

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF BELLSOUTH TELECOMMUNICATIONS, ) CASE NO.  
INC. FOR PRESUMPTIVE VALIDITY OF TARIFF ) 2002-00276  
FILINGS )

O R D E R

On July 12, 2002, BellSouth Telecommunications, Inc. ( BellSouth ) applied to this Commission, pursuant to KRS 278.512, for presumptive validity treatment of certain of its tariffs. Subsequently, the Southeastern Competitive Carriers Association ( SECCA ), AT&T Communications of the South Central States, Inc. ( AT&T ) and TCG Ohio ( TCG ) and Sprint Communications Company L.P. ( Sprint ) requested, and were granted, intervention. The parties participated in an informal conference with Commission staff on November 26, 2002. Thereafter, BellSouth filed a revised petition, modifying its original request.

BellSouth limits its proposal to the Retail category of its transition regulation plan, at A36 of its General Subscriber Services Tariff, requesting that [1] rate reductions be presumptively approved with one calendar day s notice, with no suspension period and with the proviso that reduced bundled rates be treated as a reduction ; and [2] all other proposed tariffs, except for elimination of services, be presumptively approved with 30 days notice, with suspension possible within only 15 days from the filing date.<sup>1</sup>

---

<sup>1</sup> BellSouth Revised Petition, filed January 15, 2003.

BellSouth states that reducing the time for Commission review of its tariffs would enable it to get its products to the market more quickly and efficiently, and would therefore benefit customers. It disagrees with AT&T that a 30-day delay is necessary to protect consumers or to promote competition,<sup>2</sup> and asserts that other telecommunications carriers in Kentucky should also be entitled to the presumptions and shortened review period.<sup>3</sup>

We begin our analysis with KRS 278.512, a statute that permits this Commission to exempt to the extent it deems reasonable, services or products related to telecommunications utilities or persons who provide telecommunications services or products from any or all of the provisions of this chapter, or adopt alternative requirements for establishing rates and charges for any service by a method other than that which is specified in this chapter upon a finding that clear and satisfactory evidence demonstrates that such exemption or alternative requirements are in the public interest. KRS 278.512 requires us to determine whether the exemption or alternative requirement is in the public interest based on the following factors:

- (a) The extent to which competing telecommunications services are available from competitive providers in the relevant market;
- (b) The existing ability and willingness of competitive providers to make functionally equivalent or substitute services readily available;
- (c) The number and size of competitive providers of service;

---

<sup>2</sup> Motion of BellSouth and Response to AT&T's Comments on BellSouth's Presumptive Validity Tariff, filed March 13, 2002 ( BellSouth Motion and Response ), at 4.

<sup>3</sup> BellSouth Revised Petition, at 4, fn. 1.

- (d) The overall impact of the proposed regulatory change on the continued availability of existing services at just and reasonable rates;
- (e) The existence of adequate safeguards to assure that rates for services regulated pursuant to this chapter do not subsidize exempted services;
- (f) The impact of the proposed regulatory change upon efforts to promote universal availability of basic telecommunications services at affordable rates and upon the need of telecommunications companies subject to the jurisdiction of the commission to respond to competition;
- (g) Whether the exercise of commission jurisdiction inhibits a regulated utility from competing with unregulated providers of functionally similar telecommunications services or products;
- (h) The overall impact on customers of a proposed change to streamline regulatory treatment of small or nonprofit carriers; and
- (i) Any other factors the commission may determine are in the public interest.<sup>4</sup>

The statute thus emphasizes at least three basic principles: ensuring that a reasonable level of competition exists before relaxing regulation; protecting the ability of a regulated utility to compete with unregulated providers of functionally equivalent services; and protecting consumers ability to obtain high quality services at just and reasonable rates. We must fairly balance all these factors in this case; and we conclude, as we did in our Order of August 3, 2000<sup>5</sup> denying in part a similar BellSouth petition, that conditions in Kentucky do not yet warrant granting the petition.

---

<sup>4</sup> KRS 278.512(3).

