

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

THE INTERCONNECTION AGREEMENT)	
BETWEEN UNIVERSAL TELECOM, INC.)	CASE NO.
AND ALLTEL TELECOMMUNICATIONS)	2000-027
SERVICE CORPORATION)	

and

THE APPLICATION BY COMM SOUTH)	
COMPANIES, INC. D/B/A KENTUCKY)	
COMM SOUTH AND ALLTEL COMMUNICATIONS)	CASE NO.
SERVICE CORPORATION FOR APPROVAL OF)	2000-083
RESALE AGREEMENT PURSUANT TO THE)	
FEDERAL TELECOMMUNICATIONS ACT OF 1996)	

O R D E R

We reopen these cases upon remand from the United States District court, Eastern District of Kentucky, in ALLTEL Kentucky, Inc. v. Brenda Helton, et al., C.A. No. 00-45 (E.D. Ky. September 18, 2000) for two purposes: [1] to clarify the public interest standard pursuant to which certain terms in the negotiated interconnection agreements in these cases were rejected pursuant to 47 U.S.C. § 252(e)(2)(A)(ii); and [2] to set a procedural schedule that offers ALLTEL Kentucky, Inc. (“ALLTEL”) an opportunity to demonstrate at hearing that it is entitled to retain rural exemption status under 47 U.S.C. § 251(f)(1)(B).

BACKGROUND

On February 24, 2000 and January 18, 2000, respectively, ALLTEL filed with the Commission negotiated inter-carrier agreements providing for the sale of its services to Comm South Companies, Inc. (“Comm South”) and Universal Telecom, Inc. (“Universal”), which would then resell those services within ALLTEL’s service area.

Section 252(e) confers upon state utility commissions the authority to approve or reject a negotiated inter-carrier agreement. An agreement may be rejected if it is “not consistent with the public interest, convenience, and necessity.” 47 U.S.C. § 252(e)(2). A state commission may also enforce state law in reviewing agreements. 47 U.S.C. § 252(e)(3).

Upon review of the agreements submitted in these cases, the Commission found that, despite the requirement of 47 U.S.C. § 252(d)(3) that the incumbent sell services to resellers at an avoided cost discount off the tariffed rate, the prices ALLTEL planned to charge these two resellers were its tariffed rates. The Commission concluded that such pricing violates the public interest and rejected the pricing in the agreements. Because ALLTEL had not provided the Commission with cost studies demonstrating the expense ALLTEL would avoid in wholesale, as opposed to retail, transactions, the Commission ordered ALLTEL to provide wholesale services to Comm South and Universal at the 17 percent discount rate set by the Commission in Administrative Case No. 355¹ to be charged by carriers that have failed to furnish relevant cost information.

Contending that its rural exemption under Section 251 entitled it to provide services to resellers at its tariffed rate, ALLTEL requested rehearing. The Commission denied rehearing but explicitly offered ALLTEL an opportunity to provide cost information so that its discount rate would accurately reflect costs it actually avoided.

ALLTEL filed suit both in federal and state courts, alleging deprivation of its statutory rights and asserting, once again, its right to charge tariffed rates to resellers

¹ Administrative Case 355, An Inquiry Into Local Competition, Universal Service, and the Non-Traffic Sensitive Access Rate, Order dated September 26, 1996 (“PSC Local Competition Order”).

based on its rural exemption. The Commission asserted in both proceedings that ALLTEL had failed to state a claim for which relief could be granted and, in the federal proceeding, filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). On September 18, 2000, the Court found that, as the issues before it were purely statutory, action on the Commission's motion was appropriate.

The Court remanded the case to the Commission for further proceedings consistent with its Opinion, which contained two key conclusions. First, the Court found that the Commission's authority to reject negotiated inter-carrier agreements pursuant to the public interest standard of 47 U.S.C. § 252(e)(2)(A)(ii) is unaffected by the rural exemption:

ALLTEL may hold a rural telephone company exemption, but it is still required to enter into agreements that are consistent with the "public interest, convenience, and necessity." 47 U.S.C. § 252(e)(2)(A)(ii)...[i]f the commission reached its decision under 47 U.S.C. § 252(e)(2)(A)(ii), which did not require a determination of ALLTEL's status as a rural carrier, the decision in question was reached without the necessity of a 47 U.S.C. § 251(f)(1)(B) hearing to terminate ALLTEL's standing exemption as a rural carrier and ALLTEL's right to due process was not violated by the commission.

