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January 25, 2008

VIA HAND DELIVERY

Ms. Beth O'Donnell
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. O'Donnell:

Enclosed for filing in the above-captioned cases are the original and ten (10) copies of BellSouth Telecommunications, Inc, d/b/a AT&T Kentucky's Response to SouthEast Telephone, Inc.'s Proposed Options for the Measure of Damages on Remand.

Thank you for your attention to this matter.

Sincerely,

Mary K. Keyer
General Counsel/Kentucky

cc: Parties of Record

Enclosures

702535

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

BELLSOUTH TELECOMMUNICATIONS, INC., D/B/A AT&T KENTUCKY'S RESPONSE TO SOUTHEAST TELEPHONE, INC.'S PROPOSED OPTIONS FOR THE MEASURE OF DAMAGES ON REMAND

BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky ("AT&T Kentucky"), pursuant to the Kentucky Public Service Commission's ("Commission") Informal Conference Memorandum dated December 21, 2007, responds to the options for the determination of damages proposed by SouthEast Telephone, Inc. ("SouthEast") in its response ("*SouthEast Resp.*") and supplemental response ("*SouthEast Supp. Resp.*") to AT&T Kentucky's motion for a damages award on an expedited basis ("*AT&T's Motion*"). In determining the amount of damages due AT&T Kentucky, the Commission must do so in light of the evidence, Kentucky law, and the District Court's *Remand Order,* in which

the District Court held that "[s]ince the PSC had no authority to act pursuant to Section 271, the PSC's Order is hereby declared unlawful and enjoined from enforcement."[1]

For the reasons set forth herein, the Commission should find that the damages due AT&T Kentucky on remand are those set forth in *AT&T's Motion*.

FACTUAL BACKGROUND

The undisputed facts in this case support AT&T Kentucky's proposed determination of damages and a rejection of the options proposed by SouthEast. AT&T Kentucky and SouthEast executed an Interconnection Agreement ("ICA") on October 9, 2001, setting forth the rates, terms and conditions for the services contained therein, including resale services. This Commission approved the ICA and the rates contained therein on November 6, 2001.

Effective as of March 11, 2005, AT&T Kentucky was no longer required to accept new UNE-P orders.[2] AT&T Kentucky notified all competitive local exchange carriers ("CLECs"), including SouthEast, that it would no longer accept such orders after April 27, 2005,[3] and after that date they could order Section 271 elements under a short term or long term commercial agreement. *See BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky's Reply to Southeast*

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[1] *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 ("*Remand Order*")

[2] *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 20 FCC Rcd 2533 (2005), ¶ 227 ("TRRO")

[3] AT&T Kentucky originally notified CLECs that it would not accept new UNE-P orders as of March 11, 2005, the date specified in the TRRO, but upon complaint of Kentucky CLECs, the Commission ordered AT&T Kentucky to continue to accept such orders. On appeal, the federal District Court reversed the Commission's decision. *See BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order* (E.D. Ky. Apr. 22, 2005) ("*Cinergy Order*"). *See also Memorandum Opinion and Order* (E.D. Ky., Mar. 20, 2006). This led AT&T Kentucky to release a second notice, changing the date to April 27, 2005, after which no new UNE-P orders would be accepted.

Telephone, Inc.'s Response to Motion for the Issuance of a Damages Award on an Expedited Basis ("AT&T's Reply"), Exhibit 1. The Parties' ICA did not cover Section 271 elements.

All CLECs that ordered Section 271 elements from AT&T Kentucky after April 27, 2005, entered into commercial agreements for such elements. SouthEast refused to sign a commercial agreement, and instead, chose to place orders for resale services after April 27, 2005, utilizing the resale ordering system available to it under its ICA.[4] Despite the fact that SouthEast ordered resale services, and received resale services, it refused to pay for those services by withholding payment in full for those services. Month after month, and prior to an order from this Commission, SouthEast continued to intentionally order resale services without fully paying for them. Thus, the matter before the Commission is straightforward --- AT&T Kentucky is entitled to payment for services SouthEast ordered and AT&T Kentucky provisioned.

