COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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AUG 30 2004

PUBLIC SERVICE COMMISSION

In the Matter of:

ADOPTION OF INTERCONNECTION AGREEMENT PROVISION BETWEEN BELLSOUTH TELECOMMINICATIONS, INC. AND CINGERGY COMMUNICATIONS COMPANY BY SOUTHEAST TELEPHONE, INC.	)	**CASE NO. 2004-00235**

SOUTHEAST TELEPHONE, INC., RESPONSE TO COMMISSION STAFF DATA REQUESTS

Comes now SouthEast Telephone, Inc. ("SouthEast"), by and through counsel, and for its response to the Commission Staff Data Requests propounded on August 10, 2004, states as follows:

REQUEST NO. 1: 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:

Yes, the FCC's ruling likely affects SouthEast's request in this proceeding. Whether it does depends upon this Commission's interpretation as to whether the FCC's ruling is intended to have retroactive application.

SouthEast filed its Notice of Intent to Adopt Certain Provisions of an Interconnection Agreement between BellSouth Telecommunications, Inc. ("BellSouth") and Cinergy Communications Company ("Cinergy") on June 8, 2004. SouthEast filed this Notice pursuant to Section 252(i) of the 1996 Act,[1] which grants competitive local exchange carriers ("CLECs") the right to choose discrete portions of an interconnection agreement ("ICA") that had been approved by a State Commission, and incorporate them into another ICA. This statute was mirrored by FCC Rule 51.809.[2] Both rules are silent as to the procedure to be used when a CLEC elects to "opt-in" to a certain provision of an existing ICA.

Based on a recent telephone conference with Dorothy Chambers of BellSouth and Amy Dougherty of the PSC, it appears that the Commission Staff believes the time limitation set forth in the 1996 Act for the Commission to arbitrate a dispute between

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[1] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, *codified* at 47 U.S.C. §151 *et seq.* (West 2001)
[2] 47 C.F.R. §51.809

carriers in negotiating ICAs applies. SouthEast filed its Notice with the Commission to make the Commission aware of its intent to adopt the provision of the ICA mentioned herein. SouthEast did not intend to enter into a full-scale arbitration of its existing ICA with BellSouth. Thus, SouthEast believes that the time limitations set forth in the 1996 Act should not apply to this case or, in the alternative, that the time limitations are only applicable to the limited issue at hand.

At the time of SouthEast's notice filing, the so-called "pick and choose" rule was in effect. The FCC's order seeks to eliminate this rule in favor of the "all-or-nothing" rule. By its terms, the FCC's order became effective August 23, 2004, and will apply immediately to all existing ICAs and all pending or future negotiations.

BellSouth has refused to permit SouthEast to opt-in to certain provisions of its ICA with Cinergy. This Commission has not yet ruled on that refusal. If this Commission determines that the FCC's ruling is not intended to have retroactive application, then the ruling will not affect SouthEast's notice in this case because it was filed well in advance of the date of the order. If, on the other hand, the Commission determines that the FCC's ruling is intended to either have retroactive application, or it is intended to apply to pending cases such as the present one, then the FCC's ruling would certainly have an effect on SouthEast's request in this proceeding.

It is SouthEast's position that its notice of intent was filed in good faith at a time when the "pick and choose" rules were still in effect. The rule was not changed until after SouthEast filed its notice. BellSouth should not gain from its refusal to comply with its statutorily mandated duties under to Section 252(i). Nonetheless, this matter is still

pending, and it appears that the FCC intended its ruling to apply to all pending and future ICA matters.

REQUEST NO. 2: 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 stay have on the outcome of this proceeding?

RESPONSE:

The request for stay, if granted, will have a significant impact on the outcome of this proceeding. The request for stay asked that the FCC preserve the *status quo* in ICA negotiations pending judicial review. The *status quo*, of course, is the "pick and choose" rule. If the stay is granted, the existing rules would be preserved as contemplated by the 1996 Act and SouthEast would then be permitted to opt-in to the ICA provision it requested in its notice filed herein. If the stay is denied, then the FCC's recent Order would be effective to eliminate the "opt-in" rule unless a Court of competent jurisdiction either grants a judicially-mandated stay or strikes down the FCC's Order.

The Ninth Circuit Court of Appeals apparently agreed to hear a recent challenge filed by New Edge Networks to the FCC's Order. If the Court strikes down the FCC Order as contravening the clear mandates of the 1996 Act, then the rule intended by Congress, i.e., the "opt-in" rule, will once again be in effect.

It is noteworthy that the FCC has essentially re-written Section 252(i) to suit an agenda that was clearly not contemplated by the 1996 Act. Congress deliberately drafted Section 252(i) to provide competing carriers with access to discrete portions of different ICAs. The FCC has ignored the plain language of Section 252(i), and has essentially re-written it for its own purposes. This seems clearly beyond its authority and increases the likelihood that the decision will be judicially overturned.

REQUEST NO. 3: List each option available to the Commission for the disposition of this proceeding and comment on same.

RESPONSE:

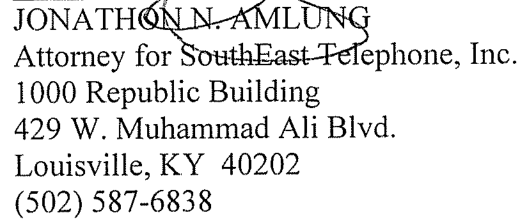
(1) One option available to the Commission and the parties is to hold this case in abeyance pending the outcome of the request for judicial review mentioned herein. As discussed herein, this case was filed as essentially a notification to the Commission that SouthEast intended to opt-into one discreet provision of an existing ICA between BellSouth and Cinergy. SouthEast did not intend to have the Commission arbitrate a full interconnection agreement between the parties. Assuming, however, that the Commission intends to apply the time limits set forth in the 1996 Act to only the limited issues posed by the present case, SouthEast suggests that the parties and Commission agree to an indefinite period of abeyance for this case until (1) a stay is granted or (2) judicial review of the FCC's Order is complete.

(2) The Commission may also dismiss this case. For obvious reasons, SouthEast objects to a dismissal given the current uncertainty as to the final outcome of not only the stay, but also any judicial review.

(3) The Commission may also enter an Order compelling BellSouth to permit SouthEast to amend its ICA in accordance with the Notice filed herein.

Given the clear, but apparently erroneous, language of the FCC in its Order referenced herein SouthEast suggests that this case should be held in abeyance pending finality of the FCC's Order.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, this the 30th day of August, 2004, to:

Hon. Dorothy Chambers
BellSouth Telecommunications, Inc.
601 W. Chestnut Street, Room 410
P.O. Box 32410
Louisville, KY 40232

JONATHON N. AMLUNG