ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

AT&T Communications of The Southern States, Inc., and TCG South Florida

Plaintiffs,

v. Civil Action No. 4:02cv10-RH

BellSouth Telecommunications, Inc., et al.,

Defendants.
_____/

NOTICE OF APPEAL

Notice is hereby given that defendant BellSouth Telecommunications, Inc. ("BellSouth") hereby appeals to the United States Court of Appeals for the Eleventh Circuit the Order on Merits and Judgment entered in this action by the United States District Court, Northern District of Florida on August 20, 2004. The Order on Merits and Final Judgment are final orders issued by the District Court reviewing a decision issued by the Florida Public Service Commission. Copies of the Order on Merits and Final Judgment are attached.

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

AT&T COMMUNICATIONS OF THE SOUTHERN STATES, INC., and TCG SOUTH FLORIDA,

Plaintiffs,

v. CASE NO. 4:02cv10-RH

BELLSOUTH TELECOMMUNICATIONS, INC., et al.,

Defendants.

_____/

ORDER ON MERITS

This action presents a challenge under the Telecommunications Act of 1996 to a decision of the Florida Public Service Commission on the method by which competitive local exchange carriers are entitled to access an incumbent local exchange carrier's multiunit premises subloop. All parties agree that under the statute, the incumbent must provide access to the subloop at any "technically feasible" point. The issue is whether direct access—as sought by the competitive carriers—is "technically feasible." The Florida Commission sided with the

incumbent and held that, rather than direct access, the competitive carriers must use an intermediate access terminal; this increases cost and interjects delay. The Florida Commission justified this approach not on the ground that direct access is impossible or even difficult from an engineering standpoint; to the contrary, direct access apparently is easy, and is widely provided by other incumbents in other places. The Florida Commission ruled, however, that direct access imposes an unnecessary risk to the integrity of the incumbent's network and to the reliability of service, rendering such access not "technically feasible." This conclusion is not supported by the evidence and is foreclosed by the contrary view of the Federal Communications Commission, whose approach trumps that of the Florida Commission. The Florida Commission's decision on this issue thus will be vacated.

Background - The Statutory Framework

Historically, local telephone service was provided in the United States on a monopoly basis by carriers regulated under state law by state public service commissions. Congress fundamentally changed that approach by enacting the Telecommunications Act of 1996, 47 U.S.C. §§251-52. The Act imposes on local carriers, as a matter of federal law, various duties designed to foster competition. The Act allows state commissions the option of taking a major role in

implementing the Act's requirements.

The federal duties imposed on each "incumbent local exchange carrier"—that is, on each carrier who previously provided local service on a monopoly basis—include the obligation to sell local services at wholesale to any competing carrier for resale by the competing carrier to customers; the obligation to allow competitors to interconnect with the incumbent's facilities for the purpose of providing services to the competitor's own customers; and, of importance in the case at bar, the obligation to make certain "network elements"—parts of the incumbent's telecommunications system—available to competing carriers for their use in providing service to their own customers. The Act directs the FCC to determine which network elements must be made available to competitors and to consider, in making that determination, whether access to proprietary network elements is "necessary" and whether the failure to provide access would "impair" the ability of the competitive carrier to provide services. 47 U.S.C. §251(d)(2).[1]

The Act also imposes on each incumbent the duty to negotiate in good faith

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[1] These duties are described in greater detail in an ever growing list of judicial decisions. *See, e.g., AT&T Corp. v. Iowa Util. Bd.*, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999); *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 112 F. Supp. 2d 1286 (N.D. Fla. 2000). A comprehensive review of FCC and judicial interpretations of the "necessary and impair" standard is set forth in *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd. 19020 (2003) ("Triennial Review Order").

with any requesting carrier on the terms and conditions of an agreement under which these various duties will be fulfilled. *See* 47 U.S.C. §251(c)(1). The Act likewise imposes on requesting carriers the duty to negotiate in good faith. *Id.*

If the parties reach a negotiated agreement, it must be submitted to the state commission for approval. *See* 47 U.S.C. §252(e)(1). If the parties fail to agree on all terms and conditions, any party to the negotiation may request binding arbitration before the state commission of "any open issues." 47 U.S.C. §252(b)(1).[2]

The Act provides for judicial review of the state commission's decisions in federal district court. *See* 47 U.S.C. §252(e)(6). The case at bar is an action for judicial review under this provision.

