

BEFORE THE TENNESSEE PUBLIC SERVICE COMMISSION

Nashville, Tennessee

May 17, 1996

**IN RE: CHANGES IN LOCAL TELECOMMUNICATIONS PROVIDER RULES
TO CONFORM WITH THE TELECOMMUNICATIONS ACT OF 1996**

Docket No. 94-00184

ORDER

This matter is before the Tennessee Public Service Commission upon its own motion, having issued a Request for Comments in Docket 94-00184 on March 28, 1996. The Commission previously filed new Rule Chapter 1220-4-8 with the Attorney General on December 29, 1995. On February 8, 1996, the President signed the federal Telecommunications Act of 1996 (the Act) into law. The Request for Comments asked for comments by April 8, 1996 on the Commission Staff's proposed changes to this new Rule Chapter to make it conform with the Act.

On April 8-9, 1996, comments were received from AT&T, BellSouth, Citizens, LDDS, MCI, and Sprint/United Telephone Southeast (UTSE). Earlier related comments were received by letter from ATS on February 28, 1996. The Commission Staff released its initial summary of the comments and its recommendations on April 10, 1996. Subsequent comments from Henry Walker and Time Warner were received on April 12 and 16, 1996, respectively. At the regularly scheduled Commission Conference on April 16, 1996, Time Warner asked the Commission to delay its consideration of this matter to allow full consideration of all late-filed comments, and

that delay was granted. The Commission Staff issued a revised summary of comments on April 24, 1996 and additional comments were received from LDDS on April 25, 1996. The Commission subsequently considered this matter at its regularly scheduled Conference on April 30, 1996.

With the following exceptions, all of these comments are addressed in detail below. UTSE concurred with the Staff's proposed revisions in their entirety and its comments will not be referred to in what follows. Time Warner proposed a new rule on special contracts and discounts. This proposal exceeds the scope of the Request for Comments, which was limited to the Staff's proposed revisions for compliance with the Act, and will not be considered further.

BellSouth, alone among the commenting parties, recommended against adopting revisions to the rules until its questions concerning the justifications for adopting certain rule sections are answered. All other parties urge adoption of some revisions at this time.

PROPOSED CHANGES TO RULE CHAPTER 1220-4-8

We consider each proposed change and the associated comments received by the rule section to which each applies. Changes from the language of Rule Chapter 1220-4-8 as sent to the Attorney General on December 29, 1995 are shown in bold, with the applicable section of federal law created by the Act noted immediately following.

1220-4-8-.01 DEFINITIONS

(q) Incumbent Local Exchange Telephone Company - A public utility offering and providing basic local exchange service pursuant to tariffs approved by the Commission prior to June 6, 1995, **or as designated by the Federal Communications Commission pursuant to 47 U.S.C. 251(h)(2).**

47 USC 251(h)(2)

Discussion:

LDDS suggests adding a new definition for "Network Element" by merely copying the definition from the Act into this rule chapter. This is redundant and unnecessary. We adopt the change as proposed.

1220-4-8-.10 INTERCONNECTION, UNBUNDLING, AND NUMBER
PORTABILITY FOR TELECOMMUNICATIONS SERVICE
PROVIDERS

(1) Interconnection and Unbundling

(a) All Telecommunications Service Providers shall, to the extent that it is technically and financially feasible, be able to purchase desired features, functions, and services promptly, and on an unbundled and non-discriminatory basis from all other providers. Nothing in this rule shall be construed to require a Local Telecommunications Service Provider to offer any unbundled network capability at a price lower than its long run incremental cost. Provided, however, that this rule shall not apply to any incumbent local exchange telephone company **that is exempt from interconnection requirements under state or federal law.**

47 USC 251 (f)

Discussion:

LDDS, Time Warner, and MCI suggest replacing the phrase "technically and financially feasible" with "technically feasible," because they claim the Act does not "contemplate financial feasibility as a component in these issues." Nevertheless, the

Act (at 47 USC 252 (e)(3)) states that "nothing in this section shall prohibit a State Commission from establishing or enforcing other requirements of State law in its review of an [interconnection] agreement." The 1995 Tennessee telecommunications legislation (TCA 65-4-124(a) created by Chapter 408 of the Public Acts of 1995, Section 8(a)) requires that, "all Telecommunications Services Providers shall, *to the extent that it is technically and financially feasible*, be provided desired features, functions and services promptly, and on an unbundled and non-discriminatory basis from all other Telecommunications Services Providers"(emphasis added). This rule section merely enforces other requirements of State law as provided for in the Act. Hence, there is no conflict between the Act and this rule section.

