BELLSOUTH

BellSouth Telecommunications, Inc.
601 W. Chestnut Street
Room 407
Louisville, KY 40203

Mary.Keyer@BellSouth.com

Mary K. Keyer
General Counsel/Kentucky

502 582 8219
Fax 502 582 1573

June 8, 2007

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

Re: South Central Telcom LLC, Complainant v. BellSouth Telecommunications, Inc., Defendant
PSC 2006-00448

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of BellSouth's Response to South Central's Motion for Summary Judgment.

Sincerely,

Mary K. Keyer

cc: Parties of Record

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

SOUTH CENTRAL TELCOM LLC **Complainant**	)	
v.	)	**Case No. 2006-00448**
BELLSOUTH TELECOMMUNICATIONS, INC. **Defendant**	)	

BELLSOUTH'S RESPONSE TO SOUTH CENTRAL'S MOTION FOR SUMMARY JUDGMENT

BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("BellSouth"), by counsel, files its Response to the Motion for Summary Judgment filed by South Central Telecom ("South Central"), and states the following:

I. INTRODUCTION AND PROCEDURAL HISTORY

South Central's Motion for Summary Judgment is both procedurally improper and inadequate as a matter of law. Not only has South Central failed to meet the standard for obtaining a summary judgment under Kentucky law, it has also failed to develop a factual record as the basis for such a motion. Beyond the procedural infirmities in South Central's Motion, there is the more fundamental problem that South Central is espousing a legal theory under which it cannot prevail under any set of facts. For these reasons, the Motion for Summary Judgment must be denied.

This case commenced with South Central's filing of a Complaint. BellSouth responded with an Answer and Motion to Dismiss. In this Motion, BellSouth outlined the

reasons that South Central cannot prevail in this case as a matter of law, even if the facts alleged in the complaint were proven to be true. South Central filed a Response to BellSouth's Motion, and BellSouth filed a Reply to that response. Subsequently, South Central requested that the Commission hold an informal conference, and that it also set a discovery schedule. Although BellSouth did not oppose the informal conference, it did (and still does) oppose setting a schedule for discovery because the Commission has not yet ruled on BellSouth's Motion to Dismiss. BellSouth should not be burdened with having to respond to discovery from South Central unless the Commission determines that South Central has filed a colorable claim that is at least sufficient to justify the commencement of discovery. Although an informal conference was held, the Commission did not set a schedule for discovery. Accordingly, at this point in the case, there has been no discovery conducted whatsoever.

Nevertheless, on May 22, 2007, South Central filed a Motion for Summary Judgment. South Central's motion is not supported by any affidavits. Instead, South Central has styled its motion as a "verified motion," and included a very brief section entitled "Verified Statement of Facts." The "verification" attached to the motion was left blank, but a substitute "verification" was subsequently filed in which an apparent employee of South Central stated that the verified statement of facts in the motion was true "to the best of [his] knowledge, information and belief." (Motion, p. 11).

II. DISCUSSION

A. South Central's Motion Is Procedurally Improper and Otherwise Inadequate To Merit Consideration

The above described procedural history of this case highlights one of the many fatal flaws in South Central's argument: the fact that a motion for summary judgment is

not only inappropriate at this juncture of the case, but wholly unsupportable. South Central begins its argument by quoting from the standard for summary judgment contained in the Kentucky Rules of Court. Specifically, South Central states that "summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, stipulations of admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[1] However, in this case, there currently are no depositions, interrogatories, stipulations, admissions on file, or affidavits. In point of fact, there is no record whatsoever (nor could there be) because the Commission has not yet authorized the commencement of discovery. Given the fact that there has been no discovery and there is no record, a motion for summary judgment that purports to be based on the record is grossly inappropriate.

South Central compounds its problems by relying on the wrong standard for the granting of a motion for summary judgment. South Central contends that a motion for summary judgment should be granted when "the respondent, having had sufficient time for discovery, has no evidence to support . . . (its) case."[2] Even under this purported standard, South Central's motion would fail because, given the procedural status of the case, neither party has had an opportunity to conduct discovery. Still, the standard asserted by South Central is not the standard under Kentucky law.

South Central quotes the *Steelvest* case as promulgating the controlling standard. However, in this case, the Supreme Court of Kentucky analyzed at length the difference in the respective summary judgment standards under Kentucky law and

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1 Motion for Summary Judgment, p. 2, *quoting* CR 56.03.