[Opinion at 7-8]. The Court did not dismiss ALLTEL's claims. Instead, it held them in abeyance, stating that it was unclear from the Commission's Orders in these cases whether the Commission had rejected the agreements under the public interest standard and, if it had, what rationale supported that public interest conclusion. Accordingly, the Court remanded "for further findings of fact consistent with this opinion" [Opinion at 9].

Next, the Court held that, if the Commission's Orders were *not* based on the public interest standards of Section 252(e)(2)(A)(ii), but were instead "*de facto*" denials

of ALLTEL's exempt status, they might have violated ALLTEL's right to due process [Opinion at 7]. On the other hand, if the Commission reached its decision pursuant to Section 252(e)(2)(A)(ii), due process issues were not implicated [Opinion at 8].

The Court concluded that, "[u]pon reopening this issue, the commission may engage in the exemption analysis outlined in 47 U.S.C. § 251(f)(1)(B), thereby mooting ALLTEL's due process claim."

THE PUBLIC INTEREST ANALYSIS SUPPORTING
THE COMMISSION'S REJECTION OF ALLTEL'S PRICING OF
SERVICES TO RESELLERS AT THE TARIFFED RATE

The Commission's refusal to accept the tariffed price in an inter-carrier contract between an incumbent local exchange carrier ("ILEC") and a new carrier proposing to enter the telecommunications market by reselling the ILEC's services is fully grounded in the pro-competitive policy which Congress itself found to be in the public interest when it enacted the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, 47 U.S.C. §§ 151 et seq.; which the Federal Communications Commission ("FCC") has upheld in its discussions regarding the federal policies geared toward developing meaningful competition in rural areas; and which this Commission has, as a matter of state policy, upheld in numerous Orders. Competition will not develop in the area currently subject to ALLTEL's monopoly until prices to new entrants are sufficiently low to enable them to make a profit.

As explained in the Joint Explanatory Statement of the Committee of Conference, Congress's purpose in passing the Telecommunications Act of 1996 was to open "*all* telecommunications markets to competition." (Emphasis added.) As the FCC has observed, Congress "did not intend to insulate smaller or rural LECs from competition, and thereby prevent subscribers in those communities from obtaining the benefits of

competitive local exchange service.”² Similarly, this Commission has long made clear to incumbent carriers in Kentucky that it favors a pro-competitive policy and believes that policy serves the public interest:

The Commission favors a pro-competitive policy for all geographic areas of Kentucky and expects that the decisions made in this and subsequent orders will ensure compliance with the 1996 Act while providing the benefits of competition to all of the Commonwealth’s citizens.³

We recognized in 1996 that Kentucky’s urban areas would be more lucrative, and thus more attractive to new market entrants, and that competition would not develop “at the same pace throughout the state.”⁴ Accordingly, we ordered ALLTEL, and other rural carriers, to file cost studies within three years of the date of the Order.⁵ ALLTEL did not appeal that Order, pursuant to which its cost studies were due to this Commission a year ago. Nevertheless, it has not filed its cost studies, pursuant to which an accurate wholesale discount rate could have been calculated.⁶ We also, in that same Order, refused to establish a rural exemption that would continue for a set number of years, explaining that new entrant requests to enter rural carriers’ markets would initiate the

² *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98 (F.C.C. Aug. 8, 1996) (“FCC Local Competition Order”), Paragraph 1262.

³ PSC Local Competition Order at 51.

⁴ PSC Local Competition Order at 49.

⁵ PSC Local Competition Order at 53.

⁶ We later rescinded the three-year deadline for rural carriers in Administrative Case No. 355, *An Inquiry into Local Competition, Universal Service and the Non-Traffic Sensitive Access Rate* and Case No. 99-376, *Approving Duo County’s Avoided Cost Methodology and Study* (Order dated Sept. 22, 1999). However, we have never wavered from our intention to require the filing of such cost summaries and the calculation of the appropriate discount prior to the execution of any resale agreement between a rural carrier and a new market entrant.

appropriate public interest inquiry. We then set an automatic default rate of 17 percent for all ILECs other than BellSouth Telecommunications, Inc. and GTE South Incorporated,⁷ and warned the rural companies that they were expected “to undertake all steps necessary to compete effectively in an expeditious manner.”⁸

Finally, we warned the rural ILECs that, three years from the date of our Local Competition Order, we would not consider failure to complete an appropriate cost study “as an adequate basis in support of petitions to maintain an exemption or to be given a suspension or modification.”⁹

The Telecommunications Act of 1996, the FCC’s Local Competition Order, and this Commission’s Local Competition Order are now over four years old, and the first small steps toward competition in ALLTEL’s monopoly market are beginning to be taken: new competitors wish to provide resold services. However, ALLTEL signed agreements with these carriers that would provide ALLTEL with windfall profits, since it would sell at its tariffed rate while not incurring the costs associated with retailing the service. Competition cannot develop when would-be competitors pay, as their cost, the same rate paid by end-use customers to the incumbent. Such circumstances would only result in the incumbent maintaining its captive customer base and perpetuating its monopoly.

