

Docket No. 9577-U

In Re: Complaint of US LEC of Georgia, Inc. Against BellSouth Telecommunications, Inc.

ORDER TO DETERMINE INTERCONNECTION RATE

BY THE COMMISSION:

I. INTRODUCTION

A. Background

On July 2, 1999, US LEC of Georgia, Inc. (“US LEC”) filed a Complaint (“Complaint”) with the Georgia Public Service Commission (“Commission”) against BellSouth Telecommunications, Inc. (“BellSouth”). The Complaint alleged that BellSouth breached the terms of the Interconnection Agreement dated November 12, 1996, as amended, between BellSouth and US LEC (“Initial Agreement”) as well as the Interconnection Agreement effective November 1, 1998, between US LEC and BellSouth (“ALEC Agreement”).

On May 18, 2000, the Hearing Officer issued a Recommended Order. In its June 15, 2000 order, the Commission adopted the recommendation of the Hearing Officer in its entirety. The Commission ordered that both the Initial Agreement and the ALEC Agreement require the payment of reciprocal compensation for calls to internet service providers (“ISPs”). (Order, Page 21 of 22). The Commission also found that US LEC did not provide sufficient evidence to bill the tandem interconnection rate to BellSouth. The Commission ordered that “US LEC shall submit an invoice to BellSouth that reflects only the end office rate until such time that it provides sufficient evidence to establish that the tandem interconnection rate is appropriate.” *Id.* at 22.

On July 13 and 14, 2000, US LEC filed Supplemental Submissions in Support of Request for Payment of Reciprocal Compensation at Tandem Rate. On August 8, 2000, BellSouth filed its Response in Opposition to US LEC’s Request. The Commission assigned the matter to a Hearing Officer on August 16, 2000. On October 6, 2000, US

LEC filed further support for its request for reciprocal compensation payments at the tandem rate. BellSouth filed its response to this further support on October 17, 2000. The Hearing Officer issued an Order on Preliminary and Procedural Issues Surrounding Supplemental Submission and Response (“Preliminary Order”) on November 15, 2000. On November 29, 2000, the Hearing Officer issued a Consent Schedule setting the hearing date for March 8, 2001.

On January 9, 2001, US LEC sponsored the pre-filed Direct testimony of Jeremiah T. Needham. On behalf of BellSouth, Jerry L. Dick pre-filed Rebuttal testimony on February 7, 2001. Mr. Needham pre-filed Sur-Rebuttal testimony on February 20, 2001. The hearing took place on March 8, 2001. The parties filed briefs on April 24, 2001. The Hearing Officer issued a Recommended Order on May 24, 2001. The Hearing Officer found that US LEC’s switch provided similar functions and served a comparable geographic area to BellSouth’s tandem switch. (Order on Tandem Interconnection Rate, pp. 6-7). The Hearing Officer recommended that US LEC be authorized to bill BellSouth at the tandem interconnection rate as of October 6, 2000. *Id.* at 9. This is the date that US LEC supplemented its filing to provide the requisite support for its claim that its switch performs similar functionality to BellSouth’s tandem switch.

On May 25, 2001, US LEC filed a letter with the Hearing Officer asking for reconsideration of the Recommended Order. US LEC argued that it should be entitled to the tandem interconnection rate as of October 1, 1998. US LEC stated that the agreements at issue in the complaint expired as of June, 1998, and that therefore, the October 1, 2000, starting date in the Recommended Order fell outside the time of the agreements. On June 21, 2001, the Hearing Officer declined US LEC’s request for reconsideration. On June 22, 2001, BellSouth requested that the Commission decline to adopt the Hearing Officer’s recommendation. BellSouth’s position is that US LEC is not entitled to reciprocal compensation at the tandem rate under the two contracts at issue in US LEC’s complaint. Finally, on July 6, 2001, US LEC filed with the Commission a request to modify the Hearing Officer’s recommendation to change the date upon which the tandem rate should be in effect to October 1, 1998.

B. Jurisdiction and Governing Law

The Commission has general jurisdiction pursuant to O.C.G.A. § 46-2-20(a) and has specific authority to consider this Complaint pursuant to O.C.G.A. § 46-2-20(b). Further jurisdiction and authority was granted under the Telecommunications and Competition Development Act at O.C.G.A. § 46-5-168 and Chapter 515-2-1-.04 of the Rules of the Georgia Public Service Commission.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The first issue before the Commission is whether US LEC has provided sufficient evidence to demonstrate that it is entitled to reciprocal compensation at the tandem rate. If that is determined in the affirmative, then the Commission must determine the time period over which the tandem rate should apply.

