

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

JAN 25 2006

PUBLIC SERVICE
COMMISSION

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

REPLY OF SOUTHEAST TELEPHONE, INC.

The complainant, SouthEast Telephone, Inc. ("SouthEast"), pursuant to the Commission's December 16, 2005 order in the above-captioned case, hereby submits its Reply to the Answer and Brief filed by defendant BellSouth Telecommunications, Inc. ("BellSouth"). SouthEast respectfully submits that the Commission should reject BellSouth's arguments and grant the relief requested in SouthEast's December 13, 2005 Complaint and Request for Emergency Injunctive Relief ("Complaint").

SouthEast demonstrated in its Complaint that it ordered "resale" only under duress, because the company intended to exercise its right to order the loop-port-switching group of elements pursuant to Section 271 and other provisions of law, but BellSouth prevented the company from doing so. Complaint at 5-7, ¶¶ 14-16. Accordingly, SouthEast showed that it was entitled to – and did – pay network element rates, rather than resale rates, for this service. SouthEast also showed that BellSouth never carried out the required procedures for resolving billing disputes, and that it instead unlawfully threatened to disconnect SouthEast's service. SouthEast provided an extensive legal argument demonstrating that Sections 201, 202, 251, 252, and 271 of the federal Communications Act ("Act"), as well as the terms of the

BellSouth/SouthEast interconnection agreement and relevant provisions of Kentucky law, prohibit BellSouth from denying the requested network elements to SouthEast.

Incredibly, BellSouth's Brief does not even address, let alone refute, the legal arguments presented in SouthEast's Complaint. Instead, BellSouth simply *assumes* that it is right on all these legal issues, without presenting any arguments to that effect. BellSouth irrelevantly contends that SouthEast has no right to order the Unbundled Network Element-Platform ("UNE-P") pursuant to the FCC's *TRRO* decision (*Unbundled Access to Network Elements*, 20 FCC Rcd 2533 (2005)) and Judge Hood's preliminary ruling on the Commission's emergency order regarding the interpretation of the *TRRO* (*BellSouth Telecommunications, Inc. v. Cinergy Communications Corp.*, Civil Action No. 3:05-CV-16-JMH, Memorandum Opinion and Order (E.D. Ky., Apr. 22, 2005)). Regardless of the merits of BellSouth's arguments in that regard, they are irrelevant to this case, since the *TRRO* exclusively addressed the availability of UNE-P at TELRIC rates pursuant to Section 251. By contrast, SouthEast's Complaint focuses on SouthEast's rights under Section 271 and other provisions of law to order the loop-switching-transport group of network elements at "just and reasonable" prices.

Significantly, just a few days ago the Georgia Public Service Commission concluded that it has jurisdiction to set the "just and reasonable" rates for BellSouth's offering of these Section 271 elements. *Generic Proceeding to Examine Issues Related to BellSouth Telecommunications, Inc.'s Obligations to Provide Unbundled Network Elements*, Docket No. 19341-U, Order Initiating Hearings to Set a Just and Reasonable Rate Under Section 271 (Ga. PSC, Jan. 20, 2006) (available at <ftp://www.psc.state.ga.us/19341/89229.doc>). A recent decision of the U.S. District Court for the District of Maine reached the same conclusion. *Verizon New England, Inc. v. Maine Public Utilities Commission*, Civil No. 05-53-B-C,

2005 U.S. Dist. LEXIS 30288 (D. Maine, Nov. 30, 2005) (available in the record of PSC Case No. 2004-00427, filed on Dec. 14, 2005). This Commission should adopt the same approach here. ^{1/}

The Commission should reject each of BellSouth's arguments for the following reasons:

1. *Duress*. BellSouth denies that SouthEast ordered "resale" only under duress due to its inability to order the loop-switching-transport group of network elements, because, BellSouth contends, SouthEast had no right to purchase UNE-P. Brief at 4-7; *cf.* Complaint at 5-7, ¶¶ 14-16. Accordingly, BellSouth contends that it may compel SouthEast to pay the "resale" rates rather than network element rates for the services at issue. But BellSouth's contention in this regard ignores the critical question of whether Section 271 and other provisions of law require BellSouth to provide SouthEast and other CLECs with the loop-switching-transport group of elements – an argument presented squarely in SouthEast's Complaint. *See* Complaint at 8-14, ¶¶ 22-40 (Counts One, Two and Three). Since Section 271 and other provisions require BellSouth to offer these elements to SouthEast, BellSouth must continue to make them available and may not withhold them or disconnect them until the open question of the "just and reasonable" rate level is resolved.

BellSouth's denial of SouthEast's "duress" claim also ignores SouthEast's showing that BellSouth is obligated to "carry on [its] obligations under the interconnection agreement while the dispute resolution is pending, pursuant to the U.S. District Court's final

^{1/} As BellSouth observes, the important questions of whether Section 271 obligates BellSouth to offer the loop-switch-transport group of elements, and whether this Commission has authority to enforce BellSouth's Section 271 obligations, are also presented in the pending *Generic Docket To Consider Amendments to Interconnection Agreements Resulting From Changes of Law*, Case No. 2004-00427. *See* BellSouth Brief at 7 & n.8; 10-11 & n.11. Nonetheless, SouthEast has presented a complete argument regarding these questions in this case, and believes the Commission can and should answer both of them in the affirmative.

order upholding SouthEast's adoption of the "dispute resolution" provision in its interconnection agreement. *BellSouth Telecommunications, Inc. v. SouthEast Telephone, Inc.*, Civil Action No. 3:04-CV-84-JH, Memorandum Opinion and Order (E.D. Ky., Sept. 16, 2005), *appeal pending*. SouthEast demonstrated in the Complaint that, pending resolution of the disputes between BellSouth and SouthEast, BellSouth must continue performing its obligations under the interconnection agreement, and therefore BellSouth has no right to deny SouthEast access to the loop-switching-transport group of elements. Complaint at 14-17, ¶¶ 41-49 (Count Four). BellSouth offers no response at all to this argument; indeed, the Brief *never even mentions it*.

