

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

SOUTH CENTRAL TELCOM, LLC)	
)	
COMPLAINANT)	
)	CASE NO.
V.)	2006-00448
)	
BELLSOUTH TELECOMMUNICATIONS, INC.)	
D/B/A AT&T KENTUCKY)	
)	
DEFENDANT)	

O R D E R

South Central Telcom, LLC ("South Central"), a competitive local exchange carrier ("CLEC"), filed a complaint against BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky") alleging that AT&T Kentucky wrongfully refused to pay South Central's switched access tariff rates. South Central requested that the Commission declare AT&T Kentucky liable for all past and future switched access services incurred pursuant to South Central's tariff and order AT&T Kentucky to pay all unpaid, tariffed charges due to South Central.¹

AT&T Kentucky denied that it had to pay the tariff rates for switched access and asserted that the proper arrangement for payment for calls terminated to South Central was via an interconnection agreement, which the parties lacked. AT&T Kentucky stated that it was willing to negotiate an interconnection agreement with South Central that

¹ Complaint at 5.

would address the terms and conditions for the payment of charges for the terminating of AT&T Kentucky's originating traffic and the exchange of traffic with South Central.²

Currently, South Central is billing AT&T Kentucky switched access charges for all traffic delivered by AT&T Kentucky and terminated by South Central with the exception of certain Commercial Mobile Radio Service ("CMRS") traffic. Switched access charges apply to toll or access traffic, which is usually associated with traffic delivered by a long-distance or Interexchange Carrier ("IXC"). AT&T Kentucky claims that only two percent of the traffic it sends to South Central is originated by AT&T Kentucky and subject to payment by AT&T Kentucky and the remainder is either CMRS traffic or transit traffic originated by a third party.³ AT&T Kentucky seeks an interconnection or traffic exchange agreement with South Central so it does not have to pay charges for traffic that it does not originate. South Central argues that AT&T Kentucky sends only switched access traffic to it and that this is all covered by its switched access tariff.⁴

South Central filed its complaint on October 16, 2006. AT&T Kentucky filed its answer and a motion to dismiss on November 6, 2006. The parties participated in an informal conference with Commission Staff on March 21, 2007. At the informal conference, the parties agreed to pursue settlement negotiations and to keep the Commission apprised of the status of the case.

On April 23, 2007, South Central filed a proposed settlement agreement with the Commission, a copy of which it simultaneously sent to AT&T Kentucky. AT&T Kentucky

² Answer and Motion to Dismiss at 3-9.

³ AT&T Kentucky's Post Hearing Brief at 7.

⁴ South Central's Response to AT&T Kentucky's Motion at 2-3.

moved the Commission to strike the proposed settlement agreement from the record, arguing that the filing of the settlement agreement breached the confidential nature typically granted settlement negotiations. On May 23, 2007, South Central filed a motion for summary judgment, arguing, inter alia, that summary judgment was appropriate because no genuine issues of material fact were presented to the Commission for consideration.

On April 22, 2008, the Commission granted AT&T Kentucky's motion to strike and denied both AT&T Kentucky's motion to dismiss and South Central's motion for summary judgment. The Commission also established a procedural schedule and set a formal hearing for July 2, 2008. On May 21, 2008, on joint motion of the parties, the Commission extended all deadlines of the procedural schedule by one month and cancelled the July 2, 2008 hearing. The stated grounds for the extension of the procedural deadlines were so that the parties could: (1) better develop the issues for presentation to the Commission; and (2) engage in settlement negotiations.

After extensive discovery, and when it became apparent that settlement was not to be reached, the Commission scheduled and held a formal hearing on February 25, 2009. Post-hearing briefs were filed, as well as response and reply briefs, the last of which was filed on July 27, 2009. The case is now ripe for a decision.

