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June 27, 2007

Via Hand Delivery
Hon. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Blvd.
P. O. Box 615
Frankfort, KY 40601

Re: In the Matter of: South Central Telcom LLC v. BellSouth Telecommunications, Inc., Case No. 2006-00448

Dear Ms. O'Donnell:

Enclosed for filing in the above-referenced case, please find one original and ten (10) copies of South Central Telcom's Reply to BellSouth's Response to South Central's Motion for Summary Judgment . Please return a file-stamped copy in the self-addressed, postage prepaid envelope furnished herewith.

Thank you, and if you have any questions, please call me.

Very truly yours,

DINSMORE & SHOHL LLP

Holly C. Wallace

HCW/rk
Enclosures
cc: All 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	)	

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

South Central Telcom LLC ("South Central"), by counsel, hereby files with the Kentucky Public Service Commission (the "Commission") its reply to BellSouth Telecommunications, Inc.'s response to South Central's motion for summary judgment.

INTRODUCTION

This matter concerns the refusal of BellSouth Telecommunications, Inc. ("BellSouth") to pay South Central for terminating BellSouth-originated interexchange traffic. The material facts are undisputed: (1) South Central terminates BellSouth-originated interexchange traffic; (2) South Central has an access tariff on file with the Commission and there are no agreements governing the termination of interexchange traffic (therefore as a matter of law South Central's access tariff must apply);[1] and (3) BellSouth has not paid South Central's tariffed rates for terminating interexchange traffic.

[1] Nothing within this reply should be construed as an admission that South Central is required to execute an interconnection agreement with BellSouth to terminate interexchange traffic. On the contrary, South Central is not required to execute an interconnection agreement with BellSouth because South Central merely terminates BellSouth's interexchange access traffic; the parties do not exchange any local traffic. Pursuant to 47 U.S.C. §§ 251(b)(5), 251(g) and 47 C.F.R. § 51.701(b)(1), interexchange traffic is not subject to reciprocal compensation obligations; therefore an interconnection agreement is neither required nor appropriate.

Accordingly, South Central is entitled to summary judgment as a matter of law.

ARGUMENT AND ANALYSIS

I. SOUTH CENTRAL'S VERIFIED MOTION FOR SUMMARY JUDGMENT IS PROCEDURALLY SOUND.

Despite the fact that the Kentucky Revised Statutes provide the Commission is not bound by Civil Rule 56, BellSouth devotes a significant portion of its response to pontificating on the technicalities of the standard for summary judgment.

> All hearings and investigations before the Commission or any commissioner shall be governed by rules adopted by the Commission, and in the conduct thereof, neither the Commission nor the commissioner shall be bound by the technical rules of legal evidence.

KRS 278.310.

While South Central recognizes that the Commission looks to the Civil Rules for guidance,[2] South Central also recognizes that the standard for summary judgment is well-established and need not be rehashed in this reply. Succinctly put, summary judgment is appropriate when there is no genuine issue of material fact with regard to a claim or defense, and the movant is entitled to judgment as a matter of law. *Continental Casualty Co. v. Belknap Hardware and Mfg. Co.*, 281 S.W.2d 914, 916 (Ky. 1995). As South Central shall establish in Section II of this reply, the facts supporting South Central's claim are undisputed. Accordingly, summary judgment is appropriate in this case.

Nonetheless, in an effort to obfuscate the central issue in this matter—that BellSouth refuses to pay South Central for terminating interexchange traffic—BellSouth

[2] *In the Matter of: Ballard Rural Telephone Cooperative Corporation, Inc. v. Jackson Purchase Energy Corporation*, Case No. 2004-00036, 2005 Ky. PUC LEXIS 277 *11 (March 23, 2005) ("The Commission has not established a rule that explicitly governs summary judgment; therefore, in determining whether to summarily dispose of this proceeding, we are guided by Civil Rule 56 and the principles established by the courts resolving motions for summary judgment.")

raises a series of claims regarding alleged procedural issues with South Central's motion for summary judgment. All of the procedural claims raised by BellSouth are groundless.

