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February 23, 2007

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

Re: Petition of SouthEast Telephone, Inc., for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection Under the Telecommunications Act of 1996
PSC 2006-00316

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case are the original and three (3) copies of the Brief of BellSouth Telecommunications, Inc. The Brief will be emailed to SouthEast today.

Sincerely,

Mary K. Keyer

cc: Parties of Record

668999

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF SOUTHEAST TELEPHONE, INC. FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF PROPOSED AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. CONCERNING INTERCONNECTION UNDER THE TELECOMMUNICATIONS ACT OF 1996	))))))	CASE NO. 2006-00316

BRIEF OF BELLSOUTH TELECOMMUNICATIONS, INC.

INTRODUCTION

There are seven issues for the Kentucky Public Service Commission ("Commission") to determine in this arbitration. Those issues are divided roughly in half between operational issues and legal issues. A common theme permeates each issue, however. In every instance, SouthEast Telephone, Inc. ("SouthEast") is asking the Commission to confer upon it some unique privilege that no other competitive local exchange carrier ("CLEC") enjoys.

For example, notwithstanding the fact that this Commission has in place established section 251 UNE loop rates which SouthEast and every other CLEC in Kentucky have been paying to lease BellSouth's loops, SouthEast is asking the Commission to change those rates in this two-party arbitration. SouthEast's loop rate proposal is patently unfair and discriminatory, as well as being contrary to federal law. SouthEast's so-called "public interest" proposal would result in cost savings to SouthEast of approximately $1.3 million per year and a substantial increase in costs for CLECs operating in all zones, thereby giving SouthEast a competitive advantage over other CLECs providing services in rural areas. Tr. 129, 139-140. *Loop rates would increase for other CLECs who are not parties to this arbitration and who were not given*

notice that their material rights may be affected by this proceeding and an opportunity to participate and voice their opinions. If the rates were to apply just to SouthEast, the effect would be discriminatory on other CLECs because if they were to adopt SouthEast's rates, their overall rates would increase.

Every State in the nine-state BellSouth region has a similar loop rate structure to the one in place in Kentucky. There is no legitimate reason for SouthEast to receive special treatment from the Commission by providing rates to SouthEast that are below TELRIC. Moreover, the Commission does not have legal authority to set rates under section 271 of the Telecommunications Act of 1996 (the "1996 Act") (as opposed to section 251). And it is pursuant to section 271 that SouthEast is seeking the establishment of new rates.[1]

Issue 4 is another example of SouthEast's "the rules that everyone else follows don't apply to me" approach in this arbitration. SouthEast is asking the Commission to mandate a form of "collocation" that is not required by law and which no other CLEC has the right to implement. SouthEast's witness on this issue admitted so much under cross-examination at the hearing when he acknowledged that the purported basis for SouthEast's claim of entitlement in fact does not apply. (Tr. 77)

Examination of each issue demonstrates that in every instance SouthEast is seeking special or unique treatment that is not required by law or is otherwise inappropriate. The Commission should not create impermissible remedies because SouthEast requests them and

[1] There was some confusion at the hearing as to the basis for SouthEast's rate proposal. SouthEast was quite clear in its prefiled testimony that its rate proposal is under section 271. Mr. Gillan testified at the outset of the section of his testimony addressing this issue: "Although voice grade loops are required under Section 251 of the Act, I am recommending that the Commission also establish Section 271 prices at this time so that it may more broadly consider factors clearly relevant under Section 271 of the Act, ..." Gillan Direct, at 18. SouthEast witness Turner reiterated: "It is my understanding that Mr. Gillan will present to the Commission in his testimony the basis for why the Commission should set § 271 rates for the voice-grade local loop element." Turner Direct, at 30. Mr. Turner further recommended that the Commission "open a generic § 251 cost proceeding" **"should the Commission choose not to adopt § 271 voice-grade local loop rates."** Turner Direct, at 3 (emphasis added).

says that its special or unique circumstances warrant such extraordinary treatment. Every CLEC seeks to differentiate itself from the competition. The 1996 Act and corresponding rules are in place to offer a broad framework for all competitors to compete on equal footing. State commissions cannot lawfully craft CLEC-by-CLEC business plans for each and every competitor. Yet that is what SouthEast is seeking in this arbitration. The Commission should simply and rightfully say no. In addition to being unlawful, it would be impracticable if state commissions were put to the task of crafting individual business plans for each of the hundreds of CLECs offering services in their jurisdictions. These arbitrations would fill the Commission's docket and be endless in nature. The fact that SouthEast is a CLEC competing primarily in rural areas does not entitle it to special treatment under the law.

For the reasons set forth below, the Commission should rule in favor of BellSouth on each of the issues in this arbitration.

ISSUES

ISSUE A-2: What monthly recurring rate should be established in each pricing Zone for the voice-grade Local Loop element?

The Commission should reaffirm that the monthly recurring rates that the Commission established in Kentucky Public Service Commission Order, *An Inquiry into the Development of Deaveraged Rates for Unbundled Network Elements*, Administrative Case No. 382, (December 8, 2001) ("AC 382"), and which all CLECs in Kentucky, including SouthEast, pay for UNE loops, are the rates that SouthEast should continue to pay for the section 251 loop elements. The Commission should not order the special loop rates and a different geographic deaveraging scheme as proposed by SouthEast for the reasons stated herein.

First, the Commission has already established FCC-required TELRIC-based UNE loop rates and SouthEast has provided no compelling evidence that would justify the Commission

changing them. To the Commission's credit, in AC 382, the Commission spent two years holding informal conferences, reviewing thousands of documents, including three rounds of data requests and responses, analyzing numerous cost studies, cost models, and proposals, considering testimony submitted by multiple parties, consulting with other commissions within BellSouth's nine-state region concerning cost study models, inputs and expected results, including a visit to the Florida Public Service Commission in Tallahassee, Florida, reviewing the records and decisions of other commissions in the BellSouth region regarding the development of UNE rates, and considering the arguments of all parties, including those who intervened in the case. (AC 382, at 2-6) SouthEast chose not to participate in that docket. After an extended and thorough review of the evidence presented, the Commission issued its order establishing UNE rates and finding, among other things, that there "should be three geographic zones established based upon the ascending ranking of individual wirecenter costs." (AC 382, at 34) The rates and zones established by the Commission in AC 382 were not appealed and have remained in effect. All CLECs in Kentucky pay those rates. Notably, SouthEast has consistently grown its customer base while paying the existing UNE rates.[2]

The rates are based on a three-zone split of ascending wire center costs consisting of those below the statewide average, above the statewide average, and greater than double the statewide average. The methodology of rank-ordering wire centers by loop cost and dividing the wire centers into three zones based on those costs is consistent with the methodology used by other state commissions in BellSouth's nine-state region, and is the methodology the CLEC community supported in each of the UNE cost proceedings. (Tipton Rebuttal at 6; Tr. 131-134)

[2] The publicly filed line data information for SouthEast from the Commission website is: 10,253 lines in 2003, 17,612 lines in 2004, and 32,336 lines in 2005. http://psc.ky.gov/utility_master/mastersearch.aspx

Second, to order different rates and a new pricing zone structure in this two-party arbitration proceeding would be discriminatory and unfair to the other CLECs in Kentucky. The existing pricing structure was established by this Commission after a long and arduous process in its generic UNE pricing docket, where all CLECs had the opportunity to participate. BellSouth and all CLECs (including SouthEast) have operated with those rates in place. SouthEast now wants the Commission to alter those rates.

The testimony in this case revealed that the pricing scheme that SouthEast is attempting to create would result in a drastic price reduction for itself in the areas of the Commonwealth in which SouthEast provides service, and a significant increase in costs to the majority of CLECs that operate in all UNE zones in Kentucky.[3] (Tr. 139-140) Not only did those other CLECs not have the opportunity to participate in this two-party arbitration, they were not given notice that SouthEast was proposing a new rate structure that would have a material impact upon them. It would be grossly unfair and would violate the due process rights of every other CLEC if the Commission established new UNE loop rates in this arbitration between BellSouth and SouthEast.

SouthEast has been inconsistent in its position on whether the special pricing scheme it proposes would apply to all CLECs or just to SouthEast. (Gillan Rebuttal at 3; Tr. 114) Either way, the Commission should refuse to order it. If it applies to all CLECs, then it is inappropriate to order such change in rates in a two-party arbitration to which all CLECs are not parties. If it applies just to SouthEast, then the effect would be a discriminatory one on other competitors because although SouthEast argues others could adopt its interconnection agreement, the fact is that no other competitors would do so because it would increase their costs of doing business in

[3] SouthEast would stand to gain a cost savings of $1.3 million a year under its proposed special pricing scheme. (Tr. 129)

urban areas, resulting in SouthEast receiving discriminatory treatment by obtaining special rates for itself while the other competitors comply with the rates set forth by this Commission in AC 382. (Tr. 139-140) (Gillan admitted that under the special pricing proposed for SouthEast there would be more offices and a higher cost in Zone 1 so that a competitor that adopted SouthEast's interconnection agreement would have a higher cost). This plan would provide SouthEast with a competitive advantage over other CLECs that provide services in the rural areas where SouthEast chooses to operate, and would likely lead other CLECs to abandon the rural market to SouthEast. Such special rates for SouthEast would also be unfair to BellSouth since the rates established in AC 382 were implemented after considering all zones as a whole. SouthEast's proposed rate deaveraging scheme would allow one competitor that operates primarily in Zone 3 (i.e., SouthEast) to obtain rates that were substantially lower than those ordered in AC 382 across all zones.

A Commission adoption of special pricing for SouthEast as requested would ignore the requirement that UNE loop pricing zones be cost-based. Contrary to SouthEast's assertions (Tr. 114; Gillan Direct at 4), its proposal is not a cost-based and "zero sum" proposal, but results in a net decrease overall to SouthEast and a reduction in the statewide rate. (Tipton Rebuttal at 6) Since SouthEast operates for the most part in the current Zone 3, the result of SouthEast's special pricing scheme does not maintain the statewide average, but effectively reduces the pricing for SouthEast. *See*, BellSouth Exh. 5. SouthEast's proposed pricing scheme, by placing more of SouthEast's lines in its proposed Zone 2, results in a lower rate for SouthEast in its proposed Zone 2 than in the current Zone 3. *Id.* The Zone 3 wire center costs, however, are not lowered by SouthEast's proposal. SouthEast is essentially asking the Commission to ignore the TELRIC-based rates in Zone 3 and set rates significantly below TELRIC rates for those Zone 3 service

areas. Adopting SouthEast's proposal would cause other competitors and BellSouth to bear the cost for SouthEast's cost reductions. Specifically, based on the proposed rates, SouthEast's pricing scheme would result in a 66% increase in costs to competitors in Zone 1 and an 18% increase in costs to competitors in Zone 2, while SouthEast would enjoy a 29% decrease in costs in Zone 3 where a majority of its customers reside. (Tipton Rebuttal at 7; Tr. 179, 181-182) Indeed, while SouthEast's in-service units represent only 26% of the total units impacted by the proposed zone shuffle and rate rebalance in the wire centers where SouthEast operates, SouthEast would enjoy 63% of the reductions realized by such a proposal. (*Id.*) SouthEast chose to enter the rural market and operate for the most part in Zone 3 and has been successful doing so. *See,* fn. 2, *supra.* There are other CLECs that chose different business plans and operate for the most part in Zones 1 and 2 based on the rates established by the Commission for those zones. If the Commission allows this CLEC to obtain special rates to fit its particular business plan, why wouldn't every other CLEC be allowed to be treated the same and get special rates to fit its particular business plan? A Commission ruling granting SouthEast its special proposed rates would have a discriminatory effect on other competitors in the marketplace in violation of KRS 278.170(1) and 47 USC §§ 251(c)(2)(D) and 251(c)(3).

