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June 9, 2008

**RECEIVED**  
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PUBLIC SERVICE  
COMMISSION

**VIA EMAIL AND**  
**FEDERAL EXPRESS**

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

Re: BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect  
SouthEast Telephone, Inc. for Nonpayment  
PSC 2005-00519

SouthEast Telephone, Inc., Complainant v. BellSouth  
Telecommunications, Inc., Defendant  
PSC 2005-00533

Dear Ms. Stumbo:

Enclosed for filing in the above-referenced cases are the original and ten (10) copies of AT&T Kentucky's Reply to SouthEast Telephone's Response to AT&T Kentucky's Motion for Rehearing and/or Reconsideration.

Thank you for your attention to this matter.

Sincerely,

Mary K. Keyer  
General Counsel/Kentucky

cc: Parties of Record

711899

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 NONPAYMENT	)	CASE NO. 2005-00519
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AND

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

**REPLY TO SOUTHEAST TELEPHONE'S RESPONSE TO AT&T KENTUCKY'S  
MOTION FOR REHEARING AND/OR RECONSIDERATION**

BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky ("AT&T Kentucky"), respectfully replies to SouthEast Telephone, Inc.'s ("SouthEast") response to AT&T Kentucky's Motion for Rehearing and/or Reconsideration. For the reasons set forth herein and in AT&T's Motion for Rehearing and/or Reconsideration ("Motion"), the Kentucky Public Service Commission ("Commission") should reconsider its order dated May 2, 2008 ("*Remand Order*") and issue an Order that: (1) enforces the Parties' interconnection agreement ("ICA") and; (2) requires SouthEast to promptly pay the past due balance on its resale account.

Contrary to SouthEast's claim in its response brief that AT&T Kentucky provided nothing new, as noted in AT&T Kentucky's Motion,<sup>1</sup> AT&T Kentucky provided additional authority for the position that the Commission does in fact have the jurisdiction to undo the effects of its legal errors. Based on such authority, the Commission can and should issue an Order undoing the effects of its unlawful order and require SouthEast to pay the resale rates for the resale services that SouthEast ordered under the parties' ICA. To do otherwise would be to give full legal effect to an unlawful order and to deny AT&T Kentucky the payment due from SouthEast for the services provided.<sup>2</sup> SouthEast attempts to side-step the aforementioned, relevant authority provided by AT&T Kentucky in its Motion by arguing that half of the cases cited by AT&T Kentucky did not involve any question as to whether an agency had jurisdiction over the *rate(s) at issue*.<sup>3</sup> This is a distinction without a difference. More importantly, SouthEast did not dispute that the cited cases squarely support the straightforward proposition that an agency has both the authority *and* the duty to *correct the effect of its own errors on private parties*. As the United States Supreme Court has held, "[a]n agency, like a court, can undo what is wrongfully done by virtue of its order."<sup>4</sup> Here, the Commission wrongfully imposed an interim rate on resale services provided by AT&T Kentucky.<sup>5</sup> The Commission can and

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<sup>1</sup> AT&T's Motion for Rehearing at 3-6 and cases attached thereto.

<sup>2</sup> In the *Remand Order*, the Commission held that it had no jurisdiction to award damages in this case or to set rates retroactively. In so doing, the Commission effectively reinstated an unlawful Commission Order (the Commission's August 16, 2006 Order ("*271 Order*")) by putting SouthEast in the same position it would have been in if the *271 Order* had been upheld, even though on appeal the *271 Order* was declared unlawful. Opinion and Order, *BellSouth Telecommunications, Inc. v. Kentucky Public Service Commission, et al.*, Civil Action No. 06-65-KKC, United States District Court, Eastern District of Kentucky (September 18, 2007) at 21 ("Since the PSC had no authority to act pursuant to § 271, the PSC's Order is hereby declared unlawful and enjoined from enforcement.") ("*Kentucky Order*").

<sup>3</sup> SouthEast's Response to AT&T Rehearing Motion at 6-7.

<sup>4</sup> *United Gas Improvement et al v. Callery Props.*, 382 U.S. 223, 229, 86 S. Ct. 360, 364.

<sup>5</sup> AT&T Kentucky denies that SouthEast has paid the Commission-ordered interim rate. See AT&T Kentucky's Motion for the Issuance of a Damages Award at 4, footnote 7.

should undo the effects of that order by ordering SouthEast to pay resale rates for resale services provided by AT&T Kentucky.

