

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

December 7, 2009

IN RE:)	
)	
PETITION OF AT&T REQUESTING)	DOCKET NO.
RELIEF FROM PAYING FINES ASSOCIATED)	09-00083
WITH REPOSTING SQM PERFORMANCE DATA)	

**ORDER GRANTING AT&T RELIEF FROM PAYING FINES
ASSOCIATED WITH REPOSTING SQM PERFORMANCE DATA**

This matter came before Chairman Sara Kyle, Director Kenneth C. Hill, and Director Mary W. Freeman of the Tennessee Regulatory Authority (the “Authority” or “TRA”), the voting panel assigned to this docket, at the regularly scheduled Authority Conference held on September 21, 2009, for consideration of the *Petition Requesting Relief from Paying Fines Associated with Reposting SQM Performance Data* (“*Petition*”) filed by BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee (“AT&T” or the “Company”) on June 11, 2009.

BACKGROUND

In 1995, the General Assembly enacted the Tennessee Telecommunications Act of 1995 (the “1995 Act”), which significantly altered the manner in which Tennessee regulated public utilities.¹ The passage of the 1995 Act reflected a new policy in Tennessee telecommunications regulation that encouraged greater competition for local telecommunications services and eased certain traditional regulatory constraints on local telephone companies.²

¹ See Tenn. Code Ann. § 65-5-201 *et seq.*

² See *BellSouth Telecommunications, Inc. v. Greer*, 972 S.W.2d 663, 666 (Tenn. Ct. App. 1997); Tenn. Code Ann. § 65-4-123.

Congress adopted a similarly pro-competitive policy a year later with the passage of the Telecommunications Act of 1996 (the “1996 Act”). To stimulate effective competition, the 1996 Act requires incumbent local exchange carriers (“ILECs”) to offer competitive local exchange carriers (“CLECs”) three means of gaining access to local telephone networks: [1] by selling local telephone services to the CLECs at wholesale rates for resale to end users; [2] by leasing network elements to CLECs on an unbundled basis; and [3] by interconnecting a requesting CLEC’s network with their own.³ Network elements and interconnection must be offered at “rates, terms, and conditions that are just, reasonable, and nondiscriminatory.”⁴ Further, the 1996 Act allows AT&T to enter the intrastate long distance market only after satisfying certain statutory conditions, including providing nondiscriminatory access to network elements in accordance with the requirements of 47 U.S.C. §§ 251(c)(3) and 252(d)(1) and receiving the approval of the Federal Communications Commission (“FCC”).⁵

The purpose of performance measurements, benchmarks and self-effectuating enforcement mechanisms is to provide a mechanism for establishing, assessing and enforcing the level of service AT&T provides to CLECs to assure nondiscriminatory access to its network.⁶ Absent nondiscriminatory access to AT&T’s network, the CLECs’ ability to offer consumers quality service in a timely manner is limited, thereby thwarting the statutorily mandated policy of fostering competition among telecommunication service providers. In Tennessee, the Service Quality Measurement (“SQM”) and Self-Effectuating Enforcement Mechanism (“SEEM”) plans

³ *Id.* (citing 47 U.S.C. § 251(c)(2)-(4)).

⁴ 47 U.S.C. § 251(c)(2)(D), (c)(3).

⁵ *See* 47 U.S.C. § 271. A consent decree arising from a 1982 antitrust suit brought by the Department of Justice permitted incumbents to provide local service in their respective regions but barred them from providing long distance services. *See SBC Communications, Inc. v. FCC*, 138 F.3d 410, 412 (D.C. Cir. 1998).

⁶ *See* Tenn. Code Ann. § 65-4-124(a) and (b).

were adopted as part of a Settlement Agreement that allowed AT&T to enter the intrastate long distance market.⁷

TRAVEL OF THE CASE

At the July 13, 2009 Authority Conference, the panel initially considered the *Petition* and voted to order AT&T to file information by July 17, 2009 setting forth the fines it has paid as a result of incorrect posting of SQM data since 2003, together with an explanation of how such paid fines differ from the one that is subject of this docket. The panel further ordered that TRA Staff be designated as a party to work with the Company to determine whether resolution could be reached in this matter. The panel additionally voted to permit interested parties to file comments regarding AT&T's *Petition* in this docket.

