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February 8, 2008

Ms. Elizabeth O'Donnell
Executive Director
Public Service Commission
P.O. Box 615
Frankfort, KY 40602

RE: ***BellSouth Telecommunication, Inc.'s Notice of Intent to Disconnect SouthEast Telephone, Inc. for Non-Payment***
Case No. 2005-00519
And
SouthEast Telephone, Inc. v. BellSouth Telecommunications, Inc.
Case No. 2005-00533

Dear Ms. O'Donnell:

Please find enclosed an original and ten copies of Southeast Telephone Inc.'s Reply to AT&T Kentucky's Response Concerning the Proper Measure of Damages in the above-referenced matters.

Please acknowledge receipt of this filing by placing your file-stamp on the extra copy and returning to me via our runner.

Very truly yours,

STOLL KEENON OGDEN PLLC

Deborah T. Eversole

Enclosure

cc: Parties of Record

101164.117856/509170.1

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS, INC'S NOTICE OF INTENT TO DISCONNECT SOUTHEAST TELEPHONE, INC. FOR NON-PAYMENT	)	CASE NO. 2005-00519
And		
SOUTHEAST TELEPHONE, INC.	)	
COMPLAINANT	)	CASE NO. 2005-00533
vs.	)	
BELLSOUTH TELECOMMUNICATIONS, INC.	)	
DEFENDANT	)	

REPLY OF SOUTHEAST TELEPHONE, INC. TO AT&T KENTUCKY'S RESPONSE CONCERNING THE PROPER MEASURE OF DAMAGES

SouthEast Telephone, Inc., by counsel, pursuant to the direction of Staff at its Informal Conference of December 19, 2007, as memorialized in the Commission's Informal Conference Memorandum dated December 21, 2007, files the following Reply to AT&T Kentucky's third brief filed in this case on the proper measure of damages ("AT&T Kentucky January 25 Brief"):

INTRODUCTION

The Commission has given AT&T Kentucky every opportunity to present its case that it is entitled to damages calculated by its resale rate based on a "breach of contract" theory. AT&T Kentucky filed its first brief presenting its resale/breach of contract theory on November 9, 2007. It filed its second brief in support of its resale/breach of contract theory on December 12, 2007. It presented its resale/breach of contract theory yet again on December 19, 2007 at the

Informal Conference. On January 25, 2008, it filed a third brief in support of its resale/breach of contract theory. But even on its fourth bite at the apple, it presents nothing new. It still contends that this case concerns a breach of an existing contract rather than a breakdown in negotiations for a contract not yet agreed upon. It still argues upon the presumption that the District Court in *BellSouth Telecommunications, Inc. v. Kentucky Public Service Comm'n, et al.*, C.A. No. 06-65-KKC (E.D. Ky., September 18, 2007) (the "Remand Order") directed the Commission to calculate damages resulting from *SouthEast's* action (alleged breach of contract) rather than resulting from the *Commission's* action (issuance of an Order based on Section 271 authority). The Court clearly said that the *Commission's Order* constitutes the action from which damages, "if any," have resulted.[1] And the only error the Court found in the Commission's Order is lack of Section 271 jurisdiction.

AT&T Kentucky also continues to argue that the Court directed the Commission to determine damages, but never even attempts to explain what it believes the Court could possibly have meant in saying, no fewer than *three times,* that the Commission is to determine "damages, ***if any***" [Remand Order at 21 and 27 (emphasis added)]. AT&T Kentucky does not even acknowledge these crucial words. The reason it does not is obvious: the Court obviously concluded that AT&T may not have sustained any damages *at all.* This is particularly significant since the Court had the AT&T Kentucky resale theory before it, which clearly results in alleged "damages" in the *millions* of dollars. Yet the Court left the matter entirely to the Commission's discretion to determine "damages, if any." The Court's thrice-repeated "if any" language conflicts on its face with AT&T Kentucky's insistence that the Court agrees with its

[1] *See* Remand Order, Slip Op. at 27 (specifying that the Commission is to "determine the amount of damages, if any, owed *as a result of the unlawful order*"). Absolutely nowhere in its decision did the Court direct damages to be calculated based on a breach of contract or based on any other action of SouthEast, for that matter. The decision was a determination of jurisdiction, and nothing more.

sole damages theory. Finally, AT&T's insistence that the Court directed the Commission to adopt the resale theory does not take into account one simple, irrefutable fact: AT&T Kentucky's resale rate theory was before the Court, and the Court did not adopt it.

What *is* new in AT&T Kentucky's latest brief is a futile effort to distinguish the recent Georgia District Court damages decision in *BellSouth Telecommunications, Inc. v. Georgia Public Service Comm'n, et al.*, Nos. 1:06-CV-00162CC and 1:06-CV-00972-CC (N.D. Ga. January 3, 2008) (the "Georgia Order")[2] from the case before this Commission. In the Georgia Order, the court ruled that its holding was a *jurisdictional* determination only that had nothing whatsoever to do with the reasonableness of the Section 271 rate set by the Georgia Commission. Accordingly, the Georgia Court denied AT&T Georgia's request for damages. Similarly, the holding of the Court in the Remand Order is a jurisdictional determination only that had nothing whatsoever to do with the reasonableness of the Section 271 rate set by the Kentucky Commission. AT&T Kentucky's attempt to distinguish the Georgia Order fails miserably. The Georgia Order is directly on point, and constitutes an entirely reasonable basis for this Commission to find that no damages should be awarded.

