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VIA HAND DELIVERY

filed electronically in docket office on 12/04/06

Hon. Sara Kyle, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

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

Dear Chairman Kyle:

Enclosed are an original and four copies of BellSouth's Reply Brief.

A copy of the enclosed has been provided to counsel of record.

Very truly yours,

Joelle Phillips

JJP:nc

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BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re: *GENERIC DOCKET TO ESTABLISH A RATE FOR SWITCHING PROVIDED PURSUANT TO REQUIREMENTS OTHER THAN 47 U.S.C. 251*

Docket No. 06-00080

BELLSOUTH'S REPLY BRIEF

BellSouth Telecommunications Inc. ("BellSouth") files this Reply Brief and respectfully shows the Authority as follows:

INTRODUCTION

Momentum's Initial Brief provides a surprisingly scant discussion of the important recent federal court decisions addressing rate-making for elements that are provided solely pursuant to 271. Momentum likewise fails to identify any particular state-law basis on which the TRA could engage in such 271 rate-making. Instead of providing the TRA with any meaningful legal analysis, Momentum's brief consists of an over-simplified argument that (1) the TRA embarked upon the path of 271 rate-setting in the DeltaCom arbitration and (2) the TRA must now stay the course of that decision - without regard for the many decisions of federal courts issued after the TRA's decision and without regard for the fact that DeltaCom has negotiated a commercial rate for switching and no longer needs a TRA-set generic rate. Momentum further urges the TRA to set a rate using cost evidence, which is flatly inconsistent with the FCC's instructions that the "just and reasonable" nature of a 271 rate is to be measured by comparison to other negotiated rates in

negotiated commercial agreements.

I. Momentum's Initial Brief Invites the TRA to Move Forward in a Manner Inconsistent with Holdings of the Federal Courts who have Ruled on the Issue of 271

A. Momentum's Discussion of the Maine Case is Misleading

Momentum relies upon the case of *Verizon New England & Maine* PUC, 403 F.Supp. 2d96 (D.Me. 2005) ("the Maine case"), but Momentum provides only a short footnote describing the case. The picture Momentum paints is misleading. Contrary to Momentum's exceedingly short description of it, the Maine case ***did not*** evaluate whether Congress had empowered state commissions, or instead empowered only the FCC, to set rates pursuant to 271. Instead, the Court found only that the state legislature - in Maine - had empowered the Maine PUC to ***enforce a specific promise that Verizon made in that state to tariff wholesale services, including 271 UNEs***. Obviously, BellSouth has made no such promise in Tennessee (or anywhere else). The unique facts of the Maine case render it unhelpful as precedent for cases in which the ILEC has not promised the commission that it will file its wholesale 271 rates in a tariff.

The Maine PUC issued an Order in September 2005. On the very first page of the Maine PUC Order, the Commission stated that Verizon, in Maine, had agreed to additional requirements in order to obtain Commission support of its 271 application and that one of those additional requirements was Verizon's agreement to file a wholesale tariff in Maine. *See* Order at page 1, footnote 1. In its decision in that docket, the Maine Commission did not rely upon a state unbundling statute,

or even upon section 271, as the foundation for its jurisdiction to establish a rate for a 271 element. Instead, as is demonstrated by this first page reference in its Order, the Maine Commission acted in reliance upon its inherent authority to enforce a commitment that Verizon made to the Commission in exchange for the Commission's support of Verizon's 271 application.

