

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

SOUTH CENTRAL TELCOM, LLC)	
)	
COMPLAINANT)	
)	
V.)	CASE NO. 2006-00448
)	
BELLSOUTH TELECOMMUNICATIONS, INC.)	
)	
DEFENDANT)	

O R D E R

On October 13, 2006, South Central Telcom, LLC ("South Central"), a competitive local exchange carrier ("CLEC"), filed a complaint against BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky") alleging that AT&T Kentucky wrongfully refused to pay South Central's switched access tariff rates. South Central requested that the Commission declare AT&T Kentucky liable for all past and future switched access services incurred pursuant to South Central's tariff and order AT&T Kentucky to pay all unpaid, tariffed charges due to South Central.

AT&T Kentucky filed its answer and motion to dismiss on November 6, 2006. In its answer, AT&T Kentucky denied that it had to pay the tariff rates for switched access and asserted that proper arrangement for payment for switched access was via an interconnection agreement, which the parties lacked. AT&T Kentucky stated that it was willing to negotiate an interconnection agreement with South Central that would address

the terms and conditions for the payment of charges for the terminating of AT&T Kentucky's originating traffic and the exchange of traffic with South Central.

In addition to the motion to dismiss, still pending are a motion to strike filed by AT&T Kentucky and a motion for summary judgment filed by South Central. As discussed below, the Commission finds that the motion for summary judgment and the motion to dismiss should be denied, the motion to strike should be granted, and a procedural Order should be issued.

MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT

Both AT&T Kentucky's motion to dismiss and South Central's motion for summary judgment contain similar arguments, and the Commission addresses the motions jointly as follows.

AT&T Kentucky argues that the complaint should be dismissed because it fails to state a claim upon which relief can be based. Citing 47 U.S.C. §§ 251-252, AT&T Kentucky asserts that the 1996 Telecommunications Act¹ established a regulatory scheme that allows a CLEC to interconnect with an incumbent local exchange carrier ("ILEC"). AT&T Kentucky argues that the Federal Communications Commission ("FCC") has expressly held that interconnection agreements are the appropriate arrangements for establishing reciprocal compensation between carriers, and that arrangements addressing reciprocal compensation are required by 47 U.S.C. § 251(b)(5). AT&T Kentucky argues that, until the parties enter into an interconnection agreement, the classification of "local traffic" and "toll traffic" has not been established for billing purposes. An interconnection agreement, according to AT&T Kentucky, would

¹ 47 U.S.C. § 151 *et seq.*

allow the parties to cover the terms and conditions for the exchange of traffic and, moreover, the physical interconnection necessary for the proper routing and monitoring of the traffic. AT&T Kentucky claims that it and every other ILEC and CLEC with which it exchanges traffic have interconnection agreements that control the exchange of traffic between them. AT&T Kentucky claims that it is merely requesting that South Central do the same as all other CLECs.

AT&T Kentucky also asserts that South Central's access tariff requires a customer to order switched access services from different feature group categories. AT&T Kentucky argues that this would entail a customer, such as an AT&T Kentucky, deciding in advance the specific access facilities it needs and ordering them through the proper feature group--which AT&T Kentucky has not done. AT&T Kentucky asserts that if South Central's tariff were applicable, AT&T Kentucky would need to place an order for the provisioning of switched access services. AT&T Kentucky argues that, because it has never had to choose such an arrangement, and that South Central has chosen to use an independent telephone company's ("ICO") interconnection facilities to achieve indirect interconnection with AT&T Kentucky, South Central's argument is substantially undermined.

According to AT&T Kentucky, South Central utilizes the switch of its affiliate, South Central Rural Telephone Company, an incumbent ICO, with which AT&T Kentucky has an interconnection agreement. AT&T Kentucky alleges that South Central uses the relationship with its ICO to avoid the obligations of a CLEC to negotiate terms and conditions for the exchange of traffic.

AT&T Kentucky argues that since there is no interconnection agreement between the parties, AT&T Kentucky would be within its rights to refuse to terminate traffic to South Central. AT&T Kentucky states, however, that it has continued to route AT&T Kentucky-originated and third-party transit traffic to South Central despite South Central's refusal to negotiate an interconnection agreement. AT&T Kentucky alleges that South Central is avoiding entering into an interconnection agreement so that it may charge AT&T Kentucky switched access charges for traffic that AT&T Kentucky did not originate.

