KPSC 2004-00235
BellSouth Telecommunications, Inc.'s Responses to the Commission Staff's First Data Requests dated August 10, 2004

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BELLSOUTH

BellSouth Telecommunications, Inc.
601 W. Chestnut Street
Room 407
Louisville, KY 40203

Dorothy.Chambers@BellSouth.com

Dorothy J. Chambers
General Counsel/Kentucky

502 582 8219
Fax 502 582 1573

August 30, 2004

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

Re: Adoption of Interconnection Agreement Provision Between BellSouth Telecommunications, Inc. and Cinergy Communications Company by SouthEast Telephone, Inc.
PSC 2004-00235

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case is the original and eight (8) copies of BellSouth Telecommunications, Inc.'s Responses to the Commission Staff's First Data Requests dated August 10, 2004.

Sincerely,

Dorothy J. Chambers

Enclosures

cc: Parties of Record

547907

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by mailing a copy thereof, this 30th day of August, 2004.

Hon. Jonathon N. Amlung
Attorney at Law
1000 Republic Building
429 W. Muhammad Ali Boulevard
Louisville, KY 40202

Darrell Maynard
SouthEast Telephone, Inc.
106 Power Drive
P.O. Box 1001
Pikeville, KY 41502-1001

Robert A. Bye
Corporate Counsel
Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214

Dorothy J. Chambers

REQUEST: An analysis of the effect of the recent Federal Communications Commission ("FCC") Report and Order regarding 47 U.S.C. § 252(i). On July 13, 2004, the FCC released "Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers," CC Docket No. 01-338, Second Report and Order (FCC 04-164). Does this FCC ruling affect SouthEast's request filed June 8, 2004 in this proceeding?

RESPONSE: This FCC ruling only strengthens BellSouth's position that SouthEast's June 8, 2004 request for adoption of the dispute resolution provision of another CLEC agreement must be denied. Under Section 252(i) of the Telecommunications Act of 1996,[1] '[a] local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section . . . to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement."[2] Even prior to July 2004 when the FCC had interpreted Section 252(i) to allow a requesting carrier to "pick-and-choose" any individual interconnection, service, or network element contained in another carrier's interconnection agreement, the other requirements of the pick-and-choose rule, FCC Rule 51.809,[3] were required to be satisfied. SouthEast's request to adopt the dispute resolution provision of another carrier's (Cinergy) interconnection agreement failed to satisfy even the FCC's **now eliminated** pick-and-choose rule in one material respect: (i) SouthEast had not requested to adopt an interconnection, service, or network element provision.[4]

In July 2004, the FCC revised its interpretation of Section 252(i), as implemented in Rule 51.809, by replacing the pick-and-choose rule with

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1 47 U.S.C. § 252(i)

2 *Id.*

3 47 C.F.R. § 51.809

4 *Id.* at subsection (a). The now eliminated pick-and-choose rule provided in relevant part that: "[a]n incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier **any individual interconnection, service, or network element arrangement** contained in any agreement to which it is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement." (emphasis added)

RESPONSES (CONT.):

an all-or-nothing rule that requires a requesting carrier to adopt in its entirety the rates, terms, and conditions contained in another carrier's interconnection agreement.[5] In revising Rule 51.809, the Commission concluded that "the burdens of the current pick-and-choose rule outweigh its benefits."[6] Specifically, the Commission found that the existing pick-and-choose rule "fails to promote the meaningful, give-and-take negotiations envisioned by the Act."[7] Accordingly, the Commission eliminated the pick-and-choose rule and replaced it with an all-or-nothing rule under which "a requesting carrier may only adopt an effective interconnection agreement in its entirety, taking all rates, terms, and conditions of the adopted agreement."[8] The FCC went on to state that "the new all-or-nothing rule will apply to all effective interconnection agreements, including those approved and in effect before the date the new rule goes into effect. As of August 23, 2004, the effective date of this new rule, the pick-and-choose rule no longer applies to any interconnection agreement."[9] The FCC's new Rule 51.809(a) provides in relevant part as follows: "An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act upon the same rates, terms, and conditions as those provided in the agreement." Although under the new FCC rule, carriers may adopt more than interconnection arrangements, services and network elements, they now must adopt the **entire** agreement of another carrier. Thus, without question, SouthEast's request to adopt a single provision (dispute resolution provision) of another carrier's interconnection agreement failed to comply with the requirements of the FCC's old Rule 51.809(a) and also fails to comply with the requirements of the FCC's new Rule 51.809(a).

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5 Second Report and Order, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* CC Docket No. 01-338, FCC 04-164 (rel. July 13, 2004).

6 *Id.* at ¶ 10.

7 *Id.*

8 *Id.*

9 *Id.*

REQUEST: A group of competitive local exchange carriers has requested an emergency stay from the FCC pending a judicial review of the FCC ruling. What effect, if any, will the request for a stay have on the outcome of this proceeding?

RESPONSE: On August 26, 2004, the United States Court of Appeals for the Ninth Circuit denied the emergency stay request filed by certain CLECs including New Edge Networks. Even if an emergency stay had been granted, and the old pick-and-choose rule reinstated, SouthEast's request still would be inappropriate and should be denied as it does not comply with the old pick-and-choose rule. Thus, the request for a stay has no effect on the outcome of this proceeding. See also the response to prior Data Request.

REQUEST: List each option available to the Commission for the disposition of this proceeding and comment on same.

RESPONSE: The Commission's only supportable option is to deny SouthEast's request. Given the FCC's now effective "all or nothing" rule, the Commission should deny SouthEast's adoption request to adopt a single provisions of another interconnection agreement. Even under the now expired "pick and choose" rule, the provision SouthEast is requesting to adopt is not related to the provisioning of interconnection, services or network elements. See Response to First Data Request. Adoptions pursuant to 47 USC § 252(i) are limited to network elements, services, and interconnection rates, terms and conditions and do not apply to other aspects of the Interconnection Agreement. The FCC's prior interpretation of 47 USC § 252(i) only required an ILEC to make available "any interconnection, service, or network element" under the same terms and conditions as the original Interconnection Agreement. The basis for this position is:

a) Network elements are defined in 47 USC § 3 to mean a "facility or equipment used in the provision of a telecommunication service. "

b) Per 47 USC § 251(c)(2), Interconnection is "the duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network for the transmission and routing of telephone exchange service and exchange access...."

c) Although the term "service" is not specifically defined in 47 USC various terms have "service" included within other terms. Each of these terms, such as telecommunication service and telephone exchange service, refer to offering of telecommunications directly to the public, via some sort of telecommunications equipment. This term would also include resale, collocation, number portability, access to rights of way and other obligations set forth in 47 USC §251, as well as other services BellSouth makes available under the interconnection agreement.

RESPONSE (CONT.):

Therefore, if a CLEC requests to adopt only a term or condition that does not meet one of the above definitions, this Commission should conclude such term or condition is not available for adoption. Further, in the FCC's recent order regarding interim unbundling rules, the FCC held that CLECs may not opt into the contract provisions "frozen" in place by the interim rules.[10] Thus, even if SouthEast's adoption request complied with applicable FCC rules (which is does not), the FCC interim rules appear to prevent the adoption request.

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[10] Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 (rel. August 20, 2004) at ¶ 22..