2 Motion, p. 3, *quoting Steelvest Inc. v. Scansteel Service Center*, 807 SW 2nd, 476, 481 (Ky. 1991).

under federal law. The standard on which South Central relies in its Motion is not the Kentucky standard at all. Instead, the above-quoted language appears in a section of the case in which the Kentucky Supreme Court discusses the comparatively more relaxed federal standard.[3] After describing the federal standard, the Kentucky Supreme Court then compared it to the prevailing Kentucky standard as follows:

> . . . [I]n both jurisdictions, the movant has the initial burden of showing that no genuine issue of material fact exists. However, under the new federal standards, this burden does not necessarily require the movant to produce evidence showing the absence of a genuine issue of material fact, but only that he show that there is an absence of evidence possessed by the respondent to support an essential element in this case. Under the present practice of Kentucky courts, the movant must convince the Court, by the evidence of record, of the nonexistence of an issue of material fact.[4]

After comparing these standards, the Kentucky Supreme Court decided to continue to follow the existing law in Kentucky as set forth in *Paintsville Hospital v. Rose*, 683 SW 2d 255 (Ky. 1985), that summary judgment is only proper "where the movant shows that the adverse party could not prevail under any circumstances."[5] In doing so, the Court expressly declined to apply the "more relaxed standard of summary judgment" that prevails in federal courts,[6] i.e., the standard to which South Central erroneously cites in its motion.

Although South Central's motion is so weak that it would fail to meet any reasonable summary judgment standard, it falls far short of the comparatively high standard in Kentucky, that the movant must affirmatively show that there are no circumstances under which the respondent could prevail. Again, there is no record in

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[3] This discussion appears in the case under the heading "Summary Judgment Practice in Federal Courts." *Id.*, p. 480-81.

[4] *Id.*, p. 482.

[5] *Id.*

[6] *Id.*

the case, and South Central has not even attempted to create a record by filing affidavits. Instead, the motion has only an extremely brief recitation of facts that are verified by an apparent employee of South Central named Kyle Jones. However, under the Kentucky Rules of Civil Procedure, an affidavit filed in support of the motion for summary judgment must conform to the requirement that, "supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein." (C.R. 56.05). The "verification" provided by South Central fails to recite a basis to conclude that the signer has personal knowledge of the facts or that he is competent to testify as to these facts. To the contrary, Mr. Jones swears only that the facts are true upon "knowledge, information and belief." Thus, Mr. Jones not only does not swear that he has personal knowledge, the reference to "information and belief" implies that he does not.

Moreover, even if South Central were to remedy the flaws in its verification and bring it into compliance with Rule 56.05, it would still be insufficient. Again, the verified statement of facts is a very short section that appears at the beginning of the Motion. However, South Central also attempts to rely upon a variety of other factual assertions that are scattered throughout the Motion, and that are not addressed by the verification in any way. For example, the Motion makes factual statements regarding (1) where BellSouth, South Central and Windstream (another LEC) provide service, (2) South Central's agreements with Windstar, (3) the dates of these agreements, (4) the substance of these agreements, and (5) the nature of the traffic at issue.[7] Again, none of these factual assertions are addressed in the verified statement of facts. Thus,

[7] *See* Motion, pp. 3-5.

again, South Central has failed to set forth a record sufficient to prompt even the consideration of its Motion.

Finally, the extremely casual approach that South Central has taken to the facts in this case only highlights the paucity of support for South Central's position. As BellSouth noted in its Motion to Dismiss, South Central simply cannot prevail on its claim as a matter of law. Nevertheless, even if there were a legal basis for South Central's claim, South Central could only prevail if it proved a variety of facts that it has not even addressed. For example, South Central claims that it is terminating access traffic for BellSouth, but has offered no evidence to establish the nature of the traffic. South Central also fails to describe the specifics of the physical interconnection arrangement that it utilizes to terminate this traffic, or even to show that it actually has terminated traffic, i.e., that has actually rendered a service to BellSouth.

Moreover, South Central claims that its access tariff applies, but has offered absolutely nothing to demonstrate how it could have been properly applied. In other words, South Central's access tariff sets forth particular procedures for ordering physical connections to South Central's network and for charging those who buy access services according to the interconnection arrangements they order from the tariff. However, South Central does not claim that BellSouth ever placed an order, and it does not detail the facilities that it has utilized to provide the alleged access services. Further, South Central's motion contains a cursory allegation as to the amount that is due, but it does not provide any information or support as to what it has charged BellSouth for individual access services or how these individual charges aggregate to make up the $65,393.83 that South Central now claims to be due.

