

**GENERIC PROCEEDING TO ESTABLISH
PRICES FOR INTERCONNECTION
SERVICES AND UNBUNDLED
NETWORK ELEMENTS**

DOCKET 27821

(In Re: Petition for Enforcement)

ORDER

BY THE COMMISSION:

I. Introduction and Background

A. The Joint Petition for Enforcement

By Petition filed on August 6, 2002, ITC DeltaCom Communications, Inc. (“ITC DeltaCom”); AT&T Communications of the South Central States, LLC (“AT&T”); TCG MidSouth, Inc. (“TCG”); and Talk America, Inc. (“Talk America”) (collectively the “Joint Petitioners”) urge the Commission to enforce its May 31, 2002 Order in this cause establishing revised unbundled network element (“UNE”) prices for BellSouth Telecommunications, Inc. (“BellSouth”) (the “*UNE Order*”). Said Order further required BellSouth to provide combinations of UNEs that it ordinarily and typically combines in the normal course of operating its network, even if the particular elements being ordered by Competitive Local Exchange Carriers (CLECs) are not physically connected at the time the order is placed.¹ The particular provision of the Commission’s *UNE Order* that is disputed by the parties reads as follows:

These are the Alabama UNE prices that should be recognized in all ongoing interconnection negotiations as of the effective date of this Order. Further, any amendments required by the language of

¹ *UNE Order* at p. 85.

existing interconnection agreements should be based on the prices established herein as of the effective date noted below.²

The Joint Petitioners maintain that the language cited above clearly mandates that the UNE rates adopted by the Commission were intended to become effective on May 31, 2002, regardless of the provisions of currently effective interconnection agreements wherein different UNE rates may have been incorporated. BellSouth disputes this position as noted in more detail below.

ITC DeltaCom represents that it initially proposed on June 3, 2002, an amendment to the existing BellSouth/ITC DeltaCom interconnection agreement in order to incorporate the Commission's ruling regarding UNE combinations.³ ITC DeltaCom maintains that on June 6, 2002, it renewed its request to amend its existing interconnection agreement with BellSouth to incorporate the "ordinarily combined" standard and the revised UNE rates ordered by the Commission on May 31, 2002. ITC DeltaCom maintains that BellSouth inappropriately refused to implement the "ordinarily combined" provisions and would not implement the UNE rates ordered by the Commission on May 31, 2002 until thirty (30) days from the date of the last signature of the parties on an amendment to the existing agreement entered by the parties.

The Joint Petitioners request that the Commission clarify that its ordered rates were effective as of May 31, 2002. The Joint Petitioners further seek to have the Commission require BellSouth to credit the difference between the existing UNE rates and the lower rates ordered by the Commission, as well as the difference in the charges on those orders the Joint Petitioners were forced to order as resale/special access when they should have been permitted to place orders under the "ordinarily combined" standard.

² *Id.* at p. 91.

³ Joint Petition at p. 1.

B. The BellSouth Response

On August 29, 2002, BellSouth submitted its response to the August 6, 2002 filing of the Joint Petitioners. BellSouth alleges that the interconnection agreements between it and the Joint Petitioners specifically address the manner in which parties are to go about amending their agreements in the event of regulatory rulings like those set forth in the Commission's *UNE Order* of May 31, 2002. BellSouth contends that it has already agreed to amend ITC DeltaCom's interconnection agreement to incorporate the "ordinarily combined" standard and the new UNE rates ordered by the Commission in the *UNE Order*. BellSouth represents that it would agree to do the same for AT&T, TCG and Talk America.

According to BellSouth, the only issue in dispute is whether the amendment to incorporate the new rates will become effective after the parties amend their interconnection agreements to adopt the new rates or whether such amendments should be retroactively effective as of the day of the Commission's *UNE Order*. BellSouth contends that per the agreement of the parties, the new rates ordered by the Commission should become effective only after the parties amend their interconnection agreements to adopt the new rates.

