes.

– facilities itself. Ignoring the possibility of self-deployment, as Mr. Gillan admitted that he did, renders his analysis worthless. The Commission should not adopt an analysis designed to reach a particular result by just ignoring a critical input to the analysis.

Mr. Gillan's proposal is further jeopardized by the fact that the Commission itself already has held the switching rates in the commercial agreements to be just and reasonable. This Commission already has *approved* 68 agreements containing the same rates proposed here. While Mr. Gillan and the Staff tried to draw distinctions between the approved commercial agreements and the rates at issue here, there are only two choices -- either the rates were approved as just and reasonable, or the Commission concluded that unjust and unreasonable rates were in the public interest.

– Section 252(e), the provision under which the Commission (unlawfully) asserted jurisdiction over the commercial agreements, provides that negotiated agreements can only be rejected in relevant part if “the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity.” 47 U.S.C. § 252(e). Section 46-2-23 informs the Commission's inquiry as to what constitutes the public interest in Georgia – specifically, “[t]he Commission shall have exclusive power to determine what are just and reasonable rates and charges to be made by any ... corporation subject to its jurisdiction.” Thus, to find that an agreement is in the public interest (which is what the Commission had to find to approve the agreement) it presumably complied with Georgia law and found the rates to be just and reasonable. *See Transcript*, at 98 (Dr. Taylor explained that he was unaware of any regulatory authority approving unjust and unreasonable rates as in the public interest).

– While Mr. Gillan obviously would not concede that the Commission found the rates to be just and reasonable, the best defense he could construct for the Commission was that the

Commission either didn't pay attention or didn't know what it was approving. *Transcript*, at 228.

Q. ... Is it your testimony that this Commission would have approved rates for the consumers in Georgia that were unjust and unreasonable?

A. Certainly not knowingly. I mean, the issue here is obviously you file things and the Commission allowed them to -- treated them as approval ... I am not going to go anywhere near a statement that says that the Commission has rendered a judgment that either compels it to follow that precedent here, **or really means that the Commission looked at those rates and made a judgment as to whether they were reasonable.** Yes, you have the point that in the statute the Commission should -- **would have rejected, had it found that they weren't in the public interest**"

Transcript, at 228-229 (emphasis added).

Neither of these seem like viable positions for the Commission credibly to take.

The Commission also should reject Mr. Gillan's proposal because over the last several years he has used at least three different methodologies for calculating what he claims to be a "just and reasonable" rate.⁶ In his initial rebuttal testimony in Tennessee Docket No. 03-00119, Mr. Gillan argued that 271 switching should be provided at TELRIC. *See BellSouth Hearing Exhibit 3*. Later in that same proceeding, Mr. Gillan testified that he "was able to perform additional analysis on behalf of ITC^DeltaCom" that recommended a different rate for 271 switching. *Id*; *Transcript*, at 241. Subsequent to the Tennessee case, Mr. Gillan filed a sworn affidavit with the FCC's Enforcement Bureau using the second methodology he used in Tennessee to advocate a rate of \$5.91 for switching. *Transcript*, at 242. On cross-examination, he testified that the methodology upon which the TRA relied and upon which he asked the FCC

⁶ Mr. Gillan's erratic approach to rate-setting further demonstrates the peril of proceeding down the path CompSouth advocates. Mr. Gillan himself cannot credibly support any particular methodology as the appropriate course for Section 271 rate setting, which supports the Commission following precisely the FCC's directive at ¶ 664 of the *TRO*.

to rely “suffered from an infirmity.” *Transcript*, at 243.⁷ In this proceeding, Mr. Gillan has used yet another methodology to devise his proposed rate. The Commission should reject Mr. Gillan’s proposal in this case simply because he has come up with four different answers to the same question of what constitutes a just and reasonable rate for local switching.

The Commission also should reject Mr. Gillan’s proposal because it is based on TELRIC rates – an approach the FCC has rejected. Recently, the FCC argued “[c]ompetitors’ persistent reliance on UNE-P - even after extensive deployment of competitive switches – provides powerful evidence that TELRIC-based switching rates were not even close to ‘the high end’ of the permissible range of rates under the ‘just and reasonable’ standard of section 201(b).” *See Covad v. FCC*, Case No. 05-1095, United States Court of Appeals for the DC Circuit, Brief of Respondents (FCC) dated September 9, 2005, at 36. Rather, the Commission should look to the market test the FCC established in the *TRO* for determining just and reasonable rates in markets in which CLECs have competitive alternatives.