SOUTH CENTRAL'S POSITION

South Central argues that all traffic from AT&T Kentucky, except for CMRS traffic, is toll traffic and subject to switched access charges.⁵ South Central asserts that, although some of the traffic may be originated by other carriers, AT&T Kentucky has

⁵ Phipps Direct Testimony at 3, lines 20-21.

voluntarily put itself in the position of a third-party transit carrier and should not be rewarded for using its monopoly power to enhance its revenue through transit charges.⁶

South Central argues that it is not required to enter into an interconnection agreement with AT&T Kentucky and that, in the absence of an interconnection agreement and pursuant to KRS 278.160, its tariff governs the rates charged for the exchange of traffic between South Central and AT&T Kentucky. South Central asserts that the purpose of the 1996 Telecommunications Act is to “foster competition in the local telephone marketplace, not to redress the exchange of access traffic between non-competing carriers.”⁷ South Central asserts that AT&T Kentucky and it are not competitors, as South Central provides only local exchange service in exchanges where Windstream is the Incumbent Local Exchange Carrier (“ILEC.”) South Central asserts that it exchanges access traffic only with AT&T Kentucky and that the 1996 Telecommunications Act was not intended to address access traffic.⁸

South Central argues that the duty to enter into an interconnection agreement applies only to an ILEC and that AT&T Kentucky’s attempt to force South Central into an interconnection agreement is “nothing less than a self-serving attempt to gain a competitive advantage by unilaterally imposing its own favorable access terms upon South Central.”⁹ South Central claims that this would give AT&T Kentucky an unfair

⁶ South Central’s Motion for Summary Judgment at 10.

⁷ South Central’s Response to AT&T Kentucky’s Motion to Dismiss at 2.

⁸ Id. at 3.

⁹ Id. at 4.

competitive advantage compared to other carriers that pay for access traffic pursuant to South Central's tariff.

South Central asked that the Commission determine that all the traffic that AT&T Kentucky sends to South Central, except for CMRS traffic, is toll or exchange access traffic and, thus, subject to South Central's access charges in its access tariff and requested that the Commission order AT&T Kentucky to pay the past-due amounts under the tariff.¹⁰

AT&T KENTUCKY'S POSITION

AT&T Kentucky asserts that approximately two percent of the traffic it terminates to South Central is originated by AT&T Kentucky and, thus, is subject to any payment by AT&T Kentucky to South Central.¹¹ This includes CLEC (resale and Wholesale Local Platform ["WLP"]) end-users served by AT&T Kentucky's switch. Although AT&T Kentucky does not originate this traffic, AT&T Kentucky is willing to negotiate with South Central regarding compensation for exchange of this traffic. AT&T Kentucky asserts that the rest of the traffic is transit traffic or CMRS traffic.¹² AT&T Kentucky argues that South Central should bill the originating carrier termination charges for the transit traffic, not AT&T Kentucky.

AT&T Kentucky asserts that the 1996 Telecommunications Act established a regulatory scheme that allows a CLEC to interconnect with an ILEC. AT&T Kentucky argues that the Federal Communications Commission has expressly held that

¹⁰ South Central Complaint at 8.

¹¹ AT&T Post Hearing Brief at 6.

¹² Id.

interconnection agreements are the appropriate arrangements for establishing reciprocal compensation between carriers and that arrangements addressing reciprocal compensation are required by 47 U.S.C. § 251(b)(5).¹³

AT&T Kentucky argues that, until the parties enter into an interconnection agreement, the classification of “local traffic” and “toll traffic” has not been established for billing purposes. An interconnection agreement, according to AT&T Kentucky, would allow the parties to cover the terms and conditions for the exchange of traffic and, moreover, the physical interconnection necessary for the proper routing and monitoring of the traffic. AT&T Kentucky claims that it and all other ILECs and CLECs with which it exchanges traffic have interconnection agreements that control the exchange of traffic between them. AT&T Kentucky claims that it is merely requesting that South Central do the same as all other CLECs. AT&T Kentucky has proposed several agreements to South Central; all have been rejected. AT&T Kentucky has offered to pay prices commensurate with South Central’s access charges for traffic AT&T Kentucky claims is subject to those charges.¹⁴

AT&T Kentucky also asserts that South Central’s access tariff requires a customer to order switched access services from different feature group categories. AT&T Kentucky argues that this would entail a customer, such as AT&T Kentucky, deciding in advance the specific access facilities it needs and ordering them through the proper feature group--which AT&T Kentucky has not done. AT&T Kentucky asserts that, if South Central’s tariff were applicable, AT&T Kentucky would first need to place

¹³ AT&T Kentucky’s Answer and Motion to Dismiss at 6.

