COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION BY AT&T COMMUNICATIONS OF THE SOUTH CENTRAL STATES, INC. AND TCG OHIO FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF A PROPOSED AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. PURSUANT TO 47 U.S.C. SECTION 252	))))))	CASE NO. 2000-465

BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR RECONSIDERATION OF MAY 16, 2001, ORDER

BellSouth Telecommunications, Inc., ("BellSouth"), by counsel, pursuant to KRS 278.400, hereby respectfully requests reconsideration of the Commission's Order issued May 16, 2001. Specifically, BellSouth requests reconsideration of the following issues for the reasons provided herein.

Issue 4: What does "currently combines" mean as that phrase is used in 57 C.F.R. §51.315(b)?

Issue 5: Should BellSouth be permitted to charge AT&T a "glue charge" when BellSouth combines network elements?

Issues 4 and 5 deal with combinations of unbundled network elements. The Commission found BellSouth must combine unbundled network elements for AT&T if the elements are typically combined by BellSouth in its network, and must do so for a charge that is determined in accord with the TELRIC methodology. BellSouth

respectfully seeks reconsideration of this portion of the Commission's decision because BellSouth believes it is contrary to law.

The Commission's Order requires BellSouth to combine UNEs at any location in Kentucky even where they are not presently combined. Moreover, the Commission's Order requires that BellSouth perform this combining at a price that may have no relationship to the current cost of performing the "combining" work. This result is contrary to the FCC's present determination and contrary to existing case law.

An illustration may help to clarify this issue. When a residential customer in Louisville orders basic residential service, BellSouth provides that service using a local loop that runs from the customer's serving central office to the customer's location. That loop is connected at one end to the customer's premise and on the other end to BellSouth's switch via a port. Both the loop and the port are unbundled network elements and can be purchased separately by any CLEC. When purchased as unbundled network elements, the CLECs can use the loop and the port with its own network facilities, or the CLEC can combine the loop and the port itself, without using any of its own facilities.

At the same time, where BellSouth already has combined the loop and port to provide service to a specific location, a CLEC can buy that already combined loop and port. None of the foregoing is in dispute. Both parties agree that the law requires that BellSouth sell unbundled network elements to AT&T, and where BellSouth already has combined the specific loop and port AT&T wants, BellSouth must furnish that combination to AT&T.

However, the Commission's Order on issues 4 and 5 goes well beyond the legal requirements with respect to combining UNEs, requiring BellSouth to combine loops and ports for a CLEC at **any location** in the Commonwealth of Kentucky, even where the specific loop and port that the CLEC requests is not combined. That is contrary to the same law upon which the Commission relies in its Order.

Specifically, the Commission, in reaching its decision, relied on the language of 47 U.S.C.A. § 251 (c)(3), which imposes on ILECs:

> The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(Order at 4)

The last sentence of the above quote clearly requires CLECs to combine unbundled network elements, and says nothing about requiring ILECs to perform the "combining" function.

The FCC's initial interpretation of the 1996 Act was the same as contained in this Commission's Order, i.e., requiring ILECs to combine UNEs upon the request of a CLEC. The FCC's interpretation was codified in FCC Rules 51.315(c), which provided in pertinent part that: "Upon request, an incumbent LEC shall perform the functions necessary to combine unbundled network elements in any manner, even if those elements are not ordinarily combined in the incumbent LEC's network…."

CFR § 51.315(c), however, was **vacated** by the 8th Circuit Court of Appeals in *Iowa Utils. Bd. v. FCC*, 120 F.3rd 753 (8th Cir. 1997) *rv'd in part*, 525. U.S. 366 (1999),

cert. granted, in part, ____ U.S. ____, 121 S. Ct. 878 (2001).[1] **The reversal of this rule was not a part of the appeal to the Supreme Court of the United States and that part of the 8th Circuit's decision was not reviewed, vacated or reversed.** The Eighth Circuit, as part of its review of those sections of its decision that were reviewed by the Supreme Court and remanded for further action, reconsidered, essentially on its own motion, its ruling vacating this particular subsection. That is, even though it was not required to do so, the 8th Circuit again reviewed its decision to vacate CFR §51.315(c), and **confirmed** its earlier ruling. The 8th Circuit Court of Appeals said:

> Rule 51.315(b) prohibits the ILECs from separating previously combined network elements before leasing the elements to competitors. The Supreme Court held that 51.315(b) is rational because "[section] 251(c)(3) of the Act is ambiguous on whether leased network elements may or must be separated." AT&T Corp, 525 U.S. at 395. Therefore, under the second prong of Chevron, the Supreme Court concluded 541.315(b) was a reasonable interpretation of an ambiguous statute.
>
> Unlike 51.315(b), subsections (c)-(f) pertain to the combination of network elements. Section 251(c)(3) specifically addresses the combination of network elements. It states, in part, "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service. **Here, Congress has directly spoken on the issue of who shall combine previously uncombined network elements. It is the requesting carriers who shall "combine such elements." It is not the duty of the ILEC to "perform the functions necessary to combine unbundled network elements in any manner" as required by the FCC's rule. [Emphasis added.] See 47 C.F.R. §51.315(c).**