Third, even if the Commission believes that the rates and/or geographic deaveraging scheme established in AC 382 should be reviewed, which neither BellSouth nor any other CLEC advocates, such a review should not be accomplished in a two-party arbitration such as this. Although SouthEast ultimately withdrew its Motion to Compel BellSouth's responses to certain data requests, SouthEast stated in its Motion to Compel that "[c]ost data and other information within BellSouth's exclusive possession are needed for SouthEast to analyze these issues and for the Commission to decide them." (SET Mot. to Compel, p. 2) The fact that SouthEast withdrew

its motion does not change the fact that in order to set a *cost-based* rate, as required under section 251 for section 251 elements, the Commission must have cost data. SouthEast witness Gillan testified that, without such information, the analysis regarding these rates and zones was "seriously constrain[ed]." (Gillan Direct at 6)

SouthEast has provided no compelling evidence that would warrant or require this Commission to reopen AC 382. The entire basis for SouthEast's claim that the Commission should do what no other state Commission in BellSouth's region has done, and open a new generic cost proceeding, is some anecdotal evidence that there may have been some reductions in cost for certain network components. (Turner Direct at 31-34) It is hardly "evidence" of the type on which the Commission could make sustainable findings. Moreover, the fact is that labor, engineering, and outside contractor costs have risen considerably during the past several years, as have copper prices, conduit placement costs, and pole costs. (Tipton Rebuttal at 7; Tr. 198) Increased urban sprawl and the loss of lines to cable and cellular providers would also cause the cost per voice grade line in the loop network to increase. (Tipton Rebuttal at 8) Accordingly, a review of the current rates could result in an increase of the rates, a decrease of the rates, or no change in the rates. There is simply no compelling evidence provided in this proceeding and no fair basis upon which to order a rate change. (Tr. 204) If the Commission were to review rates every time a cost factor increased or decreased, there would never be any static rates upon which a competitor could create a business plan and enter the marketplace based on that plan.

The other state Commissions in BellSouth's region opened generic cost dockets similar to AC 382 and issued rulings similar to and in the same general timeframe as this Commission's rulings in AC 382. These rulings are still in effect today. No other state commission has ordered rates and zones different than those established in its generic cost docket nor has another

jurisdiction reevaluated UNE prices that were previously determined. (Tr. 141) Neither should this Commission. Given also that the FCC has not yet ruled on its Notice of Proposed Rulemaking (NPRM) regarding the TELRIC methodology, it would be premature and a potential waste of time and resources for this Commission, or any commission at this point, to undertake such an endeavor given the pending outcome of the NPRM.[4]

Finally, to the extent SouthEast is requesting a rate for a loop element under section 271, the Commission should decline to consider or order such a rate because the Commission does not have jurisdiction or the necessary rate-setting authority under section 271 to make such a determination. In support of this position, BellSouth incorporates its arguments in response to Issue A-3 as set forth below. Even if that were not the case, there is no basis for setting a section 271 rate below or different from the section 251 rate. In fact, as to items still required by section 251, checklist item 2 incorporates the section 251 pricing standard.

ISSUE A-3: What monthly recurring rate should apply to the "Port" component of the Platform combination?

The Commission should not set a monthly recurring rate for the "Port" switching component in this proceeding because BellSouth is no longer required to provide a port as an unbundled network element under section 251 of the Act. This issue, therefore, is not appropriate for a section 252 arbitration. SouthEast is proposing to include rates for section 271 elements in its interconnection agreement. Under federal law, this Commission has no jurisdiction under section 271 to enforce the provisions of that section or to set rates under that

[4]*Review of the Commission's Rules Regarding the Pricing of Unbundled Network Elements and the Resale of Service by Incumbent Local Exchange Carriers*, WC Docket No. 03-173, Notice of Proposed Rulemaking, 18 FCC Rcd 18945 (2003)..

section.[5] Notwithstanding the fact that this Commission does not have jurisdiction to set rates under section 271, the rate SouthEast proposes falls below what would be the actual TELRIC rate for an unbundled switching port under the rates approved by this Commission in AC 382 when considering usage components and, thus, does not comply with the just and reasonable standard prescribed by the FCC. Finally, the Commission should not rule on this issue in this two-party arbitration when the generic change of law docket (*BellSouth Telecommunications, Inc.'s, Petition to Establish Generic Docket,* KPSC Case No. 2004-00427), which includes this very issue, is still pending before this Commission.

1. The Commission Has No Jurisdiction under Section 271 to Enforce Its Provisions or to Set Rates Under that Statute.

This arbitration proceeding was brought pursuant to section 252 of the Telecommunications Act. Section 252(a) directs that agreements reached through negotiations are "pursuant to section 251." There is no reference to section 271 in section 252(a). Section 252(c) directs state commissions to ensure that arbitrated agreements "meet the requirements of section 251." Again, there is no reference to section 271. Importantly for present purposes, section 252(d) specifically limits the state commission's authority to set rates *to facilities and services that must be offered under section 251(b) and (c).* That provision provides that state commissions may set rates *only* for (i) "the interconnection of facilities and equipment for purposes of [section 251(c)(2)];" (ii) "network elements for purposes of [section 251(c)(3)];" (iii)

[5] On August 16, 2006, in KPSC Case No. 2005-00519, *BellSouth Telecommunications, Inc. v. SouthEast Telephone, Inc.'s Notice of Intent to Disconnect SouthEast Telephone Service for Nonpayment* and in KPSC Case No. 2005-00533, *SouthEast Telephone, Inc. v. BellSouth Telecommunications, Inc.*, the Commission issued an order asserting authority to require BellSouth to provide access to network elements at TELRIC-based rates. The Commission purported to impose unbundling requirements under 47 U.S.C. § 271, which it claimed independently authorizes it both to require BellSouth to provide access to network elements at TELRIC rates and to set those rates. That decision is on appeal before the federal district court for the Eastern District of Kentucky and is set for oral argument on March 14, 2007, regarding BellSouth's motion for summary judgment and the Commission's and SouthEast's cross-motions for summary judgment on this very issue. *BellSouth Telecomms., Inc., v. SouthEast Telephone, Inc.*, No. 06-CV-65-KKC, (E.D. Ky.)

"reciprocal compensation" for purposes of section 251(b)(5); and (iv) the resale discount mandated by "section 251(c)(4)." 47 U.S.C. § 252(d)(1)-(3). Nowhere in section 252(d) is any section other than section 251 referenced. Congress thus explicitly limited state commission arbitration authority to setting rates for purposes of section 251, and the Commission would be acting unlawfully in arbitrating disputes if it were to set prices for "purposes of section 271." *See, e.g., SBC Communications Inc. v. FCC*, 138 F.3d 410, 416-17 (D.C. Cir. 1998) ("Congress has clearly charged the FCC, and not the State commissions," with determining whether a BOC has complied with conditions in section 271); *MCI Telecomms. Corp. v. BellSouth Telecomms., Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002) (confirming that state commission authority is limited to implementing sections 251 and 252). Indeed, should the Commission issue a decision in this case purporting to set a rate under section 271, as requested by SouthEast, it would violate federal law in several independent ways.

First, section 271 is subject to the exclusive jurisdiction of the FCC, and the Commission accordingly has no authority to interpret or enforce its obligations. On its face, section 271, under which SouthEast is requesting the Commission to act, grants the Commission no authority other than to act in an advisory role to the FCC as it relates to application for long distance relief. The statute makes clear that *only* the FCC may implement section 271 and that state commissions are limited to a purely advisory role. *See* 47 U.S.C. § 271(d)(2)(B). This fact is clear from the plain text of the statute. When a Bell operating company ("BOC"), which BellSouth is, applies for permission to serve the long-distance market, its section 271 application must be submitted to the FCC, *see* 47 U.S.C. § 271(d)(1), and the FCC alone may approve an application under section 271, *see id.* § 271(d)(3) ("[T]he [FCC] shall issue a written determination approving or denying the authorization . . . ."). During the application process,

state commissions are afforded no role other than as a consultant to the FCC. *See id.* § 271(d)(2)(B). And where, as here, the BOC has *already* received approval, the statute leaves enforcement of any ongoing obligations exclusively to the FCC. *See id.* § 271(d)(6) (establishing that the FCC shall enforce continuing conditions for compliance and that the agency shall act on complaints within 90 days).

The absence of state commission authority to implement or enforce section 271 is further confirmed by the text of section 252. It is section 252 that gives the state commission authority to arbitrate and approve interconnection agreements between incumbent LECs and CLECs. That provision repeatedly limits state authority to implementing the requirements of sections 251 and 252. For example, section 252 authorizes state commissions to resolve through arbitration only those "open issues" that remain after the parties negotiate "a request for interconnection, services, or network elements *pursuant to section 251.*" *Id.* § 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) (emphasis added). Similarly, in reviewing the resulting interconnection agreement, the state commission must approve the agreement to ensure it "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(e)(2)(B) (emphasis added); *see MCI Telecomms. v. BellSouth Telecomms.*, 298 F.3d 1269, 1274 (11th Cir. 2002). Nowhere are state commissions authorized to ensure that an agreement meets the "requirements" of § 271. Critically for present purposes, moreover, § 252 carefully and specifically authorizes state commissions to set *rates* only "for purposes of" *§ 251. See* 47 U.S.C. § 252(d)(1); *id.* § 252(c)(2). Thus, as the FCC has explained, with respect to state commissions' authority to set

rates for network elements, § 252 is "quite specific" and "*only* applies for the purposes of implementation of section 251(c)(3)." *Triennial Review Order*[6] ¶ 657 (emphasis added).

In accord with both the clear text of section 271 and the limitations on state authority contained in sections 251 and 252, both the FCC and the courts have repeatedly recognized that Congress granted "*sole authority* to the [FCC] to administer . . . section 271." *InterLATA Boundary Order,*[7] ¶¶ 17-18 (emphasis added); *see id.* ¶ 18 (finding that Congress intended that the FCC exercise "*exclusive authority* . . . over the section 271 process") (emphasis added); *see also* Missouri Decision, 2006 U.S. Dist. LEXIS 65536, at *32 (relying on the FCC's *InterLATA Boundary Order* to support its holding that state commission could not mandate unbundling under section 271). As one federal court explained last year, "it is the prerogative of the FCC . . . to address any alleged failure by [a Bell company] to satisfy any statutorily imposed conditions to its continued provision of long distance service." *BellSouth Telecomms. v. Miss. PSC*, 368 F. Supp. 2d 557, 566 (S.D. Miss. 2005); *see also Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 497 (7th Cir. 2004) (holding that a state commission may not "parlay its limited role" in consulting with the FCC on a BOC's application for long-distance relief to impose substantive requirements).