¹⁴ Id. at 6-7.

an order for the provisioning of switched access services. AT&T Kentucky argues that, because it has never had to choose such an arrangement, and because South Central has chosen to use an ILEC's interconnection facilities to achieve indirect interconnection with AT&T Kentucky, South Central's argument is substantially undermined.¹⁵

AT&T Kentucky claims that South Central uses the relationship with its affiliate ILEC, South Central Rural Telephone Cooperative Corporation, Inc. ("South Central Rural") to avoid the obligations of a CLEC to negotiate terms and conditions for the exchange of traffic.¹⁶ South Central utilizes the switch of South Central Rural, with which AT&T Kentucky has interconnection, for the exchange of telecommunications traffic.

AT&T Kentucky argues that, since there is no interconnection agreement between the parties, AT&T Kentucky would be within its rights to refuse to terminate traffic to South Central. AT&T Kentucky states, however, that it has continued to route AT&T Kentucky-originated and third-party transit traffic to South Central despite South Central's refusal to negotiate an interconnection agreement. AT&T Kentucky alleges that South Central is avoiding entering into an interconnection agreement so that it may charge AT&T Kentucky switched access charges for traffic that AT&T Kentucky did not originate.¹⁷ AT&T Kentucky requests that the Commission order South Central to negotiate a traffic exchange agreement to resolve the dispute.

¹⁵ Id. at 7.

¹⁶ AT&T Kentucky Brief at 10.

¹⁷ AT&T Kentucky's Motion to Dismiss at 8.

DISCUSSION

The situation that gave rise to this complaint comes about because of a number of unique factors. One is the relationship between AT&T Kentucky and the Rural Local Exchange Carriers ("RLECs") in this state. For many years, AT&T Kentucky has been known as the default intraLATA (intraLocal Access Transport Area) toll carrier. AT&T Kentucky acknowledged this arrangement at the hearing:

When an end user served by an ICO [Independent Telephone Company] does not select an interexchange carrier or access an interexchange carrier through a 10xxx dial around mechanism through the KRSP [Kentucky Revised Settlement Procedure], AT&T is the default intraLATA toll provider, as we are for a number of our own end users, and, in that situation, AT&T has to carry the call.¹⁸

AT&T Kentucky has established relationships and trunking arrangements with most of the RLECs. Under these historical arrangements, AT&T Kentucky sends toll traffic to the RLECs over the trunk groups and the receiving RLEC bills AT&T Kentucky access charges for that traffic. Prior to the introduction of wireline competition and the growth of wireless traffic, there was no need to analyze the traffic to determine the billed party or the type of traffic being delivered to the RLEC. However, due to federal requirements that have established a unique definition of "local" traffic for wireless-originated calls, there is now a need to evaluate and determine the originating information of such traffic.

Also complicating the case at hand is South Central's relationship with its affiliate, the RLEC, South Central Rural. South Central relies on the switch of South Central Rural to deliver traffic to and from its customers. Because South Central and

¹⁸ Pellerin, Video Transcript, 100:11-17.

South Central Rural share the same switch, a double indirect relationship exists between South Central and AT&T Kentucky. South Central is not directly connected to AT&T Kentucky, relying instead on the facilities of South Central Rural; and the CLECs and wireless companies are not directly connected to South Central Rural, relying instead on the facilities of AT&T Kentucky. Because of this unique relationship, no tariff or other existing agreement appears to account for the treatment of all the traffic being delivered to South Central by AT&T Kentucky. Although AT&T Kentucky has an established arrangement with RLECs in Kentucky for the exchange of intrastate toll traffic, this arrangement does not cover, nor was it contemplated to include, CLEC-originated traffic that is transited by AT&T Kentucky to RLECs such as South Central Rural.

