BELLSOUTH

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April 20, 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 Motion for Reconsideration and/or Rehearing of BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky. This Motion will be emailed to SouthEast today.

Sincerely,

Mary K. Keyer

cc: Parties of Record

675107

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	)	Case No. 2006-00316
with BellSouth Telecommunications, Inc. Concerning	)	
Interconnection Under the Telecommunications Act of 1996	)	

MOTION FOR RECONSIDERATION AND/OR REHEARING OF BELLSOUTH TELECOMMUNICATIONS, INC. (d/b/a AT&T KENTUCKY)

INTRODUCTION

Pursuant to KRS § 278.400, BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky ("AT&T Kentucky"), respectfully requests that the Kentucky Public Service Commission ("Commission") reconsider two aspects of its order dated March 28, 2007 ("Order"), which for Issue A-3 purported to set a rate for the port switching element under 47 U.S.C. § 271 and which for Issue A-4 held that the adjacent offsite collocation requested by SouthEast is permitted and required by the Telecom Act and FCC rules.

The Commission should, at a minimum, hold the Order in abeyance on Issue A-3 pending the forthcoming ruling from the United States District Court for the Eastern District of Kentucky on the very issue of whether the Commission has authority to set rates under § 271. Given that this same issue is pending before the federal district court, which has already received full briefing and argument on the matter, the prudent course is not to finalize a second order that would likewise need to be appealed to the same federal court. Holding the order in abeyance pending the federal court decision

will conserve the resources of the Commission and its Staff, as well as the private parties to this proceeding.

In the alternative, the Commission should grant rehearing to permit AT&T Kentucky to provide evidence demonstrating that the market rate for switching that numerous CLECs are currently paying is a just and reasonable rate for these purposes. The Order specifically invites AT&T Kentucky to provide additional evidence of the market rate for switching. In response to that express invitation, AT&T Kentucky, while still maintaining that the Commission lacks authority to set such rates, is herewith providing evidence that numerous CLECs that operate in Kentucky (at least 57 separate companies) have voluntarily agreed to the rates specified in the Affidavit of James E. Maziarz, Jr., attached as Exhibit 1. Given that this rate has been adopted in numerous arms-length agreements, it meets the "just and reasonable" standard of 47 U.S.C. §§ 201 and 202 under the FCC's binding orders. *See Triennial Review Order*[1] ¶¶ 663-664.

With respect to Issue A-4, the Commission should follow the guidance set forth by the United States District Court for the Western District of Washington in *U.S. West v. American Telephone Technology*, 2000 U.S. Dist. LEXIS 19046 (W.D. Wash.), a copy of which is attached as Exhibit 2. The court in considering this very issue granted U.S. West's motion for summary judgment finding that the "Commission's requirement that [U.S. West] provide for collocation on nearby property not owned or controlled by [U.S. West] is not consistent with federal law." Id. at *2.

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

STANDARD FOR REHEARING

KRS § 278.400 allows any party to apply for rehearing with respect to "any of the matters" determined by the Commission. The Commission, in construing KRS § 278.400, has determined that "the administrative agency retains full authority to reconsider or modify its order during the time it retains control over any question under submission to it." Order on Rehearing, *General Adjustments in Electric Rates of Kentucky Power Company*, Case No. 7489, at 3 (June 27, 1980). Further, the Commission can reconsider an order based upon evidence adduced at the initial hearing or new evidence presented at rehearing. *See* Order, *Adjustment of the Rates of Kentucky-American Water Company*, Case No. 2000-120, at 2-3 (Feb. 26, 2001).