ARGUMENT

I. AT&T OFFERS NO RELEVANT MEANS TO DISTINGUISH THE GEORGIA COURT'S DECISION THAT DAMAGES WERE NOT APPROPRIATE BECAUSE JURISDICTION, AND NOT THE REASONABLENESS OF THE RATE, WAS THE REASON FOR DECLARING THE COMMISSION'S ORDER UNLAWFUL.

The Georgia Court in its written decision denied damages on exactly the same rationale it had used in its bench ruling, the pertinent transcript pages of which have been previously provided by SouthEast to the Commission. The Georgia Court's reasoning on the damages issue, in its entirety, is as follows:

[2] The decision is attached hereto for the Commission's convenience.

> Although the Court finds that the PSC acted unlawfully in the orders under review, the Court concludes that BellSouth should not be awarded damages in this case. The Court denies BellSouth's request to be made whole for the difference between the § 271 rates the PSC set and the rates that BellSouth would have charged in the absence of the PSC's orders. As stated by the PSC at argument, this case involves the agency's authority to set rates, not whether a particular rate is just and reasonable. Thus, although no party may require BellSouth to provide service at the PSC-established rates from the date of this Order, the Court does not require the PSC to reset the rates it authorized BellSouth to charge prior to the date of this Order. From the date of the PSC's orders through the date of this Order, BellSouth is entitled to recover the rates set by the PSC.

Georgia Order, Slip Op. at 16.

This rationale applies just as surely here as it did in Georgia. The Georgia Court made its decision based on Section 271 jurisdiction. The Kentucky Court made its decision based on Section 271 jurisdiction. The Georgia Court made no finding with regard to the reasonableness of the PSC-ordered rates. The Kentucky Court made no finding with regard to the reasonableness of the PSC-ordered rates.

The difference between the two decisions for "damages" purposes is procedural only. The Georgia Court decided the damages issue itself, while the Kentucky Court said it would "not address the issue of damages," [Remand Order at 21], but would remand to the PSC for a determination of "damages, if any." *Id.* The very language used by the Kentucky Court indicates that it was not directing that damages be awarded unless the *Commission* found that they should be.

AT&T Kentucky nevertheless purports to see substantive differences between the Georgia and Kentucky orders and, predictably, bases those alleged differences on the status of contracts [AT&T Kentucky January 25 Brief at 14-15 (explaining that AT&T Georgia had actually included the Section 271 rates that the Georgia Commission established into its interconnection agreements)]. That argument *does* establish that AT&T Georgia complied with

the Georgia Commission's Order, unlike AT&T Kentucky, which refused even to provide the network element ordering system, violating the Kentucky Commission's Order. But the argument establishes nothing at all with relation to the damages issue, because the Georgia Court did not base its decision on the status of anyone's contract. Indeed, the word "contract" does not appear anywhere in the court's discussion of damages. Instead, the court's rationale is couched solely in terms of the "§ 271 rates the PSC set" [Georgia Order, Slip Op. at 16] rather than, for example, the "§ 271 rates in the contracts." Further, as in Kentucky, it is the Georgia Commission's *orders* that were declared "unlawful" and enjoined from enforcement [Georgia Order, Slip Op. at 17]. The Georgia Court did not declare anyone's contract unlawful or enjoin it from enforcement. Contracts were, simply put, not the issue. Nor are contracts the issue here.

AT&T Kentucky next argues that AT&T Georgia challenged the jurisdiction of the Commission rather than the rates it set [AT&T Kentucky January 25 Brief, at 15]. It is unclear what AT&T Kentucky means to establish by this argument. After all, it is the holding of the courts that matter, not the arguments made to it – and both courts entered jurisdictional determinations only. Furthermore, AT&T Georgia, just like AT&T Kentucky, argued that it was entitled to damages, and *both* challenged the jurisdiction of the state commission to act under Section 271. Nor is it in the least relevant that the Georgia Commission had held a hearing before declaring Section 271 rates [AT&T Kentucky January 25 Brief at 14], while this Commission, dealing with an emergency, set an interim Section 271 rate pending further negotiations and/or hearing. Such an argument can go only to the reasonableness of the rate – and neither the Georgia court nor the Kentucky court addressed the reasonableness of the rate. For damages purposes, there is simply no principled distinction between the substance of the two orders.

The Georgia Court did not mention contracts or rate hearings or lack thereof as a factor in its decision. The reason it did not is simple: It was Commission authority to enter the order – not whether the AT&T entity had complied with that Order by entering into a contract, or whether the rate had been reasonable or reasonably set -- that was at issue in Georgia. Commission authority was the issue – the *only* issue -- in Kentucky as well. AT&T Kentucky's attempt to distinguish the Georgia Order should be rejected.

II. AT&T FAILS ONCE AGAIN TO ESTABLISH THAT THE MEASURE OF DAMAGES SHOULD BE CALCULATED BASED ON SOUTHEAST'S ALLEGED "BREACH OF CONTRACT" RATHER THAN ON THE COMMISSION'S HAVING ACTED UNDER SECTION 271.

The court directed the Commission to "determine the amount of damages, if any, owed *as result of the unlawful order*" [Remand Order at 27]. The court did not discuss any alleged "breach of contract." Nevertheless, AT&T Kentucky repeatedly mischaracterizes the question before the Commission as a breach of contract issue in which SouthEast seeks to "take advantage of [its] own act or omission to escape liability" [AT&T January 25 Brief, at 12 (internal citation omitted]. But the District Court did not direct the Commission to assess damages based on anything SouthEast has or has not allegedly done. Specifically, the Court did not direct the Commission to determine damages resulting from an alleged breach of contract.