Verizon appealed the action of the Maine Commission, arguing that, notwithstanding any authority the Commission had to interpret and enforce the commitment Verizon made to file its wholesale tariff, the Commission was nonetheless prohibited from setting rates under section 271 because only the FCC can take such action. The District Court in Maine determined that section 271 was not intended by Congress to exclude "the PUC in the circumstances of this case" from all activity related to 271. Maine Decision, page 16. Of course, the "circumstances of this case" to which the Court referred included Verizon's promise made to the commission that Verizon would tariff wholesale rates for 271 elements. The Maine Court did not rely on any specific statutory language in reaching its conclusion. Instead, it simply cited *Verizon New England vs. PUC*, 875 A.2d 118 (St. Ct. Maine) as the support for its decision that the Maine PUC had state law authority to enforce and interpret the commitment it concluded that Verizon had made to tariff 271 elements. In turn, that case cites to the general statute creating the Maine PUC. In short, there is no state law analysis of any independent state authority to engage in whole-sale rate making for de-listed UNEs provided under 271. The only state-based legal analysis is the evaluation of the

Maine PUC's general authority to enforce a promise made to the Commission in exchange for the Commission's endorsement of Verizon's 271 application.

The District Court's opinion is now on appeal to the U.S. Circuit Court of Appeals for the First Circuit. As is clear from the discussion above, the Maine case included a peculiarly unique fact - the fact of Verizon's voluntary commitment to file a wholesale tariff, a commitment which the Maine Commission interpreted to include a promise to tariff 271 obligations. There is absolutely no analogous fact in this docket, nor in the generic change of law docket, nor in the DeltaCom arbitration. No one has alleged, nor could they allege, that BellSouth has made any agreement to tariff wholesale 271 obligations. For this reason, the Maine decision provides no persuasive authority in this case. Moreover, as BellSouth's initial brief set forth, since the time that the Maine case was decided, many other federal courts have evaluated the 271 issue in cases that did not involve the unique Verizon commitment to file a wholesale tariff. Those cases, discussed in BellSouth's earlier brief, provide a much more analogous set of facts to the situation before the TRA. In those cases, which did not involve the type of commitment Verizon made, the courts have overwhelmingly rejected the concept of state commission action to set 271 rates.

The bottom line is that, notwithstanding Momentum's misleading reference that "only the Maine court directly addressed the state issue"[1], the so-called "state issue" addressed by the Maine court is in no way applicable to any potential state

[1] Momentum initial brief, footnote 3, page 3.

issue presented here in Tennessee. For example, as noted above, the Maine case does not rely in any fashion upon a state unbundling statute. The only state issue in that case was the general authority of the PUC to enforce commitments made by regulated utilities. Consequently, the Maine case is not a case that examines a state's attempt to establish 271 rates under the auspices of a state unbundling statute and whether such a statute would in fact be preempted by federal law or otherwise would be inconsistent with FCC policy and decisions.

Moreover, Momentum is absolutely wrong to say that only the Maine case addressed the issue of state-based authority to set rates for 271 UNEs. As discussed further below, the federal court in New Hampshire reversed that state's commission and found state law to be pre-empted in this area.

For all its emphasis on the so-called "state law issue," Momentum does not rely on (or cite to) any Tennessee state law to urge the TRA to set a rate for switching. It cites no state statute, nor does it discuss how the application of some (unidentified) Tennessee law to set 271 rates would not be pre-empted (as the New Hampshire court found). Instead, Momentum appears to agree that only Section 271 of the federal statute (and not Tennessee law) should form the basis for how such a rate should be determined. Inconsistently, however, Momentum then asks the TRA to ignore what the FCC and federal courts have said about Section 271-based rates (both what courts have said about ***who*** should set those rates and what the FCC has said about ***how*** they should be set).

B. Momentum's Brief Ignores the Many Federal Courts that have ruled that State Commissions Cannot Set 271 Rates

BellSouth's initial brief discussed at length the many federal cases that considered the 271 issue ***after*** the TRA considered the issue in the DeltaCom arbitration and after the Tennessee Generic Change of Law docket. Moreover, the four recent opinions were attached to BellSouth's brief. Momentum's brief acknowledges that federal courts in Missouri and Illinois have recently ruled "...that only the FCC had authority under Section 271 to set 271 rates.[2]" Momentum's meager discussion (limited to a footnote) of the federal cases, however, fails to discuss either the New Hampshire or Florida cases. Both of those courts also squarely reject the position advocated by Momentum.