PROCEDURAL HISTORY

On December 6, 2005, approximately 7 months after SouthEast began ordering resale services and not paying for them, AT&T Kentucky notified SouthEast and the Commission of its intent to disconnect SouthEast's services for nonpayment. In response to that notice, SouthEast filed with this Commission on December 13, 2005, the complaint that resulted in the Commission's Orders on (1) December 16, 2005, ordering AT&T Kentucky to consider SouthEast's

[4] SouthEast entered into a commercial agreement for Section 271 elements on November 18, 2007, after the *Remand Order* was issued.

account current while the dispute of law was pending, and (2) August 16, 2006,[5] ordering AT&T Kentucky to provide the "*services* ordered by SouthEast from April 27, 2005," at TELRIC plus $1.[6]

AT&T appealed these orders to federal court. The District Court found on September 18, 2007, that the Commission had no authority to enforce Section 271 and to order AT&T Kentucky to provide Section 271 elements or to set rates for Section 271 elements.[7] The Court, in finding that the Commission had no authority to act pursuant to Section 271, declared the "PSC's Order" to be unlawful and enjoined from enforcement.[8] Finally, the Court made it clear that enforcement of Section 271 lies solely with the FCC.[9] There has been no finding that AT&T Kentucky at any time violated its Section 271 obligations.

ARGUMENT

I. SouthEast's Proposed Options Are Based on Erroneous Assumptions and Must Be Rejected.

SouthEast proposes that damages in this case should be based on AT&T Kentucky showing "that its property was 'confiscated' (i.e., that it suffered actual out-of-pocket costs) by the Commission's orders requiring the interim rate of TELRIC plus one dollar for network elements." *SouthEast's Supp. Resp.* at 2-3.

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[5] Case No. 2005-00519, In the Matter of: *BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect SouthEast Telephone, Inc. for Non-Payment*, and Case No. 2005-00533, *SouthEast Telephone, Inc. v. BellSouth Telecommunications, Inc.*, Order dated August 16, 2006 ("*271 Order*")

[6] *Id.* at 12 (emphasis added). It should be noted that the Commission did not find these services in its Order to be Section 271 elements, as SouthEast alleges, but referred to them as the "*services* ordered by SouthEast," not the *elements* ordered by SouthEast. The undisputed evidence shows that these services were, in fact, resale services ordered under SouthEast's ICA. Because SouthEast could not agree on Section 271 rates, it simply refused to enter into a commercial agreement for Section 271 elements, then exercised self-help and intentionally ordered resale services under its ICA with the intention of not paying for them at the ICA rates.

[7] *Remand Order* at 20.

[8] *Id.* at 21.

[9] *Id.* at 23.

SouthEast provides no authority to support this measure of damages, but rather backed into the argument as a way to support the result it wants. [10]

SouthEast's proposed options are based on the same arguments made throughout the litigation of this matter that the services ordered by SouthEast were or should have been Section 271 elements[11] and that AT&T Kentucky violated its obligations under Section 271.[12] In addition, SouthEast mistakenly claims that this controversy involves issues that were by definition non-contractual.[13] As AT&T Kentucky has demonstrated again and again to this Commission and to the federal court, these assumptions are flawed and should be rejected.

First, SouthEast's claims that it intended to, and did, order Section 271 elements and that AT&T Kentucky has Section 271 obligations are irrelevant.[14] Section 271 elements were available to SouthEast as they were for all other CLECs. *See AT&T's Reply*, Exhibit 1. If SouthEast intended to order Section 271 elements, it could have and should have entered into a commercial agreement, as did all other CLECs who wanted to order Section 271 elements,

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[10] The case cited by SouthEast in *SouthEast Resp.* at 10, actually supports AT&T Kentucky's measure of damages in awarding damages based on the Commission-approved rates set forth in the Parties' interconnection agreement. *See Kentucky Power Co. v. Energy Regulatory Cmm'n of Kentucky*, 623 S.W.2d 904 (Ky. 1981). In the context of a real property taking, Kentucky law actually provides that generally the market value is the standard to determine just compensation for the taking of property, not the actual out-of-pocket costs proposed by SouthEast. *See Com. Dept. of Highways v. Congregation Anshei S'Fard,* 390 S.W.2d 54 (Ky. 1965) ("This Court has generally followed the rule that the market value is the standard to determine just compensation.")

[11] *SouthEast Resp.* at 10.

[12] *Id.* at 8.

[13] *SouthEast Supp. Resp.* at 3.

