

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

IGLOU INTERNET SERVICES, INC.)	
)	
)	CASE NO.
VS.)	99-484
)	
)	
BELLSOUTH TELECOMMUNICATIONS, INC.)	

O R D E R

On November 12, 1999, IgLou Internet Services, Inc. ("IgLou"), an enhanced service provider, filed a formal complaint against BellSouth Telecommunications, Inc. ("BellSouth"). IgLou is a Kentucky-based Internet Service Provider ("ISP") that provides Internet access to thousands of Kentucky residents. BellSouth was subsequently ordered to satisfy the matters complained of, or file a written answer to, IgLou's complaint. A public hearing was held May 26, 2000. Both parties presented evidence and had an opportunity for cross-examination of witnesses. Post-hearing briefs were also filed.

The issues raised by the complaint transcend the private dispute between the parties to this case. They are major ones for this Commonwealth, implicating concerns involving the growth of competition in our telecommunications market, as well as ease of access to information technology that is crucial in determining Kentucky's future. We have jurisdiction over these matters pursuant to KRS 278.260 (empowering the Commission to address complaints regarding utility service) and KRS 278.280

(empowering the Commission to prescribe proper utility practices to replace those found unreasonable).

IgLou's Allegations

IgLou asserts that BellSouth currently maintains dominant control of the telecommunications market that it serves in Kentucky and it thereby controls the dominant technology -- Asynchronous Digital Subscriber Line ("ADSL") -- that allows customers the ability to connect to the Internet at high speeds and with high capacity. IgLou argues that BellSouth's occupation of the position between an ISP and its end-users enables it to exploit this position to benefit BellSouth's own unregulated ISP operations, BellSouth.net, to the detriment of its competitors and the competitive market in general.

IgLou also argues that BellSouth provides better service and better rates to its own Internet operations than it does to competitors such as IgLou. IgLou hinges its complaint on KRS 278.170(1):

No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to an unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions.

IgLou asserts that BellSouth's marketing strategy and business practices in connection with its ADSL offerings constitute (1) an unreasonable preference in favor of its own ISP offering; (2) a cross-subsidy between regulated and nonregulated services in violation of KRS 278.514; and (3) an unreasonable leveraging of its monopoly power. IgLou asks the Commission to require BellSouth to offer all Kentucky ISPs the same

benefits and terms it offers to itself in regard to the deployment of ADSL technology. IgLou's arguments are supported on the record by representatives of other ISPs.

IgLou asserts that BellSouth provided DSL service to itself prior to having made it available to any of its competitors. Thus, according to IgLou, BellSouth beat its competitors to the market by providing a service to itself while intentionally withholding the service from its competitors.

IgLou also asserts that BellSouth has structured its wholesale DSL tariff to ensure that only the largest market providers, including, of course, BellSouth's own Internet service operations, can obtain the best discount available. The tariff provides for major discounts based on a large volume of service spread over the nine-state region. According to IgLou, given this tariff price differential, a Kentucky-based ISP simply cannot compete with BellSouth in providing Internet service.

IgLou explains that the Federal Communications Commission ("FCC") tariff under which DSL is offered prescribes a penalty when an end-user fails to complete his contract term. If IgLou's customer fails to complete a contract term under the wholesale FCC tariff, then IgLou must pay BellSouth the commitment penalty. BellSouth's ISP operations must also pay the penalty when one of its customers fails to complete a contract; however, that penalty is, of course, paid to BellSouth itself.

IgLou alleges many instances in which BellSouth has actively provided better service to itself than to its competitors, including BellSouth's upgrading of its network to serve one of its own customers before serving one of IgLou's customers. Moreover, IgLou charges that BellSouth unfairly competes with other ISPs by actively marketing customers away from competitors when those customers contact BellSouth regarding

regulated telephone service for which BellSouth retains a near-monopoly. For example, IgLou asserts that, when customers contact BellSouth regarding DSL service or any other service provided in conjunction with Internet service, the customer is immediately forwarded to BellSouth's ISP operations rather than simply being informed about the issue at hand or, in the alternative, being informed that there are competing ISPs.

IgLou also asserts that BellSouth improperly mixes its regulated and unregulated services to the detriment of the competitive market and that its regulated services cross-subsidize its unregulated services, in violation of KRS 278.514. IgLou asks the Commission to require BellSouth to change its discriminatory and anti-competitive practices and to assess damages against BellSouth.

