

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION REGARDING)
COMPLIANCE OF THE STATEMENT)
OF GENERALLY AVAILABLE TERMS)
OF BELL SOUTH) CASE NO. 98-348
TELECOMMUNICATIONS, INC. WITH)
SECTION 251 AND SECTION 252(D) OF)
THE TELECOMMUNICATIONS ACT OF)
1996)

O R D E R

On June 22, 1998, BellSouth Telecommunications, Inc. ("BellSouth") filed its updated Statement of Generally Available Terms ("SGAT"), with supporting documents, together with a request that the SGAT be approved by this Commission. By Order dated July 6, 1998, the Commission established this case to determine, pursuant to the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (the "Act"), at 47 U.S.C., § 252(f), whether the SGAT meets the requirements of 47 U.S.C., § 251 and 252(d) and relevant requirements of state law. The parties to Case No. 96-608¹ were also made parties to this proceeding and were invited to submit comments on the SGAT. Comments have been filed by e.spire Communications, Inc. ("e.spire"), MCI Telecommunications Corporation and MCImetro Access Transmission Services, Inc. (collectively, "MCI"), Sprint Communications Company, L.P. ("Sprint"), AT&T

¹ Case No. 96-608, Investigation Concerning the Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996.

Communications of the South Central States, Inc. (“AT&T”), and the Competitive Telecommunications Association (“CompTel”). BellSouth has filed a response to those comments. The issue of whether BellSouth’s SGAT complies fully with applicable law is ripe for Commission decision.

As an introductory matter, the Commission reiterates that matters relevant to Case No. 96-608, including BellSouth’s actual dealings with its competitors and its technical ability to furnish nondiscriminatory access to necessary operating systems, are not at issue here. Accordingly, comments filed by the parties which discuss these issues will not be addressed herein. The sole focus of this proceeding is to determine the legal sufficiency of the SGAT as an adequate vehicle for competitive entry.

The SGAT purports to furnish legally sufficient terms regarding, inter alia, number portability, reciprocal compensation, unbundled access, collocation, rates for interconnection, transport and termination of traffic, unbundled network elements (“UNEs”), and resale of BellSouth services by competitive local exchange carriers (“CLECs”). Commenters dispute the legal sufficiency of several of these provisions. The Commission’s findings regarding the relevant issues are as follows.

Operations Support Systems

Section 251(c)(2) requires BellSouth to provide interconnection and access that is at least equal in quality to that provided by BellSouth to itself. Commenters argue that the lack of clearly defined performance measurements in the SGAT render the SGAT provisions in this area inadequate. They also raise a number of issues relating to whether BellSouth can, in practice, provide nondiscriminatory access. However, performance measurements are not, in themselves, required by Section 251.

Moreover, the actual ability of BellSouth to deliver what it promises in its SGAT is not at issue. The SGAT offers electronic interfaces for pre-service ordering, service ordering and provisioning, trouble reporting, and customer usage data, as well as the option of placing orders manually.² Current systems will be updated as needed to improve operations, and CLECs choosing the SGAT will be kept informed of updates and given the option to migrate with BellSouth.³ The provision for updating these systems ensures that CLECs electing to provide service pursuant to the SGAT will be able to receive the benefits of improvements as they are made. The Commission finds no legal infirmity in the terms offered in the SGAT, and finds that performance issues pursuant to those terms are not ripe for decision. Performance measurements may very well be necessary to determine whether BellSouth's performance in actually providing nondiscriminatory access is sufficient to enable it to enter the interLATA market. However, that issue will be addressed in Case No. 96-608.

Resale

The Act prohibits BellSouth from imposing "unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." Once again, several commenters discuss performance issues rather than contract terms offered in the SGAT. These issues are irrelevant here. AT&T points out that the joint marketing restriction in the SGAT, at Section XIV(E) does not contain a sunset provision stating that the restrictions no longer apply when BellSouth is authorized to provide in-region, interLATA services or on February 8, 1999, whichever is earlier. Such a sunset

² SGAT at II.B.5 and 6.

³ SGAT at II B 6(f).

provision should be included pursuant to applicable law. Otherwise, except as specified elsewhere in this Order, SGAT terms regarding resale appear to be legally sufficient.

Customer Migration Issues

MCI complains that BellSouth inappropriately may require of the CLEC, at BellSouth's discretion, "proof" of authorization to migrate a customer. MCI accurately characterizes the section that contains this provision, XIV.G, as inappropriately vague. Accordingly, BellSouth shall clarify its SGAT to make it clear that BellSouth will not take upon itself the responsibility of determining whether one of its customers has, indeed, elected another local exchange carrier. Fraudulent carrier change orders will be handled by this Commission pursuant to HB 582 (eff. July 15, 1998), to be codified at KRS Chapter 278. The Commission notes that this statute requires the carrier that initiated the change, and not the customer's previous local exchange carrier, to retain proof that the change was actually requested.