For example, Momentum fails to discuss how the federal court in Florida explicitly resolved the question of 271 jurisdiction by agreeing with the Florida PSC decision that any complaint alleging that BellSouth's wholesale actions violate 271 "is an issue for the FCC, not for the Florida Commission." *Dieca Communications v. Florida Pub. Serv. Comm'n*, No. 4:06cv72-RH/WCS (N.D. Fla. Sept. 12, 2006), Order on Merits, slip op. at 9-11. Momentum also fails to discuss the fact that the district court in Florida explicitly rejected the analysis in the Maine case. Id at 10, n. 7.

Likewise, Momentum fails to discuss the decision from the federal district court in New Hampshire, which recently reversed the New Hampshire Public Utilities Commission's attempt to assert jurisdiction under §271. *See*

[2] *See* Momentum brief at page 3, footnote 3.

Memorandum and Order, *Verizon New England, Inc. v. New Hampshire Pub. Utils. Comm'n*, No. 05-cv-94-PB, 2006 WL 2433249 (D.N.H. Aug. 22, 2006). In that decision, the court highlighted the state commissions' "limited role in the §271 application process," *id.* at *3; it emphasized the limitations that the FCC has placed on requiring access to network elements, *see id.* at *5-*6; it held that the New Hampshire Commission had "failed to identify" a source of authority to set rates under §271, *id.* at *8; and it further held that in any event the Commission's decision conflicted with and was preempted by the FCC's unbundling determinations, *see id.* at *8 n.33. *See Also id.* at *7 n.29 (declining to follow the Maine decision).

The New Hampshire case makes clear that federal law prohibits a state commission from acting as urged by Momentum. In light of that court's reversal of the New Hampshire Commission's actions, the TRA must evaluate the reasonableness of using its time and resources proceeding in a manner that is equally likely to be overturned in the same manner as the New Hampshire Commission was overturned.[3] These concerns, of course, are not part of Momentum's agenda.

[3] In evaluating whether it is reasonable to move forward against the current of all of these federal cases, the TRA is also entitled to consider whether such an effort to set a switching rate is truly even needed as a practical matter. As of today, BellSouth has entered into 245 commercial agreements that provide for local switching on commercial terms, and 190 of those agreements apply to Tennessee. Of the 190, BellSouth understands that 31 involve CLECs who are certificated to operate in Tennessee. The existence of these agreements explains the lack of CLEC interventions in this docket, and it also provides a compelling practical basis for the TRA to dismiss this docket as an unnecessary waste of Authority resources.

II. Momentum's Initial Brief Mischaracterizes the TRA's May 18, 2006 Order.

A. The TRA's Order on Reconsideration Provides No Support for the Cost-Based Analysis Urged by Momentum or Even for the Relevance of Cost

In its May 18 Order, quoted by Momentum in its initial brief, the TRA discussed the "just and reasonable" analysis relevant to 271 elements as follows:

> As justification for their findings in the *Final Order*, the Arbitrators relied upon the FCC rules, which state that in situations where unbundled switching is not required under Section 251, the element must still be offered to competitors in order to comply with the requirements of Section 271; however, the rate does not have to comply with TELRIC pricing methodology. Instead, the FCC requires that rates for unbundled elements offered pursuant to Section 271 must be "just and reasonable." The FCC has stated,
>
> > [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.

May 18, 2006 Order at 5 (citations omitted).

The quoted language from the FCC provides no basis to establish a rate based on evidence of the BOC's costs. To the contrary, the FCC refers solely to tariff analogues and to evidence of negotiated rates with other carriers. Likewise, the TRA explains that the 271 elements do "not have to comply with TELRIC

pricing methodology." In short, both the TRA and the FCC have explained that 271 rates are about market rates (proven by evidence of agreements reached in the market) and are not about TELRIC methodology.

