COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION REGARDING COMPLIANCE OF THE STATEMENT OF GENERALLY AVAILABLE TERMS OF BELLSOUTH TELE-COMMUNICATIONS, INC. WITH SECTION 251 AND SECTION 252(D) OF THE TELECOMMUNI-CATIONS ACT OF 1996	)	CASE NO. 98-348

O R D E R

On August 21, 1998, the Commission entered its Order in this case specifying the revisions BellSouth Telecommunications, Inc. ("BellSouth") would be required to make to its Statement of Generally Available Terms ("SGAT") prior to receiving approval. Subsequently, BellSouth has filed a Motion for Reconsideration ("BellSouth Motion") and e.spire Communications, Inc. ("e.spire") has filed a "Request for Clarification" ("e.spire Motion"). MCI Telecommunications Corporation, MCIMetro Access Transmission Services, Inc., and WorldCom Technologies, Inc., subsidiaries of MCI WorldCom, Inc. (collectively "MCI WorldCom"), AT&T Communications of the South Central States, Inc. ("AT&T") and e.spire have filed responses to the BellSouth Motion (hereinafter the "MCI WorldCom Response," the "AT&T Response," and the "e.spire Response," respectively). The Commission addresses the issues raised by these motions below.

The e.spire Motion

e.spire asserts that the Order contains an inconsistency in that it states on the one hand that the issue of whether local service includes Internet service provider traffic

(thereby qualifying for reciprocal compensation) will be decided in Case No. 98-212,[1] while, on the other hand, it permits preclusive language on the subject to remain in the SGAT at Section XIII.C. This section specifically provides that traffic originated to and terminated by enhanced service and information service providers does not qualify for reciprocal compensation. e.spire points out that a Commission Order approving this SGAT provision may have the effect of predetermining the Commission's eventual decision in Case No. 98-212.

e.spire's point is well taken. A decision on this matter may appropriately be reached only after full consideration of the arguments and evidence presented by the parties in the context of the case in which the arguments and evidence have been fully presented. Accordingly, if BellSouth wishes to conform its SGAT to the Commission's Orders entered in this case, it shall strike Section XIII.C. Should the Commission determine in Case No. 98-212 that reciprocal compensation is not appropriate for Internet service provider traffic, BellSouth may at that time file an amendment to its SGAT reinstating the provision.

The BellSouth Motion

BellSouth contends that the Commission's decisions in relation to sales of combinations of unbundled elements cannot stand because they are in conflict with federal law as explicated by the Eighth Circuit Court of Appeals in Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998). The

[1] Case No. 98-212, American Communications Services of Louisville, Inc., d/b/a e.spire Communications, Inc. and American Communications Services of Lexington, Inc., d/b/a e.spire Communications, Inc. and ALEC, Inc. v. BellSouth Telecommunications, Inc.

Commission in its Order required BellSouth to revise its SGAT to provide that competitive local exchange carriers ("CLECs") may obtain unbundled network elements ("UNEs") in combinations if the requested combinations already exist in BellSouth's network. The Commission in its Order also permits BellSouth to charge a one-time "glue charge" to compensate it for its expense and expertise for having assembled the elements, and finds that the "recent change mechanism" is an appropriate way to permit CLECs to "recombine" UNEs ordered in combination when those combinations already exist in BellSouth's network. BellSouth asserts that federal law has preempted state law on this issue because it prohibits the sale of UNEs in combination. Such sales are not in compliance with the Telecommunications Act of 1996, BellSouth contends, because they erase the distinction drawn in the Act between resale pricing and UNE pricing. BellSouth brings to the Commission's attention a federal court decision explicitly stating that the Eighth Circuit Court of Appeals' opinion on this issue has a preemptive effect on state law to the contrary. See US West Communications, Inc. v. AT&T Communications of the Pacific Northwest, Inc., No. C97-132OR (W.D. Wash. July 21, 1998). BellSouth also asserts that there is nothing discriminatory in its offering UNE combinations to AT&T and MCI WorldCom through their respective negotiated interconnection agreements because, inter alia, for the time being, CLECs may choose the MCI WorldCom or AT&T agreement instead of the SGAT if they wish. BellSouth states it will "renegotiate" its existing contracts to cease to offer UNE combinations to AT&T and MCI WorldCom if the United States Supreme Court upholds this aspect of the Iowa Utilities decision. MCI WorldCom, AT&T and e.spire vigorously dispute that Iowa Utilities preempts state law on this issue. Instead, they contend, the Eighth Circuit

Court of Appeals addressed only the Federal Communication Commission's ("FCC's") authority to require incumbent local exchange carriers to sell combinations of UNEs. Further, as AT&T notes, insofar as the distinction between resale and sales of UNEs is a pricing issue, the Eighth Circuit in its opinion reserved pricing issues to the states.[2] AT&T also contends that BellSouth undercuts its preemption argument by admitting that provision of UNEs in combination is not "illegal" under the Act.[3]

