

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

November 17, 2006

Re : Petition to Establish a Rate for Switching)
Provided Pursuant to Requirements Other Than)
47 U.S.C. 251)

Docket No. 06-00080

INITIAL BRIEF OF MOMENTUM TELECOM, INC.

Momentum Telecom, Inc. ("Momentum") submits the following initial brief, in response to the request of the Hearing Officer, to address the purpose and legal foundation of this proceeding and outline the legal parameters applicable to the establishment of -- as stated in the caption of this proceeding -- a "Rate for Switching Provided Pursuant to Requirements Other Than 47 U.S.C. 251."

Discussion

As noted by the Hearing Officer in her September 5, 2006, "Notice of Filing," this proceeding was opened as the result of the Authority's "Final Order of Arbitration Award" in Docket 03-00119 (the ITC^DeltaCom-BellSouth arbitration), issued October 20, 2005. That Final Order, along with a subsequent "Order On Reconsideration," issued May 18, 2006, discuss at length the purpose and legal foundation of this proceeding and the legal parameters for fixing a "just and reasonable" rate at which BellSouth must lease unbundled switching pursuant to Section 271 of the federal Telecommunication Act. Both of those orders are now final. Once these orders were issued, BellSouth could have filed an appeal of the TRA's decision.¹ BellSouth has chosen not to do so. For purposes of this proceeding, those orders establish the

¹ As the Sixth Circuit noted in *ITC^DeltaCom v. BellSouth*, 2006 WL 2430998 (6th Cir. Tenn.), BellSouth could seek an appeal of the TRA's decision following the issuance of a final order. Slip Opinion, at 2.

law of the case.

1. Purpose of the Case.

As explained in the Final Order, at pp. 26-27, the issues from which this proceeding arose are Issues 26(c) and (d) in the ITC^DeltaCom-BellSouth arbitration. Those issues are:

26(c) Is BellSouth required to provide local switching at market rates where BellSouth is not required to provide local switching as an Unbundled Network Element (UNE)?

26(d) What should be the market rate?

In regard to Issue 26(c), the parties agreed that, where BellSouth is not required to offer unbundled switching as a UNE pursuant to Section 251, BellSouth nevertheless “is required to offer unbundled switching pursuant to Section 271 of the Act.” Final Order at 28. Therefore, in regard to Issue 26(d), the Authority held, “The rate to be set pursuant to Issue 26(d) is the unbundled 271 switching rate.” Order on Reconsideration at 6. That is the purpose of this generic docket: to set “the unbundled 271 switching rate.”

After unanimously rejecting BellSouth’s claim that the Authority had no jurisdiction to establish a 271 switching rate, a majority of the Directors adopted the “final-best-offer” of ITC^DeltaCom “as an interim rate subject to true up.” Final Order, at 28. The Directors also voted unanimously “to have the Chair open a generic docket to adopt a rate for switching outside of 47 U.S.C. §251 requirements” and ruled that the interim rate should be trued up to the earlier of the “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 27 C.F.R. §251.” Final Order, at 39.

This proceeding is the first of those three options: the opening of a generic docket for the purpose of establishing “a switching rate” to replace the interim rate established earlier. Final Order, at 39.

2. Legal Basis for this Proceeding.

The Final Order discusses in detail the agency's jurisdiction, under both federal and state law, to establish a "just and reasonable" rate for unbundled switching offered by BellSouth pursuant to Section 271. Final Order, at 28-37. The agency reaffirmed that decision in the Order On Reconsideration, at 5, and again when the same issue arose in Docket 04-00381 (the "change-of-law" docket). See Transcript of Authority conference on May 15, 2006 at pp. 5-11.² (A written order has not yet been issued.)

The Authority explained in the Final Order that "Tennessee statutes and the relevant portions of the Federal Act together form the basis for the authority 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." Final Order, at 37. The agency added, "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" and the agency's decision does "not conflict with any current federal requirements." *Id.*

As explained earlier, BellSouth could have appealed the Authority's decision in the ITC^DeltaCom arbitration but chose not to do so.³ Unless and until a court rules otherwise, the

² Referring back to the ITC^DeltaCom arbitration decision, Director Miller explained, "I think the action we took in ITC^DeltaCom was unanimous. All three Directors concluded we had jurisdiction.: Transcript at 9-10. He went on to explain that BellSouth had filed a petition with the FCC on the jurisdictional issue but that the FCC had not yet ruled on the issue. He added that if the FCC decides "that the state commission's don't have jurisdiction, that's fine, but I don't see anywhere where the FCC has said that the state commissions don't have jurisdiction." Tr., at 10. As of today, the FCC has still not ruled on BellSouth's petition or on the jurisdictional issue.

