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February 8, 2008

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**PUBLIC SERVICE
COMMISSION**

Ms. Beth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 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
Case No. 2006-00316

Dear Ms. O'Donnell:

Enclosed for filing in the above-referenced case is the original and three (3) copies of AT&T Kentucky's Reply to SouthEast Telephone, Inc.'s Response to AT&T Kentucky's Filing, Motion to Incorporate, and Motion to Enforce.

Thank you for your attention to this matter.

Sincerely,

Mary K. Keyer
General Counsel/Kentucky

cc: Parties of Record

Enclosures

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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PUBLIC SERVICE
COMMISSION

In the Matter of:

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

**AT&T KENTUCKY'S REPLY TO SOUTHEAST TELEPHONE INC.'S
RESPONSE TO AT&T KENTUCKY'S FILING,
MOTION TO INCORPORATE, AND MOTION TO ENFORCE**

BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky") respectfully submits this reply to SouthEast Telephone Inc.'s Response to AT&T Kentucky's Filing, Motion to Incorporate, and Motion to Enforce ("Motion"). For the reasons stated herein, the Kentucky Public Service Commission ("Commission") should issue an Order that: (i) sets aside the Commission's ruling that it has the authority under § 271 of the Telecommunications Act of 1996 (the "Act") to establish a switching or so-called "port" rate; and (ii) denies SouthEast Telephone Inc.'s ("SouthEast") Motion.

- I. The Commission should set aside its original Order with respect to Issue A-3 and find that the Commission does not have authority to set switching rates under Section 271 of the Telecommunications Act.**

SouthEast states that "[t]he Commission should reject AT&T Kentucky's request to set aside the resolution of Issue A-3"¹ As explained below, SouthEast's position lacks merit and should be rejected. In its Order dated March 28, 2007, ("*Arbitration Order*") the Commission relied on § 271 to set a rate for the "port component of the loop

¹ Motion at 1.

switching transport group of elements.”² In doing so, the Commission held that “[t]he FCC has not pre-empted this Commission from enforcing the requirements of § 271” and that the “Commission’s jurisdiction extends to pricing disputes regarding those elements required pursuant to § 271.”³ Additionally, the Commission’s adoption of SouthEast’s proposed “port” rate was based on “the Commission’s determination that pricing disputes for § 271 elements are *legitimately within the purview of this Commission . . .*”⁴ However, the Commission’s underlying tenets that it has jurisdiction over § 271 enforcement and over § 271 pricing were rejected as unlawful by the District Court in its *Remand Order*.⁵ Accordingly, the Commission has no choice but to set aside its ruling on Issue A-3 because such ruling is likewise unlawful.

Again, the District Court clearly and unequivocally held that the Commission does *not* have jurisdiction to set rates for § 271 elements and does *not* have jurisdiction to enforce the requirements of § 271, enforcement of which lies solely with the Federal Communications Commission (“FCC”). Specifically, the District Court explained that:

The PSC claimed to act pursuant to § 271 in its Order. However, it simply cannot point to any provision in § 271 granting it authority to enforce § 271 and set rates for those elements. The plain language of the statute does not grant the PSC authority to act pursuant to § 271. Furthermore, considering the explicit authority granted to state commissions under §§ 251 and 252, Congress could have easily included the same provisions in § 271, but did not. Instead, Congress granted sole

² *Arbitration Order* at 5.

³ *Id.* at 6-7.

⁴ *Id.* at 7 (emphasis added).

⁵ Opinion and Order, *BellSouth Telecommunications, Inc. v. Kentucky Public Service Commission, et al*, Civil Action No. 06-65-KKC, United States District Court, Eastern District of Kentucky (September 18, 2007) (“*Remand Order*”).

enforcement authority to the FCC and only gave state commissions an advisory role”⁶

The Commission granted AT&T Kentucky’s motion for reconsideration of Issue A-3 “for the purpose of holding the matter in abeyance *pending a ruling by the United States District Court for the Eastern District of Kentucky.*”⁷ In granting reconsideration of Issue A-3, the Commission acknowledged that the issue of “[w]hether this Commission has *pricing authority over in-state facilities and functionalities provided pursuant to 47 U.S.C. § 271* is the subject of pending federal litigation.”⁸ There has now been a ruling by the United States District Court for the Eastern District of Kentucky holding that this Commission has *no* rate-setting or enforcement authority under § 271.⁹ Consequently, the Commission should set aside its previous ruling on Issue A-3 that holds otherwise. Indeed in its generic change of law docket, Case No. 2004-00427, (“Generic Docket”), the Commission specifically recognized that in the *Remand Order* the District Court “found that the Commission has no authority to enforce 47 U.S.C. § 271 or to set rates pursuant to 47 U.S.C. § 271.”¹⁰ It necessarily and logically follows that the Commission must recognize that it lacked the authority to set a “port” rate pursuant to § 271 in this arbitration and thus should set aside its ruling on Issue A-3.

SouthEast submits three meritless arguments for its position that the Commission should not set aside its previous ruling on Issue A-3: (1) that the *Remand Order* is not yet final and *could be* appealed; (2) the ruling is relevant to a “potential”

⁶ *Id.* at 20.