MCI also points out that the SGAT charge to a local service provider for initiating an unauthorized carrier change is \$19.41, see Section XIV.H, plus the appropriate nonrecurring charge to reestablish the customer's service with his preferred provider. The SGAT does not explain how BellSouth determines whether "slamming" actually has occurred. Moreover, such a finding should be made, in any event, by this Commission rather than by BellSouth. Reestablishing a customer's service with his preferred carrier will involve a cost, and the SGAT's provision passing that cost on to the carrier initiating the change is appropriate. However, there is no reason why BellSouth should collect an additional \$19.41 in the absence of adequate cost justification. Alleged slamming violations should be reported to this Commission for resolution.

MCI correctly states that BellSouth should include in its SGAT a provision that a new CLEC customer may choose to migrate his directory listing as-is from BellSouth to his new carrier. BellSouth contends that the CLEC should provide the listing to BellSouth. However, ease of customer migration is crucial to development of local exchange competition, and BellSouth offers no reason why it should not provide “as-is” listings. BellSouth shall reform its SGAT to include such a provision.

Termination of Service and Notification of Network Changes

MCI contends that SGAT Section XIV.R is one-sided in that it contains no dispute resolution clause and only vaguely explains the reasons BellSouth may terminate service to a CLEC. As BellSouth notes, the Commission’s complaint process is available pursuant to KRS 278.260. MCI also fears the section is so vague that a CLEC could have its service cut off at any time, even if it believes in good faith it is complying with the parties’ agreement and with applicable rules. MCI demands that BellSouth clarify reasons for which it will terminate service and provide timely notification of termination or network changes. BellSouth says that it will provide “reasonable” notice, that the SGAT is sufficiently specific, and that the law requires nothing more. The Commission finds that prior notice of pending termination and network changes, together with available Commission complaint procedures, are sufficient protection for CLECs.

Reciprocal Compensation

Section 252(d)(2) of the Act defines just and reasonable reciprocal compensation to mean a reasonable approximation of the costs of terminating calls that originate on the network of the other carrier. Recovery of these costs must be mutual and

reciprocal. Id. Numerous commenters argue that internet service provider traffic must be explicitly defined in the SGAT as “local” traffic for which reciprocal compensation must be paid. However, the terms of the SGAT, at I(A), adequately define “local traffic” to include telephone calls that originate in one exchange and terminate in the same exchange or in a corresponding extended area service exchange. The issue of whether internet service provider traffic is local is before the Commission in Case No. 98-212⁴ and will be decided therein. The terms of the SGAT are silent on this specific issue and, regardless of the Commission’s eventual decision in Case No. 98-212, those terms are adequate.

Switched Access and Billing Issues

Commenters argue that terminating access should be at the CLEC’s tariffed rate rather than BellSouth’s rate if termination is to a CLEC customer; and commenters contend the SGAT must include a provision that CLECs will be provided with access daily usage files to enable them to bill access charges. BellSouth states it will clarify the SGAT to provide that the access daily usage files will be provided. The Commission finds that the proposed clarification should be made. The Commission also finds that terminating access charges should be at the CLEC rate if the call terminates to a CLEC customer. BellSouth shall revise its SGAT accordingly.

⁴ Case No. 98-212, American Communications Services of Louisville, Inc., d/b/a e.spire Communications, Inc. and American Communications Services of Lexington, Inc., d/b/a e.spire Communications, Inc. and ALEC, Inc., Complainants v. BellSouth Telecommunications, Inc., Defendant.

Audits

Commenters contend that BellSouth's provision enabling it to perform resale audits of CLECs at its discretion is intrusive. However, BellSouth should be authorized to audit annually the services provided to CLECs to test conformity to the SGAT or its tariff. Other audit provisions are also included in the SGAT. Commenters contend these provisions are discriminatory since no reciprocal provision exists. The Commission agrees. The SGAT shall include reciprocal provisions for audit. Parties may bring disputes to the Commission's attention.

Access to Unbundled Network Elements

The SGAT, at Section II(G)(1), specifies that UNEs may be combined by means of collocation only. Numerous commenters discuss this provision of the SGAT, and correctly point out that the Act, at Section 251(c)(3) requires ILECs to provide nondiscriminatory access to UNEs "at any technically feasible point" and "in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications services," and they object to BellSouth's unwarranted limitation of methods of combination to collocation alone, particularly since the Eighth Circuit Court of Appeals, Iowa Utilities, held that a CLEC is not required to own a portion of a telecommunications network before it may provide service by means of unbundled elements. In addition, the Federal Communications Commission has determined that "nondiscriminatory access" requires an ILEC to provide access that is "at least equal in quality to that which the incumbent LEC provides to itself."⁵ The Commission finds that the requirement that a CLEC may combine UNEs only by means of collocation is both discriminatory and unwarranted. The provision violates the Act and must be reformed.