As the 8th Circuit clearly stated, "Here Congress has directly spoken on the issue of who shall combine previously uncombined network elements." It is the CLEC's, not

[1] On cert, the Supreme Court agreed to consider, among other issues, whether 47 U.S.C. §251(c)(3) prohibits regulators from requiring that ILEC's combine certain previously uncombined network elements when a new entrant requests the combination and agrees to compensate the incumbent for performing that task.

BellSouth's, duty to combine previously uncombined network elements. To the extent this Commission concludes that this requirement puts additional costs on CLECs, that is the clear decision of Congress, as confirmed by the courts.

Further, the FCC has demonstrated that it understood what it had been told by the 8th Circuit in its first order addressing these rules. In the FCC's Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, released November 5, 1999 ("UNE Remand Order"), the FCC confirmed that ILECs presently have no obligation to combine network elements for CLECs when those elements are not currently combined in BellSouth's network. As the FCC made clear, Rule 51.315(b) applies to elements that are "in fact" combined, stating that "[t]o the extent an unbundled loop is in fact connected to unbundled dedicated transport, the statute and our rule 51.315(b) require the incumbent to provide such elements to requesting carriers in combined form." (¶ 480). The FCC declined to adopt a definition of "currently combines," as AT&T proposes in this case, that would include all elements "ordinarily combined" in the incumbent's network. *Id.* (declining to "interpret rule 51.315(b) as requiring incumbents to combine unbundled network elements that are 'ordinarily combined'…"). This Commission should reach that same conclusion.

As noted previously, even though not required to do so by law, BellSouth will combine unbundled network elements for CLECs, but it is BellSouth's position that TELRIC-based pricing is not appropriate under these circumstances. Because a TELRIC-based price, is based on a forward-looking cost that bears no necessary relationship to the current cost of doing such work, it is not appropriate to compensate BellSouth for work the company has no legal obligation to perform. In such

circumstances, if a CLEC requests that BellSouth combine unbundled network elements for the CLEC, BellSouth should be able to charge the price at which it is willing to do the work, and should have the right to reject any work at a lesser price.

The Commission's decision, as presently written, imposes a greater burden on BellSouth than is legally permissible. The Commission should reconsider its decision on this issue.

Issue 6: Under what rates, terms, and conditions may AT&T purchase network elements or combinations to replace services currently purchased from BellSouth tariffs? (UNEs, Attachment 2, Section 2.11)

Issue 6 involves a contractual dispute between AT&T and BellSouth. AT&T purchased special access services from BellSouth under a contract where AT&T committed to paying BellSouth at a certain revenue level each month in exchange for a discount that effectively provided AT&T with a reduced price on each of the individual special access services. Now AT&T seeks to convert some of the special access services it purchased into the services' constituent unbundled network elements. There is no dispute that AT&T's motivation here is to avoid payment of termination liability that it has contractually agreed to pay. Purchasing unbundled network elements that are currently being used to provide special access services would be cheaper than purchasing the services themselves. If AT&T makes these conversions, and the revenue it pays BellSouth falls below the agreed upon level, AT&T will owe termination liability to BellSouth. AT&T is merely seeking to avoid termination liability it will owe.

The Commission erred in concluding that AT&T should be allowed to convert special access services to the services' underlying unbundled network elements without

paying a termination charge[2]. The difficulty with the Commission's conclusion is that the payment of termination liabilities is not predicated on whether the service was terminated, but rather on whether AT&T paid the amount of money to BellSouth that it contractually bound itself to pay. Allowing AT&T to avoid paying termination liability amounts to rewriting a valid and binding contract between AT&T and BellSouth.

Moreover, the FCC specifically addressed this issue and found that such termination liability must be paid under these circumstances. In its Third Report and Order, *In re: In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 99-238, released November 5, 1999, the FCC specifically said:

> We note, however, that any substitution of unbundled network elements for special access would require the requesting carrier to pay any appropriate termination penalties required under volume or term contracts.

Id. at n. 985.

Clearly the FCC acknowledged that the conversion of special access into unbundled network elements could trigger termination liabilities, even though the service itself was not terminated. The terms of the contract that AT&T agreed to, which are not in dispute in this proceeding, control the outcome of this issue.

BellSouth respectfully suggests that the Commission has reached the wrong conclusion regarding this issue, and has done so in a way that impairs a valid contract, in violation of law. BellSouth requests that the Commission reconsider its position, and find in favor of BellSouth on this issue.

