BELLSOUTH

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November 6, 2006

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

Re: South Central Telcom LLC, Complainant v. BellSouth Telecommunications, Inc., Defendant
PSC 2006-00448

Dear Ms. O'Donnell:

Enclosed for filing in the above-referenced case are the original and ten (10) copies of BellSouth's Answer and Motion to Dismiss.

Sincerely,

Mary K. Keyer

Enclosures

cc: Party of record

656897

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

SOUTH CENTRAL TELCOM LLC	)	
	)	
COMPLAINANT	)	
	)	
v.	)	CASE NO. 2006-00448
	)	
BELLSOUTH TELECOMMUNICATIONS, INC.	)	
	)	
DEFENDANT	)	

ANSWER AND MOTION TO DISMISS OF BELLSOUTH TELECOMMUNICATIONS, INC.

ANSWER

Defendant BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, files its answer to the Formal Complaint ("Complaint") of South Central Telcom LLC ("South Central Telcom"), and states as follows:

FIRST DEFENSE

The Complaint fails to state a cause of action upon which relief can be granted.

SECOND DEFENSE

1. BellSouth is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1 of the Complaint and, therefore, denies the same.

2. BellSouth admits the allegations in Paragraph 2 of the Complaint.

3. BellSouth denies the allegations in Paragraph 3 of the Complaint and states that South Central Telcom has no interconnection agreement with BellSouth for

the exchange of traffic in Kentucky and refuses to negotiate such an interconnection agreement in violation of the Telecommunications Act of 1996 (the "Act") as contemplated by Sections 251 and 252 of the Act.

4. BellSouth states that the allegations in Paragraphs 4 and 5 of the Complaint contain statements of law that require no response from BellSouth. BellSouth further states that the Commission's jurisdiction over interconnection agreements is set forth in Section 252 of the Act and the Parties have yet to negotiate and enter into an interconnection agreement pursuant to the Act.

5. BellSouth is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 6 and 7 of the Complaint and, therefore, denies the same. BellSouth further states that whether South Central Telcom has made interconnection arrangements with WindStream is irrelevant to its relationship with BellSouth and the exchange of traffic between South Central Telcom and BellSouth.

6. BellSouth is without knowledge or information sufficient to form a belief as to the truth of the allegation that BellSouth is not the incumbent service provider in South Central Telcom's competitive exchanges and denies the remaining allegations in Paragraph 8 of the Complaint.

7. BellSouth is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 9 and 10 of the Complaint and, therefore, denies the same, and specifically denies the implication that BellSouth is an interexchange carrier.

8. BellSouth denies the allegations in Paragraph 11 of the Complaint. Further, BellSouth affirmatively states that South Central Telcom has not negotiated an interconnection agreement or traffic exchange agreement with BellSouth, which is the federally mandated mechanism to establish terms and conditions governing the relationship between incumbent local exchange carriers ("ILECs"), such as BellSouth, and competitive local exchange carriers ("CLECs"), such as South Central Telcom. BellSouth further specifically denies that it has ever stated that it is entitled to "favorable pricing," as South Central Telecom has refused to negotiate an agreement with BellSouth despite the fact that it exchanges traffic with BellSouth and receives the benefit of transiting services from BellSouth. It is disingenuous for South Central Telcom to allege "favorable pricing" when it refuses to even discuss an agreement and the rates associated with such an agreement. BellSouth further states that it is more than willing to negotiate with South Central Telcom the terms and conditions for the payment of terminating charges, where appropriate, for BellSouth originated traffic, along with the other rates, terms and conditions regarding the exchange of traffic with South Central Telcom.

9. BellSouth denies the allegations in Paragraph 12 of the Complaint as written and states that South Central Telcom is attempting to circumvent the Act by refusing to negotiate an interconnection agreement with BellSouth.

10. BellSouth denies the allegations in Paragraphs 13, 14, 15, and 16 of the Complaint.

11. In response to the allegations in Paragraph 17 of the Complaint, BellSouth reiterates and incorporates by reference its responses to the allegations in Paragraphs 1-16 of the Complaint as if they are fully set forth herein.

12. The allegations in Paragraph 18 of the Complaint state conclusions of law to which no response is required. The filed rate doctrine speaks for itself and is not applicable to this case. *See Iowa Network Servs. v. Qwest Corp.,* 363 F.3d 683, 2004 U.S. App. LEXIS 6653, *aff'd* 2006 U.S. App. LEXIS 26982 (8th Cir. Iowa, Oct. 31, 2006) (finding that wireless calls originating and terminating within the same local MTA are "local" calls governed by reciprocal compensation arrangements under §§ 251 and 252 of the Act, and the filed rate doctrine and access tariffs do not apply to such traffic).[1] Federal law requires ILECs to exchange traffic with CLECs pursuant to agreements that govern the terms and conditions of interconnection, which agreements are filed with the Commission for its approval pursuant to Section 252 of the Act.