South Central argues that it is not required to enter into an interconnection agreement with AT&T Kentucky and that, in the absence of an interconnection agreement and pursuant to KRS 278.160, its tariff governs the rates charged for the exchange of traffic between South Central and AT&T Kentucky. South Central asserts that the purpose of the 1996 Telecommunications Act is to "foster competition in the local telephone marketplace, not to redress the exchange of access traffic between non-competing carriers."² South Central asserts that it and AT&T Kentucky are not competitors as South Central provides only local exchange service in exchanges where Windstream is the ILEC. South Central asserts that it exchanges access traffic only with AT&T Kentucky and that the 1996 Telecommunications Act was not intended to address access traffic.

South Central argues that the duty to enter into an interconnection agreement applies only to an ILEC and that AT&T Kentucky's attempt to force South Central into an interconnection agreement is "nothing less than a self-serving attempt to gain a

² South Central's Response to AT&T's Motion to Dismiss at 2.

competitive advantage by unilaterally imposing its own favorable access terms upon South Central.”³ South Central claims that this would give AT&T Kentucky an unfair competitive advantage compared to other carriers that pay for access traffic pursuant to South Central’s tariff.

The primary issues raised in both the motion to dismiss and the motion for summary judgment revolve around: (1) the type of traffic exchanged; and (2) the applicability of the 1996 Telecommunications Act to the traffic exchanged. Despite the numerous pleadings filed in this case, the type of the traffic exchanged between South Central and AT&T Kentucky is not clear, nor is the manner in which it is exchanged. Additional evidence must be considered by the Commission. Moreover, the legal issues surrounding the applicability of the 1996 Telecommunications Act cannot be amply addressed by the pleadings that have been submitted to the Commission. Therefore, we find that the motion to dismiss and the motion for summary judgment should be denied and a procedural schedule entered.

MOTION TO STRIKE

AT&T Kentucky moves the Commission to strike the proposed settlement agreement that South Central filed with the Commission and provided to AT&T Kentucky. The proposed settlement agreement provides that: (1) AT&T Kentucky would pay South Central for all switched access services provided by South Central; (2) South Central’s access tariff rate would apply; (3) South Central would not pre-subscribe any end-users to AT&T Kentucky until South Central entered into a billing and collection

³ Id. at 4.

agreement for such traffic; and (4) the parties would exchange billing information by specified methods.

AT&T Kentucky filed a letter with the Commission objecting to the filing of the proposed settlement agreement and calling it a “blatant disregard of the confidentiality of such settlement discussions.”⁴ Because the proposed settlement agreement allegedly contained confidential information, AT&T Kentucky requested that the Commission not include the proposed settlement agreement in the case record and remove and destroy all copies.

South Central argues that settlement proposals are not inherently confidential, citing KRE 408.

KRE 408 states:

- (1) Furnishing or offering or promising to furnish; or
- (2) Accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

South Central argues that because it did not offer the proposed settlement agreement during a formal hearing and it did not file the proposed settlement agreement to prove liability of the claim or its amount, the filing of the proposed addendum was

⁴ Letter from Mary Keyer to Beth O'Donnell, May 1, 2007, at 1.

reasonable and allowable. South Central asserts that the sole purpose for filing the proposed addendum was to update the Commission on the progress of the settlement negotiations.

South Central also asserts that AT&T Kentucky waived any right to confidentiality when it entered into settlement negotiations in the presence of Commission Staff. South Central argues that even if AT&T Kentucky could identify specific confidential material in the proposed addendum, AT&T Kentucky could not assert the privilege.

South Central relies largely on a Commission Order in Case No. 9613⁵ in which the Commission found that Big Rivers Electric Corporation (“Big Rivers”) could not assert a privilege of confidentiality for the documents and discussions used to reach a financial workout plan with its bankruptcy creditors (that were not parties to the rate case) prior to filing its rate case before the Commission. Big Rivers submitted the financial workout plan as part of its justification for a rate increase. An intervenor in the rate case sought discovery of the documents used in reaching the settlement that formed the financial workout plan. Big Rivers refused to provide the documents, claiming that they were privileged because they had been used during settlement negotiations.

The Commission found that no privileges of confidentiality were available to block discovery and ordered Big Rivers to provide the documents sought by the intervenor. The Commission reasoned that Big Rivers had waived any privilege of confidentiality when it disclosed privileged information to other parties.

⁵ Case No. 9613, Big Rivers Electric Corporation’s Notice of Changes in Rates and Tariffs for Wholesale Electric Service and Other Financial Workout Plan, (Ky. PSC Oct. 29, 1986).