Background—The Case at Bar

Defendant BellSouth Telecommunications, Inc. ("BellSouth") is the incumbent local exchange carrier in parts of the State of Florida. Plaintiffs AT&T Communications of the Southern States, Inc. ("AT&T") and TCG South Florida ("TCG") are competitors. In accordance with the Telecommunications Act of 1996, BellSouth entered negotiations with AT&T and TCG, respectively, for

[2] If the state commission chooses not to act on either a negotiated agreement or request for arbitration, the Federal Communications Commission must assume the responsibilities of the state commission. *See* 47 U.S.C. § 252(e)(5).

agreements under which, among other things, AT&T and TCG would purchase access to some of BellSouth's network elements. The parties were unable to agree on all terms and conditions of an agreement and thus sought and obtained arbitration before the Florida Public Service Commission. Following an evidentiary hearing, the Florida Commission issued a final arbitration order and, in due course, an order on reconsideration.

AT&T and TCG now bring this action challenging the Florida Commission's decision on one specific issue: the method by which AT&T and TCG are entitled to access BellSouth's subloop in multiunit premises.[3] AT&T and

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[3] AT&T and TCG initially raised two additional issues: first, whether BellSouth must make available to AT&T and TCG combinations of BellSouth network elements that are not currently combined in BellSouth's own network; and second, whether BellSouth may exact so-called "glue charges" based on market rates, not cost, for combining network elements. After the Florida Commission resolved these issues in BellSouth's favor, the United States Supreme Court weighed in, issuing its decision in *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 122 S. Ct. 1646, 152 L. Ed. 2d 701 (2002). The parties to the case at bar acknowledge that the Florida Commission's order with respect to these issues does not survive *Verizon*. The parties agreed at oral argument that vacating the Florida Commission's decision on these issues for further consideration in light of *Verizon* would be appropriate. More recently, the parties said they had settled these issues and expected to file soon a motion for dismissal of the appropriate portion of the complaint, but no such motion has been filed. The Florida Commission's decision on these issues will be vacated, leaving the parties free to implement their settlement before the Commission. If any party objects to this disposition of these issues, the party may file a timely motion to alter or amend the judgment that will be entered pursuant to this order, and the matter will be considered further, as may be appropriate.

TCG have named as defendants BellSouth, the Florida Commission, and the members of the Florida Commission in their official capacities.[4]

The parties have agreed that this court's review should be conducted based solely on the record as compiled in the Florida Commission. The parties have

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[4] Such an action for judicial review of a state commission's decision may proceed against the individual commissioners in their official capacities in accordance with *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), and thus is not barred by the Eleventh Amendment. *See Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645-48, 122 S. Ct. 1753, 1760-61, 152 L. Ed. 72 751 (2002); *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 1997 WL 1133453 (N.D. Fla. 1997). Recognizing this, the Florida Commission has not pressed the issue of whether the Commission in its own name should be dismissed. Had the Commission done so, I would have dismissed the Commission, without addressing the significant issue of whether the Commission's voluntary participation in the statutory arbitration process effected a waiver of its Eleventh Amendment immunity from actions of this type. *Compare, e.g., MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 512-13 (3d Cir. 2001) ("We agree with our sister circuits that this language constitutes a sufficiently clear congressional statement that a state will and must waive its sovereign immunity when it acts to regulate local competition agreements.") (citing *AT&T Communications v. BellSouth Telecomms. Inc.*, 238 F.3d 636, 646 (5th Cir. 2001); *MCI Telecomms. Corp. v. Ill. Bell Tel. Co.*, 222 F.3d 323, 341 (7th Cir. 2000); and *MCI Telecomms. Corp. v. Pub. Serv. Comm'n of Utah*, 216 F.3d 929, 938 (10th Cir. 2000)); *with Bell Atlantic Md., Inc. v. MCI WorldCom, Inc.*, 240 F.3d 279, 292 (4th Cir. 2001), *vacated in part by Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 645, 122 S. Ct. 1753, 1760, 152 L. Ed. 72 751 (2002) (Fourth Circuit's *Bell Atlantic Maryland* holding that state commissioners were not subject to suit under *Ex Parte Young* vacated; Fourth Circuit's holding that Telecommunications Act of 1996 did not contain sufficient waiver so as to abrogate Eleventh Amendment immunity for the commission *itself* left undisturbed because "Whether the Commission waived its immunity is another question we need not decide, because . . . even absent waiver, Verizon may proceed against the individual commissioners in their official capacities, pursuant to the doctrine of *Ex parte Young*").

