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May 22, 2007

Via Federal Express
Hon. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Blvd.
P. O. Box 615
Frankfort, KY 40601

Re: In the Matter of: South Central Telcom LLC v. BellSouth Telecommunications, Inc., Case No. 2006-00448

Dear Ms. O'Donnell:

Enclosed for filing in the above-referenced case, please find one original and ten (10) copies of South Central Telcom's Verified Motion for Summary Judgment.

Please return a file stamped copy in the self-addressed envelope enclosed herewith.

Thank you, and if you have any questions, please call me.

Very truly yours,

DINSMORE & SHOHL LLP

Holly C. Wallace

JES/ki
Enclosures
cc: All Parties 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	)	
	)	

SOUTH CENTRAL TELCOM'S VERIFIED MOTION FOR SUMMARY JUDGMENT

Pursuant to CR 56.02, South Central Telcom LLC ("South Central") moves the Kentucky Public Service Commission (the "Commission") for summary judgment on the Complaint it filed against BellSouth Telecommunications, Inc. ("BellSouth") in Case No. 2006-00448. In support of its Motion, South Central states as follows.

INTRODUCTION

BellSouth refuses to pay switched access tariff charges billed to it by South Central, despite the fact that South Central terminates BellSouth's intraLATA traffic on its network pursuant to South Central's filed and approved switched access tariff. Instead, BellSouth contends that it can avoid the application of South Central's switched access tariff by demanding that South Central enter an interconnection agreement with it. However, the law is clear that: (i) interconnection agreements are not required to exchange *access* traffic; and (ii) CLECs are not required to enter into interconnection negotiations with ILECs. Therefore, there are no genuine issues of law or fact, and South Central is entitled to summary judgment as a matter of law.

VERIFIED STATEMENT OF FACTS

South Central Telcom LLC is a telecommunications company providing competitive local exchange services in Glasgow, Kentucky. BellSouth is an incumbent local exchange carrier ("ILEC"), but is not the ILEC in South Central's service area. (Instead, South Central competes locally against Windstream Kentucky East, Inc. ("Windstream").) South Central has been terminating, and continues to terminate, BellSouth access traffic in its exchange. It then bills BellSouth its switched access rates, in accordance with South Central's PSC KY Tariff No. 2, and the filed-rate doctrine, codified at KRS 278.160. BellSouth has refused to pay South Central's tariffed access charges, and it therefore owes South Central in excess of $65,393.83 as of the time of this filing. This amount increases with each day that BellSouth refuses to pay South Central's tariffed access charges.

ARGUMENT AND ANALYSIS

I. SUMMARY JUDGMENT STANDARD OF REVIEW.

Summary judgment is appropriate in Kentucky "if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." CR 56.03.

In *Steelvest, Inc. v. Scansteel Service Center*, 807 S.W.2d 476 (Ky. 1991), the Kentucky Supreme Court held that "the proper function for summary judgment..." is to terminate litigation when, as a matter of law, it appears that it would be impossible for the respondent to produce evidence at the trial warranting a judgment in his favor and against the movant." *Id.* at 482 (citations omitted). Shortly thereafter, the court clarified its

ruling in *Steelvest* and noted that "'impossible' is [to be] used in a practical sense, not in an absolute sense." *Perkins v. Hausladen*, 828 S.W.2d 652, 654 (Ky. 1992). Given *Perkins*' pragmatic standard, summary judgment is appropriate in "any case where the record shows that there is no real issue as to any material fact with respect to a particular claim or part thereof or defense thereto." *Continental Casualty Co. v. Belknap Hardware and Mfg. Co.*, 281 S.W.2d 914, 916 (Ky. 1995) (*Steelvest*, 807 S.W.2d at 482, reaffirmed this standard).

While the movant must meet the initial burden of showing "the absence of a genuine issue of material fact," the movant can meet that burden by "pointing out...that the respondent, having had sufficient time for discovery, has no evidence to support...(its) case." *Steelvest*, 807 S.W.2d at 481. A complete failure of proof on an essential element renders all other facts immaterial and the movant is "entitled to judgment as a matter of law." *Id.* Under this standard, South Central is entitled to summary judgment on its claim as a matter of law.

