

BEFORE THE TENNESSEE REGULATORY AUTHORITY

NASHVILLE, TENNESSEE

October 10, 2008

IN RE: )  
 )  
COMPLAINT OF MOMENTUM TELECOM, INC. ) DOCKET NO.  
AGAINST AT&T TENNESSEE CONCERNING ) 08-00079  
WHOLESALE SWITCHING RATES )  
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ORDER DISMISSING PROCEEDING WITHOUT PREJUDICE

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This matter came before Director Eddie Roberson, Director Sara Kyle, and Director Mary W. Freeman, the voting panel assigned to this docket, at the July 28, 2008 Authority Conference to consider the *Complaint of Momentum Telecom, Inc. Against AT&T Tennessee Concerning Wholesale Switching Rates* (“*Complaint*”) filed on May 15, 2008.

**MOMENTUM’S PETITION**

On May 15, 2008, Momentum Telecom, Inc. (“Momentum”) filed the *Complaint* with the Authority against BellSouth Telecommunications, Inc. d/b/a AT&T Tennessee (“AT&T”). In the *Complaint*, Momentum is requesting the TRA to (1) examine the rates charged by AT&T for unbundled local switching services and determine whether those rates are non-discriminatory, just and reasonable, and otherwise consistent with state and federal law; (2) direct AT&T to charge Momentum a rate of no more than \$5.08, including usage and features; and (3) provide whatever additional relief the TRA determines is appropriate based on the evidence and arguments presented.

In its *Complaint*, Momentum asks the Authority to investigate the rates charged by AT&T for the use of AT&T’s local switching services in Tennessee, claiming that the TRA determined in Docket No. 03-00119 that a “just and reasonable” rate for the use of AT&T’s local

switching services is a flat rate of \$5.08 (including usage and features) per line, per month.<sup>1</sup> Additionally, Momentum states that as of April 29, 2008, there is no longer any pending appeal of the ruling in Docket No. 03-00119.<sup>2</sup>

Momentum further states that AT&T presently charges Momentum a switching rate of \$10.65 (based on average usage), more than twice the rate established by the TRA in Docket No. 03-00119, and that there is no competitive wholesale market for local switching in Tennessee. Therefore, Momentum asks the Authority, pursuant to its power under state law, to open a proceeding to investigate the current rates charged by AT&T and if appropriate, establish a new rate that complies with state and federal law. Pending a final decision, Momentum asks the Authority to order AT&T to charge Momentum an interim rate for local switching services of no more than \$5.08, including usage and features. Once a final decision has been made, Momentum contends, the established rate should be applied retroactively to the date upon which AT&T is ordered to begin charging the interim rate.

### **AT&T'S RESPONSE**

On June 16, 2008, AT&T responded that the TRA has already considered all of the legal and practical considerations at issue in this docket during deliberations in the Generic Switching Docket.<sup>3</sup> AT&T claims that both the state and federal bases for establishing a switching rate were raised in that docket and that the TRA conclusively decided that there is no need for a docket to mandate a rate.

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<sup>1</sup> *In re: Petition for Arbitration of ITC DeltaCom Commc'ns, Inc. with Bellsouth Telecomm., Inc.*, Docket No. 03-00119, *Final Order of Arbitration Award* (Oct. 20, 2005).

<sup>2</sup> After the TRA issued the October 20, 2005 *Final Order of Arbitration Award*, AT&T filed a petition with the FCC asking the federal agency to overturn the TRA's order. The FCC never ruled on the petition, and AT&T's petition was recently withdrawn. While no other appeal of the order in Docket No. 03-00119 has been filed, AT&T did file a *Complaint* in federal court with regard to an Authority decision in *In re: BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 04-000381. In its *Complaint*, AT&T challenges the Authority's decisions that the Authority may set rates for Section 271 elements. See *BellSouth Telecomm., Inc. v. Tennessee Regulatory Auth.*, No. 03:08-0059, *First Amended Complaint*, paras. 27 & 44 – 47 (Feb. 8, 2008).

<sup>3</sup> *In re: Generic Docket to Establish a Rate for Switching Provided Pursuant to Requirements Other than 47 U.S.C. 251*, Docket No. 06-00080.

AT&T further states that in every TRA deliberation relating to imposing rates for switching the TRA has been consistent in efforts to support, rather than undermine, commercial negotiations and that, as a practical matter, it is not appropriate to prevail upon the parties to negotiate on one hand and then engage in regulatory rate-making on the other.

AT&T also asserts that states do not have authority to set rates for wholesale local switching provided pursuant to 47 U.S.C. § 271. AT&T explains that any attempt to impose state regulation on switching prices is preempted by federal law.

Finally, AT&T states that Momentum can do as other competitors in the marketplace have done - negotiate to obtain switching from another service provider, deploy its own facilities, or negotiate a rate with AT&T. Therefore, AT&T requests that the Authority issue an order denying the Complaint.