AT&T filed the information requested by the Authority in the form of comments on July 17, 2009. The Competitive Carriers of the South ("CompSouth") filed comments on August 5, 2009. AT&T filed reply comments on August 17, 2009. AT&T filed information on August 27, 2009 and September 17, 2009 showing that the Kentucky, Florida and Georgia Public Service Commissions had granted AT&T's waiver request. On September 17, 2009, AT&T filed a request to be heard at the September 21, 2009 Authority Conference.

THE PETITION

In the *Petition*, which was supported by the accompanying affidavit of Ronald M. Pate, AT&T Director – Network Regulatory, the Company requests relief from the provisions of its SEEM Administrative Plan that requires it to pay the Authority a fine of \$35,200 for reposting results to its SQM plan. The SQM plan measures AT&T's wholesale service to competitive local exchange carriers ("CLECs"), and the SEEM plan enforces AT&T's compliance with the

⁷ See *In re: Docket to Establish Generic Performance Measurements, Benchmarks and Enforcement Mechanisms for BellSouth Telecommunications, Inc.*, Docket No. 01-00193, *Final Order Accepting Settlement Agreement and Adopting Measurements, Benchmarks and Enforcement Mechanisms* (October 4, 2002). The plan was modified by the *Order Adopting Settlement Agreement* issued on August 25, 2005 in Docket No. 04-00150.

standards for wholesale service levels to CLECs that are established in the SQM plan.⁸ Tier I penalties are payable directly to CLECs, and Tier II penalties are payable to the Authority after three consecutive monthly failures to meet the standard.⁹ In addition, AT&T pays penalties to the Authority in the amount of \$400 per day for all reposted SQM and SEEM reports.¹⁰

AT&T explained that while validating performance data for March 2009, the Company identified a reposting obligation related to a coding error which caused certain activity to be posted under Resale results instead of UNE results where it belonged.¹¹ AT&T further stated that because the coding used to post SQM performance results is different from the coding used to calculate SEEM remedies, all SEEM remedy obligations and SEEM liability calculations were correctly posted at all times, and the CLECs received the appropriate payments under the SEEM plan.¹² The Company maintains that “without Authority relief, the reposting will result in fines far exceeding the administrative error.”¹³ Additionally, the Company maintains that where it “has properly self-reported and arranged for the necessary coding corrections, payment of a fine exceeding a quarter of a million dollars in the Southeast seems inconsistent with the intent of the plan” and would be of no benefit to AT&T’s wholesale customers.¹⁴

COMMENTS OF INTERESTED PARTIES

AT&T: AT&T submits that, unlike past reposting penalties, the penalty that is the subject of this docket did not require recalculation of SEEM remedies to the CLECs. In this case, performance data was properly processed and resulted in on-time and accurate CLEC remedy

⁸ Minimum service levels represent either (1) analogs with the retail service that AT&T provides to its retail customers or (2) performance levels established by the Authority where no retail analog exists.

⁹ See Tennessee SEEM Administrative Plan, Version 3.02 (Effective December 15, 2008), paras. 2 and 4.

¹⁰ *Id.*, para. 2.6.

¹¹ *Affidavit in Support of Petition Requesting Relief from Paying Fines Associated with Reposting SQM Performance Data*, p. 2 (June 9, 2009). (Attached to *Petition* filed on June 11, 2009).

¹² *Id.*

¹³ *Petition*, p. 3.

¹⁴ *Id.*

payments. Some Local Number Portability (“LNP”) transactions were reported as Resale instead of UNE, but this error did not impair the CLECs’ ability to compete.¹⁵

CompSouth: CompSouth argues that even though AT&T’s errors did not affect CLEC payments, that is no reason to waive the fines that it owes to the State of Tennessee. The purpose of the reposting rule is to ensure that regulators can track AT&T’s performance and spot service problems.¹⁶ CompSouth suspects AT&T’s position that Tier II payments should be waived because they don’t directly benefit the CLECs, “...is a prequel to arguing that Tier II penalties should be abolished altogether.”¹⁷

