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NOV 20 2006

PUBLIC SERVICE
COMMISSION

November 20, 2006

VIA HAND DELIVERY

Hon. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Blvd.
Frankfort, KY 40601

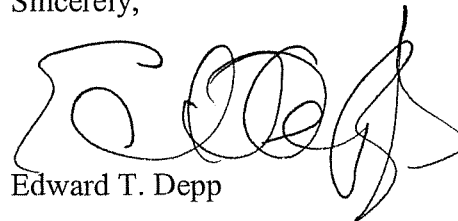
Re: *In the Matter of: South Central Telcom LLC v. Bellsouth Telecommunications, Inc; Case No. 2006-00448*

Dear Ms. O'Donnell:

I have enclosed for filing in the above-styled case the original and eleven (11) copies of South Central Telcom LLC's Response to BellSouth Telecommunications, Inc.'s Motion to Dismiss. Please file-stamp one copy and return it to our delivery person.

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

Sincerely,



Edward T. Depp

ETD/lb
Enclosure

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COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

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NOV 20 2006

PUBLIC SERVICE
COMMISSION

In the Matter of:

SOUTH CENTRAL TELCOM LLC)
Complainant)
v.)
BELLSOUTH TELECOMMUNICATIONS,)
INC.)
Defendant)

Case No. 2006-00448

RESPONSE TO BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION TO DISMISS

South Central Telcom LLC ("South Central"), by counsel, hereby files its response to the motion to dismiss of BellSouth Telecommunications Inc. ("BellSouth"). In support of its response, South Central states as follows.

INTRODUCTION

This matter concerns BellSouth's refusal to pay South Central for switched access services. South Central's switched access services are governed by Section 2, Rates and Charges, of its PSC KY Tariff No. 2 entitled "Regulations and Schedule of Intrastate Access Charges Within the Commonwealth of Kentucky." Pursuant to the filed-rate doctrine and KRS 278.160, South Central is required to provide access services only in accordance with its filed tariff, or in accordance with special contracts filed with the Commission. South Central has not executed a contract with BellSouth governing access traffic, nor is it required to do so. Therefore, pursuant to KRS 278.160, South Central must charge BellSouth its tariffed rates, to do otherwise would violate Kentucky law. Nonetheless, BellSouth refuses to pay South Central's tariffed rates, forcing South Central to file the complaint that gave rise to this action.

ARGUMENT

A motion to dismiss is a blunt instrument that should be used sparingly. "[T]he moving party is not entitled to judgment unless it appears beyond doubt that the nonmoving party cannot prove any set of facts that would entitle him to relief." *Henderson v. Thomas*, 129 S.W.3d 853, 855 (Ky. App. 2004). Moreover, "the allegations contained in the complaint shall be liberally construed in a light most favorable to the non-moving party, and all allegations taken in the complaint shall be deemed true. *Kidd v. Board of Education*, 29 S.W.3d 374, 376 (Ky. App. 2000).

South Central asserts in its Complaint that it has provided BellSouth with switched access services. South Central further asserts that BellSouth refuses to pay for these services and owes South Central \$52,886.13 as of the date the Complaint was filed. Pursuant to *Kidd v. Board of Education*, when reviewing BellSouth's motion to dismiss the Commission must deem all facts as alleged by South Central to be true. For this reason alone the Commission should deny BellSouth's motion to dismiss.

A. The Purpose of the Telecommunications Act of 1996 is to Foster Competition.

BellSouth relies primarily on sections 251 and 252 of the Telecommunications Act of 1996 (the "Act") to support its argument that BellSouth cannot exchange traffic with South Central, or any other carrier, unless the parties execute an interconnection agreement. BellSouth's argument is based on the faulty premise that Congress enacted sections 251 and 252 to govern the exchange of access traffic between non-competing carriers. On the contrary, the purpose of the Act is to foster competition in the local telephone marketplace, not to redress the exchange of access traffic between non-competing carriers. *MCI Telecommunications, Corp. v. Ohio Bell Tel. Co.*, 376 F.3d 539, 549 (6th Cir. 2004). South Central and BellSouth are not competitors. South Central provides local exchange service solely in exchanges where Windstream is the incumbent local exchange carrier

(“ILEC”). BellSouth and South Central exchange access traffic only. The Act was not intended to address the exchange of this type of traffic.

