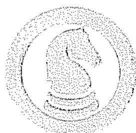

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June 2, 2008

RECEIVED
JUN 02 2008
PUBLIC SERVICE
COMMISSION

Ms. Stephanie L. Stumbo
Executive Director
Public Service Commission
P.O. Box 615
Frankfort, KY 40602

***RE:*** ***BellSouth Telecommunication, Inc.'s Notice of Intent to Disconnect SouthEast Telephone, Inc. for Non-Payment***
***Case No. 2005-00519***
***And***
***SouthEast Telephone, Inc. v. BellSouth Telecommunications, Inc.***
***Case No. 2005-00533***

Dear Ms. Stumbo:

Please find enclosed an original and ten copies of Southeast Telephone Inc.'s Response to AT&T Kentucky's Motion for Rehearing and/or Reconsideration in the above-referenced matters.

Please acknowledge receipt of this filing by placing your file-stamp on the extra copy and returning to me via our runner.

Very truly yours,

STOLL KEENON OGDEN PLLC

Deborah T. Eversole

Deborah T. Eversole

Enclosure

cc: Parties of Record

101164.117856/509170.1

RECEIVED
JUN 02 2008
PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

| | | |
|---|---|---|
| BELLSOUTH TELECOMMUNICATIONS, INC'S NOTICE OF INTENT TO DISCONNECT SOUTHEAST TELEPHONE, INC. FOR NON-PAYMENT | ) | CASE NO. 2005-00519 |

And

| | | |
|---|---|---|
| SOUTHEAST TELEPHONE, INC. | ) | |
| COMPLAINANT | ) | CASE NO. 2005-00533 |
| vs. | ) | |
| BELLSOUTH TELECOMMUNICATIONS, INC. | ) | |
| DEFENDANT | ) | |

**RESPONSE OF SOUTHEAST TELEPHONE, INC. TO AT&T KENTUCKY'S MOTION FOR REHEARING AND/OR RECONSIDERATION**

SouthEast Telephone, Inc., by counsel, for its Response to AT&T Kentucky's Motion for Rehearing and/or Reconsideration ("AT&T Motion") of the Commission's May 2, 2008 Order (the "Order") in this matter, states as follows:

## INTRODUCTION

The Commission's rehearing statute permits a party, subsequent to issuance of a Final Order, to "offer additional evidence that could not with reasonable diligence have been offered on the former hearing." KRS 278.400. AT&T offers absolutely nothing in its Motion that it has not offered repeatedly. Instead, it argues once again that it is entitled to "damages" from

SouthEast calculated by its resale rate based on a "breach of contract" theory. There is no need to rehash this issue yet again. However, if the Commission does reconsider its holding that it lacks jurisdiction to enter a determination regarding "damages, if any," it should either [1] follow the clear and reasonable precedent set by the Georgia District Court *BellSouth Telecommunications, Inc. v. Georgia Public Service Comm'n, et al.,* Nos. 1:06-CV-00162CC and 1:06-CV-00972-CC (N.D. Ga. January 3, 2008) (the "Georgia Order"),[1] and find that no damages should be awarded as the court did not find that the Commission-set rate was unreasonable; or [2] hold that, on a "make-whole" theory, AT&T may receive damages *if* (and only if) it can demonstrate actual loss in that its cost to provide the elements exceeded the Commission-ordered payments it received from SouthEast.

## BACKGROUND

In 2005 SouthEast asserted its right, to which AT&T pays lip service, to negotiate reasonable rates for Section 271 checklist elements. When negotiations were at an impasse, and AT&T threatened to terminate SouthEast's service, the Commission entered its Order prohibiting termination, recognizing SouthEast's right to Section 271 checklist elements and setting TELRIC plus $1 as an interim rate for those elements SouthEast ordered from AT&T Kentucky. The TELRIC plus $1 rates were to remain in effect until a new "prospective" rate had been set [August 16, 2006 Order at 12]. Southeast promptly complied with the Order by paying AT&T the Commission-ordered rate. AT&T, in the meantime, refused to provide SouthEast with access to its network element ordering system, forcing it to place orders through the resale system.

AT&T also sought judicial review. In *BellSouth Telecommunications, Inc. v. Kentucky Public Service Comm'n, et al.,* C.A. No. 06-65-KKC (E.D. Ky., September 18, 2007) (the

[1] The decision is attached hereto for the Commission's convenience.

"Remand Order"), the federal court held, on narrow jurisdictional grounds, that the Commission has no authority to act under Section 271. The Court nevertheless held that, "as a BOC [Bell Operating Company]," AT&T "is subject to § 271 duties" [Remand Order, Slip. Op. at 26]. The Court did not grant AT&T's request that it receive damages measured by its resale rate. Instead, the Court declared that it "will not address the issue of damages," but would remand the case to the Commission to determine what "damages, ***if any***," are "due as a result of the unlawful orders." [Remand Order, Slip. Op. at 21 (emphasis added)].

After numerous briefings and an informal conference (during which AT&T repeatedly argued to the Commission that, as SouthEast ordered resale service, it should be awarded damages based on its resale rate), the Commission issued its Order on May 2, 2008. The Commission held that it lacks jurisdiction to award damages in this case and that, since SouthEast ordered Section 271 checklist items and not resale service, AT&T's resale rate does not apply. On May 22, AT&T filed its Motion for Rehearing and/or Reconsideration, arguing once again that it is entitled to its resale rate as a measure of damages.

