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August 11, 2006

Ms. Beth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40601

Re: Petition To Establish Docket To Consider Amendments To Interconnection Agreements Resulting From Changes of Law
KPSC No. 2004-00427

Dear Ms. O'Donnell:

On July 27, 2006, the Competitive Carriers of the South, Inc. ("CompSouth") filed with the Commission a copy of an Order entered July 18, 2006 by a Federal District Court upon review of an Order by the Maine Public Utilities Commission, *Verizon New England, Inc. v. Maine Public Utilities Commission,* Civil No. 05-53-B-C, (Order Granting Defendant's Motion For Summary Judgment and Denying Plaintiff's Motion for Summary Judgment Or, Alternatively, For Judgment On The Pleadings) (D. Me. 2006) ("Maine Order"). In its letter, CompSouth requested that the Commission take notice of this decision, and contended that it is significant to the resolution of the issues in the above-identified case (i.e., the change of law proceeding). Specifically, CompSouth states that the Maine Order is "significant to the issues pending before the Kentucky Commission as it addresses the selfsame arguments offered here by BellSouth."[1] CompSouth's letter, however, does not provide an accurate representation of the actual ruling of the federal court or of the significance (or lack thereof) of that case to the issues currently under consideration by the Kentucky Commission. Viewed properly, the above-described federal court Order amounts to a ruling that is unpersuasive, and that turns upon different arguments than those presented by the parties herein. Furthermore, that decision has been appealed by Verizon.[2]

CompSouth maintains that the Maine Order includes decisions on two critical points:

[1] CompSouth Letter, p. 2.
[2] *See* Docket Sheet, First Circuit Court of Appeals, attached hereto as Attachment 1.

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> [1] [T]he Court has definitively concluded that, as a matter of law, a state public service commission possesses the jurisdiction to set rates for unbundled network elements required by Section 271 of the Telecommunications Act of 1996. [2] The court also specifically concluded that Federal law does not preempt a state commission requirement that elements required by Section 271 be provided at TELRIC rates pending approval of permanent rates for those elements.[3]

CompSouth neglects, however, to mention the basis of the Court's ruling.

In the Maine Order, the Court acknowledged the position of Verizon that whether a Public Service Commission can lawfully set rates for elements required by 271 depends on whether "Congress conferred on state commissions the authority to regulate and enforce the Section 271 obligations."[4] The Court disagreed with this assessment, however, and noted that the State of Maine has granted the Maine PUC broad authority to make services available on rates that are just and reasonable.[5] Based on this conclusion, the Maine Order states that Verizon could only successfully challenge this exercise of state-delegated authority by demonstrating that this authority has been preempted by Federal law. As the Court noted, "Verizon failed to make the argument in its Motion for Summary Judgment."[6] The Court then went on to consider TELRIC rates specifically, and found that "on this issue, Verizon presents no new facts and makes no additional arguments to those it offered in seeking preliminary injunctive relief."[7]

Thus, the Maine Order is not a sweeping declaration that federal law does not preempt state law on matters related to 271. Instead, the Court simply found that Verizon failed to make the preemption argument that the federal court believed to be necessary to prevail on this point. The more important point, however, is that the federal court did not decide that the Maine PUC had been delegated federal authority to interpret the Act, but rather that it could set rates for § 271 offerings under state-delegated authority.

This Maine Order is, of course, not binding on this Commission. Rather the Commission may adopt the approach of the federal court in Maine, or not, depending on whether it finds the logic of the Maine Order to be persuasive. BellSouth submits that this Commission should decline to rule as the Maine Court did for three reasons, each

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[3] CompSouth Letter, p. 1.

[4] Maine Order, p. 6.

[5] Id.

[6] Maine Opinion, p. 6. The Court did note in dictum that Verizon presented a preemption argument in support of its request for preliminary injunctive relief, and that the Court did not believe that a preemption argument would have been successful even if Verizon had made this argument in its Motion for Summary Judgment.

[7] Id.

of which is independently compelling: (1) the Maine Order is patently illogical; (2) it is contrary to the overwhelming weight of authority and (3) it turns on a point of law that is not only not before this Commission, but that CompSouth expressly decided not to rely upon.

