

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

May 15, 2008

In re: Complaint of Momentum Telecom, Inc.)
Against AT&T Tennessee Concerning Wholesale)
Switching Rates)

Docket No. 08-00079

**COMPLAINT OF MOMENTUM TELECOM, INC. AGAINST AT&T TENNESSEE
CONCERNING WHOLESALE SWITCHING RATES**

Summary

In this complaint, Momentum Telecom, Inc. asks the agency to investigate the rates charged by AT&T for the use of AT&T's local switching services in Tennessee.

The Tennessee Regulatory Authority has determined that a "just and reasonable" rate for the use of AT&T's local switching services is a flat rate of \$5.08 (including usage and features) per line, per month. Docket 03-00119; Order issued October 20, 2005. As of April 29, 2008, there is no longer any pending appeal of that ruling.¹

AT&T presently charges Momentum a switching rate of \$10.65 (based on average usage),² more than twice the rate established by the TRA in Docket No. 03-00119. Momentum asks that the Authority, pursuant to its power under state law, open a proceeding to investigate the current rate charged by AT&T and, if appropriate, establish a new rate which complies with state law and is consistent with and federal law. Pending a final decision, Momentum asks the

¹ When the TRA decision was first announced, BellSouth (the predecessor of AT&T) filed a petition with the FCC asking the federal agency to overturn the TRA's order. The FCC never ruled on the petition and, two weeks ago, the petition was withdrawn. No other appeal has been filed.

² The \$10.65 rate applies to residential customers. The wholesale rate charged by AT&T for business lines is \$13.65 per month, based on average usage. The great majority of Momentum's 5,300 customers in Tennessee are residential users.

Authority to order AT&T to charge Momentum an interim rate for local switching services of no more than \$5.08 under the same terms and conditions the Authority adopted in Docket 03-00119. Once a final decision has been made, it should be applied retroactively to the date upon which AT&T is ordered to begin charging the interim rate.

Parties

1. Momentum Telecom, Inc. ("Momentum") is a competitive local exchange carrier ("CLEC") certified by the Authority pursuant to T.C.A. § 65-4-201(c) to offer intrastate telephone services in Tennessee. Momentum is headquartered in Birmingham, Alabama and presently provides local telephone services in 38 states. Momentum currently has approximately 5,300 retail customers in Tennessee. About 80% to 90% are residential users. Momentum is one of the few CLECs in the state that offers stand alone, wireline telephone service to residential customers in competition with AT&T.

2. BellSouth Telecommunications, Inc., d/b/a AT&T Tennessee ("AT&T") is an incumbent local exchange carrier offering retail and wholesale telephone services in Tennessee under the jurisdiction of the Authority.

3. Momentum leases local switching services from AT&T in Tennessee pursuant to a private contract between the carriers. There is no state tariff for AT&T's wholesale switching services and the contract offered by AT&T has never been submitted to, or approved by, the TRA. There is no competitive wholesale market for local switching in Tennessee and, in the absence of such competition, Momentum has no economically viable means of serving its customers other than by leasing local switching services from AT&T. The switching rates offered by AT&T to Momentum are not negotiable.

Jurisdiction of the TRA

4. Under the Tennessee Telecommunications Act of 1995, the Tennessee General Assembly declared that the policy of this state is to permit "competition in all telecommunications services markets." T.C.A. § 65-4-123. Pursuant to that policy, the Act requires that "all telecommunications services providers shall provide non-discriminatory interconnection to their public networks under reasonable terms and conditions." All providers are also required to offer competing carriers the use of "desired features, functions, and services" on an "unbundled and non-discriminatory basis." T.C.A. § 65-4-124(a). The Tennessee Regulatory Authority is directed "at a minimum" to issue such rules and orders "as necessary to implement" these provisions. T.C.A. § 65-4-124(b).