AT&T Kentucky asserts that only the traffic it terminates to South Central that is originated by AT&T Kentucky customers is subject to payment by AT&T Kentucky. The remaining traffic consists of: (1) cellular wireless calls; (2) facility-based CLEC-originated transit traffic; (3) independent telephone company-originated transit traffic; and (4) CLEC resale and wholesale local platform-originated traffic from CLECs that use switching provided by AT&T Kentucky rather than their own switches.¹⁹ AT&T Kentucky asserts that it should be responsible only for payment of charges for the traffic originated by its customers and the traffic originated via CLEC resale on its own switch, approximately two percent of the traffic it delivers to South Central.²⁰

¹⁹ Pellerin Direct Testimony at 9.

²⁰ Id. at 10.

AT&T Kentucky asserts that it sends an itemized bill to South Central every month that breaks down the type of traffic and states that the itemized bill would allow South Central to bill the originators of the traffic. South Central disputes the accuracy of the billing records for the purpose of billing the traffic originators. However, South Central relies on the billing records for the purpose of billing the CMRS providers. If the billing records submitted by AT&T Kentucky adhere to industry standards, that should be sufficient to allow South Central to bill the originators of local traffic. However, there remains the question of whether or not non-local traffic, i.e., toll calls, is subject to such a billing requirement.

South Central makes no pretense of attempting to differentiate between the types of traffic that AT&T Kentucky delivers to it. South Central contends that, because the traffic travels over the toll trunks from its RLEC affiliate, the traffic, other than CMRS-originated local traffic, must be toll traffic and subject to access charges. South Central has designated in the Local Exchange Routing Guide that all traffic delivered to it from outside its service area, transit traffic or otherwise, should be delivered to it via its RLEC affiliate, South Central Rural.

The Commission has previously found that AT&T Kentucky is obligated to deliver transit traffic between originating and terminating carriers when AT&T Kentucky maintains sufficient interconnecting facilities between each of the carriers.²¹ Thus,

²¹ Case No. 2004-00044, Joint Petition for Arbitration of Newsouth Communications Corp., et al. of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Communications Act of 1934, as Amended (Ky. PSC Sep. 26, 2005 at 15). (“The Commission has previously required third party transiting by the incumbent based on efficient network use. The Commission will continue to require [AT&T Kentucky] to transit such traffic.”)

AT&T Kentucky remains obligated to deliver traffic to South Central that is originated by other carriers interconnected with AT&T Kentucky. However, allowing South Central to bill AT&T Kentucky access charges for toll traffic transited by AT&T Kentucky results in AT&T Kentucky's being treated as an IXC.

South Central requested that the Commission order AT&T Kentucky to pay access charges on all the traffic it delivered to South Central. The Commission cannot grant the requested relief because whether AT&T Kentucky owes access charges to South Central is determined by the nature of the traffic and not solely by the type of facility used to deliver the traffic. If the traffic terminated by South Central is non-local toll traffic, then AT&T Kentucky must pay access charges. If the traffic is local in nature, then AT&T Kentucky is not responsible for paying access charges; but the traffic would be subject to reciprocal compensation if such arrangements are in place between the originating and terminating carriers.

The 1996 Telecommunications Act requires every telecommunications carrier to interconnect, either directly or indirectly, with one another for the purpose of exchanging telecommunications traffic.²² It further obligates all Local Exchange Carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications traffic²³ that is local in nature.²⁴ The Act does not impose a formal obligation on a CLEC to enter into an interconnection agreement. However, the obligation to interconnect implies that something must govern the terms of

²² 47 U.S.C. § 251(a)(1).

²³ 47 U.S.C. § 251(a)(5).

²⁴ 47 C.F.R. § 51.701(b).

interconnection. If, as in this case, a tariff may not govern the terms and conditions of interconnection, then an agreement should be formed if the CLEC desires to receive compensation for terminating local traffic.