B. BellSouth Cannot Impose an Interconnection Agreement Upon a Non-Requesting Carrier.

The duty to execute an interconnection agreement is one borne solely by ILECs upon the request of another carrier. *See* 47 USC §§ 251(c) and 252(a). South Central made no such request. The statute does not authorize BellSouth to impose an interconnection agreement upon another carrier. *Id.* Moreover, the purpose of an interconnection agreement is to “fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection.” 47 USC § 251(c)(1). The duties enumerated in subsections (b) and (c) are resale, number portability, dialing parity, access to rights-of-way, reciprocal compensation, unbundled access, collocation and interconnection for the transmission and routing of telephone exchange service and exchange access. None of these duties apply in the present case. South Central is not requesting any of these services. More to the point, all of these services are applicable within the context of the exchange of local traffic between competitors. As already stated, South Central and BellSouth do not exchange local traffic and they are not competitors. Therefore, there is no reason for the parties to execute an interconnection agreement.

Notwithstanding the foregoing, South Central anticipates that BellSouth might argue that the last duty enumerated above—interconnection for the transmission and routing of telephone exchange service and exchange access—is applicable because Bellsouth terminates access traffic to South Central. The problem with this argument, should BellSouth assert it, is that the Act contemplates the exchange of *both* exchange service and exchange access traffic. South Central and BellSouth do not exchange local exchange traffic. Had Congress intended interconnection agreements to govern solely access traffic in situations where the parties do not exchange local traffic, as in the present

case, then Congress would have so stipulated. It did not. Under principles of statutory construction, full effect must be given to the plain language of the Act as it is written. *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 476 (1992).

Moreover, the Commission has already addressed this very issue in the case of *Brandenburg Telecom LLC v. AT&T Communications of the South Central States, Inc.*, Case No. 2002-00383, 2003 Ky. PUC LEXIS 351 (May 1, 2003). In that case, AT&T, like BellSouth, refused to pay tariffed rates for switched access services and sought to compel Brandenburg Telecom to execute an agreement to govern the provision of access services. The Commission refused to require Brandenburg Telecom to execute a contract and ordered AT&T to pay Brandenburg Telecom's access tariff rates. The facts in the present case are substantially similar to those in *Brandenburg Telecom LLC v. AT&T Communications of the South Central States, Inc.*, therefore, BellSouth must pay South Central's access tariff rates.

BellSouth's effort to thrust an interconnection agreement upon South Central is nothing less than a self-serving attempt to gain a competitive advantage by unilaterally imposing its own favorable access terms upon South Central. If BellSouth is permitted to impose favorable access terms, it will not only gain an unfair competitive advantage vis a vis other carriers who purchase access services pursuant to approved state tariffs, but unreasonably disadvantage South Central in violation of KRS 278.170 by imposing a lower rate on South Central than BellSouth pays to other carriers. The Commission should not permit BellSouth to engage in such blatantly anti-competitive behavior.

CONCLUSION

Pursuant to *Kidd v. Board of Education*, the Commission must deem the facts asserted by South Central in its Complaint to be true. South Central asserts it provided BellSouth with switched

access services and BellSouth failed to compensate South Central for those services. Moreover, BellSouth's argument that the Act contemplates the execution of interconnection agreements solely for the purpose of exchanging access traffic conflicts with the plain language of the Act. For these reasons, BellSouth has failed to establish beyond doubt that there is no set of facts under which South Central is entitled to relief; therefore, the Commission should deny BellSouth's motion to dismiss.

Respectfully submitted,



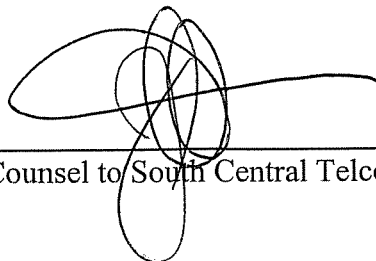
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COUNSEL TO SOUTH CENTRAL LLC

CERTIFICATE OF SERVICE

I hereby certify a copy of the foregoing was sent via U.S. Mail, postage prepaid, this 20th day of November, 2006 to:

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601 W. Chestnut Street, Room 407
P.O. Box 32410
Louisville, KY 40203

Jay Philip Carver
BellSouth Telecommunications, Inc.
675 West Peachtree Street NW
Atlanta, GA 30375



Counsel to South Central Telcom, LLC