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ELECTRONIC FILING

October 21, 2005

Ms. Elizabeth O'Donnell
Executive Director
Kentucky Public Service Commission
P.O. Box 615
Frankfort, KY 40602

Re: Case No. 2004-00427 – Tennessee Decision Explaining Authority of State Commissions to Set Rate for Unbundled Switching

Dear Ms. O'Donnell,

On April 26, 2005, Cinergy Communications Company ("CCC") filed a petition for emergency declaratory ruling asking the Commission to determine that CLECs unable to obtain certain network elements from incumbent local carriers under Section 251 of the Communications Act may continue to obtain those elements from BellSouth, albeit under a different pricing standard, pursuant to Section 271 and under this Commission's auspices. CCC's petition explained how the Commission has legal authority to determine the rate for switching provided as a Section 271 element.

On July 21, 2005 we wrote to the Commission to advise how the Missouri Public Service Commission determined that rates patterned on the FCC's transition period rates for declassified UNEs provide a suitable interim rate structure for Section 271 UNEs. Yesterday, another neighboring commission found that it has legal authority to set rates for BellSouth switching provided under Section 271.

In an arbitration involving BellSouth, the Tennessee Regulatory Authority found:

1) there is no federal law expressly prohibiting a state from exercising jurisdiction over Section 271 elements;

2) despite BellSouth's claim to the contrary, nowhere in the TRO did the FCC preclude state commissions from setting rates for Section 271 elements; and

3) state law, read in conjunction with the Communications Act, forms the basis for the authority of a state commission to set an interim rate for switching (in an arbitration) and to convene a generic proceeding for the purpose of determining a permanent rate for switching.

Enclosed please find an excerpt of yesterday's order, issued in TRA Docket No. 03-00119.[1] CCC requests that the Commission take notice of this sister state's order, grant CCC's long pending motion, and similarly determine rates for Section 271 network elements in Kentucky.

I certify that this filing was uploaded electronically today to the Commission's web filing portal, and that the electronic version is a true copy of the document filed in paper form. Please indicate receipt of this filing by returning an electronic receipt.

Sincerely yours,

Douglas F. Brent

Digitally signed by Douglas F. Brent
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Date: 2005.10.21 18:03:37 -04'00'

Signature Not Verified

Douglas F. Brent

DFB:jms

[1] The complete text of the order is available at: http://www.state.tn.us/tra/orders/2003/0300119db.pdf

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

October 20, 2005

IN RE:	)	
	)	
PETITION FOR ARBITRATION OF ITC^DELTACOM COMMUNICATIONS, INC. WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996	)	DOCKET NO. 03-00119

FINAL ORDER OF ARBITRATION AWARD

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Further, there is no language contained in the Federal Act that expressly prohibits state jurisdiction over Section 271 elements that are included in issues required to be arbitrated pursuant to Section 252. Rather, there is language that indicates that Congress gave states a role in determining Section 271 elements through state approval of both SGAT conditions and interconnection agreements. Under Section 271(c)(1) of the Federal Act, an incumbent telephone company must offer network elements either through a statement of generally available terms and conditions or an interconnection agreement. Each must be filed with and approved by the state commission.[120] Section 271 of the Federal Act requires an incumbent telephone company to satisfy its competitive checklist obligations through interconnection agreements.[121] These interconnection agreements are required to be approved by a state commission under Section 252.[122]

BellSouth must provide switching pursuant to the requirements of Section 271. In its *Final Best Offer* BellSouth argued that the TRA does not have jurisdiction to establish the rate for switching. BellSouth argued that, because Section 271 elements are regulated under Sections 201 and 202 of the Federal Act, state commissions are precluded from setting a rate for a Section 271 switching element. BellSouth cites to ¶ 664 of the TRO as standing for the proposition that ". . .the jurisdiction to enforce Sections 201 and 202 of the Act is vested with the FCC, not with state public service commissions." Paragraph 664 of the TRO, in its entirety, states:

> Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). We note, however, that for a given purchasing carrier, a BOC might satisfy this standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions

[120] 47 U S C. § 252(e) and (f) (2001)
[121] 47 U.S C § 271(c)(2)(A) (2001)
[122] 47 U S.C § 271(c)(1)(A) (2001)

> to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist. Alternatively, a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.