With regard to the specific allegations of ITC DeltaCom, BellSouth maintains that it engaged several discussions with ITC DeltaCom. As a result of those discussions, BellSouth alleges that on July 24, 2002, it proposed an amendment⁴ that not only would allow ITC DeltaCom to get the new rates ordered by the Commission on a going forward basis, but would also expressly acknowledge ITC DeltaCom's right to raise the issue of the effective date with the Commission.⁵ BellSouth contends that DeltaCom refused to accept its offer in that regard

⁴ Attached as Exhibit A to BellSouth's Response.

⁵ BellSouth maintains that the same offer would be available to AT&T, TCG and Talk America; BellSouth Response at p. 3, footnote 3.

and instead chose to file a complaint with the Commission while continuing to operate without any amendment to the parties' interconnection agreement.

BellSouth points out that its interconnection agreement with ITC DeltaCom and virtually all other carriers contains the following provision:

In the event that any effective legislative, regulatory, judicial, or other legal action materially affects any material terms of this agreement, or the ability of ITC DeltaCom or BellSouth to perform any material terms of this agreement, ITC DeltaCom or BellSouth may, on thirty (30) days' written notice require that such terms be renegotiated, and the parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within ninety (90) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in Section 11.⁶

BellSouth maintains that the above language makes it clear that a party requesting an amendment based on regulatory action such as the Commission's May 31, 2002 *UNE Order* must give thirty (30) days notice before the commencement of negotiations over the terms of the amendment. BellSouth further points out that the existing interconnection agreement between BellSouth and ITC DeltaCom provides for a negotiation period of ninety (90) days in order to allow the parties to fairly assess the impact of the regulatory action in question and assess whether Motions for Reconsideration and/or Appeals will be filed. BellSouth asserts that the renegotiation process also allows for necessary billing systems changes to be implemented.

BellSouth further contends that the *UNE Order* does not state that an interconnection agreement amendment incorporating the UNE rates must be deemed effective retroactively to the date of the Order. BellSouth argues that the Commission's UNE Order was not intended by the Commission to nullify or override the relevant terms of Commission-approved interconnection agreements that are already in effect.

⁶ See General Terms and Conditions/Part A ¶16.4.

BellSouth further points out that the hearings preceding the UNE Order did not address the terms of any existing, Commission-approved interconnection agreements and thus the parties were not heard on this issue. BellSouth accordingly argues that it would be unfair for the Commission to interpret its *UNE Order* to require retroactive application of the newly established UNE rates. BellSouth if fact contends that an adoption by the Commission of ITC DeltaCom's interpretation would render the terms of the interconnection agreements which were negotiated by sophisticated parties at arms length and approved by the Commission a dead letter.

C. The Reply of ITC DeltaCom

On September 25, 2002 ITC DeltaCom submitted a Reply to BellSouth's Response. In said Reply, ITC DeltaCom points out that there can be only one lawful rate for the telecommunications services at issue – the rates approved by the Commission on May 31, 2002. ITC DeltaCom further contends that the Commission's May 31, 2002 Order unequivocally establishes that the UNE rates adopted therein were effective on May 31, 2002.

ITC DeltaCom asserts that BellSouth's claim that its interconnection agreement with ITC DeltaCom (and presumably those with all other CLECs in Alabama) must be amended to incorporate the revised UNE rates established by the Commission fails to recognize that the Alabama Public Service Commission approved the interconnection agreements in question and has the authority to modify them. According to ITC DeltaCom, the Commission's May 31, 2002 *UNE Order* expressly declared that the UNE rates established therein were to be effective from May 31, 2002 forward. ITC DeltaCom contends that if the Commission were to adopt BellSouth's position, BellSouth's Alabama interconnection agreements reflecting the ordered rates could be effective at different times for different carriers resulting in unlawful discrimination.⁷

⁷ ITC DeltaCom Reply at p. 4, *Citing Alabama Code* §§37-2-13, 37-8-20, and 37-8-21.