[14] *SouthEast Resp.* at 3. AT&T Kentucky has never disputed that it is subject to Section 271 obligations, as indicated in the *Remand Order* at 26. This fact, however, does not mean that AT&T Kentucky has not complied with those duties nor does it make the resale services ordered by SouthEast Section 271 elements.

and as SouthEast did in November 2007 after the *Remand Order* was issued.[15] SouthEast simply refused and, instead, chose to order resale services under the negotiated and Commission-approved ICA and then refused to pay for them in accordance with the rates, terms and conditions in the ICA. This conduct is blatantly unlawful and the Commission should immediately remedy it.

Second, SouthEast claims that the Commission found in its unlawful *271 Order* that the services were Section 271 elements[16] and that the *Remand Order* did not disturb that finding. SouthEast's claim is incorrect. Because the federal Court found the Commission had no authority to act pursuant to Section 271, the Court "declared unlawful and enjoined from enforcement" the Commission's *271 Order*. *Remand Order* at 21. Contrary to SouthEast's assertions, no part of the Commission's unlawful *271 Order* survived the *Remand Order*. Tellingly, SouthEast can point to no language in the *Remand Order* that supports its meritless contention that certain aspects of the *271 Order* remain intact. The reason is simple – there is no such language in the *Remand Order* (other than, of course, a remand to the Commission for a damages determination and award). In sum, once the Court determined that the Commission had no Section 271 jurisdiction and declared the *entire* Order unlawful, all findings of the Commission in its order were void *ab initio*. *Kriegal v. Actkinson*, 2007 WL 2806738 at 1 (Tex. App. 2007) *citing In re Frost*, 815 S.W.2d 890, 892 (Tex. App. 1991) (when a

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[15] Without an agreement in place with SouthEast setting forth the rates, terms and conditions for Section 271 elements, there was no means by which SouthEast could have ordered Section 271 elements and AT&T Kentucky had no obligation to provide them.

[16] As indicated in fn. 6 *supra*, the Commission's *271 Order* referred to the "*services* ordered by SouthEast" and did not find that those services were Section 271 *elements*. *271 Order* at 12 (emphasis added).

court lacks jurisdiction, any action taken is void). *See also Raikes v. Langford*, 701 S.W.2d 142, 145 (Ky. App. 1985) (where the court had no jurisdiction to entertain a bankruptcy action, it was a nullity and void and was as if no complaint at all had been filed).

Third, while SouthEast "jumps to the conclusion" that AT&T Kentucky violated its Section 271 obligations, there is no basis in fact to support this conclusion nor has there been a finding of such by the FCC, which has the sole enforcement authority over Section 271. *Remand Order* at 20. Furthermore, SouthEast has never filed a complaint with the FCC alleging these violations. In determining what damages are due AT&T Kentucky in this case, this Commission cannot arbitrarily assume there is truth to this unsubstantiated claim.[17]

Finally, contrary to SouthEast's claims that this controversy involves issues that were by definition non-contractual, the issues are, in fact, contractual as supported by the undisputed evidence. There is no dispute that (1) AT&T Kentucky offered to make Section 271 elements available to SouthEast under a commercial agreement, (2) SouthEast refused to enter into an agreement with AT&T Kentucky for Section 271 elements, (3) rather than filing a complaint with the FCC (or the Commission) alleging violations of Section 271 by AT&T

[17] Nor should the Commission consider SouthEast's claim that "any damages computation must take into account the access charges to which SouthEast was entitled, but was unable to recover from interexchange carriers due to AT&T Kentucky's wrongful conduct." *SouthEast Resp.* at 3-4. SouthEast is not entitled to access charges when it provides services via resale. Furthermore, In addition to there being no finding that AT&T Kentucky engaged in "wrongful conduct," such an offset would require speculation by the Commission. *See Kentucky West Virginia Gas Co. v. Frazier*, 195 S.W. 2d 271, 273 (Ky.1946) ("facts must be shown which afford a basis for measuring or computing damages with reasonable certainty").

Kentucky, SouthEast ordered resale services under its existing ICA,[18] and (4) SouthEast refused to pay the full amount due under the ICA for the resale services it ordered.

SouthEast cannot change the facts in an effort to escape its contractual liability for the resale services it ordered under the ICA, which was approved by this Commission. The District Court's *Remand Order* does not give the Commission leave to start over – even a public utility has a right to a final determination of its claim within a reasonable time and in accordance with due process. *See, Kentucky Power Co.,* supra.

The District Court declared the Commission's *271 Order* to be unlawful, found the Commission to have no Section 271 jurisdiction, and remanded the case to the Commission for the express purpose of determining damages. *Remand Order* at 21. In doing so, the Commission must act within its authority and jurisdiction and award the appropriate damages due thereunder.