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[6] 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"), *vacated in part and remanded,* USTA v. FCC, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied,* 543 U.S. 925 (2004).

[7] Memorandum Opinion and Order, *Application for Review and Petition for Reconsideration or Clarification of Declaratory Ruling Regarding US West Petitions To Consolidate LATAs in Minnesota and Arizona*, 14 FCC Rcd 14392 (1999) ("*InterLATA Boundary Order*").

Of particular significance, *four* separate federal courts have determined that state commissions have no authority whatsoever to implement section 271.[8] Moreover, at least 28 state commissions and the District of Columbia, the vast majority of those to address the issue, have all agreed with that analysis, and thus rejected claims that they possess the authority to set rates under section 271. *See* List of State Commission Decisions attached hereto as Exhibit A. For instance, the Indiana Commission has stated that it joined "the many courts and commissions that have already held that Section 271 obligations have no place in a Sections 251/252 interconnection agreement and that state commissions have no jurisdiction to enforce or determine the requirements of Section 271."[9]

In a detailed opinion issued last year in the Missouri Decision, the federal district court of Missouri reversed the Missouri commission, concluding that "[t]he text of § 271 gives the FCC exclusive jurisdiction over the enforcement of that section," and that the state commission's "only role" is to "act as consultant to the FCC during the application process." Missouri Decision, 2006 U.S. Dist. LEXIS 65536, at *31. The Missouri federal court further explained that "Section 252 provides that the state commission's duty in arbitrating and approving agreements is limited to ensuring that the agreement 'meets the requirements of section 251,' and does not mention any role for the state commission under § 271." *Id.* at *32. The court therefore held that the "requirement that SBC include § 271 unbundling obligations in its interconnection

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[8] *See Illinois Bell Tel. Co. v. O'Connell-Diaz*, Case No. 05-C-1149, 2006 WL 2796488 (N.D. Ill. Sept. 28, 2006) ("Illinois Decision"); *Dieca Communications, Inc. v. Florida Pub. Serv. Comm'n*, 447 F. Supp. 2d 1281 (N.D. Fla. 2006), *appeal pending*, Docket No. 06-15589 (11th Cir.); *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, No. 4:05-cv-1264, 2006 U.S. Dist. LEXIS 65536 (E.D. Mo. Sept. 14, 2006) ("Missouri Decision"), *appeals pending*, Docket Nos. 06-3701, 06-3726, 06-3727 (8th Cir.); *Verizon New England, Inc. v. New Hampshire Pub. Util. Comm'n*, Case No. 05-cv-94, 2006 WL 2433249 (D.N.H. Aug. 22, 2006) ("New Hampshire Decision"), *appeal pending* (1st Cir.).

[9] Order, *Indiana Utility Regulatory Commission's Investigation of Issues Related to the Implementation of the Federal Communication Commission's Triennial Review Remand Order*, Cause No. 42857, 2006 WL 618004, at *26 (Ind. Util. Regulatory Comm'n Jan. 11, 2006).

agreements is beyond the jurisdiction of the [Missouri] PSC," and it enjoined the enforcement of the Missouri commission's decision. *Id.* at *37. *See also* Illinois Decision, 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 its intent to confine state authority to the former provisions."); *Dieca Communications*, 447 F. Supp. 2d 1281, 1286, (N.D. Fla. 2006) (holding that section 271 "assigns state commissions no role in the process" other than consulting with the FCC "prior" to the FCC's decision, and that it "is correct . . . that any complaint by Covad that BellSouth's failure to provide [a certain form of network access] will violate section 271 is an issue for the FCC, not for the Florida Commission"); New Hampshire Decision, 2006 WL 2433249, at *8 (holding that the state commission "ha[d] failed to identify" any legitimate "source for its power to set § 271 UNE rates").

Second, even if the Commission had any authority to act under section 271, it has no authority to set *rates* under that statute. To the contrary, the FCC has made clear that facilities made available under section 271 need only be provided at "market" rates, not cost-based regulated rates determined by a state commission. The FCC has determined that an element required to meet the conditions imposed by section 271 is *not* required to be unbundled under section 251, and the *rate* that applies to that element is not the low TELRIC-based rate that applies to section 251 unbundled elements. *Triennial Review Order,* ¶¶ 657-659. Rather, in that circumstance, the pricing of the section 271 element is subject to the "just, reasonable, and nondiscriminatory rate standard of sections 201 and 202" of the Communications Act. *Id.* ¶ 663. A BOC may satisfy sections 201 and 202 by, among other things, "showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate." *Id.* ¶ 664. Under this standard, "the *market price* should prevail" – "as

opposed to a regulated rate." *UNE Remand Order*[10] ¶ 473 (emphasis added). BellSouth has entered into 200 such arms-length agreements with other, similarly situated carriers to SouthEast to provide the "Port" element for which SouthEast improperly seeks a rate from this Commission. (Tipton Rebuttal at 9; Tr. 167)

Beyond that, however BellSouth chooses to demonstrate that the rate for a section 271 element is "just and reasonable" under sections 201 and 202, the statute makes clear that any questions regarding the adequacy of its compliance with section 271 conditions are to be resolved by the FCC, not a state commission. Congress granted "*sole authority* to the [FCC] to administer . . . section 271." *InterLATA Boundary Order*, ¶¶ 17-18 (emphasis added); *see* 47 U.S.C. § 271(d)(3) ("[T]he [FCC] shall issue a written determination approving or denying the authorization . . . ."); *id.* § 271(d)(6) ("If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may" order the company to correct the deficiency, impose a penalty, or revoke the approval.). By contrast, Congress gave the states only an advisory role in the section 271 application process. *See id.* § 271(d)(2)(B).

For all these reasons, the same statutory analysis adopted by all these other courts and state commissions applies here. The Commission has no jurisdiction over section 271.

Although a lone district court reached a different result in *Verizon New England, Inc. v. Me. PUC*, 403 F. Supp. 2d 96 (D. Me. 2006), *appeal pending*, Docket No. 06-2151 (1st Cir.), that decision is not only contrary to the great weight of federal court authority – indeed, the four district courts cited above all *postdate and expressly disagree with* the analysis of the Maine

[10] Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 15 FCC Rcd 3696 (1999) (*"UNE Remand Order"*), vacated and remanded, United States Telecom Ass'n v. FCC, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003).

court[11] – but also lacks persuasive reasoning. Although the Maine court asserted that states may set rates for purposes of section 271, it cited no provision of *federal law* granting such authority. Instead, the court concluded that *state law* grants state commissions authority to set rates for purposes of section 271. *See Id.* at 102. But section 271 is a provision of *federal* law, and states have no presumed or inherent authority to implement federal law. On the contrary, they only have the authority to implement federal law that Congress explicitly grants to them. As the Eighth Circuit has held, "[t]he new regime [under the federal 1996 Act] for regulating competition in this industry is federal in nature . . . and while Congress has chosen to retain a significant role for the state commissions, *the scope of that role is measured by federal, not state law.*" *Southwestern Bell Tel. Co. v. Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) (emphasis added). Thus, as the Missouri court explained in rejecting the Maine court's decision, "The [Maine] decision cites no federal-law grant of authority to support its conclusion, but rather implies it from section 271's silence with respect to rate-making authority and relies on Maine law as a source of authority. This reasoning is contrary to the FCC's rulings and the decisions of most state commissions, and fails to adequately acknowledge the Act's transfer of the regulation of local telecommunications competition from the states to the FCC." Missouri Decision, 2006 U.S. Dist. LEXIS 65536, at *36.

Additionally, the FCC order approving BellSouth's section 271 application for Kentucky did not involve any assertion by a state commission of authority to regulate a BOC's post-approval compliance with section 271, much less any FCC statement that state commissions may lawfully undertake that role so as to regulate section 271 unbundling and rates. To the contrary,

[11] *See* Missouri Decision, 2006 U.S. Dist. LEXIS 65536, at *36; *Dieca Communications*, 447 F. Supp. 2d at 1286 n.7 ("In this circuit, a state commission's authority in a § 251 arbitration is only to address issues arising under § 251."); Illinois Decision, 2006 WL 2796488, at *13 (citing Maine decision, but holding that "SBC has the better argument"); New Hampshire Decision, 2006 WL 2433249, at *7 n.30 (noting that the Maine "ruling has no bearing on this case, which turns on other issues").

the FCC order makes clear that the FCC was referring to *its own* enforcement authority – not to any independent state commission authority, except for the ability of the PSC to enforce a voluntary performance plan, which is not at issue here.[12] Beyond that, federal courts have specifically held that state commissions may not *impose* such performance plans on BOCs under section 271 (or state law). *See Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n*, 359 F.3d 493, 496-98 (7th Cir. 2004).

Finally, it has been argued by SouthEast in the past that section 271(c) provides the Commission authority to set rates for the UNE Platform based on the fact that a BOC applicant for long-distance authority under section 271 is permitted to make available each item on the "competitive checklist" – including unbundled switching – 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). Because state commissions "approve[]" agreements "under section 252," the argument goes, it follows that state commissions can set rates for any element required to meet section 271's conditions for long-distance authority, including elements (such as switching) that are *not* required under section 251.

But section 271(c) says nothing about state commission authority to set *rates*. Rather, section 271(c) merely provides that a BOC is eligible to seek long-distance relief under section 271 if it has "*entered* into one or more" agreements "that have been *approved* under section 252" and that contain terms and conditions for each item on the competitive checklist. *Id.* section 271(c)(1)(A) (emphases added). On its face, that provision is satisfied by the existence of a *single, voluntarily negotiated* agreement that has been approved by a state commission and

[12] *See BellSouth Kentucky 271 Order* ¶ 302 ("Thus, the [FCC] has a responsibility not only to ensure that BellSouth is in compliance with section 271 today, but also that it remains in compliance in the future."); *id.* ¶ 303 (stating that, although the FCC would "[w]ork[]with each of the state commissions, we intend to closely monitor BellSouth's post-approval compliance . . . ."); *id.* ("We stand ready to exercise our various statutory enforcement powers quickly and decisively in appropriate circumstances . . . .").

under which a BOC makes available the items on the competitive checklist at a just and reasonable rate. BellSouth has 200 such agreements. *See, BellSouth's Petition to Establish Generic Docket, KPSC Case No. 2004-00427, October 29, 2004, at 4* On no theory could that limited statutory reference to state commission "approv[al] under section 252" vest authority in the PSC to *arbitrate* disputes and thereby establish terms and conditions, including rates, for *all* section 271 checklist items. Thus, the FCC has held, and the D.C. Circuit has affirmed, that the rate-setting authority in section 252(d)(1) is "quite specific" and "*only applies* for the purposes of implementation of section 251(c)(3)."[13] Indeed, the D.C. Circuit found that there is "*no serious argument*" that "the § 251 pricing rules apply to unbundling pursuant to § 271."[14]

Accordingly, as the Missouri federal court explained when faced with this exact same argument, "Section 271(c)(1) does not . . . provide authority to state commissions to arbitrate disputed terms or to set rates during an arbitration." Missouri Decision, 2006 U.S. Dist. LEXIS 65536, at *35. "Instead, the statute limits state commission arbitration and rate-setting authority to items required under § 251," and SBC "could satisfy the requirements of § 271(c)(1)(A) by pointing to a single, voluntarily negotiated agreement, approved by a state commission, pursuant to which SBC would make available the items on the competitive checklist, including switching, at a just and reasonable rate." *Id.* As a result, "the limited statutory reference to state commission approval under § 252 cannot vest authority in the [Missouri] PSC to set the rates for all § 271 checklist items, and is not properly understood as an implied grant of arbitration or rate-making authority." *Id.*

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[13] *Triennial Review Order* ¶ 657 (emphasis added); *see id.* ¶ 656 ("Where there is no impairment under section 251 . . . section 271 requires [certain] elements to be unbundled, but not using the statutorily mandated rate under section 252."); *USTA v. FCC*, 359 F.3d 554, 589 (D.C. Cir. 2004), cert. denied, 543 U.S. 925 (2004) ("USTA II") ("we see nothing unreasonable in the [FCC]'s decision to confine TELRIC pricing to instances where it has found impairment").

