

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

November 26, 2007

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
)	
)	
)	

DISSENTING OPINION OF DIRECTOR RON JONES

This docket came before a panel of the Tennessee Regulatory Authority (“Authority”) at an Authority Conference held on January 23, 2007, for the purpose of considering whether to close the docket. During the Authority Conference, the majority voted to close the docket and, on November 26, 2007, filed its *Order Closing Docket* memorializing the decision. Because I do not agree with the majority’s decision, I respectfully dissent from the majority and provide this opinion in support of my vote.

I. RELEVANT PROCEDURAL HISTORY

On October 20, 2005, the Authority entered the *Final Order of Arbitration Award* in Docket No. 03-00119. In regard to Issue 26, the order states:

Thereafter, a majority of the Arbitrators voted to adopt DeltaCom’s Final Best Offer of \$5.08 as an interim rate subject to true up. The Arbitrators voted unanimously to have the Chair open a generic docket to adopt a rate for switching outside of 47 U.S.C. § 251 requirements. The Arbitrators unanimously found that the interim rate should be trued up to the earlier of establishment of: 1) a switching rate in the generic docket; 2) a commercially negotiated rate; or 3) FCC rules regarding switching rates outside of 47 C.F.R. § 251.¹

¹ *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 03-00119, *Final Order of Arbitration Award*, pp. 38-39 (Oct. 20, 2005) (internal footnotes omitted).

On March 22, 2006, the Authority Chairman filed a memorandum creating Docket No. 06-00080 to adopt a rate for switching other than switching required by Section 251.

On September 29, 2006, Momentum Telecom, Inc. (“Momentum”) filed a petition to intervene. The Hearing Officer held a status conference on October 23, 2006. During the status conference, it was determined that briefing was necessary prior to the filing of the parties’ cases. The Hearing Officer determined that the briefing should cover topics such as whether it is appropriate to proceed with this docket and what are the legal requirements of a market rate.² The Hearing Officer also granted the petition to intervene of Momentum.³

During the status conference, AT&T of the South Central States, LLC (“AT&T”), TCG MidSouth, Inc. (“TCG”), and SBC Long Distance d/b/a AT&T Long Distance presented an oral motion to intervene, and the Hearing Officer instructed them to file a written motion.⁴ On October 27, 2006, AT&T and TCG filed a written petition to intervene. No order on the petition had been entered as of the January 23, 2007, Authority Conference.

On November 17, 2006, Momentum filed an initial brief on the issues of whether it is appropriate to proceed with this docket and the legal requirements of a market rate. Thereafter, on November 20, 2006, BellSouth Telecommunications, Inc. (“BellSouth”) filed its initial brief. On December 4, 2006, BellSouth and Momentum each filed a reply brief.

II. ANALYSIS

In its briefs, BellSouth argues that the docket should be closed because (1) BellSouth has reached agreements with ITC^DeltaCom Communications, Inc. (“DeltaCom”), Momentum, and other competing local exchange carriers (“CLECs”) on a non-251 switching rate;⁵ (2) since the

² Transcript of Status Conference, p. 39 (Oct. 23, 2006).

³ *Id.* at 3.

⁴ *Id.* at 40.

⁵ *BellSouth’s Brief on Legal Issues*, pp. 8-9 (Nov. 20, 2006).

issuance of the *Final Order of Arbitration Award*, multiple federal district courts have determined that state commissions lack authority to set Section 271 rates;⁶ (3) there is a lack of interest among CLECs in this docket;⁷ and (4) the Authority should not expend its resources given the lack of interest and likelihood of being overturned on appeal.⁸ The majority relies on an argument somewhat related to the first argument of BellSouth listed earlier, namely that “the parties have settled on a rate which satisfies one of the criteria outlined in Docket No. 03-00119.”⁹ Because I did not agree with the majority’s conclusion or BellSouth’s arguments, it was my motion that the docket should remain open. I address each of BellSouth’s arguments and the majority’s conclusion below.

A. Satisfaction of a Condition Set Forth in Docket No. 03-00119

I cannot agree with the argument that this docket should be closed because one of the three conditions contained in the *Final Order of Arbitration Award* in Docket No. 03-00119 has been met; namely, the establishment of a commercially negotiated rate with DeltaCom. The conditions established in the *Final Order of Arbitration Award* have little to do with this docket except that in the event a Section 271 rate is set in this docket before the other conditions are met, then the true-up of the interim rate would be triggered in Docket No. 03-00119. This docket is a generic docket to set a rate. Thus, the rate set in this docket will be available to all carriers, not just DeltaCom. The question of whether this generic docket should proceed should not depend on and is, in fact, independent of an agreement between DeltaCom and BellSouth or the satisfaction of a condition set forth as part of the resolution of Issue 26 of Docket No. 03-00119. Based on these comments and conclusions, I reject the conclusion of the majority.