BACKGROUND

A. The Previous Proceeding Concerning § 271 Authority

After the FCC, through its 2005 *Triennial Review Remand Order*,[2] eliminated switching as an unbundled element under 47 U.S.C. § 251(c)(3), SouthEast began to place UNE-Platform orders under the resale provisions of its previous interconnection agreement, albeit while refusing to pay the appropriate resale rate. After AT&T Kentucky sought to exercise its right to disconnect SouthEast for lack of payment, SouthEast filed a complaint with the Commission, which asserted authority to require AT&T Kentucky to provide unbundled switching under § 271 at TELRIC-based rates. *See* Order, *In re BellSouth Telecommunications, Inc's Notice of Intent to Disconnect SouthEast Telephone, Inc. for Non-Payment, and SouthEast Telephone, Inc. v.*

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

BellSouth Telecommunications, Inc., Case Nos. 2005-00519, 2005-00533 (Ky. PSC Aug. 16, 2006).

That order is now on appeal to the United States District Court for the Eastern District of Kentucky, Docket No. 06-65-KKC. The threshold question raised in that proceeding – and addressed in detail in the briefs filed by the Commission, AT&T Kentucky, and SouthEast – is whether this Commission has authority to set rates for purposes of § 271. Oral argument was heard before the federal court on April 19, 2007, and a ruling is expected soon.

B. This Proceeding

This proceeding concerns SouthEast's petition to arbitrate a new interconnection agreement with AT&T Kentucky pursuant to 47 U.S.C. § 252. Throughout this proceeding, AT&T Kentucky has consistently maintained that the Commission is not authorized to include § 271 elements in a § 252 interconnection agreement, or to arbitrate the rates and terms for § 271 elements. In its March 28 order resolving disputed issues, the Commission rejected that argument and reiterated its holding that it has jurisdiction over § 271 elements and services, and that the "FCC has not pre-empted this Commission from enforcing the requirements of § 271." Order[3] at 6. In addition, the Commission held that its authority "extends to pricing disputes regarding those elements required to be provided by AT&T Kentucky pursuant to § 271." *Id.* at 6-7.

Purporting to apply the "just and reasonable" standard from 47 U.S.C. §§ 201 and 202, the Commission adopted SouthEast's proposed rate for the port switching

[3] Order, *In 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*, Case No. 2006-00316 (Ky. PSC Mar. 28, 2007) ("Order").

element ($4.32 per month). *See* Order at 7. The Commission then stated that "[i]f AT&T Kentucky believes that this rate is inappropriately low, then AT&T Kentucky should submit justification to the Commission for rates that it believes are appropriate," and that SouthEast's proposed rate would be used "unless modified by further Commission order." *Id.*

DISCUSSION

The Commission should reconsider its Order regarding Issue A-3 for two reasons.

First, the rate for the port switching element should be held in abeyance pending the decision of the federal district court regarding whether the Commission is authorized to set rates under § 271. As discussed above, that question is currently pending before a federal district court, which has already received full briefing from the Commission, AT&T Kentucky, and SouthEast, and heard oral argument.

To conserve the limited and valuable resources of the Commission and its Staff, as well as to avoid duplicative and potentially unnecessary litigation, the Commission should not issue a final order in this docket purporting to set rates under § 271 until the federal court resolves the pending dispute. At the least, the federal court's order will significantly clarify the law in this jurisdiction as to the scope of the Commission's authority (if any) under § 271. The Commission should thus exercise its discretion to abate this proceeding pending the federal court's decision (or to stay any decision it might issue pending the federal court's ruling). *See, e.g.*, Order, *Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, 2006 Me. PUC LEXIS

352, at *18 (Me. PUC Oct. 6, 2006) (agreeing to "delay commencement of the rate investigation until the First Circuit issues a decision on our authority to set section 271 rates").

Second, if the Commission decides to act now or if the federal court determines that the Commission does have authority to set rates for purposes of § 271, the Commission should grant reconsideration to consider AT&T Kentucky's evidence that the proper rate here (if one is to be set) is the market rate contained in the commercial agreements that scores of CLECs have signed and are relying upon to provide service.