AT&T offers nothing in its Motion that it has not already argued. As the Commission has now found – at least twice - SouthEast did not "breach" any contract for resale service. Instead, it ordered network elements and paid the rate set by the Commission. AT&T's refusal to provide the proper ordering system despite the Commission's Orders does not entitle it to recast this case as one in which SouthEast violated a contract. Neither the District Court nor the Commission has ever indicated that this is a breach of contract case. The issue is Commission jurisdiction, not breach of contract. AT&T's repeated arguments to the contrary should be, once again, rejected.

## ARGUMENT

### I. AT&T OFFERS NOTHING IN ITS MOTION THAT "COULD NOT WITH REASONABLE DILIGENCE HAVE BEEN OFFERED ON THE FORMER HEARING."

KRS 278.400 exists for the purpose of allowing a party, subsequent to issuance of a Final Order, to "offer additional evidence that could not with reasonable diligence have been offered on the former hearing." KRS 278.400. AT&T offers absolutely nothing in its Motion that it has not offered repeatedly. Instead, it argues once again that it is entitled to "damages" from SouthEast calculated by its resale rate based on a "breach of contract" theory.

This is at least the *sixth time* that AT&T has made this same argument, counting the time it made that argument to the United States District Court. The court did not adopt the theory. Instead, it remanded the damages issue to the Commission, directing it to "determine the amount of damages, ***if any,*** owed as a result of the unlawful orders" [Remand Order, Slip. Op. at 26-27]/ The court did not find that SouthEast had breached any contract. The court did not find that AT&T had no obligation under Section 271 to provide the elements SouthEast ordered. It found only that the Commission had erred in exercising jurisdiction under Section 271 of the Telecommunications Act.

Sent back to the Commission, AT&T Kentucky filed its first Commission brief presenting its resale/breach of contract theory on November 9, 2007. It filed its second brief in support of its resale/breach of contract theory on December 12, 2007. It presented its resale/breach of contract theory yet again on December 19, 2007 at the Informal Conference. On January 25, 2008, it filed a third brief in support of its resale/breach of contract theory. Now it has filed a Motion for Rehearing and/or Reconsideration in which, for the *fifth time,* it presents to the Commission that same shopworn breach of contract argument. The Commission found, in its

Order, at 7, that AT&T's claim for damages cannot be "categorized as a mere breach of contract by SouthEast," finding as a matter of fact that SouthEast had "asserted from the beginning" that it did not wish to buy resale service, but instead wished to serve its customers by means of network elements [Order at 6]. The Commission had previously made this same finding in its August 16, 2006 Order, at 11-12, and that finding was never disturbed by the District Court. The Commission was, and is, correct. This question should be retired.

SouthEast did not seek to obtain resale service from AT&T and then simply refuse to pay the resale rate. SouthEast sought 271 elements from AT&T and, even when the Commission ordered AT&T to provide them, it refused to do so, making only its resale ordering system available and issuing bills for a service SouthEast did not want – apparently so that it could later claim "breach of contract."

Ironically, whether or not SouthEast is entitled to the 271 elements it ordered from AT&T *is not, and has never been, at issue.* All parties, the Commission, and District Court, [Remand Order, Slip. Op. at 26], agree that AT&T is required to provide 271 elements to its competitors. The only issue ruled upon by the District Court was whether a State commission has authority under Section 271 to require a Bell Operating Company to comply with its obvious and unquestioned obligations under that section.

The Court did not rule on the reasonableness of the interim rate the Commission had set. The Court did not hold that, in paying that rate, SouthEast had breached a contract. The Court did not hold that SouthEast's scheme was to order resale service under false pretenses and refuse to pay for it. The Court did not hold that SouthEast is not entitled to obtain 271 elements from

AT&T. Finally, the Court did not even hold that AT&T is entitled to damages, although it acknowledged the possibility.[2]

This most emphatically is not, and never has been, a breach of contract case. Pursuant to KRS 278.400, AT&T is not entitled to have this same argument considered yet again.

## II. IF THE COMMISSION RECONSIDERS ITS JURISDICTIONAL RULING, IT SHOULD FOLLOW THE GEORGIA ORDER OR HOLD THAT NO DAMAGES SHOULD BE AWARDED UNLESS AT&T CAN SHOW ACTUAL OUT-OF-POCKET COSTS.

There is clear irony here. Having argued strenuously to the Court that the Commission lacks jurisdiction to set rates under Section 271, AT&T now just as strenuously argues that the Commission *does* have jurisdiction to award it damages. But, as the Court held the Commission has no jurisdiction to set rates under Section 271, retroactively or otherwise, the question has always been *"How?"*

AT&T ignores the conundrum. Consequently, the case law it offers is not on point. In *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223 (1965), for example, the Supreme Court merely upheld an order of the Federal Power Commission - now the Federal Energy Regulatory Commission ("FERC") - requiring gas companies to refund excessive rates previously collected. There was absolutely no question that the agency had jurisdiction over the rate at issue: the only question was when the rate could take effect. The same is true in *Verizon Telephone Companies v. Federal Communications Comm'n,* 269 F.3d 1098 (D.C. Cir. 2001).

