COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

SOUTHEAST TELEPHONE, INC. Complainant,	)	
v.	)	Case No. 2005-00533
BELLSOUTH TELECOMMUNICATIONS, INC. Defendant.	)	

COMPLAINT AND REQUEST FOR EMERGENCY INJUNCTIVE RELIEF

The complainant, SouthEast Telephone, Inc. ("SouthEast"), hereby submits this Complaint and seeks immediate preliminary relief enjoining Defendant, BellSouth Telecommunications, Inc. ("BellSouth"), from rejecting SouthEast's requests for additional services, disconnecting SouthEast's interconnection arrangements, or interrupting services to SouthEast's customers. As set forth below, these threatened actions would violate applicable statutes, rules, and policies, as well as the Interconnection Agreement between the parties. Emergency preliminary relief is needed to preserve the status quo until a hearing is held, or other permanent resolution is reached regarding this dispute. Absent such injunctive relief, SouthEast and its customers would suffer extraordinary, irreparable harm.

COMPLAINT

PARTIES AND JURISDICTION

SouthEast Telephone, Inc.

1. SouthEast is a Kentucky corporation with its principal office located at 106 Scott Avenue, Pikeville, KY 41502. SouthEast is a competitive local exchange carrier ("CLEC") that focuses on providing competitive telecommunications and Internet services to

customers in rural Kentucky. SouthEast serves thousands of customers in a service area of 56 rural counties extending from its Pike County base of operations westward as far as Nelson County.

BellSouth Telecommunications, Inc.

2. BellSouth is a Georgia corporation with its principal office located at 1155 Peachtree Street, N.E., Atlanta GA 30309. Upon information and belief, the chief officer of BellSouth residing in Kentucky is E.C. Roberts, Jr., President-Kentucky, 601 W. Chestnut Street, Louisville, KY 40203. BellSouth provides service throughout Kentucky, including the rural areas served by SouthEast. BellSouth is a public service company engaged in and operating a utility business.

3. BellSouth's parent, BellSouth Corporation, is a publicly traded corporation and is included in the Fortune 100® list of America's largest companies. According to publicly available documents, BellSouth Corporation has a market capitalization of over $50 Billion and reported annual revenues of over $20 Billion per year. *See* http://finance.yahoo.com/q/ks?s=BLS (visited December 12, 2005).

4. BellSouth is an Incumbent Local Exchange Carrier ("ILEC") as defined in Section 251(h) of the federal Communications Act of 1934, as amended ("Act"), and as such is subject to the interconnection, unbundling, and related obligations specified in Sections 251(c) and 251(d) of the Act.

5. In addition, BellSouth is a Bell Operating Company ("BOC") as defined in Section 153(4) of the Act, and has received authority to provide long distance service in Kentucky pursuant to Section 271(d)(3) of the Act. As such, BellSouth is subject to an ongoing obligation to provide "access and interconnection to its network facilities," including unbundled

local switching, local transport, and 12 other specified elements and services, to "one or more unaffiliated competing providers" pursuant to "binding agreements that have been approved under section 252" of the Act. 47 U.S.C. §§ 271(c)(1)(A), (c)(2)(A), and (c)(2)(B)(i)-(xiv).

This Commission's Jurisdiction

6. The Kentucky Public Service Commission ("Commission") has jurisdiction over this Complaint pursuant to Section 278.040 of the Kentucky Revised Statutes, which gives the Commission jurisdiction over all utilities located within the Commonwealth.

7. Section 278.260 of the Kentucky Revised Statutes gives the Commission jurisdiction over complaints regarding unreasonable and unjustly discriminatory practices of any utility.

8. Section 252 of the federal Communications Act gives the Commission jurisdiction to arbitrate, oversee, and enforce the implementation of interconnection agreements between ILECs and CLECs (including those agreements required under Sections 271(c)(1)(A) and (c)(2)(A) of the Act), such as the Interconnection Agreement between BellSouth and SouthEast.

9. Section 271 of the Act gives the Commission jurisdiction to enforce BellSouth's continuing compliance with the statutory preconditions for BellSouth's authority to provide long distance service, and to enforce the commitments BellSouth made in its application for such authority.

BACKGROUND

10. SouthEast provides service primarily by purchasing network elements from BellSouth, including the group of unbundled loop, switching, and transport elements formerly known as the Unbundled Network Element Platform ("UNE-P"). SouthEast's purchase of these

elements from BellSouth is governed by an Interconnection Agreement signed on October 9, 2001, and subsequently amended several times ("Interconnection Agreement").

11. On February 4, 2005, the FCC issued an Order holding that ILECs, including BellSouth, are no longer required to offer the switching and shared transport elements included in UNE-P at forward-looking cost-based rates pursuant to the standards of Sections 251(c)(3), 251(d)(2), and 252(d)(1). *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533 (2005) ("*TRRO*"). The *TRRO* did not address, or make any changes to, the continuing obligations of BellSouth and other BOCs to offer the switching and shared transport elements specified in Sections 271(c)(2)(B)(v) and (vi), or any of the other elements specified in Sections 271(c)(2)(B).

12. BellSouth announced that it would stop accepting orders for UNE-P upon the effective date of the *TRRO*, March 11, 2005. In response, the Commission issued emergency orders requiring BellSouth to negotiate with CLECs before carrying out this action. On April 22, 2005, the U.S. District Court for the Eastern District of Kentucky issued an interlocutory order preliminarily enjoining the Commission's emergency orders from taking effect. *BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, Civil Action No. 3:05-CV-16-JMH, Memorandum Opinion and Order (E.D. Ky., April 22, 2005) ("*BellSouth v. Cinergy Preliminary Injunction Order*"). Shortly thereafter, BellSouth ceased processing SouthEast's orders for UNE-P or for any other configuration of the loop-switching-transport group of elements.

13. SouthEast and BellSouth exchanged correspondence from early in 2005 through October 2005, regarding the terms under which BellSouth would provide SouthEast with the loop, switching, and transport elements that it is required to provide pursuant to Section 271, subsequent to the *TRRO*'s effective date. To date, the two companies have not been able to

resolve this dispute. While SouthEast offered a number of possible alternative ways to resolve the differences between the parties, BellSouth refused to negotiate in good faith. Instead, BellSouth's representatives persisted in offering SouthEast little more than its standard terms and conditions for a 9-state "commercial agreement" and Interconnection Agreement on a "take it or leave it" basis, and declined to provide any substantive responses to SouthEast's proposals.

14. SouthEast attempted to place orders for the loop-switching-transport group of elements on several occasions, but BellSouth refused to accept those orders. Without the ability to initiate service for new customers or even to modify existing customers' services, SouthEast would have been placed in an impossible position. Given this situation, and BellSouth's intransigent refusal to deal with SouthEast in good faith, SouthEast realized that it would be effectively unable to provide service to its existing or new customers during the long time period it would take to resolve the dispute. In the meantime, while SouthEast continued to attempt to negotiate with BellSouth and to press its arguments before the Kentucky PSC, SouthEast was compelled to submit orders into BellSouth's system for resale services. SouthEast submitted these "resale" orders under duress, even though what SouthEast intended to order (and was entitled to order) was the loop-switching-transport group of elements.

15. On September 16, 2005, the U.S. District Court for the Eastern District of Kentucky issued a decision affirming an earlier Commission order requiring BellSouth and SouthEast to include the following provision in their Interconnection Agreement: "Except as otherwise specified in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement, the aggrieved party shall petition the [Kentucky Public Service] Commission for a resolution of the dispute. For issues over which the Commission does not have authority, the Parties may avail themselves of any available legal remedies in the

appropriate forum. * * * Furthermore, the Parties agree to carry on their respective obligations under the agreement while any dispute resolution is pending." *BellSouth Telecommunications, Inc. v. SouthEast Telephone, Inc., et al.*, Civil Action No. 3:04-CV-84-JH, Memorandum Opinion and Order (E.D. Ky. Sept. 16, 2005) ("*BellSouth v. SouthEast Final Order*").

16. Notwithstanding the federal district court's directive, BellSouth refused to comply with the Interconnection Agreement's requirement that it "carry on [its] obligations under the agreement" to make available to SouthEast the loop-switching-transport group of network elements "while any dispute resolution is pending." *Id.* BellSouth's system continued to reject SouthEast's orders for these elements that BellSouth was obligated to provide pursuant to Section 271. This conduct effectively compelled SouthEast to continue submit orders for what BellSouth's systems refer to as "resale" in order to obtain an analogue to the elements it needs to remain in business. BellSouth views the service as resale and has billed SouthEast in accordance with that position. SouthEast views the service as network elements, since it had intended to order (and was entitled to order) the loop-switching-transport group of elements.

17. SouthEast continued to carry out its obligations under the Interconnection Agreement to pay the rates specified under that agreement for the network elements provided by BellSouth. In response to BellSouth's bills, SouthEast paid the full amount due and owing for such network elements. By letter dated October 20, 2005, SouthEast notified BellSouth that its higher bills, based on the resale rate, were inaccurate.

18. BellSouth never responded to the portion of SouthEast's October 20 letter addressing the billing dispute. Instead, BellSouth mailed SouthEast a form letter threatening to cut off service to SouthEast and its customers unless BellSouth's bills for resale service were

fully paid. BellSouth's letter was dated November 2, 2005, but SouthEast did not receive it until the last week in November.

19. BellSouth did not follow the dispute procedures mandated by the Interconnection Agreement, in which BellSouth and SouthEast had agreed that, "[i]n the event of a billing dispute, the Parties will endeavor to resolve the dispute within sixty (60) calendar days of the notification date." BellSouth never made any effort to resolve the dispute, and never offered SouthEast's management or counsel any opportunities to discuss and resolve the dispute. Instead, BellSouth attempted to impose its will unilaterally by threatening to disconnect service to SouthEast and its customers.

20. On November 30, 2005, SouthEast sent BellSouth (via e-mail) a letter responding to BellSouth's disconnection threat, explaining why it would be unlawful to carry out that threat, and noting that SouthEast did not receive BellSouth's letter dated November 2, 2005 until the last week of November.

21. BellSouth sent SouthEast a new letter, purportedly dated November 29, 2005 but received by SouthEast on December 2, 2005. In this letter, BellSouth reiterated its disconnection threat, but provided different dates than those in the earlier letter. BellSouth now threatens to refuse to take any orders for additional services unless SouthEast remits $1,520,396 to BellSouth by December 14, 2005. BellSouth also stated that it will disconnect SouthEast's interconnection arrangements and interrupt SouthEast's customers' services on December 29, 2005 unless this amount is paid. BellSouth also sent the Commission a letter regarding this disconnection threat, purportedly dated December 2, 2005 but received and file-stamped by the Commission on December 6, 2005.

COUNT ONE

BELLSOUTH'S THREATENED DISCONNECTION OF SOUTHEAST VIOLATES SECTION 271 OF THE COMMUNICATIONS ACT

22. SouthEast restates and incorporates paragraphs 1-21 of this Complaint as if fully set forth herein.

23. Section 271 of the Act requires BellSouth to continue providing the switching and transport elements to SouthEast at "just and reasonable" rates, terms, and conditions, even though those elements are no longer required "unbundled network elements" under the Section 251 "impairment" standard. Section 271 also mandates that BellSouth negotiate in good faith and reach interconnection agreements regarding such elements, and empowers the Commission to enforce those continuing obligations. BellSouth's unilateral withdrawal of these elements, and most egregiously, its attempt to impose its will through "self-help" – *i.e.*, its threat to disconnect SouthEast and cut off its business unless SouthEast caves in to BellSouth's duress – blatantly violate these obligations.

24. The FCC has specifically held that Section 271's requirements "establish an *independent* obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251," and rejected BOCs' arguments to the contrary. *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 15978, ¶ 654 (2003) ("*TRO*") (emphasis added), *aff'd in pertinent part, rev'd in other parts, United States Tel. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 538 U.S. 940 (2003).

25. In several orders since the *TRRO*, including one released just a week before the filing of this Complaint, the FCC has rejected BOCs' requests to "forbear" from requiring them to offer the Section 271 group of loop, switching, and transport elements. *Petition for*

Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), Memorandum Opinion and Order, 19 FCC Rcd 21946 (2004); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-233, Memorandum Opinion and Order, FCC 05-170, ¶¶ 100-110 (released December 2, 2005) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-170A1.pdf) ("*Qwest Omaha Order*"). In the *Qwest Omaha Order* (¶ 104, citations omitted), the FCC specifically concluded as follows:

> The economic barriers to self-providing facilities can be substantial, and "can differ from city to city, within the same city, or between a city and its suburbs because of differences in municipal right-of-way and permitting policies, as well as conduit availability," among other factors. When the Commission established its impairment determinations, it did so at a level designed to provide incentives for self-provisioning competitive facilities, rather than based on a finding that in all cases self-provisioning of competitive facilities is economically feasible. As a result, the Commission's impairment determinations necessarily sometimes are under-inclusive. In other words, it sometimes is not feasible for a reasonably efficient competitive carrier economically to construct all of the facilities necessary to provide a telecommunications service to a particular customer despite not being impaired under the Commission's rules without access to such facilities. In addition, even when it is economically feasible for a reasonably efficient competitor to construct such facilities, "the construction of local loops generally takes between six to nine months absent unforeseen delay." In order to provide service to customers, competitive LECs therefore may require wholesale access to Qwest's network on a temporary basis while they construct their own facilities to their customers' premises. If carriers lacked wholesale access to Qwest's network elements in such cases, they sometimes would not be able to provide service to that customer. The record contains no evidence to indicate that such an outcome would be a rare occurrence.

26. The FCC has also determined that BellSouth and the other BOCs must provide Section 271 elements at rates, terms, and conditions that are "just and reasonable" and non-discriminatory in accordance with Sections 201 and 202 of the Act, rather than at the typically lower TELRIC rates required for Section 251 UNEs. *TRO*, ¶¶ 656-664.

27. This Commission has authority to enforce BellSouth's Section 271 obligations. The FCC has made it clear on a number of occasions that state commissions play an

important role in enforcing the RBOCs' Section 271 unbundling duties. For example, in the FCC order granting BellSouth long distance authority in Kentucky, the FCC made it clear that if BellSouth were later accused of "backsliding" – *i.e.*, failing to comply with Section 271 preconditions – the problem could be addressed by "cooperative state and federal oversight and enforcement." *Joint Application of BellSouth Corp., et al., for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, 17 FCC Rcd 17595, ¶ 304 (2002) ("*FCC's Kentucky 271 Order*"); *see also id.* at ¶ 301 & n.1171 (referring to earlier FCC orders' discussion of the "post-approval enforcement framework," including enforcement actions by state commissions).

28. Moreover, the FCC has long held that "[c]omplaints involving a BOC's alleged noncompliance with specific commitments the BOC may have made to a state commission . . . should be directed to that state commission[.]" *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, ¶ 452 (1999), *aff'd, AT&T Corp. v. FCC*, 200 F.3d 607 (D.C. Cir. 2000).

