COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF SOUTHEAST TELEPHONE, INC. FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF THE PROPOSED AGREEMENT WITH KENTUCKY ALLTEL, INC., PURSUANT TO THE COMMUNICATIONS ACT OF 1934, AS AMENDED BY THE TELECOMMUNICATIONS ACT OF 1996	)))))))	CASE NO. 2003-00115

O R D E R

This case has been returned to the active docket for the purpose of ruling on an additional dispute that the parties appear not to have anticipated previously and that must be resolved before an agreement can be executed. As ALLTEL need not provide unbundled local circuit switching in Kentucky to "DS1 enterprise market customers,"[1] the parties dispute whether, if a customer is served by 4 DSO, or voice-grade, loops, that customer is more economically served by a DS1 and should therefore be considered an "enterprise market customer" whom SouthEast may not serve by means of the unbundled network element platform ("UNE-P") obtained from ALLTEL. Both parties have filed statements of position with supporting arguments, accompanied by a joint motion for leave to file outside the time we had initially allotted for these filings.

[1] The Commission entered its Order in Case No. 2003-00347, In the Matter of Review of Federal Communications Commission's Triennial Review Order Regarding Local Circuit Switching for DS1 Enterprise Customers, on December 23, 2003, finding insufficient evidence to rebut the Federal Communications Commission's presumption that CLECs would not be impaired absent unbundled switching for DS1 enterprise market customers.

ALLTEL argues that 47 C.F.R. 51.319(d)(3)(ii) compels this Commission to establish a four-line cut-off pending its ultimate decision regarding the availability of UNE-P for CLECs seeking to serve mass market customers. In the alternative, ALLTEL contends, as the Commission cannot establish a different cut-off point as a matter of law, it must conduct further proceedings to establish a factual record upon which to establish the proper cut-off.

SouthEast responds that the FCC rule applies the four-line cut-off only to the top 50 metropolitan statistical areas ("MSAs") in the nation. Accordingly, it contends, there should be no limit on the number of DSO lines that it may provide to a customer by means of unbundled circuit switching. SouthEast also asserts that a very strong "change of law" provision, allegedly written with an appeal of our orders in this case in mind, provides great protection to ALLTEL. Finally, SouthEast argues that our Order in this case does not include the subject exception to ALLTEL's obligation to provide unbundled local switching.

First, we must reiterate a decision we have made repeatedly in this proceeding: Issues to be determined in Case No. 2003-00379, our mass-market inquiry pursuant to

the FCC's TRO, will not, and cannot, be decided in this arbitration proceeding.[2] Time limitations do not allow it. Nor do fundamental principles of due process, which require notice and an opportunity to participate for all parties who will be affected by Commission decisions on these issues. Until a final decision on issues in Case No. 2003-00379 is reached, the Commission will, as it must, apply the law as it currently exists. Accordingly, ALLTEL's renewed request for a lengthy inquiry in violation of the deadlines for arbitration proceedings established by the Telecommunications Act of 1996 must be denied.

It remains, however, to establish the parameters of existing law on the subject of whether there must be, at this point, a mandatory four-line cut-off to distinguish mass market customers from those who could more economically receive service by means of a DS1 and who should, therefore, be served pursuant to enterprise customer standards.

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[2] The FCC specifically noted the complexities inherent in the issue we address here when it delegated to the states the responsibility to determine, in their nine-month proceedings concerning mass market customers, what constitutes a "potential" enterprise customer:

> We determine that the state commissions are best situated to identify *potential* enterprise customers, *i.e.,* those customers for whom it could be economically feasible to serve using a DS1 or above loop. Because of the expected difficulties and detailed information needed in conducting this inquiry, we allow the states nine months to make this determination, which would include determining the maximum number of lines that a carrier may obtain from a particular customer before that customer is classified as an enterprise customer. We expect such analysis to be conducted at the same time as the analysis of the mass market.

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket Nos. 01-338, FCC 03-36 (August 21, 2003) ("TRO"), at fn. 1376 (emphasis in original).

The FCC in its TRO held, and 47 C.F.R. 51.319(d)(3)(ii) provides, that until a state commission has made its decision with regard to defining "potential" DS1 customers, an ILEC "shall comply with the four-line 'carve out' for unbundled switching established in Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3822-31, paras 276-98 (1999), reversed and remanded in part sub. nom. United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002)."[3] In the TRO, at Paragraph 497, the FCC explained that, "in those areas where the switching carve out *was applicable,*" (emphasis supplied) the appropriate cutoff would be four lines "without significant evidence to the contrary." The FCC then declared that it was "not persuaded, based on this record, that we should alter the Commission's previous determination on this point."[4]

Accordingly, the question before us is a straightforward one: What, precisely, did the FCC establish as the four-line "carve out" rule in its UNE Remand Order of 1999 and then refuse to reconsider in the TRO?

47 C.F.R. 57.319 specifically cites the paragraphs of the UNE Remand Order that apply. A review of those paragraphs demonstrates that, in fact, the "exception to the switching unbundling obligation" applied, and continues to apply, only "in certain circumstances in the top 50 MSAs."[5] Moreover, the finding of a lack of impairment

[3] Hereinafter, the "UNE Remand Order."

[4] Id.

[5] Id. at Paragraph 279.

applies only to "density zone 1."[6] The FCC explained its decision to employ a four-line rule only in the top 50 MSAs because competing carriers were less likely to be impaired in those MSAs, in which most switches had been deployed.[7] "In contrast," the FCC said, "MSAs below the top 50 typically contain fewer competitive switches."[8] The FCC went on to emphasize that incumbent carriers remain obligated to provide unbundled switching in MSAs other than the top 50: "We recognize that drawing the line at the top 50 MSAs means that incumbent LECs serving more rural territories, which have fewer MSAs that are in the top 50 MSAs, will continue to be subject to an unbundled switching obligation…."[9] The FCC's ruling is crystal clear.

Consequently, we hold as a matter of law that the rule established in the UNE Remand Order and affirmed in the FCC's TRO applies until our nine-month TRO proceeding is concluded. As a result, the parties' interconnection agreement may not include language creating a four-line "carve out" for areas other than those within density zone 1 of the top 50 MSAs in this nation.

IT IS THEREFORE ORDERED that:

1. The parties' Joint Motion for Leave to File Outside Time Allotted for Arbitration Briefs is granted, and the parties' filings of January 26, 2004 are hereby accepted into the record of this case.

[6] Id. at Paragraph 278.

[7] Id. at Paragraph 280.

[8] Id. at Paragraph 281.

[9] Id. at Paragraph 282.

2. The parties shall file their interconnection agreement in accordance with the findings herein no later than 10 days from the date of this Order.

Done at Frankfort, Kentucky, this 6th day of February, 2004.

By the Commission

ATTEST:

Executive Director