[14] *USTA II* at 589 (emphasis added).

Furthermore, a Commission requirement of BellSouth to continue to make available the same set of facilities that comprise the UNE Platform at cost-based regulated rates "contravenes the clear intent of the [*Order on Remand.*]." *BellSouth Telecomms., Inc. v. MCImetro Access Transmission Services*, 425 F.3d 964, 970 (11th Cir. 2005). It would accordingly be preempted. *See* Missouri Decision, 2006 U.S. Dist. LEXIS 65536, at *30-*31 (holding that Missouri commission ruling requiring access to facilities that made up the UNE-P at TELRIC-based rates was "preempted by the Act"); New Hampshire Decision, 2006 WL 2433249, at *8 n.33 ("[T]he PUC's § 271 unbundling orders, which require Verizon to make § 271 UNEs available to competitors at TELRIC rates, are in direct conflict with the FCC's determination that TELRIC pricing is not appropriate for § 271 UNEs."); Memorandum Opinion and Order and Notice of Inquiry, *BellSouth Telecommunications, Inc. Request for Declaratory Ruling*, 20 FCC Rcd 6830 (2005) ("*BellSouth Preemption Declaratory Ruling*") (holding that a state commission cannot use another source of law to reinstate an unbundling obligation that the FCC has rejected under section 251).

If the Commission ordered the section 271 "Port" element at the rate proposed by SouthEast (Gillan Direct at 25), such order would violate federal law by purporting to set a cost-based regulated rate for access to items provided under section 271, as opposed to the market rate that the FCC has determined should apply. The FCC has specifically explained that an element that is required only under section 271 is *not* subject to the TELRIC-based rates that apply under section 251. Rather, an element that is required only under section 271 is subject only to the "just, reasonable, and nondiscriminatory rate standard of sections 201 and 202" of the Communications Act, *Triennial Review Order* ¶ 663, which the FCC has stated should be the *market price* as opposed to a regulated rate of the type that SouthEast is proposing. *UNE*

Remand Order ¶ 473. SouthEast relies upon now outdated FCC orders to describe "just and reasonable," (Gillan Direct at 9-13) and ignores the more recent TRO and the clear FCC guidance that is more applicable to *today's* competitive framework. In accordance with the FCC's recent guidance, BellSouth may satisfy sections § 201 and 202 by, among other things, "demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers [any] comparable functions" under its federal tariffs, or "by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate." *Triennial Review Order* ¶ 664. BellSouth has satisfied this standard by entering into 200 arm-length agreements with other similarly situated purchasing carriers. (Tipton Rebuttal at 9; Tr. 167)

For all these reasons and those below, the Commission should refuse to order the rate proposed by SouthEast for the section 271 "Port" element.

2. SouthEast's Proposed "Port" Rate Does not Even Meet the Minimum Criteria for the Just and Reasonable Standard and There Is Insufficient Information upon which the Commission Can Establish an Appropriate "Port" Rate.

If the PSC were inclined to order a rate under section 271 that is cost-based rather than market-based, which would be unlawful for the reasons set forth above and adopted by a multitude of federal courts and state commissions, the Commission should adopt the rate set forth in the 200 commercial agreements that have been entered into between BellSouth and other CLECs. These rates are rates that have been reached on an arms-length basis and are thus just and reasonable under section 271.

In contrast, the SouthEast proposed rate falls below what would be the actual TELRIC rate for an unbundled switch port under the rates approved by this Commission in Administrative Case 382. (Tipton Rebuttal at 10-12, Tr. 186) SouthEast's proposed flat-rated port charge is

based on faulty assumptions about average minutes of use and the supposed declining trend in minutes of use. In BellSouth's view, the actual, average minutes of use exceed the 1,000 minutes of use put forth by SouthEast in Mr. Gillan's testimony. (*Id.* at 12) And since SouthEast has provided no supporting data for its assumption that the average wireline customer uses 1,000 minutes of use per month, it raises the speculation that SouthEast understates the average minutes of use by not including all of the network elements used for a call and, specifically, neglecting to include minutes of use applicable to both ends of a call where both originating and terminating switch facilities are used.

Finally, there is not sufficient evidence upon which the Commission can order an appropriate "Port" rate. SouthEast in its own Motion to Compel, which it subsequently withdrew, stated that the cost and demand data that it had requested in its data requests "are needed for SouthEast to analyze these issues and for the Commission to decide them" and "are needed to determine what rates are 'just and reasonable' under Section 201, 202, and 271...." (SET Mot. to Compel at 2 and 3) BellSouth properly objected to these requests, and the Commission did not compel BellSouth to respond to them prior to the hearing. There was thus no such data provided to the Commission in this arbitration proceeding.

BellSouth has taken the position from the beginning of this proceeding that a two-party arbitration is not the appropriate forum within which to set section 251 rates for all CLECs and that the Commission does not have jurisdiction to set section 271 rates. Accordingly, BellSouth properly objected to responding to some of the data requests propounded by SouthEast for the reasons set forth in BellSouth's responses to the data requests, incorporated herein by reference, and timely filed its opposition to SouthEast's motion to compel BellSouth's responses. At the time of the hearing on January 9, 2007, the Commission had not ruled that the cost data

requested was relevant nor did it require that BellSouth produce such data. Instead, the Commission ruled from the bench in the hearing that it would consider SouthEast's motion to compel and issue a written order "very quickly" and depending on if the motion were granted, a supplemental hearing may be necessary. (Tr. 9)

Following the hearing on January 9, 2007, SouthEast submitted a letter on January 12, requesting leave to withdraw its motion to compel stating that "BellSouth has fully exhausted its opportunity to provide a countervailing analysis" and that "it would be most productive for the Commission to resolve this proceeding based on the information in the record to date." *See* David Sieradzki Letter dated January 12, 2007. BellSouth takes exception to SouthEast's statements given that the Commission had not required BellSouth to provide such data and specifically stated in its ruling from the bench that if the Commission were to grant SouthEast's motion, a supplemental hearing may be necessary. It is disingenuous for SouthEast to (1) file a Motion to Compel responses to data requests for information that it claimed was *necessary* for SouthEast's analysis and *for the Commission to decide the issues*, (2) participate in the hearing in which the Commission stated it would rule on the motion very quickly, and if granted, it may require a supplemental hearing, and (3) then immediately following the hearing request leave to withdraw its motion claiming that BellSouth had "exhausted its opportunities to provide a countervailing analysis" and that the Commission should rule "based on the information in the record to date." The Commission should not allow such manipulation. BellSouth provided valid legal arguments as to why the information requested was not relevant to this arbitration case and had a reasonable expectation that it was not unless and until the Commission ruled otherwise. The Commission should decline to set a monthly recurring rate for the "Port" switching component based on insufficient data in the record to date.

ISSUE A-4: What rates, terms and conditions should govern an interconnection arrangement in which BellSouth's offering of UNE-L interconnected to SouthEast's network at an "Adjacent Meet Point"?

SouthEast is asking that the Commission require BellSouth to provide SouthEast with a novel form of adjacent off-site "collocation" that BellSouth does not make available to any other CLEC. The Commission should not impose such a requirement upon BellSouth. Neither the 1996 Act nor any FCC rule or order requires the provision of adjacent off-site collocation. Second, the "rebuttable presumption" upon which SouthEast bases its argument does not, in fact, support SouthEast's plea.

SouthEast is asking the Commission to impose an obligation on BellSouth to allow "collocation" of equipment on non-BellSouth property that is close in proximity to a BellSouth central office. SouthEast's collocation witness, Steve Turner, admitted at the hearing, however, and there is no dispute, that there is no explicit requirement that BellSouth (or any ILEC) allow CLECs to collocate equipment on property adjacent to, but not owned, by the ILEC. (Tr. 77)

Mr. Turner testified that the sole basis for SouthEast's request is the "rebuttable presumption" set forth in the FCC's *Advanced Services Order*[15]. (Tr. 68, 78); *see also* (Turner Direct at 7, Turner Rebuttal at 5) That Order states, in pertinent part, that "the deployment by any incumbent LEC of a collocation arrangement gives rise to a rebuttable presumption in favor of a competitive LEC seeking collocation in any incumbent LEC *premises* that such an arrangement is technically feasible." *Advanced Services Order,* ¶ 45 (emphasis added); *see also* (Turner Direct at 7) Mr. Turner further testified: "My testimony provides support for the availability of collocation in other parts of the country that *mirrors* that which Kentucky

[15] First Report and Order and Further Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* 14 FCC Rcd 4761 (1999) ("*Advanced Services Order*").

SouthEast is seeking in Kentucky." (Turner Rebuttal at 5) "As such, through this arbitration, we are seeking the *same ability* for interconnection in Kentucky as well." *Id.* (emphasis added).

The cross-examination of Mr. Turner revealed, however, that what SouthEast is asking for in this case goes beyond what ILECs make available in other jurisdictions. SouthEast's case rests on Mr. Turner's claim that AT&T and Verizon make adjacent off-site collocation available to CLECs in Texas and California. (Turner Direct at 6) Notably, Mr. Turner did not attach to his testimony a tariff, a contract provision, or any other document, to support his claim that AT&T or Verizon make available the type of off-site collocation that SouthEast seeks. Indeed, the only evidence in this case regarding the AT&T and Verizon offerings other than Mr. Turner's uncorroborated claims are Verizon and AT&T documents introduced into evidence as exhibits during Mr. Turner's cross-examination as BellSouth Exhibits 3 and 4, respectively. These documents demonstrate that Verizon does *not* offer adjacent off-site collocation and that the AT&T offering does not "mirror" what SouthEast seeks. BellSouth Exhibit 3 is an excerpt from Verizon's wholesale website that describes the types of collocation that Verizon makes available to CLECs. The listing of relevance here is "Adjacent Collocation" in Verizon West – i.e., California – territory. Verizon states that:

> Adjacent collocation is only an option when the following conditions are met:
>
> - Space is legitimately exhausted in Verizon's premises for caged and cageless collocation; and
>
> - It is technically feasible to construct or procure a hut or similar structure on Verizon West property that adheres to local building code, zoning requirements, and Verizon West building standards.

(emphasis added).