Paragraph 664 offers two examples of situations where the FCC will make determinations of fact regarding whether a rate for a Section 271 element is just and reasonable. There is nothing, however, in the above-quoted language, to preclude a state commission from setting the rate for a Section 271 element.

Congress explicitly charged state commissions with the responsibility to arbitrate Section 252 disputes, and this charge includes arbitrating the rates, terms and conditions of Section 271 elements. Further, the fact that the FCC has the authority to enforce Section 271 does not diminish or cut off the obligations of the state commissions to arbitrate interconnection agreements required by Section 271 which also includes establishing rates for elements required by the competitive checklist.

Section 271(c)(2)(A) links BellSouth's obligations under the competitive checklist to its providing that access through an interconnection agreement (or SGAT):

> (A) AGREEMENT REQUIRED - A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought—
>
> (i) (I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A) [Interconnection Agreement], or
>
> (II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B) [an SGAT], and
>
> (ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph [the competitive checklist].[123]

[123] 47 U S C § 271(c)(2)(A) (2001).

By directly tying interconnection agreements to Section 271(c)(1)(A) and (B), the Act explicitly ties compliance with the competitive checklist to the review process described in Section 252. As Section 271(c)(1) states:

> (1) AGREEMENT OR STATEMENT- A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.
>
> (A) PRESENCE OF A FACILITIES-BASED COMPETITOR- A Bell operating company meets the requirements of this subparagraph if it has entered into one or more **binding agreements that have been approved under section 252** specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 3(47)(A), but excluding exchange access) to residential and business subscribers.[124]

This language demonstrates that Section 271 network elements must be offered pursuant to the same, identical review process as Section 251 network elements.

The FCC's TRO determined that pricing of Section 271 elements must be more liberal than TELRIC prices but produce just and reasonable prices.[125] The TRO states:

> Thus, the pricing of checklist network elements that do not satisfy the unbundling standards in section 251(d)(2) are reviewed utilizing the basic just, reasonable, and nondiscriminatory rate standard of sections 201 and 202 that is fundamental to common carrier regulation that has historically been applied under most federal and state statutes, including (for interstate services) the Communications Act. Application of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements.[126]

Thus, the FCC recognized that the pricing standards of Section 271 elements must be the same as the pricing standards used before the Federal Act such as those standards in Sections

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[124] 47 U.S C. § 271(c)(1)(A) (2001) (Emphasis added)

[125] This does not mean that TELRIC prices are not just and reasonable On the contrary, TELRIC prices must first meet the just and reasonable definition of the Act

[126] TRO, 18 FCC Rcd at 17389

201 and 202. Nevertheless, it is significant that the FCC did not change the division of pricing responsibility defined in the Federal Act. While the FCC will continue to set the pricing standards, it continues to be incumbent upon state commissions to apply those standards in the process of establishing rates.[127] The FCC did not change the process utilized to resolve pricing disputes of Section 271 elements. There is no indication that the FCC intended to remove Section 271 elements from state arbitrations or from approval of interconnection agreements consistent with Section 252.

In the regulatory scheme set up by the Federal Act, state commissions are directed by provisions of the Federal Act and FCC regulations in making decisions, which are subject to federal court review.[128] Thus, cooperative federalism is a statutory framework in which there is both state and federal regulation of telecommunications services. The parameters of both federal and state regulation within this statutory framework are determined by the Federal Act and the state statutes establishing regulatory authority.

In construing the reach of the TRA's authority, the Tennessee Supreme Court has held:

> Any authority exercised by the Public Service Commission must be as the result of an express grant of authority by statute or arise by necessary implication from the expressed statutory grant of power. *Pharr v. Nashville, Chattanooga and St. Louis Railway,* 186 Tenn. 154, 208 S.W.2d 1013 (1948); *Nashville, Chattanooga and St. Louis Railway v. Railroad and Public Utilities Commission et al,* 159 Tenn. 43, 15 S.W.2d 751 (1929). In either circumstance, the grant of power to the Commission is strictly construed.[129]

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[127] The United States Supreme Court affirmed this division of responsibility in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U S 366, at 384 (1999), emphasis added:

> "252(c)(2) entrusts the task of establishing rates to the state commissions . . . The FCC's prescription, through rulemaking, of a requisite pricing methodology no more prevents the States from establishing rates than do the statutory 'Pricing standards' set forth in 252(d). It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances."

