

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

IGLOU INTERNET SERVICES, INC.	)	
	)	
COMPLAINANT	)	
V.	)	CASE NO. 99-484
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.	)	
	)	
DEFENDANT	)	

O R D E R

On December 22, 2000, BellSouth Telecommunications, Inc. (“BellSouth”) filed a motion for reconsideration of the Commission’s November 30, 2000 Order (“the Order”). BellSouth also filed a motion for extension of time to respond to the Commission’s request for information on a retail offering. Complainant, IgLou Internet Services, Inc. (“IgLou”) responded to the motion for reconsideration on January 4, 2001, and the Commission has considered the arguments presented by each party.

BellSouth requests reconsideration and clarification of the Order and its requirements, including the directive that BellSouth file an intrastate wholesale DSL tariff. In support of its motion, BellSouth presents three separate legal arguments, which can be briefly summarized as follows: (1) BellSouth contends that its wholesale Digital Subscriber Line (“DSL”) service is interstate in nature and thus the Federal Communications Commission (“FCC”) has preempted state commission action in this area; (2) BellSouth argues that the “Filed Rate Doctrine” prohibits it from making

Kentucky-specific changes that impact its FCC tariff; and (3) BellSouth maintains that the Commission erred in finding discrimination.

BellSouth prefaced its legal arguments with a proposal that it revise its FCC wholesale tariff to offer DSL service at more competitive rates in lieu of filing a state tariff. This proposal, according to BellSouth, would render moot the jurisdictional issue and would be responsive to the Commission's other concerns addressed in the Order. BellSouth's proposal included a revision in its pricing schedule which appears to result in basic entry-level service being priced at a lower rate than its current FCC tariff, and a lower rate than would result from the Order. The proposal is silent, however, with respect to pricing at other levels of service.

The Commission concludes that BellSouth's offer to revise its FCC filing merits further consideration as set out below. Before attending to the particular aspects of BellSouth's proposal, however, we address BellSouth's legal arguments.

The Commission affirms its position as to the three legal arguments advanced by BellSouth. DSL is recognized as a fundamental piece of a broadband infrastructure with actual and potential uses that are far-ranging and are not limited to ISP-bound traffic. Many services can and will be purely intrastate in nature, for example, a "work at home" application where an end-user connects to a corporate office in a local area network. The Commission will continue to regulate such intrastate utility service over intrastate communications facilities, as well as dial-up connections and local area network ("LAN") connections from a local customer to a local Internet Service Provider ("ISP"), i.e., in the same local exchange.

The Commission acknowledges that the issue of whether calls to ISPs are local or interstate has not yet been finally determined by the FCC or by the courts. In March 2000, the D.C. Circuit of the Federal Court of Appeals vacated and remanded an FCC ruling (14 F.C.C.R. 3689 (1999)), which had determined that calls to ISPs within the caller's local calling area are not "local" so as to be subject to reciprocal compensation requirements. Bell Atlantic Telephone Companies v. FCC, 206 F.3d 1 (D.C. Cir., 2000). To date, the FCC has not reissued or clarified its ruling.

A recent 10<sup>th</sup> Circuit decision, however, fully supports the Commission's position on this issue. In Southwestern Bell Telephone Company v. Brooks Fiber Communications of Oklahoma, Inc., 2000 WL 1827576, (10<sup>th</sup> Cir. Okla., Dec. 13, 2000), the court reviewed application of the reciprocal compensation provisions of an agreement between Southwestern Bell and Brooks Fiber, a local exchange carrier, as it pertained to calls to ISPs doing business with Brooks Fiber. Southwestern Bell declared it would no longer pay reciprocal compensation for calls to ISPs served by Brooks Fiber because Southwestern Bell characterized these calls as interstate communications which the reciprocal compensation agreement would not cover. A state administrative law judge ("ALJ") ruled in favor of Southwestern Bell; Oklahoma's Corporation Commission ("OCC") reversed the ALJ's decision, calling the traffic local; and Southwestern Bell appealed to the federal district court. The district court upheld the OCC decision as consistent with federal law, but declined to rule on the merits of the issues pertaining to state contract law.