---

[2] "No service is terminated, and thus, the Commission finds that the termination liability charge should not be assessed . . . ." Order at 6.

ISSUE 9: Should AT&T be permitted to charge tandem rate elements when its switch serves a geographic area comparable to that served by BellSouth's tandem switch? (Local Interconnection, Attachment 3, Section 1.3)

Issue 9 involves the question of whether AT&T will be compensated for a service that it does not provide. That is, AT&T has requested that this Commission order BellSouth pay AT&T for switching calls that originate from BellSouth's subscribers and terminate at AT&T's subscribers, as if every such call were switched twice, even though the call may have only been switched once.

The dispute between AT&T and BellSouth regarding this issue has two aspects. First, the parties disagree as to the test the Commission should use to determine whether AT&T was entitled to be paid for something it did not do. BellSouth argued that AT&T had to show that its switches performed the same function as BellSouth's tandem switches, and also show that AT&T's switches served the same geographic area as BellSouth's switches. AT&T argued that it only had to show its switches covered the same geographic area as BellSouth's switches. After making a decision as to the correct test, the Commission was required to apply that test to the facts at hand to see if AT&T met the test in Kentucky.

The Commission apparently decided that BellSouth's version of the test was correct because it found that AT&T "presented information to demonstrate that its switch

performs similar functions to those performed by BellSouth's tandem switch." (Order at 8).[3] However, even though the Commission ordered AT&T should be compensated at the tandem interconnection rate, the Commission did not find, as a factual matter, that the AT&T switches served the same geographic area as the BellSouth tandem switches. Thus, it appears the Commission's order does not address the specific, undisputed test both parties agreed applies to this issue.

In the absence of a specific finding that AT&T's switches serve the same geographic area as BellSouth's switches, the Commission's conclusion that AT&T is entitled to always be compensated at the tandem interconnection rate does not comport with the law and should be reconsidered. The evidence of record and the Commission's factual findings do not support compensating AT&T at the tandem interconnection rate. AT&T has a single "local" switch located in Kentucky as does TCG. Both switches are located in Louisville. (Transcript, pages 77-78). AT&T claims to also serve portions of Kentucky from switches located in Indianapolis, Indiana; Cincinnati, Ohio; and Bloomington, Indiana. (Transcript, pages 77-79). More specifically, AT&T claims that switches located hundreds of miles from Kentucky are "local" switches "capable" of serving any point in Kentucky. *Id.*

AT&T could as easily claim to be serving a "comparable" geographic area even if it only had a single switch in the United States and that switch were located in Butte, Montana. Accepting AT&T's argument, if AT&T were capable of running a line from a single switch in Butte, Montana to any point in the Commonwealth of Kentucky, then

[3] BellSouth would note that subsequent to the hearing in this matter, the FCC has made it clear that its rules require only that the "geographic" test need be applied in cases like this. Since the Commission found that AT&T's switches perform the same functions, that matter now is moot.

AT&T would "serve" all of Kentucky and would be entitled to compensation at a tandem switch rate. This conclusion would nullify 47 C.F.R. § 51.711 (a)(3). If the placement of a single switch, coupled with a claim that AT&T "could" run lines to any part of the country was what the FCC intended when it enacted the "geographic" scope rule, the FCC would have said: "AT&T always gets the tandem rate." Of course, that is not the meaning of the rule. AT&T also has to show actual geographic coverage; AT&T has to show that it actually serves the areas in question, not that it is just capable of doing so.

AT&T has not met its burden in this proceeding because it has not shown it actually serves the same geographic area that is served by BellSouth's access tandems. Therefore, AT&T is not entitled to a finding it should be paid the tandem interconnection rate by BellSouth. BellSouth respectfully requests the Commission reverse its decision on this issue.

ISSUE 18: Has BellSouth provided sufficient customized routing in accordance with State and Federal law to allow it to avoid providing Operator Services/Directory Assistance ("OS/DA") as a UNE?

ISSUE 19: What procedure should be established for AT&T to obtain loop-port combinations (UNE-P) using both Infrastructure and Customer Specific Provisioning? (Attachment 7, Sections 3.20 – 3.24)

BellSouth requests clarification of the Commission's conclusions on Issues 18 and 19. With regard to Issue 18, the Commission's Order directs BellSouth to provide AT&T with a workable process to effectively utilize LCCs or AIN. With regard to Issue 19, the Commission directs BellSouth to either (1) establish an indicator AT&T can use on specific orders or (2) provide AT&T full and complete access to the necessary

databases so that AT&T can efficiently and accurately determine appropriate LCCs for a specific customer order.