Mr. Gillan’s proposal of a TELRIC-based rate is further flawed because the Commission already has held that the 1 FR or 1 FB resale rate, with all the accompanying terms and conditions, is a just and reasonable rate for local switching. Specifically, the Commissioner Motion in this docket, which the Commission unanimously approved, held as follows:

The Commission has decided to set rates based on the just and reasonable standard in Section 271. Those will be the rates to which CLECs transition. For local switching, the Commission states that BellSouth shall be able to charge CLECs the resale tariff rate beginning March 11, 2006.

Commissioner Motion, at 4. The Commission thus has held not only that resale rates are just and reasonable, but that such rates are the just and reasonable rates for section 271 elements.

⁷ Despite the fact that he now believes his sworn affidavit at the FCC “suffer[s] from an infirmity,” Mr. Gillan did not amend it or withdraw it from the FCC’s consideration. *Transcript*, at 243.

Mr. Gillan's methodology also is contradicted by the margins of his own clients. Mr. Gillan testified that 20% over cost was what he believed to constitute just and reasonable rates. *Transcript*, at 244. His own client Momentum, however, has margins for its business products MomentumBiz 60 and MomentumBiz 600 of 84% and 149%, respectively.⁸ *BellSouth Hearing Exhibit 5*. While Mr. Gillan was strident in his opposition to Exhibit 5, his two criticisms of the numbers identified as Momentum's margins are without merit. Specifically, he criticized the numbers because they didn't include DUF rates and they didn't, according to him, reflect Momentum's costs. Even assuming those are true statements (which seems unlikely), if one assumes that the margin on MomentumBiz 60 is only 14% (i.e. that the other 70% is cost)⁹, that leaves the margin of MomentumBiz 600 at 79% margin -- well above the 20% Mr. Gillan advocates.

BellSouth does not make this point to criticize Momentum -- rather, BellSouth makes this point to highlight the arbitrary nature of Mr. Gillan's analysis. By his own admission, his analysis was driven by a desire simply to thwart an appeal -- not based on any independently credible analysis.

... Obviously we all know BellSouth is going to appeal this and BellSouth is going to use every argument they can and one of the arguments they're going to try and say is that somehow this is recreating TELRIC based access. And so I wanted to make absolutely clear that the prices we are paying are above TELRIC levels. No I don't think their argument has merit, but I also want to make sure that the Commission is in the strongest legal position possible.

Transcript, at 189.

⁸ The only difference between the two products is the number of long-distance minutes each package includes. *BellSouth Hearing Exhibit 4*.

⁹ This number is for illustrative purposes only. The same analysis would be true if Momentum's costs for MomentumBiz 60 left its margin at 4% -- MomentumBiz 600 would then have a margin of 69%, still well above Mr. Gillan's 20% recommendation.

Finally, the Commission should not adopt Mr. Gillan's proposal and thereby disadvantage the myriad of CLECs who have signed commercial agreements in favor of three CompSouth members with an approximate total of less than 5% of the UNE-Ps in Georgia. While Mr. Gillan claimed on the first day of the hearing that setting an arbitrarily low rate would not harm CLECs that have signed agreements because some "have signed agreements that permit them, if there's a 271 rate, to shift," *Transcript*, at 194, he admitted on Tuesday that he had not actually reviewed the agreements of his 8 clients with commercial agreements. *Transcript*, at 256. Thus, he is in no position to opine on the effect of granting three CLECs a rate to which those CLECs providing the vast majority of former UNE-Ps in Georgia would not be entitled.

II. THE COMMISSION SHOULD CONFIRM BELLSOUTH'S TARIFFED OFFERINGS FOR HIGH-CAPACITY LOOPS AND TRANSFER AS JUST AND REASONABLE.

In addressing high capacity loops and transport, this Commission should follow the FCC's directive in paragraph 664 of the *TRO*. In relevant part, BellSouth can satisfy the just and reasonable pricing standard contained in Sections 201 and 202 of the Act "by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers similarly situated purchasing carriers under its interstate access tariff." Indeed, CompSouth agrees that the FCC identified tariffed offerings as a "possible way to analyze the rates." *Transcript*, at 229-230. BellSouth satisfies its section 271 high capacity loop and transport obligations through the use of its tariffed offerings, all of which have been admitted into the evidentiary record in this proceeding. Taylor Direct Testimony, at 28; and *Transcript*, at 5 (Commission granted BellSouth's January 24, 2006 Motion for Official Notice, which included the tariffed offerings containing the rates, terms, and conditions for the high-capacity loops and transport services offered by BellSouth).