13. The allegations in Paragraph 19 of the Complaint state allegations to which no response is required. The Commission's Order dated October 19, 2005, speaks for itself and is not applicable to this case. Federal law requires ILECs to exchange traffic with CLECs pursuant to agreements that govern the terms and conditions of interconnection, which agreements are filed with the Commission for its approval pursuant to Section 252 of the Act.

14. The allegations in Paragraph 20 of the Complaint state conclusions of law to which no response is required. BellSouth affirmatively states that it has attempted to

[1] South Central Telcom, in billing BellSouth pursuant to its tariffs for all traffic, has ignored the fact that the vast majority of the traffic BellSouth delivers to South Central Telcom is wireless transit traffic and has not taken into consideration intraMTA (Major Trading Area) traffic. It should be noted that with the exception of a small portion of the Commonwealth, all of Kentucky falls within the same MTA.

negotiate an agreement with South Central Telcom, as required by the Act, and South Central Telecom has refused.

15. The allegations in Paragraph 21 of the Complaint state conclusions of law to which no response is required, except that BellSouth states that South Central Telcom has refused to negotiate an interconnection agreement or traffic exchange greement with BellSouth for the exchange of the traffic at issue in this case as required by the Act, and the filed rate doctrine is inapplicable to this case.

16. In response to the allegations in Paragraph 22 of the Complaint, BellSouth states the Commission's Order dated May 1, 2003, speaks for itself and requires no response. BellSouth further states that BellSouth is not an interexchange carrier to which the May 1, 2003, Order applies.

19. BellSouth is without knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 23 of the Complaint and, therefore, denies the same.

20. BellSouth denies the allegations in Paragraphs 24 and 25 of the Complaint.

21. BellSouth denies any and all allegations contained in the Complaint that BellSouth has not specifically admitted.

WHEREFORE, BellSouth respectfully requests that this Complaint be dismissed and held for naught and BellSouth be granted any and all other relief to which it may appear entitled.

MOTION TO DISMISS

BellSouth supplements its Answer to the Complaint with this Motion to Dismiss. South Central Telcom's Complaint should be dismissed because it fails to state a claim. Pursuant to Kentucky law, a complaint can be dismissed for failure to state a claim if the plaintiff would not be entitled to relief under any facts that could be proven. *Kellerman v. Vaughan*, KY, 408 S W 2d 415 (1966). In this case, dismissal is appropriate because South Central Telcom's claim is based upon a fundamental mischaracterization of the relationship between the Parties and of the law that applies.

In the Complaint, South Central Telcom admits that it is a competitive local exchange carrier ("CLEC"). The Act created a framework whereby CLECs obtained the ability to interconnect and exchange traffic with ILECs and other carriers. *§§ 251 and 252.* The Federal Communications Commission has expressly held that interconnection agreements, and not tariffs, are the appropriate mechanism for the establishment of reciprocal compensation obligations between carriers.[2] Further, until the carriers negotiate such an agreement, the definition of what constitutes local traffic and toll traffic as between those parties has not been established.[3]

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[2] *In the Matter of Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, *Declaratory Ruling and Report and Order*, 20 FCC Rcd 4855, ¶¶ 14, 19-21 (2005)(FCC amended its rules to prohibit local exchange carriers from imposing compensation obligations for non-access traffic pursuant to tariff, stating that "precedent suggests that the Commission intended for compensation arrangements to be negotiated agreements" and finding that "negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the 1996 Act.") *See also Iowa Network Servs., supra.*

[3] The FCC has, however, definitively established that traffic to and from wireless service providers is local traffic subject to the reciprocal compensation obligations of the Act. *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, CC Docket No. 95-185, First Report and Order, 11 FCC Rcd 15499, 16014, ¶ 1036 (1996) ("*FCC First Report and Order*").

Under the process contemplated by the Act, the CLEC would negotiate with the ILEC for an interconnection agreement that would specifically cover such items as the terms, conditions and rates for the exchange of traffic. Further, in a typical situation, an agreement would be reached as a prerequisite to establishing the actual physical connection between the two companies that would be utilized to exchange traffic, or at least to determine the type of interconnection (direct or indirect) that the parties would utilize. Moreover, while Section 251 provides the framework for interconnection agreements between CLECs and ILECs, agreements to exchange traffic are not unique to the business relationship between local exchange service providers. BellSouth and very other ILEC with whom BellSouth exchanges traffic have in place agreements to govern the terms of the exchange of traffic between them. Similarly, BellSouth and every CLEC that BellSouth compensates for the exchange of traffic also have in place agreements to govern the terms of the exchange of the traffic between them.