The issue before the Commission is readily distinguishable from the Commission's decision in Case No. 9613. In Case No. 9613, Big Rivers submitted a previously confidential document into the official record as part of the basis for a requested rate increase. Neither the intervenor in the rate case nor the Commission were parties to the financial workout plan and were not privy to the underlying justification for the plan and, therefore, could not accept the reasonableness of the financial workout plan without knowing the details that led to the formation of the plan.

In the case before the Commission, AT&T Kentucky has not entered into the record any confidential information comparable to that of Big Rivers. In fact, with the exception of the proposed settlement agreement in this case, no privilege of confidentiality has been raised. South Central has simply filed an unsigned proposed settlement document that does not have any probative or evidentiary value and does not appear designed in any way to assist the Commission in making a determination in this proceeding.

In Kentucky American Water Company v. Commonwealth of Kentucky, ex rel. J. Cowan, 847 S.W.2d 737 (Ky. 1993), the Kentucky Supreme Court held that the Commission erred by allowing a non-unanimous settlement agreement into the official record and affording it evidentiary weight. The Supreme Court also noted that filing contested proposed settlement agreements "may actually increase the amount of hearing time."⁶ Such is the case here in that AT&T Kentucky and South Central have devoted an extraordinary amount of time to litigating and reviewing this one issue.

⁶ Id. at 741.

AT&T Kentucky has waived no privilege of confidentiality. Traditionally settlement negotiations before the Commission, unless otherwise specifically agreed upon, are kept confidential. The Commission agrees with AT&T Kentucky's assertion that the "law has long fostered voluntary dispute resolution by protecting against the possibility that a compromise or offer of compromise might be used to the disadvantage of a party in subsequent litigation."⁷

Moreover, the proposed addendum has no probative value, is not relevant evidence and, despite assertions to the contrary, serves no substantive purpose. Based on the foregoing facts, the Commission finds that AT&T Kentucky's motion to strike should be granted and that the proposed addendum should not be placed in the public record.

IT IS THEREFORE ORDERED that:

1. AT&T Kentucky's motion to dismiss is denied.
2. South Central's motion for summary judgment is denied.
3. AT&T Kentucky's motion to strike is granted.
4. The parties shall abide by the procedural schedule set forth in Appendix A, attached hereto and incorporated herein, unless otherwise ordered by the Commission.
5. a. Responses to requests for information shall be appropriately bound, tabbed and indexed and shall include the name of the witness responsible for responding to the questions related to the information provided, with copies to all parties of record and 6 copies to the Commission.

⁷ AT&T Kentucky's Motion to Strike at 2, citing Green River Elec. Corp. v. Nantz, 894 S.W.2d 643, 646 (Ky. App. 1995.)


b. Each response shall be answered under oath or, for representatives of a public or private corporation or a partnership or association or a governmental agency, shall be accompanied by a signed certification of the preparer or person supervising the preparation of the response on behalf of the entity that the response is true and accurate to the best of that person's knowledge, information, and belief formed after a reasonable inquiry.

c. Any party shall make timely amendment to any prior responses if it obtains information which indicates that the response was incorrect when made or, though correct when made, is now incorrect in any material respect.

d. For any requests to which a party fails or refuses to furnish all or part of the requested information, that party shall provide a written explanation of the specific grounds for its failure to completely and precisely respond.

Done at Frankfort, Kentucky, this 22nd day of April, 2008.

By the Commission

ATTEST:

Executive Director

APPENDIX A

APPENDIX TO AN ORDER OF THE KENTUCKY PUBLIC SERVICE
COMMISSION IN CASE NO. 2006-00448 DATED April 22, 2008

Written requests for information shall be filed with the
Commission and served on all parties no later than..... 04/29/08

Responses and all objections to requests for information
shall be filed with the Commission and served on all
parties no later than..... 05/14/08

Supplemental requests for information shall be filed with the
Commission and served on all parties no later than..... 05/23/08

Responses and objections to supplemental requests for
information shall be filed with the Commission and served
on all parties no later than 06/03/08

Direct testimony of all witnesses shall be filed with
the Commission and served on all parties no later than..... 06/10/08

Rebuttal testimony shall be filed with the Commission and
served on all parties no later than 06/20/08

A public hearing shall begin at 9:00 a.m.,
Eastern Daylight Time, in Hearing Room 1
of the Commission's offices at 211 Sower
Boulevard, Frankfort, Kentucky 07/02/08