COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

A PETITION BY AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC. AND TCG OHIO FOR ARBITRATION OF AN INTERCONNECTION AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO SECTIONS 252(b) OF THE TELECOMMUNICATIONS ACT OF 1996	)))))))	CASE NO. 2000-465

AT&T'S OPPOSITION TO BELLSOUTH'S MOTION FOR RECONSIDERATION

AT&T Communications of the South Central States, Inc. and TCG Ohio (collectively, "AT&T") hereby submits its Opposition to BellSouth's Motion for Reconsideration of the Commission's May 16, 2001, Order in the above-captioned matter. BellSouth's motion should be denied, because it presents no valid reason for the Commission to rehear or reconsider any aspect of its May 16, 2001, Order. BellSouth fails to identify any issues on which the Commission's May 16, 2001, Order is contrary to law or the record in this proceeding. On the contrary, the Commission's Order is well-grounded in the voluminous record of this proceeding, and is consistent with federal and Kentucky law.

ISSUES 4 AND 6: THE COMMISSION CORRECTLY DETERMINED THAT BELLSOUTH MUST COMBINE ELEMENTS IF THOSE ELEMENTS ARE TYPICALLY COMBINED IN BELLSOUTH'S NETWORK

The Commission's decisions on these issues is fully consistent with federal and Kentucky law, and BellSouth's motion presents no new legal or factual issues that were not already presented in its original Post-Hearing Brief and fully considered by the

Commission in its May 16, 2001, Order. First, the Commission's decisions on these issues are fully consistent with FCC rule §51.315(b). In interpreting its own rule, the FCC specifically determined, that "***incumbent LECs are required to perform the functions necessary to combine those elements that are ordinarily combined within their network, in the manner in which they are typically combined.***" *Local Competition Order* ¶ 296. Thus, the Commission's May 16, 2001, Order is fully consistent and compliant with the FCC's determination as to the scope of its own rules.

In no subsequent Order has the FCC ever retracted this position. Because of issues remaining before the Eighth Circuit, the FCC in its subsequent *UNE Remand Order* declined to revisit the "currently combines" requirement of Rule 315(b). *UNE Remand Order* ¶ 479. The FCC did restate, however, the conclusion in its *Local Competition Order* that the "***proper reading of `currently combines' in rule 51.315 (b) means `ordinarily combined within [the incumbent's] network, in the manner which they are typically combined.***'" Id. (emphasis added) That restatement remains the most recent pronouncement by the FCC on this issue.

In deciding this issue, the Commission thus decided, consistent with the intent of the FCC, that Rule 315(b) encompasses the obligation to provide to AT&T all UNEs in combined form which BellSouth ordinarily combines in its network. This is the path chosen by the Georgia Public Service Commission, which ruled that 'currently combines' [as set forth in Rule 315(b)] means ordinarily combined within the BellSouth network, in the manner in which they are typically combined. Thus, CLECs can order combinations of typically combined elements, even if the particular elements being ordered are not

physically connected at the time the order is placed."[1] This also was the approach of the Tennessee Regulatory Authority in its BellSouth/Intermedia Arbitration.[2] There, the TRA held:

> Consistent with the Supreme Court's reinstatement of FCC Rule 351(b) and the standing definition of "currently combines" in the FCC's first report and order, I move to define the term "currently combines" to include any and all combinations that BellSouth currently provides to itself anywhere in its network thereby rejecting BellSouth's position that the term means already combined for a particular customer at a particular location.

The Commission's decisions are fully consistent with these decisions of the Georgia and Tennessee commissions.

Additionally, the Commission's decision is fully supported under its own authority to order that BellSouth combine elements for CLECs. Two decisions uphold the independent authority of the Commission to reach this conclusion. *U.S. West Communications v. MFS Intelenet*, 193 F. 3d 1112 (9th Cir. 1999); *Southwestern Bell Telephone Co. v. Waller Creek Communications, Inc., et. al.*, 221 F 34 812 5th Cir. 2000). In *MFS Intelenet*, the Ninth Circuit held that requiring an ILEC to combine elements is not inconsistent with the Act, "because the Act does not say or imply that network elements may only be leased in discrete parts." *MFS Intelenet*, 193 F.3d at 1121. Similarly, in *Waller Creek*, the Fifth Circuit determined that it was permissible to allow a CLEC to opt into a provision of an agreement requiring an ILEC to combine elements. The court held that "there is nothing 'illegal' about the provision requiring SWBT to

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[1] *Order*, Georgia Public Service Commission, Docket No. 10682-U, February 1, 2000 at 11.