29. BellSouth made specific, enforceable commitments to this Commission, in connection with the company's application for Section 271 authority to provide long distance, that it would provide local switching and shared transport as unbundled elements. In particular, BellSouth specifically represented to this Commission that BellSouth would offer unbundled transport in compliance with item #5 of the Section 271 checklist, as well unbundled local circuit switching as in compliance with item #6 of the Section 271 checklist, including the features and capabilities needed for the loop-switching-transport group of elements. Direct Testimony of Cynthia K. Cox, Senior Director-State Regulatory, BellSouth, Case No. 2001-00105, at 48-57

(filed May 18, 2001). The Commission relied on these representations in recommending to the FCC that BellSouth's Section 271 application be granted. *See Investigation Concerning the Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Case No. 2001-00105, Advisory Opinion, at 33-34 (Ky. PSC, April 26, 2002); *see also FCC's Kentucky 271 Order*, ¶ 7 (noting FCC's reliance in part on Kentucky PSC's recommendation regarding Section 271 compliance).

30. Consistently, the Commission has determined that it retains authority to require BellSouth to comply with its Section 271 obligations. In a recent arbitration order, the Commission specifically rejected BellSouth's contention that "this Commission may not regulate the rates, terms, and conditions for elements required to be provided by BellSouth pursuant to Section 271." *Joint Petition for Arbitration of NewSouth Communications Corp., et al., of an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Case No. 2004-00044, Order at 10 (Sept. 26, 2005) ("*NewSouth-BellSouth Arbitration Order*").

31. In sum, the Commission has authority to enforce BellSouth's Section 271 continuing commitments and obligations to provide the loop-switching-transport group of elements, and should exercise that authority in this case to order BellSouth to cease its unlawful conduct.

COUNT TWO

BELLSOUTH'S THREATENED DISCONNECTION OF SOUTHEAST VIOLATES SECTION 251 OF THE ACT.

32. SouthEast restates and incorporates paragraphs 1-31 of this Complaint as if fully set forth herein.

33. BellSouth is obligated to offer the voice-grade loop element, a required "unbundled network element" under Section 251, commingled with the Section 271 switching and transport elements.

34. In the *TRO*, the FCC held that ILECs are still required to "permit commingling of UNEs and UNE combinations with other wholesale facilities and services[.]" *TRRO*, ¶ 584. The FCC reaffirmed this requirement in the *TRRO*, specifically holding that ILECs must continue allowing CLECs to commingle Section 251 UNEs with Section 201-priced elements. *TRRO*, ¶¶ 229-232.

35. Consistently, this Commission correctly ruled, in the *NewSouth-BellSouth Arbitration Order* (at 10), that it has authority to require BellSouth to offer Section 251 UNEs (*e.g.*, loops) "commingled" with Section 271 elements (*e.g.*, switching and transport).

> The *TRO* and subsequent FCC orders have not relieved BellSouth of its obligation to commingle UNEs or combinations of UNEs that it is required to make available pursuant to Section 271. If BellSouth prevails, commingling would be eliminated. This elimination is not required by the FCC. Moreover, the network facilities used by BellSouth to provide access which it is obligated to provide pursuant to Section 271 are within this Commonwealth and are used to provide intrastate service. Accordingly, BellSouth has not been relieved from obligations to commingle these facilities as requested by Joint Petitioners.

36. BellSouth's rejection of SouthEast's orders for the loop-switching-transport group of elements, and its threat to terminate SouthEast's purchase of those elements, violates Section 251.

COUNT THREE

BELLSOUTH'S THREATENED DISCONNECTION OF SOUTHEAST VIOLATES SECTIONS 201 AND 202 OF THE ACT

37. SouthEast restates and incorporates paragraphs 1-35 of this Complaint as if fully set forth herein.

38. BellSouth violates the "just and reasonable" requirement of Section 201 of the Act and the non-discrimination requirement of Section 202, by refusing to allow SouthEast to commingle the Section 271 switching and transport elements, which BellSouth must offer under terms that comply with Sections 201 and 202, with Section 251 loops. According to the FCC, "a restriction on commingling would constitute an 'unjust and unreasonable practice' under 201 of the Act, as well as an 'undue and unreasonable prejudice or advantage' under section 202 of the Act." *TRO*, ¶ 581.

39. BellSouth is engaging in an unjust and unreasonable practice, in violation of Section 201, by insisting on disconnecting or breaking apart elements that are already combined in its network, such as the loop, switching, and transport, and by threatening to terminate SouthEast's use of that group of elements. The U.S. Supreme Court, in upholding the FCC's rule regarding combinations of unbundled network elements, found that, aside from the ambiguous provision in Section 251, it was "well within the bounds of the *reasonable* for the Commission to opt in favor of ensuring against an anticompetitive practice" of "disconnect[ing] previously connected elements, over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants." *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 395 (1999) (emphasis added).

40. BellSouth's unilateral attempt to impose wasteful costs upon SouthEast by threatening to disconnect the loop-switching-transport group of elements or refusing to allow

SouthEast to order them together is unreasonable, in violation of the Section 201 "just and reasonable" requirement, for precisely the same reasons as noted by the Supreme Court.

COUNT FOUR

BELLSOUTH'S CONDUCT VIOLATES SECTION 252 OF THE ACT AND THE PARTIES' INTERCONNECTION AGREEMENT

41. SouthEast restates and incorporates paragraphs 1-38 of this Complaint as if fully set forth herein.

42. By unilaterally threatening to terminate SouthEast's service and willfully flouting the dispute resolution provisions of the Interconnection Agreement, BellSouth has violated its statutory obligations under Section 252 of the Act and its contractual obligations under the Interconnection Agreement.

43. Section 252 requires BellSouth to provide the local switching, transport, and other elements specified in the Section 271 checklist through interconnection agreements "that have been approved under Section 252." 47 U.S.C. § 271(c)(1)(A); *see also* § 271(c)(2)(A)(i) and (ii). Thus, Section 271 incorporates by reference the process of entering interconnection agreements with respect to the checklist elements under Section 252, subject to the authority of state commissions. *Id.*; *TRO*, ¶ 654.

44. The FCC declined to grant a petitioning BOC's request for a ruling that interconnection agreements may not include provisions governing services or elements that are not subject to Section 251, and instead deferred to the discretion of state commissions on whether to include rates, terms and conditions for closely related services and elements (such as the Section 271 checklist elements). *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order,

17 FCC Rcd 19377, ¶ 10 (2002). This Commission has used that discretion to require BellSouth to include provisions relating to Section 271 elements in its Section 252 interconnection agreements with CLECs. *NewSouth-BellSouth Arbitration Order*, at 10.

45. BellSouth is obligated to comply with the Interconnection Agreement with SouthEast, under Section 252 (as well as the other statutory sections cited herein) and pursuant to basic principles of contract law. That Interconnection Agreement includes the requirement that, in the event of "any dispute . . . as to the interpretation of any provision of this Agreement, the aggrieved party shall petition the Commission for a resolution of the dispute." *See BellSouth v. SouthEast Final Order, supra.* The Interconnection Agreement also obligates BellSouth (as well as SouthEast) to "carry on their respective obligations under the agreement while any dispute resolution is pending." *Id.* BellSouth failed to petition the Commission for resolution of this dispute. Nor is BellSouth carrying on its obligations under the Interconnection Agreement while the dispute resolution is pending.

46. In essence, this matter arose from a billing dispute regarding the payment of the difference between the amounts due for network elements (which SouthEast has paid) and the amounts that would be due for resale services (which BellSouth claims are due). BellSouth has already conceded that this "issue should be handled through the normal billing dispute process." Letter from Alessandra Richmond, BellSouth, to David Sieradzki, Counsel for SouthEast, Oct. 28, 2005, at page 2. Nonetheless, BellSouth has refused to use any of the procedures prescribed in the BellSouth-SouthEast Interconnection Agreement regarding resolution of billing disputes and disconnection of service.

47. The "Billing" section of the Interconnection Agreement (Attachment 7, § 2.1.1) specifies, "Each Party agrees to notify the other Party in writing upon the discovery of a

billing dispute. In the event of a billing dispute, the Parties will endeavor to resolve the dispute within sixty (60) calendar days of the notification date." SouthEast notified BellSouth of the billing dispute on Oct. 20, 2005, and the 60 day period has not yet expired. BellSouth never made any effort to resolve the dispute.

48. The "Resale" section of the Interconnection Agreement (Attachment 1, § 7.6.4) specifies more detailed procedures that must be followed in the event of a billing dispute, including extensive escalation procedures that can take 120 days or more. BellSouth believes the disputed charges relate to "resale" services, but it has followed none of these procedures:

> 7.6.3 Billing Disputes
>
> 7.6.3.1 Each Party agrees to notify the other Party upon the discovery of a billing dispute. In the event of a billing dispute, the Parties will endeavor to resolve the dispute within sixty (60) calendar days of the Bill Date on which such disputed charges appear. Resolution of the dispute is expected to occur at the first level of management resulting in a recommendation for settlement of the dispute and closure of a specific billing period. If the issues are not resolved within the allotted time frame, the following resolution procedure will begin:
>
> 7.6.3.2 If the dispute is not resolved within sixty (60) days of the Bill Date, the dispute will be escalated to the second level of management for each of the respective Parties for resolution. If the dispute is not resolved within ninety (90) days of the Bill Date, the dispute will be escalated to the third level of management for each of the respective Parties for resolution
>
> 7.6.3.3 If the dispute is not resolved within one hundred and twenty (120) days of the Bill Date, the dispute will be escalated to the fourth level of management for each of the respective Parties for resolution. * * * * *

49. As discussed above, there is no basis for BellSouth's unlawful position that it may terminate the provision of loop-switching-transport group of elements. But even if BellSouth were correct on the merits (which it is not), it would not be entitled to impose its will unilaterally by disconnecting service to SouthEast and its customers. BellSouth may not

implement such an extreme measure without following the procedures required under the Interconnection Agreement.

COUNT FIVE

BELLSOUTH'S ACTIONS VIOLATE PROVISIONS OF KENTUCKY LAW

50. SouthEast restates and incorporates paragraphs 1-47 of this Complaint as if fully set forth herein.

51. By threatening to unilaterally terminate service to SouthEast and to disconnect the provision of required network elements, BellSouth has violated pertinent provisions of the Kentucky public utility law, including KRS 278.030, KRS 278.260, and KRS 530.

52. In particular, KRS 278.030(2) requires BellSouth to "furnish adequate, efficient and *reasonable* service," and to "establish *reasonable* rules governing the conduct of its business and the conditions under which it shall be required to render service." KRS 278.030(3) requires BellSouth to "employ in the conduct of its business suitable and *reasonable* classifications of its service, patrons and rates." (Emphasis added.) For the same reasons as discussed in Count Three of this Complaint and the other Counts set forth above, BellSouth's conduct is unjust, unreasonable, and discriminatory.

53. BellSouth's conduct here constitutes an "unreasonable or unjustly discriminatory" utility practice, which the Commission is empowered to enjoin under KRS 278.260. That section also directs the Commission to issue orders, as needed, in cases where "any regulation, measurement, practice or act affecting or relating to the service of the utility or any service in connection therewith is unreasonable, unsafe, insufficient or unjustly discriminatory, or [when] any service is inadequate or cannot be obtained[.]"

54. Finally, this case involves a situation in which a "telephone company [*i.e.*, SouthEast] desires to connect its exchange or lines with the exchange or lines of another telephone company [*i.e.*, BellSouth] and the latter refuses to permit this to be done upon reasonable terms, rates and conditions[.]" KRS 278.530(1). The federal Act makes it clear that the provision of unbundled elements, such as the switching, transport, and other elements listed in Section 271, constitute a form of interconnection. KRS 278.530(2) authorizes the Commission to issue injunctions to compel such interconnection.

REQUEST FOR EMERGENCY INJUNCTIVE RELIEF

55. The Commission should immediately issue a Temporary Restraining Order, Preliminary Injunction, or other form of emergency injunctive relief to prevent BellSouth from carrying out its threat to cease taking orders from SouthEast, disconnect SouthEast's existing lines, and/or interrupt services to SouthEast's customers.

56. As set forth above, BellSouth's refusal to provide SouthEast the loop-switching-transport group of elements violates numerous provisions of law. Moreover, BellSouth's attempt to resolve this matter through unilateral action, rather than by following the dispute resolution procedures required under the Interconnection Agreement and/or raising the dispute before the Commission, is an unjust, unreasonable, and discriminatory practice that violates the Interconnection Agreement and applicable federal and state statutes. Accordingly, SouthEast has shown that, if this matter were considered in the context of a full-scale contested proceeding, SouthEast would be entitled to a favorable ruling. At a minimum, SouthEast has demonstrated that it has a strong *likelihood* of establishing success on the merits.

57. The balance of equities strongly supports the requested injunctive relief. SouthEast would be irreparably harmed by the lack of an injunction. If BellSouth were to carry

out its threat to disconnect SouthEast and interrupt service to SouthEast's customers, SouthEast effectively would be put out of business. SouthEast would have virtually no chance of winning back its customers if BellSouth took action to interrupt these customers' service and they were forced to use BellSouth's telecommunications service.

58. By contrast, grant of the requested injunctive relief would not have an irreparable effect on BellSouth because any so-called "harm" is easily compensable in money damages. The payment or nonpayment of BellSouth's bills could be addressed in due course via monetary damages. Thus, even in the unlikely event that BellSouth were to prevail on the merits, the company would not be irreparably harmed by a delay in receiving the money to which it claims to be entitled. Moreover, BellSouth is an enormous company with revenues in excess of $20 Billion per year, and cannot credibly claim irreparable harm due to the relatively small amount at issue in this case.

59. The public interest militates strongly in favor of the requested emergency injunctive relief. BellSouth's threatened resort to "self-help" and its attempt to bully SouthEast through coercive action, if allowed to proceed, would turn Kentucky into a lawless environment, in which larger companies could unilaterally impose their will on smaller companies. BellSouth must be compelled to obtain a resolution of its dispute with SouthEast through appropriate, lawful measures, rather than allowing BellSouth to pull the plug on SouthEast unless its demands are met.

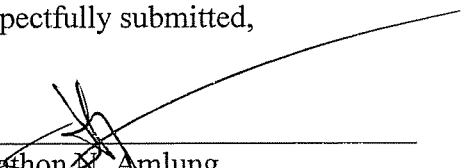
60. The public interest also favors preservation of SouthEast as a service provider to rural Kentuckians. SouthEast is one of the few companies that has focused on bringing competitive telecommunications services to those rural communities that are often forgotten or "left to last" by BellSouth and other large carriers. Without the injunctive relief

requested here, SouthEast would no longer be able to offer competitive service options to our customers. Moreover, BellSouth's threatened actions would make it impossible, perhaps permanently, for SouthEast to proceed with its long-term goal of deploying cutting-edge infrastructure and technology in our rural Kentucky service area. By issuing an emergency injunction or other relief, the Commission would preserve the public interest and the interest of consumers in competitive telecommunications facilities and services.