The 10th Circuit Court ruled that federal courts have jurisdiction to rule on both the federal and state aspects of the parties' agreement, and the Court affirmed the

OCC's order that calls to an ISP within the local calling area are "local traffic" and are covered by the reciprocal agreement. Id. at 5. The Court agreed with OCC that calls to ISPs are "terminating traffic" as defined in the agreement under review, and that by placing a call to an ISP the end-user originating the call in effect "establishes communications" with another end-user. Id. The Court also noted that the FCC Ruling (14 F.C.C.R. 3689 (1999)), which was vacated by the D.C. Circuit (as discussed above), contained the FCC's statements that it currently has no rule governing inter-carrier compensation; it finds no reason to interfere with state commission findings as to whether reciprocal compensation provisions of interconnection agreements apply to ISP-bound traffic, pending adoption of a rule establishing an appropriate interstate compensation mechanism; and that, historically, the FCC has directed states to treat ISP traffic as local.

In light of these appellate decisions from the D.C. Circuit and the 10<sup>th</sup> Circuit, and in view of Kentucky's interest in the growth of competition in the telecommunications market, as well as in the ease of access to information technology that is crucial in determining Kentucky's technological future, the Commission affirms its jurisdiction as set out in the Order.

The Commission cannot agree that the "Filed Rate Doctrine" would be implicated by its Order requiring BellSouth to file a Kentucky-specific DSL tariff. The Commission, after an investigation, may, upon a finding that rates are unreasonable, order new rates to be charged on a prospective basis. The Commission is not suggesting that any rates should be changed retroactively.

Additionally, the Commission affirms its determination that the practical result of BellSouth's current DSL tariff is that it creates unacceptable disparities between rates for which BellSouth's ISP qualifies and rates for which its average competitor would qualify. These disparities result in preferential service by BellSouth to itself. Despite BellSouth's stated efforts to try to minimize problems for its wholesale customers, such problems still exist and still create the disparities addressed in the Order.

While "agreeing to disagree" regarding jurisdiction and other issues noted in BellSouth's motion, the Commission is nevertheless amenable to granting a rehearing to allow BellSouth to expand its proposal for a revised tariff. Additional information is needed to determine if BellSouth's proposed changes to its federal tariff will result in a positive resolution of the issues raised in this case. The proposal does not fully describe the reduction in pricing for levels of service beyond the entry level. Moreover, the Commission desires to allow the parties to engage in constructive dialogue to attempt to resolve additional concerns expressed in IgLou's response to the motion, if the Order is to be significantly modified.

Accordingly, the Commission HEREBY ORDERS that:

1. BellSouth's motion for an extension of time to file an explanation detailing the requirements of a retail DSL tariff and the related public interest issues described in the Order is granted.
2. Within 30 days of the date of this Order, BellSouth shall file a copy of the complete revised interstate wholesale tariff it proposes to file in lieu of filing a state tariff, along with supporting cost information for all rates. The proposal shall address all levels of service which are included in the FCC tariff.

3. IgLou shall be permitted 15 days in which to respond to BellSouth's proposal.

4. An informal conference is hereby scheduled at the Commission's offices at 211 Sower Boulevard, Frankfort, Kentucky for 9:00 a.m., Eastern Standard Time, on March 7, 2001, at which time the parties may present any additional information to assist the Commission in determining whether to accept BellSouth's proposal in lieu of requiring compliance with its previous Order.

5. The parties shall communicate following IgLou's submission of its response and prior to the informal conference date to determine if an agreed proposal can be submitted for the Commission's approval. The parties shall file a status report not later than March 2, 2001, describing their efforts to reach an agreement.

6. BellSouth's obligations as to ordering paragraph 1 of the November 30, 2000 Order are temporarily suspended until further Orders of this Commission.

Done at Frankfort, Kentucky, this 11<sup>th</sup> day of January, 2001.

By the Commission

ATTEST:

  
Executive Director