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[2] AT&T Kentucky has never reconciled its frequently-reiterated contention that the Court *required* a damage award with the Court's actual words. The Court said, no fewer than three times, that the Commission is to determine "damages, ***if any***" [Remand Order at 21 and 27 (emphasis added)]. These crucial words clearly indicate the Court's conclusion that AT&T may not have sustained any damages at all. This is particularly significant since the Court had the AT&T Kentucky resale theory before it, which clearly results in alleged "damages" in the *millions* of dollars. The Court neither adopted the resale theory nor confirmed that AT&T was entitled to a damages award.

The issue was whether the FCC had erred in classifying independent payphone providers ("IPPs") as "end users," thereby allowing local exchange carriers to assess end user charges upon them. No one had questioned the FCC's jurisdiction over the issue. In *Exxon Co., U.S.A. v. Federal Energy Regulatory Comm'n,* 182 F.3d 30 (D.C.Cir. 1999), once again, FERC's *jurisdiction* to order a methodology for valuation of petroleum for rate purposes was not at issue. These cases teach that the agency with jurisdiction over the rate at issue may take retroactive action to ensure that fair, just and reasonable rates prevail. They do not even begin to address the issues presented to this Commission by the Remand Order. They certainly do not hold that any utility customer can be forced to pay for a service it did not order because the agency setting the rate for the service it *did* order has jurisdiction only over the rate it did *not* order.

There are, however, two judicial opinions that are directly relevant here: The first, of course, is the Eastern District of Kentucky's Remand Order. The second is the Georgia Order, in which the Court held that *no* damages should be awarded because the court ruled only on Section 271 jurisdiction and not on the reasonableness of the rate set by the Georgia Commission.

The Georgia Order makes perfect sense. The court (like the Eastern District in Kentucky) held *only* that the State Commission that had set rates for 271 elements had no jurisdiction to do so. AT&T Georgia, like AT&T Kentucky, had asked the Court to award it damages based on its resale rate. The Court refused. In fact, it refused to award any damages to AT&T at all. Instead, the court explained that its holding was a *jurisdictional* determination only that had nothing whatsoever to do with the reasonableness of the Section 271 rate set by the Georgia Commission. Under such circumstances, no damages are due:

> Although the Court finds that the PSC acted unlawfully in the orders under review, the Court concludes that BellSouth should not be awarded damages in this case. The Court denies BellSouth's request to be made whole for the difference between the § 271 rates the PSC set and the rates that BellSouth would have

> charged in the absence of the PSC's orders. As stated by the PSC at argument, ***this case involves the agency's authority to set rates, not whether a particular rate is just and reasonable.*** Thus, although no party may require BellSouth to provide service at the PSC-established rates from the date of this Order, the Court does not require the PSC to reset the rates it authorized BellSouth to charge prior to the date of this Order. ***From the date of the PSC's orders through the date of this Order, BellSouth is entitled to recover the rates set by the PSC.***

Georgia Order, Slip Op. at 16 (emphasis added).

This rationale applies just as surely here as it did in Georgia. The Georgia Court made its decision based on Section 271 jurisdiction. The Kentucky Court made its decision based on Section 271 jurisdiction. The Georgia Court made no finding with regard to the reasonableness of the PSC-ordered rates. The Kentucky Court made no finding with regard to the reasonableness of the PSC-ordered rates. Instead, in stating that it would not consider the issue of damages but would remand the case to the Commission for a determination of "damages, if any," the Kentucky Court indicated that it was not directing that damages be awarded unless the *Commission* found that they should be.

AT&T Kentucky has tried previously to distinguish the Kentucky and Georgia cases by arguing in its January 25 Brief at 14-15 that AT&T Georgia had actually included the Section 271 rates that the Georgia Commission established into its contracts with competitors. The argument is the very definition of chutzpah, establishing only that AT&T complied with the Georgia Commission's Orders while violating the Orders of the Kentucky Commission, and now seeks an advantage in Kentucky based on that very violation. In any event, the alleged "distinction" is irrelevant: the Georgia Court did not base its decision not to award damages on the status of anyone's contract. The word "contract" does not appear anywhere in the court's discussion of damages. Instead, the court's rationale is couched solely in terms of the "§ 271 rates the PSC set" [Georgia Order, Slip Op. at 16] rather than, for example, the "§ 271 rates in

the contracts." Further, as in Kentucky, it is the Georgia Commission's *orders* that were declared "unlawful" [Georgia Order, Slip Op. at 17]. The question, as in Kentucky, was merely a question of Section 271 jurisdiction. Both courts declared that the state commissions do not have it. Neither court addressed the reasonableness of the rate. For damages purposes, there is simply no distinction between the two courts' holdings.