The Commission's Order specifically invited AT&T Kentucky to "submit justification to the Commission for rates that it believes are appropriate." Order at 7. With this filing, AT&T Kentucky, while still maintaining that the Commission lacks authority to set such rates, has accepted that invitation. As shown in the attached affidavit of James E. Maziarz, Jr. (at ¶ 5), AT&T Kentucky has entered into at least 57 commercial agreements with CLECs providing service in Kentucky to provide the switching element at the rates discussed in Mr. Maziarz's affidavit (*id.* ¶ 7). The CLECs that have signed these agreements serve more than 70,000 lines in Kentucky, and serve both residential (including rural) and business customers. *See id.* Indeed, approximately two-thirds of the commercial agreement lines are located in UNE zones 2 and 3. *See id.* ¶ 6.

As the FCC has held, a BOC satisfies the "just, reasonable, and nondiscriminatory rate standard of sections 201 and 202" by "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* ¶¶ 663-664. Similarly, the relevant rate under § 271 should be based on the best evidence available as to the "market price." *UNE Remand Order*[4] ¶ 473 (holding that under the "just and reasonable" standard, "the *market price* should prevail, *as opposed to* a regulated rate") (emphases added); *see also Triennial Review Order* ¶ 651 (noting that the *UNE Remand Order* held "that market prices should be permitted to prevail for [§ 271] network elements, rather than requiring forward-looking prices").

AT&T Kentucky's commercial agreements are precisely the sort of "arms-length agreements" the FCC specified. *See* Final Order, *Petition for Arbitration of Covad Communications Co. with Qwest Corp. Pursuant to 47 U.S.C. § 252(b) and the Triennial Review Order*, 2005 Wash. UTC LEXIS 54, Docket No. UT-043045, ¶ 45 (Wash. UTC Feb. 9, 2005) (finding, based on paragraph 664 of the *Triennial Review Order*, that "Section 271 elements, are . . . appropriately included in commercial agreements entered into between an ILEC and CLEC"). Moreover, the fact that 57 separate carriers have agreed to the arms-length rates in this agreement and are providing service under these agreements indicates that these rates satisfy the just and reasonable standard of §§ 201 and 202. Under binding FCC precedent, such a "market price" (*UNE Remand Order* ¶ 473) meets AT&T Kentucky's obligations under § 271. The Commission should thus grant reconsideration and reopen this proceeding to consider adoption of these prices as the appropriate rates for the AT&T Kentucky-SouthEast agreement.

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[4] 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 ("*UNE Remand Order*") (subsequent history omitted).

The Commission should reconsider its Order regarding Issue A-4 because it is clearly contrary to federal law as indicated in *American Telephone Technology*, *supra.*

CONCLUSION

The Commission should hold its order in abeyance until the federal district court rules on the Commission's authority to set rates under § 271. In the alternative, the Commission should grant reconsideration and reopen this proceeding in order to set rates according to the FCC's standard, *i.e.*, by looking at the "market price" in numerous arms-length agreements between AT&T Kentucky and other carriers. With regard to Issue A-4, the Commission should reconsider its Order and find, consistent with the federal district court in Washington, that as a matter of law SouthEast Telephone is not entitled to the adjacent offsite collocation it is requesting.

Respectfully submitted,

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COUNSEL FOR BELLSOUTH
TELECOMMUNCIATIONS, INC.
d/b/a AT&T KENTUCKY

675109

EXHIBIT 1

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

AFFIDAVIT OF JAMES E. MAZIARZ, JR.

The undersigned, JAMES E. MAZIARZ, Jr., first being duly sworn, deposes and says that:

1. I am a manager in the wholesale voice organization within AT&T. I worked for BellSouth Telecommunications, Inc. for approximately 9 years prior to the December 2006 merger of BellSouth Corporation with AT&T. The facts set forth herein are based on my personal knowledge.

2. BellSouth has numerous commercial agreements with competitive local exchange carriers ("CLECs") pursuant to which BellSouth provides CLECs with wholesale switch port services and wholesale local platform services. The wholesale local platform is a replacement for the UNE Platform or "UNE-P," which I understand incumbent providers are no longer required to provide. As part of my job responsibilities, I am familiar with these agreements and with the quantity of services that BellSouth provides to CLECs within the Commonwealth of Kentucky pursuant to such agreements.