II. THE TELECOMMUNICATIONS ACT OF 1996 DOES NOT APPLY, BECAUSE BELLSOUTH AND SOUTH CENTRAL ONLY EXCHANGE ACCESS TRAFFIC. INSTEAD, THE FILED-RATE DOCTRINE APPLIES, AND SOUTH CENTRAL IS REQUIRED TO BILL THE TARIFF RATES IT HAS ON FILE WITH THE COMMISSION.

BellSouth is not the incumbent local exchange carrier in South Central's competitive local exchanges; Windstream is. As contemplated and permitted by 47 USC § 251, South Central requested an interconnection agreement from Windstream. An interconnection agreement between South Central and Windstream, dated December 17, 2001 and amended May 27, 2005, was approved by the Commission on November 1, 2005. That interconnection agreement controls the exchange of South Central's local

exchange traffic with Windstream. BellSouth and South Central, alternatively, exchange access traffic only. They do not exchange local traffic. This is an important difference.

The Telecommunications Act of 1996 (47 USC § 151 *et seq.*; the "Act") restructured local telephone markets and prohibited states from enforcing laws that would impede competition in the local markets. *Iowa Network Services, Inc., v. Qwest Corp.*, 363 F.3d 683, 685 (8th Cir. 2004); *see also GTE Northwest, Inc. v. Hamilton*, 971 F.Supp. 1350 (D.OR. 1997). Therefore, the Act does not apply to the non-local, access traffic exchanged between BellSouth and South Central. Rather, in accordance with the filed-rate doctrine, *see* KRS 278.160, South Central is required to bill the rates it has on file with the Commission. There are no exemptions or special treatments under this doctrine.

The filed-rate doctrine requires that "no utility...charge, demand, collect, or receive from any person a greater or less compensation for any service rendered or to be rendered than that prescribed in its filed schedules." KRS 278.160. Additionally, "no utility shall, as to rates or service, give any unreasonable preference or advantage to any person or subject any person to any unreasonable prejudice or disadvantage, or establish or maintain any unreasonable difference between localities or between classes of service for doing a like and contemporaneous service under the same or substantially the same conditions." KRS 278.170(1). Therefore, compensation for interLATA and intraLATA access services (which are the services at issue in this case) are governed by the respective parties' switched access tariffs approved by and on file with the Commission. Interconnection agreements are not required.

BellSouth, in its Answer, stated that the filed-rate doctrine does not apply to the traffic at issue in this case. (Answer at ¶12.) BellSouth cited to a case holding that

"traffic to or from a CMRS ("Commercial Mobile Radio Service") network that originates and terminates within the same MTA (Major Trading Area) is subject to transport and termination rates under section 251(b)(5) rather than interstate or intrastate access charges." *Iowa Network Services, Inc., v. Qwest Corp.*, 363 F.3d 683 (8th Cir. 2004). That case directly cited to an FCC order[1] that singularly addressed the proper billing of calls originated by a wireless provider and delivered to a LEC within the same MTA.

BellSouth, of course, is not a CMRS Provider, nor has BellSouth claimed that the traffic at issue here is CMRS traffic. Moreover, MTAs are irrelevant to this matter. Instead, this case deals with non-CMRS calls placed from wireline customers within BellSouth's exchange to wireline customers within South Central's separate, non-local exchange. Therefore, *Iowa Network Services* does not apply and BellSouth cannot rely on that case to support its misguided notion that "federal law requires ILECs to exchange [access] traffic with CLECs pursuant to agreements that govern the terms and conditions of interconnection." (Answer at ¶12.)

BellSouth further attempts to obfuscate matters by claiming that "interconnection agreements, and not tariffs, are the appropriate mechanism for the establishment of reciprocal compensation obligations between carriers." (Answer and Motion to Dismiss of BellSouth Telecommunications, Inc., at p. 6.) With respect to traffic subject to Section 251(b)(5) of the Act, South Central agrees. Access traffic, however, is not subject to the Section 251(b)(5) reciprocal compensation obligations. *See* 47 CFR § 51.707(b)(1)

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[1] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Provider,, First Report and Order*, 11 FCC Rcd. 15499 (1996) (hereinafter *First Report and Order*).