BellSouth stated, in its closing brief, that the "footprint" issue, that is the issue of how AT&T would place an order establishing the various options it wanted in individual central offices had been settled. AT&T in its closing brief did not concede that point, but in subsequent arbitrations, AT&T's witness, Mr. Bradbury, has clearly stated that the "footprint" issue has been settled.[4] BellSouth currently is exploring the second option the Commission authorized, that is, allowing AT&T to have access to BellSouth's databases so that AT&T can determine the appropriate LCCs to use on a specific customer order for itself.

Assuming AT&T does not deny in its response to this Motion that the "footprint" order has been settled, BellSouth asks for 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.

ISSUE 23: What should be the resolution of the following OSS issues currently pending in the change control process but not yet provided? (OSS, Attachment 7, Exhibit A)

a) parsed customer service records for pre-ordering?
b) ability to submit orders electronically for all services and elements?
c) electronic processing after electronic ordering, without subsequent manual processing by BellSouth personnel?

BellSouth's concern with Issue 23 is not with the result that the Commission reached. The Commission noted that sub-issue 1 was currently pending in the Change

[4] For instance, in Tennessee, Mr. Bradbury stated: "Mr. Lackey talked earlier that we've settled a portion of this issue, and I'm happy to agree that we have. It's the issue -- portion of the issue for placing the original what I call "footprint order" to get arrangements in place. (Tennessee Docket 00-00079, Volume 1A, page 150)

Control Process, where it should be resolved, and that with regard to the other two sub-issues, they were under review in other proceedings inquiring as to whether BellSouth should be granted interLATA relief. BellSouth has no quarrel with those findings.

However, after making those findings, the Commission included an additional, and nonessential, paragraph that appears likely to create confusion. The Commission stated that "non-discriminatory access…means that (1) the interfaces used by CLECs must be electronic…." (Order at 14). The questioned paragraph in the Commission's Order is not essential to the resolution of the issues presented for decision by the Commission, and if this verbiage is allowed to remain in the Order, it could raise issues about whether the Commission, in spite of its decision to defer this type of issue to the pending 271 proceedings, has pre-determined the issue in a way inconsistent with the legal requirements.

This reference to electronic ordering evidently stems from the fact that not every order an AT&T customer service representative takes from an AT&T customer can be electronically transmitted to BellSouth. Instead, for some orders, the AT&T service representative has to take the order from its potential customer, print the order out, and then manually transmit the order to BellSouth. This is usually done by facsimile. (Transcript, page 192). When the printed order is received in the BellSouth Local Carrier Service Center (LCSC), a BellSouth worker in that center enters the order into one of BellSouth's systems, either DOE (Direct Order Entry) or SONGS (Service Order Negotiation System) (Transcript, page 200). Currently, more than 88% of orders are taken electronically for the CLEC group as a whole. (Transcript, page 203). What AT&T asked the Commission to do in this sub-issue was to order BellSouth to accept

every order electronically, if AT&T chooses to submit the order electronically. (Transcript, page 192). This seems to be what the Commission has suggested is appropriate in the paragraph of the Order in question.

There are several problems with AT&T's position. First, the orders that are involved here are generally complex orders. (Transcript, page 193). The specific computer programming and cost that would be necessary to accept such orders electronically is unknown. Second, despite AT&T's assertions to the contrary, BellSouth's similar complex orders for its retail customers are first handled by BellSouth's account teams, who then send these orders to the appropriate BellSouth service representatives for entry into the appropriate service order negotiation system. (Transcript, pages 195-200). That is, BellSouth handles these orders manually, and the orders are handled by BellSouth at least twice, just as AT&T's orders are handled twice. There is no discrimination in the way BellSouth's retail customer service units are treated as compared to the way AT&T's complex orders are handled.

Moreover, the FCC has not imposed an entirely electronic interface requirement on either SBC or Verizon when granting those companies' applications for interLATA relief. For instance, in the Bell Atlantic decision, the FCC acknowledged that some complex orders would be submitted manually. (*Application by Bell Atlantic New York for Authorization Under Section 271 To Provide In-Region, InterLATA Service*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC 3953, released Dec. 22, 1999 ("Bell Atlantic Order") at Paragraph 92, Footnote 230). Since the paragraph in question is not essential to the resolution of the issue, BellSouth respectfully requests that the Commission delete that paragraph.

Conclusion

For the stated reasons, BellSouth respectfully requests that the Commission grant reconsideration of Issues 4, 5, 6, 9, 18, 19 and 23 and modify or clarify, as appropriate, its May 16, 2001 Order based on the grounds BellSouth has stated herein.

Respectfully submitted,

Creighton E. Mershon, Sr.
601 West Chestnut Street, Room 407
P. O. Box 32410
Louisville, KY 40232

R. Douglas Lackey
Suite 4300, BellSouth Center
675 West Peachtree Street, NE
Atlanta, GA 30375

COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

390850v2