AT&T now claims that the Commission must correct the "harm" done by its previous Orders [AT&T Motion at 4]. AT&T begs the question. There is no evidence that any "harm" was done. AT&T cannot claim it has been "harmed" by providing 271 elements that it is obligated to provide simply because the wrong agency ordered it to provide them. Nor has anyone anywhere found that the rate AT&T was paid for those elements was unreasonable. The Georgia Court certainly did not find that some "harm" had occurred when it refused to award damages against Georgia's competing carriers who had paid the Section 271 rates the Georgia Commission had set. AT&T also claims that the Commission's Order gives "legal effect to an unlawful order." Again, there certainly is no more "legal effect given to an unlawful order" by this Commission's ruling than by the Georgia Court's order. As the Georgia Court ruled, ***no one has found that there is anything wrong with the rate the Commission set***. Accordingly, there is no need to disturb it retroactively.

SouthEast has attempted, in response to the Commission's request, to apply the law of damages and general utility law to the problem of finding a reasonable means of computing "damages, if any," pursuant to the court's order. Those methods are fully described in SouthEast's prior briefs in this case. One such method is to attempt to reconstruct an imaginary history to ascertain what *would* have happened, and how high AT&T Kentucky's profits for 271 elements *would* have been, if the Commission had not "acted" under Section 271. But such a

reconstruction is, as a practical matter, impossible, and an attempt to produce one would result in such highly speculative results as to be unworkable and improper under Kentucky law. AT&T continues to insist that awarding it its resale rate "would place the parties in the position they would have been in absent the Commission's past legal error." [AT&T Motion at 5]. That is simply wrong. Computing AT&T's alleged "damages" by its resale rate is the one reconstruction of the past that can *certainly* be discarded, for SouthEast would not have reacted to the Commission's refusal to act by becoming a reseller. That option is not consistent with SouthEast's mission to provide new, cutting-edge telecommunications services and broadband in rural Kentucky. In fact, no one can say with any certainty what the rate over all those months would have been if the Commission had refused to act on SouthEast's petition. It can reasonably be surmised that SouthEast would have gone to the FCC long ago if the Commission had refused to act, but no one knows what the FCC would have done or when it would have done it. It can also reasonably be surmised that SouthEast would have adjusted its business plan to account for the changed circumstances that would have existed if the Commission had refused to act. Instead, it acted in reliance upon the Commission's Orders.

Simply put, it is impossible to "place the parties in the position they would have been in" if the Commission had not entered its Orders. Toothpaste cannot be put back into the tube.

There is, however, a more realistic option to discover actual and non-speculative damages: to conduct an inquiry to determine whether AT&T Kentucky suffered *actual out of pocket losses* as a result of the Commission's having "acted" under Section 271. SouthEast has consistently stated that it does not object to allowing AT&T to attempt to make such a showing.

Should the Commission reconsider its holding on the jurisdictional issue, and conclude that it may rule on damages, SouthEast respectfully requests the Commission either to follow the

Georgia Court's decision or to conduct an inquiry to determine whether AT&T has suffered actual out-of-pocket loss as a result of the Commission's having acted under Section 271.

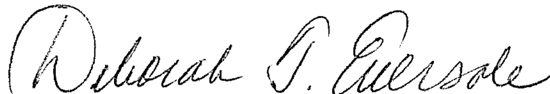
## CONCLUSION

This is not a breach of contract case. Neither the Court nor this Commission has ever found that it is. It is a case concerning the Commission's interim, price-setting action to prevent AT&T Kentucky from terminating service to SouthEast as a result of the parties' inability to agree on a contract price for 271 checklist elements. No contract price existed, although *SouthEast's right to 271 elements clearly did.* The Commission has found as fact, at least twice, that SouthEast ordered Section 271 elements, not resale service. AT&T's Motion, in which it argues again that SouthEast ordered resale service and simply refused to pay for it, thereby breaching its contract, offers nothing new on the subject. At this point, it is unimaginable that there could be anything new to offer. KRS 278.400 forecloses AT&T's effort to have this same tired issue considered yet again.

For the foregoing reasons, and other reasons stated in its previous filings, SouthEast respectfully requests that the Commission deny AT&T's Motion to be awarded its resale rate as a measure of damages. In the alternative, if the Commission should reconsider and conclude that it has jurisdiction to enter a damages determination, SouthEast asks the Commission to rule that,

unless AT&T comes forward with evidence to demonstrate that its cost exceeded the payments it received, it has sustained no damages to which it is entitled pursuant to the Remand Order.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I hereby certify that this 2nd day of June, 2008, a copy of the foregoing was served, by U.S. Mail, postage prepaid, upon Mary K. Keyer, 601 W. Chestnut Street, Room 407, P.O. Box 32410, Louisville, Kentucky, 40203, and Robert Culpepper, Suite 4300, 675 W. Peachtree St., NW, Atlanta, Georgia, 30375.

Deborah T. Eversole

FILED IN CLERK'S OFFICE
U.S.D.C. Atlanta

JAN 3 2008

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE NORTHERN DISTRICT OF GEORGIA**

JAMES N. HATTEN, Clerk
By: Deputy Clerk

BELLSOUTH TELECOMMUNICATIONS, INC.,
Plaintiff,
v.
The GEORGIA PUBLIC SERVICE COMMISSION,
*et al.*,
Defendants.

No. 1:06-CV-00162-CC

COMPETITIVE CARRIERS OF THE SOUTH, INC.,
*et al.*,
Plaintiffs,
v.
The GEORGIA PUBLIC SERVICE COMMISSION,
*et al.*,
Defendants.