LDDS suggests other changes both here and to section 1)(e), but the suggestions are redundant in that language from the Act is written into the rule. Time Warner also discusses section 1)(e), correctly pointing out that only Incumbent Local Exchange Carriers are subject to stringent interconnection requirements under the Act (47 USC 251) and proposes substituting "Incumbent Local Exchange Carriers" for "Telecommunications Services Providers" here. The Act, however, is silent on the details of interconnection for other carriers, so there is no conflict between the rule and the Act. Moreover, this rule sub-section enforces the requirements of state law (TCA 65-4-124) as allowed by the Act (47 USC 252 (e)(3)).

For these reasons, we adopt only those changes to 1220-4-8-.10(1) proposed by the Staff.

(2) Interconnection Agreements

Discussion:

LDDS suggests language changes to rule section 2)(b), but these are merely redundant in that language from the Act is written into the rule. No change required.

(c) The **agreements** reflecting the negotiated arrangements and prices shall be submitted to the Commission within thirty (30) days of the conclusion of the negotiations and will be available for review by any interested party. The Commission **shall approve or reject the arrangement within 90 days of submission. If the Commission fails to act within these 90 days, the agreement shall be deemed approved.**

47 USC 252(e)

Discussion:

LDDS suggests writing language from the Act directly into this rule section. This is redundant and unnecessary.

(e) **For negotiation under TCA 65-5-209(d), if at any time, for any reason, a party believes that further attempts to negotiate would be futile or if negotiations cease, any affected party may petition the Commission for hearing to establish prices and service arrangements for interconnection. The petition shall be accompanied by pre-filed testimony and documentation to support the petitioner's complaint and a request for a specific interconnection arrangement to be approved by the Commission. The party preparing the petition shall serve a copy on the Local Telecommunications Provider on the same date that it is delivered to the Commission. Within fifteen (15) days of the filing of such a petition, the Local Telecommunications Service Provider will provide the Commission with appropriate cost information and evidence that they have attempted to comply with the provisions of this rule. The Commission shall hold a contested case proceeding within thirty (30) days of said petition and shall issue a Final Order within (20) days of the proceeding.**

47 USC 252(b), (c), and (e)

(f) **For negotiation under 47 USC 252, after the 135th day and before the 160th day, inclusive, following the request for negotiation, any affected party**

may petition the Commission for arbitration to establish prices and service arrangements for interconnection as provided by law.

47 USC 252(b), (c), and (e)

(g) The Local Telecommunications Service Provider shall make available to all providers requesting resale of their service(s) non-discriminatory listings in white page directories and directory assistance services.

47 USC 252(b), (c), (e), and (i)

Note: The change above deletes the original (g) and replaces it with the original (f).

(h) Nothing in this Rule shall require changes in mutually satisfactory and agreed upon interconnection arrangements entered into prior to the effective date of this Rule. However, any arrangements entered into between an Incumbent Local Exchange Company and a Competing Telecommunications Provider prior to the effective date of this Rule shall be approved by the Commission and made available to any similarly situated company seeking similar arrangements.

47 USC 252(i) and 252(e)

Discussion:

No comments were received on the proposed changes to sub-sections (e) through (g). AT&T suggests adding to the end of sub-section (h), "or rejected if the agreement does not meet the requirements of 47 USC 252(e)(2)." This is not incorrect, but it is redundant, since the Act preempts the states on the standards for rejection of interconnection agreements. There is no conflict between the Act and this rule section. No change is needed.

We adopt only those changes to rule section 1220-4-8-.10(2) proposed by the Staff.