In encouraging this Commission to discard BellSouth's tariffed offerings, CompSouth's witness erroneously claims the FCC makes a distinction between interstate special access services and Section 271 obligations. Gillan Direct Testimony, at 43-44. This claim cannot withstand scrutiny. The FCC made clear in addressing the transition away from de-listed Section 251 UNEs that competing carriers could transition to "self-provided facilities, alternative facilities offered by other carriers, *or special access services offered by the incumbent LEC.*" *TRRO*, at ¶ 142 (DS1 and DS3 transport) *and* 195 (high-capacity loops) (emphasis added). Mr. Gillan explicitly acknowledged that special access services were included within the options available to CLECs. *Transcript*, at 234. The FCC never listed a state commission Section 271 imposed rate as a viable transition option for CLECs; instead, the options available are limited to self-provided facilities, other wholesale offerings, or access services. The fact is, CLECs have choices.

Equally without merit is CompSouth's reliance upon the FCC's *Qwest Forbearance Order*.¹⁰ In that order, although Qwest did not meet the thresholds necessary to obtain relief from Section 251(c)(3) unbundling obligations for high capacity loops and dedicated transport established in the *TRRO* the FCC nonetheless granted such relief in portions of Nebraska and Iowa. In granting Qwest relief from Section 251(c)(3) unbundling the FCC acknowledged Qwest provided evidence that it offered carriers DS1 and DS3 special access and interstate special access tariffed offerings which "must be priced at just, reasonable and nondiscriminatory rates." *Qwest Forbearance Order*, at ¶ 68. Indeed, paragraph 80 of that decision, upon which Mr. Gillan so heavily relies, does not demonstrate that the FCC has modified paragraph 664 of the *TRO*. Rather, paragraph 80 stands for the unremarkable proposition that a carrier could elect to provide high capacity loops and transport services via a commercial offering separate and

¹⁰ *Memorandum Opinion and Order*, WC Docket No. 04-223 (Dec. 2, 2005).

apart from tariffed offerings, and *not* that a carrier *is required* to do so. BellSouth's use of tariffed offerings to satisfy its Section 271 obligations, therefore, is entirely consistent with the *Qwest Forbearance Order* notwithstanding Mr. Gillan's attempt to paint it otherwise.

The Commission has taken official notice of the applicable rates, terms, and conditions that BellSouth offers high capacity loops and transport to CLECs in Georgia. See *Transcript*, at 5 and *BellSouth's* January 24, 2006 Motion for Official Notice. Because a CLEC can purchase high capacity services from BellSouth's interstate or intrastate tariffs (depending on the jurisdiction of the traffic), BellSouth included all applicable tariffs in its motion. Consequently, a CLEC can choose (subject to the terms and conditions within specific tariffs), to purchase a local channel (DS1 loop) from BellSouth's Georgia Access Tariff, Section E7.5.6, and pay \$130 per month for such a loop as opposed to such a loop from BellSouth's FCC Access Tariff, at the rate of \$168 per month in zone 1. By subscribing to one of BellSouth's Optional Payment Plans (service level and/or term plans), CLECs can receive the same local channel for a 13% to 40% discount off the month-to-month rates, respectively. Similarly, a CLEC could purchase transport from BellSouth's FCC tariff and pay \$75 per month, plus \$16 per mile for DS1 interoffice transport in zone 1, as opposed to higher rates from the Georgia Access Tariff. Again, CLECs can receive significant discounts by subscribing to BellSouth's Optional Payment Plans. The point is that CLECs can purchase high-capacity loops and transport services at just and reasonable rates via any number of tariffed alternatives, and there is no reason for this Commission to disrupt that process.

The Commission should ignore Mr. Gillan's loop and transport rate proposals. As with switching, his view is clouded by his personal opinions about what the FCC should have decided as opposed to what the FCC actually decided. For example, in his summary, Mr. Gillan claimed

that “special access just isn’t good enough,” *Transcript*, at 178, a statement that directly contradicts the FCC’s holding in Paragraph 664 of the *TRO*. He later testified that his “testimony goes into an extensive discussion as to why [paragraph 664] should be rejected” after admitting that the use of interstate access tariffs “is a way the FCC identified” to assess whether rates are just and reasonable. *Transcript*, at 229-230.