A. South Central's Motion for Summary Judgment is Timely.

BellSouth claims that South Central's motion for summary judgment is premature "because the Commission has not yet authorized the commencement of discovery." (BellSouth's Response, p. 3.) BellSouth's complaint is disingenuous. On February 15, 2007, South Central moved the Commission to enter a procedural order "providing for discovery [and] direct and rebuttal testimony." (South Central's Motion for a Procedural Schedule, p. 2.) BellSouth objected to the motion and asked the Commission to deny it. (February 23, 2007 Letter from Mary Keyer to Beth O'Donnell.) Having objected to South Central's motion to establish a procedural order for discovery, BellSouth cannot now complain that South Central's motion for summary judgment is premature because the parties have not engaged in discovery.[3] Moreover, as South Central shall establish below, there is evidence of record supporting South Central's motion for summary judgment. Therefore, BellSouth's argument is without merit.

B. South Central's Motion for Summary Judgment is Properly Verified.

BellSouth also complains about South Central's verified statement of facts and the verification page, characterizing the statement of facts as an "extremely brief recitation of facts verified by an apparent employee of South Central named Kyle Jones." (BellSouth's Response, p. 5.) The length of the statement of facts is irrelevant to the

[3] In addition, BellSouth has not submitted an affidavit of counsel that it requests discovery. *See, Hancock Indus. v. Schaeffer,* 811 F.2d 225, 229 (3d. Cir. 1987) (party opposing motion for summary judgment must submit "affidavits . . . that he cannot for reasons stated present by affidavit *facts* essential to justify his opposition") (emphasis in original); and *Hartford Ins. Group v. Citizens Fidelity Bank & Trust Co.*, 579 S.W.2d 628, 630 (Ky. App. 1979) (opposing party must provide an "affidavit pursuant to CR 56.06").

standard for summary judgment; therefore, BellSouth's curious argument that the statement of facts was not lengthy has no bearing on the merit of South Central's motion.

With regard to the "apparent employee" who verified the statement of facts, Kyle Jones was identified by both his name and title, manager, in the motion for summary judgment. Mr. Jones swore, before a notary, that the allegations and statements in the verified statement of facts were true and correct to the best of his knowledge, information, and belief. Although pursuant to KRS 278.310 the Commission is not bound by the technicalities of CR 56.05 regarding the form of affidavits, Mr. Jones' sworn testimony based on "his knowledge" satisfies this rule which provides that the testimony be based on the individual's "personal knowledge." Moreover, the Civil Rules do not even require that a motion for summary judgment be supported by an affidavit. "A party seeking to recover upon a claim, . . . may . . . move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof." CR 56.01. Once again, BellSouth's argument is meritless.

C. The Verified Statement of Facts Support South Central's Motion for Summary Judgment.

BellSouth also complains that five factual statements in the motion for summary judgment were allegedly not included in the verified statement of facts. (BellSouth's response to South Central's motion for summary judgment, p. 5.) These five factual statements concern "(1) where BellSouth, South Central, and Windstream provide service, (2) South Central's agreements with Windstream, (3) the dates of those agreements, (4) the substance of those agreements, and (5) the nature of the traffic at issue." (BellSouth's response, p. 5.) The first four statements are immaterial to South

Central's claim. They concern South Central's relationship with another carrier. South Central need not prove those facts to obtain summary judgment.

The fifth factual statement regarding "the nature of the traffic at issue" was addressed in the verified statement of facts: "South Central has been terminating, and continues to terminate, BellSouth access traffic in its exchange." (Motion for Summary Judgment, p. 2 (emphasis added.)) Therefore, there is no merit to BellSouth's argument.

II. SOUTH CENTRAL HAS SATISFIED THE ELEMENTS OF ITS CLAIM; THEREFORE SUMMARY JUDGMENT IS APPROPRIATE.

To prevail on its motion for summary judgment, South Central must establish that: (1) it terminates BellSouth-originated interexchange traffic; (2) its access tariff applies to BellSouth's interexchange traffic; and (3) BellSouth has not paid South Central's tariffed rates for terminating access. Despite BellSouth's baseless protestations to the contrary, South Central has satisfied all three elements of the claim. Therefore the Commission should grant South Central's motion for summary judgment.

