

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE PETITION BY AMERICAN COMMUNICATIONS)
SERVICES, INC., AND ITS LOCAL EXCHANGE)
OPERATING SUBSIDIARIES, FOR ARBITRATION) CASE NO. 96-467
WITH GTE SOUTH, INC. AND CONTEL OF)
KENTUCKY PURSUANT TO THE TELECOM-)
MUNICATIONS ACT OF 1996)

O R D E R

The Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 ("the Act") was enacted to open all telecommunications markets to competition. See Conference Report, H.R. Rep. No. 458, 104th Cong., 2d Sess., at 113 (1996). Section 251 of the Act requires incumbent local exchange carriers ("LECs") to negotiate in good faith with new entrants to the local exchange market. Section 252 permits the parties to those negotiations to petition a state commission to arbitrate unresolved issues. Subsection (b)(4)(C) states that the state commission "shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement." Subsection (b)(4)(A) requires the Commission to "limit its consideration . . . to the issues set forth in the petition and in the response." Subsection (b)(4)(C) requires the Commission to resolve the issues presented not later than nine months after the date on which the incumbent local exchange carrier received the request for negotiations.

On April 17, 1996, American Communications Services, Inc. ("ACSI") submitted its request for negotiations to GTE South Incorporated ("GTE"). On September 26, 1996, ACSI submitted its petition for arbitration to this Commission. Pursuant to the Act, these proceedings are to be concluded by January 17, 1997.

ACSI submitted seven broad issues for arbitration. GTE's Response to the petition, filed October 21, 1996, responds to those issues. Those seven are addressed in the body of this Order. Decisions regarding the pricing terms in dispute are included in Appendix 1.

Because the emphasis of the Act is on free negotiations between the parties, GTE and ACSI may negotiate modifications to decisions reached herein and submit them to this Commission for approval.

I. PRICING FOR CERTAIN UNBUNDLED ELEMENTS

GTE argues, as it has in other arbitration proceedings before this Commission, that it must be made "whole" and that its market-determined efficient components pricing rule ("M-ECPR") is an appropriate basis for price. However, as we have previously found, M-ECPR would make GTE indifferent to competition by ensuring that it received the same compensation whether it sold to an end-user or to a reseller. If GTE's "make-whole" philosophy were adopted, GTE would have no incentive to make positive efforts to market its services to retail customers, and the purpose of competition would be defeated. It is unnecessary to reiterate what the Commission has stated in the final Order in Case No. 96-440.¹ Prices based on the principles stated in that Order are included in Appendix 1.

¹ Case No. 96-440, Petition by MCI for Arbitration of Certain Terms and Conditions of a Proposed Agreement with GTE South Incorporated Concerning Interconnection and Resale Under The Telecommunications Act of 1996, Order dated December 23, 1996, at 13-23.

Because the studies submitted were insufficient to determine prices for nonrecurring loop charges, GTE shall submit, within 45 days of the date of this Order, appropriate cost studies as noted in Appendix 1 and as discussed in the final Order in Case No. 96-440.

II. THE "MOST FAVORED NATION" CLAUSE

GTE strongly opposes the inclusion of such a clause, stating that it defeats the Act's encouragement of private negotiations. GTE also claims that ACSI's position is based upon FCC Rule 51.809,² which is among those portions of the FCC Order that were stayed by the United States Court of Appeals for the Eighth Circuit, and that such clauses are not part of a "normal sound business contract."³ ACSI contends, *inter alia*, that the requested "most favored nation" clause would protect ACSI against discriminatory terms and conditions as mandated by the Act.⁴ Moreover, ACSI disputes GTE's contention that a clause of this nature would not be included in a sound business contract.⁵

GTE is correct that the FCC's "pick and choose" rule has been stayed by the Eighth Circuit Court of Appeals. The stay does not, however, prevent this Commission from finding on its own that principles embodied in the FCC's pricing rules are appropriate for, and should be implemented in, Kentucky. Moreover, the Act itself was not stayed by the court. The Act states, in pertinent part:

² Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, CC Docket 96-98 (August 8, 1996) ("FCC Order"), at Appendix B.

³ Prefiled Testimony of Meade C. Seaman on Behalf of GTE, at 10-11.

⁴ Rebuttal Testimony of Richard Robertson on Behalf of ACSI, at 2.

⁵ *Id.* at 4.

A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

Telecommunications Act of 1996, Section 252(i).