⁷ Commission Order dated May 10, 2007, at 2 (emphasis added) (“*Recon. Order*”).

⁸ *Id.* at 2 (emphasis added).

⁹ *Remand Order* at 20.

¹⁰ Generic Docket, Order issued December 12, 2007 (“*Change of Law Order*”) at 2.

upcoming FCC proceeding; and (3) the Commission has jurisdiction to set these rates under state law. All three arguments fail.

First, the District Court has ruled on the very issue that was held in abeyance pending the Court's ruling. The Commission held the issue in abeyance pending the outcome of that order and should now look to that order as further guidance and authority to make its original ruling on Issue A-3 consistent with the Court's order. Whether the ruling is final or could be appealed should not influence the Commission's decision because there the District Court left nothing open regarding its determination that the Commission lacked authority to act under § 271.¹¹ Rather, the District Court left open only one issue – the issue of whether AT&T Kentucky engaged in unreasonable practices in violation of 47 U.S.C. §§ 201-202. That issue is one SouthEast raised in a counterclaim to AT&T Kentucky's appeal, and the District Court merely refused to consider the merits of the argument until the FCC has considered it.¹² The outcome of that issue has no bearing on the Court's determination that *this Commission* has no authority to set rates for § 271 elements.¹³ Indeed, after finding the Commission lacked the authority to act pursuant to § 271, and after declaring the Commission's underlying Order "unlawful and enjoined from enforcement," the District Court remanded the matter to the Commission for a damages determination.¹⁴ In short, there is no interim aspect to the District Court's § 271 ruling.

¹¹ *Remand Order* at 21

¹² *Id.* at 24.

¹³ *Id.* at 20-21.

¹⁴ *Id.* at 21.

SouthEast's proposal for the Commission to continue to hold this issue in abeyance is yet another attempt by SouthEast to ignore the law and to drag this out as long as possible. The Commission should not allow such tactics. The Commission held the issue in abeyance pending the District Court's decision, the District Court has decided, and the Commission should set aside its original ruling on Issue A-3 which is contrary to the District Court's decision.

Second, whether there is (which there is not) or will be an FCC proceeding has no impact on this issue. This Commission has no jurisdiction to enforce or set rates under § 271, therefore, the rate set by the Commission for § 271 switching would have no relevance to an FCC proceeding.¹⁵ As confirmed by the District Court, § 271 rate-setting and enforceability are solely within the jurisdiction of the FCC.¹⁶

Third, SouthEast still asserts the same old argument that this Commission has jurisdiction to set § 271 rates. It does not. SouthEast relies this time on the *Change of Law Order* to claim that the Commission has jurisdiction to "address this issue" under state law and other sources of authority not addressed by the District Court.¹⁷ It does not. The District Court made it plain that this Commission has *no* rate-setting authority under § 271.¹⁸ Contrary to SouthEast's arguments, in the Generic Docket the

¹⁵ It should be noted that there is no FCC proceeding pending. It has been over four months since the *Remand Order* and three months since SouthEast signed the commercial agreement with AT&T. While SouthEast repeatedly refers to "potential" upcoming FCC proceedings and states that it has "begun the process necessary to file an FCC complaint," it has not filed such a complaint.

¹⁶ *Remand Order* at 20.

¹⁷ Motion at 4

¹⁸ *Remand Order* at 20.

Commission recognized the binding nature of the District Court's § 271 ruling.¹⁹ Of course, adherence to the District Court's § 271 ruling requires the Commission to set aside as unlawful its ruling on Issue A-3. Even if the Commission had § 271 authority (which it does not), the Commission's *Change of Law Order* requires a *market based rate* for § 271 elements such as switching,²⁰ and *not* the "port" rate proposed by SouthEast and adopted by this Commission.

For the reasons stated herein, the Commission should set aside its ruling regarding Issue A-3.

II. There is no need for the Commission to order the incorporation of certain rulings issued in the Commission's Change of Law Docket into the ICA.

In its Motion, SouthEast seeks a Commission Order that requires the Parties to incorporate into SouthEast's new interconnection agreement ("ICA"), four rulings made by the Commission in the Generic Docket.²¹ Specifically, SouthEast seeks an Order requiring the inclusion of the Commission's rulings made in its Generic Docket regarding commingling, line sharing, line splitting, and removal of de-listed unbundled network elements ("UNEs") from the AT&T Kentucky's performance measurement plan ("SQM/SEEM plan") into the Parties' new ICA.²² There is no need for the Commission to issue such an Order because AT&T Kentucky is not opposed to incorporating such

¹⁹ *Change of Law Order* at 2 (noting that the *Remand Order* "relates to litigation between AT&T Kentucky and SouthEast," but conceding that the *Remand Order* "clearly affects decisions rendered herein.")

²⁰ *Change of Law Order* at 11.

²¹ Case No. 2004-00427; Order issued December 12, 2007 ("*Change of Law Order*"); Order granting in part and denying in part AT&T Kentucky's Motion for Reconsideration and Clarification issued January 18, 2008.