BellSouth's Response

In response, BellSouth asserts that it has followed all cost allocation rules and that its regulated services do not subsidize its Internet service. It acknowledges its practice of routing of DSL inquiries directly to its own ISP operations; however, it has agreed to alter this practice. BellSouth has provided an acceptable script which its employees now follow when queried concerning DSL service. Thus, a portion of IgLou's joint marketing concerns have been addressed.

The remainder of BellSouth's response to IgLou's allegations largely consists, however, of assertions that IgLou's allegations are hearsay and/or cannot be taken seriously. BellSouth also contends that, because the claims of discrimination are based upon the terms and conditions of its FCC tariff, this Commission has no authority to address those claims. BellSouth offers to consider Commission proposals for

alterations to its FCC tariff when it next revises the tariff.¹ Finally, BellSouth contends that IgLou already has reasonable options, including becoming a telecommunications carrier or joining an ISP association, by which it can lower the price it must pay for high speed access for its customers.

Intervenor's Allegations

On August 25, 2000, Richard Breen moved to intervene in this case, alleging claims that underscore those of IgLou: he claims that BellSouth has failed to furnish him adequate, efficient and reasonable service. Breen asserts that he attempted to receive high-speed Internet access service from both BlueStar Communications Inc. and Adelphia Telecommunications Inc., and that these utilities could not provide his service because BellSouth would not provide them the necessary network upgrades. He further alleges that BellSouth employees told him that the facilities were ready and in place, but that delay after delay occurred. He has been unable to receive service, and asserts that on one occasion when he contacted BellSouth, he was simply told that DSL service is not available for his office phone number. Mr. Breen's office is located on Breckinridge Lane in Louisville. Mr. Breen's complaint will be addressed in a separate proceeding, Case No. 2000-409².

¹ BellSouth post-hearing brief at 23.

² Case No. 2000-409, Richard Breen v. BellSouth Telecommunications, Inc.

DSL Service and the Interstate Tariff

DSL is a broadband technology used to transfer high bandwidth digital signals over existing copper pairs. One of many uses for the service is access to the Internet. An end-user's twisted pair connects into BellSouth's network, terminating at a DSL-equipped wire center. The traffic is then routed to BellSouth's Asynchronous Transfer Mode Service using frame relay interface capabilities. The subscriber's use of the local exchange plant for circuit switched intrastate and interstate voice and data calls is unaffected by the DSL service.

The FCC has determined that DSL is an interstate access service subject to its jurisdiction.³ In reaching this decision, the FCC distinguished circuit-switched dial-up Internet connections from dedicated Internet connections. The FCC has stated that dial-up connections and local area network ("LAN") connections are matters for state jurisdiction, but that the connection to the Internet is an FCC interstate matter.⁴

The FCC also asserts that a vital ISP market benefits the public interest and that its policies are meant to ensure that ISPs and their customers will obtain DSL at low prices:

We believe that our conclusions will encourage incumbents to offer advanced services to ISPs at the lowest possible price. In turn, the ISP Providers, as unregulated information service providers, will be able to package the DSL Service with their Internet service to offer affordable, high-speed access to the Internet to residential and business consumers. As a result, consumers will ultimately benefit

³ GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, released October 30, 1998.

⁴ Congress's goals with respect to advanced services have been implemented by the FCC. See Second Report and Order (CC Docket No. 98-147, November 2, 1999).

through lower prices and greater and more expeditious access to innovative, diverse broadband applications by multiple providers of advanced services. We note that our conclusions herein do not change the regulatory status of the ISP, which we have previously concluded to be an information service provider rather than a telecommunications carrier. We believe that maintaining the non-carrier status of ISPs, in this instance, benefits the public interest.⁵

The FCC Order also describes the two distinct ways incumbent local exchange carriers (“ILECs”) market and provide DSL service: (1) directly to residential and business end-users (retail); and (2) to ISPs who package DSL as part of a high-speed Internet service (wholesale).

Retail

ILECs file tariffs with the FCC offering single lines of DSL services to end-user customers. The advertising for these services makes clear the single line DSL offerings are designed for and offered to the ultimate end-user because the ILEC will be performing functions such as marketing and billing.

ILECs utilizing the retail business model for tariffing DSL must offer the service to competing local exchange carriers (“CLECs”) at the resale discount. However, the FCC concluded that advanced services sold to ISPs are not subject to the discounted resale obligations contained in the 1996 Telecommunications Act.