ITC DeltaCom further argues that the provisions of the Commission's *UNE Order* unequivocally establish that the UNE rates adopted in said Order were effective from May 31, 2002 forward. ITC DeltaCom argues that any contractual provision to the contrary must take into account the prescribed rates as of the date specified by the Commission. ITC DeltaCom argues that decades of common carrier jurisprudence dictate that BellSouth is prohibited from "bargaining for" rates other than the "lawful" rates prescribed by the Commission.⁸

II. Findings and Conclusions

Although BellSouth is correct in noting that there was no "true-up" language included in the Commission's May 31, 2002 *UNE Order*, the unequivocal intention of said Order was to make the newly established UNE rates *immediately* available to all CLECs. In fact, the language in the *UNE Order* which is disputed by BellSouth and the Joint Petitioners was included to clearly specify that any amendments to existing interconnection agreements necessitated by the revised UNE rates established in the Commission's *UNE Order* should be retroactively based on the prices established in the *UNE Order* as of May 31, 2002.

We note with particularity that the Commission's decision to require retroactively effective amendments to interconnection agreements to incorporate the revised UNE rates established by the Commission did not constitute retroactive ratemaking. To the contrary, the Commission established that from May 31, 2002, *forward*, the correct UNE rates to be recognized were those established in the *UNE Order* dated and effective on May 31, 2002. The rates adopted by the Commission on May 31, 2002, thus had a purely future application.

We note further that BellSouth's arguments concerning the difficulties typically associated with true-ups were considered when the language of the *UNE Order* was developed.

⁸ ITC DeltaCom Reply at p. 6 *Citing Northern Alabama Ry. Co. v. Phillips*, 126 So. 846, 847 (Ala. 1930).

It was determined, however, that those difficulties were outweighed by the benefits of making the newly established UNE rates available to CLECs and their customers as soon as possible. There did not then, nor does there now, appear to be any need to subject CLECs to unnecessary “negotiations” when there should be no negotiation with respect to the rates and terms established in the Commission’s May 31, 2002 *UNE Order*. In fact, Alabama law makes it clear that there can be only one lawful set of rates with regard to the telecommunications services at issue in this cause – the rates approved by this Commission in its May 31, 2002 *UNE Order*.⁹

The jurisdiction of the Commission with respect to the establishment of rates for telecommunications carriers is clearly established in Alabama law. In fact, the Commission is charged with the duty and responsibility of supervising, regulating and controlling all telecommunications carriers doing business in the state of Alabama in all matters relating to the performance of their public duties and their charges therefore.¹⁰ That duty extends to the prescription and enforcement of rate requirements including the altering or amending of rates and charges from time-to-time, as necessary.¹¹ All rates, charges, classifications, rules and regulations adopted or acted upon by telecommunications carriers which are inconsistent with those prescribed by the Commission when acting within the scope of its authority, or inconsistent with those prescribed by any statute, are unlawful and void.¹²

The Commission was clearly acting within the scope of its authority when the revised UNE rates were made effective from May 31, 2002, forward. As noted previously, the Commission exercised its statutory discretion and determined that the public interest would best

⁹ See *T.R. Miller Mill Company v. Louisville and Nashville R.Co.*, 92 So. 797, 800 (Ala. 1921); accord *Taffet v. Southern Co.*, 967 F. 2d 1491-92, 1494 (11th Cir.), cert denied 506 U.S. 1021 (1992).

¹⁰ *Alabama Code*, §37-2-3.

¹¹ *Id.*

¹² *Id.*

be served by the immediate effectiveness of the revised UNE rates adopted on May 31, 2002.¹³ BellSouth was from that date forward statutorily precluded from “charging, demanding, collecting or receiving a greater or less or different compensation” for its UNEs other than that established by the Commission on May 31, 2002.¹⁴ That statutory concept is further entrenched in the Commission’s Telephone Rule T-12 (A)(4) which establishes that “a telephone utility shall not charge, demand, collect or receive a greater or lesser or different compensation for regulated telecommunications services than the rates, fares and charges specified in the tariffs in effect at the time, ...except where otherwise authorized by a vote of the Commission.”