submitted briefs and presented oral argument. This order constitutes the court's ruling on the merits.

Standard of Review

The Telecommunications Act provides for actions such as the case at bar in a single sentence:

> In any case in which a State commission makes a determination under [the Act], any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of [the Act].

47 U.S.C. § 252(e)(6). The Act does not further specify the standard of review to be applied in determining "whether the agreement . . . meets the requirements of" the Act.

For the reasons set forth at length in *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 112 F. Supp. 2d 1286 (N.D. Fla. 2000), I will review *de novo* issues regarding the meaning and import of the Telecommunications Act, and I will review state commission determinations of how to implement the Act as so construed only under the arbitrary and capricious standard. This apparently is the standard of review advocated by all parties to this proceeding.

Merits

BellSouth, like any incumbent local exchange carrier, provides service to customers over "local loops" running from BellSouth's wire centers to customer locations. For multiunit premises such as apartment or condominium buildings, the local loop runs to a location at the building and cross-connects with "network terminating wire" running to each individual customer's premises. The network terminating wire, together with the remainder of the infrastructure by which calls are transmitted from the common location at the multiunit premises to the individual customer, is a "subloop."[5] This subloop is a "network element" within the meaning of the Telecommunications Act of 1994.

The FCC has determined that multiunit premises subloops meet the Act's "necessary and impair" standard and thus must be made available to competing carriers. *See* 47 C.F.R. §51.319(a); *Triennial Review Order*, *supra* note 1, ¶¶343-58. All parties to the case at bar accept this determination; none asserts the contrary. It is thus undisputed that BellSouth must make its multiunit premises

[5] This is an abbreviated description of the facilities over which calls are delivered to and from multiunit premises, but a more detailed description is not necessary for present purposes. The configuration may vary from building to building and is somewhat different at other types of multiunit premises such as garden apartments. For a more detailed description of the subloop and its various components, *see Triennial Review Order*, *supra* note 1, ¶¶343-58.

subloops available to AT&T and TCG. BellSouth of course is entitled to charge an appropriate cost-based fee for doing so.

It also is undisputed that access to the subloop must be provided at any "technically feasible" point. Again, no party to the case at bar asserts the contrary, nor could any party reasonably do so. The Act itself expressly adopts the technical feasibility standard, imposing on an incumbent carrier

> [t]he duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis *at any technically feasible point* on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with terms of the [parties' interconnection] agreement and the requirements of [the Act].

47 U.S.C. §251(c)(3) (emphasis added). The FCC has applied the requirement specifically to multiunit premises subloops. *See Triennial Review Order*, *supra* note 1, ¶350.

