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December 12, 2007

RECEIVED

DEC 12 2007

PUBLIC SERVICE
COMMISSION

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

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

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

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned cases are the original and ten (10) copies of *BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky's Reply to SouthEast Telephone, Inc.'s Response to Motion for the Issuance of a Damages Award on an Expedited Basis.*

Sincerely,



Mary K. Keyer

cc: Parties of Record

Enclosures

698774

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

DEC 12 2007

PUBLIC SERVICE
COMMISSION

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS,)
INC.'S NOTICE OF INTENT TO) CASE NO. 2005-00519
DISCONNECT SOUTHEAST)
TELEPHONE, INC. FOR NONPAYMENT)

AND

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

**BELLSOUTH TELECOMMUNICATIONS, INC., D/B/A AT&T KENTUCKY'S REPLY
TO SOUTHEAST TELEPHONE, INC.'S RESPONSE TO MOTION FOR THE
ISSUANCE OF A DAMAGES AWARD ON AN EXPEDITED BASIS**

BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky ("AT&T Kentucky") submits the following reply to SouthEast Telephone, Inc.'s ("SouthEast Telephone"), response to AT&T Kentucky's motion for a damages award on an expedited basis. ("*SouthEast Response*"). SouthEast Telephone's response is the second attempt by SouthEast Telephone to persuade the Kentucky Public Service Commission ("Commission") to ignore a federal court order (and the third attempt to entice the Commission to ignore federal law) and keep this case on an endless merry-go-round. The Commission should not acquiesce.

SouthEast Telephone cavalierly claims that the federal court ruled *only* on a narrow jurisdictional issue, finding that the Commission had no jurisdiction to act under Section 271.¹ That “narrow jurisdictional issue,” however, validates AT&T Kentucky’s long held position that this is a simple breach of contract situation. SouthEast Telephone has distracted this Commission for more than two years with its canned mantra that the resale services SouthEast Telephone ordered should have been provisioned as § 271 elements. The federal court has made clear that the Commission does not have jurisdiction over § 271 rates and elements, leaving the Commission with only the Parties’ Interconnection Agreement (“ICA”) to look to for resolution of this matter. Simply put, SouthEast Telephone has a contractual obligation to pay for the resale services that SouthEast Telephone ordered.

SouthEast Telephone ordered resale services under the ICA and refused to pay for such services in accordance with the terms of the ICA. The evidence in this case clearly demonstrates that AT&T Kentucky *is* entitled to damages in an amount equal to the difference in what it billed for resale service and the amounts SouthEast Telephone has paid for the period of April 27, 2005, through September 18, 2007, as fully set forth in AT&T Kentucky’s motion for damages.

SouthEast Telephone’s attempt to avoid paying for the resale services it ordered is exclusively premised on its untenable (and false) position that AT&T Kentucky somehow “unreasonably compelled SouthEast Telephone to use the resale ordering system to purchase the Section 271 competitive checklist elements that AT&T Kentucky was obligated to provide pursuant to [Section 271].”² This assertion is false. AT&T

¹ See *SouthEast Response* at 1-2.

² *SouthEast Response* at 5.

Kentucky (then known as BellSouth) advised CLECs in Kentucky (including SouthEast Telephone) that beginning April 2005, BellSouth would continue to offer CLECs that wished to continue serving their customers with the combinations of switching and loops that once constituted UNE-P (such as SouthEast Telephone) that such CLECs should execute a commercial agreement.³ Until October 2007, SouthEast Telephone refused to execute a commercial agreement,⁴ and instead chose to continue ordering resale services. As such, and as set forth in AT&T Kentucky's motion for damages, SouthEast should be required to pay for the services it ordered.

Given SouthEast Telephone's incredulous and unreasonable position that it does not owe the resale contract rate(s) for the resale services it ordered, it is respectfully submitted that the Commission should cancel the Informal Conference scheduled for December 19, 2007, and issue an order granting in its entirety, AT&T Kentucky's motion for damages.

DISCUSSION

By its Order dated August 16, 2006, ("*271 Order*"), the Commission accepted SouthEast Telephone's erroneous construction of Section 271 of the Telecommunications Act of 1996 (the "Act") and ordered AT&T Kentucky to provide switching and transport elements to SouthEast Telephone pursuant to Section 271 of the Act. *271 Order* at 11. On appeal, the federal district court found SouthEast Telephone's position, as embodied in the *271 Order*, to be unlawful and remanded the

³ Carrier Notification SN91085094, attached hereto as **Exhibit 1**.