WHEREFORE, SouthEast requests that the Commission:

- Immediately grant a Temporary Restraining Order, Preliminary Injunction, or other emergency injunctive relief to prevent BellSouth from rejecting SouthEast's service orders, disconnecting SouthEast's circuits, or interrupting SouthEast's customers' service; and issue a Permanent Injunction to the same effect;
- Compel BellSouth to enter good-faith negotiations with SouthEast to reach an agreement regarding the provision of the loop-switching-transport group of elements, as required under Sections 201, 202, 251, and 271 of the Act;
- Compel BellSouth to submit to arbitration of disputes over such agreement by this Commission, in the event that such negotiations do not result in a consensual agreement and resolution of all outstanding disputes;
- Grant SouthEast its reasonable costs and attorney fees; and
- Grant any such additional relief as the Commission deems appropriate.

Respectfully submitted,



Jonathon N. Amlung
616 South Fifth Street
Louisville, KY 40202
(502) 582-2424

David L. Sieradzki
HOGAN & HARTSON, LLP
555 – 13th St., N.W.
Washington, D.C. 20004
(202) 637-6462

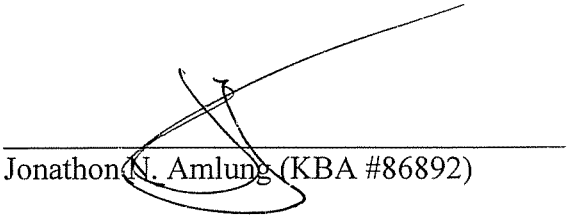
Bethany Bowersock
SOUTHEAST TELEPHONE, INC.
106 Power Drive
Pikeville, KY 41502

Dated at Louisville, Kentucky, this 13th day of December, 2005.

CERTIFICATION

I hereby certify that a true and correct copy of the foregoing was mailed, postage pre-paid, this 13th day of December, 2005, to:

Ms. Dorothy Chambers
BellSouth Telecommunications, Inc.
601 W. Chestnut Street
Louisville, KY 40203



Jonathon N. Amlung (KBA #86892)

COMMONWEALTH OF KENTUCKY

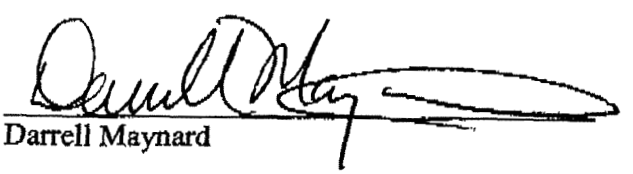
BEFORE THE PUBLIC SERVICE COMMISSION

SOUTHEAST TELEPHONE, INC. Complainant,	)	
v.	)	Case No. 2005-00519
BELLSOUTH TELECOMMUNICATIONS, INC. Defendant.	)	

CERTIFICATION

I, Darrell Maynard, am President of SouthEast Telephone, Inc., the Complainant in this proceeding. My business address is 106 Scott Avenue, Pikeville, KY 41502.

I certify under penalty of perjury that I have read the foregoing Complaint and Request for Emergency Injunctive Relief, and that all facts stated therein are true and correct to the best of my knowledge, information, and belief.



Darrell Maynard

Exhibit 1

BellSouth Letter to SouthEast Threatening to
Disconnect Service for
Alleged Non-Payment of Bills
(November 29, 2005)

Date: 11/29/2005
Customer: SOUTHEAST TELEPHONE

Mr. Darrell Maynard
106 Power Drive
Pikeville, KY 41501

OUR RECORDS INDICATE THAT AS OF 11/29/2005, WE HAVE NOT RECEIVED PAYMENT OF $1,520,396.44 FOR SOUTHEAST TELEPHONE. IF PAYMENT OF THIS AMOUNT IS NOT RECEIVED BY 12/14/2005, REQUESTS FOR ADDITIONAL SERVICES WILL BE REFUSED. ALSO, PAYMENTS ARE EXPECTED FOR ANY CURRENT CHARGES THAT MAY BECOME PAST DUE BY 12/14/2005

YOUR END USERS' SERVICE WILL BE INTERRUPTED UNLESS PAYMENT OF YOUR PAST DUE CHARGES IS RECEIVED BY 12/29/2005.

IF YOUR END USERS' SERVICE IS INTERRUPTED FOR NON-PAYMENT OF PAST DUE CHARGES, A RESTORAL FEE WILL APPLY FOR EACH END USER ACCOUNT UPON RESTORAL OF SERVICE. THIS MAY BE THE ONLY WRITTEN NOTIFICATION YOU RECEIVE. IN ADDITION, FURTHUR NOTICE MAY NOT BE GIVEN BEFORE DISCONTINUING SERVICE IF A CHECK IS DISHONORED.

IF YOU HAVE PAID YOUR BILL SINCE THIS NOTICE WAS PREPARED PLEASE ACCEPT OUR THANKS AND DISREGARD THIS NOTICE.

IF YOU HAVE ANY QUESTIONS, PLEASE CALL 1-800-872-3116

Account Representative

**THIS LETTER EXCLUDES ANY AMOUNTS WHICH MAY BE DUE FROM LA OR MS ACCOUNTS.

Exhibit 2

SouthEast Letter to BellSouth Regarding
BellSouth/SouthEast Billing Dispute
(December 7, 2005)

HOGAN & HARTSON
L.L.P.

DAVID L. SIERADZKI
PARTNER
(202) 637-6462
DLSIERADZKI@HHLAW.COM

COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910
WWW.HHLAW.COM

December 7, 2005

BY E-MAIL

Parkey J. Haggman
Senior Counsel
BellSouth Telecommunications, Inc.
675 West Peachtree Street
Atlanta, GA 20275
Parkey.Haggman@bellsouth.com

RE: BellSouth/SouthEast Billing Dispute

Dear Ms. Haggman:

This letter on behalf of SouthEast Telephone, Inc. ("SouthEast") responds to your December 2, 2005 letter. BellSouth's threat to terminate service to SouthEast is unjustifiable, notwithstanding your letter's attempt to justify it, and if carried out would violate the law as well as the Interconnection Agreement between BellSouth and SouthEast. Please advise me immediately whether BellSouth intends to continue its unlawful course of conduct.

First, your letter mischaracterizes the nature of the orders SouthEast has placed with BellSouth, and is wrong when it alleges that SouthEast willingly ordered resale services and then refused to pay the bills after BellSouth provided those services. The Interconnection Agreement and governing law give SouthEast the right to order the loop UNE pursuant to Section 251 of the Communications Act commingled with the switching/transport elements pursuant to Section 271. SouthEast attempted to exercise this right by placing orders for such elements on several occasions after the *TRRO* took effect. BellSouth refused to accept those orders, putting SouthEast in an impossible position. Given this situation, and BellSouth's intransigent refusal to deal with SouthEast in good faith, SouthEast realized that it would be unable to provide service to its existing or new customers during the long time period it would take to resolve the dispute. In the meantime, while SouthEast continued to attempt to negotiate

with BellSouth and to press its arguments before the Kentucky PSC, SouthEast was compelled to place orders for resale services under duress.

Second, it is patently absurd to argue that the U.S. District Court's September 16, 2005 decision regarding the dispute resolution provision in the Interconnection Agreement has no practical effect. Judge Hood ordered BellSouth to comply with a dispute resolution clause that, among other things, obligates BellSouth to "carry on [its] obligations under the Agreement while any dispute resolution is pending." You claim, in effect, that Judge Hood's September 16, 2005 order regarding dispute resolution has no effect because the same judge resolved the same dispute in an order issued five months earlier, on April 22, 2005. Federal courts do not adopt orders regarding matters that have already become moot.. Moreover, Judge Hood's April 22, 2005 order did not fully resolve the dispute, but merely adopted an interlocutory preliminary injunction in this case pending a full scale review on the merits. And Judge Hood's April 22, 2005 order related to a Kentucky PSC emergency order regarding BellSouth's continued provision of UNE-P pursuant to Section 251; while the instant dispute is closely related, it involves BellSouth's claim for payments from SouthEast, BellSouth's threatened disconnection of SouthEast's existing customers, and BellSouth's provision of a combination of Section 251 UNEs and switching and transport network elements pursuant to Section 271.

Third, SouthEast is vigorously pursuing its entitlement to order BellSouth's loop/switch/transport elements before several forums, contrary to your unfounded contention that "SouthEast has not attempted to raise that dispute in any forum." As you are aware, SouthEast is advancing its case in proceedings before the Kentucky PSC (Case No. 2004-00427) and before the U.S. District Court for the Eastern District of Kentucky (*BellSouth v. Cinergy Communications Co.*, No. 3:05-CV-16-JMH, a case in which SouthEast is a co-defendant).

Fourth, BellSouth failed to attempt *any* form of dispute resolution with SouthEast before threatening to disconnect SouthEast's service, in violation of the Interconnection Agreement. Your assertion that BellSouth followed the processes set forth in the Interconnection Agreement by reviewing and discussing SouthEast's claims "by at least four levels of management *within BellSouth*" is laughable. It takes two parties to resolve a dispute. As contemplated by the Interconnection Agreement, the required "endeavor to resolve the dispute" cannot be a unilateral process carried out through levels of management within one of the companies, but requires the involvement of personnel at the appropriate "level of management for *each of the respective Parties* for resolution." Interconnection Agreement, Attachment 1, Sections 7.6.3.1, 7.6.3.2, 7.6.3.3, and 7.6.3.4 (emphasis added).

Fifth, you state that "SouthEast's complaint does not constitute a billing dispute but is instead a policy dispute regarding whether BellSouth is obligated to continue to allow SouthEast to purchase UNE-P lines . . . ." If that were true, then BellSouth – as the aggrieved party (since it claims to be owed money that SouthEast has not paid) – would have the obligation to raise the issue before the Kentucky PSC. The Interconnection Agreement provides, "if any

dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party shall petition the Commission for a resolution of the dispute." Interconnection Agreement, General Terms and Conditions, § 12. But BellSouth has never presented to the Kentucky PSC the issue of its monetary claim against SouthEast based on BellSouth's difference of opinion with SouthEast as to the interpretation or implementation of the Interconnection Agreement. Instead, BellSouth is inappropriately trying to impose its view through unilateral action.

Finally, BellSouth has already conceded that this "issue should be handled through the normal billing dispute process." Letter from Alessandra Richmond, BellSouth, to David Sieradzki, Counsel for SouthEast, Oct. 28, 2005, at page 2. Nonetheless, BellSouth has refused to use the prescribed billing dispute resolution process to handle the dispute.

In sum, the law and the Interconnection Agreement require BellSouth to withdraw its threat to terminate SouthEast's service, which would interrupt services to SouthEast's customers and, in effect, put SouthEast out of business. Instead, BellSouth is obligated to pursue its billing dispute with SouthEast through lawful channels.

Please advise me by no later than Monday, December 12, 2005, whether BellSouth is willing to engage in a good faith attempt to resolve this dispute within the time frames and pursuant to the procedures required by the Interconnection Agreement, or whether BellSouth intends to continue its attempt to impose its will unilaterally.

I look forward to hearing from you.

Very truly yours,

David Sieradzki

David L. Sieradzki
Counsel for SouthEast Telephone, Inc.

Exhibit 3

SouthEast Letter to BellSouth Regarding BellSouth
Threat to Disconnect Service
to SouthEast
(November 30, 2005)

HOGAN & HARTSON
L.L.P.

DAVID L. SIERADZKI
PARTNER
(202) 637-6462
DLSIERADZKI@HHLAW.COM

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WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910
WWW.HHLAW.COM

November 30, 2005

BY E-MAIL

Rodger Edmonds
BellSouth Accounts Receivable Management
Interconnection Billing and Collections
600 North 19th St., 22nd Floor
Birmingham, AL 35203
Rodger.Edmonds@BellSouth.com

Glenn T. Reynolds
Vice President-Federal Regulatory
BellSouth D.C. Inc.
1133 – 21st St., NW, Suite 900
Washington, DC 20036
glenn.reynolds@bellsouth.com

Alessandra Richmond
John Hamman
BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, GA 20275
Alessandra.Richmond@bellsouth.com
John.Hamman@bellsouth.com

Dorothy J. Chambers
General Counsel/Kentucky
BellSouth Telecommunications, Inc.
601 W. Chestnut St., Room 407
PO Box 32410
Louisville, KY 40232
Dorothy.Chambers@bellsouth.com

RE: BellSouth Threat to Disconnect Service to SouthEast

Ladies and Gentlemen:

My client, SouthEast Telephone, Inc. ("SouthEast"), received a letter from BellSouth threatening to disconnect SouthEast's interconnection arrangements and interrupt services to SouthEast's customers unless SouthEast pays certain disputed bills by December 2, 2005 ("Disconnect Threat Letter," copy attached as Exhibit 1). If BellSouth were to carry out this threat, it would flagrantly violate federal and state law as well as the Interconnection Agreement between BellSouth and SouthEast. Moreover, such an action would have an extraordinarily harmful effect on SouthEast's customers, and effectively would put SouthEast out of business. I am writing to demand that BellSouth desist from carrying out this threat until the dispute can be resolved through the legally required procedures.

This dispute arose from a difference of opinion over BellSouth's bills to SouthEast for combinations of loop, switching, and transport network elements activated since the effective date of the *Triennial Review Remand Order* ("*TRRO*"). BellSouth and SouthEast have not yet reached an agreement regarding the post-*TRRO* rates, terms and conditions for this service. BellSouth views the service as resale and has billed SouthEast accordingly. SouthEast views the service as network elements provided pursuant to Section 271 of the Act, the parties' pre-existing Interconnection Agreement, and other governing law. In SouthEast's view, BellSouth has improperly billed SouthEast at rates far higher than those that should apply. SouthEast pointed out BellSouth's error in a letter dated October 20, 2005 (copy attached as Exhibit 2).

BellSouth never responded to the portion of SouthEast's October 20 letter addressing the billing dispute. Instead, BellSouth sent SouthEast a form letter stating, "Our records indicate that as of 11/2/2005, we have not received payment of $567,437.84 by SouthEast Telephone. . . . Your end users' service will be interrupted unless payment of your regulated charges is received by 12/2/2005. . . . This may be the only written notification you receive." Disconnect Threat Letter.

