



PAETEC

June 25, 2010

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PUBLIC SERVICE
COMMISSION

Jeff Derouen, Executive Director
Kentucky Public Service Commission
211 Sower Blvd
P.O. Box 615
Frankfort, KY 40602-0615

Re: *In the Matter of AT&T Communications of the South Central States, TCG Ohio, and BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky v .Kentucky Rural Incumbent Local Exchange Carriers, Kentucky Competitive Local Exchange Carriers, Windstream West, LLC, Windstream East, LLC, and Cincinnati Bell, Case No. 2010-00162*

Dear Mr. Derouen:

Please find enclosed for filing in the above-referenced case the original and ten (10) copies of the Initial Statement of US LEC of Tennessee, L.L.C., d/b/a PAETEC Business Services ("PAETEC").

Should you have any questions, please let me know.

Very truly yours,

 (NW)

John B. Messenger
Vice President & Associate General Counsel

cc: Parties on attached Certificate of Service

**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

AT&T COMMUNICATIONS OF THE SOUTH CENTRAL)	
STATES, TCG OHIO, AND BELLSOUTH)	
TELECOMMUNICATIONS, INC., d/b/a AT&T KENTUCKY)	
)	
Complainants)	Case No.
)	2010-00162
KENTUCKY RURAL INCUMBENT LOCAL EXCHANGE)	
CARRIERS, KENTUCKY COMPETITIVE LOCAL)	
EXCHANGE CARRIERS, WINDSTREAM WEST, LLC,)	
WINDSTREAM EAST, LLC, AND CINCINNATI BELL)	
)	
Respondents)	

INITIAL POSITION STATEMENT OF PAETEC.

US LEC of Tennessee L.L.C., d/b/a PAETEC Business Services) (“PAETEC”) respectfully files this Initial Statement regarding AT&T’s petition and complaint (“Complaint”) filed with the Kentucky Public Service Commission (“Commission”) on April 21, 2010.¹

AT&T’s Complaint must be dismissed primarily because it fails to meet the requirements of KRS 278.260(1), which provides in relevant part:

The commission shall have original jurisdiction over complaints as to rates or service of any utility, and upon a complaint in writing made against any utility by any person that any rate in which the complainant is directly interested is unreasonable or unjustly discriminatory, or any practice or act . . . or any service in connection therewith is unreasonable . . . or unjustly discriminatory, . . .the commission shall proceed, . . .to make such investigation as it deems necessary or convenient. The commission may also make such an investigation on its own motion. No order affecting the rates or service complained of shall be entered by the commission without a formal public hearing.

¹ Subsequent to the filing of the Complaint, the following substantive filings have been made: Comments by TDS Telecom (May 17, 2010); Initial Position Statement By Windstream East and Windstream West (May 27, 2010); Rural Incumbent Exchange Carriers’ Initial Position (June 11, 2010); Comments of the Competitive Carriers of the South (June 14, 2010); and AT&T Reply Comments (June 14, 2010).

If AT&T's Complaint is to proceed, it also must meet the requirements of 807 KAR 5:001, the Commissions Rules of Procedure, as a complaint against the specific rates of specific common carriers in an adjudicatory proceeding.

AT&T has completely failed to meet these requirements, which relate to the rates of a single entity and contemplate adjudicatory proceedings in which the rights of an individual carrier are determined. . However, the relief AT&T requests is for a blanket rule that no competitive local exchange carrier ("CLEC") or rural incumbent local exchange carrier ("ILEC") in Kentucky be allowed to have intrastate access rates that are greater than the access rates of AT&T. AT&T's pleading labels, without exception, every access rate of over 190 CLECs and of 16 rural ILECs operating in Kentucky² as unjust and unreasonable if they are higher than AT&T's carrier access rates. AT&T also totally ignores that there is no precedent establishing AT&T's rates as the sole "fair, just and reasonable rates" (*see* KRS 278.030(1)) applicable to every other carrier in the state. Procedurally, the Complaint must be dismissed because the individual rights of different carriers cannot be fairly resolved in a generic proceeding of the nature AT&T requests.

