BEFORE THE TENNESSEE REGULATORY AUTHORITY

AT NASHVILLE, TENNESSEE
September 5, 2000

IN RE:	)	
	)	
PETITION FOR APPROVAL OF	)	**DOCKET NO. 00-00057**
THE INTERCONNECTION AGREEMENT	)	
AND AMENDMENTS THERETO	)	
NEGOTIATED BETWEEN BELLSOUTH	)	
TELECOMMUNICATIONS, INC. AND	)	
ACCESS INTEGRATED NETWORKS, INC.	)	
PURSUANT TO THE	)	
TELECOMMUNICATIONS ACT OF 1996	)	

ORDER REJECTING INTERCONNECTION AGREEMENT AND AMENDMENTS

This matter came before the Tennessee Regulatory Authority (the "Authority" or the "TRA") upon the Petition for Approval of the Interconnection Agreement and Amendments (the "Agreement") negotiated by and between BellSouth Telecommunications, Inc. ("BellSouth") and ACCESS Integrated Networks, Inc. ("ACCESS"). The Agreement was considered at a regularly scheduled Authority Conference held on April 25, 2000. Based upon the Petition, the record in this matter, and the standards for review set forth in the Telecommunications Act of 1996 (the "Act"), codified at 47 U.S.C. §§ 251-252, the Directors unanimously rejected the Agreement.

BELLSOUTH'S FILING

On January 25, 2000, BellSouth and ACCESS filed the Agreement with the Authority for approval under Sections 251 and 252 of the Act. The Agreement, specifically Attachment 14 (the "Attachment") entitled "Professional Services and Combinations," includes provisions that are of great concern to the Authority.

A. Availability to Other Carriers

The Attachment contains the following language relating to the availability of the terms of the Attachment to other telecommunications carriers:

> The Parties agree that any telecommunications carrier may obtain **the totality** of the identical rates, terms and conditions of this Attachment 14 pursuant to Section 252(i) of the Act.[1]

Other statements in the Attachment, however, indicate that the provisions of the Attachment are **only** available for the benefit of the parties thereto and not for any other person. The Attachment states that:

> BellSouth having **voluntarily** agreed to perform such duties and obligations, will make the rates, terms and conditions contained in this Attachment 14 available to any other local telecommunications carrier **that agrees to be bound by rates, terms and conditions identical to those in this Attachment 14**.[2]

Through the assertion that certain "duties and obligations [are] entered into **voluntarily** by BellSouth,"[3] the Attachment attempts to exempt BellSouth from the requirement in Section 252(i) that BellSouth make the provisions of an interconnection agreement available to a requesting third party.

B. UNEs and Network Combinations

The Attachment goes on to state that its provisions concerning combinations of network elements are not subject to the jurisdiction of the Federal Communications Commission (the "FCC") and the TRA:

> The Parties further acknowledge and agree that BellSouth's duties and obligations as set out in this Attachment 14 require BellSouth to combine network elements that, but for the Parties' agreement herein, BellSouth would not be required to provide or combine for any telecommunications carrier. Accordingly, the Parties agree that, to the extent this Attachment 14 requires BellSouth to undertake duties and obligations that it is not otherwise required to perform pursuant to any section of the Act nor

[1] Attachment, January 25, 2000, at 3 (Emphasis supplied).
[2] Attachment, January 25, 2000, at 2 (Emphasis supplied).
[3] Attachment, January 25, 2000, at 2 (Emphasis supplied).

> pursuant to any current or future order of the Federal Communications Commission ("FCC") or of any state public service commission, such duties and obligations are not subject to the jurisdiction of the FCC or of any state public service commission, including but not limited to any authority to arbitrate the rates, terms and conditions for the offering of such combinations of network elements.[4]

The Attachment then states that any attempt to assert the contrary by ACCESS or any other "person, entity or party" renders the terms of the Attachment null and void.[5]

C. Dispute Resolution

Instead of recognizing the FCC's and the TRA's jurisdiction over arbitration of disputes concerning interconnection agreements, the Attachment states that:

> Any dispute arising out of or related to this Attachment 14 that cannot be resolved by negotiation shall be settled by binding arbitration in accordance with the J.A.M.S./ENDISPUTE Arbitration Rules and Procedures ("Endispute Rules"), as amended by this Attachment.
>
> . . .
>
> The Parties agree that this provision and the Arbitrator's authority to grant relief shall be subject to the United States Arbitration Act, 9. U.S.C. 1-16 et seq. ("USAA"), the provisions of this Attachment and the ABA-AAA Code of ethics for Arbitrators in Commercial Disputes. The Parties agree that the Arbitrator shall have no power or authority to make awards or issue orders of any kind except as expressly permitted by this Attachment, and in no event shall the Arbitrator have the authority to make any award that provides for punitive or exemplary damages.[6]

FINDINGS

Section 252(e)(1) of the Act requires interconnection agreements to be submitted to state commissions for approval. This Section states:

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.[7]

---

[4] Attachment, January 25, 2000, at 2.
[5] Attachment, January 25, 2000, at 2.
[6] Attachment, January 25, 2000, at 9-10.
[7] 47 U.S.C. § 252(e)(1).

Both the Fifth and Eighth Circuit Courts of Appeal have considered the authority of State commissions under the Act and have ruled that the Act grants to State commissions plenary authority to approve or disapprove interconnection agreements and that this authority necessarily carries with it the authority to interpret and enforce the provisions of agreements that State commissions have approved.[8] Therefore, because the Attachment has been submitted to the Authority as part of the Agreement, and the Attachment itself is an agreement for interconnection between telecommunications providers, approval of the Attachment, as well as the rest of the Agreement, is subject to the jurisdiction of the Authority, notwithstanding any assertions to the contrary contained in the Attachment.

