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October 6, 2008

VIA HAND DELIVERY

Ms. Stephanie Stumbo
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40602

Re: SouthEast Telephone, Inc., Complainant v. BellSouth Telecommunications, Inc.
d/b/a AT&T Kentucky, Defendant
KSPC 2008-00279

Dear Ms. Stumbo:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of AT&T Kentucky's Response to SouthEast Telephone's Motion for Intermediate Relief.

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

SOUTHEAST TELEPHONE, INC. Complainant, v. BELLSOUTH TELECOMMUNICATIONS, INC. d/b/a AT&T KENTUCKY Defendant.	)	Case No. 2008-00279

AT&T KENTUCKY'S RESPONSE TO MOTION OF SOUTHEAST TELEPHONE, INC. FOR INTERMEDIATE RELIEF

AT&T Kentucky hereby responds to SouthEast Telephone's Motion for Intermediate Relief. SouthEast's request for intermediate relief in the form of a rate change is not grounded in fact or law and should be summarily denied.

DISCUSSION

First, SouthEast attempts to mischaracterize the timeline of events in this matter to support the alleged need for "intermediate relief." SouthEast is not entitled to "intermediate relief" because AT&T Kentucky has not delayed complying with the Commission's order. While it is true that the Commission issued its order requiring commingling in December 2007, SouthEast failed to mention that AT&T Kentucky filed a motion for reconsideration of the Commission's Order on January 2, 2008. The Commission issued its decision denying the motion for reconsideration on January 18, 2008.

Subsequent to the denial, AT&T Kentucky filed an appeal of the Commission's decision with the federal district court. In the meantime, AT&T Kentucky started to

prepare an amendment to the parties' interconnection agreement that would conform it to the Commission's decision. AT&T Kentucky provided the amendment to SouthEast in April 2008 and the last party executed it with a June 2008 signature date.

In June 2008, SouthEast submitted an order for what it claimed was a commingled unbundled copper loop – nondesigned (UCL-ND) and a port. Due both to the fact that the order was not for a UCL-ND and that AT&T Kentucky does not have a process to accept an order for or provision such a commingled arrangement, AT&T Kentucky could not provision the order as requested and advised SouthEast to submit two separate orders.

In July 2008, rather than engage in discussions with AT&T Kentucky and give AT&T Kentucky an opportunity to discuss the particulars of UCL-ND, SouthEast filed a complaint with the Commission. The Complaint was vague and did not attach the July 9 email from AT&T Kentucky, therefore making it difficult for AT&T Kentucky to ascertain the substance of SouthEast's complaint. Once SouthEast filed its response in August 2008 to AT&T Kentucky's Answer, AT&T Kentucky was able to analyze the issue and discuss with SouthEast the technical parameters of NCL-ND and confirm that is in fact what SouthEast wanted to order.

In sum, there is nothing in this timeline that supports an entitlement to "intermediate relief" or any other type of ruling. As discussed at the informal conference held in September 2008, AT&T Kentucky is working to develop a process pursuant to which SouthEast can order a commingled UCL-ND and port. AT&T Kentucky does not object to provisioning these commingled elements for SouthEast, but AT&T Kentucky must develop a process so the elements can be ordered together and provisioned.

SouthEast's request for relief is similarly flawed because the law does not entitle SouthEast to order any commingled set of elements on the day of the Commission's order.[1] No where does the law provide that an ILEC is obligated to develop, in advance of the first order being placed, a process pursuant to which a CLEC could order any and all possible commingled elements. AT&T Kentucky has stated, and continues to reiterate, that it will comply with the Commission's commingling order. The Commission's decision does not, however, obligate AT&T Kentucky to develop an ordering and provisioning process for every possible combination of commingled elements, whether or not they are ever ordered.

The law is supported by common sense. There are a multitude of possible combinations of commingled elements that will never be ordered. It would be uneconomic and impractical to obligate a company to develop ordering processes for products no one would ever buy – it would be the equivalent of requiring a sub shop to make every possible sandwich combination before a customer ever placed an order. No sandwich shop that wanted to prosper would conduct its business in such a manner.

In this case, SouthEast is the first CLEC to have ever requested commingling of a UCL-ND and a port. The UCL-ND was developed as a result of specific CLEC requests as a stand-alone loop to be utilized for the provision of DSL-type services and was not intended to be used in the manner SouthEast is requesting, particularly given that it is not consistently available throughout the network. Consequently, given that SouthEast's request was new, it caused some confusion on the AT&T Kentucky side. Once it became clear what SouthEast wanted, however, AT&T Kentucky committed to

[1] Equally nonsensical is SouthEast's claim that it is entitled to a retroactive rate back to July 1, 2008, only 2 weeks after it submitted an order for commingled elements (this is particularly true given that there is no UCL-ND facility available at the location for which SouthEast requested the service).

develop a process to provide the commingled elements as requested. The development process is underway. When that process is in place, SouthEast can order the commingled element. There is no need, nor any basis, for Commission intervention.

The Commission also should deny SouthEast's request for billing credits for existing circuits provisioned out of the parties' commercial agreement because the Commission does not have jurisdiction over the commercial agreement. Today, SouthEast purchases all of its loop and port combinations via a commercial agreement. The combination is referred to in the agreement as the wholesale local platform ("WLP") and the rate for a WLP circuit is specified in the agreement. Every circuit for which SouthEast wants the Commission to change the rate is a WLP circuit ordered out of the parties' commercial agreement.