For these reasons the Commission also should not initiate an investigation or some ill-defined "administrative case"³ upon its own motion based on AT&T's Complaint. As noted above, AT&T's Complaint is a broad-brushed attack against the intrastate carrier access rates of every CLEC and every rural ILEC in Kentucky. Until AT&T can establish that its intrastate carrier access rates are the only "fair, just and reasonable rates" possible in Kentucky within the meaning of KRS Section 278.030(1), there is no statutory basis for a complaint that all other carriers' rates are "unreasonable or unjustly discriminatory" within the meaning of KRS Section

² AT&T's Complaint is against 16 Rural ILECs and in excess of 190 CLECs in Kentucky (*see* AT&T Complaint, Exhibits A and B).

³ *See* AT&T Complaint, p. 2.

278.260(1) and for its demand that the Commission prescribe AT&T's rate levels as the maximum rate levels any CLEC or rural ILEC may charge.

PAETEC will address the Complaint primarily as it addresses the intrastate access rates of CLECs, although many of the arguments herein would also apply equally to AT&T's Complaint regarding the intrastate access rates of Kentucky's rural ILECs. We note, however, that the CLECs and the rural ILECs are in quite different positions - as AT&T recognizes that the rural ILECs should be made whole for any revenue losses they would incur by being forced to adopt AT&T's carrier access rates and rate structure. AT&T, in fact, sets forth a detailed plan to make the rural ILECs 100% whole by means of the state Universal Service Fund and Commission-authorized rate increases applicable to their monopoly local exchange customers. (See AT&T Complaint, Exhibit F, "AT&T Plan For Switched Access Reform [for ILECs]") As CLECs are not eligible for USF support, and have no monopoly-era local exchange customers, AT&T would have the CLECs take the revenue loss hit "immediately."⁴ There is a declaratory ruling request pending at the FCC (Docket No. WC-10-45)⁵ on whether it is reasonable for a state to grant one group of LECs, subject to mandated access rate reductions, access to a fund that would make those LECs whole while other LECs are not. It is especially unfair to CLECs since their customers will be required to pay into the USF fund that will then make whole other ILECs.

AT&T's Complaint is defective for other reasons. It essentially requests that the Commission reverse more than a decade of precedent and treatment of CLECs as competitive, non-dominant carriers and impose arbitrary prices on the CLECs by regulatory fiat. AT&T has

⁴ "CLECs should immediately cap their intrastate access rates at the intrastate rates of the ILECs with which they compete." (AT&T Complaint, p. 16).

⁵ Joint Petition for Expedited Declaratory Ruling that the State of Michigan's Statute 2009 PA 182 is Preempted Under Sections 253 and 254 of the Communications Act, WC Docket No. 10-45 (filed Feb. 12, 2010), 25 FCC Rcd 1807 (2010).

failed to make even a rudimentary showing of why the AT&T rates are correct and the sole possible legal rates for itself, let alone for the quite different CLECs and rural ILECs. Capping the CLEC access rates at the level of AT&T's rates would be arbitrary and capricious – it would impose rates on CLECs that had been administratively set for AT&T, and would fly in the face of the reliance that CLECs have on the continued collectability of their rates. CLECs' business plans, investment decisions, designed networks, service offerings and operations, have all been based upon assumptions of what their revenues for all sources, including intrastate access rates, would be.

CLEC's access rates are presumably proper as filed rates; AT&T's generalized complaint does not state a basis upon which to upset the presumption of reasonableness. AT&T's overall theory appears to be that only the dominant ILEC's existing intrastate carrier access rates can be considered just and reasonable, and further that any CLEC's rates in excess of the ILEC's rates are by definition somehow "unjust and unreasonable" within the meaning of KRS 278.260(1), and presumably KRS 278.170(1)⁶ and KRS 278.270. AT&T cites no precedent for such expanded use of KRS 278.260(1), KRS 278.170(1) and KRS 278.270 – Nor, except for broad generalizations of theoretical competitive harm, has AT&T provided critically relevant facts such as a specific showing of harm to the competitive market from existing CLEC rates. AT&T's broad-brush unsupported Complaint must be dismissed.

Under KRS 278.260(1), a complaint must be specific and detail how and why each individual CLEC's rates being attacked are unjust and unreasonable. The complainant must specify the specific rate(s) being alleged unjust and reasonable. AT&T has not done this. It is

⁶ KRS 278.170(1), Discrimination as to rates or service – provides:

"No utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions."

not sufficient to merely argue, as has AT&T, that other public utility commissions (“PUCs”) in some instances have ordered that CLEC intrastate or interstate carrier access rates be capped at an ILEC’s existing rates. Neither the FCC nor the other PUCs cited by AT&T found that the ILEC’s rates were cost-based⁷ and therefore just and reasonable for the affected CLECs. Nor did the FCC or the other PUCs find that the existing CLEC rates were unjust and unreasonable. The decisions of the FCC and other PUCs, cited by AT&T, were made as a matter of general policy, not on the basis that CLECs’ existing rates failed to meet a statutory standard of “just and reasonable”. AT&T has failed to meet the Kentucky statutory standard that individual CLECs rates can not be considered “fair, just and reasonable rates for the services rendered” or that AT&T’s rates are the sole and exclusive “fair, just and reasonable rates for the services rendered” (*see* KRS Section 278.030(1)).