Wholesale

ILECs also enter into arrangements directly with ISPs pursuant to which the ISPs purchase large volumes of DSL lines at various discounts based on the number of lines purchased and the duration of the plan. The entities obtaining the bulk DSL services

⁵ Id.

perform certain functions with respect to the DSL service supplied to them, including provisioning all customer premises equipment and wiring, providing customer service, and marketing, billing, ordering, and repair. DSL service sold under the volume and discount plan is not a finished end-user product and is not subject to resale obligations.

Discussion

The record demonstrates that BellSouth's unregulated FastAccess ADSL Internet Service is provided to end-users and not to ISPs. An end-user may not, however, order FastAccess in conjunction with any ISP other than BellSouth's own operations: BellSouth.net. ISPs must purchase BellSouth regulated wholesale ADSL service and use it to create their own ADSL Internet service offerings.⁶

A large part of BellSouth's defense in this case has been based on its contention that IgLou has reasonable options that will enable it to obtain DSL at a lower price than it can now obtain regardless of whether BellSouth changes its practices. BellSouth contends, for example, that IgLou should join an association of ISPs to order DSL in the aggregate. But such action still may not enable Kentucky-based ISPs to qualify for the lowest price and the ISPs would be forced to pay a surcharge not required by BellSouth.⁷ BellSouth also suggests that IgLou should order DSL from a CLEC. But there is evidence in the record that resale DSL market is not generally available. Finally, BellSouth suggests that IgLou file for CLEC status, as such entities may purchase unbundled network elements ("UNEs") to avoid the voluminous volume-

⁶ For a description of BellSouth's Internet operations, see BellSouth's response to IgLou data requests, Item No. 1.10 and 1.19.

⁷ Transcript of Evidence ("T.E.") at 29, 163, and 273-274.

discount tariff requirements. Such action would, however, involve IgLou's assumption of a line of business that it has no desire to assume. Like the other options urged by BellSouth, this option would entail additional expense and administrative burdens that small ISPs can ill afford. In summary, the Commission finds that each option suggested by BellSouth entails unnecessary burdens upon small competitors and/or is unrealistic. Moreover, even if the options offered by BellSouth were reasonable, BellSouth's suggestion of these self-help remedies loses sight of IgLou's primary charge: that BellSouth is burdening, and ultimately may be destroying, many of its competitors by means of providing utility service in a discriminatory manner.

In short, it appears that the wholesale tariff of BellSouth unreasonably discriminates against most Kentucky independent ISPs and will not advance DSL service in Kentucky. IgLou is clearly correct in its contention that smaller ISPs simply cannot purchase the services its customers request in the volume necessary to receive the lowest tier price. BellSouth's FCC tariff is extremely complicated and contains severe pricing disparities between rates for which BellSouth qualifies and rates for which its average competitor could qualify. In addition, the tariff requires a term commitment with associated penalties for early termination. Under the current tariff, ISPs must market DSL service to a large regional customer base to secure, and guarantee under penalty, a minimum of 40,000 lines to take advantage of the lowest tier price. This tariff makes it extremely difficult, if not impossible, for the small independent ISP wishing to take advantage of BellSouth's currently proposed broadband rollout to compete against a regional ISP. Given this Commission's frequently reiterated position in favor of telecommunications competition, together with its support for the proposed

broadband rollout,⁸ we can only find the practical result of BellSouth's DSL tariff unacceptable.

We must also note that Verizon South, Inc. ("Verizon"), formerly known as GTE South Incorporated, has chosen to sell DSL very differently and that, as a result, independent ISPs have a more realistic opportunity to compete in areas served by Verizon.⁹ Cincinnati Bell, Inc., meanwhile, sells DSL at retail directly to end-users who want it.¹⁰ No 40,000 line commitment is necessary to receive a \$29.95 residential rate for 768 kbps/384 kbps "Turbospeed" service.¹¹

This Commission has previously stated that it does not purport to regulate the Internet *per se*. However, the issue here has to do with intrastate utility service over intrastate communications facilities. See 47 U.S.C. 152(b). Although DSL is used to connect to the Internet, other uses for this service exist and will evolve as a broadband infrastructure is deployed throughout the Commonwealth. DSL is a fundamental piece of a broadband infrastructure that will support future advanced services. Open, non-discriminatory access to this infrastructure is imperative for the development of

⁸ See Case No. 99-434, The Review of BellSouth Telecommunications, Inc.'s Price Regulation Plan.

