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October 4, 2006

VIA ELECTRONIC MAIL AND OVERNIGHT DELIVERY

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Re: DTE 04-33, Supplemental Authority

Dear Ms. Cottrell:

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Silicon Valley
Tokyo
Walnut Creek
Washington

RCN-BecoCom, LLC and RCN Telecom Services of Massachusetts Inc. (collectively "RCN"), by its attorneys, respectfully respect leave to file the attached relevant pages of the United States District Court for the Eastern District of Missouri's (the "Court") order in *Southwestern Bell v. Missouri Public. Serv. Comm.*, No. 4:05-CV-1264 CAS issued September 14, 2006. In this order, the Court affirmed the Missouri Public Service Commission's decision and held that "SBC is required under the Act and FCC regulations to provide access to entrance facilities necessary for interconnection" at "TELRIC rates."¹ The relevant pages of this order are provided as further support of RCN's August 17, 2006 Opposition to Motion of Verizon Massachusetts for Partial Reconsideration of Letter Order in the above-referenced docket.

An original and nine (9) copies of this filing are enclosed. Please date-stamp the enclosed extra copy of this filing and return it to the undersigned.

Sincerely,

Philip J. Macres / by TLB
Philip J. Macres

Attachment

cc: DTE 04-33 Service List

¹ See attached Exhibit A at 26-27.

EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

MEMORANDUM & ORDER RE:
No. 4:05-CV-1264 CAS

PAGES 24-27

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SOUTHWESTERN BELL TELEPHONE,)
L.P., d/b/a SBC MISSOURI,)
)
Plaintiff,)
)
v.)
)
THE MISSOURI PUBLIC SERVICE)
COMMISSION, et al.,)
)
Defendants.)

No. 4:05-CV-1264 CAS

MEMORANDUM AND ORDER

This action was filed by Southwestern Bell Telephone, L.P., d/b/a SBC Missouri (“SBC”) seeking declaratory and injunctive relief under the Federal Telecommunications Act of 1996.¹ The matter is before the Court on a motion to dismiss for lack of subject matter jurisdiction, two motions to strike, and motions for summary judgment filed by SBC and defendants Sprint Communications Company, L.P. and Charter Fiberlink-Missouri, LLC. The Court concludes that it has subject matter jurisdiction over this action, the motions to strike should be denied, plaintiff SBC’s motion for summary judgment should be granted in part and denied in part, defendant Sprint Communications Company, L.P.’s motion for summary judgment should be granted, and defendant Charter Fiberlink-Missouri, LLC’s motion for summary judgment should be denied.

¹The Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 47 U.S.C.).

After this action was filed, SBC Communications, the parent company of plaintiff Southwestern Bell Telephone, L.P., merged with AT & T Corp. to form AT & T Inc. Plaintiff now does business as AT & T Missouri.

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facilities, in circumstances where the FCC has said they may not be unbundled under § 251, creates a substantive conflict with federal law and is accordingly preempted.

SBC's motion for summary judgment should also be granted on the issue of unbundled access to other network facilities no longer required under § 251, on the basis that the MPSC lacked jurisdiction to require the inclusion of these elements in SBC's interconnection agreements, and the Arbitration Order is contrary to federal law.

D. Access to Entrance Facilities Under Section 251(c)(2).

SBC asserts that the Arbitration Order also contravenes the FCC's rulings in the TRRO by requiring SBC to provide CLECs with entrance facilities at TELRIC rates, although CLECs are no longer impaired with respect to entrance facilities and therefore are not entitled to these facilities as UNEs under § 251(c)(3). Defendant Sprint contends in its cross-motion for summary judgment that the MPSC correctly ruled that CLECs are entitled to entrance facilities as needed for interconnection pursuant to § 251(c)(2), and that TELRIC is the appropriate rate for these facilities. The Court agrees with Sprint's position.