A. South Central Terminates Interexchange Traffic From BellSouth.

In South Central's verified motion for summary judgment, Mr. Kyle Jones, Manager of South Central, attests under oath that South Central "has been terminating and continues to terminate, BellSouth access traffic in its exchange." (Motion for Summary Judgment, p. 2.) Access traffic is, by definition, interexchange traffic. 47 U.S.C. § 153 (16) ("The term "exchange access" means the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services.")

Notably absent from BellSouth's response is any claim that South Central does not terminate BellSouth interexchange traffic, and for good reason. BellSouth could not

make such a sworn allegation because it would be blatantly false. Given BellSouth's failure to contest South Central's assertion that it terminates BellSouth-originated interexchange traffic, it is an uncontroverted fact that South Central terminates BellSouth's interexchange traffic. *Gevedon v. Grigsby*, 303 S.W.2d 282, 284 (Ky. 1957) ("affidavits . . . never countered . . . clearly pierce the pleadings which is one of the prime purposes of summary judgment procedure.") Therefore, South Central has satisfied the first element of its claim.

B. South Central's Commission-Approved Access Tariff Applies to BellSouth's Interexchange traffic.

It is also uncontroverted that South Central has an access tariff on file with the Commission, and that South Central and BellSouth are not party to an existing interconnection agreement or traffic exchange agreement that governs the termination of interexchange traffic. BellSouth's principal defense to South Central's claim for outstanding access charges is that the parties must execute an interconnection agreement to govern terminating access traffic. As explained below, BellSouth is mistaken. Moreover, it is undisputed that no such agreement exists between the parties. BellSouth, therefore, cannot claim that an existing contract governs South Central's termination of BellSouth's interexchange traffic.

Absent a contract governing terminating access, South Central's Commission-approved tariff must apply. KRS 278.160; *see In the Matter of Kentucky Utilities Company Revised Special Contract with North American Stainless, L.P.*, Case No. 2003-00137, 2005 Ky. PUC LEXIS 885 (October 19, 2005) (by analogy, requiring any "special contract that touches upon rates (or service) . . . [be] filed with the Commission in the same manner as the utility's generally available tariffs"); *see also* 807 KAR 5:011 § 13

("Every utility shall file true copies of all special contracts entered into governing utility service which set out rates, charges or conditions of service not included in its general tariff.").

The filed-rate doctrine requires that,

> [N]o utility...charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules.

KRS 278.160. Additionally,

> [N]o utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions.

KRS 278.170(1). Therefore, South Central's termination of BellSouth's interexchange traffic is governed by South Central's switched access tariff approved by, and on file with, the Commission.

In addition, South Central is not required to execute an interconnection agreement with BellSouth for the sole purpose of terminating BellSouth-originated interexchange access traffic.[4] As BellSouth concedes, pursuant to 47 U.S.C. § 251(g), terminating access services provided to interexchange carriers are exempt from the 47 U.S.C. § 251(b)(5) reciprocal compensation obligations. (BellSouth's response, pp. 9-10.)

[4] BellSouth claims that for South Central to prevail on its motion for summary judgment, South Central must prove it is not required to execute an interconnection agreement. BellSouth is mistaken. Bellsouth raised the issue of the interconnection agreement as an affirmative defense to South Central's claim. Therefore, it is BellSouth's burden to prove that South Central is required to execute an interconnection agreement to terminate BellSouth's interexchange traffic. *City of Louisville, Div. of Fire v. Fire Service Managers Ass'n ex rel. Kaelin*, 212 S.W.3d 89, 94 (Ky. 2006) ("The party asserting an affirmative defense has the burden to establish that defense. The party with the burden of proof on any issue has the burden of going forward and the ultimate burden of persuasion as to that issue.") BellSouth has failed to satisfy this burden.

BellSouth, however, much like the emperor in his new clothes, unsuccessfully tries to hide behind the label "local exchange carrier" to claim that *its* interexchange traffic is not subject to the 47 U.S.C. 251(g) exemption. Whether BellSouth is an interexchange carrier or a local exchange carrier, it delivers interexchange traffic to South Central, and therein lays the transparency of the clothes BellSouth would don. Regardless of what BellSouth calls itself, if it is delivering interexchange traffic to South Central (and it uncontrovertibly is doing so), it must pay South Central's access tariffed rates. (*See* South Central's verified motion for summary judgment, p. 2 (Kyle Jones verifies that "South Central has been terminating, and continues to terminate, BellSouth access traffic in its exchange") .)

