BEFORE THE STATE OF KENTUCKY
PUBLIC SERVICE COMMISSION

Z-TEL COMMUNICATIONS, INC., Complainant, v. BELLSOUTH TELECOMMUNICATIONS, INC. Respondent.	No. 2003-00368

COMPLAINT

Complainant Z-Tel Communications, Inc. ("Z-Tel") hereby brings this Complaint against BellSouth Telecommunications, Inc. ("BellSouth") for a refund of monies owed for BellSouth's overcharging of rates. Z-Tel respectfully shows:

I. BACKGROUND

1. Z-Tel is a Delaware corporation with corporate offices in Florida. Z-Tel's business address is 601 South Harbour Boulevard, Suite 220, Tampa, Florida 33602

2. BellSouth is a Georgia corporation with corporate offices in Georgia. BellSouth's business address is 675 West Peachtree Street, NE, Atlanta, Georgia 30375.

3. Z-Tel is a competitive local exchange carrier ("CLEC") that offers bundled packages of local, long distance, and enhanced services to residential and small business consumers using the combination of unbundled network elements ("UNEs") known as the UNE Platform, or "UNE-P." At present, Z-Tel provides integrated local, long distance, and enhanced services to more than 200,000 consumers, located in 46 states, including Kentucky.

4. BellSouth is an incumbent local telecommunications provider that operates in the Southeastern portion of the United States. As an incumbent provider, BellSouth controls access

to the local telecommunications networks over which Z-Tel provides local telecommunications services.

5. Sections 251 and 252 of the 1996 Act, and various rules and orders of this Commission and the Federal Communications Commission ("FCC"), require BellSouth to offer Z-Tel access to BellSouth's network in a manner that is just, reasonable, and non-discriminatory, so that Z-Tel can in turn provide local telecommunications services to its own end-user customers. *See generally* 47 U.S.C. 251; 47 U.S.C. 252; 47 C.F.R. 51.305 through 51.321. In exchange for granting access to its network, BellSouth charges competitive local exchange carriers like Z-Tel various rates ("UNE Rates") for using BellSouth's network.

II. FACTS

6. Pursuant to Section 252 of the 1996 Act, Z-Tel and BellSouth entered into an Interconnection Agreement (the "Original Agreement") in or about October 2000. This Original Agreement was functionally an adoption of an identical interconnection agreement that BellSouth had previously signed with another competitive local carrier, Birch Telecommunications.

7. On December 18, 2001, this Commission adopted its *UNE Order* in Administrative Case Number 382,[1] which established new rates for UNEs that applied as a matter of law.

8. On April 21, 2002, Z-Tel expressly requested an amendment to the Original Agreement to obtain the rates contained in the Commission's *UNE Order* (*see* Exhibit A).

9. By letter dated June 2, 2002 (mailed June 11, 2002), BellSouth notified Z-Tel that it was terminating the Original Agreement and initiating negotiations for a successor agreement.

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[1] *An Inquiry Into the Development of Deaveraged Rates for Unbundled Network Elements*, Order, Administrative Case No. 382 (Dec. 18, 2001) ("*UNE Order*").

Through the second half of 2002 and through the first quarter of 2003, Z-Tel and BellSouth negotiated but were unable to reach agreement on a successor interconnection agreement to the Original Agreement.

10. Z-Tel and BellSouth entered into a revised Interconnection Agreement on April 18, 2003 (the "Revised Agreement"). However, the Original Agreement was in effect from October 2000 until April 18, 2003. The Revised Agreement has only governed the terms of the relationship between Z-Tel and BellSouth from April 18, 2003 until the present.

11. In response to inquiries by Z-Tel and its counsel regarding the availability of the Commission's December 2001 rates, on June 8, 2003 BellSouth denied in writing Z-Tel's request for application of the Commission's *UNE Rates* to the Original Agreement. (*see* Exhibit B).

12. In the June 8, 2003 letter, BellSouth denied Z-Tel's request on the sole ground that Z-Tel had entered into the Revised Agreement, and therefore allegedly could not obtain a true-up for overcharges under the Original Agreement, even though: (a) Z-Tel previously sought the *UNE Rates*; (b) the Original Agreement contained no restriction on Z-Tel's ability to obtain the UNE Rates; (c) and BellSouth never had asserted that the Original Agreement contained any such a restriction.

III. SPECIFIC COUNTS

A. BellSouth Has Violated And Is Violating The Commission's *UNE Order* By Overcharging Z-Tel For UNEs

13. Z-Tel incorporates all of the foregoing paragraphs.

14. As a matter of law, BellSouth's cost-based rates for UNEs changed on December 18, 2001 when the Commission issued its *UNE Order*.