Mr. Turner correctly noted that the Verizon adjacent collocation offering is for adjacent *on-site* collocation, and that it does *not* speak to an *off-site* arrangement. (Tr. 81) Mr. Turner

conceded that he is not aware of a Verizon offering for the type of arrangement that SouthEast is asking the Commission to mandate that BellSouth make available to SouthEast in Kentucky:

> Q. Have you ever seen a Verizon tariff offering where Verizon makes available adjacent off-site collocation?
>
> A. No, I have not.
>
> Q. Have you ever seen contract language in a Verizon interconnection agreement where Verizon makes available off-site adjacent collocation?
>
> A. No, I have not.

(Tr. 81-82)

BellSouth Exhibit 4 is the portion of the Southwestern Bell Telephone Company (now AT&T) Texas tariff addressing physical collocation. Section 6.1.1(E) provides for off-site collocation. It states:

> Where Physical Collocation space within a SWBT Eligible Structure is Legitimately Exhausted, and Collocator's Adjacent On-site space is not within 50 ft. of the Eligible Structure's outside perimeter wall, the Collocator has the option and SWBT shall permit an Adjacent Structure Off-Site Arrangement, to the extent technically feasible. The Adjacent Off-Site Arrangement is available if the Collocator's site is located on a property that is contiguous to or within one standard city block of SWBT's Central Office or Eligible Structure.

(Emphasis added).

SouthEast is asking the Commission to mandate that BellSouth allow SouthEast to place its equipment off BellSouth premises without regard to whether space in the BellSouth central office is exhausted. *See* Turner Ex. SET-2 ("Terms and Conditions for Adjacent Off-Site Collocation"). There is no question that what SouthEast is seeking in Kentucky does not "mirror" arrangements that are available elsewhere. The only evidence of an ILEC making off-site collocation available is the Texas tariff, and that tariff makes clear that an off-site arrangement is available when there is a space exhaust situation in the ILEC's structure.

The fact that Verizon and AT&T limit the availability of adjacent collocation to situations where there is space exhaustion is hardly surprising, for that is an express condition the FCC stated would be required before an ILEC would have to make an adjacent *on-site* collocation arrangement available. The FCC addressed this issue directly in its *Advanced Services Order*, where it stated: "Finally, we require incumbent LECs, *when space is legitimately exhausted in a particular LEC premises*, to permit collocation in adjacent controlled environmental vaults or similar structures to the extent technically feasible." *Advanced Services Order*, ¶ 44 (emphasis added).

The FCC did not at anytime even imply that *off-site* collocation would be required under *any* circumstances. Indeed, it consistently limited its requirements for any type of collocation outside the ILEC central offices to other ILEC "premises."

Mr. Turner admitted at the hearing that the FCC language upon which SouthEast bases its plea for *off-site* collocation does not in fact apply: Upon questioning from Commission counsel, Mr. Turner reconfirmed that the FCC's rebuttable presumption repeated in AT&T's tariff, BellSouth Exhibit 4, was the basis for SouthEast's request for off-site collocation. (Tr. 89-90) The tariff states:

> Other Physical Collocation Arrangements – SWBT will provide other collocation arrangements that have been demonstrated to be technically feasible. Deployment by an incumbent LEC of a collocation arrangement gives rise to a rebuttable presumption in favor of a CLEC seeking collocation **in SWBT's Eligible Structures** that such arrangement is technically feasible.

BellSouth Exh. 4 (emphasis added). On re-cross examination Mr. Turner testified:

> Q. Let's look at that language in that subparagraph (F), the very last part of the Exhibit 4. If you look at the second sentence, it says, "Deployment by any incumbent LEC of a collocation arrangement gives rise to a rebuttable presumption in favor of a CLEC seeking collocation in SWBT's Eligible Structures ..." Do you see that?

A. Yes.

Q. And, by "Eligible Structures," that would be referring to SBC's property; correct?

A. Yes. That would be generally how one might read that.

Q. And **that would be on-site collocation, not off-site collocation; correct?**

A. **Yes.**

Q. And I know you're familiar with the FCC's Advanced Services Order because you quote it in your prefiled testimony, but **that language in SBC's tariff tracks the FCC's language; does it not?**

A. **It does.**

(Tr. 101-02) (emphasis added).

The off-site arrangement SouthEast desires would not be on BellSouth's premises. Consequently, as SouthEast's witness admitted, the rebuttable presumption that is the foundation for SouthEast's argument for off-site collocation does not apply. Moreover, even if it did apply, SouthEast has not demonstrated that what it seeks is provided by other ILECs. Indeed, to the contrary, the evidence demonstrates conclusively that the off-site arrangement available in Texas is available only where space in the ILEC premises is exhausted and is further limited by distance restrictions. SouthEast is asking for an arrangement without regard to space exhaust and with no distance limitations. There is no legal basis upon which to grant SouthEast's request for special, unique treatment.

ISSUE A-7: Should the standard rule of construction apply to this interconnection agreement, with any ambiguity in the terms of the agreement being construed against BellSouth?

The simple and correct answer to this question is no. It is not "standard" to construe a negotiated or arbitrated agreement against either party who participated in such negotiations or arbitration. This common law rule applies to contracts of adhesion, where one party has no

ability to negotiate terms. *Elliott v. Pikeville Nat'l. Bank & Trust Co.*, 128 S.W.2d 756, 760 (Ky. App. 1939) ("The rule is never applied to words which are the common language of both parties, nor where the intention is clearly expressed.") *See also, Terra Int'l v. Miss. Chemical Corp.*, 119 F.3d 688, 692-693 (8th Cir. 1997) (court declined to construe ambiguous clause against its drafter where there were equal bargaining strengths of both parties and the plaintiff was represented by sophisticated legal counsel during the formation of the agreement). BellSouth and SouthEast have negotiated and will continue to negotiate the interconnection agreement between them with the assistance of legal counsel if they so desire and, once finalized, the agreement will be filed with and approved by this Commission. Furthermore, both parties have a right to bring before this Commission, for arbitration and decision, issues on which they cannot agree in the negotiations. So, while this is a negotiated agreement, SouthEast has the right, and has in fact invoked the right, to have a third party – this Commission - set the terms of the agreement if SouthEast cannot reach agreement with BellSouth on the terms. Thus, in some instances, it may very well be the Commission that drafts or imposes the language, and not one of the parties; therefore, the rule of construction is not applicable.

There is no valid legal basis upon which to determine in advance that any ambiguity automatically should be construed against one of the parties to the negotiation or arbitration. If a dispute arises as to the meaning of a contract term, the court or regulatory agency charged with determining its meaning should apply standard rules of contract construction for negotiated agreements.

ISSUE A-8: What rates, terms, and conditions should apply to the Parties' respective "Dispatched/No Trouble Found" charges?

The Commission should conclude that the terms and conditions previously approved by the Commission and contained in BellSouth's interconnection agreements with all CLECs in Kentucky also should apply to SouthEast. BellSouth believes, however, that this issue is not properly before the Commission for resolution, so the Commission does not have to reach a conclusion.

Pursuant to section 251 of the 1996 Act, a party may petition a state commission to arbitrate interconnection agreement issues that the parties were not able to agree upon during the statutorily prescribed negotiation period. SouthEast did not at any time during the parties' extensive negotiations raise an issue regarding the terms and conditions applicable to "Dispatched/No Trouble Found" charges. (Tipton Direct at 10) Consequently, the issue is not appropriate for arbitration and determination by the Commission.

If Issue A-8 were properly before the Commission, the Commission should reject SouthEast's proposal. As an initial matter, the rates and policies employed by BellSouth with respect to "no trouble found" are the same conditions that have been approved by this Commission and under which other CLECs in Kentucky are subject. A "No Trouble Found" situation occurs when BellSouth receives a trouble report that appears to warrant a dispatch, yet the dispatched technician finds no evidence of a problem with the service once the technician's diagnosis is complete. BellSouth encounters "No Trouble Found" instances with its own customers.

If such a trouble report were initiated by a CLEC for one of its customers, however, BellSouth closes the ticket and bills the CLEC a "No Trouble Found" charge for the dispatch. Should the trouble recur within 30 days and is found to have been caused by a condition on the

BellSouth side of the demarcation point, BellSouth will credit the CLEC any "No Trouble Found" charges assessed for the initial or any subsequent trouble dispatches that were caused by a recurring, or "intermittent" network problem, upon request. If the trouble is ultimately determined to be caused by a condition on the CLEC's side of the demarcation point, there would be no credit due the CLEC for the "No Trouble Found" charges.

A CLEC can control to some degree the number of "No Trouble Found" charges by performing some basic testing on its customers' lines or end user equipment prior to reporting a trouble condition to BellSouth. Indeed, BellSouth expects all CLECs to make a reasonable effort to isolate the location of the trouble on a customer's line and attempt to identify the nature and possible source before submitting a trouble ticket. This preliminary action may alleviate unnecessary expenditures of resources and may prevent billing of a service call to SouthEast if the problem is determined to be in SouthEast's network or its customer's premise equipment.

It would be both unnecessary and inappropriate to allow SouthEast to charge BellSouth a "no trouble found" charge. First, it is not unusual for troubles to be intermittent. That is, the specific cause of the trouble is not present all the time. For example, during inclement weather a cable may be influenced by moisture which induces a high resistance trouble condition, resulting in service degradation or interruption. Once the weather condition abates, service is no longer affected. It is not rare, therefore, for a service technician to be dispatched to clear a trouble on a line, only to find that no trouble is apparent, and to have the problem appear again later. SouthEast implies that it should have the ability to reciprocally bill BellSouth if no trouble is found, but the trouble recurs, regardless of which party's network may ultimately be at fault. (Kendrick Direct at 4, lines 17-20)

Because it is not technically feasible for a BellSouth technician to determine that an intermittent trouble is present on a line that appears to be a fully functioning line at the time the technician is dispatched, it is appropriate for BellSouth to charge SouthEast for a trouble dispatch charge when no trouble is found at the time of the actual dispatch. The fact that intermittent troubles exist in the network is a reality for all telecommunications carriers, including SouthEast and BellSouth. As such, intermittent troubles are a normal cost of doing business and should be borne by all telecommunications providers. It is clearly inappropriate to suggest that BellSouth reimburse SouthEast for any of SouthEast's costs associated with a dispatch that BellSouth did not initiate.

There is a Self-Effectuating Enforcement Mechanism ("SEEM") measurement, "Customer Trouble Report Rate and Percent Repeat Customer Troubles Within 30 Days" approved by this Commission, which would allow SouthEast to receive SEEM payments should service to SouthEast not be at parity with BellSouth's service to its own customers. In 2006, SouthEast received no penalty payments for repeat customer troubles within 30 days, indicating that the number of repeat troubles experienced by SouthEast is proportionally less than the number of repeat troubles experienced by BellSouth's retail end users. Further, the existence of this SEEM measurement provides assurance that BellSouth would compensate SouthEast in the event that repeat troubles for SouthEast exceed the level of repeat troubles that BellSouth's own end users experience.

There is no evidence to suggest that extending the current 30-day interval to 60 days would alleviate in any way the occurrence of intermittent troubles. Rather, a 60-day interval could encompass separate and distinct trouble conditions and be mistakenly viewed as the same issue.