While AT&T Kentucky admits it has Section 271 obligations, the federal court has made clear that this Commission does not have jurisdiction over Section 271 rates and elements and that the FCC has the sole enforcement authority over Section 271. *Id.* at 21, 23. There is no finding by the FCC of wrongful conduct by AT&T Kentucky. The Commission, therefore, must look to the Parties' ICA, the enforcement of which is within the jurisdiction of the

[18] SouthEast has consistently claimed that it had no choice other than to order resale services since, as it alleged, AT&T Kentucky refused to provide Section 271 elements, and SouthEast had to have some means of ordering services so that it could serve its end users. However, SouthEast clearly could have signed the commercial agreement, obtained the elements it claims to have wanted, and then filed a complaint with the FCC. SouthEast chose the route of self-help at its own risk and without necessity.

Commission,[19] for resolution of this matter. That is the only reasonable and lawful measure of damages.

II. SouthEast's Proposed Measure of Damages Violates the Remand Order: The Commission Has No Jurisdiction to Find the Services at Issue Were Section 271 Elements and to Award Damages Based on the Services Being Section 271 Elements.

The *Remand Order* made it clear that this Commission has no enforcement authority over Section 271. Consequently, it has no authority to determine that the services ordered by SouthEast utilizing the resale ordering system under its ICA were Section 271 elements and not resale services. If the Commission were to adopt SouthEast's contention that the services were Section 271 elements, the Commission could not comply with the *Remand Order* and could not adequately or fairly assess the appropriate damages due AT&T Kentucky because, as SouthEast concedes, "according to the Remand Order, the PSC cannot set rates pursuant to Section 271, and cannot, therefore, use such rates as a measure of damages." *SouthEast Resp.* at 3. Such a finding would render the *Remand Order* meaningless and result in the Commission being unable to award the appropriate damages due AT&T Kentucky as a result of the Commission's unlawful orders. It defies logic and sound reasoning that, after finding that the Commission had no authority to order AT&T Kentucky to provide Section 271 elements or to set a rate for such elements, *Remand Order* at 20, the District Court would then remand the case to the Commission to determine damages for Section 271 elements over which the District Court found

[19] *SouthEast Resp.* at 9, fn. 7.

the Commission lacked jurisdiction. This result cannot be an intended outcome by the Court in its *Remand Order* and cannot withstand scrutiny.

SouthEast's proposed confiscatory theory does not cure SouthEast's Section 271 jurisdictional problem. If the services were, in fact, Section 271 elements as SouthEast insists, then regardless of how the damages are calculated, the end result would involve the Commission setting a rate (or rates) for Section 271 elements in direct contravention of the *Remand Order*.

The Commission must give full effect to the District Court's *Remand Order* and act within its authority and the law in complying with it. Because the Commission has no jurisdiction to award damages based on SouthEast's "cost" theory but does have jurisdiction to (and must) enforce the ICA, it should reject SouthEast's proposed options and award damages to AT&T Kentucky based on the rates set forth in the ICA for the services ordered by SouthEast as proposed in *AT&T's Motion*.

III. SouthEast's Proposed Measure of Damages Based on a Confiscatory Theory Is Confiscatory in Itself and Is Unconstitutional.

To the extent the options proposed by SouthEast require an award of damages in an amount less than the resale service rates in the ICA that have been negotiated by the Parties and *approved by this Commission*, such an award would be confiscatory in nature. *See Kentucky Power Co.,* 623 S.W.2d at 907 (Ky. 1981) (to the extent rates were less than those originally approved by the Commission, such rates were found to be "unreasonable, unlawful and confiscatory"). Moreover, Kentucky's Constitution provides that one's property

cannot be taken or applied to public use without consent or just compensation. Ky. Const. Sec. 13.

IV. SouthEast's Proposed Option for the Measure of Damages Is Discriminatory and Patently Unfair.

SouthEast is asking this Commission to award no damages or damages based on a rate of the actual cost to AT&T Kentucky of provisioning the services that SouthEast ordered through the resale ordering system under its ICA. *SouthEast Resp.* at 3. SouthEast proposes damages be awarded to AT&T Kentucky based on its claim that SouthEast "intended" to order Section 271 elements for which it had no contract instead of on the fact that it actually ordered resale services under its existing ICA. If the Commission does not enforce the Commission-approved ICA and order SouthEast to pay for such services pursuant to the rates, terms and conditions set forth in the ICA (which this Commission approved), then the Commission would be failing to enforce its own order. Moreover, and critically, the Commission would be discriminating in favor of SouthEast over all other CLECs that entered into interconnection agreements and paid resale rates for the services they ordered through the resale ordering system under their ICAs, not to mention against CLECs that entered into commercial agreements for the Section 271 elements they ordered and paid for in accordance with the rates, terms and conditions set forth therein.