Put simply, even if South Central had a case that was viable as a matter of law, it could only sustain its claim if it actually proved that services were rendered, that they were rendered according to the terms of its access tariff, the price for the services rendered, and how it has calculated the amount it alleges is due. Again, the determinative standard for summary judgment is that upon review of the complete record, the movant must show that there is no way that the respondent could prevail under any circumstances. In this case, not only is there no record, South Central has failed to even make a passing attempt to create a record. South Central has failed to address the many factual issues that it would have to, not only address, but prove if it were to prevail.

B. South Central's Substantive Arguments Fail As Well

As BellSouth noted in its Reply to South Central's Response to its Motion to Dismiss, South Central can only prevail in this case if it proves two things. One, that an interconnection agreement is not the proper vehicle to set forth the terms and conditions under which traffic is to be exchanged between an ILEC and a CLEC. Two, South Central must also prove that its exchange access tariff[8] applies. Since South Central cannot prove either point, its Motion for Summary Judgment must be denied (and BellSouth's pending Motion to Dismiss should be granted).

South Central, of course, claims that traffic from one LEC terminated on the network of another LEC is access traffic that is subject to the terms of a LEC's access tariff. The federal rules, the Telecommunications Act and the decisions of the Federal Communications Commission ("FCC") provide otherwise. As BellSouth stated previously, an interconnection agreement is the appropriate mechanism for the

[8] South Central has adopted the access tariff of Duo County Cooperative Corp. Inc.

establishment of reciprocal compensation obligations between carriers. South Central claims to the contrary, and cites in support of its claim, 47 CFR § 51.707(b)(1). Specifically, South Central claims in its Motion that § 51.707(b)(1) stands for the proposition that "'interstate or intrastate exchange access' is not 'telecommunications traffic,' and therefore, not subject to the 47 CFR § 51.703(a) requirements that LECs 'establish reciprocal compensation arrangements for transport and termination of telecommunications traffic.'"[9]

Contrary to South Central's assertion, 51.707(b)(1) is completely unrelated to the definition of exchange access service or whether it constitutes telecommunications traffic. However, Section 51.701(b)(1) does address exchange access service, and BellSouth assumes that it is this section that South Central intended to reference. Section 51.701(b)(1) does not, as South Central claims, state that exchange access service is not telecommunications traffic, but it does appear, at first blush, to exclude exchange access traffic from the reciprocal compensation obligations set forth in § 51.703. However, a more careful reading of this section reveals that what it actually excludes is something quite different from the traffic at issue in this case.

Although Section 51.701(b)(1) does not specifically define exchange access, it does include an express reference to FCC Order No. 01-131, paragraphs 34, 36, 39, 42-43.[10] The referenced *Order on Remand* first states the conclusion that Congress intended to exclude the traffic listed in subsection (g) of Section 251 from the reciprocal

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[9] Motion, pp. 5-6.

[10] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic,* CC Docket Nos. 96-98 & 99-68, *Order on Remand and Report and Order,* 16 FCC Rcd 9151 (2001) ("*Order on Remand*").

compensation requirements of Section 251(b)(5).[11] Section 251(g) of the Act provides that after the date of enactment of the Act, "each local carrier . . . shall provide exchange access, information access, and exchange services for such *access to interexchange carriers and information service providers* . . ." in the same manner as it provided such service prior to enactment of the Act (emphasis added). Accordingly, in the *Order on Remand*, the FCC interpreted the interrelated provisions of subsections 251(g) and 251(b)(5) of the Act as follows:

> 36. We believe that the specific provisions of Section 251(g) demonstrate that Congress did not intend to interfere with the Commission's pre-Act authority over 'non-discriminatory interconnection . . . obligations (including receipt of compensation with respect to 'exchange access, information access, and exchange services for such access, *provided to IXCs or information service providers*. We conclude that Congress specifically exempted the services enumerated under Section 251(g) from the newly imposed reciprocal compensation requirement in order to ensure that Section 251(b)(5) is not interpreted to override either existing or future regulations prescribed by the Commission.[12]

The Commission then went on to explain the rationale for the specific treatment of these particular access services when provided to IXCs or information service providers as follows:

> 37. This limitation in Section 251(g) makes sense when viewed in the overall context of the statute. All of the services specified in Section 251(g) have one thing in common: they are all access services or services associated with access. Before Congress enacted the 1996 Act, LECs provided access services to *IXCs and to information service providers* in order to connect calls that travel to points—both interstate and intrastate—beyond the local exchange. In turn, before the Commission in the states had in place access regimens applicable to this traffic, which they have continued to modify over time. It makes sense that Congress did not intend to disrupt *these pre-existing relationships.* Accordingly, Congress excluded *all such* access traffic from the purview of Section 251(b)(5).[13]

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11 *Id.* ¶ 34.