First, it is inappropriate for SouthEast to receive a different time period for trouble determination than all other CLECs that interconnect with BellSouth. Second, it is not uncommon for a repeat trouble to exist and not be related to a previous trouble report. For example, a customer could have a defective buried service wire and then, less than 30 days later, experience a bad cable pair due to an unrelated cause. Although these two conditions are not related, BellSouth must still treat the second instance as a repeat trouble. And, finally, the current 30-day interval is the standard, not only between BellSouth and the other CLECs in Kentucky, but for CLECs throughout BellSouth's nine-state region.

The changes proposed by the direct testimony of witness Kendrick with respect to "no trouble found" charges should be rejected because they are unsupported, unnecessary, and would allow SouthEast to be treated differently than other CLECs in Kentucky. The SEEMs mechanism provides adequate assurance to protect SouthEast's interests.

ISSUE A-9: Must BellSouth provide data on the location and type of certain network facilities and the number of customer lines and geographic service area of such facilities? If so, at what rate?

This issue concerns SouthEast's desire to obtain information from BellSouth regarding the geographical location of BellSouth remote terminals that service particular end user locations. Although BellSouth is not required to do so, the testimony confirmed that BellSouth is providing to SouthEast remote terminal location information and has been doing so at the rate agreed upon by the parties. (Tipton Direct at 11; Tipton Rebuttal at 29-30) The 1996 Act does not require that BellSouth provide such information, and SouthEast has not cited any legal authority that requires that BellSouth provide it. Nevertheless, BellSouth provides SouthEast with the same information that it provides to other CLECs pursuant to the same terms and conditions. BellSouth is willing to continue to provide such information to SouthEast at the rates

previously agreed upon. SouthEast appears to want more, but it is not entitled to anything additional from BellSouth.

First, BellSouth is not required by section 251 of the 1996 Act to provide remote terminal location information to CLECs. This issue, therefore, is outside of the Commission's jurisdiction. The Commission should not issue a ruling on this issue in this section 252 arbitration.

Second, there is not a controversy in any event. Pursuant to a voluntary agreement, BellSouth provides remote terminal location information to SouthEast in the form that BellSouth has such information. If BellSouth has a street address for a remote terminal, BellSouth provides the street address to SouthEast, along with the street addresses of all customers that are served via the remote terminal. (Tipton Rebuttal at 30) SouthEast's witness, Mr. Keller, opined in his very short piece of testimony that SouthEast would like it if BellSouth would provide SouthEast with "an address in a format that could be used by 911 dispatchers – address for every RT." (Keller Direct at 3) Mr. Keller acknowledged in his pre-filed testimony and also at the hearing, however, that SouthEast was not requesting that BellSouth provide remote terminal data that BellSouth did not have. Mr. Keller stated in his pre-filed testimony: "All SouthEast is requesting is that BellSouth take the information it already has in its computer systems and download the data for burning onto a CD-ROM disk." (Keller Direct at 5) BellSouth is doing that today. (Keller Direct at 5; Tr. 42-43) Mr. Keller confirmed that point on cross-examination:

> Q. Let me ask you this, then. Is SouthEast requesting that BellSouth provide SouthEast with information that BellSouth doesn't already have?
>
> A. No, sir.

(Tr. 43)

BellSouth does not assign 911 coordinates or mailing addresses to its remote terminals. And SouthEast does not contend otherwise. (Tr. 59-60) Consequently, this "issue" is a non-issue. Even if the Commission had the authority to make a determination, which it does not, there is no additional remedy. SouthEast's testimony is that it is not asking for any information that BellSouth does not possess, and BellSouth agrees to continue to voluntarily provide the information it has and has been providing to SouthEast at the previously agreed upon price.

CONCLUSION

For the reasons stated herein, BellSouth respectfully requests the Commission to rule in its favor on each of the issues submitted in this case.

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CERTIFICATE OF SERVICE KPSC 2006-00316

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals via email this 23rd day of February 2007.

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EXHIBIT A

State Commission Decisions Rejecting Claim of Authority to Implement Section 271

- Alabama: Order Dissolving Temporary Standstill, *Competitive Carriers of the South, Inc.*, Docket 29393, 2005 Ala. PUC LEXIS 126, at *42-*43 (Ala. Pub. Serv. Comm'n May 25, 2005) ("With regard to MCI's argument that BellSouth has an independent obligation to provision UNE-P switching pursuant to § 271 of the Telecommunications Act of 1996, we conclude, as did the court in [*BellSouth Telecommunications, Inc. v. Mississippi Pub. Serv. Comm'n*, 368 F. Supp. 2d 557 (S.D. Miss. 2005], that given the FCC's decision 'to not require BOCs to combine § 271 elements no longer required to be unbundled under § 251, it [is] clear that there is no federal right to § 271 based UNE-P arrangements.' This conclusion is further bolstered by the fact that the ultimate enforcement authority with respect to a regional Bell operating company's alleged failure to meet the continuing requirements of § 271 of the Telecommunications Act of 1996 rests with the FCC and not this Commission. MCI's argument that there is an independent obligation under § 271 to provide UNE-P is accordingly rejected.").

- Arkansas: Memorandum Opinion and Order, *Petition of Southwestern Bell Telephone, L.P. d/b/a SBC Arkansas for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Arkansas 271 Agreement ("A2A")*, Docket No. 05-081-U, 2005 Ark. PUC LEXIS 432, at *3-*4 (Ark. Pub. Serv. Comm'n Oct. 31, 2005) ("ICA arbitrations are limited to establishing the rates, terms and conditions to implement the obligations of 47 USC § 251. This Commission's obligations under Section 271 of the Act are merely advisory to the FCC. . . . Although SBC should provide the items specified in Section 271 and the *TRO*, this Commission has no jurisdiction to enforce Section 271.").

- Colorado: Order on Commission Jurisdiction, *Review of Certain Wholesale Rates of Qwest Corporation*, Docket No. 04M-111T, at 19 (Colo. Pub. Utils. Comm'n Oct. 31, 2006) ("[W]e hold that the Commission's jurisdiction is limited," finding "we may not review wholesale rates for Section 271 elements."), *available at* http://www.dora.state.co.us/PUC/decisions/2006/C06-1280_04M-111T.doc

- Delaware: Arbitration Award, *Petition of Dieca Communications Inc. et al for an Amendment to Interconnection Agreements with Verizon Delaware Inc., Pursuant to Section 252(b) of the Communications Act of 1934, as amended, the Triennial Review Order and the Triennial Review Remand Order*, Docket Nos. 05-164 & 04-68, at 111-12 (Del. Pub. Serv. Comm'n Mar. 24, 2006) ("This arbitration proceeding involves the ICAs changes necessary to implement changes in Verizon's obligations resulting from the TRO and TRRO. For the most part, these changed obligations are subject to the provisions of § 251 of the Act. Furthermore, there is no clear indication in either the TRO or TRRO that the FCC expected the states to address any issues beyond that scope, such as potential § 271 obligations, as part of the subsequent § 252 process. As a result, it is not necessary to address the questions of state authority over § 271 matters in order to resolve the matters that are within the basic scope of the present arbitration proceeding. Therefore, the ICAs should not include anything related to any claimed § 271 entitlements."), *available at* http://www.state.de.us/delpsc/dockets/0468award.pdf.

- Florida: Order on Generic Proceeding, *Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.*, Docket No. 041269-TP, Order No. PSC-06-0172-FOF-TP, at 52 (Fla. Pub. Serv. Comm'n Mar. 2, 2006) ("Upon thorough analysis of FCC orders, the Act, case law, and the record in this proceeding, we find that this Commission does not have authority to require BellSouth to include in § 252 interconnection agreements § 271 elements. We acknowledge that this is a complex issue, the resolution of which is burdened by the lack of a clear declaration by the FCC and the existence of a significant, yet inconsistent body of law. However, we find that the regulatory framework set forth by the FCC in both the TRO and the TRRO leads reasonably to the conclusion that jurisdiction over § 271 matters lies with the FCC rather than this Commission."), *available at* http://www.floridapsc.com/library/FILINGS/06/01842-06/01842-06.PDF.

- Idaho: Order No. 29825, *Petition of Dieca Communications, Inc., d/b/a Covad Communications Co. for Arbitration of an Interconnection Agreement with Qwest Corp.*, Case No. CVD-T-05-1, 2005 Ida. PUC LEXIS 139, at *9 (Idaho Pub. Utils. Comm'n July 18, 2005) ("We conclude that the Commission does not have authority under Section 251 or Section 271 of the Act to order the Section 271 unbundling obligations as part of an interconnection agreement.").

- Illinois: Arbitration Decision, *Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 with Illinois Bell Telephone Company to Amend Existing Interconnection Agreements to Incorporate the Triennial Review Order and the Triennial Review Remand Order*, Docket 05-0442, 2005 WL 3359097, at *54 (Ill. Commerce Comm'n Nov. 2, 2005) ("We note that the Commission has no jurisdiction to enforce the provisions of Section 271 absent an agreement. General jurisdiction would lie only with the FCC. . . . The Commission rejects CLECs' proposal to update underlying agreements requiring SBC to provide new rates, terms, and conditions for Section 271 elements, apart from any terms agreed to in the underlying agreement."). *But see* Amendatory Arbitration Decision, *XO Illinois Petition for Arbitration of an Amendment to an Interconnection agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended,* Docket No. 04-0471, 2004 WL 3050537, at *58-*59 (Ill. Commerce Comm'n Oct. 28, 2004); Order, *Cbeyond Communications et al. v. Illinois Bell Telephone Company*, Case No. 05-0154, 2005 WL 1711981, at [23-26]* (Ill. Commerce Comm'n June 2, 2005).

- Indiana: Order, *Indiana Utility Regulatory Commission's Investigation of Issues Related to the Implementation of the Federal Communication Commission's Triennial Review Remand Order and the Remaining Portions of the Triennial Review Order*, Cause No. 42857, 2006 WL 618004, at *26 (Ind. Util. Regulatory Comm'n Jan. 11, 2006) (joined "the many courts and commissions that have already held that Section 271 obligations have no place in Section 251/252 interconnection agreement[s] and that state commissions have no jurisdiction to enforce or determine the requirements of Section 271.").

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* Bracketed page numbers refer to the pages of the printed Westlaw version of the cited decision.

- Iowa: Arbitration Order, *Arbitration of Dieca Communications, Inc., d/b/a Covad Communications Co. v. Qwest Corp.*, Docket No. ARB-05-1, 2005 Iowa PUC LEXIS 186, at *10 (Iowa Util. Bd., May 24, 2005) ("Clearly, the provisions that are at issue in this arbitration are unbundling obligations pursuant to § 271, rather than § 251 obligations. Therefore, the Board lacks jurisdiction or authority to require that Qwest include these elements in an interconnection agreement arbitration brought pursuant to § 252.").

- Kansas: Order No. 13: Commission Order on Phase I, *Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P d/b/a SBC Kansas Under Section 252(b)(1) of the Telecommunications Act of 1996*, Docket No. 05-BTKT-365-ARB, 2005 Kan. PUC Lexis 602, at *2 (Kan. Corp. Comm'n May 16, 2005) ("Where a checklist item is no longer subject to section 251 unbundling, section 252(d)(1) does not operate as the pricing standard. Rather, the pricing of such items is governed by the 'just and reasonable' standard established under sections 201 and 202," which "provide no authority to state commissions to establish prices for services required to be provided pursuant to section 271.") (internal quotation marks omitted).