As the language quoted from the Attachment demonstrates, the Attachment seeks to prohibit third parties from adopting individual sections of the Agreement. The Attachment improperly limits the availability of the provisions of the Agreement to a third party by forcing a third party to request those provisions in their totality. This violates Section 252(i) of the Act and the FCC's "Pick and Choose" rule, 47 C.F.R. § 51.809 (1997), and it discriminates against other carriers not a party to the agreement. Section 252(i) of the Act states:

> A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.[9]

The FCC's "Pick and Choose" rule, which interprets and implements this section, states in pertinent part that:

> (a) An incumbent LEC [local exchange carrier]shall make available without unreasonable delay to any requesting telecommunications carrier any individual interconnection, service, **or network element arrangement** contained in any agreement to which it is a party that is approved by a state

[8] *Southwestern Bell Telephone Co. v. Public Util. Comm'n of Tex.*, 208 F.3d 475, 479-480 (5th Cir. 2000); *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997), *aff'd in part, rev'd in part on other grounds, AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S.Ct. 721, 142 L.Ed.2d 835 (1999).
[9] 47 U.S.C. § 252(i).

> commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any individual interconnection, service, or network element only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or inter-exchange) as the original party to the agreement. [10]

Plainly, the Attachment improperly restricts the rights of third parties by attempting to force other carriers to obtain the totality of the network element arrangements in the Attachment. The Attachment, and thus the Agreement of which it is a part, does not conform, therefore, to the intent of Section 252(i) of the Act or the FCC's "Pick and Choose" rule.

The Dispute Resolution section of the Attachment lacks reference to the authority granted to the TRA, or any other state regulatory body, by the Act as confirmed by the Fifth and Eighth Circuit Courts of Appeals. The Attachment attempts to supersede the authority of the TRA with regard to arbitrating disagreements between the parties and resolving interconnection complaints. This language is inconsistent with the statutory authority expressly granted to the TRA in Section 252 of the Act.

The Attachment also contains language that erroneously suggests that BellSouth is not required by the Act to provide unbundled network element ("UNE") combinations and that the TRA does not have the authority to order such combinations, although BellSouth does "voluntarily" agree to provide ACCESS with a UNE combination (loop/port). However, provision of UNE combinations by an incumbent local exchange carrier ("ILEC"), in this case BellSouth, is in no sense limited to "voluntary" actions by the ILEC. The FCC's rule on combination of UNEs, 47 C.F.R. § 51.315, requires an ILEC to combine UNEs upon request by

[10] 47 C.F.R. § 51.809 (1997) (Emphasis supplied). The Supreme Court of the United States reversed the decision of the Eighth Circuit Court of Appeals vacating the FCC's "pick and choose" rule, stating that the "FCC's interpretation is not only reasonable, it is the most readily apparent." *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 395, 119 S.Ct. 721, 737, 142 L.Ed.2d 835 (1999).

a competing local exchange carrier ("CLEC"), such as ACCESS. In *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 393, 119 S.Ct. 721, 736-37, 142 L.Ed.2d 835 (1999), the United States Supreme Court held that this rule is consistent with the Act. In addition, as the Authority reminded BellSouth at the April 25, 2000 Authority Conference, the TRA does have the authority to order UNE combinations. Indeed, consistent with the FCC and the Supreme Court's ruling, the TRA has ordered BellSouth on numerous occasions to provide CLECs with the loop/port combination, a form of UNE combination.[11]

Section 252(e)(2) of the Act states:

> (2) The State commission may only reject –
>
> . . .
>
> (A) an Agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that –
>
> (i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or
>
> (ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity ...[12]

The Attachment, and thus the Agreement of which it is a part, does not meet the requirements of the FCC "Pick and Choose" Rule and Section 252(i) of the Act. Specifically, the Attachment prohibits other carriers from opting into certain provisions of the Attachment and thus discriminates against other carriers not a party to the Agreement. The Attachment also attempts to void certain rights and responsibilities granted to other carriers and to this Authority by the Act. By discriminating against non-party carriers, it cannot be consistent with the public

---

[11] See *In Re: Petition of BellSouth Telecommunications, Inc. to Convene a Contested Case to Establish "Permanent Prices" for Interconnection and Unbundled Network Elements*, TRA Docket No. 97-01262, Interim Order on Phase I, January 25, 1999; *In Re: Petition by ICG Telecom Group, Inc. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 252(b) of the Telecommunications Act of 1996,* TRA Docket No. 99-0377, Final Order of Arbitration, August 4, 2000 (Date of decision: March 14, 2000 Authority Conference); and *In Re: Petition for Arbitration of ITC^Deltacom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996,* TRA Docket No. 99-00430, Interim Order of Arbitration Award, August 11, 2000 (Date of decision: April 4, 2000 Authority Conference).

[12] 47 U.S.C. § 252(e)(2).

interest. For these reasons, and in consideration of the grounds upon which the Authority may reject an agreement submitted for approval as stated in Section 252(e)(2)(A) of the Act, the Authority hereby rejects the Agreement.

IT IS THEREFORE ORDERED THAT:

1. The Petition of BellSouth Telecommunications, Inc., and ACCESS Integrated Networks, Inc., for Approval of an Interconnection Agreement and Amendments thereto, filed with the Authority on January 25, 2000, is rejected; and

2. Any party aggrieved by the Authority's determination in this matter may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of 47 U.S.C. §§ 251 and 252.

Melvin J. Malone, Chairman

H. Lynn Greer, Jr., Director

Sara Kyle, Director

ATTEST:

K. David Waddell, Executive Secretary