⁴ As directed by the district court, *Opinion and Order* at 24, to the extent SouthEast Telephone believes that its commercial agreement rates are not just and reasonable, then SouthEast Telephone can raise that contention with the FCC. Of course, this same option was available to SouthEast Telephone in 2005 when it declined to execute a commercial agreement and chose instead to order resale services under the now alleged fiction that such services somehow constituted 271 elements.

matter to the Commission to determine the damages, if any, owed to AT&T Kentucky as a result of the unlawful 271 Order.⁵

SouthEast Telephone now claims that no damages are due or that damages should be calculated using the “difference between what SouthEast Telephone paid pursuant to the PSC’s Order⁶ and the provisioning cost to AT&T Kentucky.” (Emphasis added) It is as if two years of litigation had never occurred. SouthEast’s position is based on the same arguments made throughout the litigation of this matter, and rejected by the district court, that the services ordered by SouthEast Telephone were or should have been § 271 elements⁷ and that AT&T Kentucky violated its obligations under Section 271.⁸ The federal court in its *Opinion and Order* found the Commission

⁵ See Opinion and Order, *BellSouth Telecommunications, Inc. v. Kentucky Public Service Commission, et al.*, Civil Action No. 06-65-KKC, United States District Court, Eastern District of Kentucky (September 18, 2007) (“*Opinion and Order*”) (“the PSC’s Order is hereby declared unlawful and enjoined from enforcement”). The court did not say that only certain portions of the 271 Order were unlawful, as SouthEast Telephone argues in its response.

⁶ SouthEast Telephone’s position ignores the fact that the PSC’s Order *in its entirety* was found by the district court’s *Opinion and Order* to be illegal and unenforceable. *Opinion and Order* at 21. The district court held that the Commission had *no jurisdiction over § 271 elements and issues*, therefore, the Commission had no authority to order AT&T Kentucky to provide § 271 elements and no authority to order a rate for such elements. *Id.* at 20-21. For SouthEast Telephone to twist what was plainly stated in the *Opinion and Order* and to interpret it in a fashion contrary to its plain meaning in an effort to support its never-ending quest to get the Commission to exert jurisdiction over § 271 issues is yet another delay tactic to getting this matter finally resolved.

⁷ It is interesting how SouthEast Telephone tries to get around the fact that if these services were § 271 elements, as it claims, then admittedly the Commission could not adequately or fairly assess the appropriate damages due AT&T Kentucky because “according to the Remand Order, the PSC cannot set rates pursuant to Section 271, and cannot, therefore, use such rates as a measure of damages.” *SouthEast Response* at 3. This raises the obvious question as to why the district court would have remanded a case to the Commission to rule on damages pertaining to § 271 elements when the district court made it clear that the Commission had no authority to order AT&T Kentucky to provide § 271 elements or to set a rate for such elements. This is just one more reason why the Commission must reject SouthEast Telephone’s proposal and order damages within the jurisdiction of the Commission based on the rates for what SouthEast Telephone ordered – resale services.

⁸ *SouthEast Response* at 8. SouthEast Telephone states that AT&T Kentucky’s “assertion that it is now entitled to its resale rate for all the months that it *refused to comply with its Section 271 duties* conflicts with the Court’s Remand Order expressly affirming AT&T Kentucky’s obligation to fulfill those duties and must be rejected.” *Id.* (Emphasis added.) There is no support, however, for these conclusory allegations that AT&T Kentucky failed to fulfill its Section 271 duties and obligations. SouthEast Telephone has not filed a complaint of such allegations with the FCC and the FCC has not found any such non-compliance. Without such a finding, SouthEast Telephone’s conclusory allegations made throughout its response cannot be countenanced by this Commission.

has no jurisdiction over § 271 elements, found the Commission's *271 Order* on these issues to be unlawful, and held that the FCC has the sole enforcement authority over Section 271. *Order and Opinion* at 21, 23.

SouthEast Telephone claims that the court "explicitly stated that it did *not* endorse [the resale rate as a measure of damages], or indeed any measure, of damages." *SouthEast Response* at 4. The court "explicitly stated" no such thing. The court merely remanded the matter to the Commission to determine damages in light of its ruling that the Commission lacks jurisdiction over § 271 elements and rates. Thus, while the Commission is tasked with the determination of the damages, if any, due to AT&T Kentucky, it must make that determination in light of the *Opinion and Order*.

In fact, throughout its response, SouthEast Telephone repeatedly alleges that AT&T Kentucky failed to fulfill its Section 271 duties and obligations, but there is no support in the *Opinion and Order* for this position. SouthEast Telephone emphasizes in its response that the court's order "makes it abundantly clear that SouthEast was, in fact, entitled to 271 competitive checklist elements and was *not* required to make do with resale service." *SouthEast Response* at 5. This statement and the numerous other assertions in the response that stretch the court's order beyond the bounds of reasonable interpretation are incorrect. The extent of the court's finding on this issue, as quoted in the *SouthEast Response*, is as follows:

Furthermore, as a BOC, BellSouth is subject to § 271 duties. The Court, by holding that the PSC Orders are unlawful, in no way suggests that BellSouth is not subject to § 271 duties.