Finally, while Mr. Gillan flatly denied that the FCC looked at competitive alternatives to loops and transport on a wire center basis, *Transcript*, at 236-237, he is again incorrect. The FCC specifically examined whether CLECs were impaired without access to unbundled network elements of high capacity loops and transport and devised a test by which such alternatives could be assessed on a wire center basis. The FCC’s test was designed to designate those wire centers in which alternatives to BellSouth’s tariffed offerings exist or could exist. It is these alternatives that create the market that will ensure BellSouth’s section 271 rates (in this case its tariffed offers) are just and reasonable. This Commission cannot relitigate the FCC’s conclusions on this matter.

III. THIS COMMISSION SHOULD ENDORSE BELL SOUTH’S LINE-SHARING RATES AS JUST AND REASONABLE.

This Commission should follow the FCC’s guidance in the *TRO* in addressing line-sharing rates.¹¹ In relevant part, when the FCC de-listed line sharing as a Section 251 UNE, it exercised its authority under Section 201(b) of the Act to adopt transitional line sharing rates. *TRO*, ¶ 267. Section 201(b) authorizes the FCC to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions” of the Act and requires that “charges, practices, and regulations ... shall be just and reasonable.” Consequently, the

¹¹ BellSouth refers interchangeably to line sharing arrangements or to “HFPL.” HFPL refers to the high frequency portion of the copper loop that CLECs use to provide xDSL service to CLECs’ end user customers.

transitional line sharing rates established by the FCC are just and reasonable and provide the appropriate guidance for this Commission concerning any line-sharing rates in Georgia.¹²

The FCC's transitional line sharing rates and plan are as follows. Line sharing arrangements placed in service from October 2, 2003 through October 2, 2004 are subject to three-year transitional rates. *TRO*, at ¶ 265. Rates increase during year 1 (October 2, 2003 through October 2, 2004) to 25% of the state-approved recurring rate for a stand-alone copper loop. *TRO*, at ¶ 265 and 47 C.F.R. § 51.319(a)(B)(1). During year 2, October 2, 2004 to October 2, 2005, rates increase to 50% of the state-approved recurring rate for a stand-alone copper loop. *TRO*, at ¶ 265 and 47 C.F.R. § 51.319(a)(B)(2). During year 3, October 2, 2005 to October 2, 2006, the recurring rates are 75% of the state-approved recurring rate for a stand-alone copper loop. *TRO*, at ¶ 265 and 47 C.F.R. § 51.319(a)(B)(3). Beginning October 2, 2006, the FCC made clear that "the recurring charge for the HFPL increases to 100% of the recurring charge for a stand-alone loop." *TRO*, at ¶ 265 n. 788. These are just and reasonable rates according to the FCC. *TRO*, at ¶ 267 and 47 U.S.C. § 201(b).

In Georgia, the application of the FCC's transitional rates means that the current recurring line sharing rates would be \$8.27 because this is year three of the three-year transition period (.75 x \$11.02). *Transcript*, at 110, 112. Beginning October 2, 2006, the FCC approved rate for line sharing is the full loop rate. *TRO*, at ¶ 265, n. 788, 267. The full loop rate for an unbundled copper loop in zone 1 in Georgia is \$11.02. *Transcript*, at 110, 112. The FCC endorsed this rate as just and reasonable.

Given the FCC's guidance, the recurring line sharing rates that BellSouth has proposed are eminently just and reasonable. BellSouth proposed a recurring rate of \$9.75, which is less

¹² As BellSouth continues to reiterate, BellSouth disagrees that line sharing is a Section 271 obligation and any rates proposals made herein should not be construed as a waiver of BellSouth's position. *See n. 2 infra*.

than the full loop rate for an unbundled copper loop in Georgia, yet above the year three transitional rate for line sharing under the federal rules. *Transcript*, at 110. In addition, this Commission must also make clear that the line sharing rate it adopts applies retroactively to all line sharing arrangements placed in service in Georgia from October 2, 2004. Because the two CLECs in Georgia with line sharing arrangements never amended their Section 251 interconnection agreements, these carriers have had the ability to obtain new line sharing customers at rates that significantly underpay BellSouth for the services it provides. *Transcript*, at 108. Indeed, when this Commission moved consideration of line sharing from Docket No. 19144-U to this docket, it expressly contemplated the need for a true-up. *See* October 19, 2004 *Order to Consider Line Sharing in Generic Docket*, p. 3. BellSouth should be made whole for having to continue to provide access to the HFPL even after line sharing was de-listed as a Section 251 UNE.