- Louisiana – Order U-28131 Consolidated With Order U-28356, *In re: Petition to establish generic docket to consider amendments to Interconnection Agreements resulting from changes of law*, Docket Number U-28356, at 3 (Louisiana Pub. Serv. Comm'n Feb. 22, 2006) ("The Commission declines to order BellSouth to include Section 271 elements in Section 252 agreements and further declines to set rates for Section 271 elements."), available by searching for order number at http://204.196.11.47/Workplace/Search.jsp.

- Maryland: Order No. 79893, *Petition of AT&T Communications of Maryland, Inc. and TCG Maryland for an Order Preserving Local Exchange Market Stability*, Case No. 9026, 2005 MD PSC Lexis 11, at *12 (Md. Pub. Serv. Comm'n Apr. 8, 2005) ("With respect to whether Section 271 provides an independent basis for continued provisioning of switching . . . at TELRIC rates, the Commission notes that Verizon's fulfillment of its Section 271 obligations do not necessitate the provision of Section 251 elements at Section 251 rates."). *But see* Order No. 80958, *Petition of Verizon Maryland Inc. for Consolidated Arbitration of an Amendment to Interconnection Agreements of Various Competitive Local Exchange Carriers and Commercial Mobile Radio Service Providers Pursuant to Section 252 of the Telecommunications Act of 1996*, Case No. 9023, at 101 (Md. Pub. Serv. Comm'n July 31, 2006) ("The Commission has yet to rule on the matter of its jurisdiction over Verizon's § 271 obligations. Nonetheless, the Commission is not persuaded that there is a connection between the TRO and the proposed Amendment language. Therefore the Commission rejects the CLEC language and reserves judgment on the issue of its § 271 jurisdiction until, if and when, the issue comes squarely before us."), *available at* http://webapp.psc.state.md.us/Intranet/Casenum/NewIndex3_VOpenFile.cfm?ServerFilePath=C:\CaseNum\9000-9099\9023\125.pdf

- Massachusetts: Consolidated Order Dismissing Triennial Review Order Investigation and Vacating Suspension of Tariff M.D.T.E. No. 17, *Proceeding by the Department of Telecommunications and Energy on its own Motion to Implement the Requirements of the Federal Communications Commission's Triennial Review Order Regarding Switching for Mass Market Customers*, D.T.E. 03-60, at 55-56 (Mass. Dep't of Telecomms. & Energy Dec. 15, 2004) (Section 271 elements "should be priced, not according to TELRIC, but rather according to the 'just and reasonable' rate standard of Sections 201 and 202 of the Act. . . . [T]he FCC has the authority to determine what constitutes a 'just and reasonable' rate under Section 271, and the FCC is the proper forum for enforcing Verizon's Section 271 unbundling obligations. . . . [W]e do not have authority to determine whether Verizon is complying with its obligations under Section 271."), *available at* http://www.mass.gov/dte/telecom/03-60/1215conord.pdf.

- Montana: Final Order, *Petition of Dieca Communications, Inc., d/b/a Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket No. D2005.4.51, Order No. 6647a, 2006 Mont. PUC LEXIS 11, at *4-*7 (Mont. Pub. Serv. Comm'n Jan. 8, 2006) ("Although § 271 makes passing references to certain provisions of §§ 251 and 252, there is no indication that § 271 was intended to be part of the §§ 251/252 arbitration regime. . . . Covad is effectively precluded from using a § 252 arbitration to obtain an unbundling of § 271 network elements. . . . [T]o the extent that Qwest has not fulfilled this [§ 271] obligation, Covad may pursue its administrative remedies with the FCC.").

- New Jersey: Telecommunications Order, *Petition of Verizon New Jersey Inc. for Arbitration of an Amendment to Interconnection Agreements with Competitive Local Exchange Carriers in New Jersey Pursuant to Section 252 of the Communications Act of 1934, as Amended, the Triennial Review Order and the Triennial Review Remand Order*, Docket No. TO05050418, at 14 (New Jersey Bd. of Pub. Utils. Mar. 16, 2006) ("The Board declines to require separate unbundling under sections 251, 252 and 271 of the Act, . . . and disagrees with the need to institute any additional rate review proceedings at this time."), *available at* http://www.nj.gov/bpu/wwwroot/telco/TO05050418_20060327.pdf.

- North Carolina: Order Concerning Changes of Law, *Proceeding to Consider Amendments to Interconnection Agreements Between BellSouth Telecommunications, Inc. and Competing Local Providers Due to Changes of Law*, 2006 N.C. PUC LEXIS 230, Docket No. P-55, SUB 1549, at 86 (N.C. Util. Comm'n Mar, 1, 2006) ("The Commission after careful consideration concludes that the Commission lacks the authority to compel BellSouth to include Section 271 UNEs in its Section 251/252 ICAs, nor does the Commission believe it has the authority to establish rates for such elements.").

- North Dakota: Order, *Dieca Communications, Inc. Interconnection Arbitration*, Case No. PU-05-165, 2006 N.D. PUC LEXIS 3, at *22-*23 (N.D. Pub. Utils. Comm'n Feb. 8, 2006) ("We find that we do not have the authority under the Act to impose unbundling obligations under Section 271. The FCC has the exclusive authority to determine whether Qwest has complied with the substantive provisions of Section 271 including the checklist provisions. Enforcement of Section 271 requirements is also clearly under the exclusive jurisdiction of the FCC. State commissions have only a consulting role under the Act.").

- Ohio: Arbitration Award, *Establishment of Terms and Conditions of an Interconnection Agreement Amendment Pursuant to the Federal Communications Commission's Triennial Review Order and its Order on Remand*, Case No. 05-887-TP-UNC, 2005 WL 3018712, at [20]* (Ohio Pub. Utils. Comm'n Nov. 9, 2005) (rejecting CLEC arguments that "they are entitled to purchase § 271 checklist items pursuant to § 252 agreements," and holding that "these obligations should be addressed in the context of carrier-to-carrier agreements, and not § 252 interconnection agreements, inasmuch as the components will not be purchased as network elements").

- Oregon: Order Adopting Arbitrator's Decision, *Covad Communications Co. Petition for Arbitration of an Interconnection Agreement with Qwest Corp.*, ARB 584, 2005 Ore. PUC LEXIS 445, at *36 (Ore. Pub. Util. Comm'n Sept. 6, 2005) ("Every state within the Qwest operating region that has examined this issue has done so in a thoughtful, thorough and well-reasoned manner. In each case, the agency with the authority to review the Covad/Qwest ICA dispute has found that there is no legal authority requiring the inclusion of Section 271 UNEs in an interconnection agreement subject to arbitration under Section 251 of the Act, and I adopt the legal conclusions that they all hold in common.").

- Pennsylvania: Opinion and Order, *Verizon Pennsylvania Inc. Tariff No. 216 Revisions*, Docket No. P-00042092, 2005 Pa. PUC LEXIS 9, at *42 (Pa. Pub. Util. Comm'n June 2, 2005) ("We believe that the enforcement responsibilities of Section 271 compliance lies with the FCC. Therefore, the Commission will not oblige Verizon PA to produce tariff amendments that reflect its Section 271 obligations. However, the Commission will continue to monitor Verizon PA's compliance with its Section 271 obligations and, if necessary, initiate appropriate complaint proceedings before the FCC.").

- Rhode Island: Report and Order, *Verizon-Rhode Island's Filing of February 18, 2005 to Amend Tariff No. 18*, Docket No. 3662, 2005 WL 3971406, at *5 (R.I. Pub. Utils. Comm'n July 28, 2005) ("The FCC has not clearly indicated what role, if any, a state utility commission plays in the Section 271 process other than providing a consultation to the FCC on a Bell Operating Company's ('BOC') initial application to enter the long distance market. In fact, the FCC recently indicated it has the authority to enforce Section 271. In addition, the FCC has clearly stated that it will undertake a 'fact-specific inquiry' as to whether a BOC's rates for Section 271 facilities are just and reasonable under Section 201 and 202. At this time, it is apparent to the Commission that at the bistro serving up the BOCs' wholesale obligations, the kitchen door numbered 271 is for 'federal employees only.'").

* Bracketed page numbers refer to the pages of the printed Westlaw version of the cited decision.

- South Carolina: Commission Directive, *Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 2004-316-C (S.C. Pub. Serv. Comm'n Feb. 28, 2006) (Commission vote to accept following motion: "The first category of issues would be the 271-related issues: With regard to Issue 8 (a), I move that we adopt the BellSouth position, along with the proposed Office of Regulatory Staff reporting requirements. Disputes regarding 271 issues would be reported to both the Commission and ORS. Issues 8 (b) and 8 (c) would then be declared moot. I further move that we adopt BellSouth's reasoning for Issues 14, 17, 18, and 22."), *available at* http://dms.psc.sc.gov/attachments/B6C82725-D7D8-9648-DE003D8F79E35898.pdf.

- South Dakota: Arbitration Order, *Petition of DIECA Communications, Inc. dd/b/a Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corporation*, Docket TC05-056, at 6 (S.D. Pub. Utils. Comm'n July 26, 2005) ("With respect to the section 271 issue, the Commission finds that it does not have the authority to enforce section 271 requirements within this section 252 arbitration. . . . The language in [section 252] clearly anticipates that Section 252 arbitrations will concern section 251 requirements, not section 271 requirements."), *available at* http://www.state.sd.us/puc/commission/orders/telecom/2005/tc05-056ao.pdf.

- Texas: Arbitration Award – Track II Issues, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement*, Docket No. 28821, at 18-19 (Tex. Pub. Util. Comm'n June 17, 2005) (holding that the 1996 Act "provides no specific authorization for the Commission to arbitrate section 271 issues;" that "Section 271 only gives states a consulting role in the 271 application/approval process"; that a state commission "does not have direct oversight over section 271 network elements; and that and the "review of section 271 pricing" is limited to "proceedings at the FCC, as well").

- Utah: Arbitration Report and Order, *Petition of DIECA Communications, Inc. d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement with Qwest Corporation*, Docket No. 04-2277-02, 2005 WL 578197, at *9 (Utah Pub. Serv. Comm'n Feb. 8, 2005) ("[W]e differ with Covad in its belief that we should therefore impose Section 271 and state law requirements in the context of a Section 252 arbitration. Section 252 was clearly intended to provide mechanisms for the parties to arrive at interconnection agreements governing access to the network elements required under Section 251. Neither Section 251 nor 252 refers in any way to Section 271 or state law requirements, and certainly neither section anticipates the addition of new Section 251 obligations via incorporation by reference to access obligations under Section 271 or state law.").

- Vermont: Order, *Petition of Verizon New England, Inc., d/b/a/ Verizon Vermont, for Arbitration of an Amendment to Interconnection Agreements*, Docket No. 6932, at 247, 264 (Vt. Pub. Serv. Comm'n Feb. 27, 2006) ("As Verizon points out, enforcement of Section 271 obligations rests largely with the FCC. Thus, for issues related to whether Verizon still complies with a particular checklist item, recourse would be to the FCC. . . . However, to the extent that Verizon made specific commitments to the state of Vermont during the Section 271 process, and asked the state to rely upon those commitments, the Company's agreement represents a binding arrangement enforceable by the Board."), *available at* http://www.state.vt.us/psb/orders/2006/files/6932fnl.pdf.