(3) Traffic Exchange - Inter-Company In-Kind Compensation

Discussion:

The Staff proposed no changes to this rule section, but BellSouth claims that 1220-4-8-.10(3)(a) is inconsistent with the pricing standards for traffic exchange set out in 47 USC 252(d)(2) and should be deleted. BellSouth admits that "bill and keep" arrangements, proposed here as an interim solution while data are collected to support permanent arrangements, are not precluded by the Act. It also claims, however, that "bill and keep" arrangements may be arrived at *only* by mutual consent of the parties involved. It further asserts that the Act's pricing standards require reciprocal compensation arrangements to recover the costs associated with termination of calls.

Nevertheless, 47 USC 261(b) and (c) allow State commissions to prescribe regulations to implement the Act and to impose requirements on a carrier's intrastate services "that are necessary to further competition in the provision of telephone exchange service or exchange access," as long as those regulations and requirements are not inconsistent with the Act or Federal Communications Commission regulations. Interim "bill and keep" arrangements will "further competition" by facilitating the initial entry and operation of local telecommunications competitors. Moreover, this Commission's approval of any reciprocal compensation arrangements will require evidence as to traffic imbalances and costs in order to determine the justness and reasonableness of the arrangements under the Act. Interim "bill and keep" is a reasonable method to allow competition to grow as this supporting evidence is collected. Without some interim arrangement, competition may be frustrated as competitors cannot exchange traffic until the costs of that exchange are determined,

but costs cannot be determined until traffic is exchanged. This section serves a crucial function by insuring that these and similar outcomes are avoided. Furthermore, negotiated compensation arrangements as contemplated in the Act are clearly not prohibited by this rule section. For these reasons, BellSouth's arguments are unpersuasive.

BellSouth also raises policy arguments against "bill and keep," but these are irrelevant since they fall outside the scope of our limited Request for Comments on changes to Rule Chapter 1220-4-8 to conform with the Act.

LDDS suggests language to clarify the interim nature of the "bill-and-keep" arrangement for traffic exchange provided here. While perhaps unobjectionable, this is unnecessary, since no inconsistency with the Act is claimed.

(4) Interconnection Tariffs

Discussion:

Even though the Staff proposed no revisions to this section, BellSouth objects to the requirement in 1220-4-8-.10(4)(a) for tariffing interconnection elements. BellSouth rightly argues that tariffing is not required by the Act, but admits that publishing and making available any approved interconnection agreement to any requesting party, as the Act requires, is very similar to a tariff. BellSouth fails to point out anything in the Act that prohibits tariffs for interconnection elements. BellSouth also claims that tariffing interconnection elements will prevent individual parties from seeking unique contractual arrangements with BellSouth. This is a misconception. Just as the Act's mandate of

negotiated interconnection agreements does not outlaw tariffing of interconnection elements, the tariffing provision of this rule does not prohibit parties from seeking special contracts. Thus, we find that there is no reason to change this section.

1220-4-8-.11 RESALE OF LOCAL SERVICES BY LOCAL TELECOMMUNICATIONS SERVICE PROVIDERS

Discussion:

BellSouth and LDDS would write in language from the Act to sub-section 1)(a) of this rule to define resale service offerings. This is unnecessary.

LDDS suggests rewriting sub-section 1)(b) of this rule so that the first sentence reads, "Incumbent Local Exchange Telephone Company resale service offerings shall be offered at a discount based upon avoidable cost." In the existing rule, this sentence begins with "resale" and ends with "avoidable cost of the Local Exchange Telephone Company." LDDS's suggestion clarifies a possible confusion over whose avoidable cost to use for which resale rate. This stems from the proposed modification to section 1)(c), below. The Act requires Competing Telecommunications Providers to make their services available for resale, which this rule previously did not contemplate. The first sentence of 1)(b) should be rewritten. We adopt the revised rule sub-section 1220-4-8-.11(1)(b) as follows:

(b) **Incumbent Local Exchange Telephone Company** resale service offerings shall be offered at a discount based upon avoidable cost. Until otherwise determined by the Commission at the conclusion of a contested case proceeding, the Incumbent Local Exchange Company's avoided costs shall be presumed to be 25% of the tariffed rate.