In addition to being unlawful and discriminatory, SouthEast's proposals are patently unfair as a policy matter and should be rejected by the Commission. SouthEast should be treated like every other CLEC. SouthEast's refusal to enter into a commercial agreement for the purchase of Section 271 elements, as other

CLECs did; its blatant and intentional self-help action in ordering resale services without intending to pay for them at the rates provided in its ICA; and its insistence that AT&T Kentucky violated its Section 271 obligations even though AT&T Kentucky offered Section 271 elements to SouthEast and there has been no finding that such offer is not consistent with the obligations of Section 271; preclude this Commission from awarding damages at anything less than the resale rates provided for in the Commission-approved ICA for the services SouthEast intentionally ordered under its ICA. To do otherwise, would constitute discriminatory treatment against all other CLECs.

V. SouthEast Cannot Escape Liability under the ICA by Its Own Acts or Omissions.

SouthEast tries to justify its self-help actions of ordering resale services under the ICA and not paying for them at the ICA rates by claiming that AT&T Kentucky violated its Section 271 obligations.[20] Again, SouthEast has not filed a complaint with the FCC, the agency with sole enforcement authority over Section 271, and there has been no such finding by the FCC (nor should there be).

It has long been held under Kentucky law that a party to a contract "cannot take advantage of his own act or omission to escape liability," which is what SouthEast is attempting to do. *See Cowden Mfg. Co., Inc. v. Systems Equipment Lessors, Inc.*, 608 S.W.2d 58, 61 (Ky. App. 1980). The Commission

[20] *See SouthEast Resp.* at 8.

should not go along with it. SouthEast had options[21] available to it if it wanted Section 271 elements, but exercised none of them. Instead, it ordered resale services under its ICA and withheld payment in full for them. It cannot now use its actions or inactions to try to avoid liability under the ICA. *Id.*

VI. The Recent District Court Order which Found that the Georgia Commission Lacks the Authority to Set Rates under Section 271 Supports AT&T Kentucky's Position that SouthEast Must Pay the Contract Rates for the Services SouthEast Ordered under the Parties' Contract.

SouthEast claims that a recent federal court case ("*Georgia Order*"),[22] wherein the federal 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.[23] SouthEast's nonsensical contention that AT&T Kentucky is not entitled to damages based on the *Georgia Order* lacks credibility and should be disregarded.

As an initial matter, in this case the District Court "declared unlawful and enjoined from enforcement" the Commission's *271 Order* and specifically remanded the matter to the Commission for a damages determination.[24] In contrast, in the *Georgia Order*, the District Court specifically ruled that BellSouth (now known as AT&T Georgia) was not entitled to damages and thus did not

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[21] SouthEast could have entered into a commercial agreement like other CLECs did, and file a complaint with the FCC alleging AT&T Kentucky was violating its Section 271 obligations. Although the Commission did not have § 271 jurisdiction as confirmed in the *Remand Order*, SouthEast could have even filed a complaint with this Commission, but failed to do so until after it received AT&T Kentucky's notice of intent to disconnect in December 2005.

[22] Order, *BellSouth Telecommunications, Inc. v. Georgia Public Service Commission, et al.*, Nos. 1:06-CV-00162-CC and1:06-CV-00972-CC, United States District Court, Northern District of Georgia (January 3, 2008)("*Georgia Order*"). For the Commission's convenience, a copy of the *Georgia Order* is attached hereto as Exhibit A.

[23] *SouthEast Supp. Resp.* at 2.

[24] *Remand Order* at 21.

remand the damages issue to the Georgia Commission. If the Court in this case wanted to prevent AT&T Kentucky from recovering its damages, then it easily could have done so by issuing a ruling similar to that made by the District Court in the *Georgia Order*. Instead, the Court remanded the case to the Commission for a damages determination. By remanding the damages issues, the Court effectively ruled that a "no damages ruling" -- like the one issued in the *Georgia Order* – was improper in this case.