²² Motion at 5-7.

rulings (if necessary) into SouthEast's new ICA.²³ Indeed, in the course of negotiations, AT&T Kentucky has not even suggested that it would refuse to incorporate the aforementioned Generic Docket rulings into the Parties' ICA.²⁴ As such, AT&T Kentucky finds SouthEast's request puzzling. In any event, in the Generic Docket, the Commission held that its "Order applies to all CLECs registered in Kentucky. In the event that parties have entered into separate agreements with AT&T Kentucky that may impact the implementation of changes of law, the parties are to be bound by those agreements."²⁵

It is unclear what SouthEast is attempting to accomplish with its Generic Docket-related request. However, for the reasons stated above, there is no need for the Commission to ascertain SouthEast's intentions, because there is no need for the Commission to order the Parties to include in the parties' new ICA the aforementioned rulings rendered in the Generic Docket.²⁶

²³ For example, SouthEast's ICA incorporates by reference the Kentucky SQM/SEEM plan. In the Generic Docket, the Commission prevented AT&T Kentucky from removing de-listed UNEs from the SQM/SEEM plan (Issue 13; *Change of Law Order* at 42). As such, and subject to a reviewing court's reversal of the Commission's ruling on Issue 13, the SQM/SEEM plan will continue to include de-listed UNEs and via Attachment 9 such plan will be incorporated into SouthEast's new ICA. In short, there is nothing the Commission needs to do to incorporate the Commission's ruling on Issue 13 in the Generic Docket into the Parties' new ICA.

²⁴ That said, AT&T Kentucky reserves all rights to seek judicial review of any aspect of the Commission's *Change of Law Order*.

²⁵ *Change of Law Order* at 40 (Issue 32).

²⁶ If such an order were necessary, then the Commission's ruling on Issue 32 would be rendered meaningless and the Commission would need to issue a similar order to all CLECs operating in Kentucky that have an ICA with AT&T Kentucky.

III. The Parties are still negotiating appropriate language to implement the Commission's ruling on Issue A-9. As such, there is no implementation issue for the Commission to resolve.²⁷

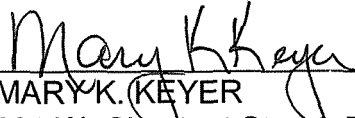
Regarding this Issue, SouthEast makes several baseless, rambling, unsupported, and irrelevant arguments regarding the Parties' negotiations.²⁸ Notably absent from its arguments is the fact that prior to SouthEast's Motion, SouthEast had failed to respond to AT&T Kentucky's proposed contract language for this Issue. Incredibly, *AT&T Kentucky provided its proposed language on this issue to SouthEast on November 6, 2007.* AT&T Kentucky's proposed language is attached hereto as Exhibit A. Instead of engaging in good faith negotiations regarding implementing contract language, SouthEast failed to respond to AT&T Kentucky's proposal, and now seeks to circumvent the negotiation process by asking the Commission to approve its version of contract language. Simply put, there is no need for Commission involvement unless and until the Parties have reached an impasse regarding implementing contract language. That is not the case, and SouthEast does not even allege such is the case. As such, the Commission should refrain on issuing an unnecessary ruling on implementing language unless and until there is a bona fide dispute regarding implementing language. Again, there is no such bona fide dispute.

²⁷ Although SouthEast refers to Issue A-4 in its Motion, there is no discussion (much less any assertion) that there is any issue regarding the implementation of the Commission's ruling on Issue A-4. As such, AT&T Kentucky will not address this issue at this time. That said, it remains AT&T Kentucky's position that the Commission's ruling on this issue violates binding federal law, and AT&T Kentucky reserves all rights to seek judicial review of the Commission's ruling on this issue.

²⁸ Motion at 7-11.

CONCLUSION

For the reasons stated herein, the Commission should deny SouthEast's Motion and should set aside its ruling on Issue A-3.



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- 2.9 Remote Terminal Information. Upon request and collocation application, AT&T will provide SouthEast, as set forth in 2.9.2 below, with the information available regarding RT locations including: (i) the address of the remote terminal; (ii) the CLLI code of the remote terminal; (iii) the carrier serving area of the remote terminal; (iv) the designation of which remote terminals subtend a particular central office; and (v) the phone number and address of customers that are served by a particular remote terminal .[11/02/07 att: revert to original language]
- 2.9.1 Additionally, upon request, AT&T Kentucky will provide redacted maps that show the location of their remote terminals. These maps will not contain any other AT&T proprietary information and will be provided pursuant to a nondisclosure agreement between the parties at the rates set forth in Exhibit X [11/02/07 att: offered language. Note: Exhibit to be identified later]
- 2.9.2 AT&T will provide the information required in Section 2.9 within thirty (30) days of a SouthEast request subject to the following conditions: (i) the information will only be provided on a CD in the same format in which it appears in AT&T's systems; and (ii) the information will only be provided for each serving wire center designated by SouthEast, up to a maximum of thirty (30) wire centers per SouthEast request per month for the state of Kentucky only. AT&T will bill the nonrecurring charge pursuant to the rates in Exhibit A and Exhibit D at the time AT&T sends the CD. (11/02/07 att: offered language)


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 8th day of February 2008.

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