

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS, INC.'S)
NOTICE OF INTENT TO DISCONNECT) CASE NO.
SOUTHEAST TELEPHONE, INC. FOR NON-) 2005-00519
PAYMENT)

AND

SOUTHEAST TELEPHONE, INC.)
)
COMPLAINANT) CASE NO.
) 2005-00533
V.)
)
BELLSOUTH TELECOMMUNICATIONS, INC.)
)
DEFENDANT)

O R D E R

This matter has been remanded to the Commission by an Opinion and Order of the United States District Court, to address the issue of damages owed to BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky") by SouthEast Telephone, Inc. ("SouthEast"), if any.¹

¹ Opinion and Order, BellSouth Telecommunications, Inc. v. Public Service Commission et al., Civil Action No. 06-65-KKC, slip copy, 2007 WL 2736544, United States District Court, Eastern District of Kentucky (September 18, 2007) ("Opinion").

In the Opinion, the District Court held that Congress granted sole enforcement authority of 47 U.S.C. § 271 (“Section 271”) to the Federal Communications Commission (“FCC”).² The District Court stated that the Commission has no authority to act pursuant to Section 271.³ The District Court also held:

BellSouth also requests the Court to order Southeast to pay BellSouth the resale rates for those services that Southeast ordered. Having determined that the PSC lacks authority under § 271, the Court will not address the issue of damages. However, the Court acknowledges that it has the power to remand the action to the PSC to determine what, if any, damages are due as a result of the unlawful orders. BellSouth Telecomms., Inc. v. Ga. Public Serv. Comm’n, 400 F.3d 1268, 1271 (11th Cir. 2005); see also BellSouth Telecomms., Inc. v. Cinergy Commc’ns Co., 2006 WL 695424 (E.D. Ky. 2006). Therefore, the Court will remand the matter to the PSC to determine the amount of damages, if any, owed to BellSouth.⁴

On November 9, 2007, AT&T Kentucky filed a motion for the issuance of a damages award. On November 29, 2007, SouthEast responded to the motion. On December 12, 2007, AT&T Kentucky replied to SouthEast, and on December 17, 2007, SouthEast filed a supplemental response. An informal conference was held on December 19, 2007. On January 25, 2008, AT&T Kentucky responded to SouthEast’s proposed options for measuring damages, and, on February 8, 2008, SouthEast replied to AT&T Kentucky’s response. Both parties stated that no evidentiary hearing is necessary and agree that this matter is ripe for decision.

² Slip copy at 18.

³ Id.

⁴ Id. at 18 and 19.

AT&T KENTUCKY'S POSITION

AT&T Kentucky views the damage award as a determination of a breach of contract. It argues that the Commission should require "Southeast to immediately pay for the resale services that it ordered under its interconnection agreement with AT&T Kentucky."⁵ AT&T Kentucky asserts that the damages should include the past-due balance on SouthEast's resale bill and the credit amount that AT&T Kentucky provided to SouthEast in order to implement the Commission's August 16, 2006 Order.⁶

AT&T Kentucky further notes that "the federal court has made clear that the Commission does not have jurisdiction over Section 271 rates and elements, leaving the Commission with only the parties' interconnection agreement to look to for resolution of this matter."⁷ AT&T Kentucky argues that the Commission must order damages within its jurisdiction based on the rates for resale services.⁸ Otherwise, according to AT&T Kentucky, the District Court would not have remanded the case to the Commission to rule on damages related to Section 271 elements when the Court said the Commission had no authority to order AT&T Kentucky to provide Section 271 elements or to set rates for such elements.

SOUTHEAST'S POSITION

SouthEast contends that no damages occurred as a result of the Commission's Orders and that the District Court did not find that AT&T Kentucky was entitled to

⁵ AT&T Kentucky Motion for Issuance of Damages Award at 5 and 6.

⁶ Id. at 7.

⁷ AT&T Kentucky Reply to SouthEast's Response at 2.