The Commission should reject the line-sharing rates proposed by DIECA Communications, Inc., d/b/a Covad Communications Company (“Covad”).¹³ Covad concedes that has agreed to pay other carriers rates higher than the rates it proposed in Georgia, and that a weighted average of such rates would be “reasonable.” *Transcript*, at 142, 143. Nonetheless, Covad elected not to use this “reasonable” approach, opting instead to propose a recurring rate of only \$3.28.¹⁴ Covad also acknowledged that, under the terms of the FCC’s transitional plan, the current recurring rate for line sharing in Georgia is \$8.27. *Transcript*, at 145. More

¹³ Any reliance Covad may place on expense figures from BellSouth’s discovery would be unavailing. *See Transcript*, at 119 (expense data contained in the discovery does not represent actual cost figures).

¹⁴ Covad’s witness described his rate proposal as \$5 (*Transcript*, at 137). Covad’s proposal actually consists of a recurring rate for access to the HFPL of \$3.28 and a splitter cost of \$1.22, which amount totals \$4.50. However, Covad purchases splitters with 96 ports and likely has ample splitter capacity. Thus, the Commission should properly compare Covad’s \$3.28 recurring rate proposal against BellSouth’s \$9.75 rate, which falls within the year three transitional rate and the full loop cost, both of which the FCC expressly found to be just and reasonable.

— fundamentally, however, Covad publicly advertises residential DSL service at a recurring rate of \$39.95, and reports revenue for broadband lines of \$54.00 per month. *Transcript*, at 144. Covad can clearly afford to pay the rates that BellSouth has proposed and has no legitimate basis to seek higher margins at BellSouth's expense.

Concerning non-recurring line sharing rates, Covad's proposals fail because they are based upon TELRIC cost studies that have no legitimate application to the just and reasonable rate standard of Sections 201 and 202. *TRO*, at ¶¶ 651, 656. Moreover, Covad's proposals are based upon an assortment of cost studies from some, but not all, of BellSouth's states. *Transcript*, at 142. This fact alone renders the rates unsound; and while BellSouth disagrees that the Commission should set any rate, the Commission should approve the nonrecurring rates contained in BellSouth's Hearing Exhibit 2 as rates consistent with a market environment. Moreover, Covad's loop modification rates appear to conflict with this Commission's ruling that BellSouth's line conditioning obligation is limited to the conditioning it provides to its own customers (*Commissioner Motion for Resolution of the Remaining Issues*, pp. 7, 49); in light of that ruling, BellSouth's loop modification rates must also be adopted.

CONCLUSION

To the extent the Commission unlawfully addresses rates in this proceeding, BellSouth respectfully requests that this Commission affirm (1) the switching rates contained in its commercial offerings; (2) the tariffed high-capacity loop and transport rates contained in BellSouth's interstate and intrastate tariffs; and (3) the recurring and non-recurring line-sharing rates contained in BellSouth's Hearing Exhibit 2 as just and reasonable rates for those services in Georgia.

Respectfully submitted, this 28th day of February 2006.

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CERTIFICATE OF SERVICE

Docket No. 19341-U

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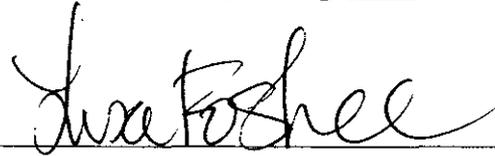
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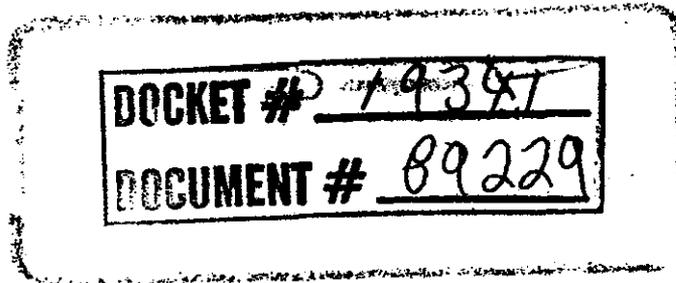
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Docket No. 19341-U