AT&T’s Reply Comments: AT&T maintains that the reposting penalty in question is unique compared with previous reposting penalties from which AT&T did not seek a waiver. The reposting that is the subject of this docket had no impact on its remedy payments paid to CLECs or on the Tier II payments paid to the TRA. AT&T takes issue with CompSouth’s argument that SEEM penalties should never be waived, because the SEEM Plan allows such waivers. AT&T submits that CompSouth’s position regarding Tier II penalties is misplaced, because the reposting fine at issue is not a Tier II SEEM remedy payment, and AT&T has paid the Authority \$12,000 in Tier II remedies for the measure in question.¹⁸ AT&T suggests that the Authority could condition its waiver on the facts and circumstances presented and clarify that such a waiver does not create a precedent with respect to any future waiver requests, such as was done by the North Carolina Utilities Commission.¹⁹ AT&T explains that its measurement plans impose a penalty whenever the corrected results would result in a decline by two percent or more

¹⁵ *AT&T Tennessee’s Comments*, pp. 2-3 (July 17, 2009).

¹⁶ *Comments of CompSouth*, p. 4 (August 5, 2009).

¹⁷ *Id.*, pp. 5-6.

¹⁸ *AT&T Tennessee’s Reply Comments*, p. 4 (August 17, 2009).

¹⁹ *Id.*, p. 5.

at the sub-metric level. Two months barely qualified for reposting in the case at hand (December: 2.15%; January: 2.29%).²⁰

FINDINGS AND CONCLUSIONS

At the September 21, 2009 Authority Conference, the panel heard statements from counsel, Mr. Guy Hicks, representing AT&T, and Mr. Henry Walker, representing CompSouth. Thereafter based on the statements of counsel and the entire record, the panel made the following findings:

1. The circumstances involving the specific posting errors at issue are unique and a first-time occurrence in that all associated SEEM remedy obligations and SEEM liability calculations were correctly processed at all times.
2. AT&T has made its required Tier I and Tier II penalty payments on time to CLECs and the Authority, respectively.
3. Section 4.5.3 of the SEEM Plan authorizes the TRA to consider requests for relief such as is being made by AT&T in this docket.
4. The Authority's decision in this case is based on fact-specific, unique and first-time occurring circumstances. This action shall not be considered as setting any precedent. Any such future requests will be considered on a case-by-case basis.

Therefore, the panel voted unanimously to grant AT&T's petition for relief from paying fines associated with reposting SQM performance data.^{21, 22}

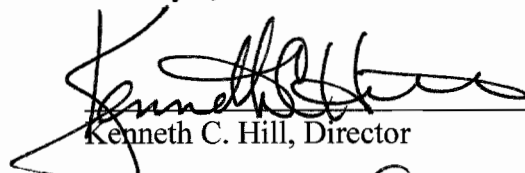
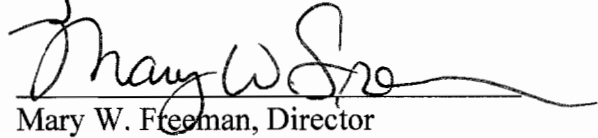
²⁰ *Id.*, p. 7.

²¹ Director Freeman stated that the Authority plays an important role as a facilitator of competition. Director Freeman went on to state that her decision to grant the petition was largely based on the fact that AT&T's actions did not cause an unfair advantage and that the Authority's decision should in no way be viewed as setting a precedent. Director Freeman also asserted that the Authority will continue to be vigilant regarding compliance with quality measurements.

²² Director Hill noted that while AT&T's violation may be minor, that did not mean that the Authority's rules should not be followed. He also noted the Authority's role in helping competition. Further, Director Hill stated that he did not find the fine to be unduly punitive. Director Hill stated he was voting to grant relief because he agreed that this was a fact-specific, unique, first-time occurrence, and granting relief was not setting any precedent.

IT IS THEREFORE ORDERED THAT:

The *Petition Requesting Relief from Paying Fines Associated with Reposting SQM Performance Data* filed by BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee is granted.


Sara Kyle, Chairman
Kenneth C. Hill, Director
Mary W. Freeman, Director