12 *Id.*, ¶ 36 (emphasis added) (internal citations deleted).

13 *Id.*, ¶ 37 (emphasis added)(internal citations deleted).

Thus, when one goes beyond the narrow (and misleading) reading of § 51.701 urged by South Central and looks at this regulation in the broader context of both the FCC Order to which it cites and of the provisions of the Act, its meaning is clear: prior to the Act, there was a structure in place under which local exchange carriers charged Commission-approved rates to provide access services to IXCs and information service providers. Access service from LECs to these providers was exempted from the reciprocal compensation requirements of the Act, and of the federal rules that implement these requirements. There is nothing in the controlling federal law that stands for the proposition that South Central argues, i.e., that it is free to define very broadly the term "access traffic" and then utilize tariffs to unilaterally impose charges for terminating traffic upon other LECs.

South Central's only other argument that an interconnection agreement is not necessary is the novel view that even if the Act otherwise applied, South Central could avoid this application by simply electing not to request an agreement with BellSouth. Specifically, South Central states that "ILECs are required under the Act to provide any requesting telecommunications carrier interconnection to the ILEC network [citation deleted]. As part of the interconnection process, a telecommunications carrier can request the negotiation of an interconnection agreement between itself and an ILEC."[14] However, South Central maintains, it has made no such request. Thus, South Central argues, in effect, that because it has chosen to avoid one part of the proper interconnection process, it has created for itself the entitlement to ignore the Act entirely.

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[14] Motion, p. 7 (emphasis added).

In a typical situation, an ILEC and a CLEC, prior to entering into a physical interconnection arrangement, will always negotiate and execute an interconnection agreement. In the normal course of business, this negotiation and ultimate agreement on the terms that govern the interconnection between the parties is simply a necessity, because the physical interconnection is not implemented until after the parties determine by negotiation the specifics of the physical arrangement, appropriate rates, etc. Rather than properly negotiating its own interconnection agreement, South Central piggy-backed onto the physical interconnection of another carrier in order to capture BellSouth traffic. South Central was able to obtain a physical interconnection without negotiating an agreement by utilizing the facilities of its affiliated ILEC, which already had in place an interconnection arrangement with BellSouth.

Thus, South Central's assertion is that, since it has taken the questionable step of capturing BellSouth's traffic through a physical interconnection that was established between BellSouth and a different carrier, it should be rewarded for this unauthorized action by being allowed to avoid the requirements of the Act that would otherwise apply, i.e., by being allowed to charge BellSouth anything that it wishes, under any terms that it deems fit. The argument that an interconnection agreement otherwise required by the Act is not required because the CLEC has not requested it is hypertechnical at best. To suggest that South Central should be rewarded for its decision to avoid the clear intent of the Act and to utilize the physical interconnection of another carrier as a means to avoid the Act is simply absurd.

Even if South Central could demonstrate that the Act does not apply and that an interconnection agreement is not required, it would still fail to make its case because it

cannot prove that its access tariff properly applies. South Central's argument on this point is based almost entirely on the filed rate doctrine, a doctrine that does not apply in this case. Moreover, South Central ignores the fact that its access tariff is part of the pre-existing structure, discussed in the *Order on Remand*, which applies to IXCs and ISPs, but not to other local exchange companies. South Central also ignores the fact that its position, and its actions in this matter, are in direct contravention of the terms of its own access tariff.

The filed rate doctrine provides that when two customers buy the same service under similar conditions, they must be treated the same. Thus, for example, when two similarly situated customers purchase service from a tariff, they must both be given the rates and terms that appear in the tariff. This doctrine, obviously, has no application if one customer purchases access service from a tariff, but another "customer" is an interconnected carrier that is not bound by the terms of the tariff. Thus, in our case, if the service in question is subject to the access tariff, then the doctrine would apply; if the service in question is not subject to the tariff, then the requirement to treat customers that purchase from the same tariff equally would obviously not apply. The filed rate doctrine cannot be used to prove that South Central's conclusion (that the tariff applies) is correct, because the conclusion that the tariff applies is a necessary predicate to the application of the doctrine.

In other words, as South Central acknowledges in its Motion, the filed rate doctrine would only apply if the customers in question purchase services that are "like and contemporaneous," and they do so "under the same or substantially same

conditions."[15] The determinative question is whether a purchase by an IXC from the access tariff is the same as the termination of traffic from another local provider. Obviously these two "conditions" are different. Nevertheless, South Central simply assumes that the two are the same, without the benefit of any basis to do so, in order to make the flawed and circular argument that the filed rate doctrine applies.