15. The federal Act and the FCC's rules empower this Commission to set TELRIC UNE-P Rates, and further prohibit an incumbent provider such as BellSouth from charging different UNE-P Rates than the TELRIC rates that are set by state Commissions, "unless the different rates could be justified by the costs incurred by the incumbent LEC."[2]

16. The FCC has expressly found that "regulations permitting non-cost based discriminatory treatment [is] prohibited by the 1996 Act." *FCC Local Competition Order*, ¶ 862. The 1996 Act itself requires that UNE-P Rates set by state Commissions be "based on the cost ... of providing the interconnection or network element" and "nondiscriminatory." 47 U.S.C. 252(d)(1)(A); 47 C.F.R. 51.503(a) and 47 C.F.R. 51.503(b).

17. Put another way, only in cases where an incumbent provider like BellSouth can demonstrate that its forward-looking cost of providing a UNE to a specific CLEC is different than that of providing that same UNE to other CLECs, may an incumbent provider set a different rate than that established by the state Commission. That is, the TELRIC cost of BellSouth's provision of UNEs to all CLECs is presumptively the same, and BellSouth bears the burden of demonstrating that its costs of providing UNEs to different CLECs varies. As a matter of law, if BellSouth cannot make this showing, it must charge Z-Tel the UNE-P Rates established by the Commission.

18. Pursuant to 47 U.S.C. 252(d)(1)(A) and 47 C.F.R. 51.503(a) and 51.503(b), the Commission, through orders addressing UNE-P Rates, did in fact establish set limits on the amount that BellSouth could charge Z-Tel for UNE-P Rates, based on the TELRIC methodology required by the 1996 Act and the FCC's rules. In addition, the UNE-P Rates established by the

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2 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, ¶ 861 (1996) (subsequent history omitted) ("*FCC Local Competition Order*").

UNE Order were to take effect almost immediately, as the Commission expressly stated that "BellSouth **shall charge**" the *UNE Order* rates as of December 18, 2001. *UNE Order* at 38 (emphasis added).

19. Therefore, for the period of December 18, 2001 (the date of the *UNE Order*) until April 18, 2003, Z-Tel was paying the higher UNE-P Rates required under the Original Agreement, *even though the Commission had already ruled, in the UNE Order, that the UNE-P Rates should be significantly lower.*

20. BellSouth has not indicated that its forward-looking cost of providing a UNE to Z-Tel is different than that of providing that same UNE to other CLECs. Instead, BellSouth anemically claims that it was impossible to amend the Original Agreement because Z-Tel entered into the Revised Agreement (*see* Exhibit B). This is pure nonsense. Under BellSouth's logic, a CLEC could relieve itself of all existing BellSouth obligations merely by executing a new agreement and then claiming that all pre-existing liability is extinguished. Moreover, as shown in Exhibit A, Z-Tel expressly sought to amend the agreement, but BellSouth refused to do so.

21. As BellSouth has failed to demonstrate that its forward-looking cost of providing a UNE to Z-Tel is different than that of providing that same UNE to other CLECs, which would be required to charge a different rate than that established by the Commission in the *UNE Order*, BellSouth has, as a matter of law, unlawfully overcharged Z-Tel in the amount of $1,268,507.37 for UNE-P Rates for the period December 18, 2001 through April 13, 2003.

22. As Z-Tel has been damaged by this overcharging, Z-Tel now seeks recoupment of payments that Z-Tel made to BellSouth which constituted overcharges in the amount of $1,268,507.37. This amount represents the difference between what BellSouth charged Z-Tel as

UNE-P Rates under the Original Agreement and the lower UNE-P Rates that should have been charged, for the period of December 18, 2001 through April 18, 2003 – the period when BellSouth still charged Z-Tel higher UNE-P Rates under the Original Agreement, *even though the Commission's UNE Order expressly required lower rates to be charged.*

B. Bellsouth Has Violated It's Obligation To Negotiate In Good Faith By Refusing To Provide Z-Tel This Commission's UNE Rates

23. Z-Tel incorporates all of the foregoing paragraphs.

24. FCC rules require incumbent providers such as BellSouth to negotiate the terms of interconnection agreements in "good faith." 47 C.F.R. 51.301(a). "Intentionally obstructing or delaying negotiations or resolutions of disputes" violates the good faith negotiations requirement of the FCC's rules." 47 C.F.R. 51.301(c)(6).

25. The Commission's *UNE Order* established the existing UNE rates was a "regulatory" change that required and requires good faith implementation by BellSouth.

26. Section 16.5 of the Original Agreement states that:

> in the event that any effective legislative, regulatory (including generic proceedings), judicial or other legal action materially affects any material terms of this Agreement ... the Parties shall renegotiate in *good faith* such mutually acceptable new terms as may be required.

Original Agreement, General Terms and Conditions at § 16.5 (emphasis added). The *UNE Order* triggered all interconnection agreement change of law provisions since the December 18, 2002 effective date for amendments incorporating the UNE Rates was required by the Commission.