That brings us to the issue on which the parties to the case at bar disagree. The parties disagree on how the technical feasibility standard should be applied, specifically with respect to the *manner* in which BellSouth must provide access to the multiunit premises subloop. AT&T and TCG propose to have their technicians directly access the network terminating wire at any available point, including, for example, at the cross-connect. BellSouth opposes this, asserting that AT&T's and

TCG's technicians, or those of any other competing carrier seeking similar access, might intentionally or accidentally bungle the connections or otherwise interfere with BellSouth's network. BellSouth proposes to build a separate, intermediate access terminal and to allow AT&T and TCG to access the subloop only through that terminal. AT&T and TCG say this would increase the cost of access and, perhaps more significantly, interject delay, by requiring a BellSouth technician to go to the premises and pull wires to the intermediate access terminal each time AT&T or TCG signs up a new customer.[6]

The issue, then, is whether it is "technically feasible" for AT&T and TCG to have direct access to the subloop as they proposes. The Florida Commission sided with BellSouth, concluding that the "technically feasible" standard means not only that the desired access is reasonably available from a purely engineering perspective, but also requires consideration of the effects of providing access on the continuing security, reliability, and quality of the incumbent's own network.

On this, the Florida Commission was plainly correct. "Feasible" suggests just such a construction. And in a related context—on the issue of an incumbent's duty to combine network elements for provision to competitive carriers—the

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[6] To avoid such delay, AT&T or TCG could pay to have wires pulled for all units from the outset, thus obviating the need to have a BellSouth technician pull the wires when a particular customer ordered service from AT&T or TCG. AT&T and TCG of course prefer to pay only for access to customers who select them, not to pay to have wires pulled for customers who might never select them.

Supreme Court has so interpreted the language "technically feasible," citing with approval the FCC's construction of this term in *In re Implementation of Local Competition in Telecommunications Act of 1996*, 11 FCC Rcd. 15499 (1996) ("First Report and Order"). The Supreme Court said that it is

> wrong to claim that the restriction to "technical feasibility" places only minimal limits on the duty to combine, since the First Report and Order makes it clear that what is "technically feasible" does not mean merely what is "economically reasonable," *id.*, ¶199, or what is simply practical or possible in an engineering sense, *see id.*, ¶¶196-198. The limitation is meant to preserve "network reliability and security," *id.*, ¶296, n. 622, and a combination is not technically feasible if it impedes an incumbent carrier's ability "to retain responsibility for the management, control, and performance of its own network," *id.*, ¶203.

Verizon Communications, Inc. v. FCC, 535 U.S. 467, 536, 122 S. Ct. 1646, 152 L. Ed. 2d 701 (2002).[7]

That network reliability and security can be considered, however, does not mean that a conclusory invocation of those factors will carry the day in any particular dispute. Here, they do not. After the Florida Commission entered the order now under review, the FCC promulgated additional rules on the extent of an incumbent's duty to provide access to network elements and issued the *Triennial Review Order*, *see supra* note 1, explaining those rules and specifically addressing

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[7] Network "reliability and security," as used in this context, include considerations of network quality.

the issue of access terminals for multiunit premises. The FCC rejected the assertion that a competitive carrier could be required to "collocate" with the incumbent its means of access to the multiunit premises subloop. Requiring use of an intermediate access terminal as proposed by BellSouth in the case at bar is precisely the type of "collocation" requirement the FCC disapproved. The FCC said:

> The rules we adopt today make clear that no collocation requirement exists with respect to subloops used to access the infrastructure in multiunit premises. Incumbent LECs are required to provide subloops to access multiunit premises without collocation. Competitive carriers are able to access these subloops at any technically feasible terminal point at or near the building in any technically feasible manner. This will provide facilities-based competitors the greatest flexibility in designing their networks and most efficiently accessing these subloops only at the point necessary.

Triennial Review Order, *supra* note 1, ¶350 (footnotes omitted). And the FCC elaborated on this decision by specifically prohibiting any requirement that a competitive carrier establish a separate terminal facility for access to parts of the multiunit premises subloop—specifically inside wire network and the interface device or "NID":

> [T]he record contains evidence that at least one incumbent LEC requires competitive LECs seeking access to the NID or inside wire subloop to undertake a lengthy and burdensome process at the customer premises to "collocate" a separate terminal facility in order

> to gain access to the inside wire subloop, or other inside wire used by the LEC to access customers in multiunit premises. *We find such a requirement to be contrary to the NID and inside wire subloop unbundling rules we adopt today and therefore prohibit such requirements.*

Triennial Review Order, *supra* note 1, ¶358 (emphasis added; footnotes omitted). The collocated "separate terminal facility" referred to in the order is not meaningfully distinguishable from the "intermediate access terminal" that BellSouth seeks to require in the case at bar.