In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunications, Inc's. Obligations to Provide Unbundled Network Elements

ORDER INITIATING HEARINGS TO SET A JUST AND REASONABLE RATE UNDER SECTION 271

I. Background

The Georgia Public Service Commission ("Commission") initiated this docket on August 24, 2004. In its June 30, 2005 Procedural and Scheduling Order, the Commission directed the parties to submit a Joint Issues List. The Commission approved the Joint Issues List submitted by BellSouth Telecommunications, Inc. ("BellSouth") and Competitive Carriers of the South ("CompSouth")¹ along with the issues added by Digital Agent, LLC. (Order on Motion to Move Issues into Generic Proceeding, p. 2).

While the docket includes twenty-five (25) issues, the most significant issue, and one that impacts the resolution of several other issues in the docket, is set forth as part of Issue 8(a). Issue 8(a) states as follows:

Does the Commission have the *authority* to require BellSouth to include in its interconnection agreements entered into pursuant to Section 252, network elements under either state law, or pursuant to Section 271 or any other federal law other than Section 251?

¹ CompSouth is an association of Competitive Local Exchange Carriers.

At its January 17, 2006 Administrative Session, the Commission limited its consideration to only this issue. At a later time, the Commission will address the remaining issues.

II. Positions of the Parties

A. BellSouth

The foundation for BellSouth's position is that its obligations with respect to state commission approved interconnection agreements are tied exclusively to Section 251. It is from this premise that BellSouth argues that a state commission's authority does not extend to requiring an incumbent local exchange carrier ("ILEC") to comply with any terms and conditions based in any other section of federal law. BellSouth concludes that to the extent it has ongoing unbundling obligations under Section 271, then those obligations are to be enforced by the Federal Communications Commission ("FCC").

CompSouth's argument is based on a theory that Sections 251 and 271 are independent but interrelated. The first step in their analysis is pointing out that the Triennial Review Order established that the duties of an ILEC under Section 271 are independent from the obligations of a Bell operating company ("BOC") under Section 251. The import of this conclusion is that the omission of an obligation under Section 251 would not mean that the obligation ceases to exist under Section 271. The next step in the analysis focuses on the references to Section 252 interconnection agreements in Section 271. In short, CompSouth argues that because Section 252 interconnection agreements must include items from the Section 271 competitive checklist, state commissions have the authority to require ILECs to include in Section 252 interconnection agreements unbundling requirements under Section 271.

III. FINDINGS AND CONCLUSIONS

The Commission has examined the arguments of both parties and recognizes that the question of its jurisdiction on this issue has not been yet been squarely addressed by a controlling authority. The Commission will proceed with its analysis in an effort to act properly under the law and to protect the consumers of the State of Georgia. Incumbent local exchange carriers have the obligation to negotiate in good faith interconnection agreements with requesting telecommunications carriers. 47 U.S.C. § 251(c)(1). Under Section 252, these interconnection agreements may be voluntarily negotiated. 47 U.S.C. § 252(a)(1). State commissions may be asked to mediate disagreements that arise between the parties during negotiations. 47 U.S.C. § 252(a)(2). If the parties are unable to reach agreement through negotiation, then a party to the negotiation may petition the state commission for arbitration. In such an instance, the state commission resolves the issues set forth in the petition for arbitration and the response thereto. 47 U.S.C. § 252(b)(4)(C). Regardless of whether the interconnection agreement is reached through voluntary negotiation or compulsory arbitration, it must be approved by the state commission prior to becoming effective. 47 U.S.C. § 252(e)(1). A state commission is also authorized to reject an interconnection agreement. *Id.* Section 251(f) provides for the filing by a bell operating company of a Statement of Generally Available Terms ("SGAT"). In order to be approved by a state commission, such a filing must be found to comply with Section 251 and Section 252(d). 47 U.S.C. § 252(f)(2).