BellSouth and Time Warner object to the interim presumption that avoided cost is 25% of the corresponding retail tariffed rate, pending conclusion of a contested proceeding before the Commission. While the Act requires State commissions to determine wholesale rates on the basis of retail rates less avoided costs (47 USC 252(d)(3)), nothing prohibits a State commission from establishing an interim wholesale rate "discount." Indeed, this sub-section appears to set up just the sort of system called for by the Act. There is no inconsistency to correct. Furthermore, as the Commission has already begun its Avoidable Cost proceeding, the entire issue is likely to be moot by the time the rule is in effect.

(c) Competing Telecommunications Service Providers **shall offer their services for resale on request, unless exempt under state or federal law.**

47 USC 251(b)(1)

(d) The service to be resold must be provided on the same basis (e.g. flat or usage based) and to the same category of customer (e.g. residential or business) as offered by the facilities-based provider, **and comply with the applicable rules and regulations of the Federal Communications Commission pursuant to 47 U.S.C. 251(c)(4)(B).**

47 USC 251(c)(4)(B)

Discussion:

No comments were received on sub-section 1)(c). In comments on sub-section 1)(d), AT&T claims that the Act allows only a restriction of resale to the same category of subscriber, but not to provision on the same basis (flat or usage based).

Nevertheless, the Act prohibits the imposition by *carriers* of "unreasonable or discriminatory conditions or limitations" on resale, while specifically allowing a State

Commission to restrict resale to the same category of subscriber. It is silent on other State imposed restrictions. As long as these restrictions are consistent with the rules to be implemented by the Federal Communications Commission to implement this part of the Act, which do not as yet exist, there is no conflict between this rule section and the Act. Therefore, there no additional changes are needed in these proposed rule sub-sections.

BellSouth claims that sub-section 1)(g) requires unbundling and is, therefore, out of place in the resale rule. This sub-section, however, merely insures that all elements of a bundled service are made available for resale as a package, preventing the seller from withholding a crucial piece-part of the end service. Otherwise, BellSouth claims that this is redundant with the resale provisions of the Act. Neither of these arguments is sufficient reason to delete sub-section 1)(g).

(3) Telecommunications Service Providers shall be prohibited from jointly marketing resold Basic Local Exchange Service with interLATA services. This restriction shall remain in place until such time as all TSPs are permitted by federal, state, and local laws, regulations and rules to provide interLATA services, **or February 8, 1999, whichever is earlier.** The term "jointly market" shall include any advertisement or marketing effort in which two or more products or services are provided or offered to a consumer, such efforts including without limitation, sales referrals, resale arrangements and sales agency arrangements.

47 USC 271(e)(1)

Discussion:

ATS, Citizens, LDDS, and Time Warner claim that the delay in joint marketing applies only to a "telecommunications carrier that serves greater than 5% of the Nations presubscribed lines" (47 USC 271(e)(1)). Similarly, AT&T asserts that the joint

marketing restriction in the Act applies only in areas served by a Bell operating company (BOCs) and that, "Areas in Tennessee not served by BellSouth Telecommunications do not have *Federal* restrictions on joint marketing" (emphasis added). Citizens also claims that the prohibition against joint marketing constitutes an unlawful barrier to entry under the Act (47 USC 253) and reserves its "right" to seek preemption pursuant to 47 USC 253(d). Henry Walker argues that the joint marketing "prohibition" violates TCA 65-4-124(b). This law requires the Commission to "promulgate rules and issue orders" to provide for "packaging of a Basic Local Exchange Telephone Service or unbundled features or functions with services of other providers," among other things. Mr. Walker claims that the rule and law conflict, unless one distinguishes "joint marketing" from "packaging."