No. 1:06-CV-00972-CC

**ORDER**

The Court has consolidated these two cases for purposes of hearing and decision because they both turn on a common question of law – namely, whether the Georgia Public Service Commission ("PSC") has authority to implement 47 U.S.C. § 271, a federal statute that imposes conditions on Bell operating companies that the Federal Communications Commission ("FCC") has authorized to provide long-distance services.

Having considered the parties' written submissions and having heard extensive oral argument on November 27, 2007, the Court finds that the PSC lacks authority to set rates for § 271 checklist items. That conclusion resolves the

principal issue in the case brought by BellSouth Telecommunications, Inc. ("BellSouth") as well as the sole issue presented by Competitive Carriers of the South, Inc. ("CompSouth"). The Court remands the remaining issues raised by BellSouth to the PSC for reconsideration in light of this Order.

## BACKGROUND

### A. Statutory and Regulatory Framework

*Section 251.* To promote competition for local telecommunications services, Congress enacted the Telecommunications Act of 1996 ("1996 Act").[1] One provision of that Act – 47 U.S.C. § 251 – obligates incumbent local exchange carriers ("ILECs"), which are companies like BellSouth that have traditionally provided local telephone service in a particular geographic area, to allow competitors, known as competitive local exchange carriers ("CLECs") to lease elements of the ILECs' telephone networks at regulated rates. *See* 47 U.S.C. § 251(c)(3). When § 251 requires an ILEC to provide access to a particular network element at regulated rates, that element is known as an unbundled network element (or "UNE").

[1] Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*).

To implement the duties of § 251, ILECs and CLECs enter into "interconnection agreements." Those parties are required, in the first instance, to negotiate terms implementing the § 251 duties. *See id.* §§ 251(c)(1), 252(a). As discussed in more detail below, if those negotiations are unsuccessful, state commissions are empowered to resolve "open issues" by applying the requirements of § 251 and the FCC regulations implementing § 251. *See id.* § 252(c), (d). Agreements reached by either negotiation or arbitration must be approved by a state commission. *See id.* § 252(e).

*Facilities at Issue Here.* Under the 1996 Act, the FCC determines which network facilities will be subject to unbundling under § 251 (and thus become UNEs). The FCC may require an ILEC to provide access to (i.e., to "unbundle") an element only if it determines that CLECs would be "impair[ed]" in their ability to provide service if they did not have access to the element as a UNE. *Id.* § 251(d)(2). These cases principally concern three particular network facilities: (i) switches, the computers that route traffic on a telecommunications network; (ii) loops, the copper wires or equivalent facilities that connect customers' premises to the ILEC network; and (iii) transport facilities, cables that connect switches to each other. Also at issue here is a service known as "line sharing,"

which allows a CLEC to provide high-speed data service over a portion of the frequency on a copper loop, without paying BellSouth to lease the entire loop.

Although the FCC previously required access to these facilities, more recently (after several adverse federal court decisions[2]), the FCC issued the *Order on Remand*,[3] which prohibited the mandatory leasing of switching and (in the circumstances presented here) loops and transport as UNEs. *See* 20 FCC Rcd at 2537, ¶ 5, 2652-54, ¶¶ 218, 220 (switching); *id.* at 2575-76, ¶ 66, 2614, ¶ 146 (loops and transport). The FCC also held in 2003 that, contrary to the agency's prior judgment, line sharing should not be made available as a UNE under § 251. *See Triennial Review Order*,[4] 18 FCC Rcd at 17132-33, ¶ 255.

*Section 271.* A separate provision of the 1996 Act, § 271, establishes a process under which so-called Bell operating companies ("BOCs") – companies

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[2] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"); *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

[3] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Order on Remand*"), *aff'd*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[4] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*") (subsequent history omitted).

such as BellSouth that were created by the 1982 federal antitrust decree that broke up the original AT&T – may seek authority to provide long-distance services. A BOC may apply only to the *FCC* to obtain authority on a state-by-state basis to provide long-distance services. *See* 47 U.S.C. § 271(d)(1). In particular, Congress specified a list of conditions – known as the "competitive checklist" – that the FCC must conclude that a BOC has satisfied in order for that federal agency to authorize the BOC to provide long-distance services. *See id.* § 271(c), (d)(3). Those checklist items include access to "[l]ocal switching," *id.* § 271(c)(2)(B)(vi); "[l]ocal loop transmission," *id.* § 271(c)(2)(B)(iv); and "[l]ocal transport," *id.* § 271(c)(2)(B)(v).

Congress likewise empowered the FCC to determine whether, after a BOC has obtained § 271 authority, the company continues to meet the conditions for that approval. *See id.* § 271(d)(6).

**B. Procedural History**

In January 2006, the PSC issued the first of the orders at issue in these cases – an order initiating hearings to set rates that BellSouth must charge for access to facilities and services that BellSouth offers to satisfy § 271.[5] The PSC held "that it

[5] *See* Order Initiating Hearings To Set a Just and Reasonable Rate Under Section 271, *Generic Proceeding To Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations To Provide Unbundled Network Elements,*

is reasonable to assert jurisdiction to set just and reasonable rates for de-listed UNEs" – which are network elements to which BellSouth no longer must provide access as UNEs under § 251 – "*pursuant to Section 271 of the Federal Telecom Act.*" *Order Initiating Hearings* at 4 (emphasis added).