⁷ PSC Local Competition Order at 53. The default rates for BellSouth and GTE South were set at 19.20 percent and 18.81 percent, respectively.

⁸ PSC Local Competition Order at 48.

⁹ PSC Local Competition Order at 48.

Because the pricing terms' crippling effects on competition, coupled with the windfall profits that would result to ALLTEL, violate the public interest, the prices were rejected by this Commission.

PROCEEDINGS REGARDING ALLTEL'S RURAL EXEMPTION

As explained above, the Commission has concluded that, whether or not an ILEC holds a rural exemption, it may not thwart meaningful competition in its monopoly service areas by agreeing to sell its services only at the retail rate. Moreover, a wholesale rate that accurately reflects costs avoided by the ILEC should simply render the ILEC indifferent to whether its service is bought by an end-use customer or by another carrier for resale to the end-use customer.

The Commission has also concluded that it is beyond question, as a matter of either logic or law, that Comm South and Universal submitted "bona fide" requests for "interconnection" or "services" to ALLTEL when they first requested negotiations. 47 U.S.C. § 251(f). Because ALLTEL wished to assert the rural exemption from Section 251's obligation to negotiate, it should have asserted the exemption at that time. Its failure to do so, coupled with the inflated pricing it demanded from new market entrants and subsequent lawsuits to uphold its anticompetitive pricing scheme, have delayed the introduction of meaningful competition in ALLTEL's service area and therefore have adversely affected the Kentucky consumers within that area. That this Commission fully intended for ALLTEL to permit competitors to enter its market on reasonable terms that include a wholesale discount is clear from the PSC Local Competition Order issued in September 1996. That Order is final, was not appealed by ALLTEL, which was a party to that proceeding, and now is enforceable under Kentucky law. See KRS 278.990.

State law, as well as federal law, may be enforced by state utility commissions in their rulings on interconnection agreement. 47 U.S.C. § 252(e)(3).

However, in order to ensure that competition is not further delayed by additional litigation regarding the terms pursuant to which new competitors may enter ALLTEL's market, a hearing in this matter should be set as expeditiously as possible so that ALLTEL may, pursuant to 47 U.S.C. § 251(f), state its reasons why sales of its services at a wholesale, rather than a retail, rate, is unduly economically burdensome, technically infeasible, and inconsistent with universal service goals pursuant to the Act.

In the meantime, with some reluctance, we have concluded that the interconnection agreements whose pricing terms were originally rejected in these cases should be permitted to go into effect as submitted pending the outcome of this proceeding, when the prices will be subject to immediate and appropriate adjustment. We continue to believe that the terms are not in the public interest, because they will effectively prevent genuine competition to develop in ALLTEL's territory. We are, however, compelled to recognize the ironic fact that our efforts to promote competition through rejection of the pricing in these agreements have actually contributed to delaying the entry of new competitors, tentative though that entry is, into ALLTEL's monopoly markets.

IT IS THEREFORE ORDERED that:

1. ALLTEL shall submit its avoided cost studies no later than November 17, 2000.
2. No later than December 1, 2000, ALLTEL shall submit summaries of its arguments that it is entitled to retain its rural exemption and that providing service to

resellers at an avoided cost discount would cause it undue economic burdens, would be technically infeasible, and would be inconsistent with Section 254 of the Telecommunications Act of 1996.

3. No later than December 11, 2000, ALLTEL shall submit a list of witnesses it will call at the hearing in this matter, together with a brief summary of those matters to which each witness will testify.

4. A hearing is scheduled in this matter for 9:00 a.m., Eastern Standard Time, December 14, 2000, in Hearing Room 1 of the Commission's offices at 211 Sower Boulevard, Frankfort, Kentucky.

5. The agreements submitted on February 24, 2000, and January 18, 2000, respectively, are effective as of the date of this Order, and the pricing terms thereof are subject to adjustment pending the outcome of this proceeding.

Done at Frankfort, Kentucky, this 17th day of October, 2,000.

By the Commission

ATTEST:

Wm H. Fowler
Deputy Executive Director