As a procedural matter, BellSouth has violated the Kentucky Public Service Commission's ("PSC") requirements regarding ILEC disconnection of CLEC service due to non-payment of bills. In a generic rulemaking order, the Kentucky PSC held that, "when an ILEC prepares to disconnect a CLEC for failure to pay carrier charges or for any other reason, the ILEC must provide the Commission prior notice of the disconnection. The ILEC must also provide the Commission with a plan for addressing customer notice and service issues and should follow procedures similar to BellSouth's emergency continuity plan." *Customer Billing and Notice Requirements for Wireline Telecommunications Carriers Providing Service In Kentucky*, Case No. 2002-00310, Order at 7 (May 20, 2003) (copy attached as Exhibit 3). In this case, BellSouth has neither notified the Kentucky PSC nor provided any plan regarding customer notice and service issues.

Moreover, BellSouth has violated all of the procedures required in the BellSouth-SouthEast Interconnection Agreement regarding resolution of billing disputes and disconnection of service (relevant provisions attached as Exhibit 4). The "Billing" section of the Interconnection Agreement (Attachment 7, § 2.1.1) specifies, "Each Party agrees to notify the other Party in writing upon the discovery of a billing dispute. In the event of a billing dispute, the Parties will endeavor to resolve the dispute within sixty (60) calendar days of the notification

date." SouthEast notified BellSouth of the billing dispute on Oct. 20, 2005, and the 60 day period has not yet expired. BellSouth never made any effort to resolve the dispute.

The "Resale" section of the Interconnection Agreement (Attachment 1, § 7.6.4) specifies more detailed procedures that must be followed in the event of a billing dispute, including extensive escalation procedures that can take 120 days or more. 1/ BellSouth believes the disputed charges relate to "resale" services, but it followed none of these procedures.

Moreover, on September 16, 2005, the U.S. District Court for the Eastern District of Kentucky ruled that the BellSouth-SouthEast Interconnection Agreement must now incorporate the following provision:

> Except as otherwise specified in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement, the aggrieved party shall petition the [Kentucky Public Service] Commission for a resolution of the dispute. For issues over which the Commission does not have authority, the Parties may avail themselves of any available legal remedies in the appropriate forum. * * * Furthermore, the Parties agree to carry on their respective obligations under the agreement while any dispute resolution is pending.

BellSouth Telecommunications, Inc. v. SouthEast Telephone, Inc., et al., Civil Action No. 3:04-CV-84-JH, Memorandum Opinion and Order (E.D. Ky. Sept. 16, 2005) (copy attached as Exhibit 5); SouthEast Telephone, Inc. Notice of Intent to Opt-In to Interconnection Agreement

---

1/ The pertinent portion of this section reads as follows:

7.6.3 Billing Disputes

7.6.3.1 Each Party agrees to notify the other Party upon the discovery of a billing dispute. In the event of a billing dispute, the Parties will endeavor to resolve the dispute within sixty (60) calendar days of the Bill Date on which such disputed charges appear. Resolution of the dispute is expected to occur at the first level of management resulting in a recommendation for settlement of the dispute and closure of a specific billing period. If the issues are not resolved within the allotted time frame, the following resolution procedure will begin:

7.6.3.2 If the dispute is not resolved within sixty (60) days of the Bill Date, the dispute will be escalated to the second level of management for each of the respective Parties for resolution. If the dispute is not resolved within ninety (90) days of the Bill Date, the dispute will be escalated to the third level of management for each of the respective Parties for resolution

7.6.3.3 If the dispute is not resolved within one hundred and twenty (120) days of the Bill Date, the dispute will be escalated to the fourth level of management for each of the respective Parties for resolution. * * * * *

Provision (filed June 8, 2004) (copy attached as Exhibit 6). BellSouth neither petitioned the Kentucky PSC nor availed itself of any legal remedies in any other forum. Nor is BellSouth carrying on its obligations under the Interconnection Agreement while the dispute resolution is pending, as the federal district court ordered it to do.

This letter does not attempt to provide a detailed substantive argument explaining why SouthEast's position on this dispute is correct and BellSouth's is wrong. We would welcome the opportunity to do so, either before the Kentucky PSC or another appropriate forum. But make no mistake: *Even if BellSouth were correct on the merits* (which it is not), it would not be entitled to impose its will unilaterally by disconnecting service to SouthEast and its customers. BellSouth may not implement such an extreme measure without following the required procedures.

Finally, I must point out that, while BellSouth's Disconnect Threat Letter is dated November 2, 2005, SouthEast did not receive it until yesterday or the day before. If for no other reason, BellSouth should allow some additional time to resolve this dispute through appropriate procedures due to the delay in delivery of the letter.

Please contact me immediately regarding this matter. I am also providing copies of this letter to the staff of the Federal Communications Commission and the Kentucky PSC.

Very truly yours,

David Sieradzki

David L. Sieradzki
Counsel for SouthEast Telephone, Inc.

cc: Alex Starr, Chief, Market Disputes Resolution Division, Enforcement Bureau, FCC
Lisa Saks, Deputy Chief, Market Disputes Resolution Division
Beth O'Donnell, Executive Director, Kentucky Public Service Commission

Exhibit 4

BellSouth Letter to SouthEast Threatening to
Disconnect Service for
Alleged Non-Payment of Bills
(November 2, 2005)

BELLSOUTH

11/2/2005

SOUTHEAST TELEPHONE
Mr. Darrell Maynard
106 Power Drive
Pikeville, KY 41501

OUR RECORDS INDICATE THAT AS OF 11/2/2005, WE HAVE NOT RECEIVED PAYMENT OF $567,437.84 FOR SOUTHEAST TELEPHONE. IF PAYMENT OF THIS AMOUNT IS NOT RECEIVED BY 11/17/2005, REQUESTS FOR ADDITIONAL SERVICES WILL BE REFUSED. ALSO, PAYMENTS ARE EXPECTED FOR ANY CURRENT CHARGES THAT MAY BECOME PAST DUE BY 11/17/2005

YOUR END USERS' SERVICE WILL BE INTERRUPTED UNLESS PAYMENT OF YOUR REGULATED CHARGES IS RECEIVED BY 12/2/2005.

IF YOUR END USERS' SERVICE IS INTERRUPTED FOR NON-PAYMENT OF REGULATED CHARGES, A RESTORAL FEE WILL APPLY FOR EACH END USER ACCOUNT UPON RESTORAL OF SERVICE. THIS MAY BE THE ONLY WRITTEN NOTIFICATION YOU RECEIVE. IN ADDITION, FURTHUR NOTICE MAY NOT BE GIVEN BEFORE DISCONTINUING SERVICE IF A CHECK IS DISHONORED.

IF YOU HAVE PAID YOUR BILL SINCE THIS NOTICE WAS PREPARED PLEASE ACCEPT OUR THANKS AND DISREGARD THIS NOTICE

IF YOU HAVE ANY QUESTIONS, PLEASE CALL 1-800-872-3116

Account Representative

**THIS LETTER EXCLUDES ANY AMOUNTS WHICH MAY BE DUE FROM LA OR MS ACCOUNTS.

CRIS/Oracle Aging Summary

11/2/2005

Customer	BAN	Bill Period	Current	31To60	61To90	91Plus	Disputed Amount	Promo Credit	Total Outstanding	Total Collectible
SOUTHEAST										
SOUTHEAST	502Q879036036	7	$2,725.93	$0.00	$9.67	$0.00	$0.00	$0.00	$9.67	$9.67
SOUTHEAST	502Q950628628	25	$535,360.58	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
SOUTHEAST	502Q837443443	13	($10.46)	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
SOUTHEAST	502Q952065065	25	$18.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00	$0.00
SOUTHEAST	502Q939811811	23	$766,720.73	$568,824.26	$0.00	$0.00	$1,396.09	$0.00	$568,824.26	$567,428.17
SOUTHEAST		$1,304,814.78		$568,824.26	$9.67	$0.00	$1,396.09	$0.00	$568,833.93	$567,437.84
Grand Total:										

Exhibit 5

BellSouth Letter to SouthEast Regarding
Interconnection Agreement and
Commercial DS0 Platform Agreement
Between BellSouth and SouthEast
(October 28, 2005)

BellSouth Interconnection Services
675 West Peachtree Street, NE
Room 34S91
Atlanta, Georgia 30375

Alessandra Richmond
(404)-927-0149
Fax: (404) 529-7839

Sent via Electronic and Certified Mail

October 28, 2005

Mr. David L. Sieradzki
Counsel for SouthEast Telephone, Inc.
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004-1109

Re: Interconnection Agreement and Commercial DS0 Platform Agreement between BellSouth and SouthEast Telephone, Inc.

Dear Mr. Sieradzki:

This is in response to your letter dated October 20, 2005. You state that SouthEast is "retracting any and all proposals regarding interconnection and commercial agreements" that SouthEast has offered in the past, and is "planning to commence a formal proceeding before the PSC to resolve the issues in dispute between our companies."

Despite SouthEast's continued unfounded allegations that BellSouth is not negotiating in good faith, BellSouth has been and continues to be willing to negotiate an Interconnection Agreement ("ICA") and a Commercial Agreement with SouthEast. Of course, it is BellSouth's position that a Commercial Agreement is not within the scope of the Commission's authority to review and approve.

Contrary to your contention that BellSouth has done nothing more than to reiterate the same position for six months, you apparently have failed to note the proposal made in BellSouth's October 7, 2005 letter. In that letter BellSouth proposed new concessions to SouthEast. For example, BellSouth advised that it is willing to include language such that the Commercial Agreement is renewable after March 31, 2008, if mutually agreed to by the Parties. BellSouth also agreed to work cooperatively with SouthEast to identify areas where BellSouth could provide credits to SouthEast in an amount approximately equal to the amount SouthEast owes BellSouth for the transitional price increase on the embedded base of UNE-Ps. Indeed, on September 2, 2005, BellSouth advised SouthEast that it was willing to continue providing remote site line splitting on commercial agreement services SouthEast purchases from BellSouth, and to continue applying the Sub-Loop Distribution rates that are in SouthEast's current agreement. Clearly, BellSouth is negotiating in good faith with SouthEast, and is willing to continue negotiations with SouthEast. However, by no means, is BellSouth willing to subsidize SouthEast's operations by agreeing to unreasonable rates, terms and conditions.

Regarding the Cinergy dispute resolution language, as stated in BellSouth's previous letter of October 7, 2005, this language was incorporated into the Parties' current ICA on November 5, 2004. Thus, such language is in effect in SouthEast's ICA, subject to any additional changes that may be required due to the U. S. District Court's remand of the Kentucky Public Service Commission's ("KPSC's") decision for further consideration. SouthEast's interpretation that this

language somehow entitles SouthEast to continue to order Unbundled Network Element-Platform ("UNE-P") at the established TELRIC rates for both the embedded UNE-P base and for new UNE-P orders is simply wrong.

The Federal Communications Commission ("FCC") made clear in the Triennial Review Remand Order ("TRRO") that "Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local switching." TRRO, at ¶ 5. The FCC added that competing carriers have a 12-month period to "transition away from use of unbundled mass market local circuit switching" and that "the transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs." TRRO, at ¶ 5. The FCC made clear that its "no new adds" ruling was self-effectuating; thus, the bar on new UNE-P adds is not subject to the change of law process. Furthermore, the U. S. District Court has addressed this issue and determined that BellSouth is not required to provide new UNE-P service. BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al., Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order*, (E.D.Ky. Apr. 22, 2005), at 19. Therefore, there is no "dispute" to be resolved. This issue has been fully litigated and resolved by the court. BellSouth will not resume taking orders for UNE-P. As you are aware, BellSouth has offered, and continues to offer to SouthEast and to all competitive LECs, the ability to obtain the loop/port combination via resale and/or the execution of a commercial agreement. Given SouthEast's refusal to negotiate a commercial agreement with BellSouth, the only method by which SouthEast may continue to obtain service for its newly acquired customers is via resale. SouthEast has ordered resale services and has obtained such services via resale, and BellSouth has appropriately charged SouthEast for the services it has received.

BellSouth does not agree with SouthEast's contention that it is "entitled to a credit of $727,259 for the difference between the resale rate and the UNE rate for the time period of May 2005 through September 2005." Of course, such an issue should be handled through the normal billing dispute process; however, BellSouth notes that the FCC and the U. S. District Court for the Eastern District of Kentucky have been clear that CLECs no longer have the right to new UNE-P service.

Regarding Section 271 elements, BellSouth does not agree with SouthEast's understanding of the KPSC's Order for the reasons stated in BellSouth's Motion for Rehearing and Request for Oral Argument filed with the KPSC on October 18, 2005, in the Joint Petitioners' Arbitration, Case No. 2004-00044.

BellSouth believes that the best path forward is for the Parties to reach a mutually acceptable set of agreements. However, if that cannot be accomplished, then BellSouth stands ready to respond to and participate in any formal proceeding filed by SouthEast before the Kentucky Public Service Commission. BellSouth will vigorously defend its rights under state and federal law. Should you have any questions, please do not hesitate to contact me.

Sincerely,

Alessandra Richmond
Manager - Interconnection Services

cc: Darrell Maynard
John Hamman

from one of its End User's locations. BellSouth shall be indemnified, defended and held harmless by SouthEast and/or the End User against any claim, loss or damage arising from providing this information to SouthEast. It is the responsibility of SouthEast to take the corrective action necessary with its End Users who make annoying calls. (Failure to do so will result in BellSouth's disconnecting the End User's service.)

8.1.6 BellSouth may disconnect and reuse facilities when the facility is in a denied state and BellSouth has received an order to establish new service or transfer of service from an End User or an End User's CLEC at the same address served by the denied facility.

8.2 The procedures for discontinuing service to SouthEast are as follows:

8.2.1 BellSouth reserves the right to suspend or terminate service in the event of prohibited, unlawful or improper use of the facilities or service, abuse of the facilities, or any other violation or noncompliance by SouthEast of the rules and regulations of BellSouth's Tariffs.

8.2.2 BellSouth reserves the right to suspend or terminate service for nonpayment. If payment of account is not received by the bill day in the month after the original bill day, BellSouth may provide written notice to SouthEast, that additional applications for service will be refused and that any pending orders for service will not be completed if payment is not received by the fifteenth day following the date of the notice. In addition BellSouth may, at the same time, provide written notice to the person designated by SouthEast to receive notices of noncompliance that BellSouth may discontinue the provision of existing services to SouthEast, if payment is not received by the thirtieth day following the date of the notice.

8.2.3 In the case of such discontinuance, all billed charges, as well as applicable termination charges, shall become due.

8.2.4 If BellSouth does not discontinue the provision of the services involved on the date specified in the thirty days notice and SouthEast's noncompliance continues, nothing contained herein shall preclude BellSouth's right to discontinue the provision of the services to SouthEast without further notice.

8.2.5 Upon discontinuance of service on a SouthEast's account, service to SouthEast's End Users will be denied. BellSouth will also reestablish service at the request of the End User or SouthEast upon payment of the appropriate connection fee and subject to BellSouth's normal application procedures. SouthEast is solely responsible for notifying the End User of the proposed disconnection of the service.

