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December 14, 2006

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PUBLIC SERVICE COMMISSION

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 Reply to South Central's Response to BellSouth's Motion to Dismiss.

Sincerely,

Mary K Keyer

Mary K. Keyer

Enclosures

cc: Party of record

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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**	)	

BELLSOUTH'S REPLY TO SOUTH CENTRAL'S RESPONSE TO BELLSOUTH'S MOTION TO DISMISS

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, files its Reply to the Response of South Central Telcom LLC ("South Central") to BellSouth's Motion to Dismiss the Complaint filed by South Central in this proceeding, and states the following:

I. INTRODUCTION

South Central's Complaint against BellSouth is a fundamentally disingenuous attempt to unilaterally impose upon BellSouth terminating switched access rates from an inapplicable tariff while refusing to negotiate an agreement with BellSouth for the exchange of traffic, as clearly required by the Telecommunications Act of 1996. South Central begins its Response with the claim that "this matter concerns BellSouth's refusal to pay South Central for switched access services." (South Central Response, p. 1). A more accurate statement would be that this matter concerns the refusal of South

Central to negotiate with BellSouth the terms, conditions and rates for traffic exchange (including terminating access) while attempting to impose on BellSouth switched access rates from a facially inapplicable tariff. To prevail in this attempt, South Central must establish two things: (1) that an Interconnection Agreement is not the proper means for competitive local exchange carriers ("CLECs") and incumbent local exchange carriers ("ILECs") to negotiate and memorialize mutually agreed upon terms for traffic exchange, and (2) that South Central can unilaterally set the rates and terms by applying its access tariff. As a matter of law, South Central cannot establish either requirement.

Not surprisingly, South Central emphasizes in its Response that Motions to Dismiss are to be granted only when the Complainant cannot "prove any set of facts that would entitle [it] to relief." (South Central Reply, p. 2). BellSouth's Motion to Dismiss meets this standard, and the Motion should be granted because (1) South Central's claim conflicts with the entire interconnection scheme of Section 251; and (2) it relies upon the application of an access tariff that clearly does not apply.

II. AN INTERCONNECTION AGREEMENT IS NECESSARY TO SET THE RATES, TERMS AND CONDITIONS FOR THE EXCHANGE OF TRAFFIC BETWEEN CLECS AND ILECS

The Act clearly contemplates that ILECs and CLECs will enter into Interconnection Agreements that control the business relationship between them. Specifically, Section 251(a)(1) states that each telecommunications carrier has the duty to "interconnect directly or indirectly with the facilities of other telecommunications carriers." Further, each local exchange carrier has "the duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications." (Section 251(b)(5)). Each ILEC has the additional duty to negotiate in good faith to

reach agreement with each requesting telecommunications carrier and to enter into an Interconnection Agreement that includes, among other things, arrangements "for the transmission and routing of telephone exchange service and exchange access." (Section 251(c)(2)(a) (emphasis added).

There is nothing in the language of the Act to suggest that parties should enter into Interconnection Agreements pursuant to the Act as a means to control the provision of only some transport, routing, traffic termination or access provided by the parties. Instead, the Act contemplates that parties will negotiate and execute Interconnection Agreements that govern all aspects of interconnection.

Thus, South Central's unlikely argument can be rejected simply by reading the language of the Act. South Central, nevertheless, attempts to avoid the clear meaning of the Act by an interpretation of the above-quoted language that is without merit. South Central acknowledges that 251(c)(1) includes the duty to interconnect "for the transmission and routing of telephone exchange service and exchange access." (Response, p. 3). South Central then claims that the Act applies, and an Interconnection Agreement is required, if the traffic in question includes exchange service and exchange access, but that the Act does not apply if the traffic includes one or the other, but not both. South Central fails to explain, however, what could possibly be the point of a provision in the Act that an Interconnection Agreement is not required when one type of traffic is exchanged, nor when a second type is exchanged, but that an agreement is required if both types of traffic are exchanged. If Congress had intended this peculiar result, then surely the Act would have stated this intention explicitly. Because it does not, and because such a distinction in the way traffic is

treated would serve no purpose whatsoever, South Central's attempt to twist the language of the Act to its own ends must be rejected.