<sup>5</sup> Case No. 1999-00434, Review of BellSouth Telecommunications, Inc. s Price Regulation Plan (Order dated August 3, 2000 at 15 and 16).

KRS 278.512 exists for the purpose of enabling the Commission to alter, and gradually even eliminate, its regulation of telecommunications as competition develops, and its first mandate is that we ensure that competition has developed to the point that the public interest in adequate service and reasonable rates will be preserved despite gradual, case-by-case deregulation of telecommunications services and providers. That is as it should be. Our traditional just and reasonable analysis under KRS 278.180 and KRS 278.190, from which BellSouth seeks exemption here, would be unnecessary in a market where a business entity must price its services to obtain market share and, at the same time, obtain sufficient revenue without regulatory subsidies and support. There is a point at which traditional regulation could actively harm an incumbent local exchange carrier that has lost market dominance. We have relaxed restrictions upon BellSouth gradually, as competitive alternatives have become increased.

In December 2002, the same month that BellSouth filed its Revised Petition in this case, the Federal Communications Commission ( FCC ) released its report on the state of telecommunications competition in the United States based on FCC Form 477 filings (the FCC Report ).<sup>6</sup> According to the statistics in the Report, 79 percent of the zip codes in Kentucky had *no competitive local exchange carriers at all*, as compared with a national percentage of 33 percent. Only West Virginia, Puerto Rico, New Mexico, and Montana reported a higher percentage of zip codes without competitive carriers. Twenty-one percent of Kentucky's zip codes had one to three competitive local exchange carriers ( CLECs ). No zip code had more than three. In contrast, 27 zip

---

<sup>6</sup> Federal Communications Commission Releases Data on Local Telephone Competition, <http://www.fcc.gov> (Dec. 9, 2002); FCC Reference Information Center, Washington, D.C. The report does not breakout BellSouth's territory in Kentucky.

codes in Florida, and 15 in Georgia, had 10 or more CLECs. Neither state reported a single zip code lacking at least one CLEC.<sup>7</sup> The chart indicates that Kentucky appears, in fact, to have less local exchange competition than any state in the BellSouth area.<sup>8</sup>

Other statistics in the FCC Report further indicate that local exchange competition in Kentucky is relatively minimal. For example, Table 6 of the FCC Report, which includes end-user switched access lines served by carriers with at least 10,000 lines, contains only an asterisk in the line recording the number of lines served by CLECs in Kentucky. In other words, CLECs in Kentucky do not have sufficient market penetration in this state to be quantified in the report. The numbers reported for other BellSouth states were Florida--1,035,417; Georgia--704,651; Louisiana--115,220; Tennessee--247,056; South Carolina--121,331; Mississippi--22,966; North Carolina--328,715; and Alabama--118,721.

According to information filed by BellSouth with the FCC in June 2002, BellSouth had lost only 7.3 to 9.3 percent of access lines in its service area in Kentucky to competitors.<sup>9</sup> Updated information filed in the same docket later showed that

---

<sup>7</sup> Despite these relatively high levels of competition, neither of these states has eliminated tariff oversight to the extent BellSouth requests here. See Presumptively Valid Tariffs Chart pertaining to the eight other states in which BellSouth is an incumbent local exchange carrier, filed by BellSouth on January 6, 2003, at an informal conference. In fact, Georgia requires 30 days notice and may suspend and defer the effective date of a tariff for five months. These are the time frames generally employed by this Commission.

<sup>8</sup> We do not have any data on wireless or satellite affecting competition in Kentucky.

<sup>9</sup> See Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina (FCC Docket No. 02-150).

competitors held from 8.4 to 10.4 percent of those access lines. These figures indicate that BellSouth's percentage of access lines in its service area in Kentucky hovers somewhere around 90 percent. It is obviously impossible to assign a hard and fast number that indicates *per se* market dominance. However, judicial decisions dealing with these issues indicate that BellSouth's percentage of the local exchange market in its Kentucky service area meets any such test.<sup>10</sup> It continues to exercise market power in Kentucky in its territory.