8.2.6 If within fifteen days after an End User's service has been denied no contact has been made in reference to restoring service, the End User's service will be disconnected.

9. Line Information Database (LIDB)

9.1 BellSouth will store in its Line Information Database (LIDB) records relating to service only in the BellSouth region. The LIDB Storage Agreement is included in this Attachment as Exhibit C.

9.2 BellSouth will provide LIDB Storage upon written request to SouthEast's Account Manager stating a requested activation date.

10. RAO Hosting

10.1 RAO Hosting is not required for resale in the BellSouth region.

11. Optional Daily Usage File (ODUF)

11.1 The Optional Daily Usage File (ODUF) Agreement with terms and conditions is included in this Attachment as Exhibit D. Rates for ODUF are as set forth in Exhibit F of this Attachment.

11.2 BellSouth will provide ODUF service upon written request to its Account Manager stating a requested activation date.

12. Enhanced Optional Daily Usage File (EODUF)

12.1 The Enhanced Optional Daily Usage File (EODUF) service Agreement with terms and conditions is included in this Attachment as Exhibit E. Rates for EODUF are as set forth in Exhibit F of this Attachment.

12.2 BellSouth will provide EODUF service upon written request to its Account Manager stating a requested activation date.

Attachment 7

Billing

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BILLING

1. Payment and Billing Arrangements

All negotiated rates, terms and conditions set forth in this Attachment pertain to billing and billing accuracy certifications.

1.1 Billing. BellSouth agrees to provide billing through the Carrier Access Billing System (CABS) and through the Customer Records Information System (CRIS) depending on the particular service(s) that SouthEast requests. BellSouth will bill and record in accordance with this Agreement those charges SouthEast incurs as a result of SouthEast purchasing from BellSouth Network Elements and Other Services as set forth in this Agreement. BellSouth will format all bills in CBOS Standard or CLUB/EDI format, depending on the type of service ordered. For those services where standards have not yet been developed, BellSouth's billing format will change as necessary when standards are finalized by the industry forum.

1.1.1 For any service(s) BellSouth orders from SouthEast, SouthEast shall bill BellSouth in CABS format.

1.1.2 If either Party requests multiple billing media or additional copies of bills, the Billing Party will provide these at a reasonable cost.

1.2 Master Account. After receiving certification as a local exchange company from the appropriate regulatory agency, SouthEast will provide the appropriate BellSouth account manager the necessary documentation to enable BellSouth to establish a master account for Local Interconnection, Network Elements and Other Services, and/or resold services. Such documentation shall include the Application for Master Account, proof of authority to provide telecommunications services, an Operating Company Number (OCN) assigned by the National Exchange Carriers Association (NECA), Carrier Identification Code (CIC), Group Access Code (GAC), Access Customer Name and Abbreviation (ACNA) and a tax exemption certificate, if applicable.

1.3 Payment Responsibility. Payment of all charges will be the responsibility of SouthEast. SouthEast shall make payment to BellSouth for all services billed. BellSouth is not responsible for payments not received by SouthEast from SouthEast's customer. BellSouth will not become involved in billing disputes that may arise between SouthEast and SouthEast's customer. Payments made to BellSouth as payment on account will be credited to an accounts receivable master account and not to an end user's account.

1.4 Payment Due. The payment will be due on or before the next bill date (i.e., same date in the following month as the bill date) and is payable in immediately available funds. Payment is considered to have been made when received by BellSouth.

If the payment due date falls on a Sunday or on a Holiday which is observed on a Monday, the payment due date shall be the first non-Holiday day following such Sunday or Holiday. If the payment due date falls on a Saturday or on a Holiday which is observed on Tuesday, Wednesday, Thursday, or Friday, the payment due date shall be the last non-Holiday day preceding such Saturday or Holiday. If payment is not received by the payment due date, a late payment penalty, as set forth in Section 1.6, below, shall apply.

1.5 Tax Exemption. Upon proof of tax exempt certification from SouthEast, the total amount billed to SouthEast will not include those taxes or fees for which the CLEC is exempt. SouthEast will be solely responsible for the computation, tracking, reporting and payment of all taxes and like fees associated with the services provided to the end user of SouthEast.

1.6 Late Payment. If any portion of the payment is received by BellSouth after the payment due date as set forth preceding, or if any portion of the payment is received by BellSouth in funds that are not immediately available to BellSouth, then a late payment penalty shall be due to BellSouth. The late payment penalty shall be the portion of the payment not received by the payment due date times a late factor and will be applied on a per bill basis. The late factor shall be as set forth in Section A2 of the General Subscriber Services Tariff, Section B2 of the Private Line Service Tariff or Section E2 of the Intrastate Access Tariff, whichever BellSouth determines is appropriate. SouthEast will be charged a fee for all returned checks as set forth in Section A2 of the General Subscriber Services Tariff or pursuant to the applicable state law.

1.7 Discontinuing Service to SouthEast. The procedures for discontinuing service to SouthEast are as follows:

1.7.1 BellSouth reserves the right to suspend or terminate service for nonpayment of services or in the event of prohibited, unlawful or improper use of BellSouth facilities or service or any other violation or noncompliance by SouthEast of the rules and regulations contained in BellSouth's tariffs.

1.7.2 If payment of account is not received by the bill date in the month after the original bill date, BellSouth may provide written notice to SouthEast that additional applications for service will be refused and that any pending orders for service will not be completed if payment is not received by the fifteenth day following the date of the notice. In addition, BellSouth may, at the same time, give thirty (30)days notice to SouthEast at the billing address to discontinue the provision of existing services to SouthEast at any time thereafter.

1.7.3 In the case of such discontinuance, all billed charges, as well as applicable termination charges, shall become due.

1.7.4 If BellSouth does not discontinue the provision of the services involved on the date specified in the thirty days notice and SouthEast's noncompliance continues, nothing contained herein shall preclude BellSouth's right to discontinue the provision of the services to SouthEast without further notice.

1.7.5 If payment is not received or satisfactory arrangements made for payment by the date given in the written notification, SouthEast's services will be discontinued. Upon discontinuance of service on SouthEast's account, service to SouthEast's end users will be denied. BellSouth will reestablish service at the request of the end user or SouthEast for BellSouth to reestablish service upon payment of the appropriate connection fee and subject to BellSouth's normal application procedures. SouthEast is solely responsible for notifying the end user of the proposed service disconnection. If within fifteen (15) days after an end user's service has been denied and no arrangements to reestablish service have been made consistent with this subsection, the end user's service will be disconnected.

1.8 Deposit Policy. When purchasing services from BellSouth, SouthEast will be required to complete the BellSouth Credit Profile and provide information regarding credit worthiness. Based on the results of the credit analysis, BellSouth reserves the right to secure the account with a suitable form of security deposit. Such security deposit shall take the form of cash, an Irrevocable Letter of Credit (BellSouth form), Surety Bond (BellSouth form) or, in its sole discretion, some other form of security. Any such security deposit shall in no way release SouthEast from its obligation to make complete and timely payments of its bill. Such security shall be required prior to the inauguration of service. If, in the sole opinion of BellSouth, circumstances so warrant and/or gross monthly billing has increased beyond the level initially used to determine the level of security, BellSouth reserves the right to request additional security in SouthEast's "accounts receivables and proceeds" only after thirty (30) day written notice to SouthEast. Interest on a security deposit, if provided in cash, shall accrue and be paid in accordance with the terms in the appropriate BellSouth tariff.

1.9 Rates. Rates for Optional Daily Usage File (ODUF), Access Daily Usage File (ADUF), and Centralized Message Distribution Service (CMDS) are set out in Exhibit A to this Attachment. If no rate is identified in this Attachment, the rate for the specific service or function will be as set forth in applicable BellSouth tariff or as negotiated by the Parties upon request by either Party.

2. Billing Disputes

2.1 Billing disputes shall be handled pursuant to the terms of this section.

2.1.1 Each Party agrees to notify the other Party in writing upon the discovery of a billing dispute. In the event of a billing dispute, the Parties will endeavor to resolve the dispute within sixty (60) calendar days of the notification date.

2.2 If a Party disputes a charge and does not pay such charge by the payment due date, or if a payment or any portion of a payment is received by either Party after the payment due date, or if a payment or any portion of a payment is received in funds which are not immediately available to the other Party, then a late payment penalty shall be assessed. For bills rendered by either Party for payment, the late payment charge for both Parties shall be calculated based on the portion of the payment not received by the payment due date times the late factor as set forth in the following BellSouth tariffs: for services purchased from the General Subscribers Services Tariff for purposes of resale and for ports and non-designed loops, Section A2 of the General Subscriber Services Tariff; for services purchased from the Private Line Tariff for purposes of resale, Section B2 of the Private Line Service Tariff; and for network elements and other services and local interconnection charges, Section E2 of the Access Service Tariff. In no event, however, shall interest be assessed by either Party on any previously assessed late payment charges. The Parties shall assess interest on previously assessed late payment charges only in a state where it has the authority pursuant to its tariffs.

3. RAO Hosting

3.1 RAO Hosting, Calling Card and Third Number Settlement System (CATS) and Non-Intercompany Settlement System (NICS) services provided to SouthEast by BellSouth will be in accordance with the methods and practices regularly adopted and applied by BellSouth to its own operations during the term of this Agreement, including such revisions as may be made from time to time by BellSouth.

3.2 SouthEast shall furnish all relevant information required by BellSouth for the provision of RAO Hosting, CATS and NICS.

3.3 Compensation amounts, if applicable, will be billed by BellSouth to SouthEast on a monthly basis in arrears. Amounts due from one Party to the other (excluding adjustments) are payable within thirty (30) days of receipt of the billing statement.

3.4 SouthEast must have its own unique hosted RAO code. Requests for establishment of RAO status where BellSouth is the selected CMDS interfacing host, require written notification from SouthEast to the BellSouth RAO Hosting coordinator at least eight (8) weeks prior to the proposed effective date. The proposed effective date will be mutually agreed upon between the Parties with consideration given to time necessary for the completion of required Telcordia (formerly BellCore) functions. BellSouth will request the assignment of an RAO

Exhibit 8

U.S. District Court for the Eastern District of Kentucky Decision:

BellSouth Telecommunications, Inc. v. SouthEast Telephone, Inc., et al.,

Civil Action No. 3:04-CV-84-JH,

Memorandum Opinion and Order

(E.D. Ky. Sept. 16, 2005)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

BELLSOUTH TELECOMMUNICATIONS, INC.,	)	
Plaintiff,	)	Civil Action No. 3:04-CV-84-JMH
v.	)	
SOUTHEAST TELEPHONE, INC. ET AL.,	)	**MEMORANDUM OPINION AND ORDER**
Defendants.	)	

** ** ** ** **

In this action, BellSouth Telecommunications, Inc. ("BellSouth") seeks review of the following Kentucky Public Service Commission ("PSC" or "Commission") orders: (1) the PSC's September 29, 2004 Order granting the request of SouthEast Telephone, Inc. ("SouthEast") to adopt a single provision of the interconnection agreement between BellSouth and Cinergy Communications Company ("Cinergy"); and (2) the PSC's November 8, 2004 Order denying BellSouth's motion for reconsideration of the September 29, 2004 Order [Record No. 16]. The defendants, SouthEast and the PSC, responded [Record Nos. 19 & 20] and the plaintiff replied [Record No. 21].

Background

The Telecommunications Act ("the Act") places a duty on incumbent local exchange carriers ("ILECs"), like the plaintiff BellSouth Telecommunications, Inc. ("BellSouth"), that have traditionally provided local telephone services to an area, to make

network elements and interconnection services available to new entrants into the market. New entrants, like the defendant SouthEast, are called competitive local exchange carriers ("CLECs"). 47 U.S.C. § 251. The network elements and services are obtained by CLECs through interconnection agreements that are subject to approval by the PSC, *Id.* § 252 (e), or CLECs may obtain the services by adopting another interconnection agreement between an ILEC and a CLEC that has been approved by the PSC. *Id.* § 252 (i).

In the case at hand, SouthEast and BellSouth entered into an interconnection agreement on October 9, 2001 ("SouthEast Agreement"). The SouthEast Agreement was approved by the PSC on November 6, 2001 and provides,

> BellSouth shall make available, pursuant to 47 U.S.C. § 252 and the FCC rules and regulations regarding such availability, to SouthEast any interconnection, service, or network element provided under any other agreement filed and approved pursuant to 47 U.S.C. § 252, provided a minimum of six months remains on the terms of such Agreement. The Parties shall adopt all rates, terms and conditions concerning such other interconnection, service or network element and any other rates, terms and conditions that are legitimately related to or were negotiated in exchange for or in conjunction with the interconnection, service or network element being adopted.

(Pl.'s Compl., Ex. 1, SouthEast Agreement at ¶ 15.) As for amendments, the SouthEast Agreement provides,

> No modification, amendment, supplement to, or waiver of the Agreement or any of its

> provisions shall be effective and binding upon the parties unless it is made in writing and duly signed by the Parties.

(*Id.* at ¶ 16.2.)

At issue in this case is the FCC's change in the rule implementing § 252(i) that provides CLECs the ability to adopt other interconnection agreements. The prior rule, known as the "pick-and-choose rule," permits CLECs to adopt any portion of an interconnection agreement among an ILEC and a CLEC, without being required to adhere to the rest of the provisions in that agreement. The rule has since been changed to the "all-or-nothing rule," wherein CLECs must adopt the entire agreement and can no longer pick the portions of an agreement they want and ignore the other provisions.

On June 8, 2004, SouthEast filed an adoption notice requesting to adopt the dispute resolution provision of BellSouth's agreement ("Cinergy Agreement) with another CLEC, Cinergy. The provision of the Cinergy Agreement that SouthEast noticed to adopt provides,

> For issues over which the Commission does not have authority, the Parties may avail themselves of any available legal remedies in the appropriate forum. Furthermore, the Parties agree to carry on their respective obligations under this Agreement, while any dispute resolution is pending.

(*Id.*, Ex. 2, SouthEast's Notice of Intent to Adopt at 2.) On June 22, 2004, BellSouth timely filed objections to the proposed adoption of the dispute resolution provision. On July 8, 2004, the

all-or-nothing rule was adopted by the FCC and on July 13, 2004, the new rule was released. The new rule became effective on August 23, 2004, thirty days after publication in the Federal Register.

Procedural History and Issues on Review

On September 29, 2004, the PSC issued an order approving the adoption of the dispute resolution provision. Applying the pick-and-choose rule, the law in effect at the time SouthEast filed the adoption notice, the Commission granted the request. The Commission held that the "[d]ispute resolution procedures which SouthEast seeks are an integral term and condition of a contract and directly relate to the provision of interconnection, service, or network elements." (*Id.*, Ex. 4, Sept. 29, 2004 PSC Order at 2.)