The Commission has no authority to change the rates for services provided pursuant to a commercial agreement. As the Commission itself has held, the Commission has no jurisdiction over the parties' commercial agreement, nor does the Commission have jurisdiction over the WLP product provided for in that agreement. *See Change of Law Order*, issued December 12, 2007, Case No. 2004-00427, at 2 and 10 (recognizing that the Commission lacks authority to determine rates for Section 271 elements). Despite this fact, SouthEast has asked the Commission to unilaterally change the rate set forth in a contract over which the Commission has no authority. ("The Commission ...should order AT&T to issue SouthEast bill credits for the difference between the price it currently charges...and the existing contract prices for the unbundled copper loop non designed...and the unbundled exchange port.") Absent a written amendment by the parties to the commercial agreement, SouthEast is obligated

to pay the rate set forth in the contract for the WLP circuits it has ordered and continues to order. The Commission cannot unilaterally change the rate in the commercial agreement for the existing WLP circuits.

Perhaps appreciating that the Commission cannot change the rate in the commercial agreement, SouthEast claims that it wants to "convert" its existing circuits to the commingled arrangement. This argument is no more persuasive than the request that the Commission change the contract rate. The WLP is a defined product for which there is a specified contractual rate. The Commission has no jurisdiction to order AT&T Kentucky to convert a specific market-based product (the WLP) over which the Commission has no jurisdiction, to a different product (the commingled UCL-ND plus port) any more than it can order AT&T Kentucky to change the rate for the WLP set forth in the commercial agreement. Once the commingled ordering process is in place, SouthEast can place new orders for the commingled product, assuming a UCL-ND circuit is available at the requested location. The parties' commercial agreement, however, will remain in effect, and WLP circuits ordered out of that agreement will be billed at the agreed-upon WLP rates specified in the contract.

In short, SouthEast is asking the Commission to exceed its section 251 jurisdiction and regulate the parties' commercial agreement. The Commission should not follow SouthEast down this unlawful path.

Even if the Commission had jurisdiction over the commercial agreement (which it does not), the Commission cannot unilaterally change the terms of the parties' contract. A court is "not at liberty to revise, modify, or distort an agreement while professing to construe it, and *has no right* to make a different contract from that actually made by the

parties." *Williston on Contracts*, Chapter 31, section 5. Similarly, regulatory agencies cannot and should not change parties' contracts.

In addition to black-letter law, and contrary to the position that SouthEast advocates, there is no precedent to support the unilateral change to a contract over which the Commission has no jurisdiction. SouthEast cites to the parties' October 2001 amendment to their interconnection agreement. First, that decision involved an interconnection agreement rather than a commercial agreement and thus is inapplicable. Second, in that amendment, the parties specifically provided for a true-up as a term in the contract. There is no such provision in the parties' commercial agreement that allows for a "true-up" if SouthEast decides it wants to order a new service (i.e., a commingled UCL-ND plus port rather than a WLP). Finally, the October 2001 amendment was necessitated due to change in law that eliminated the availability of DSL over UNE-P. Because the parties were removing a service from the interconnection agreement, they had to make provision for the transition of existing circuits from the obsolete service to a new service. In the present case, no service is being removed from any contract – rather, SouthEast seeks to order a new product, and AT&T Kentucky is working to develop it.

SouthEast's request for relief is further flawed in that there is no evidence that the WLP circuits in place today are provisioned over UCL-ND loops. A UCL-ND loop is a defined product with specific technical parameters. All loops are not UCL-ND loops -- only a portion of loops in Kentucky meet the technical parameters of the UCL-ND. While SouthEast blithely claims that it has submitted "hundred of orders for nondesigned copper loops [that have been] made and filled in the past," there is no

proof or evidence that this assertion is true. It seems highly unlikely that SouthEast conducted a loop-makeup inquiry prior to submitting its orders for wholesale local platform circuits. Thus, there is no way of knowing whether SouthEast's current circuits use UCL-ND loops or not. Without such evidence, a sweeping Commission order reducing the rates of all of the circuits would be speculative and factually unsupportable, even if it were otherwise legally appropriate (which it is not).

In sum, granting SouthEast's requested relief would violate sound public policy. Contracts are the means by which customers and suppliers do business. Written contracts set forth the terms by which the parties will govern themselves. A written contract gives each party certainty as to how business between them will be conducted, what services will be provided and what rates will be paid.

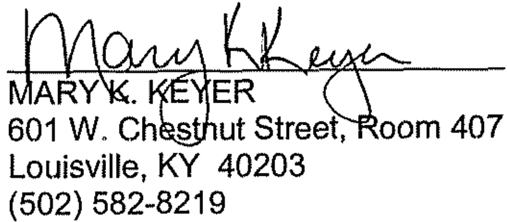
Even if they had the authority to do so, which they do not, regulatory bodies cannot be in the business of rewriting contracts at the request of one party. Such a practice would create unacceptable uncertainty in business relationships. Moreover, it would violate the sanctity of contracts and the ability of parties to govern themselves according to those contracts.

AT&T Kentucky will abide by its obligation in Kentucky to commingle section 251 elements with section 271 elements by developing a process pursuant to which those elements can be ordered. AT&T Kentucky is working with all deliberate speed to implement such a process. In the interim, the Commission should decline SouthEast's suggestion that it unlawfully rewrite the parties' commercial agreement in violation of sound public policy.

CONCLUSION

For these reasons, the Commission should deny the relief requested by SouthEast.

Respectfully submitted,



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CERTIFICATE OF SERVICE KPSC 2008-00279

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals via U.S. Mail this 6th day of October 2008.

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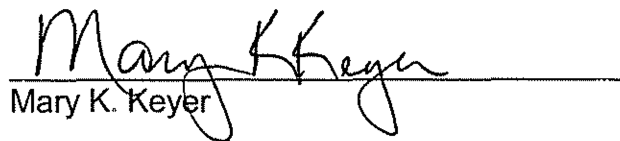

Mary K. Keyer