Accordingly, the regulatory exemption sought by BellSouth here would deprive the Commission of one of the tools it continues to need. BellSouth asserts that KRS 278.512(3)(e) the statutory provision requiring the Commission to consider whether safeguards against cross-subsidization of unregulated by regulated services would remain adequate if the petition were granted - is no impediment to its petition. BellSouth asserts that these safeguards remain the same whether or not its tariffs are fully reviewed prior to becoming effective, and that there is, therefore, no threat of cross-subsidization if the proposal is approved.<sup>11</sup>

In one sense BellSouth is correct: laws prohibiting cross-subsidization of regulated by unregulated services would continue to exist. However, one of the primary safeguards against cross-subsidization is this Commission's function as an enforcer of that law. It fulfills this function through analysis of cost information relevant to the tariff.

---

<sup>10</sup> See Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 917 F.2d 1413, 1446, (6<sup>th</sup> Cir. 1990) cert. denied, 502 U.S. 899 (1991) (monopoly power likely to be found when market share exceeds 75 to 80 percent); International Audiotext Network, Inc. v. American Telephone and Telegraph Co., 62 F.3d 69, 71 (2d Cir. 1995) (presuming that AT&T had market control with 70.8 percent of the market).

<sup>11</sup> BellSouth Revised Petition at 8.

Lack of time to conduct the analysis certainly reduces the efficacy of that safeguard. This is not to say that there will never be a time to relax our vigilance; it is, however, to say that we do not presently find that safeguards will remain adequate to protect Kentucky consumers despite our surrender of the valuable tool of prior analysis. Many of BellSouth's rural and residential customers still do not have a meaningful choice of telecommunications carriers.

We are in agreement with BellSouth's desire to get products and services, and lower prices, to the public more expeditiously. We currently accord presumptive validity status, on one day's notice, to BellSouth's special promotion tariffs.<sup>12</sup> In an effort to reduce the time BellSouth and other carriers must wait before implementing new services and prices, we have carefully considered whether we should, at this time, shorten the tariff review period for all carriers. We reluctantly conclude that such relief is not, as a practical matter, possible. This is a relatively small regulatory commission with limited staff resources. Currently, Staff processes over 100 tariffs per month.<sup>13</sup> An across-the-board reduction in time for review of telecommunications tariffs would

---

<sup>12</sup> Case No. 2001-00077, BellSouth Telecommunications, Inc.'s Proposed Changes in Procedures for Filing Contract Service Arrangements and Promotions, Order dated September 28, 2001 at 2 and 3.

<sup>13</sup> Of the 480 proposed tariffs filed by BellSouth for 2001 to the present, our official records indicate that 474 became effective, 5 were withdrawn and 1 was suspended. These statistics indicate that the tariff review process for BellSouth is not too onerous. Staff has often informally contacted BellSouth and asked that a tariff proposal be modified in some way. If this is accomplished prior to the effective date, then the tariff is finalized. This type of informal collaboration requires at least 30 days and sometimes more.

deprive the Commission of the ability to exercise the oversight that remains necessary, and deprive Kentucky ratepayers of the protections provided by that review.

We do, however, encourage BellSouth and all telecommunications carriers to take advantage, on a case-by-case basis, of the existing provisions of KRS 278.180. That statute provides, generally, for 30 days notice to the Commission prior to the proposed effective date of the tariff. However, Subsection (1) of the statute provides that, upon a showing of good cause, the Commission may shorten the notice period to 20 days. Subsection (2) provides that, upon utility application, the Commission may prescribe a less time for rate reductions.

Should time be of the essence for any tariff, the Commission stands ready, willing and able to consider shortening the notice period. The Commission also recommends that a carrier desiring expedited review confer informally with Staff before filing its tariff. Notifying Staff of the need for expedited review may help ensure that BellSouth's goals are met.

The Commission, having reviewed the record and having been otherwise sufficiently advised, HEREBY ORDERS that BellSouth's petition is denied.

Done at Frankfort, Kentucky, this 29<sup>th</sup> day of April, 2003.

By the Commission

ATTEST:

  
Executive Director