2. *Billing Dispute*. In response to SouthEast's showing that BellSouth failed to work with SouthEast to resolve the billing dispute between the two companies, BellSouth offers the circular argument that there was no legitimate billing dispute because BellSouth had no obligation to provide the loop-switching-transport group of elements. Brief at 6-9; *cf.* Complaint at 6-7, ¶¶ 17-21. As with the "duress" issue discussed above, this issue cannot be resolved by simply assuming, as BellSouth does, that the *TRRO* answers the question. Rather, it requires the Commission to consider (i) whether, as SouthEast demonstrated, BellSouth did have an obligation to provide these elements pursuant to Section 271 and other provisions of law; and (ii) whether, as SouthEast demonstrated, BellSouth also has an obligation to continue providing these elements pursuant to the "dispute resolution" provision of the interconnection agreement. Again, if Section 271 and other provisions require BellSouth to offer these elements, *and/or* if the interconnection agreement requires BellSouth to continue providing these elements pending resolution of open disputes, then the billing dispute is legitimate and BellSouth's refusal to work with SouthEast to resolve it is unlawful. BellSouth's Brief says *nothing* in response to SouthEast's arguments in this regard.

3. *Provisions of the Existing Interconnection Agreement.* BellSouth provides no legal analysis at all in response to SouthEast's showing that Sections 201, 202, and 251 obligate BellSouth to provide the Section 251 loop element "commingled" with the Section 271 switching and transport elements. Complaint at 12-14, ¶¶ 32-40 (Counts Two and Three). Instead, BellSouth asserts that even if this is the case, the existing BellSouth/SouthEast interconnection agreement contains no provisions regarding Section 271 elements or the commingling of Section 251 and 271 elements. Brief at 10-11.

Once again, BellSouth's Brief misses the point. It is beyond dispute that BellSouth and SouthEast have not yet come to terms regarding a new interconnection agreement (and/or what BellSouth calls a "commercial agreement" regarding Section 271 elements). The issue presented in this case is whether, pending resolution of the dispute between BellSouth and SouthEast over such an agreement (or agreements), BellSouth may lawfully use the threat of unilateral disconnection in order to coerce SouthEast to succumb to its demands. SouthEast respectfully submits that the Commission should reject BellSouth's contentions and instead should insist that both parties utilize lawful procedures, including good-faith negotiations and, if necessary, arbitration, to resolve their disputes.

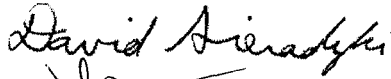
4. *Commission Authority to Grant the Requested Relief.* SouthEast cited KRS 278.260 and KRS 278.530 as authority for the proposition that the Commission may order BellSouth to furnish the service at issue to SouthEast at reasonable rates, and may forbid BellSouth from disconnecting SouthEast's service. Complaint at 17-18, ¶¶ 51-53 (Count Five). BellSouth apparently overlooks these citations and asserts that SouthEast has not identified any Kentucky statutory authority for the Commission to adopt the relief that SouthEast requests. Brief at 11-12.

Contrary to BellSouth's argument, KRS 278.260 specifically vests the Commission with "original jurisdiction over complaints as to rates or service of any utility," and provides procedures for investigations and hearings regarding such complaints. KRS 278.530 specifies a procedure by which the Commission may "compel connection with [a] telephone exchange or line." The statutory provision cited by BellSouth – KRS 278.390 – does not support BellSouth's contention that the Commission lacks authority to grant the relief requested by SouthEast. Rather, KRS 278.390 merely provides that, in the event a utility willfully disobeys a Commission order, the Commission is authorized to sue for mandamus or injunction in a court of competent jurisdiction to compel the utility to comply. One can only hope that BellSouth will not willfully disobey the Commission's direct orders.

* * * * *

In sum, the Commission should reject BellSouth's unsupported arguments and should grant the relief requested in SouthEast's Complaint. 2/

Respectfully submitted,



Jonathon N. Amlung
1000 Republic Bldg.
429 W. Muhammad Ali Blvd.
Louisville, KY 40202-2347
(502) 587-6838

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

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

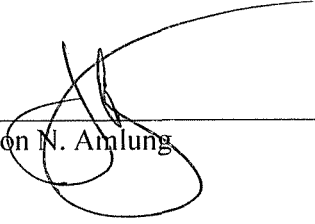
Filed: January 25, 2006

2/ SouthEast concurs with BellSouth's Motion for Confidentiality, for the reasons stated in SouthEast's January 9, 2006 filing in this proceeding in response to an earlier BellSouth motion.

CERTIFICATION

I hereby certify that a true and correct copy of the foregoing was mailed, postage pre-paid, this 25th day of January, 2006, to:

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



Jonathon N. Amlung