In spite of the foregoing, Momentum wrongly asserts in its brief that a "just and reasonable rate is typically determined based on the utility's actual costs, including a fair return, of providing service". Brief at 4. In support of its assertion, Momentum notes that the TRA, in deciding the DeltaCom arbitration, referenced "existing case law" regarding inclusion of cost and rate of return in setting "just and reasonable rates." In fact, the citation to which Momentum refers is a citation to two cases:[4] (1) a 1984 case evaluating oil pipeline rates set by the Federal Energy Regulatory Commission pursuant to the Interstate Commerce Act and (2) a 1944 U.S. Supreme Court case evaluating the establishment of natural gas rates by the Federal Power Commission. Obviously, neither case addresses telephone rates, the telecom act generally, or section 271 specifically. Most importantly, both cases, set in the context of old-fashioned rate of return regulation of fuel utilities, typify Momentum's attempt to convince the TRA to establish a 271 rate in reliance on the most out-dated methodology, in clear disregard of the FCC's focus on a more modern market-based approach to rates. It is unthinkable to disregard recent federal court decisions in the context of 271 in favor of twenty-year old and sixty-year old cases on oil and gas rates.

There is absolutely no logical link between the FCC's and TRA's discussion

[4] The two case referenced at page 38 of the TRA's order in the DeltaCom case were *Farmers Union v. FERC*, 734 F.2d 1486 (DC Cir. 1984) and *Federal Power Commission v. Hope Natural Gas* (320 US 591 (1944)).

of "market" rates or "271" rates, as set out in the TRA's May 18, 2006 Order on Reconsideration, and Momentum's focus on cost. Rather, Momentum seeks to present the very same evidence (cost) that would be used to set rates using TELRIC methodology, even though the TRA and FCC have clearly stated that 271 rates are not to be evaluated in that manner. Momentum cannot seriously think that the TRA can use the ingredients and recipe for creating TELRIC rates to produce a rate that is meaningfully different from a TELRIC rate. Momentum attempts to have the TRA turn a blind eye to the relevant FCC direction (about evidence of negotiated rates) and rely instead on the type of evidence and method used for TELRIC rate-setting (or worse, the type of evidence used to set gas prices in the 1940s). Even if 271 jurisdiction did exist in state commissions (which it does not), such an action would constitute complete disregard for the applicable law, an arbitrary action by the TRA, which is clearly reversible under TCA § 4-5-322(a).

B. Momentum Mischaracterizes the TRA's Alternative Objectives as if they were a Series of To-Do Items

At page 2 of its brief, Momentum attempts to suggest that the TRA intended to set a rate even if a rate was negotiated successfully. Momentum correctly notes that the TRA "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." Yet Momentum ignores the word "or" and goes on to suggest that the TRA should proceed with each of these "three options"

without regard to the fact that DeltaCom has, in fact, already established a commercially negotiated rate.[5]

III. Momentum's Brief Wrongly Suggests that BellSouth has Slept on its Appeal Rights

Momentum's theme throughout its Brief is that BellSouth has chosen not to appeal the DeltaCom Order, and, therefore, the TRA should proceed to set 271 rates without regard for any of the developments in the law since the time of that decision. Momentum states incorrectly that BellSouth has chosen not to appeal the TRA's decision in DeltaCom. As the TRA knows well, the appeal times in an arbitration run from the state commission order adopting the arbitrated interconnection agreement, and BellSouth is not required to take its appeal from the issuance of the TRA's arbitration order. In light of the fact that so many of CLECs have now chosen to negotiate commercial switching rates rather than continuing to seek rates set by state commissions, BellSouth's decision about the timing for any appeal it may take makes perfect sense. ***In fact, the very party against whom BellSouth litigated in the DeltaCom arbitration has negotiated a commercial rate for switching.***[6]

In addition, the suggestion that the TRA is required, as a legal matter, to stay the course of establishing a 271 switching rate, without regard for the recent holdings of federal courts on the 271 jurisdiction issue, is also plainly misleading.