Moreover, the Commission believes that the Act's temporary restriction of joint marketing only in BOC territories reflects the intent of Congress and the President and should be reflected in our rule. Therefore, we adopt the following revised rule section 1220-4-8-.11(3):

(3) Telecommunications Service Providers **which serve greater than 5 percent of the Nation's presubscribed lines** shall be prohibited from jointly marketing resold Basic Local Exchange Service **provided by a Bell Operating Company** with interLATA services. This restriction shall remain in place until such time as all Telecommunications Service Providers are permitted by federal, state, and local laws, regulations and rules to provide interLATA services, **or February 8, 1999, whichever is earlier**. The term "jointly market" shall include any advertisement or marketing effort in which two or more products or services are provided or offered to a consumer, such efforts including without limitation, sales referrals, resale arrangements and sales agency arrangements.

In addition, LDDS and Time Warner suggest substituting the Act's language, "or until 36 months have passed since the enactment of the Telecommunications Act of 1996," in place of "or February 8, 1999" as proposed. These are two ways of saying the same thing. No additional changes to this sub-section are required.

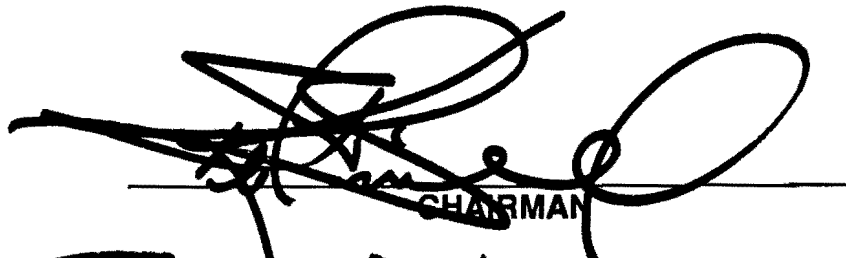
No other changes to Rule Chapter 1220-4-8 were proposed by any party in response to the Request for Comments issued on March 28, 1996.

IT IS, THEREFORE, ORDERED:

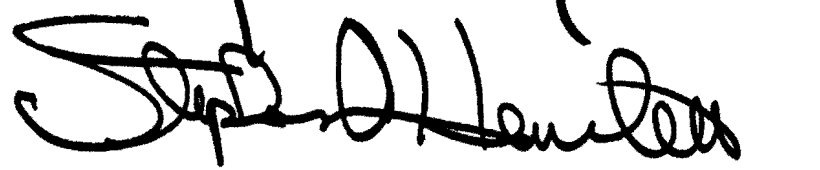
1. That the Commission adopts the changes to Rule Chapter 1220-4-8 as proposed by the Staff, with the exception of rule sub-sections 1220-4-8-.11(1)(b) and (3) which are adopted as shown herein, and the same are hereby incorporated into Rule Chapter 1220-4-8 as sent to the Attorney General on December 29, 1995.

2. That any party aggrieved by the Commission's decision in this matter may file a Petition for Reconsideration with the Tennessee Public Service Commission within ten (10) days from and after the date of this Order.

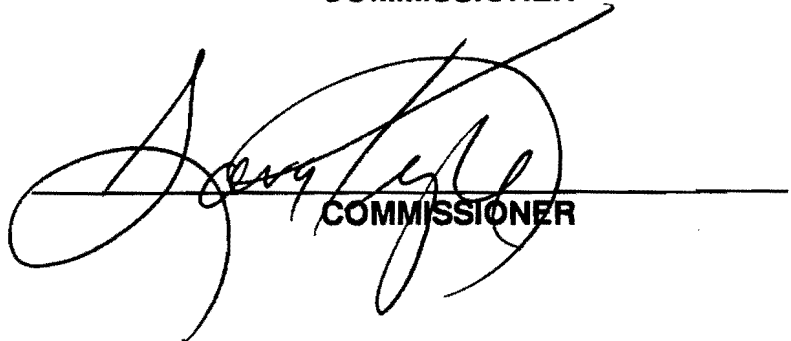
3. That any party aggrieved by the Commission's decision in this matter may file a Petition for Review in the Tennessee Court of Appeals, Middle Section, within sixty (60) days from and after the date of this Order.



CHAIRMAN

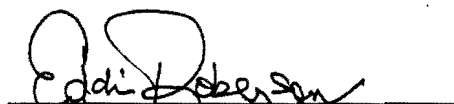


COMMISSIONER



COMMISSIONER

ATTEST:



EXECUTIVE DIRECTOR