This is not, and never has been, a breach of contract case. It is a case concerning the Commission's interim action to prevent AT&T Kentucky from terminating service to SouthEast as a result of the parties' inability to agree on a contract for 271 checklist elements *that did not yet exist.* [August 16, 2006 PSC Order at 11-12 (finding that, rather than ordering resale service under the parties' interconnection agreement, SouthEast had ordered 271 elements for which the rate was in dispute)]. There is absolutely no reason for the Commission, on its own, to reverse

its own finding of fact on this question. The Court certainly did not do so. Factual determinations are not reversed on summary judgment. *See* Fed. R. Civ. P. 56(c) (providing for summary judgment if there is "no genuine issue as to any material fact" and the movant is "entitled to summary judgment as a matter of *law*") (emphasis added). Moreover, pursuant to the Rule, the Court's entry of summary judgment establishes that the Court did not even find this particular factual issue "material" to its decision. The Court focused only on jurisdiction.

Finally, AT&T Kentucky argues that the Commission's finding that SouthEast had ordered elements and not resale service somehow no longer exists, since the Court vacated the entire order [AT&T Kentucky January 25 Brief at 6-7]. The argument is erroneous. But, perhaps even more importantly, the argument is *irrelevant.* The facts and the record continue to exist. Even if the previous finding no longer exists, the Commission can simply reaffirm that finding in the course of this damages inquiry it has been ordered by the Court to undertake.

Nor should AT&T Kentucky's refusal to comply with the Commission's order requiring it to provide elements to SouthEast be permitted to define the damages issue. Apparently AT&T Georgia provided the proper ordering system for network elements, as well as Section 271 checklist element interconnection agreements as ordered, even as it challenged the Commission's jurisdiction in federal court [AT&T Kentucky January 25 Brief at 14-15]. AT&T Kentucky, in contrast, provided only its resale ordering system in response to the Kentucky Commission's Orders, issuing "bill credits," denying access revenue to SouthEast, and setting up what it clearly meant to be a record that would support its claim to recover its resale rate. Now AT&T Kentucky argues that *because* it refused to comply with Commission Orders, unlike AT&T Georgia, it is entitled to its resale rate as a measure of damages. The sheer chutzpah of this contention is remarkable.

This is not a remand based on a Court finding of a CLEC's breach of contract or any other alleged CLEC misbehavior. This is a remand based on a Court finding of a Commission's lack of jurisdiction. Thus, instead of basing this remand proceeding on a "breach of contract," the Commission must determine what damages AT&T Kentucky incurred as the result of the Commission's having "acted" under Section 271. That is the error the District Court found. That is the *only* error the District Court found.

And that is the starting point for the Commission's inquiry as to "damages, if any," incurred by AT&T Kentucky.

III. AT&T FAILS TO REFUTE SOUTHEAST'S ARGUMENTS CONCERNING THE PROPER MEASUREMENT OF DAMAGES.

As the Commission found in its August 16 Order, SouthEast had ordered Section 271 elements. The Commission ordered AT&T Kentucky to provide those elements and set an interim price pending contract negotiations. On appeal, the Court held as a matter of law that the Commission had no authority to act under Section 271, but also held that AT&T Kentucky is required by law to provide the elements the Commission ordered it to provide. It is impossible to go from these facts to the conclusion that SouthEast is required to pay the *resale* rate as a measure of damages.

However, as SouthEast has previously suggested, there are other methods that comply with utility law, with the holding and directive of the court, and with damages law. The first is to conclude, as the Georgia Court did, that as neither the Commission nor the Court has found that the rate itself was unreasonable, no damages are due. The second is to go back into history and to try to reconstruct what *would* have happened, and how high AT&T Kentucky's profits *would* have been, if the Commission had not "acted" under Section 271. As SouthEast has explained at some length, both in its initial brief and at the Informal Conference, although this option might

arguably be consistent with the language of the court, it would produce such highly speculative results as to be unworkable and improper. No one can say what the rate over all these months would have been if the Commission had refused to act on SouthEast's petition (although it can reasonably be surmised that SouthEast would have gone to the FCC). It can, however, be definitively stated that SouthEast would *not* have reacted to the Commission's refusal to act by becoming a pure reseller. That option is not, and has never been, consistent with SouthEast's mission to provide new, cutting-edge telecommunications services and broadband in rural Kentucky. The third damages option previously discussed by SouthEast, a clear way to discover "actual" and non-speculative damages, and one that is available to the Commission under well-established utility law requiring it to avoid confiscating utility property, is to conduct an inquiry to determine whether AT&T Kentucky suffered actual out of pocket losses as a result of the Commission's having "acted" under Section 271.