GTE argues that it is willing, pursuant to the Act, to offer any competing local exchange carrier "the same entire contract" it has with another competing local exchange carrier.⁶ But the Act refers to an interconnection, service, or network element in the singular. The Act does not state, nor does it imply, that a requesting carrier must accept an "entire contract" of another carrier to receive a specific service, interconnection, or element on terms given to that carrier.

Therefore, based on the Act and without reference to the FCC's "pick and choose" rule, the Commission finds that Congress intended that discriminatory terms and conditions given by ILECs to competing carriers be avoided through such means as ACSI's proposed "most favored nation" clause. Accordingly, GTE's position is rejected, and the parties are instructed to incorporate into their agreement the "most favored nation" clause proposed by ACSI.

III. PRICING FOR INTERIM NUMBER PORTABILITY

GTE claims it should recover its total costs for providing interim number portability, including what it terms "opportunity costs," e.g., the "lost opportunity" of receiving revenues from the customer who switches carriers.⁷ However, each LEC should bear its own

⁶ GTE Response at 15.

⁷ GTE Response at 17.

costs for providing remote call forwarding as an interim number portability option. The Act, at Section 251(e)(2), designates the FCC as the authority which shall determine number portability costs on a competitively neutral basis. According to the FCC, the cost of number portability should be borne by each carrier so as to avoid significant effect on any carrier's ability to compete with other carriers for customers.⁸ The FCC concluded that pricing number portability on a cost-causative basis could defeat the purpose for which it was mandated.⁹ Moreover, requiring each LEC to bear its own costs should provide an incentive to the ILECs to implement long-term number portability.

IV. RECIPROCAL COMPENSATION ARRANGEMENTS FOR MUTUAL EXCHANGE OF LOCAL TRAFFIC

ACSI suggests that bill and keep should be employed until the traffic is sufficiently out of balance to make cash compensation economical. According to ACSI, an out of balance situation occurs when (1) one party's terminating traffic volume exceeds that of the other party by over 2 million minutes per month during the first contract year; or (2) during the second contract year, traffic is out of balance by more than 10 percent and the amount of compensation to be paid exceeds \$10,000 per month. Bill and keep, ACSI contends, is preferable because it minimizes administrative burdens and transaction costs.

GTE agrees to bill and keep. It also states that traffic should be considered balanced as long as neither party carries more than 60 percent of the total traffic.

⁸ See, generally, Telephone Number Portability, First Report and Order and Further Notice of Proposed Rule-Making, CC Docket No. 95-116 (July 27, 1996).

⁹ Id.

However, GTE contends that the compensation cut-off figure should be \$2,000 per month, rather than \$10,000.

Section 252(d)(2) of the Act requires state commissions to consider terms and conditions for reciprocal compensation to be just and reasonable (1) if they provide for mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facility of calls that originate on the network facilities of the other carrier, and (2) if they determine costs on the basis of a reasonable approximation of the additional cost of terminating calls. The Commission is aware of the start up cost of reciprocal compensation arrangements. It is also aware that the market will be best served by swift development of recording and billing arrangements to provide reciprocal compensation among local carriers. However, in order to encourage immediate development of meaningful local competition, the Commission will permit bill and keep for one year on terms stated in Appendix 1. ACSI and GTE shall, therefore, submit within one year of this Order a contract requiring total element long run incremental cost ("TELRIC") based pricing for mutual compensation unless the parties agree otherwise.

**V. COMPENSATION FOR ACSI'S CROSS-CONNECTION
WITH OTHER ENTITIES COLLOCATED AT THE SAME
INTERCONNECTION POINT AT GTE'S CENTRAL OFFICES**

ACSI states it should be permitted to cross-connect to other entities collocated at GTE's central offices by making arrangements directly with the other entity without GTE assistance and without payment to GTE. If, on the other hand, it requires GTE's assistance, it proposes to compensate GTE on a time and materials basis for the personnel and equipment used to make the connection. It states that GTE is not entitled to a transiting or traffic sensitive charge for permitting such cross-connection. GTE states it will

provide the requested connection through purchase of an unbundled element. GTE claims that the FCC's First Report and Order, at Paragraph 595, which requires incumbent local exchange carriers ("ILECs") to permit cross-connection as ACSI requests is a "taking" of GTE's property.

The Commission does not agree that a "taking" occurs in such a cross-connection if GTE is justly compensated. Property which has been dedicated to a public purpose may be regulated and even physically occupied if the regulation involves the dedicated public purpose. Munn v. Illinois, 94 U.S. 113, 126 (1876). Moreover, the portion of the FCC Order that requires GTE to permit cross-connection has not been stayed, and its provisions are binding. Accordingly, cross connection between collocated entities will be required. GTE must be compensated for any material and labor expended if its assistance is required. In addition, GTE must be paid a reasonable amount for the use of its premises by ACSI. The price for ACSI's physical presence on GTE property should be based on comparable prices for leased office space per square foot in the same geographic area.