⁸ Id. at 4, fn. 7.

damages. It did not find that AT&T Kentucky was entitled to collect its resale rate, nor did the Court instruct the Commission on the manner in which it should calculate the damages, if any.⁹ SouthEast claims that the Commission cannot use rates set pursuant to Section 271 to calculate damages and that the only reasonable way for the Commission to comply with the District Court is to determine AT&T Kentucky's damages based on a "make whole theory."¹⁰ Thus, SouthEast argues, the Commission must calculate the actual difference between what SouthEast paid pursuant to the Commission's Order and AT&T Kentucky's provisioning cost.¹¹ SouthEast states:

Section 271 competitive checklist elements, which AT&T Kentucky is required to provide, are not the same thing as "resale service," the rates for which are calculated under a separate section of the Act. SouthEast intended to order, and did order, Section 271 competitive checklist elements, not resale service. AT&T Kentucky is simply wrong in repeatedly claiming that SouthEast ordered resale services. SouthEast used the resale ordering system to submit orders for the Section 271 elements only because AT&T Kentucky wrongly denied SouthEast access to its network element ordering system.¹²

"Damage," according to SouthEast, is money to be paid as "compensation for loss or injury."¹³ SouthEast asserts that the only proper way to measure damages is to determine actual damages which will compensate for proven injury or loss, i.e., damages that repay actual losses.¹⁴ Though the Commission has no jurisdiction to

⁹ SouthEast Response to Motion at 2.

¹⁰ Id. at 3.

¹¹ Id.

¹² Id.

¹³ Citing Black's Law Dictionary (8th edition 2005).

¹⁴ SouthEast Response to Motion at 9.

award “damages” (according to SouthEast), it may restore to a utility monies lost if the loss is confiscatory and ascertainable by actual figures.¹⁵ SouthEast also alleges that Kentucky law prohibits damages to be recovered where they are uncertain, contingent, and speculative.¹⁶

SouthEast further claims that the District Court’s Opinion was merely a ruling on jurisdiction.¹⁷ Thus, according to SouthEast, the only question on remand is whether AT&T Kentucky suffered actual out-of-pocket costs by the Commission’s Order requiring an interim rate of total element long run incremental cost (“TELRIC”) plus \$1 for network elements. Without a finding that these rates were unjust and unreasonable, and without evidence that AT&T Kentucky suffered out-of-pocket costs, SouthEast alleges that AT&T Kentucky is not entitled to damages.¹⁸

DISCUSSION

The Commission framed this case as “whether BellSouth [now AT&T Kentucky] must make the port-loop-switch elements available to SouthEast at an appropriate rate pursuant to Section 271.”¹⁹ Following FCC dictates, the Commission determined that

¹⁵ Id. at 9 and 10, citing Carr v. Cincinnati Bell, Inc., 651 S.W.2d 126, 128 (Ky. App. 1983)..

¹⁶ Id. at 11, citing Barley’s Adm’x v. Clover Splint Coal Co., 150 S.W.2d 670, 671 (Ky. 1941).

¹⁷ SouthEast Supplemental Response at 2.

¹⁸ Id. at 2-4.

¹⁹ August 16, 2006 Order at 11.

those elements must be made available.²⁰ The District Court did not upset the Commission's construction of the Triennial Review Order, even though it indicated that the Commission was the improper forum to establish rates for Section 271 elements. The District Court nowhere found that AT&T Kentucky could avoid its statutory obligation to provide access to switching and transport elements to SouthEast pursuant to Section 271. The District Court determined that the Commission has no jurisdiction regarding enforcement of these obligations; however, given the District Court Opinion, we now turn to a determination of what damages, if any, are within the scope of the Commission's jurisdiction.

First, AT&T Kentucky's assertion that damages must be awarded to compensate AT&T Kentucky as though SouthEast ordered resale services is unwarranted. Although SouthEast utilized the resale ordering systems of AT&T Kentucky, SouthEast asserted from the beginning that it was seeking to serve its customers through access and interconnection, including local loop transmission, local transport, and local switching available under Section 271 and ordered those individual elements.²¹ 47 U.S.C 251(c)(4)(A) defines resale as "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." In a sense, this is

²⁰ See, e.g., Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978 (2003), aff'd in pertinent part and remanded in part, United States Tel. Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004), cert. denied, 125 S.Ct. 313 (2004) ("Triennial Review Order"), at ¶ 407 (" . . .BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates") and ¶ 656 (Section 271 UNEs are to be "priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202").