Further, the facts and circumstances surrounding the *Georgia Order* are materially different from the facts and circumstances surrounding the District Court's opinion in the *Remand Order*. Thus, comparing the two cases is akin to comparing "apples to oranges." A review of the *Georgia Order* demonstrates that the order supports AT&T Kentucky's straightforward and common sense position in this case that SouthEast is obligated to pay the resale contract rates for the resale services SouthEast ordered under the Parties' ICA.

As background, the Georgia Commission initiated a generic docket[25] to amend interconnection agreements, on a prospective basis only, between AT&T Georgia and CLECs consistent with the TRRO. 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.[26] Importantly, the Section 271 rates that the Georgia Commission established were

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[25] 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).
[26] *Id.* at 9-10.

incorporated into the interconnection agreements between AT&T Georgia and various CLECs operating in Georgia. 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,[27] CLECs operating in Georgia were obligated to pay contract rates (albeit rates set by a regulatory body without authority) 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 the specific services ordered by the CLEC was not an issue on appeal in Georgia. Because AT&T Georgia challenged the jurisdiction of the Georgia Commission to establish rates for Section 271 elements (rather than challenge the actual rates established by the Georgia Commission), the District Court left undisturbed the contract rates the CLECs in Georgia were obligated to pay for high capacity loops and transport – prior to such rates being declared unlawful.[28]

In Georgia, from the outset the CLECs were ordering services contained in an effective agreement and for which a rate was established. Similarly, SouthEast ordered resale services contained in an effective interconnection agreement and for which rates were established. To accept SouthEast's claim that it was in fact ordering Section 271 elements, however, creates an entirely different situation from that in Georgia, because SouthEast's agreement did *not* contain Section 271 elements and there was *not* a rate established for such

[27] *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.")
[28] *Georgia Order* at 16.

services. Further, the unlawful rate established here 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 the resale services SouthEast had ordered under its ICA,[29] despite the fact that the ICA already provided a Commission-approved rate for resale services. Moreover, the Commission ordered the unlawful, artificially low interim rate to apply on a retroactive basis to all resale services ordered by SouthEast since April 27, 2005 "until the parties can agree on a new rate or until the Commission can establish one."[30] Of course, the Parties did not agree on a new rate and the Commission did not establish one. As such, the unlawful rate set by the Commission, which was not incorporated into the Parties' interconnection agreement,[31] remained in effect until the issuance of the District Court's *Remand Order*. During this time, AT&T Kentucky continued to bill SouthEast the contract rates for the resale services SouthEast ordered under the Parties' ICA. Once the District Court declared the Commission's *271 Order*

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[29] *271 Order* at 12.
[30] *Id.*
[31] As noted in *AT&T's Motion*, AT&T Kentucky implemented the Commission's unlawful rate by providing SouthEast bill credits in an amount specified in *AT&T's Motion*.

unlawful and enjoined it from enforcement,[32] it necessarily and logically follows that AT&T Kentucky had sustained damages because SouthEast had failed to pay the contract rates (resale rates) for the resale services SouthEast had ordered under its contract with AT&T Kentucky. In short, the facts and circumstances in this case are materially different than the facts and circumstances surrounding the Georgia Commission's impermissible establishment of Section 271 rates in its generic change of law docket.

In declining to award damages in Georgia, the District Court explained:

> 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 . . . 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.[33]

Here, again, the District Court recognized that damages were an issue and specifically remanded the case to the Commission for a damages determination.[34] The most plausible and 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 determine damages (hence the remand) because no Party disputed the fact that AT&T Kentucky has billed

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[32] *Remand Order* at 21.
[33] *Georgia Order* at 16.
[34] *Remand Order* at 21.

SouthEast the resale 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 it bought under its contract with AT&T Kentucky.

VII. Enforcement of the ICA is the Appropriate Measure of Damages Due AT&T Kentucky.

The Commission approved the ICA between the Parties on November 6, 2001, and the rates, terms, and conditions contained therein. The Commission has the authority and jurisdiction to enforce the ICA and the rates contained therein. *SouthEast Resp.* at 9, fn. 7. When SouthEast ordered services under the resale provisions of the ICA, it was obligated to comply with the rates, terms and conditions set forth in the ICA. The evidence in this case clearly demonstrates that AT&T Kentucky is entitled to damages in an amount equal to the difference in what it billed for resale service and the amounts SouthEast has paid for the period of April 27, 2005, through September 18, 2007, as fully set forth in *AT&T's Motion*. Such damages can be calculated under the ICA without speculation and with reasonable certainty as required by Kentucky law. *See Kentucky West Virginia Gas Co.*, 195 S.W.2d at 273 ("We have heretofore held that facts must be shown which afford a basis for measuring or computing damages with reasonable certainty."). Based on the facts in this case and the law in Kentucky, the only proper and reasonable determination of damages is enforcement of the Parties' ICA, which both Parties agree is clearly within the jurisdiction of the Commission. *SouthEast Resp.* at 9, fn. 7. Any measure of