In response to this third option, AT&T Kentucky invokes the Constitution [AT&T January 25 Brief, at 10-11] and claims a right to "market value" if its property is "taken" [AT&T Kentucky January 25 Brief, at 5, n. 10]. This claim is wholly out of left field. In *Verizon Communications, Inc. v. Federal Communications Commission,* 535 U.S. 467 (2002), in which the United States Supreme Court held that TELRIC methodology is neither confiscatory nor unreasonable, the Court made a point of emphasizing that, "[i]n *Hope Natural Gas,*[3] this Court disavowed the position that the Natural Gas Act and the Constitution required fair value as the sole measure of a rate base." *Id.* at 483. The Court further remarked that, even if a rate produces "only a meager return," it cannot be "condemned as invalid." *Id.* at 484. *See also Duquesne Light Co. v. Barasch,* 488 U.S. 299, 307 (1989) ("A rate is too low if it is so unjust as to ***destroy the value of [the] property for all the purposes for which it was acquired***") (internal quotations

[3] *FPC v. Hope Natural Gas Co.,* 320 U.S. 591 (1944).

and citation omitted) (emphasis added). AT&T Kentucky's claim that it is constitutionally entitled to "market value" for its plant contradicts many decades of governing utility law.

AT&T Kentucky next contends that any award of damages "in an amount less than the resale service rates in the ICA" would be "confiscatory" [AT&T Kentucky January 25 Brief, at 10]. *Verizon* and *Duquesne,* and scores of other cases, refute this rather bizarre claim. Further, AT&T Kentucky indulges in circular reasoning when it claims that *Kentucky Power Co. v. Energy Regulatory Comm'n of Kentucky,* 623 S.W.2d 904 (Ky. 1981) supports its position [AT&T Kentucky January 25 Brief, at 10]. It is true that the Court in *Kentucky Power* chided the Commission for implementing lower rates for services than the Commission itself had found to be reasonable. However, the Commission did not do anything remotely comparable here. It set an interim rate of TELRIC plus $1 for *network elements.* It did not refuse to allow AT&T Kentucky to charge its approved resale rate for *resale service.* The Commission should reject AT&T Kentucky's determined confusion of apples (elements) with oranges (resale service), along with its contention that the Commission itself impermissibly altered its own previously-set rate. AT&T Kentucky's resale rate was not altered. AT&T Kentucky's resale rate was not, and is not, at issue. The rate at issue is TELRIC plus $1. Whether it was confiscatory is a question of fact.

The Commission may investigate whether there were any actual losses resulting from AT&T Kentucky's receipt of TELRIC plus $1 by obtaining the proper evidence from AT&T Kentucky. If the Commission concludes that such an investigation is the proper way to comply with the Remand Order, such an investigation is well within the Commission's authority.

Finally, AT&T Kentucky claims that it would be "discriminatory" not to force SouthEast to pay resale rates as a measure of damages because other CLECs paid resale rates and because

other CLECs entered into AT&T Kentucky's "commercial agreement" [AT&T Kentucky January 25 Brief at 11]. The argument is a red herring. First, as SouthEast has pointed out previously and as the Commission has found, SouthEast did not order resale service, and it cannot be compared to those who did. Nor is SouthEast similarly situated with any other CLEC with regard to the damages issue before the Commission, because the events at issue here are unique to SouthEast. In 2005 SouthEast asserted its right, to which AT&T Kentucky pays lip service, to negotiate reasonable rates for Section 271 checklist elements. When negotiations were at an impasse, and AT&T Kentucky threatened termination of service, SouthEast filed with the Commission and the Commission entered its Order prohibiting termination and setting TELRIC plus $1 as an interim rate for the Section 271 checklist elements SouthEast ordered from AT&T Kentucky, and indicating that TELRIC plus $1 would remain in effect until a new "prospective" rate had been set [August 16, 2006 Order at 12]. Southeast promptly complied with the Order by paying AT&T Kentucky the extra amount for elements it had ordered since April 2005, and continued developing its network based on a business plan incorporating the TELRIC plus $1 rate. Now a Court has held that the Commission lacked Section 271 authority to act.

As a result of this history, which is a *fait accompli,* SouthEast is not similarly situated for purposes of the damages determination with any other CLEC. The TELRIC plus $1 Order applied to SouthEast alone. SouthEast alone pursued a business plan in reliance on it. Addressing the damages issue here in the unique context presented will not create an "unreasonable difference" pursuant to KRS 278.170 with reference to other CLECs.

AT&T Kentucky's argument that it is entitled to its resale rate as a measure of damages in this case must be rejected.

CONCLUSION

The Remand Order, like the Georgia Order, addresses only Section 271 jurisdiction. It does not address substance, except insofar as it confirms the obligation of AT&T Kentucky to provide Section 271 competitive checklist elements to SouthEast. The Remand Order says nothing to disturb the PSC's factual conclusions that SouthEast intended to, and did, order Section 271 competitive checklist elements rather than resale service. Furthermore, AT&T Kentucky cannot reasonably contend that it is entitled to resale rates for the perverse reason that AT&T Kentucky, unlike AT&T Georgia, refused to allow access to the network element ordering system or to incorporate Commission-set rates into any agreement. The court's decision to remand the issue of "damages, if any," to the Commission establishes that the Commission has full discretion to determine how to measure the damages to be awarded or, indeed, to determine that *no* damages should be awarded, based on a lack of demonstrable loss to AT&T Kentucky. For these, and other reasons stated herein and in previous filings in these dockets, SouthEast respectfully requests that the Commission enter its Order finding that, unless AT&T Kentucky comes forward with evidence to demonstrate that its cost exceeded the payments it received, it has sustained no damages to which it is entitled pursuant to the Remand Order.