The Commission has long applied the principle that the “calling party’s network pays.”²⁵ This principle has also been upheld by federal courts and is consistent with 47 C.F.R. § 51.703(b).²⁶ In the current case, the “calling party’s network” is the originating network from which the call to an end-user of South Central is placed.

In cases in which either an AT&T Kentucky customer or a customer of a non-facilities-based CLEC utilizing AT&T Kentucky’s WLP places a call to South Central, that call originates on AT&T Kentucky’s network and AT&T Kentucky is the “calling party’s network.” In those instances, AT&T Kentucky is responsible for the costs of transporting and terminating the traffic to South Central, including the cost of access charges for toll traffic, if applicable.

If, however, the calling party is a customer of a facilities-based CLEC or other ICO within AT&T Kentucky’s service area and the customer places a local call to South Central, the call originates on the facilities-based CLEC’s or ICO’s network. The call is then transferred from the facilities-based CLEC’s or ICO’s network to AT&T Kentucky’s network so the call can be transited to South Central via AT&T Kentucky’s interconnection with South Central Rural. In those instances, the “calling party’s

²⁵ Case No. 2000-00404, The Petition of Level 3 Communications, LLC for Arbitration with BellSouth Telecommunications, Inc., Pursuant to Section 252(b) of the Communications Act of 1934, As Amended by the Telecommunications Act of 1996 (Ky. PSC Mar. 14, 2001).

²⁶ Atlas Telephone v. Oklahoma Corporation Commission, 400 F.3d 1256 (10th Cir. 2005) and Mountain Communications v. FCC, 355 F.3d 644 (D.C. Cir. 2004).

network” is the facilities-based CLEC or ICO and is the party that should be responsible for compensation for local traffic.

If, however, the calling party is a customer of a facilities-based CLEC or other ICO within AT&T Kentucky's service area and the customer places a non-local toll or long-distance call to South Central, the call is deemed to have originated on AT&T Kentucky's network, if the calling party is not using another presubscribed IXC. In those instances, AT&T Kentucky is functioning as an IXC and should pay access charges to South Central for the toll traffic.

Therefore, consistent with both Commission and federal court precedent, South Central should seek payment of local compensation pursuant to an interconnection agreement for local traffic originated by the calling party's network (local telephone company). The best way to effectuate this would be through an agreement between South Central and AT&T Kentucky addressing the classification of “transit traffic,” “local traffic,” and “toll traffic” for billing purposes. Such an agreement should also cover the terms and conditions for the exchange of traffic, type of interconnection, and billing information.

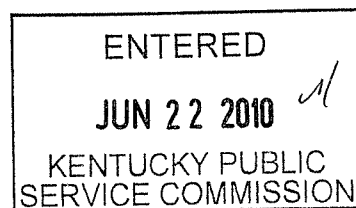
Pursuant to KRS 278.542(1)(a) and (b), the Commission has jurisdiction over any agreement or arrangement between or among ILECs and other LECs. The parties should enter into an arrangement or agreement to address interconnection and payment for the disputed traffic. The Commission orders the parties to negotiate an agreement, due within 60 days of the date of the Commission's Order. The agreement should address the following:

1. Definition of "covered traffic," i.e., what is toll, what is transit and what is local;
2. Exchange of billing information sufficient for South Central to bill the originator or calling party's network; and
3. Nature and manner of interconnection between AT&T Kentucky and South Central.

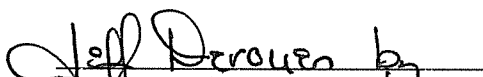
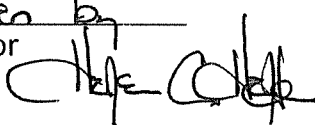
IT IS THEREFORE ORDERED that:

1. AT&T Kentucky and South Central must enter into an agreement that will set forth the parameters, including rates, for the exchange of AT&T Kentucky-originated traffic.
2. Within 60 days of the date of this Order, the parties shall file a traffic exchange agreement with the Commission consistent with the findings contained above.
3. This is a final and appealable Order.

By the Commission



ATTEST:


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