An entrance facility is a transmission facility that connects CLEC networks with ILEC networks. See TRRO, 20 F.C.C.R. at 2609, ¶ 136. In the TRRO, the FCC held that CLECs are not impaired without access to entrance facilities, and therefore CLECs are not entitled to entrance facilities as unbundled network elements (UNEs) under § 251(c)(3). See 20 F.C.C.R. at 2609-12, ¶¶ 136-41. The TRRO is clear, however, that the FCC's "finding of non-impairment with respect to entrance facilities does not alter the right of competitive LECs to obtain interconnection facilities pursuant to § 251(c)(2) for the transmission and routing of telephone exchange service and exchange access service." Id. at 2611, ¶ 140. "Thus, competitive LECs will have access to these facilities at

cost-based rates to the extent that they require them to interconnect with the incumbent LEC's network." Id.

In the Arbitration Order, the MPSC acknowledged the FCC's ruling that CLECs are not entitled to entrance facilities as UNEs, but required SBC to allow access to these same facilities pursuant to 47 U.S.C. § 251(c)(2), which requires ILECs to provide "interconnection" to CLECs. See Final Arbitrator's Report, § IV at 16, 31-35; § V at 16. The Court concludes that the MPSC's Arbitration Order correctly implements the FCC's rulings on this issue as set forth in the TRRO and the TRO. See TRRO, 20 F.C.C.R. at 2611, ¶ 140; TRO, 18 F.C.C.R. at 17,202-04, ¶¶ 365-66.

In the context of ILEC-CLEC network arrangements, carriers can use entrance (transmission) facilities for at least two distinct purposes: (1) to provide a final link in the dedicated transmission path between a CLEC's customer and the CLEC's switch, and (2) as interconnection facilities to exchange traffic between ILEC and CLEC switches. In the first situation, a CLEC does not use entrance facilities for interconnection purposes, but rather to carry traffic to and from its own end users, a process known as "backhauling." In the second situation, a CLEC uses entrance facilities to interconnect with the ILEC's network, to provide a transmission path between the ILEC's switch and the CLEC's switch for the exchange of traffic between the two networks. See TRO, 18 F.C.C.R. at 17202-03, ¶¶ 365-66; see also Ex. 9 to Sprint's Mem. Supp. of Cross-Mot. for Summ. J. (schematic drawing).

The FCC determined that when a CLEC uses entrance facilities to carry traffic to and from its own end users (situation (1) above), the CLEC is not entitled to obtain entrance facilities from ILECs as § 251(c)(3) UNEs. See TRRO, 20 F.C.C.R. at 2610-12, ¶¶ 136-41. The FCC reaffirmed its earlier determination, however, that if a CLEC needs entrance facilities to interconnect with an ILEC's network (situation (2) above), the CLEC has the right to obtain such facilities from the ILEC, at cost-

based rates, under § 251(c)(2) of the Act. Id. at 2611, ¶ 140; TRO, 18 F.C.C.R. at 17,202-04, ¶¶ 365-66.

The Court rejects SBC's contention that the TRRO only requires an ILEC to allow CLECs to interconnect with its network and does not require that it lease the interconnection facilities themselves to CLECs. The FCC has interpreted "interconnection" to mean "the physical linking of two networks for the mutual exchange of traffic." Local Competition Order, 11 F.C.C.R. at 15,590, ¶ 176. In implementing this requirement, the FCC has held that CLECs have a "right . . . to obtain interconnection facilities pursuant to section 251(c)(2) . . . at cost-based rates" TRRO, 20 F.C.C.R. at 2611, ¶ 140 (emphasis added). The term "interconnect" refers to "'facilities and equipment,' not to the provision of any service." AT & T Corp. v. FCC, 317 F.3d 227, 234-35 (D.C. Cir. 2003) (interpreting the term "interconnect" in § 251(a)(1)); see Competitive Telecommc'ns Ass'n v. FCC, 117 F.3d 1068, 1071 (8th Cir. 1997) (stating of § 251(c)(2), "By its own terms, this reference is to a physical link between the equipment of the carrier seeking interconnection and the ILEC's network."). Based on the foregoing, the Court concludes that SBC is required under the Act and FCC regulations to provide access to entrance facilities necessary for interconnection.