Respectfully submitted,

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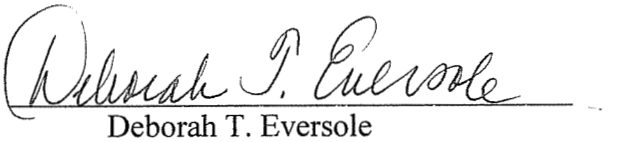
CERTIFICATE OF SERVICE

I hereby certify that this 8th day of February, 2008, a copy of the foregoing was served, by U.S. Mail, postage prepaid, upon Mary K. Keyer, 601 W. Chestnut Street, Room 407, P.O. Box 32410, Louisville, Kentucky, 40203, and Robert Culpepper, Suite 4300, 675 W. Peachtree St., NW, Atlanta, Georgia, 30375.



Deborah T. Eversole

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

BELLSOUTH TELECOMMUNICATIONS, INC., Plaintiff, v. The GEORGIA PUBLIC SERVICE COMMISSION, *et al.*, Defendants.	No. 1:06-CV-00162-CC
COMPETITIVE CARRIERS OF THE SOUTH, INC., *et al.*, Plaintiffs, v. The GEORGIA PUBLIC SERVICE COMMISSION, *et al.*, Defendants.	No. 1:06-CV-00972-CC

ORDER

The Court has consolidated these two cases for purposes of hearing and decision because they both turn on a common question of law – namely, whether the Georgia Public Service Commission ("PSC") has authority to implement 47 U.S.C. § 271, a federal statute that imposes conditions on Bell operating companies that the Federal Communications Commission ("FCC") has authorized to provide long-distance services.

Having considered the parties' written submissions and having heard extensive oral argument on November 27, 2007, the Court finds that the PSC lacks authority to set rates for § 271 checklist items. That conclusion resolves the

principal issue in the case brought by BellSouth Telecommunications, Inc. ("BellSouth") as well as the sole issue presented by Competitive Carriers of the South, Inc. ("CompSouth"). The Court remands the remaining issues raised by BellSouth to the PSC for reconsideration in light of this Order.

BACKGROUND

A. Statutory and Regulatory Framework

Section 251. To promote competition for local telecommunications services, Congress enacted the Telecommunications Act of 1996 ("1996 Act").[1] One provision of that Act – 47 U.S.C. § 251 – obligates incumbent local exchange carriers ("ILECs"), which are companies like BellSouth that have traditionally provided local telephone service in a particular geographic area, to allow competitors, known as competitive local exchange carriers ("CLECs") to lease elements of the ILECs' telephone networks at regulated rates. *See* 47 U.S.C. § 251(c)(3). When § 251 requires an ILEC to provide access to a particular network element at regulated rates, that element is known as an unbundled network element (or "UNE").

[1] Pub. L. No. 104-104, 110 Stat. 56 (1996) (amending the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.*).

To implement the duties of § 251, ILECs and CLECs enter into "interconnection agreements." Those parties are required, in the first instance, to negotiate terms implementing the § 251 duties. *See id.* §§ 251(c)(1), 252(a). As discussed in more detail below, if those negotiations are unsuccessful, state commissions are empowered to resolve "open issues" by applying the requirements of § 251 and the FCC regulations implementing § 251. *See id.* § 252(c), (d). Agreements reached by either negotiation or arbitration must be approved by a state commission. *See id.* § 252(e).

Facilities at Issue Here. Under the 1996 Act, the FCC determines which network facilities will be subject to unbundling under § 251 (and thus become UNEs). The FCC may require an ILEC to provide access to (i.e., to "unbundle") an element only if it determines that CLECs would be "impair[ed]" in their ability to provide service if they did not have access to the element as a UNE. *Id.* § 251(d)(2). These cases principally concern three particular network facilities: (i) switches, the computers that route traffic on a telecommunications network; (ii) loops, the copper wires or equivalent facilities that connect customers' premises to the ILEC network; and (iii) transport facilities, cables that connect switches to each other. Also at issue here is a service known as "line sharing,"

which allows a CLEC to provide high-speed data service over a portion of the frequency on a copper loop, without paying BellSouth to lease the entire loop.

Although the FCC previously required access to these facilities, more recently (after several adverse federal court decisions[2]), the FCC issued the *Order on Remand*,[3] which prohibited the mandatory leasing of switching and (in the circumstances presented here) loops and transport as UNEs. *See* 20 FCC Rcd at 2537, ¶ 5, 2652-54, ¶¶ 218, 220 (switching); *id.* at 2575-76, ¶ 66, 2614, ¶ 146 (loops and transport). The FCC also held in 2003 that, contrary to the agency's prior judgment, line sharing should not be made available as a UNE under § 251. *See Triennial Review Order*,[4] 18 FCC Rcd at 17132-33, ¶ 255.

Section 271. A separate provision of the 1996 Act, § 271, establishes a process under which so-called Bell operating companies ("BOCs") – companies

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[2] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*"); *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*").

[3] Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Order on Remand*"), *aff'd, Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

[4] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*") (subsequent history omitted).

such as BellSouth that were created by the 1982 federal antitrust decree that broke up the original AT&T – may seek authority to provide long-distance services. A BOC may apply only to the *FCC* to obtain authority on a state-by-state basis to provide long-distance services. *See* 47 U.S.C. § 271(d)(1). In particular, Congress specified a list of conditions – known as the "competitive checklist" – that the FCC must conclude that a BOC has satisfied in order for that federal agency to authorize the BOC to provide long-distance services. *See id.* § 271(c), (d)(3). Those checklist items include access to "[l]ocal switching," *id.* § 271(c)(2)(B)(vi); "[l]ocal loop transmission," *id.* § 271(c)(2)(B)(iv); and "[l]ocal transport," *id.* § 271(c)(2)(B)(v).