On November 8, 2004, the PSC issued an order denying BellSouth's petition for rehearing. BellSouth argued that the PSC should have utilized the all-or-nothing rule that was released on July 13, 2004, and effective on August 23, 2004, both prior to the PSC decision on September 29, 2004. The PSC held that "according to the Commission's longstanding practice, SouthEast's adoption notice would have been granted by Order within a few days of receipt by the Commission but for BellSouth's objection. As SouthEast contends, carriers may delay proceedings when matters are pending in order to allow the changed laws to be applied to pending cases." (*Id.*, Ex. 5, Nov. 8, 2004 PSC Order at 3.) The Commission further held that it would be unjust to apply the new rule to an

adoption notice that was released "a month after the Commission would ordinarily have entered its Order, under the circumstances of this particular case." (*Id.*)

On appeal, BellSouth argues three grounds for reversal of the PSC orders. First, BellSouth argues that the PSC should have used the all-or-nothing rule to deny the request for adoption of the dispute resolution provision. Second, BellSouth argues that even under the pick-and-choose rule, the dispute resolution provision was not a proper provision to be adopted pursuant to § 252(i). Finally, BellSouth argues that adoption did not comply with the SouthEast Agreement that requires any amendment to be in writing and approved by both of the parties.

Jurisdiction and Standard of Review

The Telecommunications Act provides, "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251." 47 U.S.C. § 252(e)(6). Accordingly, this Court has jurisdiction over BellSouth's appeal of the PSC orders approving adoption of the dispute resolution provision.

Along with the majority of other circuits, the Sixth Circuit utilizes a two-tiered review procedure when reviewing a ruling of a state administrative body. The bifurcated standard is employed

because arriving at a decision in these disputes involves an understanding of the interplay between federal and state law.

Under the two-tiered approach, the Court reviews whether the PSC's orders comply with the requirements of the Telecommunications Act *de novo*. The Court also reviews the Commission's interpretation of the Act *de novo*, according little deference to the Commission's interpretation. *Mich. Bell Tel. Co. v. MCIMetro Access Transmission Servs., Inc.*, 323 F.3d 348, 354 (6th Cir. 2003) (hereinafter, "*MCIMetro*"); *Mich. Bell Tel. Co. v. Strand,* 305 F.3d 580, 586 (6th Cir. 2002) (hereinafter, "*Strand*"). "If no illegality is uncovered during such a review, the question of whether the state commission correctly interpreted the challenged interconnection agreement must then be analyzed, but under the more deferential arbitrary-and-capricious standard of review usually accorded state administrative bodies' assessments of state law principles." *Mich. Bell Tel. Co. v. MFS Intelenet of Mich., Inc.*, 339 F.3d 428, 433 (6th Cir. 2003) (hereinafter, "*MFS Intelenet*"); *accord Sw. Bell Tel. Co. v. Pub. Util. Comm'n of Tex.*, 208 F.3d 475, 482 (5th Cir. 2000); *GTE S., Inc. v. Morrison,* 199 F.3d 733, 745 (4th Cir. 1999); *U.S. W. Communc'ns v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1117 (9th Cir. 1999).

"The arbitrary and capricious standard is the most deferential standard of judicial review of agency action, upholding those outcomes supported by a reasoned explanation, based upon the

evidence in the record as a whole." *MCIMetro*, 323 F.3d at 354. Under this standard, the Court will uphold a decision "'if it is the result of a deliberate principled reasoning process, and if it is supported by substantial evidence.'" *Id.* (quoting *Killian v. Healthsource Provident Adm'rs, Inc.*, 152 F.3d 514, 520 (6th Cir. 1998)). Thus, under this standard, absent clear error or failure to consider factors that are relevant to the analysis, the PSC orders will be upheld. *Id.*

In the case at hand, whether the Commission used the correct regulation and the Commission's interpretation of whether dispute resolution provisions are subject to adoption pursuant to the language of the Act are both reviewed *de novo*. *MCIMetro*, 323 F.3d at 354 (holding that state commissions' interpretations of the Act are reviewed *de novo*).

Analysis

A. Mootness

In the responses, the defendants both argue that the plaintiff's appeal is moot because after the PSC rendered the orders at issue in this matter, BellSouth and SouthEast have been negotiating a new agreement. BellSouth counters that while the parties are negotiating a new agreement, the parties are still governed by the current interconnection agreement whose adopted dispute resolution provision is at issue on the appeal.

Article III of the United States Constitution vests the Court

with jurisdiction to address actual "cases and controversies." U.S. Const. art. III, §§ 2. The Court, thus, lacks authority to render "a decision that does not affect the rights of the litigants." *Coal. for Gov't Procurement v. Fed. Prison Indus., Inc.*, 365 F.3d 435, 458 (6th Cir. 2004). "The test for mootness is whether the relief sought would, if granted, make a difference to the legal interests of the parties." *McPherson v. Mich. High Sch. Athletic Ass'n, Inc.*, 119 F.3d 453, 458 (6th Cir. 1997) (en banc) (internal quotations and citations omitted); *Bowman v. Corr. Corp. of Am.*, 350 F.3d 537, 550 (6th Cir. 2003). "An appeal becomes moot if events have taken place during the pendency of the appeal that make it 'impossible for the court to grant any effectual relief whatever.'" *Fed. Prison Indus., Inc.*, 365 F.3d at 458 (quoting *Church of Scientology v. United States*, 506 U.S. 9, 12 (1992)).

In the case at hand, the defendants have not shown that the appeal is moot merely because the parties are negotiating a new agreement. If the parties had, in fact, completed negotiations and agreed to be bound by a new agreement, then, the case perhaps would be moot. As it stands, because the parties are merely in the negotiations phase, the parties are still bound by the interconnection agreement whose adopted dispute resolution provision is the subject of this appeal. Accordingly, the matter is not moot because if the Court grants BellSouth relief and reverses the Commission's orders, then the dispute resolution

provision would no longer be in the current interconnection agreement.

B. Applicable Regulation

BellSouth's primary argument is that the PSC did not use the correct regulation in approving SouthEast's adoption notice. The initial September 29, 2004 Order granting SouthEast's request to adopt the dispute resolution provision held, without analysis, that the applicable regulation was the pick-and-choose rule, the rule in effect at the time SouthEast filed its notice, not the all-or-nothing rule, the rule in effect at the time of the PSC decision. The November 8, 2004 Order denied BellSouth's motion to reconsider and held,

> [A]ccording to the Commission's longstanding practice, SouthEast's adoption notice would have been granted by Order within a few days of receipt by the Commission but for BellSouth's objection. As SouthEast contends, carriers may delay proceedings when matters are pending in order to allow the changed laws to be applied to pending cases. To apply a change of interpretation a month after the Commission would ordinarily have entered its Order, under the circumstances of this particular case, is unjust.

(Pl.'s Compl., E. 5, PSC Order Nov. 8, 2004 at 3.) BellSouth argues that applying the regulation in effect at the time of decision is not retroactive application, but instead is prospective application of the rule in effect at the time of decision.[1]

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[1] BellSouth also argues that the Commission broke with long-standing practice by not applying a new rule in the course of a

The Supreme Court set forth the test for retroactivity in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), wherein the Court held,

> When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, there is no need to resort to judicial default rules. When, however, the statute contains no such express command, the court must determine whether the new statute would have retroactive effect, i.e., whether it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed. If the statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.[2]

Commission proceeding. BellSouth has not, however, shown the Court that the Commission was breaking with long-standing practice through the cases cited in support of this proposition.

For instance, none of the cases cited in support discuss a new rule that became effective during the pendency of a Commission hearing. *Nat'l-Southwire Aluminum Co. v. Big Rivers Elec. Corp.*, 785 S.W.2d 503, 516 (Ky. Ct. App. 1990) (PSC fashioned a new variable rate design); *S. Cent. Bell Tel. Co. V. PSC*, 702 S.W.2d 447, 451 (Ky. Ct. App. 1985) (stating general principle that an agency should not depart from its previous interpretations except for cogent reasons and holding that PSC's refusal to adopt the appellant's adjustment of test-year income procedure was not in error); *Ky. CATV Ass'n v. Voltz*, 675 S.W.2d 393, 396-97 (Ky. Ct. App. 1983) (upholding the Commission's assertion of jurisdiction over cable television's use of utility poles, despite the Commission's failure to exercise jurisdiction for thirty years).

[2] The Supreme Court recently discussed the *Landgraf* test in *Republic of Austria v. Altman*, 541 U.S. 677 (2004). In *Altman*, the Court held that the Foreign Sovereign Immunities Act ("FSIA")

Id. at 280. The *Landgraf* test applies to determine whether an administrative rule operates retroactively. *Ponnapula v. Ashcroft*, 373 F.3d 480, 490 (3d Cir. 2004) (holding that "in the absence of a clear command, a consistent line of cases establishes that 'congressional enactments and administrative rules will not be construed to have retroactive effect'") (quoting *Landgraf*, 511 U.S. at 272).

The first inquiry, thus, is whether the new rule specifically sets forth its temporal reach. *Bejjani v. INS*, 271 F.3d 670, 677 (6th Cir. 2001). The text of the all-or-nothing rule does not set forth any express indication of the rule's retroactivity.[3]

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applies retroactively. The Court held that the *Landgraf* test was inapplicable to determine whether FISA applied retroactively because of the nature of foreign sovereign immunity. *Id.* 692-96. The Court did not hold, however, that the *Landgraf* test was no longer appropriate in all situations. In fact, the Court held that "*Landgraf's* anti-retroactivity presumption, while not strictly confined to cases involving private rights, is most helpful in that context." *Id.* at 696. The instant case clearly involves private parties.

[3] The all-or-nothing rule provides,

> (a) An incumbent LEC shall make available without unreasonable delay to any requesting telecommunications carrier any agreement in its entirety to which the incumbent LEC is a party that is approved by a state commission pursuant to section 252 of the Act, upon the same rates, terms, and conditions as those provided in the agreement. An incumbent LEC may not limit the availability of any agreement only to those requesting carriers serving a comparable class of subscribers or providing the same service (i.e., local, access, or interexchange) as the original

The next inquiry is determining whether the rule has a retroactive effect "by impairing a vested right, creating a new obligation, imposing a new duty, or attaching a new disability." *Id.* The Court finds that the all-or-nothing rule has a retroactive effect because it impairs a vested right.

For instance, the Act provides that an ILEC "*shall make available* any interconnection, service, or network element provided under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 § U.S.C. 252(i) (emphasis added). The pick-and-choose rule similarly provides that an ILEC "*shall make available* without unreasonable delay to any requesting

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> party to the agreement.
>
> (b) The obligations of paragraph (a) of this section shall not apply where the incumbent LEC proves to the state commission that:
> (1) The costs of providing a particular agreement to the requesting telecommunications carrier are greater than the costs of providing it to the telecommunications carrier that originally negotiated the agreement, or
> (2) The provision of a particular agreement to the requesting carrier is not technically feasible.
>
> (c) Individual agreements shall remain available for use by telecommunications carriers pursuant to this section for a reasonable period of time after the approved agreement is available for public inspection under section 252(h) of the Act.

2004 CFR § 51.809 (emphasis added).

telecommunications carrier any individual interconnection, service, or network element arrangement . . . which it is a party." 2004 CFR § 51.809 (emphasis added). The mandatory language "shall" supports SouthEast's argument that the right to adoption was vested prior to the effective date of the all-or-nothing rule.

BellSouth argues that the language in SouthEast's adoption notice requesting that the amendment be "effective as of the date of the [PSC] Order" which was after the effective date of the all-or-nothing rule, proves that the rule operates prospectively, instead of retroactively. On the contrary, although the adoption would not be effective until the PSC issued an order approving the adoption, the *statutory right* to adoption occurred when SouthEast filed notice, prior to the new rule.[4]

Citing a First Circuit case, *Pine Tree Medical Associates v. Secretary of Health and Human Services*, 127 F.3d 118 (1st Cir. 1997), BellSouth argues that merely filing the notice of adoption does not create a completed transaction and, consequently, the all-or-nothing rule does not operate retroactively. In *Pine Tree*, the court held that the Secretary of Health and Human Services could

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[4] BellSouth similarly argues that the SouthEast Agreement provides that an amendment is not effective until both parties sign the amendment. The Court finds this argument is another way of asserting that the SouthEast Agreement precluded the amendment because SouthEast did not obtain BellSouth's consent in writing. As discussed in Section D, the Commission did not reach this issue and, thus, this issue is not appropriate for the Court to review.

use guidelines that were updated after the service provider filed the application for a low-income population to have "medically under-served population" status. Analyzing the case pursuant to *Landgraf*, the First Circuit held that the new guidelines were not considered a "completed transaction" in which parties could expect stability of the law. Further, the court held that there was no "right" to use the previous guidelines. *Id.* at 121-22.

Pine Tree is distinguished, however, because it involves applying for a prospective benefit, instead of notifying an agency of a pre-existing right to adopt, which is the case in the matter at hand. The Court likewise does not find the plaintiff's remaining out of circuit cases[5] persuasive because they all involve

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[5] For example, the plaintiff cited *US West Communications, Inc. v. Jennings*, 304 F.3d 950 (9th Cir. 2002), that held newly reinstated FCC regulations concerning pricing determinations had to be considered when a case was pending before the court in challenging an initial interconnection agreement. *Id.* at 958. The court, analyzing the case under *Landgraf*, found: 1) that there was "any vested right to methods contrary to those mandated by the FCC's reinstated rules"; 2) that prospective price determinations did not alter completed transactions; and 3) that there was ample notice of the then-stayed FCC rules prior to arbitration on the interconnection agreement. *Id.* at 957. The court also found that the same reasoning applied to newly promulgated regulations because interconnection agreements govern the future relationship of the parties and do not impose new obligations or duties with respect to past transactions. *Id.* at 958.

The plaintiff also cited *Morrison*, 199 F.3d at 740, which held that it was not improper to use reinstated FCC pricing rules to interconnection agreements on appeal that were approved during a time when the FCC pricing rules were erroneously stayed because: 1) there was no vested right to an historical rate under the Act; 2) price determinations are future obligations, not new duties with respect to past transactions; and 3) there were no unsettled

pricing determinations used for the approval of initial interconnection agreements. Pricing determinations clearly involve prospective relief, as opposed to "the adoption of an existing and currently effective contract term." (Pl.'s Compl., Ex. 5, November 8, 2004 Order at 2.)

Because the Court finds that application of the all-or-nothing rule to the case at hand would have a retroactive effect, the presumption against retroactivity applies. Accordingly, unless there is clear congressional intent that the law should be applied retroactively, the new regulation will not be applied to the case at hand. The Court finds that there is no clear congressional intent to apply the law retroactively. The FCC Order Adopting the All-or-Nothing Rule provides,

> We also clarify that in order to allow this regime to have the broadest possible ability to facilitate compromise, the new all-or-nothing rule will apply to all effective interconnection agreements, including those approved and in effect before the date the new rule goes into effect. As of the effective date of the new rule, the pick-and-choose rule

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expectations because the defendant was on notice that the Supreme Court may reinstate the rules. Plaintiff cited *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996), that held a new regulation requiring carriers to adjust the previous year's earnings solely to determine the next year's price caps was not retroactive application of a new rule because it merely used past information to decide *future* liability.