⁵ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15658, ¶ 312, vacated in part on other grounds, Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted, ___ S. Ct. ___ (199__).

The commenters also point out that BellSouth's refusal to provide other CLECs with UNE combinations through the SGAT, while allowing AT&T and MCI to obtain them through their negotiated and arbitrated interconnection agreements, is discriminatory and therefore violates the Act. The Commission agrees. BellSouth must provide service to CLECs without discriminating among them.

Commenters also contend that the SGAT method of providing multiple UNEs to competitors violates the Act in that it is anticompetitive and discriminatory, resulting in a failure of BellSouth to provide service to CLECs at parity with service provided to itself. BellSouth, they claim, uses the "recent change" capability in its system to electronically separate and reconfigure UNEs. BellSouth states the "recent change" capability does not reconfigure UNEs, but can only disable and then re-start service. However, when no "reconfiguration" has been requested by a CLEC, there appears to be no reason the "recent change" capability cannot be used to provide UNEs to CLECs. Appropriate, one-time, cost-based compensation may be required by BellSouth for performing this procedure.

The SGAT provides that physical separation of UNEs that were previously combined by BellSouth will occur when they are ordered by a CLEC, even though those elements are currently combined. This provision is unacceptable. Such separation and subsequent recombination would serve no public purpose and would increase costs that ultimately would be passed on to the consumer. Simply put, it is an unnecessary disruption and as several commenters point out, would necessarily result in provision of inferior service to the CLEC's customers. For such an operation to take place, the customer's line must unnecessarily be taken out of service. In addition, the CLEC

would incur entirely unnecessary expense and loss of customer goodwill. While BellSouth may charge a reasonable, non-recurring, cost-based “glue charge” for its expertise in having combined the UNEs, thus receiving some increment above the total cost of the unbundled elements bought by the CLEC, the Commission finds that neither BellSouth nor any other ILEC shall indulge in the wasteful habit of physically separating UNEs for no other apparent reason than to disrupt migration of a customer to the services of another carrier.

BellSouth contends that the Eighth Circuit Court of Appeals in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), cert. granted sub nom AT&T Corp. v. _____, ___ S. Ct. ___ (199___) determined that ILECs are not required by the Act to “combine” UNEs for CLECs. It also states that this Commission has never ordered it to “do the combining of UNEs” [BellSouth Response at 40]. Technically, BellSouth is correct. As the Eighth Circuit Court of Appeals noted, “the Act does not require the incumbent LECs to do all of the work.” Id. at 813 (emphasis supplied). But failure to order BellSouth to “combine” UNEs at a CLEC’s demand is a far cry from stating that BellSouth may deliberately *disconnect* UNEs that are already combined. To clarify: this Commission has not, and does not, order BellSouth affirmatively to combine UNEs for a CLEC. It does, however, order BellSouth to refrain from unnecessarily dismantling its network when elements of that network that are already combined have been ordered in that same combination by a CLEC. Even if the Act permits such anticompetitive conduct, this Commission has the authority, indeed the duty, pursuant to state law to forbid it. See, e.g., KRS 278.280 (enabling the Commission to determine the “just” and “reasonable . . . practices . . . to be observed, furnished, constructed, enforced or

employed” by a utility and to “fix the same by its order, rule or regulation”); KRS 278.512 (enabling the Commission to regulate telecommunications competition in Kentucky in the public interest) 47 U.S.C., § 252(f)(2)(a state commission in reviewing the SGAT may establish or enforce state law, including service quality standards).

UNE Prices

Commenters argue that UNE rates in the SGAT are not properly set and do not comply with the Act. However, as this Commission previously has stated, the rates it has set comply with the Act, and UNE ratesetting is clearly jurisdictional to state commissions. 47 U.S.C. 252; Iowa Utilities. Accordingly, since the SGAT rates are based upon Commission determinations and upon other standards deemed appropriate by this Commission, they are in compliance with law.

Conclusion

The Commission finds that, absent the amendments prescribed in this Order, the SGAT does not conform to applicable law. However, BellSouth may submit a reformed SGAT in accordance with this Order. If such a reformed SGAT is submitted, it shall be reviewed for compliance with the requirements stated herein and, if found to be in compliance, it shall be approved.

The Commission having considered BellSouth’s SGAT and comments thereto, and having been otherwise sufficiently advised, HEREBY ORDERS that, absent the amendments prescribed herein, the SGAT shall not be approved. However, if BellSouth submits a revised SGAT which is in accordance with this Order, it shall be approved.

Done at Frankfort, Kentucky, this 21st day of August, 1998.

By the Commission

ATTEST:

Executive Director