3. The commercial agreements between BellSouth and CLECs mentioned above are voluntarily negotiated contracts that are the result of arms-length negotiations between BellSouth and each CLEC.

4. Across its 9-state region, BellSouth has entered into commercial agreements with more than 200 different CLECs for the provision of wholesale switch port services and wholesale local platform services.

5. As of February 2007, which is the most recent data available, BellSouth was providing in the Commonwealth of Kentucky more than 70,000 local access lines to 57 different CLECS pursuant to commercial agreements.

6. CLECs are purchasing wholesale switching and local platform services from BellSouth under commercial agreements throughout Kentucky, including in rural areas. Of the 70,318 lines BellSouth provided to CLECs pursuant to commercial agreements in February 2007, approximately 47,113 of them (67%) were located in the Kentucky Public Service Commission's UNE Zones 2 and 3.

7. CLECs are paying a substantially higher rate for wholesale local switching services under their commercial agreements with BellSouth than the Commission ordered BellSouth to charge in its initial order in this arbitration. The vast majority of the 70,318 lines that BellSouth provided to CLECs in Kentucky pursuant to commercial agreements in February 2007, consisted of the entire wholesale platform (loop plus local switching). Under BellSouth's commercial agreements, the standard offering for the switch port component of the local platform is a monthly rate of $8.15 for mass market lines, typically residential lines, and $11.15 for enterprise market lines, typically business lines. (The rates when a CLEC purchases wholesale switching on a stand-alone basis in Kentucky is $8.49 and $11.49 for mass market and

enterprise market lines, respectively.) CLECs pay additional charges for usage on those lines, as well as for Daily Usage Files, and also pay a "CNAM" charge of $2.11 per month per line for those lines that have caller ID service attached to them.

JAMES E. MAZIARZ, Jr.

Subscribed and sworn to before me this 17th day of April, 2007.

NOTARY PUBLIC
Commission Expires: 2/14/09

#674587

EXHIBIT 2

15 of 100 DOCUMENTS

US WEST COMMUNICATIONS, INC., Plaintiff, v. AMERICAN TELEPHONE TECHNOLOGY, INC., et al., Defendants.

No. C00-0586L

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

2000 U.S. Dist. LEXIS 19046

November 20, 2000, Decided

DISPOSITION: [*1] Plaintiff's motion for summary judgment GRANTED. Section 40.8 of parties' arbitrated interconnection agreement VACATED and matter REMANDED to Commission.

COUNSEL: For US WEST COMMUNICATIONS INC, plaintiff: Sherilyn Christine Peterson, Kirstin S Dodge, PERKINS COIE, BELLEVUE, WA.

For AMERICAN TELEPHONE TECHNOLOGY INC, defendant: Peter Samuel Holmes, MILLER NASH WIENER HAGER & CARLSEN, SEATTLE, WA.

For AMERICAN TELEPHONE TECHNOLOGY INC, defendant: Dennis D Ahlers, MINNEAPOLIS, MN.

For MARILYN SHOWALTER, RICHARD HEMSTAD, WILLIAM R GILLIS, defendants: Shannon E Smith, ATTORNEY GENERAL'S OFFICE, UTILITIES & TRANSPORTATION, OLYMPIA, WA.

JUDGES: Robert S. Lasnik, United States District Judge.

OPINION BY: Robert S. Lasnik

OPINION:

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff filed this action to obtain review of a determination by the Washington Utilities and Transportation Commission ("Commission") pursuant to *47 U.S.C. § 252*(e)(6). Having reviewed the pleadings, declarations, and exhibits submitted by the parties, including the relevant portions of the Administrative Record, the Court finds as follows:

(1) This Court has jurisdiction over this matter [*2] pursuant to *47 U.S.C. § 252*(e)(6). The parties agree that venue is proper in this district.