[128] *Id* at 352

[129] *Tennessee Pub Serv Comm'n v Southern Ry Co*, 554 S W 2d 612, 613 (Tenn 1977).

The Tennessee Court of Appeals has echoed this interpretation of the TRA's authority:

> The Commission, like any other administrative agency, must conform its actions to its enabling legislation. It has no authority or power except that found in the statutes. While its statutes are remedial and should be interpreted liberally, they should not be construed so broadly as to permit the Commission to exercise authority not specifically granted by law.[130]

The TRA must exercise its authority in accordance with legislative limitations, directives and policy. In other words, "its actions must be harmonious and consistent with its statutory authority."[131] Chapter 4 of Title 65 sets forth the statutory framework for the TRA's authority to regulate public utilities. Pursuant to Tenn. Code Ann. § 65-4-104, the statutory grant of authority over public utilities given to the TRA is extensive:

> The authority has general supervisory and regulatory power, jurisdiction, and control over all public utilities, and also over their property, property rights, facilities, and franchises, so far as may be necessary for the purpose of carrying out the provisions of this chapter [Chapter 4].

Tenn. Code Ann. § 65-4-106 provides:

> This chapter [Chapter 4] shall not be construed as being in derogation of the common law, but shall be given a liberal construction, and any doubt as to the existence or extent of a power conferred on the authority by this chapter or chapters 1, 3, and 5 of this title shall be resolved in favor of the existence of the power, to the end that the authority may effectively govern and control the public utilities placed under its jurisdiction by this chapter.

In addition to the general powers described in the above referenced statutes, the TRA has been given specific authority or power by Tenn. Code Ann. § 65-5-201(a) "to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof," by Tenn. Code Ann. § 65-4-117(3) "to fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed, observed and followed thereafter by any public

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[130] *BellSouth Telecommunications, Inc v Greer*, 972 S W.2d 663, 680 (Tenn Ct App 1997) (internal citations omitted)

[131] *Tennessee Cable Television Ass'n v Tennessee Pub Serv Comm'n*, 844 S.W 2d 151, 159 (Tenn Ct App. 1992)

utility," and by Tenn. Code Ann. § 65-4-114(1) to require every public utility to "furnish safe, adequate, and proper service."

With the passage of the Tennessee telecommunications act in 1995 (the "Tennessee Act"), the Tennessee General Assembly changed regulation of telecommunications companies in Tennessee and established a new direction for the State and a new mandate to the TRA. The expressed goal of the Tennessee Act is articulated at Tenn. Code Ann. § 65-4-123:

> The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers. To that end, the regulation of telecommunications services and telecommunications services providers shall protect the interests of consumers without unreasonable prejudice or disadvantage to any telecommunications services provider; universal service shall be maintained; and rates charged to residential customers for essential telecommunications services shall remain affordable.

The Tennessee Act also recognizes and imposes certain requirements on providers of telephone services:

> All telecommunications services providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions; and all telecommunications services providers shall, to the extent that it is technically and financially feasible, be provided desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other telecommunications services providers.[132]

In *Mich. Bell Tel. Co. v. MCImetro Access Transmission Servs*, the Sixth Circuit Court of Appeals stated:

> When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. In fact, it expressly *preserved* existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition, stating

[132] Tenn Code Ann § 65-4-124(a).

> that the Act does not prohibit state commission regulations "if such regulations are not inconsistent with the provisions of [the FTA]." 47 U.S.C. § 261. Additionally, Section 251(d)(3) of the Act states that the Federal Communications Commission shall not preclude enforcement of state regulations that establish interconnection and are consistent with the Act. 47 U.S.C. § 251(d)(3).[133]

The Tennessee statutes and the relevant provisions of the Federal Act together form the basis for the authority of the TRA to set an interim rate for switching in the context of an arbitration proceeding and to convene a generic proceeding for the purpose of determining a permanent rate for switching. While Section 271 establishes the enforcement authority of the FCC regarding Section 271 issues, it does not strip the TRA of its authority to set rates for Section 251 or Section 271 elements. The TRA is exercising its authority provided by the General Assembly prior to the enactment of the federal act as the legal foundation for its actions. Additionally, the TRA's decision is consistent with the requirement that its actions not conflict with any current federal requirements.

