COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION BY AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC. AND TCG OHIO FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF A PROPOSED AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252	)))))))	CASE NO. 2000-465

BELLSOUTH TELECOMMUNICATIONS, INC.'S
REPLY TO AT&T'S OPPOSITION TO BELLSOUTH'S
MOTION FOR RECONSIDERATION

As a general proposition, AT&T claims in its Opposition of BellSouth's Motion for Reconsideration that "BellSouth fails to identify any issues on which the Commission's May 16, 2001, Order is contrary to law or the record in this proceeding". (Opposition, p. 1.) To the contrary, BellSouth's Motion for Reconsideration specifically outlines a number of issues that require reconsideration and the legal basis for each. As we discuss herein, it is AT&T that fails to provide sufficient legal arguments in its opposition brief.

Issue 4: What does "currently combines" means that phrase is used in 57 C.F.R. §51.315(b)?

Issue 5: Should BellSouth be permitted to charge AT&T a "glue charge" when BellSouth combines network elements?

This issue is straightforward. BellSouth is entitled to reconsideration because it is not required to combine network elements for CLECs that are not actually combined in the network. The legal authority is quite clear on this issue and AT&T's opposition brief provides no persuasive authority to the contrary. BellSouth's legal argument can be summarized as follows: (1) the 8th Circuit Court of Appeals in Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) specifically vacated FCC rules 51.315(c-f) which purported to interpret U.S.C. 47 § 251(c)(3) as requiring BellSouth to combine network elements for CLECs, (2) this vacature was not overturned by the Supreme Court in its review of this decision, (3) upon remand from the Supreme Court, the 8th Circuit reaffirmed its previous determination that requesting carriers not ILECs shall perform the work of combining uncombined network elements, and (4) the FCC's Third Report and Order and Fourth Further Notice of Proposed Rule Making, FCC 99-328, known as the "UNE Remand Order" confirmed that Rule 51.315(b) the requirement that ILECs must combine elements that are "ordinarily combined" applies to elements that are "in fact" combined in the network.

AT&T's Opposition brief cites FCC rule § 51.315(b) and barely addresses the "UNE Remand Order" in which the FCC refused to interpret "ordinarily combines" in the manner that AT&T requests herein. Nor can AT&T salvage its legal argument by

arguing that the FCC, in light of the 8th Circuit decision, still interprets rule 315(b) as requiring the incumbent local exchange carrier to combine uncombined network elements. Such an interpretation is without merit when the statute, 47 U.S.C. § 251(c)(3) clearly states that an ILEC must provide network elements to CLECs in a way that "allows requesting carriers to combine such elements". There is absolutely no requirement in the statute for ILECs to combine for CLECs uncombined elements that the ILEC "ordinarily combines".

AT&T attempts to defeat reconsideration by citing U.S. West v. MCI, 193 F.3d 1112 (9th Cir. 1999) and Southwestern Bell v. Waller Creek Communications, Inc., et al., 221 F.3d 812 (5th Cir. 2000). Both of these cases dealt with the question of whether a CLEC could opt into an existing agreement in which the ILEC had agreed to combine elements for the requesting CLEC. In both cases, the ILEC had argued that the Iowa Utilities case had voided the provision and, therefore, it was not obligated to permit a CLEC to opt into such a provision. The 5th Circuit in the Southwestern Bell case determined that such arrangements are not prohibited by the Act. Therefore, an ILEC could agree to combine elements for a CLEC and other CLECs may use the most favored nation provision to opt in. This case does not, however, hold that an ILEC must agree to such a requirement in a contested arbitration.

In the U.S. West case, the 9th Circuit acknowledged that the United States Supreme Court in Iowa Utilities did not review the 8th Circuit's invalidation of FCC rules § 51.315(c-f), but held that it was following the Supreme Court interpretation of 47 U.S.C. § 251(c)(3) in holding that U.S. West must permit CLECs to adopt a previous agreement to bundle.

The Eighth Circuit, on remand from the Supreme Court, specifically addressed the error in the Ninth Circuit holding in Iowa Utilities v. FCC, 219 F.3d 744, 757-578:

> We are not persuaded by the respondents' contention that the Supreme Court's reinstatement of rule 51.315(b) affects our decision to vacate subsections (c)-(f). Nor do we agree with the Ninth Circuit that the Supreme Court's opinion undermined our rationale for invalidating the additional combinations rule. See U.S. West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1121 (9th Cir. 1999), cert. denied, 147 L. Ed. 2d 1005, 2000 U.S. LEXIS 4680, 120 S. Ct. 2741 (U.S. 2000). [**39] The Ninth Circuit misinterpreted our decision to vacate subsections (c)-(f). We did not, as the Ninth Circuit suggests, employ the same rationale for invalidating subsections (c)-(f) as we did in invalidating subsection (b). See MCI Telecomms. v. U.S. West, 204 F.3d 1262, 1268 (9th Cir. 2000) ("The Eighth Circuit invalidated Rules 315(c)-(f) using the same rationale it employed to invalidate Rule 315(b). That is, the Eighth Circuit concluded that requiring combination was inconsistent with the meaning of the Act because the Act calls for 'unbundled' access.") Rather, the issue we addressed in subsections (c)-(f) was who shall be required to do the combining, not whether the Act prohibited the combination of network elements. See, Iowa Utils. Bd., 120 F.3d at 813.
>
> Rule 51.315(b) prohibits the ILECs from separating previously combined network elements before leasing the elements to competitors. The Supreme Court held

> that 51.315(b) is rational because "[section] 251(c)(3) of the Act is ambiguous on whether leased network elements may or must be separated." AT&T Corp., 525 U.S. at 395. Therefore, under the second prong of [**40] Chevron, the Supreme Court concluded 51.315(b) was a reasonable interpretation of an ambiguous statute.
>
> Unlike 51.315(b), subsections (c)-(f) pertain to the combination of network elements. Section 251(c)(3) specifically addresses the combination of network elements. It states, in part, "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunication service." Here, Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall "combine such elements." It is not the duty of the ILECs to "perform the functions necessary to combine unbundled network elements in any manner" as required by the FCC's rule. See 47 C.F.R. § 51.315(c). We reiterate what we said in our prior opinion: "The Act does not require the incumbent LECs to do all the work." Iowa Utils. Bd., 120 F.3d at 813. Under the first prong of Chevron, subsections (c)-(f) violate the plain language of the statute. We are convinced that rules 51.315(c)-(f) must remain vacated.

Ultimately, this need not be an issue because BellSouth has stated that it will combine network elements for CLECs at a market rate for the service.

BellSouth understands from the several orders addressing this issues that the Commission philosophically believes that it is efficient and reasonable to require BellSouth to combine elements that it ordinarily combines. Nevertheless, this is not the law as the Eighth Circuit has so clearly pointed out.

BellSouth is entitled, as a matter of law, to reconsideration of this decision.

Respectfully submitted,

_____

Creighton E. Mershon, Sr.
General Counsel-Kentucky
601 W. Chestnut Street, Room 407
P. O. Box 32410
Louisville, KY 40232
Telephone No. (502) 582-8219

R. Douglas Lackey
Suite 4300, BellSouth Center
675 W. Peachtree Street, N.E.
Atlanta, GA 30375
Telephone No. (404) 335-0747

COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

394860