[2] *In Re: Petition for Arbitration of the Interconnection Agreement Between Bellsouth Communications, Inc. and Intermedia Communications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket 99-00948 (February 6, 2001). It also is consistent with the TRA's November 22, 2001, Order in Docket No. 97-01262.

combine network elements for Waller or any other CLEC - nothing in the Act forbids such combinations." *Waller Creek*, 221 F. 3d at 821. The court reasoned that the Eighth Circuit's decision "does not hold that such combinations are prohibited; rather, it only holds that they are not required by law." *Id.*

Finally, requiring BellSouth to provide in combined form those UNEs that BellSouth ordinarily combines in its own network is necessary in order to remain consistent with other FCC rules. Specifically, FCC Rule 309(a) provides:

> An incumbent LEC shall not impose limitations, restrictions or requirements on requests for, or the use of unbundled network elements that would impair the ability of a requesting telecommunications carrier to offer a telecommunications service in the manner the requesting telecommunication carrier intends.

BellSouth cannot restrict the use of stand-alone loops (or switching, or transport) to serve only customers who currently receive service from BellSouth. For instance, when a CLEC orders a loop to serve a particular customer, it is illegal under FCC Rule 309(a) to require that the customer already be served over that facility, because such a requirement would impair the ability of that CLEC to offer a telecommunications service in the manner it intends. Similarly, Rule 309(a) prohibits BellSouth from restricting the use of elements based on the physical status of its connections to other elements (*e.g.*, BellSouth could not prevent a CLEC from using a loop to serve a particular customer because that loop was or was not connected to a switch at the time).

BellSouth admits that it will provide a loop to a CLEC to serve a customer even if there is no loop yet deployed to serve that customer. Yet, for that same customer, BellSouth will not deploy that very same loop to allow the CLEC to use a combination of that loop and switching to provide service to that very same customer. This restriction is

plainly contrary to the prohibition of Rule 309(a), and BellSouth should not be allowed to restrict the use of combinations of elements in such manner.

There should be no doubt that Rule 309(a) applies with equal force to elements in combined as well as discrete form. A combination of elements is just that – a combination ***of elements***. BellSouth is not allowed to control how, when or where a CLEC provisions service once the CLEC purchases UNEs, whether in discrete or in combined form. Under FCC Rule 309(a), it is just as illegal for BellSouth to impose restrictions on the use of elements in combined form as it is for BellSouth to impose restrictions on the use of those same elements in discrete form. There is no basis for BellSouth to impose restrictions on the use of elements merely because they are provisioned in combined rather than discrete form. The Commission's May 16, 2001, Order on these issues is fully consistent with the law and the record in this proceeding, and the Commission should deny BellSouth's motion.

ISSUE 6: THE COMMISSION SHOULD AFFIRM ITS DECISION THAT AT&T SHOULD BE ABLE TO CONVERT SPECIAL ACCESS TO UNBUNDLED ACCESS WITHOUT HAVING TO PAY TERMINATION LIABILITIES

In its *UNE Remand Order*, the FCC allowed for conversion of special access services to either unbundled network elements or to a combination of unbundled network elements, as long as the requesting carrier provides a "significant amount of local exchange service." *UNE Remand Order* ¶ 5. The Commission determined that in doing so, AT&T is not required to pay BellSouth termination liabilities. BellSouth's motion on this issue is nothing more than a rehash of the arguments in BellSouth's Post-Hearing Brief.