This is clearly a case of SouthEast taking matters into its own hands back in April 2005 when it was no longer entitled under the law to order unbundled network elements under its ICA with AT&T Kentucky. The Parties had been negotiating a commercial agreement for Section 271 elements, as pointed out by SouthEast,<sup>6</sup> but had not entered into one in April 2005.<sup>7</sup> Instead, when it could no longer legally order unbundled network elements under its ICA, and had no commercial agreement under which to order Section 271 elements, SouthEast began ordering resale services under its ICA with no intention of paying for them at the resale rates. In fact, without seeking intervention by this Commission or the Federal Communications Commission for resolution of its allegation that AT&T Kentucky was violating its Section 271 obligations (which AT&T Kentucky denies), SouthEast did not pay the resale rates, but simply withheld payment of the full amounts due for the resale services it ordered. It was only when AT&T Kentucky sought to disconnect SouthEast's services in December 2005 for failure to pay under its ICA, did SouthEast raise a complaint with this Commission, resulting in the Commission's unlawful order.

This Commission's *271 Order*, dated August 16, 2006, required AT&T Kentucky to issue a retroactive credit of approximately \$3 million in order to allow SouthEast to obtain the past resale services it ordered at the illegal rate of TELRIC plus \$1 set forth in the *271 Order*, and allowed SouthEast to continue ordering resale services at the TELRIC plus \$1 rate going forward. But for the Commission's unlawful orders, AT&T

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<sup>6</sup> SouthEast's Response Brief at 2.

<sup>7</sup> SouthEast entered into a commercial agreement for Section 271 elements on November 18, 2007, after the *Kentucky Order* was issued by the federal court.

Kentucky would have been entitled to payment at the resale rates under its ICA and would have been entitled to disconnect SouthEast's services under its ICA if payment were not received. Additionally, AT&T Kentucky would not have issued to SouthEast a retroactive credit of approximately \$3 million as a result of the Commission's unlawful order.

Not only does this Commission have the authority, it has the duty, to undo the effect of its unlawful order by requiring SouthEast to pay resale rates for the resale services provided by AT&T Kentucky. To do otherwise, would be to ignore the federal court's order and give effect to an unlawful order. It would also provide an endorsement by this Commission that competitive local exchange carriers ("CLECs"), such as SouthEast, can totally ignore their contractual obligations with incumbent local exchange carriers ("ILECs"), such as AT&T Kentucky, and take matters into their own hands without seeking resolution from the proper regulatory or legal authority if they think an ILEC is not providing them with what they believe they are entitled to receive. In its *Remand Order* dated May 2, 2008, by refusing to *correct* the effect of its unlawful order and finding that the services ordered were 271 elements, this Commission has *given* effect to its unlawful order by essentially concluding, without any supporting evidence, that AT&T Kentucky refused to provide SouthEast with Section 271 elements, a fact that has not been proven or found by the FCC, which has the sole enforcement authority to make such a finding.<sup>8</sup> AT&T Kentucky requests that the Commission correct this error.

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<sup>8</sup> *Kentucky Order* at 20.

SouthEast also repeats its contention that a recent federal court case ("*Georgia Order*"),<sup>9</sup> wherein the District Court held that the Georgia Public Service Commission ("Georgia Commission") lacked the authority to set rates for Section 271 checklist items, supports its "no damages" position.<sup>10</sup> As previously noted by AT&T Kentucky,<sup>11</sup> the facts and circumstances surrounding the *Georgia Order* are materially different from the facts and circumstances surrounding the *Kentucky Order*. In any event, a review of the *Georgia Order* demonstrates that the order supports AT&T Kentucky's straightforward and common sense position that SouthEast is obligated to pay the resale contract rates for the resale services provided by AT&T Kentucky.

As background, the Georgia Commission initiated a generic docket to amend interconnection agreements between AT&T Georgia (then known as BellSouth) and competitive local exchange carriers ("CLECs") consistent with the Federal Communications Commission's ("FCC") *Triennial Review Order* and *Triennial Review Remand Order*.<sup>12</sup> Purporting to act pursuant to Section 271, the Georgia Commission asserted jurisdiction over Section 271 elements and, following a full evidentiary hearing, established what it considered "just and reasonable rates" for high capacity loops and transport.<sup>13</sup> The Section 271 rates that the Georgia Commission established were incorporated into interconnection agreements, and only thereafter did CLECs take

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<sup>9</sup> Order, *BellSouth Telecommunications, Inc. v. Georgia Public Service Commission, et al.*, Nos. 1:06-CV-00162-CC and 1:06-CV-00972-CC, United States District Court, Northern District of Georgia (January 3, 2008) ("*Georgia Order*").

