BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

December 4, 2006

Re : Petition to Establish a Rate for Switching Provided Pursuant to Requirements Other Than 47 U.S.C. 251	)))	Docket No. 06-00080

REPLY BRIEF OF MOMENTUM TELECOM, INC.

Momentum Telecom, Inc. ("Momentum") submits the following reply brief in accordance with the schedule issued by the Hearing Officer and in response to the "Brief on Legal Issues" filed by BellSouth Telecommunications, Inc. ("BellSouth") on November 17, 2006.

Discussion

Momentum's "Initial Brief" addressed most of the issues raised by BellSouth; those arguments need not be repeated here. BellSouth largely reiterates its claims that the TRA's jurisdiction to establish "just and reasonable" switching rates has been preempted by the FCC, an argument the Authority has repeatedly rejected and which the FCC itself has declined to address. As discussed in the Initial Brief, other state commissions and reviewing courts are split on the question[1] although no court, of course, has addressed the preemption issue as applied to the state laws under which the TRA operates. While BellSouth has challenged the TRA's ruling before

[1] While Momentum has not examined all of the state commission cases cited by BellSouth, Momentum notes that BellSouth's list of states which have ruled in favor of Momentum's position does not include Kentucky (2006 Ky. PUC LEXIS 680). BellSouth's list of states ruling the other way includes Alabama, but that Commission has decided to hold the preemption issue in abeyance pending guidance from the federal courts. (Both Momentum and BellSouth are currently litigating the preemption issue in federal district court in Alabama. Civil Action No. 2:06-CV-005 77-WKW.)

the FCC and could also have appealed the Authority's decision to federal court,[2] BellSouth chose not to file a court appeal and the carrier's FCC petition remains unanswered after more than two years.

Regarding the purpose of the hearing and the applicable rate-making standard, BellSouth does not dispute its obligation under Section 271 to offer unbundled local, switching at a "just and reasonable" rate. The parameters of that rate-making process are familiar to the TRA and have been discussed at length in the Authority's earlier orders and Momentum's Initial Brief. Having participated earlier this year in a similar case in Georgia, in which the Georgia Commission established "just and reasonable" rates for other 271 elements, BellSouth is also familiar with the applicable law and rate-making standards.

BellSouth, for example, argued in Georgia as it argues here that its "market based" rates are reasonable because a number of competing carriers have signed contracts agreeing to pay those rates. The Georgia Commission rejected that argument, finding instead that the cost-based rates proposed by other parties were more reasonable based on the record before the agency. Similarly, the TRA adopted as an interim switching price the cost-based rates proposed by ITC^DeltaCom and found that BellSouth had failed to produce sufficient evidence to support any other result. It remains to be seen what evidence Bellsouth will present in this docket, but the carrier can hardly claim that it is a stranger to the process.

BellSouth points out that Momentum is the only competing carrier (other than BellSouth's soon-to-be partner AT&T) to intervene in this generic docket and that Momentum

[2] As Momentum noted in its Initial Brief, the Sixth Circuit noted that BellSouth could have appealed the TRA's decision in the ITC^DeltaCom arbitration once the TRA issued a final decision. The Court wrote, "The TRA announced this rate as an oral order, with a final order to follow. Neither party has informed this Court of any final order that has been issued by the TRA and thus no appeal is presently possible of the TRA's decision to the district court, since parties may only seek district court review of final state agency decisions." ITC^DeltaCom v. BellSouth, 2006 WL 2430998 (6th Cir. Tenn.). The TRA's final order in that case was issued October 20, 2005; an order denying BellSouth's petition to reconsider was issued May 18, 2006. No appeal to the district court has been filed.

itself has signed an agreement to purchase switching from BellSouth at a "market" rate. Both points are irrelevant. BellSouth has a legal obligation to offer unbundled switching at a "just and reasonable" rate regardless of how many carriers participate in this proceeding. While Momentum, like other carriers, had little choice but to agree to BellSouth's "market" rates in order to avoid the interruption of service to Momentum's small business and residential customers, that agreement does not preclude Momentum from challenging the reasonableness of BellSouth's rates.[3] Furthermore, the contract does not prevent Momentum from asking the Authority to require BellSouth to offer those rates in a Section 252 interconnection agreement, as the Authority ordered in the ITC^DeltaCom arbitration docket.[4]

Finally, BellSouth argues that the Authority ought to convert this contested case into a rule-making proceeding. Under Tennessee law, however, "the fixing of rates [by the TRA] shall be deemed a contested case rather than a rule-making proceeding." T.C.A. §65-2-101(2); see also T.C.A. §4-5-102(3) defining a "contested case" to include "rate making." By law, this docket must be a "contested case" proceeding.

Conclusion

It has been more than two years since the Authority first ruled that competing carriers are entitled to purchase unbundled switching from BellSouth pursuant to Section 271 and that the TRA had jurisdiction to ensure that Bellsouth's switching rates are "just and reasonable." The

[3] In fact, the commercial agreement between BellSouth and Momentum states that the agreement is governed by federal telecommunications laws. The agreement states, "Notwithstanding Section 17 below, the Parties acknowledge that this Agreement is intended to be governed by the provision of 47 U.S.C. 201, 202 [the requirements that rates be just and reasonable, and non-discriminatory] and to the extent applicable, 271."

[4] The agreement between BellSouth and Momentum does not contain an "exclusivity" provision. In other words, it does not require that Momentum purchase switching services only through the commercial agreement nor prohibit Momentum from purchasing such services, where available, through a Section 252 interconnection agreement. Therefore, Momentum signed the commercial agreement in order to avoid any disruptions in service while continuing to litigate both the reasonableness of BellSouth's rates and the right to have those rates determined by a state commission in a Section 252 arbitration proceeding.

opening of this generic docket means that competing carriers will finally have the opportunity to take advantage of the Authority's ruling. It is time to go forward.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

Henry Walker
1600 Division Street, Suite 700
P.O. Box 340025
Nashville, Tennessee 37203
(615) 252-2363

CERTIFICATE OF SERVICE

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

Guy Hicks
BellSouth Telecommunications, Inc.
333 Commerce Street
Nashville, TN 37201

Jack W. Robinson, Jr.
Gullett, Sanford, Robinson & Martin, PLLC
315 Deaderick Street, Ste. 1100
Nashville, TN 37238

on this the 4th day of December 2006.

Henry Walker