("interstate or intrastate exchange access" is not "telecommunications traffic" and, therefore, not subject to the 47 CFR § 51.703(a) requirement that LECs "establish reciprocal compensation arrangements for transport and termination of telecommunications traffic.")

South Central further directs the Commission to the case *In the Matter of: Brandenburg Telecom LLC v. AT&T Communications of South Central States, Inc.*, Case No. 2002-00383, 2003 Ky. PUC LEXIS 351 (May 1, 2003) (hereinafter *Brandenburg Telecom*). In that case, the Commission ordered AT&T to pay Brandenburg Telecom's switched access tariff rates for access traffic that terminated in its exchange. *Brandenburg Telecom*, at 3 ("The Commission finds that the rates included in the tariff are legally filed with this Commission and have been properly applied."). In its ruling, the Commission noted that Brandenburg Telecom could enter an agreement with AT&T regarding access traffic, but was not required to do so. *Brandenburg Telecom*, at 5 ("The Commission declines to order Brandenburg to enter into a CSA with AT&T. Brandenburg may voluntarily enter into a CSA with AT&T if it wishes.") The circumstances are no different here, and BellSouth is subject to South Central's access tariff.

III. EVEN IF THE ACT DID APPLY, SOUTH CENTRAL WOULD NOT BE REQUIRED TO ENTER INTO AN INTERCONNECTION AGREEMENT WITH BELLSOUTH.

Even assuming BellSouth is correct that it is not an interexchange carrier[2] and that the Act's provisions apply to the traffic at issue in this case[3], an interconnection agreement is still not required.

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[2] BellSouth alleges that it does not act as an interexchange carrier and is not subject to access rates. Despite the obvious fallacy of this contention, whether BellSouth believes it

ILECs are local exchange carriers that were providing telephone exchange services in local exchanges on February 8, 1996 (the effective date of the Act). 47 USC § 251(h). BellSouth is an ILEC. Competitive Local Exchange Carriers ("CLECs") are those local exchange carriers that were not providing telephone exchange services in local exchanges on February 8, 1996. CLECs compete directly with the ILECs and are subject to somewhat different regulatory requirements, in the name of competition. *See generally Iowa Network Services, Inc., v. Qwest Corp.*, 363 F.3d 683 (8th Cir. 2004). South Central is a CLEC.

As noted earlier, the Act restructured local telephone markets and prohibited states from enforcing laws that would impede competition in the local markets. *Id.* at 685. Through the Act, the federal government stepped into the domain previously occupied by states and facilitated competition by requiring local exchange carriers to share their networks with new competitors. *Id.* ("No longer was the local market to be viewed as a natural monopoly with only one authorized provider of local telephone service.")

ILECs are required under the Act to provide any requesting telecommunications carrier interconnection to the ILEC network. *Competitive Telecommunications Ass'n v. F.C.C.*, 117 F.3d 1068 (8th Cir. 1997). As part of the interconnection process, a telecommunications carrier can request the negotiation of an interconnection agreement between itself and an ILEC. *See* 47 USC § 251(c)(1). Upon that request, the ILEC has a

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is acting as an interexchange carrier is immaterial. BellSouth is terminating access traffic in South Central's exchange. Accordingly, South Central bills BellSouth for access charges pursuant to South Central's tariff, on file with and approved by the Commission.

[3] For the reasons identified in Section II, above, South Central does not espouse this conclusion, *except* for purposes of argument.

duty to negotiate in good faith the particular terms and conditions of the interconnection agreement. *Id.* But the Act does not permit an ILEC to request the negotiation of an interconnection agreement with a CLEC. *See* 47 USC § 251(c)(1) (imposing the "duty to negotiate in good faith" with "requesting telecommunications carriers" only upon ILECs).

SouthCentral has not requested an interconnection agreement with BellSouth. Quite simply, this is because South Central does not compete with BellSouth for local exchange traffic and, therefore, does not need to agree with BellSouth to terms and conditions regarding the handling of issues related to local telephone service. South Central only receives access traffic from BellSouth, and the exchange of access traffic is already addressed in South Central's filed and approved access tariff. Therefore, South Central is not obligated to negotiate and enter an interconnection agreement with BellSouth.