²¹ SouthEast's Complaint and Request for Injunctive Relief at 2-5.

essentially taking the complete service package that AT&T Kentucky offers its customers, and reselling it to a competitor so that the competitor may then offer those services to its customers. Resale differs from the elements that SouthEast ordered and utilized pertaining to local loop transmission, local transport, and local switching, which AT&T Kentucky must make available pursuant to Section 271.²² It is clear that SouthEast did not order or utilize AT&T Kentucky's resale services.

Moreover, the parties' interconnection agreement contained a dispute resolution provision which required AT&T Kentucky to continue its obligations under the interconnection agreement while the dispute resolution was pending.²³ The Commission does not agree that the damages issue may be categorized as a mere breach of contract by SouthEast.

Second, SouthEast correctly claims that the Commission has no jurisdiction to award damages per se. Carr v. Cincinnati Bell, Inc., 651 S.W.2d 126, addresses the issue of how "the relief sought divides itself between the jurisdiction of the PSC and the court."²⁴ If the issue presented is the validity of a utility's policy or the validity of a regulation, then the jurisdiction would be with the Commission. However, the Court states, "[n]owhere in Chapter 278 do we find a delegation of power to the PSC to adjudicate contract claims for unliquidated damages. Nor would it be reasonable to

²² These elements must be provided pursuant to 47 U.S.C. § 271(c)(2)(B)(iv), (v) and (vi.)

²³ August 16, 2006 Order at 10 and 11.

²⁴ Carr at 128.

infer that the Commission is so empowered or equipped to handle such claims.”²⁵ The Commission, thus, is not empowered by statute to determine damages in this case as proposed by SouthEast and AT&T Kentucky. While the Commission has the authority to prescribe rates, the District Court has determined that this Commission is without power to establish a rate under Section 271. Moreover, for the Commission to determine rates on a retrospective basis, we would be required to establish rates for those network elements mandated to be provided by Section 271. This determination would run afoul of the District Court’s decision that we lack jurisdiction to act pursuant to Section 271. Accordingly, without knowing the proper rate, we cannot reach back and change the rates established and apply new rates retroactively.

Having determined that the amount of damages should not be calculated by subtracting SouthEast’s payments from the prices contained in AT&T Kentucky’s resale arrangements, the Commission must determine the proper method by which to calculate damages.²⁶ The District Court was quite clear that the Commission could not act as it did pursuant to Section 271 in setting rates for elements to be provided under Section 271. Therefore, the Commission declines to apply SouthEast’s method for calculating damages, as even determining the provisioning costs of the elements AT&T Kentucky provided to SouthEast would require determining a rate for a Section 271 element and thus be prohibited by the District Court.

²⁵ Id.

²⁶ Though the District Court acknowledged AT&T Kentucky’s requested relief regarding damages, it did not grant the requested relief or direct the Commission to determine damages based upon AT&T Kentucky’s resale price.

The District Court did not address AT&T Kentucky's request for damages because the issue on appeal was one of jurisdiction; the issue of damages was not before the District Court. The issue of damages has now been briefed and we conclude that we cannot determine the proper award without knowing the proper rate for Section 271 elements. Moreover, the Commission does not have authority to award damages per se or to set rates retroactively.

CONCLUSIONS OF LAW

1. The Commission may not award damages in this case under Kentucky law.
2. The Commission may not retroactively determine rates for Section 271 elements.
3. The Commission makes no finding regarding whether any amounts are owed by SouthEast to AT&T Kentucky as damages.

The Commission, having considered matters remanded to it by the District Court, and having determined that it lacks jurisdiction to address the issue of damages, if any, HEREBY ORDERS that:

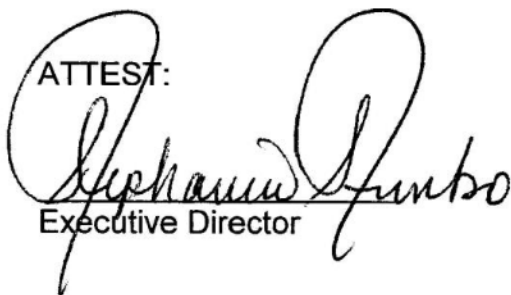
1. This case is dismissed.
2. This is a final and appealable Order.

Done at Frankfort, Kentucky, this 2nd day of May, 2008.

By the Commission

Commissioner Clark Abstains.

ATTEST:

Handwritten signature of Stephanie Gumbo in cursive script.

Executive Director