See also Ind. Bell Tel. Co. v. McCarty, 362 F.3d 378, 394 (7th Cir. 2004) (citing *Jennings* and holding that newly reinstated FCC regulations concerning unbundling requirements must be used for pending cases seeking approval of interconnection agreements).

> will no longer apply to any interconnection agreement.

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Second Report and Order, at ¶ 10 (July 13, 2004) (hereinafter, "FCC Order Adopting All-or-Nothing Rule"). The Supreme Court has held that merely mentioning the effective date of the rule is insufficient to show clear congressional intent to apply the rule retroactively. *Landgraf*, 511 U.S. at 257 ("A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.") In *Martin v. Hadix*, 527 U.S. 343, 354 (1999), the Supreme Court noted that the following language would provide congressional direction to apply a new fees statute retroactively, "No award entered after the effective date of this Act shall be based on an hourly rate greater than the ceiling rate." In contrast, the language quoted above does not speak to the judicial process like the language "award entered." Instead, the language of the FCC Order merely states that the new rule *applies* after the effective date to all agreements, not just those agreements initially approved after the effective date.

Therefore, because the presumption of retroactivity has not been rebutted by clear congressional intent to apply the rule retroactively, the PSC did not err in refusing to apply the all-or-nothing rule to SouthEast's adoption notice that was filed prior to

the effective date of the new rule.

C. Analysis Under Pick-and-Choose Rule

In the alternative, BellSouth argues that under the pick-and-choose rule, the dispute resolution provision was inappropriate for adoption because the Act limits adoption to those provisions involving interconnection, service, or network elements. For instance, the Act provides, "*A local exchange carrier shall make available any interconnection, service, or network element* provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i) (emphasis added). BellSouth asserts that the dispute resolution provision is not an "interconnection, service, or network element" and, as such, is not an adoptable provision.

The PSC held that adoption was appropriate because dispute resolution provisions "are an integral term and condition of a contract and directly relate to the provision of interconnection, service and network elements." (Pl.'s Compl., September 29, 2004 PSC Order at 2.) The Court agrees.

The text of the Act provides for adoption of "terms and conditions" under which ILECs provide interconnection, service, or network. As the PSC held, dispute resolution provisions are integral terms and conditions under which ILECS provide such services. For instance, the FCC has held that agreements

"addressing dispute resolution provisions relating to the obligations set forth in sections 251(b) and (c) are appropriately deemed interconnection agreements. The purpose of such clauses is to quickly and effectively resolve disputes regarding section 251(b) and (c) obligations." The FCC's inclusion of agreements concerning only dispute resolution as "interconnection agreements" that must be approved by state commissions supports the importance of these provisions to providing interconnection services. The FCC further held, "The purpose of such clauses is to quickly and effectively resolve disputes regarding section 251(b) and (c) obligations. The means of doing so must be offered and provided on a nondiscriminatory basis if Congress' requirement that incumbent LECs behave in a nondiscriminatory manner is to have any meaning." *Id.*

BellSouth also argues that the dispute resolution provision can not be adopted under the "terms and conditions" portion of the Act because the language "terms and conditions" refers back to "terms and conditions" that are provided for the particular interconnection, service, or network element. BellSouth's interpretation strains the statutory language of the Act. In the Cinergy Agreement, BellSouth provides interconnection, service, or network elements to Cinergy under various terms and conditions. Under the SouthEast Agreement, BellSouth similarly provides interconnection, service, or network elements to SouthEast under

various terms and conditions. SouthEast merely seeks to adopt *a* term or condition under which BellSouth offers those services, etc., to Cinergy, which includes the dispute resolution provision.

BellSouth also argues that the pursuant to the pick-and-choose rule, the FCC provides ILECs the ability to require CLECs to adopt all terms that are "legitimately related" to the term that is adopted. (Pl.'s Br. at 13) (citing *AT & T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 738 (1999)). BellSouth asserts that if the Court accepts the Commission's holding that any integral term, like a dispute resolution provision, may be adopted by SouthEast, then BellSouth can force the remainder of the Cinergy Agreement to be adopted because almost all provisions of the Agreement are "legitimately related" to the dispute resolution provision. However, it is hard to understand how every provision in an interconnection agreement, including pricing, length of service, among others, would be "legitimately related" to the dispute resolution provision. Therefore, the Commission did not err in approving the adoption of the dispute resolution provision from the Cinergy Agreement.

D. The Interconnection Agreement Issues

Finally, BellSouth argues that adoption was in contravention of the SouthEast Agreement's requirement that all amendments be in writing and approved by the parties. Because the Commission did not reach this issue in the orders on review, it would be

inappropriate for the Court to interpret the parties' agreement in the first instance. 47 U.S.C. § 252(e)(6) (providing authority for district courts to review "a determination" of the state commission pursuant to § 252); *MFS Intelenet*, 339 F.3d at 431 (accord); (Pl.'s Br. at 7) (stating that "the Commission never addressed below BellSouth's interpretation of the interconnection agreement and its requirement that all amendments be agreed to in writing by the parties").

Conclusion

Accordingly, and for the foregoing reasons, **IT IS ORDERED** that the orders of the PSC be, and the same hereby are, **AFFIRMED** and that this action be **REMANDED** to the PSC to determine whether the SouthEast Agreement precludes adoption.

This the 16th day of September, 2005.

Signed By:
Joseph M. Hood
United States District Judge

Exhibit 6

SouthEast Letter to BellSouth Regarding
Billing and Interconnection Disputes
(October 20, 2005)

HOGAN & HARTSON
L.L.P.

DAVID L. SIERADZKI
PARTNER
(202) 637-6462
DLSIERADZKI@HHLAW.COM

COLUMBIA SQUARE
555 THIRTEENTH STREET, NW
WASHINGTON, DC 20004-1109
TEL (202) 637-5600
FAX (202) 637-5910
WWW.HHLAW.COM

October 20, 2005

BY E-MAIL AND BY CERTIFIED MAIL

Alessandra Richmond
John Hamman
BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, GA 20275

RE: BellSouth-SouthEast Interconnection Dispute

Dear Ms. Richmond and Mr. Hamman:

On behalf of SouthEast Telephone, Inc. ("SouthEast"), this letter follows up on my September 23, 2005 letter, discusses certain financial obligations between SouthEast and BellSouth, and responds to your October 7, 2005 letter.

As you know, on September 16, 2005, the U.S. District Court for the Eastern District of Kentucky issued a decision affirming the September 29, 2004 order of the Kentucky Public Service Commission ("PSC") that SouthEast is entitled to opt in immediately to the dispute resolution provision of BellSouth's agreement with Cinergy Communications. *BellSouth Telecommunications, Inc. v. SouthEast Telephone, Inc., et al.*, Civil Action No. 3:04-CV-84-JH, Memorandum Opinion and Order, (E.D. Ky. Sept. 16, 2005). Under the terms of the court decision and the underlying PSC order, this means that the pre-existing interconnection agreement between SouthEast and BellSouth, incorporating the Cinergy dispute resolution (specifying that BellSouth will "carry on their respective obligations under [their pre-existing interconnection] agreement while any dispute resolution is pending"), is effective now and has been effective since before March 11, 2005, notwithstanding any generic rulemaking decisions to the contrary.

Pursuant to our existing, effective interconnection agreement, SouthEast is entitled to continue ordering the Unbundled Network Element Platform ("UNE-P"), and is entitled to pay the established TELRIC rates for both pre-existing UNE-P lines and new orders,

until the resolution of the pending dispute between the two companies. We demand that you resume taking orders for UNE-P lines immediately.

Moreover, BellSouth has billed SouthEast for all new orders at the resale rates. These bills are not supported by our existing, effective interconnection agreement or by governing law. Accordingly, SouthEast is entitled to a credit of $727,259 for the difference between the resale rate and the UNE rate for the time period of May 2005 through September 2005. (The supporting documentation evidencing the credit due on account 502 Q93-9811 811 is being submitted under separate cover.) This amount has been withheld from the current amount due of $622,273 for the above mentioned account, and a credit or a refund check for the difference of $104,986 is due and payable immediately to SouthEast Telephone.

Finally, your October 7, 2005 letter makes it clear that BellSouth is continuing to refuse to negotiate in good faith (or in any other way) with SouthEast, since that letter merely reiterates the positions that your company has consistently taken for the past six months. Accordingly, we are planning to commence a formal proceeding before the PSC to resolve the issues in dispute between our companies. Significantly, the PSC recently specifically rejected BellSouth's contention that the PSC "may not regulate the rates, terms, and conditions for elements required to be provided by BellSouth pursuant to Section 271." *Joint Petition for Arbitration of NewSouth Communications Corp., et al., of an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Case No. 2004-00044, Order, at 10 (Sept. 26, 2005). Rather, the PSC held that BellSouth continues to be obligated to "commingle" UNEs with elements that it is required to provide under Section 271, and that the PSC has authority with regard to the latter elements, which are provided "within this Commonwealth and are used to provide intrastate service." *Id.*

Accordingly, in our list of disputed issues between SouthEast and BellSouth that must be resolved going forward, we plan to ask the PSC to determine not only the TELRIC rates for UNEs such as unbundled voice-grade loops, but also the "just and reasonable" rates for the unbundled local switching and shared transport elements – the "port" component of UNE-P – which BellSouth is obligated to provide pursuant to Section 271 at "just and reasonable" rates. We plan to send you this list of the specific disputed issues in the near future. Given the newly clarified scope of the PSC's authority and BellSouth's continued refusal to negotiate with us or even to provide a substantive response to our various proposals, we are retracting any and all proposals regarding interconnection and commercial agreements that we have offered in the past.

As noted above, pending resolution of these disputes, the rates, terms, and conditions in our pre-existing interconnection agreement remain in full force and effect.

Thank you very much. Please contact me if you have any questions.

Very truly yours,

David Sieradzki

David L. Sieradzki
Counsel for SouthEast Telephone, Inc.

cc: Darrell Maynard
Amy Dougherty, Kentucky PSC

Exhibit 7

Selections from the BellSouth-SouthEast Interconnection Agreement

BELLSOUTH® / CLEC Agreement

Customer Name: SouthEast Telephone, Inc.

INTERCONNECTION
AGREEMENT
BETWEEN
BELLSOUTH TELECOMMUNICATIONS INC.
AND
SOUTHEAST TELEPHONE, INC.

AGREEMENT

THIS AGREEMENT is made by and between BellSouth Telecommunications, Inc., ("BellSouth"), a Georgia corporation, and SouthEast Telephone, Inc., a Kentucky corporation ("SouthEast"), and shall be deemed effective as of the date of the last signature of both Parties ("Effective Date"). This Agreement may refer to either BellSouth or SouthEast or both as a "Party" or "Parties."

W I T N E S S E T H

WHEREAS, BellSouth is a local exchange telecommunications company authorized to provide telecommunications services in the states of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee; and

WHEREAS, SouthEast is or seeks to become a CLEC authorized to provide telecommunications services in the state of Kentucky; and

WHEREAS, SouthEast wishes to resell BellSouth's telecommunications services and purchase network elements and other services, and the Parties wish to interconnect their facilities and exchange traffic pursuant to sections 251 and 252 of the Act.

NOW THEREFORE, in consideration of the mutual agreements contained herein, BellSouth and SouthEast agree as follows:

1. Definitions

Affiliate is defined as a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or equivalent thereof) of more than 10 percent.

Commission is defined as the appropriate regulatory agency in each of BellSouth's nine-state region, Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

Competitive Local Exchange Carrier (CLEC) means a telephone company certificated by the Commission to provide local exchange service within BellSouth's franchised area.

End User means the ultimate user of the Telecommunications Service.

FCC means the Federal Communication Commission.

10.5 Recipient agrees not to publish or use the Information for any advertising, sales promotions, press releases, or publicity matters that refer either directly or indirectly to the Information or to the Discloser or any of its affiliated companies.

10.6 The disclosure of Information neither grants nor implies any license to the Recipient under any trademark, patent, copyright, or application which is now or may hereafter be owned by the Discloser.

10.7 Survival of Confidentiality Obligations. The Parties' rights and obligations under this Section 10 shall survive and continue in effect until two (2) years after the expiration or termination date of this Agreement with regard to all Information exchanged during the term of this Agreement. Thereafter, the Parties' rights and obligations hereunder survive and continue in effect with respect to any Information that is a trade secret under applicable law.

11. Assignments

Any assignment by either Party to any non-affiliated entity of any right, obligation or duty, or of any other interest hereunder, in whole or in part, without the prior written consent of the other Party shall be void. A Party may assign this Agreement or any right, obligation, duty or other interest hereunder to an Affiliate of the Party without the consent of the other Party; provided, however, that the assigning Party shall notify the other Party in writing of such assignment thirty (30) days prior to the Effective Date thereof and, provided further, if the assignee is an assignee of SouthEast, the assignee must provide evidence of Commission CLEC certification. The Parties shall amend this Agreement to reflect such assignments and shall work cooperatively to implement any changes required due to such assignment. All obligations and duties of any Party under this Agreement shall be binding on all successors in interest and assigns of such Party. No assignment or delegation hereof shall relieve the assignor of its obligations under this Agreement in the event that the assignee fails to perform such obligations.

12. Resolution of Disputes

Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party shall petition the Commission for a resolution of the dispute. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement.

13. Taxes

13.1 Definition. For purposes of this Section, the terms "taxes" and "fees" shall include but not limited to federal, state or local sales, use, excise, gross receipts or other

Attachment 1

Resale

6.6.6 In the event service to SouthEast is terminated due to SouthEast's default on its account, any security deposits held will be applied to SouthEast's account.

6.6.7 Interest on a cash or cash equivalent security deposit shall accrue and be paid in accordance with the terms in the appropriate BellSouth tariff.

7. Payment And Billing Arrangements

7.1 Prior to submitting orders to BellSouth for local service, a master account must be established for SouthEast. SouthEast is required to provide the following before a master account is established: proof of PSC/PUC certification, the Application for Master Account, an Operating Company Number ("OCN") assigned by the National Exchange Carriers Association ("NECA") and a tax exemption certificate, if applicable.

7.2 BellSouth shall bill SouthEast on a current basis all applicable charges and credits.

7.3 Payment of all charges will be the responsibility of SouthEast. SouthEast shall make payment to BellSouth for all services billed. BellSouth is not responsible for payments not received by SouthEast from SouthEast's End User. BellSouth will not become involved in billing disputes that may arise between SouthEast and its End User. Payments made to BellSouth as payment on account will be credited to an accounts receivable master account and not to an End User's account.