The Commission should see right through BellSouth's transparent effort to circumvent the law. Just as "AT&T was unquestionably functioning as an IXC, not as a LEC" (BellSouth's Response, p. 13) in *Brandenburg Telecom*,[5] BellSouth is unquestionably functioning as an IXC, not as a LEC when the only traffic it exchanges with South Central is BellSouth-originated interexchange traffic.

Such a conclusion is consistent with the Federal Communications Commission's ("FCC") interpretation of 47 U.S.C. 251(g). The FCC ruled that:

> 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.**[6]

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[5] *In the Matter of Brandenburg Telecom, LLC v. AT&T Communications of South Central States, Inc.*, Case No. 2002-00383, 2003 Ky. PUC Lexis 351 (May 1, 2003) ("*Brandenburg Telecom*").

[6] *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*") (emphasis added).

South Central's termination of BellSouth-originated interexchange traffic is an "access service or service associated with access." Accordingly, pursuant to 47 U.S.C. 251(g), the FCC's *Order on Remand* and the Commission's May 1, 2003 order in *Brandenburg Telecom,* South Central is not required to execute an interconnection agreement to terminate BellSouth's interexchange traffic. Therefore, South Central's access tariff applies. South Central has satisfied the second of the three elements of its claim.

C. BellSouth Owes South Central in Excess of $65,393.83 for terminating Access Services.

In South Central's verified motion for summary judgment, Mr. Kyle Jones attests under oath that "BellSouth has refused to pay South Central's tariffed access charges, and it therefore owes South Central in excess of $65,393.83 as of the time of this filing." (South Central's Motion for Summary Judgment, pp. 2, 11.) Once again, notably absent from Bellsouth's response is a claim that BellSouth has made *any* payment to South Central for terminating BellSouth-originated interexchange traffic. *See Gevedon*, 303 S.W.2d at 284. Thus, it is an uncontroverted fact that BellSouth has not paid South Central for terminating interexchange traffic, and as a consequence owes South Central in excess of $65,393.83 as of the time South Central filed its motion for summary judgment.

South Central has satisfied the third and final element of its claim. Accordingly, the Commission should grant South Central's motion for summary judgment.

CONCLUSION

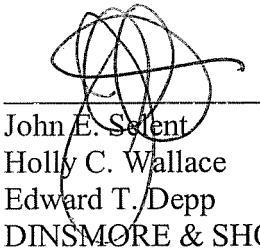
BellSouth's refusal to pay Commission-approved rates, and its attempt to hoist upon South Central the burden of an unnecessary interconnection negotiation, is not only an abuse of its monopolist power, but a blatant disregard for the Commission's authority. As BellSouth's response to South Central's motion for summary judgment reveals, there

is no basis in law or fact for BellSouth to refuse to pay South Central for terminating interexchange traffic.

In fact, BellSouth's response is most notable for what it lacks. It lacks any claim that South Central does not terminate BellSouth-originated interexchange traffic. It lacks any claim that the termination of BellSouth's interexchange traffic is governed by an existing contract. It lacks any claim that BellSouth has paid South Central for terminating its interexchange traffic. Therefore, it is undisputed that South Central terminates BellSouth's interexchange traffic pursuant to South Central's tariff, and that BellSouth refuses to pay South Central's tariffed rates for terminating access.

The Commission should grant South Central's motion for summary judgment, and order that BellSouth is liable to South Central Telcom for all past and future switched access charges incurred pursuant to South Central's PSC KY Tariff No. 2.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing was served on the following this 27th day of June, 2007:

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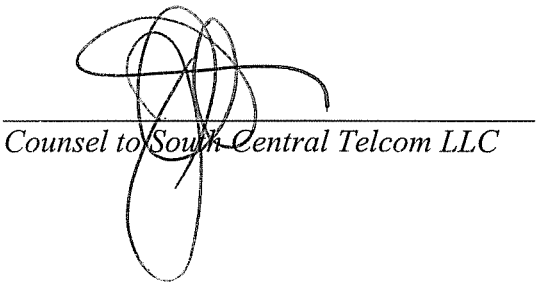

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