The Commission finds that, because BellSouth unequivocally states that a CLEC has the option of choosing the MCI WorldCom or AT&T agreement rather than the SGAT, the discrimination issue is moot. However, the preemption issue need not be addressed here. The Commission's Order is not in conflict with Iowa Utilities. The Court in Iowa Utilities, 120 F.3d at 813, found that "the Act does not require the incumbent LECs to do *all* of the work." Id. (Emphasis in Original.) The Commission has not ordered BellSouth to take any affirmative action to combine anything; nor has it ordered BellSouth to sell UNE combinations at UNE rates alone. Instead, pursuant to the Order, BellSouth shall offer UNE combinations at UNE prices *plus* a nonrecurring cost-based "glue charge" to compensate it for its time and expertise in having combined the elements. BellSouth may also have the option of disabling the UNE combination electronically and allowing the CLEC to "recombine" the elements through use of the "recent change" mechanism. A UNE combination that has been disabled in such a way is no longer electronically "combined."

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[2] AT&T Response at 7.

[3] AT&T Response at 16.

The Eighth Circuit Court of Appeals clearly contemplated that competing carriers would have direct access to the network in a manner such as the "recent change" mechanism provides in order to "recombine" UNEs. See Id. at 813 ("... the fact that the incumbent LECs object to this rule indicates to us that they would rather allow entrants access to their networks than have to rebundle the unbundled elements for them").

If there were any doubt that electronic "recombination" complies with Iowa Utilities, that doubt is dispelled in the Iowa Utilities court's unequivocal rejection of the ILECs' contention that competitors should not be permitted to provide services "entirely by acquiring all of the necessary elements on an unbundled basis from an incumbent LEC." Id. at 814. The court upheld the FCC's rule on the issue and declared that nothing in the Act "requires a competing carrier to own or control some portion of a telecommunications network before being able to purchase unbundled network elements." Id. Because a carrier *must* purchase or control some "portion of a telecommunications network" – e.g., frame equipment, cross-connection cable, etc., to collocate -- BellSouth's restriction of UNE combination methods to collocation is unlawful. BellSouth claims, however, that collocation is the *only* method of which it knows by which a CLEC may lawfully "combine" elements pursuant to the Iowa Utilities decision, although it is willing to attempt to identify "viable alternatives" that it believes are "consistent with the Telecommunications Act and the Eighth Circuit's Order."[4] The anomaly thus created -- that the only method of complying with the Eighth Circuit's decision in regard to UNE combinations is to violate another aspect of that same decision -- underscores BellSouth's error.

[4] BellSouth Motion at 13.

In fact, nothing in the Eighth Circuit's opinion requires physical separation of UNEs, then connection to a CLEC's physical facility, then reconnection to the ILEC's network. On the contrary: the Eighth Circuit has made it quite clear that the CLEC need not even own a physical facility in order to furnish service to the public solely by means of UNEs purchased from an ILEC.

Finally, BellSouth asks the Commission to "defer any action on collocation options until there have been more definitive actions taken by the FCC, the industry, and until after the U. S. Supreme Court has rendered its decision" [BellSouth Motion at 12]. It is unclear, though, how BellSouth believes the Commission can "defer any action" on the issue, since the SGAT limitation has been put squarely before it.

Having reviewed the motions and having been sufficiently advised, the Commission reaffirms its Order in all respects except as stated herein. However, the Commission recognizes that the law in this area is volatile. Accordingly, it will revisit these issues in light of any applicable change in law, including the pending ruling of the United States Supreme Court in the appeal of the Iowa Utilities decision.

It is SO ORDERED.

Done at Frankfort, Kentucky, this 5th day of October, 1998.

PUBLIC SERVICE COMMISSION

Chairman

Vice Chairman

Commissioner

ATTEST:

Executive Director

CONCURRING OPINION OF EDWARD J. HOLMES, VICE CHAIRMAN

I concur in the immediate end result of the Commission's Order in this case, which requires BellSouth to provide unbundled network elements in combination. However, I would require such provision on the basis that BellSouth's current agreements with AT&T and MCI provide for such sales. Therefore, BellSouth would be required to allow all CLECs the opportunity to use the provisions of these contracts until the Supreme Court renders its decision. Nondiscriminatory access to UNEs is required by the Act. I would also make it clear that, if the Supreme Court affirms the Eighth Circuit's decision in the Iowa Utilities case, BellSouth would no longer be required by this Commission to provide UNE combinations to CLECs.

Edward J. Holmes
Vice Chairman

ATTEST:

Executive Director