Congress likewise empowered the FCC to determine whether, after a BOC has obtained § 271 authority, the company continues to meet the conditions for that approval. *See id.* § 271(d)(6).

B. Procedural History

In January 2006, the PSC issued the first of the orders at issue in these cases – an order initiating hearings to set rates that BellSouth must charge for access to facilities and services that BellSouth offers to satisfy § 271.[5] The PSC held "that it

[5] *See* Order Initiating Hearings To Set a Just and Reasonable Rate Under Section 271, *Generic Proceeding To Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations To Provide Unbundled Network Elements*,

is reasonable to assert jurisdiction to set just and reasonable rates for de-listed UNEs" – which are network elements to which BellSouth no longer must provide access as UNEs under § 251 – "*pursuant to Section 271 of the Federal Telecom Act.*" *Order Initiating Hearings* at 4 (emphasis added).

Having declared its authority to implement § 271, the PSC subsequently issued an order requiring BellSouth to charge particular regulated rates for access to switching, loops, and transport.[6] The PSC later issued a reconsideration order in which it declined to set a rate for switching.[7] Additionally, the PSC issued a separate order addressing a variety of related issues.[8] As relevant here, that order required BellSouth to provide line sharing under § 271. *See Order on Remaining Issues* at 39-40.

Docket No. 19341-U, at 1, 3-4 (Ga. Pub. Serv. Comm'n Jan. 20, 2006) ("*Order Initiating Hearings*").

[6] *See* Order Setting Rates Under Section 271, *Generic Proceeding To Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations To Provide Unbundled Network Elements*, Docket No. 19341-U, at 9-10 (Ga. Pub. Serv. Comm'n Mar. 10, 2006).

[7] *See* Order on Reconsideration, *Generic Proceeding To Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations To Provide Unbundled Network Elements*, Docket No. 19341-U (Ga. Pub. Serv. Comm'n Mar. 24, 2006).

[8] *See* Order on Remaining Issues, *Generic Proceeding To Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations To Provide Unbundled Network Elements*, Docket No. 19341-U (Ga. Pub. Serv. Comm'n Mar. 2, 2006) ("*Order on Remaining Issues*").

In this Court, BellSouth challenges the PSC's assertion of authority to set rates for loop and transport facilities that must be provided only to satisfy § 271, and CompSouth challenges the PSC's decision on reconsideration declining to set a rate for switching. BellSouth also challenges the PSC's authority to mandate line sharing under § 271 and to set a rate for access to that arrangement. Finally, BellSouth challenges several other aspects of the PSC's orders in its amended complaint, but the Court need not specifically address those issues, as explained below.

DISCUSSION

I. The PSC Lacks Authority To Implement § 271 or To Set Rates for Facilities and Services Required Under § 271

A. The Court holds that the PSC lacks authority to set rates for § 271 checklist items. As the First Circuit has explained in rejecting the same claim of state authority, the PSC's contrary position is "at odds with the statutory language, history and policy of section 271 and most relevant precedent." *Verizon New England, Inc. v. Maine Pub. Utils. Comm'n*, Nos. 06-2151 & 06-2429, --- F.3d ---, 2007 WL 2509863, at *4-*6 (1st Cir. Sept. 6, 2007), *reh'g denied*, No. 06-2151, 2007 WL 4112192 (Nov. 20, 2007). Indeed, eight of the nine other federal courts

to have addressed this issue have reached that same conclusion.[9] The only court to have gone the other way, a district court in Maine, was subsequently reversed on this point by the First Circuit. *See Verizon New England*, 2007 WL 2509863, at *4-*6. Moreover, as detailed in BellSouth's submissions to the Court, the overwhelming majority of state commissions have held that they cannot enforce the requirements of § 271.

The text and structure of the statute confirm the correctness of these conclusions. In § 271, Congress created two administrative duties and assigned both solely to the FCC. First, a BOC seeking authority under § 271 to provide long-distance services must "apply to the Commission" – that is, to the FCC – and it is "the Commission" that "shall issue a written determination approving or

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[9] *See Verizon New England*, 2007 WL 2509863, at *5; *Michigan Bell Tel. Co. v. Lark*, No. 06-11982, 2007 WL 2868633 (E.D. Mich. Sept. 26, 2007), *appeals pending*, Nos. 07-2469, 07-2473 (6th Cir.); *BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n*, No. 06-65-KKC (E.D. Ky. Sept. 18, 2007); *Qwest Corp. v. Arizona Corp. Comm'n*, 496 F. Supp. 2d 1069, 1077-79 (D. Ariz. 2007), *appeals pending*, Nos. 07-17079, 07-17080 (9th Cir.); *Illinois Bell Tel. Co. v. O'Connell-Diaz*, No. 05-C-1149, 2006 WL 2796488, at *13-*14 (N.D. Ill. Sept. 28, 2006); *Dieca Communications, Inc. v. Florida Pub. Serv. Comm'n*, 447 F. Supp. 2d 1281, 1285-86 (N.D. Fla. 2006); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1066-69 (E.D. Mo. 2006), *appeals pending*, Nos. 06-3701, 06-3726, 06-3727 (8th Cir.); *Verizon New England, Inc. v. New Hampshire Pub. Utils. Comm'n*, No. 05-cv-94, 2006 WL 2433249, at *8 (D.N.H. Aug. 22, 2006), *aff'd*, *Verizon New England*, 2007 WL 2509863; *BellSouth Telecomms., Inc. v. Mississippi Pub. Serv. Comm'n*, 368 F. Supp. 2d 557, 565-66 (S.D. Miss. 2005).