First, although the court asserted that states can set rates for purposes of § 271, it cited no federal law granting such authority. Instead, the court concluded that state law grants the authority to set rates for purposes of § 271. However, § 271 is a provision of federal law, and states have no presumed or inherent authority to implement federal law. As the Eighth Circuit has explained, "[t]he new regime [under the 1996 Act] for regulating competition in this industry is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, the scope of that role is measured by federal, not state, law." *(Southwestern Bell Telco v. Connect Communications Corp.*, 225 F. 3d. 942, 947 (8th Cir. 2000) (emphasis added). The contrary conclusion in the Maine Order, that state authority can confer the power to interpret or implement federal law, is both legally unsupported and illogical.

Second, federal law is clear that implementation of § 271 is a task delegated to the FCC, not to State Commissions. Consistent with the plain language of § 271, courts have concluded that "it is the prerogative of the FCC . . . to address any alleged failure by [a BOC] to satisfy any statutorily imposed conditions to its continued provision of long distance service" and, accordingly, that § 271 does *not* authorize state commissions to impose unbundling obligations. *BellSouth v. Mississippi PSC,* 368 F. Supp. 2d at 566; *accord BellSouth Telecomms., Inc. v. Cingery Communications Co.,* No. 03:05-CV-16-JMH, slip op. at 12 (E.D. Ky. Apr. 22, 2005) ("The enforcement authority for § 271 unbundling duties lies with the FCC and must be challenged there first.") As the Seventh Circuit has put it, the 1996 "Act reserves to the FCC the authority to decide whether to grant a section 271 application." *Indiana Bell Tel. Co. v. Indiana Util. Reg. Comm'n,* 359 F.3d 493, 495 (7th Cir. 2004).

To date, twenty-seven State commissions have reached the same conclusion. Commissions in Alabama, Arkansas, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Massachusetts, Montana, New Jersey, North Carolina, North Dakota, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Vermont, Washington, and the District of Columbia have all agreed that they do not have authority to implement § 271 obligations. In contrast, only ten State Commissions (including Maine) have reached the contrary result.[8]

Third, CompSouth asserts that the decision of the federal court in Maine addresses a central issue in this case, i.e., whether state Commission's rate-making authority under State law allows it to set rates for § 271 offerings.[9] In reality,

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[8] See "Attachment 2" hereto for a listing of all 37 states that have ruled on this issue and a description of those rulings.

[9] CompSouth Letter, p. 2.

CompSouth specifically declined to make this an issue in the change of law proceeding. The argument that CompSouth did make in this case is that "the terms and conditions for the checklist items in 271 must be in an approved interconnection agreement."[10] CompSouth also argued that under the federal statutory scheme, "the interconnection agreements incorporating Section 271 checklist items are subject to the Section 252 state commission arbitration process if the parties do not reach agreement, as well as subject to state commission review and approval if negotiated by the parties."[11] If there is any doubt that CompSouth's argument in the instant proceeding is based on its interpretation of federal law, and not on state-delegated ratemaking authority, then this doubt is dispelled by a clear declaration in CompSouth's Post-Hearing Brief: "CompSouth also contends that the Commission may include network elements in ICAs pursuant to state law authority, but it is not requesting that the Commission exercise such authority in this proceeding."[12] At the same time, CompSouth does not claim (nor can it) that the Maine Order supports, or even comments upon, the legal theory that CompSouth actually did advance in this proceeding.

Viewed accurately, the Maine Order is nothing more than a non-binding and unpersuasive decision to uphold the Maine PUC's unique interpretation of the parameters of state law. This Order does not even address the legal arguments upon which CompSouth relies in the change of law proceeding, and it has no significance to this proceeding. BellSouth respectfully submits that if this Commission seeks guidance from the rulings of other tribunals, then the better course of action would be to follow the lead of the twenty-seven State Commissions that have interpreted the Act not to empower state Commissions to implement § 271.

Respectfully submitted,

/s/
Cheryl R. Winn

Attachments

cc: Parties of Record

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[10] CompSouth's Post Hearing Brief, p. 30.
[11] Id.
[12] Id., p. 25 (emphasis added).