Section 271 compliance is necessary for a BOC to establish or maintain the right to provide interLATA long distance services. In order to comply with the requirements of Section 271, a BOC must provide access and interconnection pursuant to at least one Section 252 interconnection agreement or be offering access and interconnection pursuant to an SGAT. 47 U.S.C. § 271(c)(2)(A)(i). In addition, Section 271 requires that the BOC provide access to unbundled network elements (“UNEs”) on the competitive checklist set forth within the statute at just and reasonable rates. 47 U.S.C. § 271(c)(2)(B)(i). The Section 271 competitive checklist items (i) and (ii) make explicit reference to compliance with provisions in Sections 251 and 252. Therefore, the Section 252 agreements are the vehicles through which a BOC demonstrates compliance with Section 271. As such, it is logical to conclude that obligations under Section 271 must be included in a Section 252 interconnection agreement. This conclusion is consistent with the holding of the Minnesota District Court in *Qwest Corporation v. Minnesota Public Utilities Commission*, 2004 U.S. Dist. LEXIS 16963 (D. Minn. 2004). The District Court found that any agreement containing a checklist term must be filed as an ICA under the Act. *Qwest Corporation*. As stated above, state commissions have authority to approve or reject these interconnection agreements.

There are elements that a BOC must provide under Section 271 that the FCC has found no longer meet the Section 251 impairment standard. While a BOC is no longer obligated to offer such an element at TELRIC² prices, the element still must be priced at the just and reasonable standard set forth in Section 271. (*Triennial Review Order*, ¶ 663). In discussing the just and reasonable standard the FCC states as follows:

Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied *under most federal and state statutes*, including (for interstate services) the Communications Act.

Id. (emphasis added). Far from claiming the exclusive right to set the rates pursuant to this standard, the FCC expressly recognizes the application of such a standard at both the state and the federal level.

BellSouth’s preemption argument overstates what the Commission is being asked to do in this proceeding. By setting rates, the Commission is not enforcing Section 271. The FCC’s enforcement authority under Section 271 is clear. Section 271(d)(6) sets forth the actions that the FCC may take if it determines that a BOC has ceased to meet any of the conditions required for approval. The actions that the FCC may take if it finds such non-compliance include the issuance of an order obligating the BOC to correct the deficiency, the imposition of a penalty or the suspension or revocation of such approval. 47 U.S.C. 271(d)(6)(A)(i), (ii) and (iii). First, the Commission is not making a finding that BellSouth has failed to meet any of the conditions for Section 271 approval. Rather, it is setting just and reasonable rates for de-listed unbundled network elements. Second, the Commission is not taking any of the actions included in Section 271(d)(6). The setting of just and reasonable rates does not assume any of the responsibilities that the Federal Act reserves for the FCC under Section 271(d)(6).

² “TELRIC” is an acronym for total element long-run incremental cost.

Recently, the United States District Court for the District of Maine considered the question of whether the FCC has exclusive jurisdiction to establish, interpret, price, and enforce network access obligations under Section 271. The District Court concluded that the Federal Act did not intend to preempt state regulation of Section 271 obligations. *Verizon New England Inc. d/b/a Verizon Maine v. Maine Public Utilities Commission*, 2005 U.S. Dist. LEXIS 30288 at 16. The Court reasons that while it is the FCC that approves Section 271 applications, there is no provision in the federal act that grants the FCC exclusive ratemaking authority for Section 271 UNEs. *Id.* The Court further reasons that Section 271 only impliedly contemplates the making of rates, and it concludes that “the authority of state commissions over rate-making and its applicable standards is not pre-empted by the express or implied content of Section 271.” *Id.* at 17. Finally, the Court notes that Verizon did not cite to any FCC order that interpreted Section 271 to provide an exclusive grant of authority for rate-making under Section 271. *Id.*

The Commission finds similarly that BellSouth has not cited to any federal court decision directly on point. BellSouth cites to a decision of United States District Court for the Southern District of Mississippi³ for the proposition that the FCC enforces Section 271. (BellSouth Brief, p. 20). Similarly, BellSouth cites to a decision for the United States District Court for the Eastern District of Kentucky⁴ that also focuses on the issue of FCC enforcement authority for Section 271. *Id.* As discussed above, the question of enforcement of the statute is a separate issue from the question of setting just and reasonable rates.