That this is so is confirmed by the record evidence to which the FCC referred. *See id.*, n.1090, citing Letter from J.G. Harrington, Counsel for Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-338, 96-98, 98-147 (filed with FCC ex parte Dec. 19, 2002), *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513401391 (last visited Aug. 19, 2004). That letter, submitted on behalf of a competitive carrier, described an incumbent's practice of requiring access to the multiunit premises subloop only by means of a specially constructed separate access terminal—precisely the approach taken by BellSouth in the case at bar. The letter said that after such a terminal was constructed, the incumbent required per-customer orders and sent its own technicians to perform the necessary connections, thus adding delay and expense to what should have been a simple process handled

by the competitor's own technicians, as was done without difficulty in multiunit premises served by other incumbents, and in other jurisdictions. The letter could as easily have been written about BellSouth's approach in the case at bar, and the FCC's disapproval undoubtedly would have been just as unequivocal; the practice, the FCC said, is "prohibit[ed]."

The contrasting positions on this issue taken by incumbent BellSouth, on the one hand, and competitors AT&T and TCG, on the other, are reminiscent of earlier disputes between incumbents and competitors dating to the very first efforts to bring competition to this industry. Claims of quality impairment must be taken seriously, especially in an industry now facing increasing competition from such alternatives as cellular service and voice over internet; without quality, this segment of the market would not be nearly so attractive to customers and, in turn, to prospective competitors. But at the same time, the cry that providing easy access to competitors will impair quality has been sounded before, often without a basis in fact. In reaching its conclusion that providing access to the multiunit premises subloop would not impermissibly impair security and reliability, the FCC undoubtedly drew on its experience in dealing with similar issues in the past.

Finally, it bears noting that, notwithstanding the FCC's statement that it "prohibits" any requirement for separate access terminals of this type, the statute, rules, and FCC orders leave open the possibility that reliability and security

considerations unique to any particular setting would lead to a different result. But this record includes evidence that direct access of the type requested by AT&T and TCG is routinely provided by other carriers without difficulty. (Tr. Feb. 15, 2001, vol. 5 at 771.) This record includes no evidence that BellSouth faces atypical circumstances that would make such access more problematic for BellSouth than for these other carriers. To the contrary, for all that appears in this record, the circumstances faced by BellSouth are the same as those that were considered by the FCC and that are typically faced by other incumbents.

Conclusion

Under the Telecommunications Act of 1996, BellSouth, as the incumbent local exchange carrier, must provide AT&T and TCG, as competitors, with access to BellSouth's multiunit premises subloops, at any "technically feasible" point. The Florida Commission's determination that direct access to such subloops is not "technically feasible," so that BellSouth need only provide access through intermediate access terminals, is contrary to the FCC's interpretation of the Act and unsupported by the record. Accordingly,

IT IS ORDERED:

The orders of the Florida Public Service Commission under review in this matter are declared invalid and are hereby VACATED to the extent they provide

for access to multiunit premises subloops only through intermediate access terminals. The orders are further declared invalid and VACATED by consent of the parties with respect to whether defendant BellSouth Telecommunications, Inc. must make available to plaintiffs AT&T Communications of the Southern States, Inc. and TCG South Florida combinations of network elements that are not currently combined in BellSouth's own network and whether BellSouth may exact charges based on market rates, not cost, for combining network elements.[8] BellSouth Telecommunications, Inc. and the defendant Commissioners of the Florida Public Service Commission are hereby enjoined from taking any action to enforce the orders of the Florida Public Service Commission to the extent those orders have been declared invalid and vacated. This matter is remanded to the Florida Public Service Commission for further proceedings not inconsistent with this order. The clerk shall enter judgment accordingly and close the file.

SO ORDERED this 20th day of August, 2004.

s/Robert L. Hinkle
Chief United States District Judge

[8] *See supra* note 3.