(2) Whether the Commission appropriately interpreted and implemented the Telecommunications Act of 1996, *47 U.S.C. § 151 et seq.*, is a matter of law to be reviewed *de novo*.

(3) Section 251(c)(6) requires an incumbent local exchange carrier ("ILEC") such as plaintiff, to "provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations."

(4) The Commission's requirement that plaintiff provide for collocation on nearby property not owned or controlled by plaintiff is not consistent with federal law. The duty imposed by § 251(c)(6) requires that an ILEC provide for collocation at its premises. The Commission's order, on the other hand, completely [*3] disregards the "at the premises of the local exchange carrier" language and, relying on the theory that the purposes of the Telecommunications Act should be furthered even if its actual terms are limiting, requires collocation wherever it is technically feasible, whether on or off the ILEC's premises. Neither the FCC nor a state commission is authorized to ignore the language of the statute in favor of generalized policy considerations, however. See, e.g., *GTE Serv. Corp. v. Federal Communications Comm'n, 340 U.S. App. D.C. 308, 205 F.3d 416, 426 (D.C. Cir. 2000)* (quoting *AT&T Corp. v. Iowa Utils. Bd., 525 U.S. 366, 389-90, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999)).*

(5) After the Commission issued its ruling in this matter, the FCC revised its regulatory interpretation of "premises":

> to make clear that "premises" includes all buildings or similar structures owned, leased, or otherwise controlled by the incumbent LEC that house its network facilities, all structures that house incumbent LEC facilities on public rights-of-way, and all land owned, leased, or otherwise controlled by an incumbent LEC that is adjacent to these structures. This definition, [*4] of course, excludes land and buildings in which the incumbent LEC has no interest. In that circumstance, the incumbent LEC and it competitors have an equal opportunity to obtain space within which to locate their equipment.

Order on Reconsideration, Deployment of Wireline Servs. Offering Advanced Telecommunications Capability, FCC 00-297 (August 10, 2000). If it was not clear before, the FCC's revised definition expressly excludes land and structures plaintiff does not own or control from the term "premises." There is, therefore, no statutory duty or statutory authorization for requiring plaintiff to provide for collocation on "nearby" properties such as that proposed here.

(5) Congress has provided that where space limitations make physical collocation impractical, competitive local exchange carriers ("CLEC") are entitled to virtual collocation. Rather than accept this option or negotiate other forms of interconnection and/or access to unbundled network elements, defendants seek to impose additional mandatory requirements on plaintiff. As noted above, such additional duties were not imposed by Congress and, in fact, are precluded by the language of § 251(c)(6).

(6) [*5] Whether plaintiff would suffer injury as a result of the Commission's order is not relevant to the analysis. The Commission's decision cannot stand because it is inconsistent with the provisions of the Telecommunications Act.

(7) At oral argument, defendants took the position that the Commission has the power to order an ILEC to allow remote access to the ILEC's system, regardless of whether that access is called "collocation" or "interconnection," and that the Commission's order should be upheld on that alternative ground. While it may be true that, in some circumstances, a CLEC's right to interconnection and access may justify the type of "agreement" at issue here, in this case, the Commission clearly intended to expand an ILEC's "collocation" obligations beyond the literal language of the statute or the existing case law. For the reasons discussed above, the Commission's interpretation of § 251(c)(6) is inconsistent with the provisions of the Telecommunications Act and must be overruled. Whether the Commission has the power to order remote interconnection as a remedy when space on the ILEC's premises is not available is a separate issue not currently before the Court.

For all [*6] of the foregoing reasons, plaintiff's motion for summary judgment is GRANTED. Section 40.8 of the parties' arbitrated interconnection agreement is hereby VACATED and this matter is REMANDED to the Commission for entry of a revised provision consistent with this Order.

DATED this 20th day of November 2000.

Robert S. Lasnik

United States District Judge

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 20th day of April 2007.

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