South Central also attempts to prove that its access tariff applies by, once again, trotting out the clearly inapplicable case, *In the Matter of Brandenberg Telecom, LLC v. AT&T Communications of South Central States, Inc.*, Case No. 2002-00383, 2003 Ky. Pc Lexis 351 (May 1, 2003). South Central has already cited to this case, and BellSouth has explained previously why it does not apply.[16] Nevertheless, South Central claims again that *Brandenburg* controls.

In *Brandenburg*, AT&T was providing long distance services to customers in Kentucky, "including some end user customers who receive local exchange telephone service from Brandenburg." (*Brandenburg Order*, p. 2). Thus, AT&T was unquestionably functioning as an IXC, not as a LEC with whom Brandenburg was exchanging traffic. Further, the issue in that case was whether an IXC can be made to purchase service from a tariff or whether the local carrier must accede to the IXC's request for a contract service arrangement that would contain additional terms not found in the LEC's tariff. That situation is readily distinguishable from the current one, in which South Central obtained indirect interconnection with BellSouth through its ICO affiliate and is now attempting to unilaterally impose access charges on BellSouth under a facially inapplicable tariff.

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[15] Motion for Summary Judgment, p. 4, *quoting* KRS 278.170(1).

[16] *See*, BellSouth's Reply to South Central's Response to BellSouth's Motion for Summary Judgment, p. 8.

Finally, South Central's argument that its access tariff applies should be rejected because the tariff, on its face, is inapplicable to the instant circumstances. BellSouth made precisely this point in its Reply to South Central's Response to BellSouth's Motion for Summary Judgment, and South Central has simply chosen to ignore this point in its Motion for Summary Judgment. The reason for South Central's approach is obvious: South Central can do nothing to alter the terms of its own access tariff, which clearly do not apply.

South Central's access tariff is composed of 150 pages of descriptions of a variety of available switched access services. The provisions of this tariff obviously contemplate the traditional purchasing arrangement between an IXC/customer and a LEC. In the tariff, a party seeking switched access service must choose from four different feature group categories (South Central Access Tariff, 6.1.1(a)). Each group has a variety of options that could be ordered as part of the specific service arrangement. Under the express terms of the tariff, "rates and charges for Switched Access Service depend generally on the specific feature group *ordered by the customer*." (*Id.*, 6.1)(Italics added).

Thus, when an IXC decides to buy access service from South Central, it first determines the specific access facilities that it needs to interconnect to South Central's network, then it orders these facilities through a specifically defined process, and it pays the rate that corresponds to the particular arrangement that it has chosen. Obviously, this process is entirely unrelated to the instant circumstance. BellSouth has not ordered any service from South Central, nor has it requested a physical interconnection arrangement by which that service would be provided. Instead, South Central has

utilized another carrier's network to capture traffic, and has fabricated a rate for that "service." By doing this, South Central has clearly contravened the ordering process of its own tariff. Thus, even if an access tariff could apply conceptually, South Central's actions in this case violates the specific terms in its own access tariff for the ordering and provisioning of service.

South Central cannot escape the consequences of its action or the fact that its tariff is facially inapplicable. Further, if South Central claims to the contrary, then it is incumbent upon South Central to put forth facts to demonstrate, not only that its tariff applies in concept, but that the tariff has been properly applied, according to the terms set forth in the tariff. However, as discussed previously, South Central has failed to do so. Thus, in addition to being conceptually defective, South Central's motion also fails for this additional reason.

IV. CONCLUSION

South Central's Motion for Summary Judgment is procedurally improper and insufficient as a matter of law. Further, South Central's claim is wholly lacking in merit, and cannot be sustained under any set of facts. Accordingly, the Commission should deny South Central's Motion for Summary Judgment, and should grant BellSouth's pending Motion to Dismiss.

[Signatures continued on following page]

Respectfully submitted,

MARY K. KEYER
601 W. Chestnut Street, Room 407
P. O. Box 32410
Louisville, KY 40203
(502) 582-8219

J. PHILLIP CARVER
675 W. Peachtree Street, NW
Suite 4300
Atlanta, GA 30305
(404) 335-0710

COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC., D/B/A AT&T
KENTUCKY

#680006-v.2

CERTIFICATE OF SERVICE -- KPSC 2006-00448

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by U.S. mail, this 8th day of June, 2007.

John E. Selent
Holly C. Wallace
Dinsmore & Shohl, LLP
1400 PNC Plaza
500 West Jefferson Street
Louisville, KY 40202
John.Selent@dinslaw.com
Holly.Wallace@dinslaw.com

Mary K. Keyer