Alabama law is also clear with regard to the effective date of Commission orders. In particular, Alabama Code §37-1-100 specifies that orders of the Commission “shall become effective twenty (20) days after the service thereof” unless the Commission prescribes “a different time.” In this instance, the Commission clearly prescribed May 31, 2002 as the effective date of the *UNE Order* and the rates established therein.

Having discussed at length the intentions of the Commission with regard to the effective date of the revised UNE rates established in the Commission’s *UNE Order* of May 31, 2002, and the clear, legal authority of the Commission to implement the revised UNE rates on May 31, 2002, we now assess whether there are circumstances present which mitigate against strict enforcement of the May 31, 2002 effective date of the *UNE Order*. We have reviewed BellSouth’s arguments in this regard and find that the only argument raised by BellSouth which is meritorious is BellSouth’s claim that its billing systems were not immediately capable of processing the revised UNE rates established on May 31, 2002. BellSouth’s contention regarding its inability to immediately bill the new UNE rates is further aided by the fact that the

¹³ *Alabama Code* §37-2-12

¹⁴ *Alabama Code* §37-3-13; See *Northern Alabama Ry. Co. v. Phillips*. 126 So. 846, 847 (Ala. 1930).

Commission departed in this instance from its normal policy of requiring revised tariffs prior to implementing rate changes.¹⁵

Based on the foregoing considerations, the Commission herein concludes that the most equitable resolution of the dispute at hand is to enforce the revised UNE rates established by the Commission from the date on which BellSouth's first made a filing publicly acknowledging the applicability of those rates. That date is June 18, 2002, the day on which BellSouth filed its revised Statement of Generally Available Terms and Conditions ("SGAT") with the Commission. More particularly, BellSouth's SGAT filed on June 18, 2002 included an "Attachment A" which recognized the UNE rates established by the Commission in its May 31, 2002 Order and indicated that those rates were generally available to CLECs in Alabama. Given BellSouth's representations in that regard, we find that the revised UNE rates established in the Commission's May 31, 2002 *UNE Order* should be assessed from June 18, 2002, forward.¹⁶ The UNE rates assessed by BellSouth should accordingly be trued up to that point. Any amendments to existing interconnection agreements which are entered to incorporate the provisions of the Commission's May 31, 2002 *UNE Order* should also date back to June 18, 2002.

IT IS, THEREFORE, ORDERED BY THE COMMISSION, That consistent with the discussions set forth above, June 18, 2002 shall be the date from which the UNE rates assessed by BellSouth will be trued-up to the rates established by the Commission in its May 31, 2002 *UNE Order*. Said true up shall also extend to all orders the Joint Petitioners were

¹⁵ As noted previously, the Commission determined that the public interest would best be served by departing from the normal policy of requiring revised "tariffs" to be filed. Part of the reasoning for this departure related to the fact that UNE rates are not necessarily reflected in a single tariff filing.

¹⁶ We note that it would have been discriminatory for BellSouth to have made the revised UNE rates established in the Commission's May 31, 2002, *UNE Order* available to CLECs operating without interconnection agreements on June 18, 2002, while at the same time requiring CLECs with existing interconnection agreements to "renegotiate" their existing agreements in order to avail themselves of the revised UNE rates. See *Alabama Code* § 37-3-13.

DOCKET 27821 - #10

forced to order as resale/special access when they should have been permitted to place such orders under the "ordinarily combined" standard.

IT IS FURTHER ORDERED BY THE COMMISSION, That jurisdiction in this cause is hereby retained for the issuance of any further order or orders as may appear to be just and reasonable in the premises.

IT IS FURTHER ORDERED, That this Order shall be effective as of the date hereof.

DONE at Montgomery, Alabama, this 18th day of October, 2002.

ALABAMA PUBLIC SERVICE COMMISSION

Jim Sullivan, President

Jan Cook, Commissioner

George C. Wallace, Jr., Commissioner

ATTEST: A True Copy

Walter L. Thomas, Jr., Secretary