In its Response, South Central also claims another questionable distinction. South Central admits that it is a CLEC (i.e., a competitive local exchange carrier) while arguing that it does not compete with BellSouth. Thus, in South Central's view, an illogical distinction exists between competitive CLECs and non-competitive CLECs (i.e., South Central contends that the Act does not apply to "non-competitive" CLECs). The Act, of course, makes no such distinction.

Nevertheless, in ostensible support of this distinction, South Central cites to MCI Communications Corp. v. Ohio Bell Telephone Company, 376 F3rd 539, 549 (6th Cir 2004) as standing for the proposition that the Act does not apply to "non-competing carriers." (Response, p. 2). In reality, the MCI case deals with the completely unrelated question of when to apply the requirement of symmetrical reciprocal compensation, which is set forth in 47 C.F.R. § 51.711. Specifically, the Court opined as to how to define the coverage area of the CLEC's switch to determine whether the reciprocal compensation requirement of this rule applies. There is nothing in the MCI case (which involved two competitive carriers that did have an Interconnection Agreement in place) to even address the issue of when an Agreement is required.

Again, South Central's position must be rejected because it is fundamentally at odds with the plain language of the Act. South Central's efforts to warp the language of the Act (and of federal case law) to fit its implausible argument must also fail.

III. SOUTH CENTRAL'S ACCESS TARIFF DOES NOT APPLY

Again, to prevail, South Central must sustain the unlikely argument that, not only do the provisions of the Act that require an Interconnection Agreement for the exchange of traffic between carriers not apply, but that South Central's access tariff does. This argument, however, cannot be sustained because as noted previously, Section 251(b)(5) requires carriers to make arrangements to reciprocally compensate "for the transport and termination of telecommunications." (Emphasis added). Section 251(c)(2)(A) specifically states that agreements are to include provisions for exchange access. (Emphasis added).

Moreover, as noted in BellSouth's Motion to Dismiss, the FCC has prohibited local exchange carriers from using tariffs to impose compensation obligations for non-access traffic. The FCC states that "precedent suggests that the Commission intended for compensation arrangements to be negotiated agreements and ... that negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the 1996 Act."[1] At the same time, the FCC specifically defined "non-access traffic" as "traffic not subject to the interstate or intrastate access charge regime, including traffic subject to Section 251(b)(5) of the Act and ISP bound traffic." (*Id.,* fn. 6). Thus, the FCC made a clear distinction in the T-Mobile case between access services that fall under the traditional access regime (which may be tariffed) and traffic exchange between carriers, including terminating access, that is subject to the requirements of Section 251, and which cannot be charged by tariff. Parties to an interconnection agreement typically negotiate the rates to be paid, if any, for the

[1] *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)("T-Mobile").

exchange of various types of traffic. Without such an agreement, traffic has not yet been jurisdictionally designated as traffic to which state-ordered reciprocal compensation rates shall apply, or traffic subject to a higher "access" rate. Thus, South Central's attempt to levy access charges by a unilateral imposition of its access tariff plainly contradicts the requirements of the Act and of the FCC's decision in T-Mobile.

South Central's position must also be rejected because a review of South Central's access tariff makes clear that the tariff applies to the traditional access charge regime, not to interconnection between LECs. South Central has a physical interconnection with BellSouth because it has opened NPA-NXX codes in its affiliated ICO's switch, and placed a notation in the Local Exchange Routing Guide ("LERG") to instruct carriers to route traffic to its ICO affiliate. Putting aside the propriety vel non of this type of "stealth interconnection," the arrangement is an indirect interconnection that is expressly covered by the Act, and by the requirements of the Interconnection Agreement. (*See*, Sec 251(a)(1).[2] In contrast, services charged pursuant to an access tariff apply when a carrier (such as an interexchange carrier ("IXC")) obtains access to the LEC's network, and ultimately to its customers, by purchasing specific access facilities from the LEC. Thus, there is a fundamental mismatch between the manner in which access tariffs function and the situation to which South Central is attempting to misapply its access tariff.