Based on the foregoing, the Commission concludes that it is reasonable to assert jurisdiction to set just and reasonable rates for de-listed UNEs pursuant to Section 271 of the Federal Telecom Act. Pursuant to this jurisdiction, the Commission will proceed with an expedited hearing schedule as detailed below for the purpose of setting just and reasonable rates for de-listed UNEs pursuant to Section 271. The Commission will continue to monitor proceedings to determine whether any case law or FCC decision sheds additional light on the jurisdictional question under Section 271. In the absence of any additional guidance, the Commission will file an emergency petition with the FCC seeking that it clarify that state commissions have the authority to set just and reasonable rates for de-listed UNEs. Along with the petition, the Commission will certify the record from the evidentiary proceeding to be held in February in this docket. In the event that the FCC concludes that this Commission does not have jurisdiction to set Section 271 rates, then the expedited petition will ask the FCC to set rates for the de-listed UNEs based on the record that this Commission will have compiled and certified in the petition.

IV. HEARING DATES AND PROCEDURES

February 10, 2006

BellSouth and other interested parties may file cost studies and Direct Testimony regarding issues in this docket. Accompanied therewith shall be an electronic version of the

³ *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n. et al.*, Civil Action No. 3:05 CV173LN, *Memorandum Opinion and Order* (S.D. Miss. Apr. 13, 2005), 2005 U.S. Dist. LEXIS 8498.

⁴ *BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.*, Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order*, (E.D. Ky. Apr. 22, 2005).

party's testimony, which shall be made on a 3.5" diskette using Microsoft Word® format for text documents and Excel® for spread sheets or other comparable electronic format. Under no circumstances should an electronic filing consist of more than four (4) files, including attachments. Cost studies may be filed on CD Rom. This filing shall be made at the office of the Executive Secretary, Georgia Public Service Commission, 244 Washington Street, S.W., Atlanta, Georgia 30334-5701. If a party chooses to use the BSTLM cost model to develop proposed rates, that party shall include in its testimony detailed descriptions of each and every change made within the model.

February 20-23, 2006

At 10:00 a.m., the Commission will commence hearings for Docket No. 19341-U beginning with the testimony of any public witnesses pursuant to O.C.G.A. § 46-2-59(g), and the hearing of any appropriate motions. After these preliminary matters, the Commission will conduct hearings on the testimony filed by BellSouth and the intervenors. Hearings will commence at 10:00 a.m. each day for the duration of the hearings, except that on February 21, hearings will commence at 1:30 p.m. The hearings will take place in the Commission Hearing Room on the First Floor of 244 Washington Street, S.W., Atlanta, Georgia 30334-5701.

February 28, 2006

All parties are to file an original and fifteen (15) copies of closing briefs, orders or recommendations. Accompanied therewith shall be an electronic version of a party's filing, which shall be made on a 3½ inch diskette using Microsoft Word® format for text documents and Excel® for spread sheets.

Discovery

The Commission finds and concludes that it is appropriate to permit the parties to conduct discovery in this proceeding, subject to the following procedures. The parties shall have the right to issue written discovery and conduct depositions. Written discovery, for parties other than the Staff, shall be limited to 25 requests. Objections to discovery shall be filed within ten (10) days after receipt of discovery. Responses to discovery shall be provided no later than fourteen (14) days after receipt of the request. Depositions shall be limited to one per witness. Parties should endeavor to keep their discovery requests focused on the issues in this docket, and to use written data requests in the first instance to obtain the data, information, or admissions they may seek. Discovery requests shall be served electronically, and all discovery requests must be served prior to January 24.

Copies of Pleadings, Filings and Correspondence

Parties shall file the original plus 15 copies, as well as an electronic version (Word format for text documents), of all documents with the Commission's Executive Secretary no later than 4:00 p.m. on the date due. However, only two copies need to be filed for discovery responses. In addition, copies of all pleadings, filing, correspondence, and any other documents related to, and submitted in the course of this docketed matter (except for discovery requests and responses) shall be served upon the other parties as well as upon the following individuals in their capacities as indicated below:

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Record

The parties shall be responsible for bringing before the Commission all evidence that they wish to have considered in this proceeding. The Commission may also require the parties to provide any additional information that the Commission considers useful and necessary in order to reach a decision. Any party filing documents or presenting evidence that is considered by the source of the information to be a "trade secret" under Georgia law, O.C.G.A. § 10-1-761(4), must comply with the rules of the Commission governing such information. *See* GPSC Rule 515-3-1-.11 Trade Secrets (containing rules for asserting trade secret status, filing both under seal and with public disclosure versions, use of protective agreements, petitioning for access, and procedures for challenging trade secret designations). Responses to discovery will not be considered part of the record unless formally introduced and admitted as exhibits.