Despite what BellSouth says, when AT&T converts special access to unbundled access, AT&T does ***not*** terminate the service. The loop-transport unbundled element combination would continue to serve the same purpose, have the same features, perform the same functions and serve the same customer. Moreover, footnote 985 from the FCC's *UNE Remand Order* does not require the Commisssion to approve BellSouth's proposal to impose termination liability charges. That footnote is in paragraph 486 of the *UNE Remand Order*. The first sentence of that paragraph provides that "under existing law, a requesting carrier is entitled to obtain existing combinations of loop and transport between the end user and the incumbent LEC's serving wire center on an unrestricted basis at unbundled network element prices." The sentence to which the footnote is appended, provides that, "to the extent those unbundled network elements are already combined as a special access circuit, the incumbent may not separate them under rule 51.315(b), which was reinstated by the Supreme Court." Thus, the footnote allowing termination liability charges is premised on the availability of combinations of elements, the very same combinations that BellSouth denied AT&T, thus forcing AT&T to purchase special access.

In a recent Order, the Georgia Public Service Commission ordered BellSouth to provide CLECs with the ability to convert special access services to loop-transport combinations.[3] In doing so, the Georgia Public Service Commission determined that for those loop-transport combinations currently in place, BellSouth's non-recurring cost model would be used. *Georgia Order* at 22. Those rates did not include, nor did BellSouth argue for, "termination liability charges." It was only after the Georgia Public

[3] Order, *In re: Generic Proceeding to Establish Long-Term Pricing Policies For Unbundled Network Elements*, Dkt. No. 10692-U (February 1, 2000) ("Georgia Order").

Service Commission rejected BellSouth's request for a "reasonable profit" in addition to the TELRIC costs for UNE combinations that the issue of "termination liability charges" arose.

In its March 6, 2001 AT&T/BellSouth arbitration decision, the Georgia Public Service Commission further ruled that AT&T is not required to pay "termination liability fees" when it converts special access services AT&T currently has in place to unbundled network elements. The Georgia Public Service Commission held that the rates charged for such conversions should be consistent with the rates previously approved by the Commission.

Similarly, the Commission should adhere to its decision not to allow BellSouth to punish AT&T and other CLECs who convert special access services to network elements. BellSouth presents this issue as being the result of AT&T's "choice" of purchasing special access under a volume or term contract rather than on a month-to-month basis. However, until a year ago, BellSouth refused to provide UNE combinations to AT&T and other CLECs. AT&T thus had ***no choice*** but to purchase special access in lieu of UNE combinations. Even today, BellSouth does not allow AT&T to purchase those UNE combinations electronically, continuing to deny them for all practical purposes.

The conversion of special access to network elements is a mere billing change from special access rates to UNE rates. AT&T does not "want out of the contracts" as BellSouth argues. If the Commission approves BellSouth's proposal, BellSouth ends up with what it wanted all along – to prevent CLECs from using network elements to serve customers who are currently served through special access service.

ISSUE 9: THE COMMISSION CORRECTLY DECIDED THAT AT&T SHOULD BE PERMITTED TO CHARGE THE TANDEM RATE ELEMENT WHEN ITS SWITCHES SERVE A COMPARABLE GEOGRAPHIC AREA TO THAT WHICH BELLSOUTH'S SWITCHES SERVE.

First, BellSouth's assumption is in error that this Commission required proof of functionality as a part of its test for whether AT&T is entitled to the tandem rate. (BellSouth's Motion for Reconsideration at pp. 8-9). Nowhere in this Commission's order is there a statement that the Commission requires AT&T or other CLECs to show that its switches satisfy a functionality test. The Commission merely included in its order an acknowledgement that AT&T demonstrated that its switches perform similar functions to BellSouth's tandem switches. AT&T made this showing at the hearing in this case because at that time, AT&T did not know whether the Commission would require AT&T to satisfy a functionality test or determine that meeting the geographic test satisfies what must be shown.

The FCC recently reiterated that the geographic test is the ***sole*** requirement for establishing that a CLEC is entitled to charge the tandem rate element. In its April 27, 2001 Notice of Proposed Rulemaking, *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 at paragraph 105, the FCC reiterates that the sole test is a geographic one:

> [s]ection 51.711(a)(3) of the Commission's rules requires only that the comparable geographic area test be met before carriers are entitled to the tandem interconnection rate for local call termination. Although there has been some confusion stemming from additional language in the text of the Local Competition order regarding functional equivalency, section 51.711(a)(3) is clear in requiring only a geographic test. Therefore, we confirm that a carrier demonstrating that its switch serves "a geographic area comparable to that served by the incumbent LEC's tandem switch" is entitled

> to the tandem interconnection rate to terminate local telecommunication traffic on its network...(footnotes omitted)

The Commission's decision is correct that AT&T is entitled to charge the tandem rate element. BellSouth's motion for reconsideration on this issue should be denied.