Having declared its authority to implement § 271, the PSC subsequently issued an order requiring BellSouth to charge particular regulated rates for access to switching, loops, and transport.[6] The PSC later issued a reconsideration order in which it declined to set a rate for switching.[7] Additionally, the PSC issued a separate order addressing a variety of related issues.[8] As relevant here, that order required BellSouth to provide line sharing under § 271. *See Order on Remaining Issues* at 39-40.

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Docket No. 19341-U, at 1, 3-4 (Ga. Pub. Serv. Comm'n Jan. 20, 2006) ("*Order Initiating Hearings*").

[6] *See* Order Setting Rates Under Section 271, *Generic Proceeding To Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations To Provide Unbundled Network Elements*, Docket No. 19341-U, at 9-10 (Ga. Pub. Serv. Comm'n Mar. 10, 2006).

[7] *See* Order on Reconsideration, *Generic Proceeding To Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations To Provide Unbundled Network Elements*, Docket No. 19341-U (Ga. Pub. Serv. Comm'n Mar. 24, 2006).

[8] *See* Order on Remaining Issues, *Generic Proceeding To Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations To Provide Unbundled Network Elements*, Docket No. 19341-U (Ga. Pub. Serv. Comm'n Mar. 2, 2006) ("*Order on Remaining Issues*").

In this Court, BellSouth challenges the PSC's assertion of authority to set rates for loop and transport facilities that must be provided only to satisfy § 271, and CompSouth challenges the PSC's decision on reconsideration declining to set a rate for switching. BellSouth also challenges the PSC's authority to mandate line sharing under § 271 and to set a rate for access to that arrangement. Finally, BellSouth challenges several other aspects of the PSC's orders in its amended complaint, but the Court need not specifically address those issues, as explained below.

## DISCUSSION

### I. The PSC Lacks Authority To Implement § 271 or To Set Rates for Facilities and Services Required Under § 271

**A.** The Court holds that the PSC lacks authority to set rates for § 271 checklist items. As the First Circuit has explained in rejecting the same claim of state authority, the PSC's contrary position is "at odds with the statutory language, history and policy of section 271 and most relevant precedent." *Verizon New England, Inc. v. Maine Pub. Utils. Comm'n*, Nos. 06-2151 & 06-2429, --- F.3d ---, 2007 WL 2509863, at *4-*6 (1st Cir. Sept. 6, 2007), *reh'g denied*, No. 06-2151, 2007 WL 4112192 (Nov. 20, 2007). Indeed, eight of the nine other federal courts

to have addressed this issue have reached that same conclusion.[9] The only court to have gone the other way, a district court in Maine, was subsequently reversed on this point by the First Circuit. *See Verizon New England*, 2007 WL 2509863, at *4-*6. Moreover, as detailed in BellSouth's submissions to the Court, the overwhelming majority of state commissions have held that they cannot enforce the requirements of § 271.

The text and structure of the statute confirm the correctness of these conclusions. In § 271, Congress created two administrative duties and assigned both solely to the FCC. First, a BOC seeking authority under § 271 to provide long-distance services must "apply to the Commission" – that is, to the FCC – and it is "the Commission" that "shall issue a written determination approving or

[9] *See Verizon New England*, 2007 WL 2509863, at *5; *Michigan Bell Tel. Co. v. Lark*, No. 06-11982, 2007 WL 2868633 (E.D. Mich. Sept. 26, 2007), *appeals pending*, Nos. 07-2469, 07-2473 (6th Cir.); *BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n*, No. 06-65-KKC (E.D. Ky. Sept. 18, 2007); *Qwest Corp. v. Arizona Corp. Comm'n*, 496 F. Supp. 2d 1069, 1077-79 (D. Ariz. 2007), *appeals pending*, Nos. 07-17079, 07-17080 (9th Cir.); *Illinois Bell Tel. Co. v. O'Connell-Diaz*, No. 05-C-1149, 2006 WL 2796488, at *13-*14 (N.D. Ill. Sept. 28, 2006); *Dieca Communications, Inc. v. Florida Pub. Serv. Comm'n*, 447 F. Supp. 2d 1281, 1285-86 (N.D. Fla. 2006); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1066-69 (E.D. Mo. 2006), *appeals pending*, Nos. 06-3701, 06-3726, 06-3727 (8th Cir.); *Verizon New England, Inc. v. New Hampshire Pub. Utils. Comm'n*, No. 05-cv-94, 2006 WL 2433249, at *8 (D.N.H. Aug. 22, 2006), *aff'd*, *Verizon New England*, 2007 WL 2509863; *BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n*, 368 F. Supp. 2d 557, 565-66 (S.D. Miss. 2005).

denying the authorization requested" after "[t]he Commission" determines whether the specified criteria, including the competitive checklist, are satisfied. 47 U.S.C. § 271(d)(1), (3); *see id.* § 271(c)(2)(B). Second, the FCC must address any enforcement issues: "The Commission shall establish procedures for the review of complaints" that a BOC is not complying with § 271; "the Commission shall act on such [a] complaint within 90 days"; and "the Commission may" take action to enforce the requirements of § 271 if "the Commission determines" that a BOC is not in compliance with its obligations under § 271. *Id.* § 271(d)(6).