- Washington: Arbitrator's Report and Decision, *Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest Inc.*, Docket No. UT-043013, Order No. 17, at 25 (Wash. Utils. & Transp.Comm'n July 8, 2005) (holding that, because "[t]he FCC has the exclusive authority to act under Section 271," state commissions "ha[ve] no authority under Section 252 or Section 271 of the Act to require inclusion of Section 271 unbundling obligations in the parties' interconnection agreements," and "[a]n order requiring [such] inclusion . . . would conflict with the federal regulatory scheme"), *aff'd*, Final Order, *Petition for Arbitration of an Amendment to Interconnection Agreements of Verizon Northwest Inc.*, Docket No. UT-043013, Order No. 18 (Wash. Utils. & Transp. Comm'n Sept. 22, 2005), available by searching for order at http://www.wutc.wa.gov/documents.

- Washington, D.C.: Order, *Petition of Verizon Washington, D.C. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996*, TAC-19, at 34 (D.C. Pub. Serv. Comm'n Dec 15, 2005) ("[T]hroughout the *TRO*, the FCC limits its discussion of the section 252 interconnection agreement process to apply to implementing section 251. The FCC has also determined that the section 271 unbundling obligations are independent of the unbundling obligations of section 251. Thus, there is no requirement that section 271 network elements be addressed in interconnection agreements negotiated and arbitrated pursuant to section 252."), *available at* http://www.dcpsc.org/pdf_files/commorders/orderpdf/orderno_13836_TAC-19.pdf.

- Wisconsin: Final Decision, *Petition of MCImetro Access Transmission Services, LLC and MCI WorldCom Communications, Inc. for Arbitration of Interconnection Terms and Conditions and Related Arrangements with Wisconsin Bell, Inc., d/b/a SBC Wisconsin Pursuant to 47 U.S.C. § 252(b)*, No. 05-MA-138, 2006 WL 2434198, at [35]* (Wisc. Pub. Serv. Comm'n May 16, 2006) ("It is not disputed that this Commission has a limited role in the investigation and approval of applications for in-region interLATA authority under § 271. . . . The Act assigns to the FCC the authority to enforce § 271. Nor does adding contract language regarding a § 271 unbundling obligation create a remedy at the state level. The FCC retains primary jurisdiction over the terms of its § 271 orders. . . . In sum, there is no effective remedy available at the state level if MCI were to complain that AT&T failed to comply with an unbundling obligation ordered under § 271.").

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* Bracketed page numbers refer to the pages of the printed Westlaw version of the cited decision.

State Commission Decisions Accepting Claim of Authority to Implement Section 271

- Arizona: Opinion and Order, *Petition of Dieca Communications, Inc., dba Covad Communications Company for Arbitration of an Interconnection Agreement with Qwest Corp.*, Docket No. T-03632A-04-0425, Decision No. 68440, at 20 (Arizona Corp. Comm'n Feb. 2, 2006) ("When read in conjunction with the entirety of the Telecom Act, the Section 271 obligations described above must be considered the type of interconnection and access requirements contemplated under Section 252. . . . We believe that our ongoing oversight and monitoring role may be exercised in any appropriate proceeding before the Commission, including this Section 252 arbitration matter . . . ."), *available at* http://images.edocket.azcc.gov/docketpdf/0000040183.pdf.

- Georgia: 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*, Docket No. 19341-U, at 4 (Georgia Pub. Serv. Comm'n Jan. 17, 2006) ("[T]he Commission concludes that it is reasonable to assert jurisdiction to set just and reasonable rates for de-listed UNEs pursuant to Section 271 of the Federal Telecom Act."), *available at* ftp://www.psc.state.ga.us/19341/89229.doc.

- Kentucky: Order, *BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect Southeast Telephone, Inc. for Non-Payment,* Case Nos. 2005-00519, 2005-00533, at 11-12 (Kentucky Pub. Serv. Comm'n Aug. 16, 2006) ("The issue raised by this complaint is whether BellSouth must make the port-loop-switch elements available to SouthEast at an appropriate rate pursuant to Section 271. No authority has been cited for the proposition that this Commission has no jurisdiction over the availability of Section 271 elements. Accordingly, BellSouth must provide to SouthEast UNE combinations required pursuant to Section 251 and FCC orders in concert with the elements required pursuant to Section 271."), *available at* http://psc.ky.gov/order_vault/Orders_2006/200500519_08162006.doc.

- Maine: Order, *Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, 2005 Me. PUC LEXIS 267, at *28-*29 (Maine Pub. Util. Comm'n Sept. 13, 2005) ("As stated earlier, the FCC has determined that the appropriate pricing standard for Section 271 UNEs is 'just and reasonable' and we have determined that until Verizon files prices for our approval or submits FCC-approved rates, Verizon must continue to provision all Section 271 UNEs at TELRIC prices."), *available at* http://mpuc.informe.org/easyfile/cache/easyfile_doc169297.DOC, *preliminary injunction denied in Verizon New England Inc. d/b/a Verizon Maine v. Maine Public Utilities Commission*, 403 F. Supp. 2d 96, 102 (D. Me. 2005) ("[T]he authority of state commissions over rate-making and its applicable standards is not pre-empted by the express or implied content of § 271. Furthermore, Verizon has failed to direct the Court to any order of the FCC interpreting § 271 to provide an exclusive grant of authority for rate-making under § 271.").

- Michigan: Order, *On the Commission's Own Motion, To Commence a Collaborative Proceeding to Monitor and Facilitate Implementation of Accessible Letters Issued by SBC MICHIGAN and VERIZON*, Case No. U-14447, at 16 (Mich. Pub. Serv. Comm'n Sept. 20, 2005) ("The Commission is still convinced that obligations under Section 271 should be included in interconnection agreements approved pursuant to Section 252. However, the Joint CLECs must negotiate with SBC concerning terms and conditions, seeking Commission arbitration if necessary. If the CLECs experience problems with obtaining items available pursuant to Section 271, they may take appropriate enforcement action."), *available at* http://efile.mpsc.cis.state.mi.us/efile/docs/14447/0110.pdf.

- Minnesota: Notice and Order for Hearing, *A Potential Proceeding to Investigate the Wholesale Rates Charged by Qwest*, Docket p-421/CI-05-1996, at 3 (Minn. Pub. Util. Comm'n May 4, 2006), *available at* https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber =3050212. *But see* Minnesota: Arbitrator's Report, *Petition of DIECA Communications, Inc. d/b/a Covad Communications Company, for Arbitration to Resolve Issues Relating to an Interconnection Agreement With Qwest Corporation*, MPUC Docket No. P-5692, 421/IC-04-549, OAH Docket No. 3-2500-15908-4, at 15 (Minn. Pub. Util. Comm'n Dec. 15, 2004) ("[T]here is no legal authority in the Act, the *TRO*, or in state law that would require the inclusion of section 271 terms in the interconnection agreement, over Qwest's objection."), *available at* https://www.edockets.state.mn.us/EFiling/ShowFile.do?DocNumber=1970559.

- Missouri: Arbitration Order, *Southwestern Bell Telephone, L.P., d/b/a SBC Missouri's Petition for Compulsory Arbitration of Unresolved Issues for a Successor Interconnection Agreement to the Missouri 271 Agreement ("M2A")*, Case No. TO-2005-0336, at 30 (Missouri Pub. Serv. Comm'n July 11, 2005) ("The Arbitrator's decision with respect to both CLEC Coalition Pricing Issues A-2 and A-3 was that 'The Arbitrator agrees that the ICA must include prices for § 271 UNEs.' However, the Arbitrator failed to specify what those rates would be. . . . [T]he Commission concurs that the Coalition's compromise position – rates patterned on the FCC's transition period rates for declassified UNEs – constitutes a suitable interim rate structure for § 271 UNEs."), available at http://www.psc.mo.gov/orders/2005/07115336.htm.

- New Hampshire: Order No. 24,598, Order Classifying Wire Centers and Addressing Related Matters, *Verizon New Hampshire Wire Center Investigation*, DT 05-083, DT 06-012, at 45-46 (N.H. Pub. Util. Comm'n Mar. 10, 2006) (holding that Verizon must offer certain 271 network elements at FCC transition rates until such time as new rates are established and approved by the NHPSC), *available at* http://www.puc.state.nh.us/Regulatory/Orders/2006orders/24598t.pdf; *relying on* Order No. 24,442, Order Following Briefing, *Proposed Revisions to Tariff NHPUC No. 84 (Statement of Generally Available Terms and Conditions), Petition for Declaratory Order re Line Sharing*, DT 03-201, DT 04-176, at 49-50 ("We are continuing our oversight of Verizon's section 271 obligations. . . . [w]e do not foreclose the possibility that Verizon may turn to the FCC regarding rates but we conclude that, unless or until the FCC acts, pricing is an area of concurrent jurisdiction and an example of cooperative federalism. Accordingly, as a state agency and being closest to the issues, if and when Verizon files changes to rates [for Section 271 network elements], we will review such proposed changes in the normal course.") (NH Pub. Util. Comm'n Mar. 11, 2005)), *available at* http://www.puc.state.nh.us/Regulatory/Orders/2005orders/24442t.pdf.

- Oklahoma: Written Report of the Arbitrator, *Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma under Section 252(B)(1) of The Telecommunications Act of 1996*, Cause No. PUD 200400497, at 199 (Okla. Corp. Comm'n April 7, 2005); Final Order, at 9 (Okla. Corp. Comm'n June 1, 2005). *But see* Final Order on Motions for Clarification and Reconsideration of Order No. 522119, *Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma Under Section 252(b)(1) of the Telecommunications Act of 1996*, Cause Nos. PUD 200400497, 200400496, Order No. 523439, 2006 Okla. PUC LEXIS 56, at *3 (Okla. Corp. Comm'n Apr. 18, 2006) ("2. 271 Related Elements. The Commission decision is reaffirmed. This Commission finds that it is not necessary to determine whether the Commission has jurisdiction over Section 271 elements because Section 271 elements are not included within the ICA. 3. TELRIC Rates for Section 271 Services. The Commission decision is reaffirmed. This Commission finds that it is not necessary to determine whether the Commission has jurisdiction over the pricing of Section 271 elements because Section 271 elements are not included within the ICA.").

- Tennessee: Final Order of Arbitration Award, *Petition for Arbitration of ITC^DeltaCom Communications, Inc. with BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Docket No. 03-00119, 2005 Tenn. PUC LEXIS 332, at *60 (Tennessee Reg. Auth. Oct. 20, 2005) ("Further, there is no language contained in the Federal Act that expressly prohibits state jurisdiction over Section 271 elements that are included in issues required to be arbitrated pursuant to Section 252. Rather, there is language that indicates that Congress gave states a role in determining Section 271 elements through state approval of both SGAT conditions and interconnection agreements."), *available at* http://www.state.tn.us/tra/orders/2003/0300119db.pdf. *But see* Excerpt of Transcript of Authority Conference, Docket 04-00046, at 21-22 (Tenn. Reg. Auth. Mar. 6, 2006) (voting to "acknowledge that BellSouth and the CLECs are free to negotiate commingling a Section 251 element with a Section 271 element but provision of a Section 251-271 commingling service by BellSouth is voluntary").