[5] In fact, as noted above, BellSouth has now entered into commercial agreements that provide switching on negotiated commercial terms with at least 31 CLECs certificated in Tennessee and with 245 CLECs region-wide.
[6] As noted above, DeltaCom and BellSouth have not completed negotiations for a new interconnection agreement. The parties have, however, negotiated a commercial agreement for switching.

The TRA is under no so-called "law of the case" obligation in this docket to take any action on the basis of a decision that was reached in a separate docket, prior to the issuance of the various federal cases discussed in BellSouth's Brief. The "law of the case" reference is nothing more than an attempt to dress up the "stay the course" argument as if it were based upon law. In fact, Momentum cites no legal authority and provides no legal analysis to support its off-hand reference of the "law of the case" doctrine.[7]

CONCLUSION

Momentum seeks to obtain a rate that is, for all practical purposes, a TELRIC-model rate for switching created using the same type of cost-based analysis drawn from cases that arose in the 1940s and dealt with natural gas. Momentum knows that TELRIC is not applicable to delisted UNEs, like switching, so Momentum pays lip service to setting the rate in reliance on the "just and reasonable" language found in 271 - yet Momentum urges the TRA to ***call*** the process "just and reasonable" while ***doing*** the very same thing the TRA would do if it were engaged in TELRIC rate-setting.

Momentum hides its efforts to lead the TRA down the TELRIC path by

[7] The term "law of the case" is generally used to describe the legal principle that if an ***appellate court*** has passed on a legal question ***and remanded the cause*** to the court below for further proceedings, then the legal question thus determined by the appellate court will not be differently determined ***on a subsequent appeal*** in the same case where the facts remain the same. *Allen vs. Michigan Bell Co.*, 232 NW 2d 302, 303. The doctrine is one applicable to remands and is not intended to tie the hands of the trial court prior to any appeal taken in that case. Because, as Momentum points out, the DeltaCom arbitration has not been appealed at this time, the concept is clearly inapplicable here. In addition, the doctrine of "law of the case" is particular to cases that have been appealed and remanded but that remain the same case on substantially the same facts. The suggestion that the TRA's prior unappealed to date decision in a different docket could have any relationship to the doctrine of "law of the case" is incorrect at best and misleading at worst.

focusing on the fact that the TRA decided to take jurisdiction under 271 in the DeltaCom docket and must "stay the course," without due regard for the many federal courts who have now ruled that state commissions should not do so, without regard for the fact that DeltaCom (like so many other CLECs) has negotiated a commercial rate and only one other CLEC has come forward urging the TRA to set a rate, and without regard for the FCC's guidance on what evidence (the existence of commercial agreements) would be relevant to a 271 rate analysis. Moreover, Momentum consistently raises the concept of "state issues" but has yet to articulate what state law arguably provides an independent basis to set a rate for a UNE like switching that has been de-listed under federal law.

The Tennessee Court of Appeals has explained that the TRA commits reversible error where it acts in violation of applicable constitutional or statutory provisions.[8] Moreover, in *Tennessee Cable TV Association v. Tennessee Public Service* Commission, 844 SW2d 151 (Tenn. App. 1992), that same court has noted the need for a rulemaking procedure when policy that will be applied generally (as would a generic rate) is developed.

While parties (like Momentum) have the luxury of advocating for whatever serves their interest, the TRA is required to look past the rhetoric to the law and to act in the correct manner. For all the reasons discussed above, the correct action

[8] *See TCA* §4-5-322(h)(l); *See also, Consumer Advocate Division v. Tennessee Regulatory Authority*, 2005 Tenn. App. Lexis 745 *28, (reversing the TRA's decision as abuse of discretion and citing *Doe v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 42 (Tenn. 2005)).

in this case would be to heed the holdings of the federal courts who have decided analogous cases and close this docket. At the very least, the TRA must conduct this docket in compliance with state law, which requires the use of proper procedure (rulemaking) and requires parties receive due process by having the legal standards the TRA will apply expressly identified and communicated to the parties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2006, a copy of the foregoing document was served on the following, via the method indicated:

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