COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF BELLSOUTH TELECOMMUNICATIONS, INC. TO ESTABLISH GENERIC DOCKET TO CONSIDER AMENDMENTS TO INTERCONNECTION AGREEMENTS RESULTING FROM CHANGES OF LAW	)))))	CASE NO. 2004-00427

MOTION OF BELLSOUTH TELECOMMUNICATIONS, INC.
AND RESPONSE TO COVAD'S OPPOSITION TO
BELLSOUTH'S CROSS-MOTION FOR DECLARATORY RULING

INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, hereby moves the Commission to permit the filing of this Response to Covad's Opposition to BellSouth's Cross Motion for Declaratory Ruling ("Covad's Opposition"). BellSouth believes this response will be of assistance to this Commission in its evaluation of this matter.

DISCUSSION

I. Neither Section 271 Nor Section 252 Authorizes This Commission to Establish Rates and Conditions for Access to Facilities That Must Be Offered Solely Under Section 271

The gist of Covad's Opposition is that references in Section 271(c)(1) to agreements "approved under section 252" support a state commission's assertion of Section 271 authority. Covad's claims, however, ignore completely the language in Section 252. Specifically, a state commission's authority to set prices under Section 252(d)(1) is expressly limited to items that must be offered "under subsection (c)(3) of that section [251]." Thus, Covad's claim that Congress permitted states to establish Section 271 rates in Section 252

arbitrations (Covad's Opposition, p. 1) conflicts directly with the statutory language. What Congress actually provided was that state commissions could set rates for items that must be offered under Section 251(c)(3). Congress did not allow states to set rates for the purposes of the competitive checklist under Section 271.

Covad also is incorrect when it alleges that BellSouth is arguing merely over the rates that should be included in interconnection agreements, rather than whether state commissions have the authority, at the outset, to consider Section 271 rates and terms (Covad's Opposition, p. 10). On the contrary, the initial and definitive issue is whether state commissions have authority to determine Section 271 rates and terms. It is clear upon review of the statutory language setting the scope of a state commission's authority under Section 252, that *a state commission cannot assert any authority over Section 271 because it cannot address Section 271 pricing.* Consequently, this statutory language makes clear that state commissions cannot, as Covad claims, "establish § 271 rates in §252 arbitrations." (Covad's Opposition, p. 1).

Since the Act makes clear that state commissions cannot establish Section 271 pricing, the dispute centers on the meaning of the reference in Section 271 to binding agreements under Section 252. Under Covad's theory, if BellSouth must include Section 271 terms in Section 252 Agreements, BellSouth is out of compliance with the Act when it offers CLECs Section 271 services through commercial agreements and tariffs rather than Section 252 interconnection agreements. Covad then asserts that state commissions can address such alleged non-compliance.

However, Covad's theory is based on a premise the FCC has plainly rejected. First, the FCC has clearly stated that it, and not state commissions, is charged with enforcement

authority over Section 271 – "[i]n the event a BOC has already received section 271 authorization, section 271(d)(6) grants the [FCC] enforcement authority to ensure that the BOC continues to comply with the market opening requirements of section 271." *TRO* ¶ 665. Also, the FCC has answered the question of how BellSouth must comply with its Section 271 obligations, and the answer is not to address these duties in Section 252 interconnection agreements.

Instead, the FCC has confirmed that "a BOC might satisfy [the 201 and 202] standard by demonstrating that the rate for a section 271 network element is at or below the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff . . . ." *TRO* ¶ 664. Likewise, "a BOC might demonstrate that the rate at which it offers a section 271 network element is reasonable by showing that it has entered into arms-length agreements with other, similarly situated purchasing carriers to provide the element at that rate." *Id.* Furthermore, if Covad has an issue with BellSouth concerning Section 271 network elements, Covad's remedy must be an enforcement proceeding at the FCC because the FCC has unequivocally stated that it, and not state commissions, will investigate whether Section 271 rates satisfy the just and reasonable standard. *Id.* Thus, Covad's claim that a state commission, and not the FCC, has enforcement authority under § 271(d)(6) (Covad's Opposition, n. 11), is in error.

In addition, Covad cannot circumvent the statutory language by its alleged reliance on out-of-date "FCC precedent." (Covad's Opposition, p. 5). Covad's reliance is based on three Section 271 orders issued at a time when Section 271 and Section 251 obligations were identical, and prior to issuance of the *TRO*. As noted above, in the *TRO* the FCC plainly stated that BOCs could satisfy their Section 271 obligations through interstate access tariffs

or arms-length agreements. *TRO* ¶ 664. Indeed, in the *TRO* the FCC also made clear that "BOCs must continue to comply with any condition required for approval, *consistent with changes in the law.*" *TRO* ¶ 665. Thus, the FCC's pre-*TRO* comments regarding state-approved interconnection agreements (*see* Covad's Opposition, n. 12, n. 13), do not mean that Section 271 rates and terms must be included in Section 252 interconnection agreements. Once Section 271 and Section 251 obligations no longer mirror one another, obligations that arise solely form Section 271 are within the exclusive jurisdiction of the FCC.