VI. ACSI'S PROPOSAL TO COMBINE PURCHASED NETWORK ELEMENTS TO PROVIDE ANY SERVICE IT CHOOSES

As this Commission has previously found,¹⁰ the Act supports ACSI's proposal. The Act, at Section 251(c)(3) states unequivocally that a requesting carrier must be provided with network elements and that the requesting carriers are to be allowed to "combine such elements in order to provide such telecommunications service." ACSI, therefore, may

¹⁰ See Case No. 96-431, Petition by MCI for Arbitration of Certain Terms And Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection and Resale under the Telecommunications Act of 1996, Final Order dated December 20, 1996 and Case No.96-440, Final Order dated December 23, 1996.

combine the elements it purchases at the unbundled element rate to provide any service it chooses, and GTE may not restrict ACSI's use of the elements to do so.

VII. COLLOCATION OF ACSI'S REMOTE SWITCHING MODULES AT GTE FACILITIES

ACSI states that it must be accorded the right to collocate its remote switching modules ("RSMs") at GTE facilities pursuant to the Act, citing Section 251(c)(6) (ILECS must permit collocation of "equipment necessary for interconnection or access to unbundled network elements"). ACSI points out that the FCC Order, at paragraph 579, interprets this portion of the Act to mean equipment "used or useful" for interconnection or for access to unbundled network elements. RSMs, ACSI asserts, meet this standard, since they perform concentration and termination, as well as switching, functions. GTE argues that the FCC Order, at paragraph 581, specifically excludes switching equipment from the list of equipment for which the ILEC must permit collocation.

The Commission rejects GTE's argument. The ILEC must permit collocation of a piece of equipment used for interconnection or access to unbundled elements. Virtual collocation may be required if GTE demonstrates a lack of physical space.¹¹

IT IS THEREFORE ORDERED that:

1. The parties shall complete their agreement in accordance with the principles and limitations described herein and shall submit their final agreement for Commission review within 60 days of the date of this Order.

¹¹ Telecommunications Act of 1996, Section 251(c)(6). FCC Order, Appendix B, § 51.323.

2. Cost studies required to complete the Commission's investigation of appropriate prices as required herein shall be filed by GTE within 45 days of the date of this Order.

Done at Frankfort, Kentucky, this 17th day of January, 1997.

PUBLIC SERVICE COMMISSION

Linda K. Breatlett
Chairman

Eric J. Helton
Vice Chairman

B. J. Helton
Commissioner

ATTEST:

Don Mills
Executive Director

APPENDIX 1

AN APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE COMMISSION
 IN CASE NO. 96-467 DATED JANUARY 17, 1997

GTE - ACSI LOCAL INTERCONNECTION AND NETWORK ELEMENT PRICES

NETWORK LOCAL INTERCONNECTION/ELEMENT	COMMISSION Decision
LOCAL LOOPS	
Local Loop	
2-Wire Analog Voice Grade Loop, Per Month	\$19.65
Nonrecurring	Study Required
4-Wire Analog Voice Grade Loop, Per Month	\$27.51
Nonrecurring	Study Required
Network Interface Device	
Basic NID	\$1.86
12x NID	\$2.00
LOCAL INTERCONNECTION	
A Bill and Keep +/- 10% Traffic	Interim
B Out of Balance Terminating Traffic Average MOU	\$0.0032276
SERVICE PROVIDER NUMBER PORTABILITY	
-Service Provider Number Portability per number ported	\$3.93
-Simultaneous Call Capability - Additional	\$2.61
COLLOCATION ELEMENTS	
Nonrecurring Costs	
Physical Engineering Fee per Request	\$3,749.00
Building Modifications per Central Office	
Simple	\$15,468.00
Moderate	\$21,305.00
Complex	\$27,189.00
DC Power per 40 Amps	\$4,191.00
Cable Pull per 12 Fibers	\$1,075.00
Cage Enclosures per Cage	\$4,705.00
Monthly Recurring	
Partitioned Space per Sq. Ft.	\$2.33
DC Power per 40 Amps	\$388.26
Cable Pull per 12 Fibers	\$15.22
Monthly Recurring for EIS	
DS0 level connection	\$1.53
DS1 level connection	\$3.22
DS3 level connection	\$23.84