A. Did US LEC provide sufficient evidence to demonstrate that it is entitled to reciprocal compensation at the tandem interconnection rate?

In its June 15, 2000 order, the Commission stated that a CLEC must show that its network performs functions similar to those performed by BellSouth's tandem switch and that the switch covers a geographic area comparable to BellSouth's. (Order, Page 19 of 22). The FCC has directed state commissions to consider "whether new technologies (e.g., fiber ring or wireless networks) perform functions similar to those performed by an incumbent LEC's tandem switch." *Implementation of the Local Competition Provision of the Telecommunications Act of 1996*, First Report and Order, CC Docket 96-98, FCC 96-325, ¶1090 (rel. August 8, 1996) ("Local Competition Order"). The FCC rules require a CLEC to demonstrate that its switch serves a comparable geographic area. 47 C.F.R. 51.711(a)(3). In the Order on Tandem Interconnection Rate, the Hearing Officer determined that US LEC met both of these standards.

At the March 8, 2001, hearing, US LEC testified that it operates a Lucent 5ESS switch, which is located at 2 Concourse Parkway in Atlanta. (Tr. 17). US LEC's switch "interconnects end offices, provides connections to other tandems, serves a central automatic message accounting point for end offices, provides access to IXCs and provides access to operator services." *Id.* BellSouth argued that in order to meet the requirement, US LEC must be performing all of the functions in the FCC's definition of tandem switching. (Tr. 67). The FCC has defined "tandem switching capability network element" as:

- (i) Trunk-connect facilities, which include, but are not limited to, the connection between trunk termination at a cross connect panel and switch trunk card;
- (ii) The basic switch trunk function of connecting trunks to trunks; and
- (iii) The functions that are centralized in tandem switches (as distinguished from separate end office switches), including but not limited, to call recording, the routing of calls to operator services, and signaling conversion features.¹

¹ 47 CFR 51.319(c)(3)

BellSouth argued that since US LEC's switch does not perform trunk-to-trunk switching, US LEC failed to meet the requirement that its switch perform similar functions to BellSouth's switch. (Tr. 74).

The Hearing Officer gave three reasons for rejecting BellSouth's test for determining similar functionality. First, the Hearing Officer referenced the FCC's direction to state commissions in its Local Competition Order to consider whether new technologies performed similar functions to those performed by a LEC's tandem switch. (Order on Tandem Interconnection Rate, p. 7). The Hearing Officer also reasoned that BellSouth's argument was contrary to the intent of the Telecommunications Act of 1996. Requiring CLECs to duplicate BellSouth's architecture may have a chilling effect on competition. *Id.* Finally, BellSouth admits that a carrier using the 5ESS switch with the proper software and a SONET ring architecture is able to provide the same call transport and termination capability to end users as BellSouth's architecture of tandem and end office switches. *Id.*

The Commission adopts the Hearing Officer's finding that US LEC meets the functionality requirement. When previously addressing this issue, the Commission has emphasized that "the FCC did not state that state commissions should consider whether the switch performs 'the same' functions as a tandem switch. Instead, the FCC stated that state commissions should consider whether the switch performs 'similar' functions as a tandem switch."² The evidence shows that US LEC's switch performs similar functions to that of BellSouth's switch.

The Hearing Officer also found that US LEC's switch served a comparable geographic area to BellSouth's switch. US LEC provided maps and charts that show that by September 30, 1998, the US LEC switch was serving a comparable geographic area to BellSouth's tandem switches in the Atlanta LATA. (Tr. 17). While US LEC has testified that its switch serves 23 of the wire centers in the Atlanta LATA, BellSouth contends that it must serve each of the wire centers served by a BellSouth tandem switch. Since US LEC's switch does not, BellSouth's position is that US LEC has not met the requirement for serving a comparable geographic area. (Tr. 74).