II. Covad's Preemption Argument Ignores *USTA II* and the Weight of Authority

In claiming that a state commission is not preempted from addressing Section 271, Covad continues to rely upon its mistaken theory that CLECs can insist upon including Section 271 pricing in Section 252 interconnection agreements. As explained above, that premise is fundamentally flawed. Covad compounds this error by improperly attempting to expand a state commission's consultative role in the Section 271 process to an ongoing enforcement and implementation role. In doing so, Covad ignores the reality that, when Congress has assigned a responsibility to the FCC, the FCC, and not 51 separate state bodies must make the relevant determinations. Indeed, given *USTA II*[1] and the D.C. Circuit's forceful rejection of the FCC's subdelegation of Section 251(d)(2) authority, Covad's arguments are particularly misplaced.

The FCC has made clear that "the statute makes no mention of a state role in setting rates for facilities or services that are provided by Bell companies to comply with Section 271 and are *not* governed by Section 251(c)(3)."[2] Indeed, Covad is wrong to suggest that this

[1] *United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *cert. denied,* 125 S. Ct. 313 (2004).
[2] September 2004 Brief of the FCC in opposition to *certiorari,* S. Ct. Docket Nos. 04-12, 04-15, and 04-18. *See also* Memorandum Opinion and Order and Notice of Inquiry, WC Docket No. 03-251 (Mar. 25, 2005).

Commission can simply implement the FCC's just and reasonable standard, given that the FCC has explained it "has yet to apply its announced 'just and reasonable' approach to rates in any State."[3]

Significantly, two federal district courts in BellSouth's region, including the federal district court for the eastern District of Kentucky, have specifically recognized that enforcement authority for Section 271 unbundling lies with the FCC and must be challenged at the FCC.[4] As a matter of law, Judge Hood's opinion, not some tally of courts and commissions, confirms the answer to this question for the Kentucky Commission.[5]

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[3] *Id.*

[4] *BellSouth Telecommunications, Inc. v. Cinergy Communications Co., et al.,* Civil Action No. 3:05-CV-16-JMH, Memorandum Opinion and Order, (E.D. Ky. Apr. 22, 2005). ("No new adds Injunction Order".) See also, *BellSouth Telecommunications, Inc. v. Mississippi Public Serv. Com'n. et al.,* Civil Action No. 3:05CV173LN, Memorandum Opinion and Order (S.D. MS. Apr. 13, 2005).

[5] Covad's claim that a greater number of states have addressed Section 271 in a manner that supports its arguments is in error. Further, Covad has not cited to any federal court decision that supports its position. The Tennessee decision is the subject of an on-going preemption petition before the FCC. Both the Maine and New Hampshire Commissions made clear that they were not asserting independent authority to define the scope of 271 obligations. The Oklahoma decision, by its terms, is an "interim" ruling that is in place for a limited timeframe. The Illinois Commission stated in the XO Order, that it was "reconsidering its unbundling power and associated decisions . . . after the remand in USTA II." Numerous parties already have sought review of the decision of the Illinois Administrative Law Judge upon which Covad relies.

If all state decisions addressing Section 271, no matter how cursory their discussion, in the manner that supported BellSouth's arguments were added, BellSouth would include decisions from state commissions in:

New York [*See also Ordinary Tariff Filing of Verizon New York Inc. to Comply with the FCC's Triennial Review Order on Remand,* New York Public Service Commission Case No. 05-C-0203 (March 13, 2005) ("[g]iven the FCC's decision to not require BOCs to combine 271 elements no longer required to be unbundled under section 251, it seems clear that there is no federal right to 271-based UNE-P arrangements")];

North Carolina [Order Concerning New Adds, *In re: Complaints Against BellSouth Telecommunications, Inc. Regarding Implementation of the Triennial Review Remand Order,* North Carolina Public Service Commission Docket No. P-55, Sub 1550 (Apr. 25, 2005) ("[t]he Commission does not believe that there is an independent warrant under Section 271 for BellSouth to continue to provide UNE-P.")]; and

Alabama [Order Dissolving Temporary Standstill And Granting In Part And Denying In Part Petitions For Emergency Relief, Alabama Public Service Commission Docket No. 29393 (May 25, 2005) ("the ultimate enforcement authority with respect to a regional Bell operating company's alleged failure to meet the continuing requirements of §271 of the Telecommunications Act of 1996 rests with the FCC and not this Commission.")].

Simple arithmetic results in seven decisions supporting BellSouth's position as opposed to Covad's five decisions. Of course, two of those decisions were issued by federal courts and are entitled to greater weight.

III. Covad's "Disguise" Argument is Baseless

In a last-ditch plea for Commission action, Covad cites to a brief filed by *SBC – not BellSouth* – as authority for the proposition that BellSouth *may* be attempting to avoid its Section 271 obligations altogether. Of course, as noted and as Judge Hood has made clear, "enforcement authority for Section 271 unbundling duties lies with the FCC and must be challenged there first."[6]

CONCLUSION

The language in the Act does not support Covad's requested relief. This Commission should confirm, as Judge Hood has held, any Section 271 issues must be addressed to the FCC.

Respectfully submitted,

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[6] "No New Adds Injunction Order" at 12.