<sup>10</sup> SouthEast's Response at 7-9.

<sup>11</sup> AT&T Kentucky's Response to SouthEast's Proposed Options for the Measure of Damages at 13-18.

<sup>12</sup> Order Setting Rates Under Section 271, *In Re: Generic Proceeding to Examine Issues Related to BellSouth Telecommunications Inc.'s Obligations to Provide Unbundled Network Elements*, Georgia Commission Docket No. 19341-U (March 10, 2006).

<sup>13</sup> *Id.* at 9-10.

advantage of the ordered rates. Accordingly, during the time frame commencing upon the execution of interconnection agreement amendments that included the Georgia Commission's Section 271 rates and concluding upon the District Court's holding that such rates were unlawful,<sup>14</sup> CLECs operating in Georgia were obligated to pay contract rates (albeit unlawful rates) for services provided by AT&T Georgia under the parties' interconnection agreements. Thus, a refusal to pay the rates set forth in an interconnection agreement for specific services ordered by a CLEC was not an issue on appeal in Georgia. Because AT&T Georgia challenged the Georgia Commission's jurisdiction to establish rates for Section 271 elements, the District Court left undisturbed the contract rates the CLECs in Georgia had been paying for high capacity loops and transport – prior to such rates being declared unlawful.<sup>15</sup>

In Georgia, from the outset the CLECs were ordering services contained in interconnection agreements. Here, SouthEast's interconnection agreement did not contain Section 271 elements. Further, the unlawful rate established by the Commission was not set in the Commission's generic docket nor was it established in the parties' Section 252 arbitration proceeding. Instead, the Commission set an unlawful rate in connection with a service disconnection proceeding initiated by SouthEast to prevent AT&T Kentucky from terminating service based on SouthEast's refusal to pay for the resale services SouthEast had ordered. Specifically, without holding an evidentiary hearing and without making any determination as to whether the rate in question met the "just and reasonable" standard or any standard whatsoever, the Commission set an artificially low, interim rate (TELRIC + \$1) to apply to resale

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<sup>14</sup> *Georgia Order* at 15 (holding that "[a]s 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.")

<sup>15</sup> *Georgia Order* at 16.

services, despite the fact that the parties' ICA already provided a Commission-approved rate for resale services.

In contrast to the Georgia situation, in Kentucky, the District Court recognized that damages were an issue and specifically remanded the case to the Commission for a damages determination.<sup>16</sup> Unlike the Georgia situation, the District Court here did not deny AT&T Kentucky's request for damages. If the District Court wanted to deny damages, then it certainly could have done so. The only rational conclusion that can be drawn here (since the District Court granted AT&T Kentucky's motion for summary judgment) is that having found the Commission's Section 271 rate unlawful and unenforceable, the District Court had no need to rule on the damages aspect of the case because no party disputed the fact that AT&T Kentucky has billed SouthEast for the proper contract rates for the resale services ordered by SouthEast. In sum, if the *Georgia Order* has any persuasive value or application here, then it stands for the proposition that SouthEast must pay the contract rates for the resale services provided by AT&T Kentucky.

### **CONCLUSION**

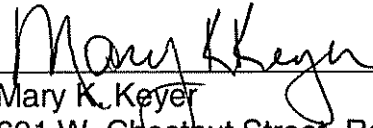
For the reasons stated herein and in AT&T Kentucky's Motion for Rehearing and/or Reconsideration, the Commission should grant AT&T Kentucky's Motion for Rehearing and/or Reconsideration and issue an order that corrects the legal errors in its *271 Order*, finds that SouthEast ordered resale services from AT&T Kentucky and enforces the parties' ICA by requiring SouthEast to immediately pay the past due balance on its resale account.

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<sup>16</sup> *Kentucky Order* at 21.



Respectfully submitted,



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**CERTIFICATE OF SERVICE -- KPSC 2005-00519 and 2005-00533**

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by email this 9th day of June 2008.

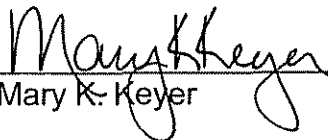
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