Opinion and Order at 26. AT&T Kentucky has never denied that it is subject to § 271 duties. The court *did not* find, however, that AT&T Kentucky had in any way

failed to comply with its § 271 obligations. SouthEast Telephone *has not* filed a complaint of such allegations with the FCC, which has sole enforcement authority over Section 271. *Order and Opinion* at 20. The FCC *has not* found AT&T Kentucky to have violated any § 271 obligation. Thus, SouthEast Telephone's conclusory allegations made throughout its response must be ignored by this Commission.

The damages due AT&T Kentucky are equal to the difference between the amounts paid by SouthEast Telephone and the amount due under the ICA pursuant to which the services were ordered and provided. At the very least, AT&T's damages are equal to the amount of the credits issued to SouthEast Telephone by AT&T Kentucky as a result of the unlawful 271 Order.⁹ To hold otherwise would be to ignore the following undisputed facts in this case: (1) As made clear by the district court, the law on April 27, 2005, no longer required that AT&T Kentucky provide UNE switching elements and access to the ordering system for such elements under § 251, (2) AT&T Kentucky had notified SouthEast Telephone prior to April 27, 2005, that it would no longer accept such orders after April 27, 2005 (see **Exhibit 1**), (3) the Parties' ICA did not cover § 271 elements, (4) the Parties had not entered into a commercial agreement to cover § 271 elements, as did other CLECs that ordered § 271 elements from AT&T Kentucky after April 27, 2005, (5) there was no legal means or process in place between the Parties by which SouthEast Telephone could have ordered § 271 elements, (6) SouthEast

⁹ These amounts are set forth in AT&T Kentucky's motion and fully supported by AT&T Kentucky's exhibits attached thereto. AT&T Kentucky's documentation provides the Commission with clear unequivocal evidence of the damages suffered by AT&T Kentucky and the ability to "proceed on the basis of actual figures available to it" without the need for speculation or trying to recreate or re-draft history. See *SouthEast Response* at 12.

Telephone placed orders for resale services utilizing the resale ordering system available to it under its ICA, (7) the enforcement of Section 271 lies solely with the FCC,¹⁰ and finally (8) SouthEast Telephone has never filed a complaint with the FCC alleging any wrongdoing by AT&T Kentucky under Section 271 nor has there been a finding by the FCC that AT&T Kentucky violated its Section 271 obligations in any way. Thus, the only conclusion that can be drawn from these facts and the *Opinion and Order* is that SouthEast Telephone refused AT&T Kentucky's offer to obtain the requested § 271 elements via a commercial agreement, failed to raise any claims of AT&T Kentucky's alleged wrongdoing with the FCC, as the sole entity with enforcement authority over such claims,¹¹ and engaged in a brazen and improper practice of using AT&T Kentucky's resale services with no intention of paying for such services based on the fiction that such services somehow constituted § 271 elements.

SouthEast Telephone *intentionally* chose to place orders for services utilizing the *resale ordering system* provided for in its ICA with AT&T Kentucky and then exercised unlawful self-help by *intentionally* refusing to pay for them. This self-help began April 27, 2005, the date by which AT&T notified all its CLEC customers that no new UNE-P orders would be accepted. For SouthEast Telephone to claim that the services it ordered were § 271 elements is a blatant disregard for the law, the federal court's *Opinion and Order*, and the Parties' ICA reached in good faith and approved by this Commission, and should not be supported and rewarded by this Commission.

¹⁰ *Opinion and Order* at 23.

¹¹ Interestingly, in its response, SouthEast Telephone places importance on the fact that one of its counterclaims against AT&T Kentucky was not dismissed pending the FCC's consideration of the issue. *SouthEast Response* at 6. However, the court clearly stated that SouthEast Telephone had 30 days from the date of the order to provide a status advising as to its intent regarding such counterclaim. *Opinion and Order* at 24. Despite this instruction by the court, almost three months after the date of the court's order, SouthEast Telephone has still not raised any complaints at the FCC.

Finally, the fact that AT&T Kentucky has an obligation under Section 271 to provide competitive checklist elements does not magically transform the resale services ordered by SouthEast Telephone into § 271 competitive checklist elements. AT&T Kentucky's ordering system for § 271 elements is available to those entering into a commercial agreement for such elements, which SouthTelephone refused to do.