⁹ See GTE Telephone Operating Companies Tariff, FCC No. 1, Section 16.6, DSL Solutions; Testimony of Susan Ashdown, T.E at 60 (asserting that Kentucky ISPs are able to "make a limited go of it in GTE territory" because "GTE does not have these absurd tariffs where they have to commit to a 40,000 line volume to – in order to obtain a reasonable discount").

¹⁰ See CBT General Exchange Tariff, PSCK No. 3, Section 55.

¹¹ Id. at 7th Revised Page 4.

competition and evolution of advanced services. Accordingly, we do not concede that the FCC has preempted any state action here. Nor do we believe that the practical result of BellSouth's FCC tariff reflects the FCC's stated intention of endorsing ISP competition. Finally, we do not believe that such business practices comport with the goals of Congress as stated in the Joint Conference Report associated with the 1996 Telecommunications Act, in which Congress indicated that it would require Bell Operating Companies to provide equal access and nondiscriminatory service to interexchange carriers and information service providers.¹²

The development of a broadband infrastructure and the resulting high-speed access market is critically important to Kentucky's economic future. Pursuant to KRS Chapter 278, this agency has been entrusted with oversight of this market, and we have specific authority to address complaints in regard to it and to ensure that unreasonable and discriminatory practices do not impede its development.

We therefore reach the following conclusions: in regard to IgLou's allegations regarding violation of accounting safeguards, we find for BellSouth. BellSouth's operations appear to comply with specified safeguards and with its cost allocation manual regarding regulated and nonregulated accounts. Second, we deny IgLou's demand for damages. This Commission has no jurisdiction to provide such a remedy.

Next, we find that, in regard to provision of DSL service in Kentucky, BellSouth has provided preferential and discriminatory service to itself to the detriment of other customers, specifically the small ISPs, in violation of KRS 278.170. Therefore, pursuant to KRS 278.280, we order BellSouth to alter its practices as follows.

¹² Joint Conference Report at 122.

BellSouth must continue to require its employees to follow the new script when queried regarding DSL service. In addition, it must advise inquirers of the availability of other ISPs on all DSL-related calls. Even more crucially, BellSouth must change the terms and conditions pursuant to which it effects DSL in Kentucky.

Specifically, BellSouth must modify its regional wholesale discount levels to Kentucky-specific levels and eliminate or greatly reduce the tariff penalties. These modifications shall be filed in an intrastate wholesale tariff so that this Commission can monitor the provision of this intrastate service. The current 40,000 threshold for the best price must be lowered so that within Kentucky all competitors have an opportunity to receive DSL for a comparable price. It is unreasonable, discriminatory, and destructive to the competitive market for BellSouth to provide itself DSL for \$29.00 when its in-state competitors cannot qualify for this price without assuming other costs and burdens that would result from aggregating or entering the business of providing telecommunications themselves.

Kentucky represents roughly 5 percent of BellSouth's nine-state region line count. To calculate a state-specific level BellSouth must multiply the number of lines required to receive the discount by 5 percent. Such calculations should produce reasonable Kentucky-specific aggregate discount levels that independent ISPs can meet.

Although we conclude that we need not require BellSouth to file a retail DSL tariff at this time, we will closely monitor the market to determine whether the wholesale tariff ordered herein adequately serves Kentucky's consumers while moving Kentucky

forward in this technological age. Moreover, BellSouth should file a written explanation detailing the requirements necessary for it to provide DSL pursuant to a retail tariff. Such explanation should also address the public interest issues involved in a retail tariff that would empower consumers to employ DSL as they please.

Having reviewed the record and having been otherwise sufficiently advised, the Commission HEREBY ORDERS that:

1. Within 30 days of the date of this Order, BellSouth shall file a Kentucky-specific DSL tariff as prescribed herein for wholesale service, together with associated cost support.
2. Within 30 days of the date of this Order, BellSouth shall file a plan for complying with all of the marketing directives contained herein, including the script BellSouth plans to use to advise customers of the availability of other ISPs.
3. Within 30 days of the date of this Order, BellSouth shall file a written explanation detailing the requirements of a retail DSL tariff and the related public interest issues as described herein.
4. Those portions of IgLou's complaint alleging violations of accounting safeguards and seeking monetary damages are hereby denied.

Done at Frankfort, Kentucky, this 30th day of November, 2000.

By the Commission

ATTEST:


Executive Director