The MPSC made a factual determination that the SBC entrance (transmission) facilities provided under its agreement with Sprint would be used solely for interconnection purposes within the meaning of § 251(c)(2). See Final Arbitrator's Report, § IV, at 33-35; id. § V, at 15-16. This factual determination was supported by the record evidence. See Direct Testimony of Don Price at 135-36 (Sprint Ex. 7); Rebuttal Testimony of Peter Sywenki at 8-11 (Sprint Ex. 4); Direct Testimony of Edward J. Cadieux at 73-75 (Sprint Ex. 5); Rebuttal Testimony of Edward J. Cadieux at 28-29 (Sprint Ex. 6). Accordingly, the MPSC's factual determination is not arbitrary or capricious and should be affirmed.

The Arbitration Order requires SBC to allow access to entrance facilities at the same cost-based TELRIC rates that apply to UNEs, when the entrance facilities are used for interconnection purposes under § 251(c)(2). See Final Arbitrator's Report, § IV at 16, 31-35; § V at 16. Although SBC challenges use of the TELRIC rate, the Court concludes the Arbitration Order's requirement correctly implements the FCC's rulings.

The FCC stated in the TRRO that the Act mandates cost-based rates for network interconnection. See TRRO, 20 F.C.C.R. at 2611, ¶ 140. Section 251(c)(2)(D) requires ILECs to provide interconnection facilities on the "rates, terms and condition" that comply with the requirements of § 252. 47 U.S.C. § 251(c)(2)(D). Section 252(d)(1), in turn, provides that "the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251" shall be cost-based. Id., § 252(d)(1)(A)(i). In implementing this rate provision, the FCC established the TELRIC methodology. See Local Competition Order, 11 F.C.C.R. at 15,844, ¶ 672; see also 47 C.F.R. §§ 51.501(a)-.505 (2005) (applying TELRIC to the pricing of interconnection). The FCC concluded that Congress intended to apply the same pricing rules to interconnection and UNEs, based on the plain language of §§ 251(c)(2), (c)(3), and § 252(d)(1). See Local Competition Order, 11 F.C.C.R. at 15, 816, ¶ 628. The Arbitration Order correctly adhered to the FCC's mandate when it directed the use of TELRIC rates for entrance facilities provided by SBC under the Sprint Agreement for use as interconnection facilities.

For these reasons, the Arbitration Order should be affirmed to the extent it determined that CLECs are entitled to entrance facilities as needed for interconnection pursuant to § 251(c)(2), and that TELRIC is the appropriate rate for these facilities. SBC's motion for summary judgment should therefore be denied with respect to the entrance facilities issue and Sprint's cross-motion for summary judgment should be granted.

facilities, in circumstances where the FCC has said they may not be unbundled under § 251, creates a substantive conflict with federal law and is accordingly preempted.

SBC's motion for summary judgment should also be granted on the issue of unbundled access to other network facilities no longer required under § 251, on the basis that the MPSC lacked jurisdiction to require the inclusion of these elements in SBC's interconnection agreements, and the Arbitration Order is contrary to federal law.

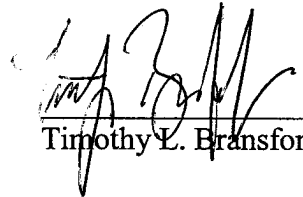
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CERTIFICATE OF SERVICE

I certify that on this 4th day of October, 2006, copies of RCN-BecoCom, LLC and RCN Telecom Services of Massachusetts' Inc.'s Supplemental Authority Letter were sent via postage prepaid first class mail (or overnight mail if noted with an asterisk) and electronic mail to the Active Party Service List associated with Case No. 04-33.



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