denying the authorization requested" after "[t]he Commission" determines whether the specified criteria, including the competitive checklist, are satisfied. 47 U.S.C. § 271(d)(1), (3); *see id.* § 271(c)(2)(B). Second, the FCC must address any enforcement issues: "The Commission shall establish procedures for the review of complaints" that a BOC is not complying with § 271; "the Commission shall act on such [a] complaint within 90 days"; and "the Commission may" take action to enforce the requirements of § 271 if "the Commission determines" that a BOC is not in compliance with its obligations under § 271. *Id.* § 271(d)(6).

Congress gave state commissions, by contrast, only an *advisory* role at the application stage of the § 271 process. The FCC is to "consult with the State commission of any State that is the subject of" a § 271 application before the FCC rules on the application. *Id.* § 271(d)(2)(B). The fact that Congress considered the appropriate role for the state commissions and explicitly limited them to this consultative task "works against" the PSC's claim of a power to set rates or otherwise implement § 271. *Verizon New England*, 2007 WL 2509863, at *5.

The absence of state commission authority to implement § 271 is confirmed by the text of § 252. Section 252 expressly limits state commissions to arbitrating terms and setting rates for purposes of §§ 251 and 252.

Specifically, § 252 authorizes state commissions to resolve only those "open issues" that remain after the parties negotiate "a request for interconnection, services, or network elements pursuant to *section 251*." 47 U.S.C. § 252(a)(1), (b)(1) (emphasis added). In resolving those issues, the state commission must "ensure that such resolution . . . meet[s] the requirements of *section 251* of this title, including the regulations prescribed by the [FCC] pursuant to *section 251* of this title." *Id.* § 252(c)(1) (emphases added). Furthermore, § 252(c)(2) authorizes state commissions to "establish any rates for interconnection, services, or network elements according to subsection (d) [of § 252]," *id.* § 252(c)(2), but limits them to setting rates only "for purposes of" § 251, *id.* § 252(d)(1), (2), (3); *see id.* § 252(c)(2). In reviewing the resulting interconnection agreement, the state commission may reject arbitrated agreements only "if it finds that the agreement does not meet the requirements of *section 251*. . . , including the regulations prescribed by the [FCC] pursuant to section 251. . . , or the standards set forth in subsection (d) of [section 252]." *Id.* § 252(e)(2)(B) (emphasis added). In short, state commission duties are explicitly limited to implementing § 251, and nothing in § 252 authorizes state commissions to impose conditions necessary to meet the requirements of § 271. *See, e.g., Illinois Bell*, 2006 WL 2796488, at *13 ("The structure of the Act strongly suggests Congress's intent to separate Sections 251

and 252 from Section 271, as well as its intent to confine state authority to the former provisions.").

Significantly in this regard, the Eleventh Circuit has held that state commission duties are limited to implementing the requirements of §§ 251 and 252. *See MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (per curiam). The circuit court explained that, if ILECs were required to negotiate (and, if necessary, arbitrate) items that go beyond those requirements, there would be "effectively no limit on what subjects the incumbent must negotiate," a result "contrary to the scheme and the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate." *Id.* (citing 47 U.S.C. § 251(b), (c)); *see Dieca Communications*, 447 F. Supp. 2d at 1286 n.7 ("[i]n this circuit, a state commission's authority in a § 251 arbitration is only to address issues arising under § 251") (citing *MCI Telecomms.*, 298 F.3d at 1274).

In claiming authority to implement § 271 in its orders, the PSC suggested that § 271(c) implicitly contemplates state commission authority to implement § 271 when arbitrating interconnection agreements. *See, e.g., Order Initiating Hearings* at 3. Section 271(c) states that a BOC applicant for long-distance authority may establish that it makes available each item on the "[c]ompetitive

checklist" by pointing to "one or more binding agreements that have been approved under section 252." 47 U.S.C. § 271(c)(1)(A), (c)(2). The PSC argues that, because state commissions "approve[]" agreements "under section 252," it necessarily follows that state commissions have the authority to enforce the requirements of § 271 when approving those agreements.

That argument does not establish that the PSC has authority to impose obligations to implement § 271. As the First Circuit explained in rejecting the same argument, "the cross-references in section 271 to sections 251 and 252 . . . are hardly a delegation of power to the states to implement section 271," and nothing in those provisions provides state commissions the arbitration or ratemaking authority asserted by the PSC here. *Verizon New England*, 2007 WL 2509863, at *5; *see also Southwestern Bell Tel.*, 461 F. Supp. 2d at 1068 (rejecting the same argument).

B. Furthermore, the PSC's orders at issue in these cases cannot be sustained on the basis of state law. Although the PSC's later orders contain brief references to state law, the order asserting jurisdiction to set rates leaves no doubt that the PSC premised its actions on its claim of authority to implement federal law, specifically § 271. *See, e.g.*, *Order Initiating Hearings* at 7 ("**ORDERED FURTHER**, that the Commission hereby asserts its authority *under Section 271 of*

the Federal Act to set just and reasonable rates for de-listed unbundled network elements.") (emphasis added); *see also BellSouth Telecomms., Inc. v. MCImetro Access Transmission Servs., LLC*, 425 F.3d 964, 970 (11th Cir. 2005) ("An order of an agency can only be defended on the grounds cited by the agency."). Moreover, the later references to state law do not suffice to show that the PSC believed it could set rates for these facilities and services if § 271 did not exist. Put differently, there is no suggestion in these orders that state law would provide an independent basis to mandate access to these facilities wholly independent of § 271.