This should be abundantly clear from the history of AT&T’s intrastate carrier access rates in Kentucky. In 1999 AT&T reduced its intrastate access rates in Kentucky to interstate levels.⁸ Prior to that action, AT&T’s intrastate carrier access rates were several times higher per minute than the \$0.0067 per minute rate⁹ it is attempting now to impose on its competitors – presumably these pre-1999 rates were just and reasonable rates. In its decisions, the Commission ordered AT&T’s intrastate access rates down to the same level as its interstate rates, thereby adopting the FCC’s market-based and non-cost based approach. In apparent recognition that AT&T’s previously existing rates were just and reasonable and to assure AT&T of revenue neutrality by

⁷ The FCC clearly did not adopt a cost-based approach to CLEC access charges in *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, 16 FCC Rcd 9923, 9941, para. 45 (2001) (“*CLEC Access Reform Order*”); Eighth Report and Order on Reconsideration, 19 FCC Rcd 9108, 9136, para. 57 (2004) (“*CLEC Access Reconsideration Order*”). The FCC and state PUCs have adopted market-based rules tying CLEC rates to those of their incumbent competitors in the access market, citing needs for administrative simplicity, not cost justification.. See, e.g., *CLEC Access Reform Order*, 16 FCC Rcd at 9954, para.76.

⁸ Order, Case No. 98-065, *The Tariff Filings of Bell South Telecommunications, Inc. to Mirror FCC Interstate Access Rates*, March 31, 1999.

⁹ See Complaint, Exhibit D.

its action, the Commission authorized AT&T to raise its *residential* and other rates by amounts that would result in overall revenue neutrality to AT&T as it lowered its intrastate access rates to interstate levels.¹⁰ Accordingly, it is clear that but for this transfer of revenue recovery to its other services, AT&T's present intrastate carrier access rates are effectively still significantly in excess of \$0.0067/per minute.

Thus, not only does AT&T have the burden of proof in any complaint proceeding to demonstrate why a specific CLEC's access rates are unjust and unreasonable under KRS 278.260(1), in light of this regulatory history it must also demonstrate (i) why AT&T's existing carrier access rates of \$0.0067/minute – its proposed benchmark and cap - are in any way the exclusive just and reasonable rates within the meaning of KRS Section 278.030(1) for all CLECs in Kentucky, and (ii) why its pre-1999 prior access rates should not be the minimum benchmark in any comparison if mirroring of AT&T's rates could, in fact, in any way be justified.

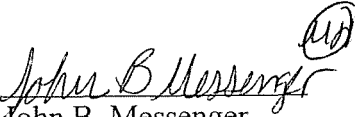
There is no requirement in Kentucky law that all CLECs must have equal rates, let alone that CLEC rates may not vary from ILEC rates and from one-another. AT&T would have the burden of proof if it attempted to establish any of these principles that have no basis in Kentucky law or Commission precedent. AT&T should not be permitted by legerdemain turn Commission rules requiring specific adjudicatory proceedings into a rulemaking proceeding.

For all the reasons set forth above, the Commission should DISMISS the Complaint of AT&T regarding CLECs' intrastate access charges.

¹⁰ See, e.g., Order, Case No. 99-434, p.10. Unlike the ILECs, CLECs in Kentucky do not have a monopoly base of residential customers with a very low elasticity of demand to whom they can raise rates to make up any shortfall from a Commission ordered decrease in intrastate access rates.

June 25, 2010

Respectfully Submitted,



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CERTIFICATE OF SERVICE – PSC 2010-00162

I hereby certify that on June 25, 2010, a true and correct copy of the foregoing has been served by United States first class mail upon:

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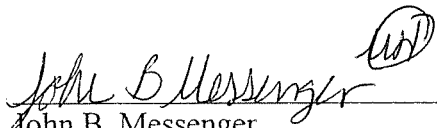
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