Congress gave state commissions, by contrast, only an *advisory* role at the application stage of the § 271 process. The FCC is to "consult with the State commission of any State that is the subject of" a § 271 application before the FCC rules on the application. *Id.* § 271(d)(2)(B). The fact that Congress considered the appropriate role for the state commissions and explicitly limited them to this consultative task "works against" the PSC's claim of a power to set rates or otherwise implement § 271. *Verizon New England*, 2007 WL 2509863, at *5.

The absence of state commission authority to implement § 271 is confirmed by the text of § 252. Section 252 expressly limits state commissions to arbitrating terms and setting rates for purposes of §§ 251 and 252.

Specifically, § 252 authorizes state commissions to resolve only those "open issues" that remain after the parties negotiate "a request for interconnection, services, or network elements pursuant to *section 251*." 47 U.S.C. § 252(a)(1), (b)(1) (emphasis added). In resolving those issues, the state commission must "ensure that such resolution . . . meet[s] the requirements of *section 251* of this title, including the regulations prescribed by the [FCC] pursuant to *section 251* of this title." *Id.* § 252(c)(1) (emphases added). Furthermore, § 252(c)(2) authorizes state commissions to "establish any rates for interconnection, services, or network elements according to subsection (d) [of § 252]," *id.* § 252(c)(2), but limits them to setting rates only "for purposes of" § 251, *id.* § 252(d)(1), (2), (3); *see id.* § 252(c)(2). In reviewing the resulting interconnection agreement, the state commission may reject arbitrated agreements only "if it finds that the agreement does not meet the requirements of *section 251*. . . , including the regulations prescribed by the [FCC] pursuant to section 251. . . , or the standards set forth in subsection (d) of [section 252]." *Id.* § 252(e)(2)(B) (emphasis added). In short, state commission duties are explicitly limited to implementing § 251, and nothing in § 252 authorizes state commissions to impose conditions necessary to meet the requirements of § 271. *See, e.g.*, *Illinois Bell*, 2006 WL 2796488, at *13 ("The structure of the Act strongly suggests Congress's intent to separate Sections 251

and 252 from Section 271, as well as its intent to confine state authority to the former provisions.").

Significantly in this regard, the Eleventh Circuit has held that state commission duties are limited to implementing the requirements of §§ 251 and 252. *See MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (per curiam). The circuit court explained that, if ILECs were required to negotiate (and, if necessary, arbitrate) items that go beyond those requirements, there would be "effectively no limit on what subjects the incumbent must negotiate," a result "contrary to the scheme and the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate." *Id.* (citing 47 U.S.C. § 251(b), (c)); *see Dieca Communications*, 447 F. Supp. 2d at 1286 n.7 ("[i]n this circuit, a state commission's authority in a § 251 arbitration is only to address issues arising under § 251") (citing *MCI Telecomms.*, 298 F.3d at 1274).

In claiming authority to implement § 271 in its orders, the PSC suggested that § 271(c) implicitly contemplates state commission authority to implement § 271 when arbitrating interconnection agreements. *See, e.g., Order Initiating Hearings* at 3. Section 271(c) states that a BOC applicant for long-distance authority may establish that it makes available each item on the "[c]ompetitive

checklist" by pointing to "one or more binding agreements that have been approved under section 252." 47 U.S.C. § 271(c)(1)(A), (c)(2). The PSC argues that, because state commissions "approve[]" agreements "under section 252," it necessarily follows that state commissions have the authority to enforce the requirements of § 271 when approving those agreements.

That argument does not establish that the PSC has authority to impose obligations to implement § 271. As the First Circuit explained in rejecting the same argument, "the cross-references in section 271 to sections 251 and 252 . . . are hardly a delegation of power to the states to implement section 271," and nothing in those provisions provides state commissions the arbitration or ratemaking authority asserted by the PSC here. *Verizon New England*, 2007 WL 2509863, at *5; *see also Southwestern Bell Tel.*, 461 F. Supp. 2d at 1068 (rejecting the same argument).

**B.** Furthermore, the PSC's orders at issue in these cases cannot be sustained on the basis of state law. Although the PSC's later orders contain brief references to state law, the order asserting jurisdiction to set rates leaves no doubt that the PSC premised its actions on its claim of authority to implement federal law, specifically § 271. *See, e.g.*, *Order Initiating Hearings* at 7 ("**ORDERED FURTHER**, that the Commission hereby asserts its authority *under Section 271 of*

*the Federal Act* to set just and reasonable rates for de-listed unbundled network elements.") (emphasis added); *see also BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., LLC*, 425 F.3d 964, 970 (11th Cir. 2005) ("An order of an agency can only be defended on the grounds cited by the agency."). Moreover, the later references to state law do not suffice to show that the PSC believed it could set rates for these facilities and services if § 271 did not exist. Put differently, there is no suggestion in these orders that state law would provide an independent basis to mandate access to these facilities wholly independent of § 271.