⁶ *Id.* at 2-7.

⁷ *Id.* at 8.

⁸ *BellSouth’s Reply Brief*, p. 7 (Dec. 4, 2006).

⁹ *Order Closing Docket*, p. 3 (Nov. 26, 2007); see Transcript of Authority Conference, p. 23 (Jan. 23, 2007).

B. Agreements with Other Carriers

I am not persuaded that this docket is unnecessary because carriers other than DeltaCom have entered into agreements containing switching rates. I will not penalize CLECs for entering into agreements that are necessary to keep service flowing to their customers. Also, the establishment of a rate by the Authority can serve a number of purposes. For example, a known market rate is likely to serve as a negotiating point in future interconnection agreement negotiations between BellSouth and another party. The Authority's act of setting a rate does not necessarily result in a mandate that the rate be contained in every agreement. The give and take of the negotiation process demands that flexibility be permitted. Based on these comments and conclusions, I reject BellSouth's argument that this docket should be closed, because BellSouth has entered into commercial agreements with other carriers, including DeltaCom and Momentum.

B. Determinations of Federal District Courts that State Commissions Lack Authority to Set Section 271 Rates

As for BellSouth's jurisdictional argument, I remain committed to my position as set forth in the *Final Order of Arbitration Award*¹⁰ and my May 15, 2006, deliberations in Docket No. 04-00381.¹¹ Having reviewed the case law, it is my conclusion that there remains considerable disagreement as to the extent of a state's jurisdiction under either state or federal law to regulate Section 271 elements. It is and has been my position that this agency is permitted under both state and federal law to set just and reasonable rates for Section 271 elements and to require the inclusion of Section 271 elements in Section 252 interconnection agreements.

¹⁰ *In re: Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 03-00119, *Final Order of Arbitration Award*, pp. 28-39 (Oct. 20, 2005)

¹¹ Transcript of Authority Conference, pp. 55-57 (May 15, 2007).

Focusing for a moment on our state law authority, I am guided by Tennessee Code Annotated section 65-4-106. This pronouncement from our General Assembly mandates that I, in my capacity as a Director of the Tennessee Regulatory Authority, resolve any doubt as to the existence of a power conferred by our enabling legislation in favor of the existence of that power.¹² Thus, to the extent that there is any doubt as to whether we have the power pursuant to state law to set rates for Section 271 elements, I conclude that I, as well as my colleagues, must determine that such a power exists. Based on these comments and conclusions, I reject BellSouth's argument that this docket should be closed, because the Authority lacks jurisdiction to set Section 271 switching rates.

C. Lack of Interest of CLECs and Expense of Authority Resources

My analyses of BellSouth's third and fourth arguments blend together. The lack of requests for intervention in this docket by CLECs has not gone unnoticed. While it is difficult to identify the reasons why participation is low, it also has not gone unnoticed that with each *Triennial Review Order*-based decision¹³ and with each mega-merger that takes place, the CLEC community in Tennessee shrinks. The lack of CLEC participation, whether as a result of the diminution of CLEC market participation or other reasons, should not serve to preclude action by this agency. Rather, it should elevate the Authority's efforts to ensure that the environment in Tennessee continues to permit a competitive marketplace.¹⁴ In my opinion establishing a just and reasonable Section 271 switching rate is essential to permitting competition in all

¹² Tenn. Code Ann. § 65-4-106 (2004 Repl.).

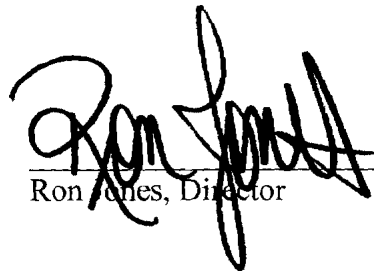
¹³ See, e.g., *In re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 03-36, 18 FCCR 19,020, *Report and Order on Remand and Further Notice of Proposed Rulemaking*, (Aug. 21, 2003); *In re: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-290, 20 FCCR 2533, *Order on Remand* (Feb. 4, 2005).

¹⁴ Tennessee's Telecommunications Services Policy states, in part, "The general assembly declares that the policy of this state is to foster the development of an efficient, technologically advanced, statewide system of telecommunications services by permitting competition in all telecommunications services markets, and by permitting alternative forms of regulation for telecommunications services and telecommunications services providers." Tenn. Code Ann. § 65-4-123 (2004 Repl.).

telecommunications services markets. Momentum's interests certainly should not be marginalized simply because in this action it is the sole standard bearer. If the Authority were to triage its regulatory efforts, few actions would or should command this agency's resources ahead of preserving competition.

III. CONCLUSION

Based on the foregoing analysis, it is my conclusion that this docket should remain open. Because this decision is contrary to the determination of the majority, I respectfully dissent from the *Order Closing Docket*.



Ron Jones, Director