According to FCC rules, in situations where unbundled switching is not required under Section 251, the element must still be offered to competitors in order to comply with the requirements of Section 271; however, the rate does not have to comply with TELRIC pricing methodology. Instead, the FCC requires that rates for unbundled elements offered pursuant to Section 271 must be "just and reasonable."[134] The reason for requesting FBOs in this case was to determine a just and reasonable rate for unbundled switching.

In its FBO on Issue No. 26(d), DeltaCom proposed a rate of $5.08 (usage included) which was based on BellSouth's ARMIS 43-08 (row 6210) reported central office switching expenses for 2002 and an estimated share of its depreciation costs for switching plant in service.

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[133] *Mich Bell Tel Co v MCImetro Access Transmission Servs*, 323 F 3d 348, 358 (6th Cir 2003)
[134] TRO, 18 FCC Rcd at 17389

BellSouth's FBO was based on the price it charges for wholesale local platform DS0 service.[135] The proposed rates were $26.48 in Zone 1; $30.31 in Zone 2; and $35.32 in Zone 3. Inclusive in these rates are the port, features, and an analog SL1 loop. These rates did not include usage, which was an additional per-minute charge.

During the deliberations it was noted that BellSouth failed to demonstrate that its proposed switching rate is at or below the rate at which BellSouth offers comparable functions to similarly situated purchasing carriers under its interstate access tariff or that the rate is reasonable by showing that it had entered into arm's length agreements with other similarly situated purchasing carriers to provide the switching element at the rate proposed in its final best offer.[136] It was also noted that BellSouth's FBO did not contain a stand-alone rate for switching. Additionally, the Arbitrators noted that existing case law holds that a just and reasonable rate includes a utility's operating expenses as well as a fair return on investments and concluded that DeltaCom's proposed rate of $5.08 contained those elements.[137] Thereafter, a majority of the Arbitrators voted to adopt DeltaCom's Final Best Offer of $5.08 as an interim rate subject to true up.[138] The Arbitrators voted unanimously to have the Chair open a generic docket to adopt a rate for switching outside of 47 U.S.C. § 251

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[135] *See In Re Petition for Arbitration of ITC^DeltaCom Communications, Inc with BellSouth Telecommunications, Inc Pursuant to the Telecommunications Act of 1996,* TRA Docket No. 03-00119, BellSouth's Best and Final Offers, p 5 (February 20, 2004)

[136] Transcript of Proceedings, p. 4 (June 21, 2004) The *Triennial Review Order* states

> Whether a particular checklist element's rate satisfies the just and reasonable pricing standard of section 201 and 202 is a fact-specific inquiry that the Commission will undertake in the context of a BOC's application for section 271 authority or in an enforcement proceeding brought pursuant to section 271(d)(6). We note, however, that for a given purchasing carrier, a BOC might satisfy this standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist Alternatively, a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate.

Triennial Review Order, ¶ 664

[137] Transcript of Proceedings, p. 4 (June 21, 2004), *see Farmers Union Central Exchange v FERC*, 734 F 2d 1486, 1502 (D C Cir 1984); *see also FPC v Hope Natural Gas Co* , 320 U S 591, 596-598, 605, 64 S.Ct 281, 88 L.Ed 333 (1994)

[138] See supra n 115, Chairman Tate did not vote with the majority with respect to the rate for local switching

requirements.[139] The Arbitrators unanimously found that the interim rate should be trued up to the earlier of establishment of: 1) a switching rate in the generic docket; 2) a commercially negotiated switching rate; or 3) FCC rules regarding switching rates outside of 47 C.F.R. §251.

[139] Transcript of Proceedings, pp. 2-9 (June 21, 2004)