The fact that South Central's access tariff does not apply is confirmed by a review of the tariff. South Central's access tariff comprises 150 pages of descriptions of

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[2] In its Response, South Central states that it has never requested an Interconnection Agreement with BellSouth (Response, p. 3). This assertion goes to the heart of the problem. South Central has manipulated the interconnection of its affiliated ICO with BellSouth to obtain indirect interconnection with BellSouth, but refuses to negotiate the terms to govern this interconnection arrangement.

a variety of available switched access services.[3] This tariff clearly states that the customer must follow a defined process to order switched access service. (South Central Access Tariff, 6.1.2). Customers may order switched access service from four different feature group categories. (*Id.*, 6.1.1(A)). Each feature group has various options that can be ordered as part of the specific service arrangements. (*Id.*). Not surprisingly "rates and charges for Switched Access Service depend generally on the specific feature group ordered by the customer." (*Id.*, 6.1). Thus, when a South Central customer buys switched access service from South Central's tariff, it decides what specific access facilities it needs, orders them through a specifically defined process and pays a rate that depends on the particular facilities and service arrangement it chooses. Obviously, this process has no relationship whatsoever to the Act-mandated process whereby carriers exchange traffic and negotiate interconnection agreements to govern this exchange.

Further, even if South Central's access tariff could apply, South Central's actions – *i.e.*, attempting to force tariffed access charges upon BellSouth by manipulating its ICO-affiliate's connection with BellSouth – violate the ordering and provisioning requirements of its own tariff. Put differently, even if South Central's access tariff were conceptually applicable (and it is not), it would still be necessary for BellSouth to place an order for access services prior to South Central's provisioning of the service. The fact that BellSouth has never ordered any such access facilities and that South Central has chosen to utilize its affiliate's existing interconnection facilities to achieve indirect interconnection with BellSouth substantially undercuts South Central's argument.

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[3] South Central has adopted the access tariff of Duo County Cooperative Corp., Inc.

Finally, South Central's continued reliance on Brandenburg Telecom LLC v. AT&T Communications of the South Central States, Case No. 2002-00383, 2003 Ky PLL Lexis 351 (May 1, 2003) ("Brandenburg Order") is clearly misplaced. In that case, AT&T was providing long distance service to customers in Kentucky, "including some end user customers who receive local exchange telephone service from Brandenburg." (Brandenburg Order, p. 2). Thus, AT&T was unquestionably functioning as an IXC, not as a LEC with whom Brandenburg was exchanging traffic. Further, the issue in that case was whether an IXC can be made to purchase service from a tariff or whether the local carrier must accede to the IXC's request for a contract service arrangement that would contain additional terms not found in the LECs tariff. That situation is readily distinguishable from the current one, in which South Central obtained indirect interconnection with BellSouth through its ICO affiliate and is now attempting to unilaterally impose access charges on BellSouth under a facially inapplicable tariff.

IV. CONCLUSION

South Central's attempt to unilaterally apply its access tariff and its refusal to negotiate an Interconnection Agreement as required by the Act (1) contradict the plan requirements of the Act, (2) contradict the decisions of the FCC, and (3) are inconsistent with the provisions of its own access tariff. For these reasons, this attempt must fail.

Because South Central cannot "prove any set of facts that would entitle [it] to relief," the Commission should grant BellSouth's Motion to Dismiss the Complaint with prejudice.

Respectfully submitted,

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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 14th day of December, 2006.

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Mary K. Keyer