

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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| PETITION OF SOUTHEAST TELEPHONE, INC. |) | |
| FOR ARBITRATION OF CERTAIN TERMS AND |) | CASE NO. |
| CONDITIONS OF THE PROPOSED |) | 2003-00115 |
| AGREEMENT WITH KENTUCKY ALLTEL, INC., |) | |
| PURSUANT TO THE COMMUNICATIONS ACT |) | |
| OF 1934, AS AMENDED BY THE |) | |
| TELECOMMUNICATIONS ACT OF 1996 |) | |

O R D E R

Kentucky ALLTEL, Inc. (ALLTEL) has filed a motion to require responses to a large number of interrogatories and requests for production of documents in this proceeding. ALLTEL has also requested an extension of time to file testimony. In response, SouthEast Telephone, Inc. (SouthEast) has filed a Motion in Limine and Objection to ALLTEL s data requests. SouthEast objects to all of ALLTEL s discovery requests. SouthEast also disputes ALLTEL s argument that the issues presented by the Federal Communications Commission s (FCC) Triennial Review Order (TRO),¹ which are currently under review in another case at this Commission,² must be decided in this proceeding. SouthEast says those issues are irrelevant to an arbitration proceeding and that the statutory time frame for concluding this case does not allow for the

¹ Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Report and Order, Order on Remand, FCC CC Docket No. 01-00338, Rel. August 21, 2003.

² Case No. 2003-00379, Review of Federal Communications Commission s Triennial Review Order Regarding Unbundling Requirements for Individual Network Elements.

complete market analysis ALLTEL seeks. SouthEast moves that the Commission enter an Order prohibiting introduction of evidence required by the TRO. By this Order, we grant in part, and deny in part, both parties motions. In addition, we order SouthEast to provide certain information to ALLTEL, and for the record, in this docket.

In this, as in other actions governed by the Telecommunications Act of 1996 (the Act), we look to the Act itself. The Act requires a state commission to enforce the provisions of 47 U.S.C. Section 251 in arbitrating an interconnection agreement pursuant to 47 U.S.C. Section 252.³ A finding of impairment is mandated by 47 U.S.C. Section 251(d)(2)⁴ before an incumbent may be required to provide unbundled network elements (UNEs). Thus, as we enforce the section of the statute in which this provision appears, the question of whether SouthEast would be impaired by an inability to obtain requested UNEs from the incumbent is relevant to this proceeding. However, it is not the relevance of the standard, but the scope of the inquiry and the responsibility of the parties that are the key issues here.

The FCC has, in the recently issued TRO, delegated to state commissions the authority to determine impairment in geographic markets within each state. It has declared a presumption that impairment exists nationally for CLECs who are unable to

³ See 47 U.S.C. Section 252(c) (In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251).

⁴ The statute provides, in pertinent part, that a decision as to which network elements should be made available by an incumbent to a requesting carrier requires the FCC to consider whether failure to provide such elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

obtain UNEs to serve mass markets. We have opened a docket to perform the necessary analysis, on a market-by-market basis, in Kentucky. We have invited participation by all carriers authorized to provide service in the Commonwealth, and anticipate a very full record. In our proceeding pursuant to the TRO, we have an obligation to obtain all information relevant to the standards set forth by the FCC. The end result of that 9-month proceeding will be a set of standards applicable to all carriers in Kentucky, the equivalent of a rulemaking. The resulting standards, by FCC Order, will be in place only after the 9-month inquiry is complete.

This proceeding, on the other hand, concerns only SouthEast and ALLTEL. Further, it must be completed in the very brief time frame specified by Congress for arbitrations. Our Order in this case, resolving all issues raised in the petition and the response, must perforce be entered long before the information needed to issue a final determination in the TRO proceeding can be gathered. As a practical matter, the full-scale market inquiry ALLTEL seeks to conduct cannot be completed in the time frame allowed by Congress. Nor, as a legal matter, should so broadly based an inquiry be conducted in this docket.

Section 251 of the Act specifies not only that impairment be found, but that the FCC is required to consider the issue. To accomplish this inquiry, the FCC established major state commission inquiries which are not complete. The final standards will not be set until our final Order in the TRO proceeding is issued. At that time, all carriers will be bound by those standards.

In this proceeding, our focus will be upon SouthEast's request to obtain UNEs. We will determine whether, without the UNEs it requests, SouthEast's ability to provide

the services that it seeks to offer will be impaired. SouthEast should, therefore, respond to questions concerning the types of services it seeks to offer, and the geographic area in which it seeks to offer them; information regarding alternative means of providing those services of which it is aware; and the relative costs of those alternatives. Consequently, questions 1, 2, 5, 6, 18, 57 and 58 of ALLTEL's interrogatories are relevant and should be answered. However, we decline to impose upon SouthEast the unduly burdensome responsibility of providing to the Commission, in this case, the breadth of information that it will be our responsibility to obtain, and all carriers responsibility to provide, in a rulemaking. Our decision not to impose this burden upon SouthEast is particularly appropriate in light of the existing presumption, declared by the FCC in its TRO, that SouthEast's ability to provide service is impaired without access to UNEs.⁵ Furthermore, we decline to render a full and final market determination concerning impairment for CLECs in general for the geographic area in which SouthEast seeks to serve.

ALLTEL may, of course, place into the record, among other things, any evidence it has concerning alternative methods of providing services that it believes are reasonably available to SouthEast.

IT IS THEREFORE ORDERED that:

1. ALLTEL's Motion to Require Responses to Discovery is granted in part and denied in part as specified herein.
2. SouthEast's Motion in Limine is granted in part and denied in part as specified herein.

⁵ TRO at paragraphs 419, 422-425.

3. Responses ordered herein are due by 1:00 p.m., Eastern Standard Time, November 7, 2003.

4. ALLTEL's Motion for Extension of Time to file testimony and other items due November 5, 2003 is granted to the extent that those items shall be filed by 10:00 a.m., Eastern Standard Time, November 10, 2003.

Done at Frankfort, Kentucky, this 3rd day of November, 2003.

By the Commission

ATTEST:

Deputy Wm. H. I. Barker
Executive Director