Further, CLECs, which were created by the Act, also have physical connections that have been created to exchange traffic pursuant to the terms of these agreements. Thus, what BellSouth has requested that South Central Telcom do, that is, to negotiate an agreement under which the terms of traffic exchange would be defined, is no different than what it would request from any other local carrier, either incumbent or competitive.

Typically, a local exchange company would not hesitate to enter into an arrangement of this type because the creation of the contractual arrangement would, as stated above, be a prerequisite to creating the physical interconnection allowing that local exchange company to exchange traffic with BellSouth, and through transit

arrangements that BellSouth is willing to offer, with other CLECs and wireless service providers. In the case of South Central Telcom, however, it uses the switch of its affiliate company, South Central Rural Telephone Company, an incumbent independent telephone company (ICO). South Central Telcom has simply used the fact that it is affiliated with an ICO that already has an interconnection facility and agreement with BellSouth to avoid the requirements of the federal Act. The result is that unlike most other CLECs, South Central Telcom believes that it can utilize the existing ICO-to-BellSouth facilities and relationship to avoid its own obligations to negotiate terms and conditions for the exchange of traffic while it reaps the benefits of allowing its customers to receive BellSouth traffic, as well as third party transit traffic. This is an advantage that no other CLEC enjoys unless it is a CLEC that is affiliated with an independent LEC. BellSouth is obligated not to treat South Central Telcom more favorably than other CLECs simply due to the nature of its affiliates.

Furthermore, in the absence of an agreement between the Parties, there are no negotiated rates for the exchange of traffic. South Central Telcom inappropriately attempts to remedy this flaw in its attempt to circumvent the standard negotiation process by relying upon a case cited in its Complaint, which ostensibly stands for the proposition that "interexchange carriers are required to pay CLECs for switched access services pursuant to the respective CLEC's applicable access tariff." (*Complaint*, ¶ 5) (emphasis added). The problem with this fundamentally irrelevant point is that the instant case has nothing to do with the relationship between South Central Telcom and an IXC. In this case before the Commission, the issue relates to how a CLEC and an ILEC exchange traffic, whether it be traffic exchanged between the Parties or traffic for

which BellSouth performs a transit function, and which results in calls being delivered to South Central Telcom's customers.

Since there is no interconnection agreement between the Parties, BellSouth would be within its rights to simply refuse to terminate this traffic to South Central Telcom. If it did, South Central Telcom would no doubt respond with an immediate complaint to this Commission. In fact, in its Complaint, South Central Telcom states that it "is not in a position to terminate service to BellSouth *because South Central Telcom could not do so without harming its own customers*." (*Complaint*, ¶ 15, emphasis added) BellSouth has, to date, continued to route BellSouth-originated and third party transit traffic to South Central Telcom even though South Central Telcom refuses to negotiate an agreement to govern this function. Instead, South Central Telcom engages in a fundamentally disingenuous attempt to extract from BellSouth switched access charges for traffic that BellSouth in most instances does not originate.[4] However, the legal authority cited by South Central Telcom, and the facts alleged, simply cannot support this result. The legal authority, in fact, as set forth in *T-Mobile*

[4] South Central Telcom's Complaint, which demands that BellSouth pay South Central Telcom's tariffed switched access charges for all traffic BellSouth delivers to it, cannot be justified. In fact, less than five percent (5%) of the traffic BellSouth delivers to South Central Telcom's ICO affiliate for termination to South Central Telcom is BellSouth-originated intraLATA toll traffic, for which BellSouth is willing to negotiate an appropriate agreement as indicated in Paragraph 8 of its Answer. Approximately eighty percent (80%) of such traffic is wireless originated transit traffic. Per the *FCC First Report and Order*, ¶ 1036, intraMTA traffic to or from a wireless provider's network is subject to reciprocal compensation pursuant to Section 251(b)(5) of the Act and not intrastate or interstate access charges. Thus, even if South Central Telcom were entitled to ignore the Act and rely on its tariffs (which it is not permitted to do), the majority of the traffic for which South Central Telcom is billing terminating access charges to BellSouth is in fact wireless traffic not subject to intrastate switched access charges, and is in fact originated by carriers other than BellSouth. *See also T-Mobile* and *Iowa Network Servs., supra.*

and *Iowa Network Servs., supra,* requires a different result. Accordingly, South Central Telcom's Complaint should be dismissed with prejudice for failure to state a claim upon which relief can be granted.

Respectfully submitted,

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656910

CERTIFICATE OF SERVICE FOR 2006-00448

It is hereby certified that a true and correct copy of the foregoing was served on the following individual by mailing a copy thereof on the 6th day of November, 2006.

John E. Selent
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Mary K. Keyer