

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

GENERAL TELEPHONE COMPANY OF KENTUCKY	)	
	)	
COMPLAINANT	)	
	)	
VS.	)	CASE NO. 8727
	)	
SOUTH CENTRAL BELL TELEPHONE COMPANY	)	
	)	
DEFENDANT	)	

ORDER  
BACKGROUND

General Telephone Company of Kentucky ("General") complains that South Central Bell Telephone Company ("South Central") settles intrastate toll revenues with it on the basis of South Central's return on total intrastate services rather than the return on intrastate toll services only, and asserts that the present method is unreasonable, unjustly discriminatory and unduly preferential in contravention of KRS 278.170 and KRS 278.260. Under the intrastate toll only settlement basis, toll revenues, less expenses, would be distributed back to General on the basis of the net book costs of its facilities devoted to intrastate toll times the intrastate toll return less the intrastate toll portion of interest charged to construction. General claims it would have received an additional \$7.9 million for the last 12 months if this method were used to settle with General

only, or \$6.5 million if all the independents settled on this basis with South Central. General claims it is entitled to recalculate settlements on this basis back to July 1, 1976, the date it alleges that South Central was capable of calculating the return on intrastate toll. South Central admits it now has this capability, but denies that it did on July 1, 1976. The parties currently operate under a contract originally entered into in October of 1970 which provides for settlement on the basis of the return on total intrastate services. Prior to the local agreement between South Central and General, in July of 1970, General Telephone and Electronics Corporation ("GTE") and American Telephone and Telegraph Company ("AT&T") executed a Joint Memorandum relating to division of both interstate and intrastate toll revenues. According to the joint memorandum, General's share was to be determined on the basis of the rate of return South Central earned on intrastate toll, or if South Central did not determine its intrastate toll rate of return, the rate of return on total intrastate services, or if neither of the above methods has been determined, the overall rate of return on total net book costs. Hence, General argues that once South Central was able to determine a toll only intrastate return, South Central was required to notify General and settle on that basis. South Central claims that General knew an intrastate toll only return could be calculated since this was ordered by the California Public Service Commission in 1959, but at the latest, since 1972 when settlements

were initiated on that basis in North Carolina. South Central claims the first contact made by General seeking this basis of settlement occurred on May 21, 1982, when General proposed a contract revision to this effect which South Central refused to adopt as indicated by a letter of July 12, 1982. At a meeting August 26, 1982, the parties failed to resolve the matter and on November 10, 1982, General filed its complaint with this Commission. To date, neither party has cancelled the existing contract by giving the requisite 60 days' notice.

#### PROCEDURAL BACKGROUND

On February 17, 1983, the Commission held a prehearing conference at its offices in which General, South Central and the Attorney General's Consumer Protection Division ("A.G.") participated. An oral argument by the parties was held on the same date regarding General's Motion for an Interim Order requiring settlements to be based on the intrastate toll rate of return. General and South Central had filed written memoranda with the Commission prior to the oral argument on the issue of Commission jurisdiction over the subject complaint as required by the Commission's order of February 4, 1983. At the conclusion of the February 17, 1983, oral argument, South Central filed a motion to dismiss for lack of subject matter jurisdiction. On March 22, 1983, General filed a motion for an order granting interim prospective relief, to which South Central responded on April 6, 1983. The matter of the Commission's jurisdiction now stands submitted.

### THE JURISDICTION ISSUE

South Central argues that this Commission does not have jurisdiction to decide any aspect of the complaint because the parties still have a valid contract in effect. South Central takes the position that only if the parties do not have a contract in force and cannot agree among themselves as to a particular contract term does the Commission have any authority to act. South Central cites KRS 278.530 as the statute most pertinent to the controversy and asserts that the language of that statute expressly premises the Commission's jurisdiction upon the absence of a contract. In support of this proposition, South Central cites Indiana Tel. Corp. v. Indiana Bell Tel. Co., Ind. App., 358 N.E.2d 218 (1976) [hereinafter cited as ITC]. South Central also asserts that the Commission cannot interpret the existing terms and conditions of the contract since that authority is vested exclusively in the courts under the Kentucky Constitution; nor can the Commission award a money judgment for the past payments, which General now contends were based upon an improper methodology, since this action would amount to retro-active rate-making.

By contrast, General views its complaint as specifically not seeking a money judgment from the Commission. However, General asserts that the "primary jurisdiction" doctrine permits the Commission to determine certain threshold questions for a trial court, much like an expert master would do, citing Port

of Boston Marine Terminal v. Rederiaktiebolaget, Transatlantic, 400 U.S. 62, 91 S. Ct. 203, 27 L.ed.2d 203 (1979) [hereinafter cited as Port of Boston]. General also cites DePaul Hospital School of Nursing v. Southwestern Bell Tel. Co., 539 S.W.2d 542 (Mo. App. 1976) [hereinafter cited as DePaul] as authority for the Commission's authority to make findings with respect to past transactions. General asserts that the Commission can make findings with regard to the contract and complaint by applying "undisputed legal terms" to "raw facts." General further asserts that the Commission's jurisdiction to resolve this dispute is not limited by the existence of the contract since the Commission has authority to supersede rate contracts. General states that it is entitled to non-discriminatory treatment pursuant to KRS 278.260 as to what it receives in division of revenues. General also asserts that the division can be conversely viewed as a rate paid by General for use of South Central's share of the facilities which are used to provide long distance service.