In any event, under this federal scheme, the PSC could not rely on state law to justify its decision to set rates for the facilities and services at issue here in light of the federal scheme the 1996 Act created. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000). In particular, the PSC's decision to set regulated rates contravenes the FCC's conclusion that rates set through other means can satisfy § 271. As the FCC explained, a BOC could demonstrate its compliance with § 271 by showing that it offers the elements on the competitive checklist at rates that are "at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff." *Triennial Review Order*, 18 FCC Rcd at 17389, ¶ 664. A BOC also could

"demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate." *Id.* The FCC's statements make sense because, when a BOC need no longer provide access to a § 271 element as a UNE under § 251, CLECs are no longer "impaired" in their ability to compete without forced access to the element at regulated rates. *See, e.g.*, *Order on Remand*, 20 FCC Rcd at 2644, ¶ 204.

The PSC's decision to require BellSouth to charge regulated rates for access to checklist items cannot be reconciled with the FCC's statements: if BellSouth must charge the rate the PSC set, then it cannot negotiate "arms-length agreements" with CLECs to charge a different rate (or file a tariff with the FCC containing a different rate), and the FCC's statements would be meaningless. *See generally BellSouth Declaratory Ruling*,[10] 20 FCC Rcd at 6840-44, ¶¶ 21-27 (states cannot impose unbundling requirements, even under § 251, that contravene FCC determinations).

Beyond that, given the federal statutory scheme involved here, there cannot be a patchwork of individual state judgments about whether to set regulated rates

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[10] Memorandum Opinion and Order and Notice of Inquiry, *BellSouth Telecommunications, Inc. Request for Declaratory Ruling*, 20 FCC Rcd 6830 (2005) ("*BellSouth Declaratory Ruling*").

for these facilities. Rather, Congress gave the FCC exclusive authority to determine compliance with § 271, and that federal agency has made clear that *it* will review rates, if necessary, for these facilities. *See Triennial Review Order*, 18 FCC Rcd at 17389, ¶ 664. Indeed, although, as CompSouth emphasized at argument, Congress reserved some state authority to impose unbundling requirements that parallel the obligations of § 251, *see* 47 U.S.C. § 251(d)(3), that provision is expressly limited to implementation of § 251, and § 271 contains no similar savings clause, strongly signaling Congress's expectation that state commissions would not exercise independent state-law authority with respect to § 271 checklist items.

**C.** For the reasons set forth above, the PSC's orders are unlawful (i) to the extent that they set rates for loops and transport that must be provided under § 271, and (ii) to the extent that they set rates for access to line sharing under § 271. BellSouth's request for declaratory and injunctive relief from the PSC's decisions to set rates for loops, transport, and line sharing therefore must be granted. As of the date of this Order, BellSouth no longer must provide access to the facilities and services at issue here at the rates the PSC set.

## II. Remaining Issues

In light of the Court's ruling, CompSouth's affirmative claim must be denied. CompSouth asserts that the PSC acted unlawfully in reconsidering its decision to set a rate for switching. Because the PSC lacked authority to set a rate for switching in the first place, the PSC could not have acted unlawfully in vacating the rate that it set.

Although the Court finds that the PSC acted unlawfully in the orders under review, the Court concludes that BellSouth should not be awarded damages in this case. The Court denies BellSouth's request to be made whole for the difference between the § 271 rates the PSC set and the rates that BellSouth would have charged in the absence of the PSC's orders. As stated by the PSC at argument, this case involves the agency's authority to set rates, not whether a particular rate is just and reasonable. Thus, although no party may require BellSouth to provide service at the PSC-established rates from the date of this Order, the Court does not require the PSC to reset the rates it authorized BellSouth to charge prior to the date of this Order. From the date of the PSC's orders through the date of this Order, BellSouth is entitled to recover the rates set by the PSC.

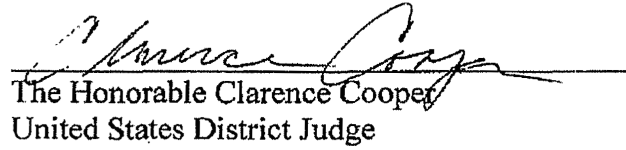
Finally, with respect to the other issues raised in BellSouth's amended complaint and not addressed in this Order, the Court remands those issues to the

PSC for further consideration in light of the Court's Order. Those issues may involve § 271 in a variety of ways, and the Court decides that it would be prudent to allow the PSC to reconsider them in light of this Order.

* * *

It is hereby ORDERED AND ADJUDGED that BellSouth's request for declaratory and injunctive relief is GRANTED. The Court hereby declares unlawful, and enjoins the Georgia Public Service Commission and the other defendants from seeking to enforce, the PSC's orders to the extent those orders require BellSouth (i) to offer access to loops and transport that BellSouth is not obligated to make available pursuant to § 251 at the rates set by the PSC and/or (ii) to offer and set rates for line sharing. No party may require BellSouth to provide service at those rates as of the date of this Order. For the period of time prior to the date of this Order, the Court does not alter in any way the rates the PSC authorized BellSouth to charge. CompSouth's request for declaratory and injunctive relief is DENIED. As to the remaining issues raised in BellSouth's amended complaint, the pertinent portions of the PSC's orders are REMANDED to the PSC for further consideration in light of the Court's Order.

ORDERED this 3rd day of January, 2008.



The Honorable Clarence Cooper
United States District Judge