ISSUES 18 AND 19: THE COMMISSION SHOULD DENY BELLSOUTH'S REQUEST TO DELETE A PARAGRAPH IN ITS ORDER CONCERNING THESE ISSUES.

In its motion for reconsideration, BellSouth requests only a clarification of the Commissions conclusions on Issues 18 and 19 and that the clarification confirm that BellSouth need to nothing more than what the Commission outlined on page 12 of its order.

With respect to Issue 18, AT&T requests that the Commission's clarification include a reference to page 11 of the Commission's order where the Commission ordered BellSouth to provide..."documentation, processing intervals, pricing, and terms and conditions" for effectively utilizing any method for ordering OS/DA that BellSouth makes available to AT&T consistent with this Commission's order. AT&T further requests that the clarification include a direction to BellSouth for its documentation to include complete and detailed business rules.

For Issue 19, BellSouth seeks clarification that ..."nothing further is required of BellSouth beyond fulfilling BellSouth's obligation to put in place one of the alternatives set forth on page 12 of the Commission's order." (BellSouth's Motion for Reconsideration at p. 11).

On page 12 of the Commission's order in this case, the Commission found that BellSouth shall either:

(1) establish an "indicator," as opposed to LCCs, that AT&T can sue on specific orders to change OS/DA routing for a customer; or (2) provide AT&T full and complete access to the necessary databases so that AT&T can efficiently and accurately determine the appropriate LCCs for a specific customer order.

AT&T requests that the Commission's clarification include the requirement that, regardless of the option on page 12 of the Commission's order that BellSouth selects for compliance on Issue 19, AT&T's orders for OS/DA routing for a customer will flow through electronically.[4]

ISSUE 23: THERE IS NO NEED FOR THE COMMISSION TO CLARIFY ITS DECISION ON THIS ISSUE

BellSouth states in its Motion for Reconsideration that is does not dispute the Commission's conclusion on this issue. (BellSouth's Motion for Reconsideration at p. 11). The Commission is correct in its holding that BellSouth must provide nondiscriminatory access to its OSS functions at parity with the functionality it provides to itself. (Order at p. 14)

BellSouth claims that the Commission included a "nonessential" paragraph in its order that is "likely to create confusion". (BellSouth's Motion for Reconsideration at p. 12). BellSouth aims to convince the Commission to remove clarifying language that the Commission included in the order. The Commission should not remove the language.

There is nothing confusing in the paragraph that BellSouth calls nonessential. The Commission is fully within its authority and within the scope of the issues in this docket to clarify for BellSouth in this paragraph at least some of the items it considers in

[4] If the Commission has determined that BellSouth is incapable of allowing electronic flow-through of these orders, than AT&T requests that the Commission include in its clarification that BellSouth's systems allow for electronic flow-through of these orders within six months from the date of the order on BellSouth's Motion for Reconsideration.

determining whether BellSouth provides non-discriminatory access to its OSS. The Commission's list of considerations include:

(1) the interfaces used by CLECs must be electronic;

(2) the interfaces must provide the capability to perform functions with the same level of quality and efficiency as BellSouth provides to itself;

(3) the interfaces must have adequate documentation to allow a CLEC to develop and deploy systems and processes, and to train its own employees; and

(4) the interfaces must be able to meet the ordering demand of all CLECs with a response time equal to that which BellSouth provides itself.

The paragraph is not confusing or nonessential. The Commission was correct in including these requirements and the paragraph should remain in the order.

Respectfully submitted,

Jim Lamoureux /AD

Jim Lamoureux
Room 8068
1200 Peachtree Street, N.E.
Atlanta, GA 30309
(404) 810-4196

Attorney for AT&T Communications of the South Central States, Inc. and TCG Ohio

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