#### **FINDINGS AND CONCLUSIONS**

Generally, the Authority has discretion as to whether to convene a contested case.<sup>4</sup> The Authority's rules provide guidance for determining whether to convene a contested case as a result of the filing of a petition or complaint. Specifically, Rule 1220-1-2-.02(1) provides that the "Authority may commence a contested case at any time with respect to any matter within its jurisdiction." However, Rule 1220-1-2-.02(2) qualifies this broad statement by providing that the Authority may not convene a contested case if:

1. The Authority lacks subject matter jurisdiction.
2. No hearing is required as a matter of law for the disposition of the matter.
3. The relief sought in the petition is on its face barred as a matter of law.
4. The petition was not submitted in a form substantially complying with any applicable law.

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<sup>4</sup> See *Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 763 (Tenn. 1998); *Office of the Attorney Gen., Consumer Advocate and Prot. Div. v. Tennessee Regulatory Auth.*, M2004-01484-COA-R12-CV, 2007 WL 2316458, \*3 (Tenn. Ct. App. Aug. 13, 2007); Tenn. Comp. R. & Regs. 1220-1-2-.02(1) (July, 2006 Revised).

5. The petition was not accompanied by the appropriate fees.

In the event that a panel decides on its own motion not to convene a contested case, the panel shall issue an order memorializing such and state the basis of the decision.<sup>5</sup>

Rule 1220-1-2-.09 sets forth the requirements of a complaint. Specifically, this rule provides:

- (1) A formal complaint filed against a public utility regulated by the Authority shall:
- (a) be in writing and signed by the complainant, or by a duly authorized representative or attorney of the complainant;
  - (b) contain the name and address of the complainant and the name and address of the defendant or respondent;
  - (c) set forth with specificity the factual basis and legal grounds upon which the complaint is based;
  - (d) enumerate each statute allegedly violated by the defendant and state each fact demonstrating a violation of the statute so that the defendant can be duly apprised of each statutory violation charged; and
  - (e) enumerate any Authority rule or regulation relied upon for a claim and set forth the manner of each alleged violation of that Authority rule or regulation.<sup>6</sup>

The courts have recognized that the Authority may deny a contested case to a complainant when the pleading fails to meet the technical requirements of a complaint.<sup>7</sup> However, the Authority may waive the provisions of 1220-1-2-.09(1) for good cause shown in order to prevent manifest injustice or hardship to the complaining party.<sup>8</sup>

The Authority considered this matter at its regularly scheduled Authority Conference held on July 28, 2008. Based upon the entire record, a majority of the panel found that the Complaint failed to provide sufficient details, as is required by Authority Rule 1220-1-2-

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<sup>5</sup> Tenn. Comp. R. & Regs. 1220-1-2-.03(5) (July, 2006 Revised).

<sup>6</sup> *Id.* 1220-1-2-.09(1).

<sup>7</sup> *See Consumer Advocate Div. v. Greer*, 967 S.W.2d 759, 762-63 (Tenn. 1998).

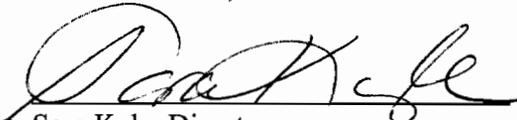
<sup>8</sup> *Id.*, Tenn. Comp. R. & Regs. 1220-1-2-.09(2).

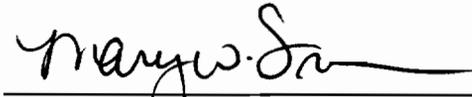
.09(1)(c) – (e), to permit a proper determination as to whether a contested case should be convened in order to investigate whether the rates charged by AT&T are just and reasonable, non-discriminatory, or otherwise compliant with state and federal law. Thereafter, the panel voted unanimously to dismiss the Complaint with a majority of the panel voting to dismiss the Complaint without prejudice.<sup>9</sup>

**IT IS THEREFORE ORDERED THAT:**

The *Complaint of Momentum Telecom, Inc. Against AT&T Tennessee Concerning Wholesale Switching Rates* is dismissed without prejudice.

  
Eddie Roberson, Director

  
Sara Kyle, Director

  
Mary W. Freeman, Director

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<sup>9</sup> Director Roberson concurred in the panel's decision to dismiss the *Complaint* but did so on different grounds. He stated that he has not made a determination regarding the Authority's jurisdiction over 47 U.S.C § 271 elements and did not intend to do so in this docket. He noted that commercial agreements are not filed with the Authority and that this avenue toward agreement between the parties should not be overly influenced by regulatory intrusion. Director Roberson further stated that he was concerned that the Authority's involvement would have a chilling affect on the commercial agreement process. He stated that the Authority's role is better exercised in the arbitration process. To consider the reasonableness of the rate for switching that is a part of a negotiated commercial agreement without considering the agreement as a whole could lead to an unfair result. Director Roberson also noted that the \$5.08 rate approved in Docket No. 03-00119 as just and reasonable was as a result of a final best offer in the arbitration between two parties. Director Roberson opined that the better course would be to consider the rate in the context of an arbitration before the Authority after negotiations between the parties have failed as was done in Docket No. 03-00119.