In any event, under this federal scheme, the PSC could not rely on state law to justify its decision to set rates for the facilities and services at issue here in light of the federal scheme the 1996 Act created. *See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000). In particular, the PSC's decision to set regulated rates contravenes the FCC's conclusion that rates set through other means can satisfy § 271. As the FCC explained, a BOC could demonstrate its compliance with § 271 by showing that it offers the elements on the competitive checklist at rates that are "at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff." *Triennial Review Order*, 18 FCC Rcd at 17389, ¶ 664. A BOC also could

"demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate." *Id.* The FCC's statements make sense because, when a BOC need no longer provide access to a § 271 element as a UNE under § 251, CLECs are no longer "impaired" in their ability to compete without forced access to the element at regulated rates. *See, e.g., Order on Remand*, 20 FCC Rcd at 2644, ¶ 204.

The PSC's decision to require BellSouth to charge regulated rates for access to checklist items cannot be reconciled with the FCC's statements: if BellSouth must charge the rate the PSC set, then it cannot negotiate "arms-length agreements" with CLECs to charge a different rate (or file a tariff with the FCC containing a different rate), and the FCC's statements would be meaningless. *See generally BellSouth Declaratory Ruling*,[10] 20 FCC Rcd at 6840-44, ¶¶ 21-27 (states cannot impose unbundling requirements, even under § 251, that contravene FCC determinations).

Beyond that, given the federal statutory scheme involved here, there cannot be a patchwork of individual state judgments about whether to set regulated rates

[10] Memorandum Opinion and Order and Notice of Inquiry, *BellSouth Telecommunications, Inc. Request for Declaratory Ruling*, 20 FCC Rcd 6830 (2005) ("*BellSouth Declaratory Ruling*").

for these facilities. Rather, Congress gave the FCC exclusive authority to determine compliance with § 271, and that federal agency has made clear that *it* will review rates, if necessary, for these facilities. *See Triennial Review Order*, 18 FCC Rcd at 17389, ¶ 664. Indeed, although, as CompSouth emphasized at argument, Congress reserved some state authority to impose unbundling requirements that parallel the obligations of § 251, *see* 47 U.S.C. § 251(d)(3), that provision is expressly limited to implementation of § 251, and § 271 contains no similar savings clause, strongly signaling Congress's expectation that state commissions would not exercise independent state-law authority with respect to § 271 checklist items.

C. For the reasons set forth above, the PSC's orders are unlawful (i) to the extent that they set rates for loops and transport that must be provided under § 271, and (ii) to the extent that they set rates for access to line sharing under § 271. BellSouth's request for declaratory and injunctive relief from the PSC's decisions to set rates for loops, transport, and line sharing therefore must be granted. As of the date of this Order, BellSouth no longer must provide access to the facilities and services at issue here at the rates the PSC set.

II. Remaining Issues

In light of the Court's ruling, CompSouth's affirmative claim must be denied. CompSouth asserts that the PSC acted unlawfully in reconsidering its decision to set a rate for switching. Because the PSC lacked authority to set a rate for switching in the first place, the PSC could not have acted unlawfully in vacating the rate that it set.

Although the Court finds that the PSC acted unlawfully in the orders under review, the Court concludes that BellSouth should not be awarded damages in this case. The Court denies BellSouth's request to be made whole for the difference between the § 271 rates the PSC set and the rates that BellSouth would have charged in the absence of the PSC's orders. As stated by the PSC at argument, this case involves the agency's authority to set rates, not whether a particular rate is just and reasonable. Thus, although no party may require BellSouth to provide service at the PSC-established rates from the date of this Order, the Court does not require the PSC to reset the rates it authorized BellSouth to charge prior to the date of this Order. From the date of the PSC's orders through the date of this Order, BellSouth is entitled to recover the rates set by the PSC.

Finally, with respect to the other issues raised in BellSouth's amended complaint and not addressed in this Order, the Court remands those issues to the

PSC for further consideration in light of the Court's Order. Those issues may involve § 271 in a variety of ways, and the Court decides that it would be prudent to allow the PSC to reconsider them in light of this Order.

* * *

It is hereby ORDERED AND ADJUDGED that BellSouth's request for declaratory and injunctive relief is GRANTED. The Court hereby declares unlawful, and enjoins the Georgia Public Service Commission and the other defendants from seeking to enforce, the PSC's orders to the extent those orders require BellSouth (i) to offer access to loops and transport that BellSouth is not obligated to make available pursuant to § 251 at the rates set by the PSC and/or (ii) to offer and set rates for line sharing. No party may require BellSouth to provide service at those rates as of the date of this Order. For the period of time prior to the date of this Order, the Court does not alter in any way the rates the PSC authorized BellSouth to charge. CompSouth's request for declaratory and injunctive relief is DENIED. As to the remaining issues raised in BellSouth's amended complaint, the pertinent portions of the PSC's orders are REMANDED to the PSC for further consideration in light of the Court's Order.

ORDERED this 3rd day of January, 2008.

The Honorable Clarence Cooper
United States District Judge