In our view, KRS 278.530 is not dispositive of the issue raised since that statute only provides a means of compelling a connection between telephone companies, and, in the present case, a connection already exists between General and South Central. This statute presents a procedure to be followed by aggrieved utilities, but does not prescribe the means by which the Commission must investigate and determine fair, just and reasonable rates. Likewise, the ITC case cited by South Central does not

dispose of the issue presented herein since that case involved a breach of contract suit in which ITC had withheld payments to South Central and the Commission had no authority to award a money judgment, whereas neither General nor South Central has taken such action in this case. The court's analysis in the ITC decision does however provide useful insights for resolving the issue presently before this Commission. For example, the court in the ITC case noted that under appropriate circumstances it might await a determination by the expert agency before rendering a judgment, such as "action by the Commission fixing a method of computing the settlements from which the judgment could be calculated." 1/ The ITC decision also makes the following observation:

[A] provision in a contract between two utility companies could impair the ability of one or both to serve the public to a degree which would properly subject the matter to the jurisdiction of the Public Service Commission. ...Since a company's rate of return is a pivotal factor in determining rates, the long distance settlements to which a company agrees may affect rate establishment indirectly. Whether such condition exists between the parties to this action is a matter properly determined by the Public Service Commission. ...If such circumstances were to exist...the order of the Commission would nonetheless have only a prospective effect and would work a modification of the terms of the contract only from the entry of the Commission's order. (Emphasis supplied.) 2/

---

1/ ITC at 224.

2/ ITC at 224-225.

In reviewing what is ultimately at stake in this proceeding, the Commission is of the opinion that the settlements procedure really amounts to setting rates between General and South Central (and other telephone companies) for utility services over which the Commission has exclusive jurisdiction pursuant to KRS 278.040(2). Thus, the Commission has jurisdiction over the subject matter of this complaint, but can only grant prospective relief since the Commission's actions in this regard would amount to rate-making which is legislative in character.

With respect to the issue of providing relief for the past period dating from 1976 to the present, the cases cited by General are distinguishable from the matter the Commission has under consideration. In the DePaul case the Missouri Commission determined what tariff applied to a given customer prior to the customer suing for 19 years of overcharges; the Commission did not interpret a contract. In the Port of Boston case, the court routed the threshold question to the Federal Maritime Commission since that body had explicitly approved the very agreement under consideration 5 years earlier. Thus, the court found the Maritime Commission was uniquely qualified to review the document since it knew what policies were considered in establishing the agreement. By contrast, in this case the Commission has not previously reviewed or approved the 1970 contract between South Central and General.

In addition to the lack of legal authority available to support the resolution by the Commission of the issue of past period payments to which General may be entitled, the Commission notes that, regardless of whether the Commission or the courts explored the matter, should General be found to be entitled to recover, this Commission could not permit General to retain a windfall. During the period of 1976 to the present, General has been fully compensated through Commission-approved rates since General's revenue requirement has been calculated based upon the current settlement method using the overall rate of return. Thus, should General recover the Commission would need to decrease General's rates so that excessive earnings would be avoided.

Having considered the oral argument, memoranda and all other evidence of record and being advised, the Commission is of the opinion and finds that:

1. The Commission does not have the authority to grant retroactive relief to General for the period from 1976 to the present; the courts provide the proper forum for such a claim for relief.

2. The Commission has jurisdiction over the subject matter of this complaint, but may only grant prospective relief should a change in the current method of settlements be indicated requiring a revision of the 1970 contract.



3. Given the few remaining months before AT&T must divest itself of its local operating companies such as South Central, and the major revisions to the settlements process which will be necessitated by the divestiture, as well as the impact of the FCC's access charge decision, pursuit of this complaint based on the present configuration of the Bell System and the revenue streams currently available to telephone utilities, would be counterproductive since any decision reached by this Commission before the end of 1983 would most likely be immediately revised due to the changes which are scheduled to take effect on January 1, 1984, due to the planned divestiture of local operating companies by AT&T.

4. With these factors in mind, the Commission will immediately institute an investigation to determine the proper method of settlements to be implemented on January 1, 1984.

5. For the reasons stated in the previous findings, General's complaint should be dismissed.

6. General's motions for interim relief should be denied.

7. South Central's motion to dismiss for lack of subject matter jurisdiction should be denied.

IT IS THEREFORE ORDERED that General's motions for interim relief be and they hereby are denied.


IT IS FURTHER ORDERED that South Central's motion to dismiss for lack of subject matter jurisdiction be and it hereby is denied.

IT IS FURTHER ORDERED that General's complaint be and it hereby is dismissed in accordance with the Commission's findings.

IT IS FURTHER ORDERED that an investigation to determine the proper method of settlements to be implemented on January 1, 1984, will immediately be established in a separate docket.

Done at Frankfort, Kentucky, this 12th day of May, 1983.

PUBLIC SERVICE COMMISSION

  
Chairman

  
Vice Chairman

  
Commissioner

ATTEST:

\_\_\_\_\_  
Secretary