³ At this time, three federal district courts have ruled directly on the issue of whether a state commission has authority to establish a just and reasonable rate for a Section 271 element. The U.S. District Court in Maine found that the Maine Commission's power under state law to set rates for 271 elements had not been preempted by federal law. Verizon New England v. Maine PUC, 403 F.Supp. 2d 96 (D. Me. 2005). District courts in Missouri, Southwestern Bell Telephone v. Missouri PSC, 2006 WL 65536 (Sept. 14, 2006) and Illinois, Illinois Bell v. O'Connell-Diaz, et al., 2006 WL 2796488 (Sept. 8, 2006), ruled that only the FCC had authority under Section 271 to set 271 rates. (Neither the Missouri nor the Illinois courts addressed whether a state commission's ratemaking authority under state law had been preempted by Section 271; only the Maine court directly addressed the state issue.) District court cases are also pending in Georgia, Alabama, and Louisiana. Of course, none of these decisions

TRA's decision on the jurisdictional issue is final.

3. Rate Making Standards.

The FCC has made clear that rates for Section 271 elements must be "just and reasonable," the basic standard of ratemaking set forth in both the federal act (47 U.S.C. §201) and the laws of many states, including Tennessee. See T.C.A. §§65-5-201(a), 65-4-117(3), and 65-4-124(a). Referring to the FCC's Triennial Review Order, the TRA explained in the Final Order, at 33, that Section 271 rates must be "just and reasonable." Quoting from the TRO, 18 FCC Rcd. at 17389, the Authority said,

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.

The Authority is familiar with the components of a "just and reasonable" rate. As the Authority wrote in the Final Order, at 38, "existing case law holds that a just and reasonable rate includes a utility's operating expenses as well as a fair return on investments." The Authority explained that the switching rate proposed by ITC^DeltaCom in that case and adopted by the Authority as an interim rate "contained those elements." In other words, a just and reasonable rate is typically determined based on the utility's actual costs, including a fair return, of providing service. See Final Order, at footnote 173 and citations included therein. The FCC also observed that a Bell company "might" be able to satisfy the "just and reasonable" standard in

or pending cases have addressed or will address the TRA's jurisdiction under Tennessee law to establish just and reasonable rates.

other ways. Quoting again from the Triennial Review Order, paragraph 664, the Authority observed,

[A] BOC might satisfy the “just and reasonable” standard by demonstrating the rate for a section 271 element is at or below the rate at which the BOC offers comparable functions to similarly situated 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.

Order On Reconsideration, at 5.

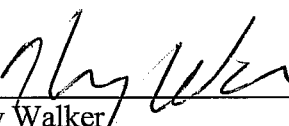
BellSouth failed in the ITC^DeltaCom case to provide any cost data to support its proposed switching rate nor, according to the Authority, did BellSouth meet either of the other criteria for demonstrating that its proposed rate was “just and reasonable.” Order On Reconsideration, at 5-6. Whether BellSouth can now provide any cost justification or other evidence to support its proposed switching rates remains to be seen. The legal parameters of what constitutes a “just and reasonable” rate are, however, clearly set forth in the TRA’s Final Order and Order On Reconsideration.

Conclusion

The purpose and legal foundation of this generic docket have been explained by the Authority in Docket 03-00119, the case in which the agency ordered the opening of this proceeding. Similarly, the Authority has already explained, citing to both federal and state law, the parameters of what constitutes a “just and reasonable” rate for unbundled switching offered by BellSouth pursuant to Section 271. BellSouth has not appealed those decisions. The Authority is now ready to hear proof and establish “a rate for switching provided pursuant to requirements other than 47 U.S.C. 251” as previously ordered.

Respectfully submitted,

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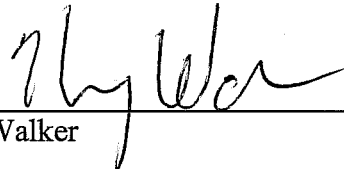
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via U.S. mail, to:

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on this the 17 day of November 2006.



Henry Walker