7.4 BellSouth will render bills each month on established bill days for each of SouthEast's accounts.

7.5 BellSouth will bill SouthEast in advance for all services to be provided during the ensuing billing period except charges associated with service usage, which will be billed in arrears. Charges will be calculated on an individual End User account level, including, if applicable, any charge for usage or usage allowances. BellSouth will also bill SouthEast, and SouthEast will be responsible for and remit to BellSouth, all charges applicable to resold services including but not limited to 911 and E911 charges, End Users common line charges, federal subscriber line charges, telecommunications relay charges (TRS), and franchise fees.

7.6 The payment will be due by the next bill date (i.e., same date in the following month as the bill date) and is payable in immediately available funds. Payment is considered to have been made when received by BellSouth.

7.6.1 If the payment due date falls on a Sunday or on a Holiday which is observed on a Monday, the payment due date shall be the first non-Holiday day following such Sunday or Holiday. If the payment due date falls on a Saturday or on a Holiday which is observed on Tuesday, Wednesday, Thursday, or Friday, the payment due date shall be the last non-Holiday day preceding such Saturday or Holiday. If

payment is not received by the payment due date, a late payment charge, as set forth in section 7.8 following, shall apply.

7.6.2 If SouthEast requests multiple billing media or additional copies of bills, BellSouth will provide these at an appropriate charge to SouthEast.

7.6.3 Billing Disputes

7.6.3.1 Each Party agrees to notify the other Party upon the discovery of a billing dispute. In the event of a billing dispute, the Parties will endeavor to resolve the dispute within sixty (60) calendar days of the Bill Date on which such disputed charges appear. Resolution of the dispute is expected to occur at the first level of management resulting in a recommendation for settlement of the dispute and closure of a specific billing period. If the issues are not resolved within the allotted time frame, the following resolution procedure will begin:

7.6.3.2 If the dispute is not resolved within sixty (60) days of the Bill Date, the dispute will be escalated to the second level of management for each of the respective Parties for resolution. If the dispute is not resolved within ninety (90) days of the Bill Date, the dispute will be escalated to the third level of management for each of the respective Parties for resolution

7.6.3.3 If the dispute is not resolved within one hundred and twenty (120) days of the Bill Date, the dispute will be escalated to the fourth level of management for each of the respective Parties for resolution.

7.6.3.4 If a Party disputes a charge and does not pay such charge by the payment due date, such charges shall be subject to late payment charges as set forth in the Late Payment Charges provision of this Attachment. If a Party disputes charges and the dispute is resolved in favor of such Party, the other Party shall credit the bill of the disputing Party for the amount of the disputed charges along with any late payment charges assessed no later than the second Bill Date after the resolution of the dispute. Accordingly, if a Party disputes charges and the dispute is resolved in favor of the other Party, the disputing Party shall pay the other Party the amount of the disputed charges and any associated late payment charges assessed no later than the second bill payment due date after the resolution of the dispute. BellSouth shall only assess interest on previously assessed late payment charges in a state where it has authority pursuant to its tariffs.

7.7 Upon proof of tax exempt certification from SouthEast, the total amount billed to SouthEast will not include any taxes due from the End User to reflect the tax exempt certification and local tax laws. SouthEast will be solely responsible for the computation, tracking, reporting, and payment of taxes applicable to SouthEast's End User.

7.8 If any portion of the payment is received by BellSouth after the payment due date as set forth preceding, or if any portion of the payment is received by BellSouth in funds that are not immediately available to BellSouth, then a late payment charge shall be due to BellSouth. The late payment charge shall be the portion of the payment not received by the payment due date times a late factor and will be applied on a per bill basis. The late factor shall be as set forth in Section A2 of the General Subscriber Services Tariff or Section B2 of the Private Line Service Tariff, as applicable. SouthEast will be charged a fee for all returned checks as set forth in Section to A2 of the General Subscriber Services Tariff or in applicable state law.

7.9 Any switched access charges associated with interexchange carrier access to the resold local exchange lines will be billed by, and due to, BellSouth.

7.10 BellSouth will not perform billing and collection services for SouthEast as a result of the execution of this Agreement. All requests for billing services should be referred to the appropriate entity or operational group within BellSouth.

7.11 In general, BellSouth will not become involved in disputes between SouthEast and SouthEast's End User customers relating to resold services. If a dispute does arise that cannot be settled without the involvement of BellSouth, SouthEast shall contact the designated Service Center for resolution. BellSouth will assist in the resolution of the dispute and will work with SouthEast to resolve the matter in as timely a manner as possible. SouthEast may be required to submit documentation to substantiate the claim.

8. Discontinuance of Service

8.1 The procedures for discontinuing service to an End User are as follows:

8.1.1 BellSouth will deny service to SouthEast's End User on behalf of, and at the request of, SouthEast. Upon restoration of the End User's service, restoral charges will apply and will be the responsibility of SouthEast.

8.1.2 At the request of SouthEast, BellSouth will disconnect a SouthEast End User customer.

8.1.3 All requests by SouthEast for denial or disconnection of an End User for nonpayment must be in writing.

8.1.4 SouthEast will be made solely responsible for notifying the End User of the proposed disconnection of the service.

8.1.5 BellSouth will continue to process calls made to the Annoyance Call Center and will advise SouthEast when it is determined that annoyance calls are originated

from one of its End User's locations. BellSouth shall be indemnified, defended and held harmless by SouthEast and/or the End User against any claim, loss or damage arising from providing this information to SouthEast. It is the responsibility of SouthEast to take the corrective action necessary with its End Users who make annoying calls. (Failure to do so will result in BellSouth's disconnecting the End User's service.)

8.1.6 BellSouth may disconnect and reuse facilities when the facility is in a denied state and BellSouth has received an order to establish new service or transfer of service from an End User or an End User's CLEC at the same address served by the denied facility.

8.2 The procedures for discontinuing service to SouthEast are as follows:

8.2.1 BellSouth reserves the right to suspend or terminate service in the event of prohibited, unlawful or improper use of the facilities or service, abuse of the facilities, or any other violation or noncompliance by SouthEast of the rules and regulations of BellSouth's Tariffs.

8.2.2 BellSouth reserves the right to suspend or terminate service for nonpayment. If payment of account is not received by the bill day in the month after the original bill day, BellSouth may provide written notice to SouthEast, that additional applications for service will be refused and that any pending orders for service will not be completed if payment is not received by the fifteenth day following the date of the notice. In addition BellSouth may, at the same time, provide written notice to the person designated by SouthEast to receive notices of noncompliance that BellSouth may discontinue the provision of existing services to SouthEast, if payment is not received by the thirtieth day following the date of the notice.

8.2.3 In the case of such discontinuance, all billed charges, as well as applicable termination charges, shall become due.

8.2.4 If BellSouth does not discontinue the provision of the services involved on the date specified in the thirty days notice and SouthEast's noncompliance continues, nothing contained herein shall preclude BellSouth's right to discontinue the provision of the services to SouthEast without further notice.

8.2.5 Upon discontinuance of service on a SouthEast's account, service to SouthEast's End Users will be denied. BellSouth will also reestablish service at the request of the End User or SouthEast upon payment of the appropriate connection fee and subject to BellSouth's normal application procedures. SouthEast is solely responsible for notifying the End User of the proposed disconnection of the service.

Exhibit 9
SouthEast Telephone, Inc.
Notice of Intent to Opt-In
to Interconnection Agreement Provision
(filed June 8, 2004)

JONATHON N. AMLUNG
ATTORNEY AT LAW
1000 REPUBLIC BUILDING
429 W. MUHAMMAD ALI BLVD.
LOUISVILLE, KENTUCKY 40202-2347

TELEPHONE: (502) 587-6838
FACSIMILE: (502) 584-0439
E-MAIL: jonathon@amlung.com

J.D./M.B.A.
LICENSED IN KENTUCKY, OHIO AND COLORADO

June 8, 2004

Mr. Thomas M. Dorman
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40602-0615

RE: SouthEast Telephone, Inc., Notice of Intent to Opt-in to Interconnection Agreement Provision

Dear Mr. Dorman:

Please find enclosed an original and ten (10) copies of SouthEast Telephone, Inc.'s Notice of Intent to Adopt Certain Provisions of an Interconnection Agreement. It is desired that the adoption take place as soon as possible. Please contact me at (502) 587-6838 should you have any questions.

Cordially yours,

Jonathon N. Amlung

Enclosures

cc: BellSouth Telecommunications, Inc.

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

NOTICE OF INTENT TO ADOPT CERTAIN PROVISIONS OF AN INTERCONNECTION AGREEMENT

Pursuant to Section 252(i) of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C §252(i), SouthEast Telephone, Inc., ("SouthEast"), through its undersigned counsel, hereby files its Notice of Intent to adopt a portion of the currently effective interconnection agreement between BellSouth Telecommunications, Inc. ("BellSouth") and Cinergy Communications Company ("Cinergy"). SouthEast is a utility within the meaning of KRS 278.010(3)(e) and is a competitive local exchange carrier or CLEC. BellSouth is an incumbent local exchange carrier or ILEC. SouthEast represents and warrants that it is an authorized provider of local telecommunications services in the Commonwealth of Kentucky and that its adoption of the terms covers services in the Commonwealth of Kentucky only. The referenced agreement, which is to be adopted only in part, was arbitrated in docket number 2001-00432. The Commission approved the final agreement in an April 21, 2003, Order. The CLEC party to this unexpired agreement is Cinergy.

SouthEast has elected to opt-in to a specific provision in the above-referenced interconnection agreement. Specifically, SouthEast elects to opt-in to numerical paragraph 11 (subsection 11.1), which reads as follows:

> 11.
>
> 11.1
> Resolution of Disputes
> Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party shall petition the Commission for a resolution of the dispute. For issues over which the Commission does not have authority, the Parties may avail themselves of any available legal remedies in the appropriate forum. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement. Furthermore, the Parties agree to carry on their respective obligations under this Agreement, while any dispute resolution is pending.

Notice of this intent to adopt is being sent to:

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

SouthEast intends to be bound by the terms of numerical paragraphs 11 and subsection 11.1 of the unexpired agreement, anticipating that these sections will be reproduced in their entirety and incorporated into the existing interconnection agreement between SouthEast and Bellsouth. A copy of the specific provision is attached to the original of this Notice and to the service copies provided to BellSouth. SouthEast will file additional copies of the Cinergy agreement if required by the Commission. The agreement containing the provision to be adopted may be viewed on the PSC's public Internet site at the following URL:

http://162.114.3.165/PSCICA/2001/2001-432/2001-432_032003.pdf

This Commission and the FCC have previously acknowledged the statutory right of carriers to opt-in, or "pick and choose" existing provisions of interconnection agreements by notice to the Commission. As the adoption arises from a statutory right, such a request may be reviewed expeditiously and promptly granted.

To the extent the Commission requires an executed Amendment, SouthEast has attached a proposed Amendment as Exhibit "A" to this Notice.

Wherefore, SouthEast respectfully requests that the Commission issue an order:

1) Acknowledging the adoption by SouthEast;

2) Approving the request and making the amendment to the interconnection agreement effective as of the date of the Order;

3) Requiring BellSouth to file with the Commission a true and complete copy of the approved Amendment.

4) To the extent required, ordering SouthEast and BellSouth to sign and file an adoption agreement as set forth in Exhibit A.

Respectfully submitted,

JONATHON N. AMLUNG
Attorney for SouthEast Telephone, Inc.
1000 Republic Building
429 W. Muhammad Ali Blvd.
Louisville, KY 40202
(502) 587-6838

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, this the 8th day of June, 2004, to:

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

JONATHON N. AMLUNG

EXHIBIT "A"

Proposed Amendment to Interconnection Agreement

Amendment to the Agreement
Between
SouthEast Telephone, Inc.
and
BellSouth Telecommunications, Inc.

Pursuant to this Amendment, (the "Amendment"), SouthEast Telephone, Inc. ("SouthEast), and BellSouth Telecommunications, Inc. ("BellSouth"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated October 9, 2001 ("Agreement") to be effective the date of the last signature executing the Amendment.

WHEREAS, SouthEast and BellSouth entered into the Agreement on October 9, 2001, and;

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

1. The parties agree to substitute the following provision for numerical paragraph 12 of the parties' Interconnection Agreement referenced herein:

> 12. Resolution of Disputes
> Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party shall petition the Commission for a resolution of the dispute. For issues over which the Commission does not have authority, the Parties may avail themselves of any available legal remedies in the appropriate forum. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement. Furthermore, the Parties agree to carry on their respective obligations under this Agreement, while any dispute resolution is pending.

2. All of the other provisions of the Agreement, dated October 9, 2001, shall remain in full force and effect.

3. Either or both of the Parties are authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996.

In witness whereof, the parties have executed this Agreement the day and year written below.

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

Name: _____

Title: _____

Date: _____

SOUTHEAST TELEPHONE, INC.

By: _____

Name: _____

Title: _____

Date: _____

exchanged during the term of this Agreement. Thereafter, the Parties' rights and obligations hereunder survive and continue in effect with respect to any Information that is a trade secret under applicable law.

10.8 Assignments

10.9 Any assignment by either Party to any non-affiliated entity of any right, obligation or duty, or of any other interest hereunder, in whole or in part, without the prior written consent of the other Party shall be void. A Party may assign this Agreement or any right, obligation, duty or other interest hereunder to an Affiliate of the Party without the consent of the other Party; provided, however, that the assigning Party shall notify the other Party in writing of such assignment thirty (30) days prior to the Effective Date thereof and, provided further, if the assignee is an assignee of Cinergy Communications Company, the assignee must provide evidence of Commission CLEC certification. The Parties shall amend this Agreement to reflect such assignments and shall work cooperatively to implement any changes required due to such assignment. All obligations and duties of any Party under this Agreement shall be binding on all successors in interest and assigns of such Party. No assignment or delegation hereof shall relieve the assignor of its obligations under this Agreement in the event that the assignee fails to perform such obligations.

11. Resolution of Disputes

11.1 Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party shall petition the Commission for a resolution of the dispute. For issues over which the Commission does not have authority, the Parties may avail themselves of any available legal remedies in the appropriate forum. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement. Furthermore, the Parties agree to carry on their respective obligations under this Agreement, while any dispute resolution is pending.

12. Taxes

12.1 Definition. For purposes of this Section, the terms "taxes" and "fees" shall include but not limited to federal, state or local sales, use, excise, gross receipts or other taxes or tax-like fees of whatever nature and however designated (including tariff surcharges and any fees, charges or other payments, contractual or otherwise, for the use of public streets or rights of way, whether designated as franchise fees or otherwise) imposed, or sought to be imposed, on or with respect to the services furnished hereunder or measured by the charges or payments therefore, excluding any taxes levied on income.