damages based on other than the rates set forth in the ICA would be confiscatory, arbitrary and capricious.

SouthEast's attempt to avoid paying for the resale services it ordered is exclusively premised on its untenable (and false) position that AT&T Kentucky somehow "unreasonably compelled SouthEast Telephone to use the resale ordering system to purchase the Section 271 competitive checklist elements that AT&T Kentucky was obligated to provide pursuant to [Section 271]."[35] This assertion is false. In fact, AT&T Kentucky has contended since this matter was initiated that SouthEast *cannot* order Section 271 elements pursuant to its ICA, through the resale ordering system or otherwise. AT&T Kentucky advised CLECs in Kentucky (including SouthEast) that beginning April 27, 2005, it would continue to offer CLECs (such as SouthEast) a service to replace UNE-P only under a commercial agreement.[36] SouthEast could have entered into a commercial agreement at any time, but refused to do so until November 2007.[37] SouthEast chose to order resale services and should be required to pay the difference between the amounts paid by SouthEast and the amount due under the ICA pursuant to which the services were ordered and provided.[38]

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[35] *SouthEast Response* at 5.
[36] *See AT&T's Reply*, Exhibit 1.
[37] As directed by the District Court, *Remand Order* at 24, to the extent SouthEast believes that its commercial agreement rates are not just and reasonable, then SouthEast can raise that contention with the FCC. Of course, this same option was available to SouthEast in 2005 when it declined to execute a commercial agreement and chose instead to order resale services under the now alleged fiction that such services somehow constituted 271 elements.
[38] These amounts are set forth in *AT&T's Motion* and fully supported by AT&T Kentucky's exhibits attached thereto. AT&T Kentucky's documentation provides the Commission with clear unequivocal evidence of the damages suffered by AT&T Kentucky and the ability to "proceed on the basis of actual figures available to it" without the need for speculation or trying to recreate or re-draft history. *SouthEast Resp.* at 12.

Thus, the only conclusion that can be drawn from these facts and the *Remand Order* is that SouthEast rejected AT&T Kentucky's offer to obtain the requested Section 271 elements via a commercial agreement, and engaged in an improper practice of using AT&T Kentucky's resale services with no intention of paying for such services based on the fiction that such services somehow constituted Section 271 elements. SouthEast's actions violate the basic tenent of contract law that services ordered and provisioned must be paid for at the contracted rate.

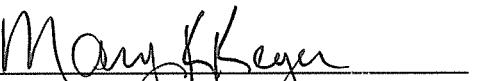
CONCLUSION

In sum, the services that SouthEast ordered, its payment obligations therefor, and the measure of damages to AT&T Kentucky due to SouthEast's failure to pay can only be determined in accordance with the ICA between the Parties. To accept SouthEast's continuing claim that the resale services it ordered were in fact, or should have been, Section 271 elements would necessitate this Commission's ignoring the *Remand Order* and determining that AT&T Kentucky failed to make available Section 271 elements. The Commission has no jurisdiction to make such a finding or to assume such allegation is true for the purposes of determining damages. For these reasons and the reasons set forth herein and in *AT&T's Motion* and *AT&T's Reply*, AT&T Kentucky's damages calculation, well documented in *AT&T's Motion*, is accurate and should be adopted by the Commission.

AT&T Kentucky does not believe an evidentiary hearing is necessary. The damages due to AT&T Kentucky are equal to the unpaid portion of

SouthEast's resale bill and are outlined in *AT&T's Motion.* They are liquidated damages that can be clearly determined from the undisputed evidence submitted in *AT&T's Motion.* AT&T Kentucky respectfully requests the Commission to expeditiously issue a final order granting in its entirety AT&T Kentucky's motion for damages.

Respectfully submitted,



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702469

EXHIBIT A

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

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.

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

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[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

[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

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 25th day of January 2008.

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