5. The TRA has also been given specific power "to fix just and reasonable individual rates, joint rates, tolls, fares, charges or schedules thereof," T.C.A. § 65-5-101(a), "to fix just and reasonable standards, classifications, regulations, practices or services to be furnished, imposed observed and followed thereafter by any public utility," T.C.A. § 65-4-117(3), and to require every public utility to "furnish safe, adequate, and proper service." T.C.A. § 65-4-114(1).

6. The Tennessee Supreme Court has stated that the General Assembly gives the TRA "practically plenary authority over the utilities within its jurisdiction." Consumer Advocate Division v. Greer, 967 S.W.2d 759, 761-762 (Tenn. 1988) quoting from Tenn. Cable Television Association v. Tenn. Public Service Commission, 844 S.W.2d 151, 159 (Tenn. App. 1992).

7. Pursuant to these statutes and court decisions, the TRA has jurisdiction under state law to examine the rates at which AT&T offers local switching services to carrier-

customers such as Momentum and to determine whether those rates are "just and reasonable," "non-discriminatory," and otherwise consistent with state and federal law.

8. The TRA has ruled that it has the statutory authority to examine and, if necessary, establish the rates at which AT&T offers local switching services to carrier-customers such as Momentum. Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996, TRA Docket 03-00119, Order issued October 20, 2005. In that proceeding, the TRA determined that a just and reasonable rate for unbundled local switching services offered by BellSouth (now AT&T) would be a rate of \$5.08 per analog switch port, including usage and features.³

9. In July, 2004, BellSouth (now AT&T) filed an "Emergency Petition for Declaratory Rule and Preemption of State Action" at the Federal Communications Commission. WL Docket No. 04-00245. In the Petition, BellSouth asked the FCC to preempt the TRA's determination of a just and reasonable switching rate in Docket No. 03-00119. The FCC took no action on the petition. On April 29, 2008, AT&T withdrew the petition. AT&T did not otherwise appeal the TRA's decision in Docket 03-00119 to any agency or court.

10. In 2006, the Authority opened a "Generic Docket to Establish a Rate for Switching Provided Pursuant to Requirements Other Than 47 U.S.C. § 251," Docket No. 06-00080. After only one CLEC (Momentum) sought to participate in the proceeding, a majority of the Directors ordered the docket closed. In closing the docket, the Directors reaffirmed the agency's prior rulings that it had jurisdiction over AT&T's local switching rates and added that,

³ The rates, terms, and conditions adopted by the TRA in that decision are spelled out in the final order in Docket 03-00119, at p. 38, adopting the "Final Best Offer" of ITC^DeltaCom and in the "Final Best Offer," filed February 20, 2004 at p. 3.

even though the Directors were closing the generic docket, the agency would, if needed, act in response to a carrier's complaint.⁴

Relief Sought

11. Based on these allegations, Momentum asks the TRA to examine the rates charged by AT&T for unbundled local switching services and determine whether those rates are non-discriminatory, just and reasonable, and otherwise consistent with state and federal law.

12. Pending a final decision by the TRA in this docket, Momentum asks that the TRA direct AT&T to charge Momentum a rate of no more than \$5.08, including usage and features, as adopted by the Authority in Docket No. 03-00119. Once a final decision has been made, Momentum asks that the interim rate be adjusted, retroactively, to conform to the final decision of the Authority.

13. In the absence of interim relief, Momentum is suffering, and will continue to suffer, irreparable harm through the payment of illegal and excessive switching rates to AT&T. These excessive and illegal rates also result in increased rates to Momentum's Tennessee customers and fewer competitive choices for those customers. Since there will be a retroactive true-up of the switching rates based on the outcome of this proceeding, neither party will be harmed by the grant of interim rate relief.

14. Momentum requests whatever additional relief the TRA determines is appropriate based on the evidence and arguments presented.

⁴ See, Order of November 26, 2007, and transcript of TRA agenda conference, January 23, 2007, at pp. 23-24.

Respectfully submitted,
BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

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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 15th day of May, 2008.

Henry Walker