SouthEast Telephone's spin on the district court's order is just another attempt in its persistent efforts to avoid and ignore the law and the district court's *Opinion and Order* holding that this Commission has no jurisdiction over § 271 elements and issues. By proposing that it is more reasonable for the Commission to find that "no damages are owed at all than to calculate damages by reference to the Act's separate avoided cost rate for resale service," *SouthEast Response* at 5, or that the Commission base its calculations of the damages on the difference between "what SouthEast paid pursuant to the PSC's [*illegal*] Order and the provisioning cost of AT&T Kentucky," *Id.* at 3, is further evidence that SouthEast Telephone "is attempting to accomplish through indirect means what it is clearly prevented from doing directly." *Opinion and Order* at 20, *citing Ill. Bell Tel. Co. v. O'Connell-Diaz*, 2006 WL 2796488, at *13 (N.D. Ill. 2006) (unpublished).

The district court made clear this Commission does not have jurisdiction to order AT&T Kentucky to provide § 271 elements to SouthEast Telephone, *Opinion and Order* at 20-21, nor does it have jurisdiction to rule that AT&T Kentucky violated any such obligation to provide § 271 elements. *Id.* If SouthEast Telephone believed that AT&T Kentucky was violating such obligations, it could have, and should have, filed a complaint with the FCC, or it could have, and should have, entered into a commercial

agreement, as it has recently done, and then filed a complaint with the FCC, which it has not done. But to do nothing and then claim that AT&T Kentucky “unreasonably compelled SouthEast to use the resale ordering system,” or “wrongfully denied SouthEast access to its network element ordering system,” or “refus[ed] to permit SouthEast to order Section 271 competitive checklist elements” when there has been no such finding by the FCC is disingenuous at best.

An informal conference would just provide one more venue for SouthEast Telephone to rehash the same arguments that have been heard and rejected by the federal court. Both Parties have made clear their positions in this matter – AT&T Kentucky in its motion and this reply, and SouthEast Telephone in its response – and there is nothing more that either Party can provide to the Commission staff in an informal conference that has not already been provided or that cannot be provided in briefs. Rather than perpetuating further delay and squandering the Commission’s resources, AT&T Kentucky requests the Commission enter an order in an expeditious fashion for damages to AT&T Kentucky in the amount set forth in its motion.

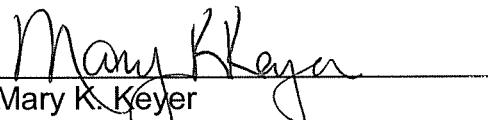
CONCLUSION

In sum, the services that SouthEast Telephone ordered, its payment obligations therefor, and the measure of damages to AT&T Kentucky due to SouthEast Telephone’s failure to pay can only be determined in accordance with the ICA between the Parties. To accept SouthEast Telephone’s continuing claim that the resale services it ordered are in fact, or should have been, § 271 elements would necessitate this Commission’s ignoring the *Opinion and Order* and determining that AT&T Kentucky failed to make available § 271 elements. The Commission has no jurisdiction to make

such a finding or to assume such allegation is true for the purposes of determining damages. For these reasons, AT&T Kentucky's damages calculation, well documented in its motion, is accurate and should be adopted by the Commission.

For two years, both Parties and the Commission have expended an exorbitant amount of time, money, and resources litigating the issues contained herein. It is time to put an end to this matter once and for all. AT&T Kentucky respectfully requests the Commission to enter an order canceling the Informal Conference scheduled for December 19, 2007, and expeditiously issue a final order granting in its entirety AT&T Kentucky's motion for damages. To do otherwise is merely to purchase yet another ticket for the seemingly perpetual merry-go-round of delay.

Respectfully submitted,



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

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by mailing a copy thereof this 12th day of December, 2007.

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Mary K. Keyer

EXHIBIT 1

BellSouth Interconnection Services

675 West Peachtree Street
Atlanta, Georgia 30375

**Carrier Notification
SN91085094**

Date: April 26, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – Triennial Review Remand Order (TRRO) - Unbundling Rules – State of Kentucky

On April 15, 2005, BellSouth released Carrier Notification **SN91085089** advising CLECs that, effective April 17, 2005, BellSouth would no longer accept new service requests from CLECs for mass market unbundled local switching and Unbundled Network Element-Platform (UNE-P) in the states of Florida, Georgia, Mississippi, and North Carolina. This letter is to advise that effective April 27, 2005, pursuant to the April 22, 2005 decision of the U.S. District Court for the Eastern District of Kentucky, BellSouth will no longer accept new service requests from CLECs for mass market unbundled local switching and UNE-P in the state of Kentucky.

BellSouth will continue to offer the following options to CLECs who wish to serve their customers with the combinations of switching and loops that constituted UNE-P:

- Short Term (6 month) Commercial Agreement to permit the CLEC to place new orders for switching and port/loop combinations.
- Long Term Commercial Agreement (through December 31, 2007)

To obtain more information about this notification, please contact your BellSouth contract negotiator.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services