The Act does not authorize ILECs[4] to impose their will on non-competing CLECs and force the negotiation of interconnection agreements. In fact, authorizing a direct descendant of the original "Ma Bell" to impose interconnection agreements on non-competing CLECs would constitute a barrier to entry into the marketplace and run directly counter to the pro-competitive purpose of the Act. The Act was intended to foster competition and provide CLECs an opportunity to compete with the ILECs in local markets. The Act was not intended to provide the ILECs with a means by which to strengthen their historically monopolistic advantage.

As noted above, the Act allows carriers to enter into an interconnection agreement addressing the terms and conditions of their interconnection. The Act also allows those

[4] Again, the obligation is imposed on BellSouth, not South Central.

carriers entering interconnection agreements to address access traffic exchanged between them within that agreement. However, BellSouth cannot reasonably claim that the Act applies (and an interconnection agreement would be required) when the traffic in question involves only exchange access traffic.[5] The Act does not contemplate exchange carriers entering an interconnection agreement only addressing non-local access traffic. There is no reason for an interconnection agreement in those instances where the only interconnection between the parties is already addressed by tariffs that have been filed and approved by the Commission.[6]

An act aimed at fostering local competition need not set forth requirements for exchange carriers to enter into interconnection agreements addressing solely long-distance traffic. Accordingly, the Act does not impose such a requirement on any carrier (including even an ILEC); instead, it merely allows the negotiation of an interconnection agreement addressing access traffic (exchange access) only when necessary to supplement the terms of an agreement related to local exchange traffic (telephone exchange service). South Central's access tariff provides all the terms and conditions necessary to address the service BellSouth seeks from South Central, and, as noted at the

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[5] BellSouth claims that South Central claimed that the Act applies (and an interconnection would be required) only in those instances in which 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." (Emphasis in original.) (BellSouth's Reply to South Central's Response to BellSouth's Motion to Dismiss, at p. 3.) That was not South Central's claim. South Central claimed that "the Act contemplates the exchange of *both* exchange service and exchange access traffic" and that, if Congress had intended interconnection agreements to "govern solely access traffic in those situations where...parties do not exchange local traffic...then Congress would have so stipulated." (Response to BellSouth Telecommunications, Inc.'s Motion to Dismiss, at pp. 3-4.)

[6] The Commission, of course, approved the tariff that BellSouth refuses to acknowledge. The law is clear that South Central's tariff applies, *see* KRS 278.160, and no amount of argument from BellSouth can change that fact.

informal conference, the physical facilities are already present, in any event. Therefore, South Central's access tariff applies and BellSouth cannot force South Central into unnecessary interconnection negotiations.

CONCLUSION

Ultimately, BellSouth is attempting an end run around the Commission, KRS 278.160, and South Central's filed and approved access tariffs. Moreover, BellSouth's actions belie a continued pattern of attempting to wield its market dominance to whittle away at the Commission's jurisdiction and create laws that will benefit only BellSouth, to the detriment of Competitive Local Exchange Carriers and consumers alike. The filed-rate doctrine requires BellSouth to pay South Central's tariffed access charges. BellSouth cannot demand an interconnection agreement with a CLEC. And, moreover, an interconnection agreement is not required to address tariffed access services. BellSouth's legal claims are baseless; there is no genuine issue of material fact; South Central is entitled to judgment as a matter of law; and therefore, the Commission should grant South Central's Motion for Summary Judgment against BellSouth for past and future switched access charges due pursuant to South Central's PSC KY Tariff No. 2.

Respectfully submitted,

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VERIFICATION

I, _____, having first been duly sworn, state that I have read the foregoing Motion for Summary Judgment. I state that the allegations and statements contained in the Verified Statement of Facts are true and correct to the best of my knowledge, information and belief.

_____
Kyle Jones, Manager
South Central Telcom LLC

COMMONWEALTH OF KENTUCKY)
) SS:
COUNTY OF BARREN)

Sworn to before me and subscribed in my presence by _____ this ____ day of May, 2007.

My Commission expires:_____
_____.

_____
NOTARY PUBLIC

CERTIFICATE OF SERVICE

I hereby certify a true and accurate copy of the foregoing was served on the following this 21st day of May, 2007:

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