The requirement that a competitive carrier serve a "comparable geographic area" should not be construed to mean that the competitive carrier must serve customers in all of the serving wire centers within a rate center. BellSouth does not point to any legal authority requiring a competing carrier to serve every wire center. Such a stringent requirement could discourage competition. In addressing this issue in previous proceedings, the Commission has not required a showing that the carrier serve each wire center served by BellSouth's tandem switch. By showing that its switch serves 23 of the wire centers in the Atlanta LATA, US LEC has met the requirement that its switch serves

² Petition of BellSouth Telecommunications, Inc. For Arbitration of an Interconnection Agreement With Intermedia Communications, Inc. Pursuant To Section 252(b) of the Telecommunications Act Of 1996. (Order, p. 6).

a comparable geographic area. The Commission finds that US LEC is entitled to be compensated at the tandem interconnection rate.

B. Over what time period should US LEC receive the tandem interconnection rate?

In its June 15, 2001 order, the Commission stated that “US LEC shall submit an invoice to BellSouth that reflects only the end office rate until such time that it provides sufficient evidence to establish that the tandem interconnection rate is appropriate.” (Order, Page 22 of 22). In response to the Commission Order, US LEC filed exhibits to demonstrate that it met the requirements for payment of reciprocal compensation at the tandem rate as of October 1, 1998. BellSouth contested this claim, and the Hearing Officer scheduled a hearing to resolve the matter.

While finding that US LEC’s evidence met the requirements for the tandem rate, the Hearing Officer determined that the appropriate date for US LEC to begin billing at this rate was October 6, 2000. (Order on Tandem Interconnection Rate, p. 8). As stated above, this was the date that US LEC supplemented its filing to support its claim that its switch meets the requirement for similar functionality.

The Initial Agreement and the ALEC Agreement are the subject of US LEC’s Complaint. The second of these two agreements, the ALEC Agreement, expired on June 30, 1999. From July 1, 2000 on, the parties have been operating under the evergreen provisions of a different interconnection agreement. This third agreement is not at issue in the Complaint. The October 6, 2000 date cannot stand as the date that US LEC is entitled to reciprocal compensation at the tandem rate because that date is outside the time period covered by the agreements at issue in the Complaint.

US LEC has argued that it is entitled to the tandem rate beginning October 1, 1998. US LEC has provided evidence in support of that date that the Hearing Officer found persuasive. BellSouth argues that US LEC should not be allowed a second opportunity to make its case. (BellSouth’s Response to US LEC’s Reply in Further Support of Request for Payment or Reciprocal Compensation at the Tandem Rate, p. 3) While it is true that it is not administratively efficient to hold an additional hearing to allow a party to make a showing that it failed to make in the initial hearing, fairness dictates that US LEC be given such an opportunity in this proceeding.

US LEC initially disputed the requirements for receiving the tandem rate, and therefore, it did not provide sufficient evidence to meet the tests. The Commission finds that the most important question is whether US LEC is entitled to the tandem rate for the time period covered by the Initial Agreement and the ALEC Agreement. At the time the Commission issued its order on June 15, 2000, the Commission did not have adequate evidence before it to determine the answer to this question. The Commission did not grant US LEC the relief it sought on this issue at that time, but left open the door for US LEC to file additional evidence to support its claim. Since the Commission adopts the Hearing Officer’s findings that the evidence supports that US LEC met the requirements,

and since the evidence presented by US LEC pertains to October 1, 1998 forward, the Commission concludes that US LEC is entitled to the tandem interconnection rate from October 1, 1998 through the expiration of the ALEC Agreement.

III. ORDERING PARAGRAPHS

The Hearing Officer has certified the record in this docket to the Commission and issued a recommendation pursuant to O.C.G.A. §§ 46-2-58(d) and 50-13-17(a). The Commission hereby decides this matter by adopting and modifying the Hearing Officer's recommendations.

WHEREFORE, it is

ORDERED, that US LEC is entitled to payment of reciprocal compensation at the tandem rate for ISP-traffic from October 1, 1998 through June 30, 1999.

ORDERED FURTHER, that all statements of fact, law and regulatory policy contained within the preceding sections of this Order are adopted as findings and conclusions of law and conclusions of regulatory policy of the Commission.

ORDERED FURTHER, that a motion for reconsideration, rehearing, or oral argument or any other motion shall not stay the effective date of this Order, unless otherwise ordered by the Commission.

ORDERED FURTHER, that jurisdiction over this matter is expressly retained for the purpose of entering such further Order or Orders as the Commission may deem just and proper.

The above by action of the Commission in Administrative Session on the 23rd day of July 2001.

Reece McAlister
Executive Secretary

Lauren McDonald, Jr.
Chairman

Date

Date