27. BellSouth, however, refused to negotiate in good faith with Z-Tel first by refusing to respond to Z-Tel request for the rates set in the Commission's *UNE Order* and later by tying implementation of the *UNE Order* rates to BellSouth's unrelated policies, which served to bog

negotiations. These actions violated the duty to negotiate in good faith imposed on BellSouth by 47 C.F.R. 51.301. *See* 47 C.F.R. 51.301(a) and (c)(6).

28. As a result of being wrongfully overcharged the higher UNE-P Rates for the period December 18, 2001 through April 18, 2003, Z-Tel has been damaged in the amount of $1.268.507.37.

IV. PRAYER FOR RELIEF

WHEREFORE, for the reasons as aforesaid, Z-Tel prays that this Commission order BellSouth to refund to Z-Tel the amount of $1,268,507.37, representing the difference between the amount that BellSouth impermissibly charged as UNE-P Rates under the terms of the Original Agreement, and the lower UNE-P Rates that Z-Tel should have been charged under the *UNE Order*, for the period December 18, 2001 through April 13, 2003. In addition, the Commission should provide any such additional relief it deems appropriate.

Respectfully submitted,

Jonathan E. Canis
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Washington, DC 20036
(202) 955-9600

COUNSEL FOR COMPLAINANT Z-TEL COMMUNICATIONS, INC.

Dated: September 23, 2003

Hazzard, Michael

From: Hazzard, Michael
Sent: Friday, May 16, 2003 4:21 PM
To: 'Lynn.Allen-Flood@BellSouth.com'
Subject: FW: TN/Interconnection Agreement/BellSouth and Z-Tel

per our conversation...
-----Original Message-----
From: Rubino, Peggy D [mailto:PRubino@Z-TEL.com]
Sent: Monday, April 29, 2002 10:16 AM
To: 'Allen-Flood, Lynn'
Cc: 'Sharyn Gaston (E-mail)'
Subject: RE: TN/Interconnection Agreement/BellSouth and Z-Tel

Lynn-

We intended to amend the agreement to retlect the rates approved by the TN commission, so if we need to sign a new amendment to do that we will. I would not want this error to hold up implementation of the correct rates, though, so please let me know if you intend to keep billing the rates currently in the contract pending resolution of this issue.

Also, the KY commission approved new UNE rates in 12/01, and I don't think we've received a new amendment reflecting those rates. Would you please prepare one, or re-send it if you've already sent it to me? Thanks.

-----Original Message-----
From: Allen-Flood, Lynn [mailto:Lynn.Allen-Flood@BellSouth.com]
Sent: Thursday, April 11, 2002 7:05 PM
To: 'prubino@z-tel.com'
Cc: Allen-Flood, Lynn
Subject: TN/Interconnection Agreement/BellSouth and Z-Tel

Peggy,
Per my voice mail, attached is the corrected rate sheets for Attachments 2, UNEs, and 3, Network Interconnection, for TN. Z-Tel can elect to amend their contract using these correct sheets reflecting the TN order OR Z-Tel can amend using those rates in the original TN amendment, however, the signature page will need to be edited to say these are updated rates and not say these are per the TN Order.

This needs to be addressed because the TN TRA will not accept the amendment as originally presented. Please let me know if you have any questions.

Thanks,
Lynn

Lynn Allen Flood
BellSouth Telecommunications, Inc.
Manager-Interconnection Services
404-927-1376

<<4112002TNAtt2UNERates.xls>> <<4112002TNAtt3Rates.xls>>

BELLSOUTH

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Sent Via Certified Mail and EMail

July 8, 2003

Mr. Michael B. Hazzard
Counsel to Z-Tel Communications, Inc.
Tysons Corner, 8000 Towers Crescent Drive
Suite 1200
Vienna, Virginia 22182

Dear Mr. Hazzard:

This is in response to your e-mail dated May 16, 2003, that included an attached e-mail from Peggy Rubino dated April 29, 2002. Pursuant to your May 16, 2003 e-mail, Z-Tel Communications, Inc. is requesting to receive retroactive rate treatment for Kentucky rates prior to April 18, 2003, the effective date of the Parties' current interconnection agreement. As you know, the current interconnection agreement reflects the most current Kentucky rates as a result of the Kentucky PSC Order dated December 18, 2001.

BellSouth's policy is not to apply rates retroactively prior to the effective date of the interconnection agreement. Currently, and as of the effective date of the Parties' interconnection agreement, April 18, 2003, Z-Tel has the most recent Kentucky rates.

If you would like to discuss this further, please email me at lynn.allen-flood@bellsouth.com or contact me directly at 404-927-1376.

Sincerely,

Lynn Allen-Flood
Manager – Interconnection Services

Cc: Jerry Hendrix
Beth Shiroishi