COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

RESPONSE OF SOUTHEAST TELEPHONE INC. TO AT&T KENTUCKY'S MOTION FOR RECONSIDERATION AND CLARIFICATION

SouthEast Telephone, Inc. ("SouthEast"), by counsel, responds as follows to the motion of BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky") (the "AT&T Kentucky Motion") for reconsideration and clarification of the Commission's Order of December 12, 2007 (the "PSC Order").

INTRODUCTION

Of the three issues raised in the AT&T Kentucky Motion, this Response addresses only one: AT&T Kentucky's continuing (and erroneous) insistence that it is not required by law to commingle unbundled network elements that continue to be required by Section 251 of the Telecommunications Act of 1996 (the "Act") with facilities and services it is required to provide to competing carriers under other provisions of law, including Section 271 of the Act. AT&T Kentucky offers no legally cognizable basis for its request. The Commission's decision should stand, and AT&T's motion should be denied.

ARGUMENT

The PSC Order contains a five-page, closely and carefully reasoned analysis supporting its conclusion that [1] AT&T Kentucky must permit a requesting carrier to commingle Section 251 UNEs or UNE combinations with "one or more facilities or services" the requesting carrier has "obtained at wholesale from an ILEC pursuant to a method other than unbundling under 47 U.S.C. § 251(c)(3)," including Section 271 competitive checklist elements; and [2] the commingling requirement also constitutes a "continuing obligation relating to interconnection and access to network elements" and must be contained in interconnection agreements filed with the Commission under Section 252 of the Act [PSC Order at 16].

Citing 47 C.F.R. §§ 51.309(e) and (f) and the FCC's Triennial Review Order ("TRO"),[1] the Commission establishes that the Federal Communications Commission's ("FCC") rules require commingling of unbundled network elements and combinations with one or more "facilities or services" obtained at wholesale, including Section 271 elements [PSC Order at 12-13]. The Commission then correctly rejects AT&T Kentucky's argument that, since local switching is no longer a UNE under Section 251 and is not a wholesale service, it is entitled – regardless of any other legal requirement – to deny a competitor's request to commingle switching with 251 UNEs. The Commission correctly concludes, instead, that pursuant to unequivocal FCC authority, AT&T Kentucky's Section 271(c) offerings, including local switching, are "wholesale offerings," and therefore that AT&T Kentucky may not deny a competitor's request to commingle switching with Section 251 UNEs. [PSC Order at 15, n. 29, *quoting Qwest Communications International, Inc. Petition for Forbearance,* 20 FCC Rcd 19415 (2005) ("Qwest Order"). Noting that AT&T Kentucky has produced "no statute, rule, or order"

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16978 (2003) (subsequent history omitted).

to support its position the Commission explains that the FCC has "repeatedly framed the issue" in a manner directly contrary to AT&T's position [PSC Order at 13]. The FCC's definition is broad, and it expressly includes " 'connecting, attaching , or otherwise linking'" a "'UNE, or a UNE combination, to *one or more facilities or services* that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to *any* method *other than unbundling under Section 251(c)(3)* of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services'" [PSC Order at 13, *quoting* the TRO at ¶ 579]. The Commission then goes on to reject AT&T Kentucky's creative arguments to the effect that certain FCC errata should be interpreted, despite context, to invalidate the FCC's published rules as well as its clear statements elsewhere [PSC Order at 14-15].

The plain meaning of the FCC – and the breadth of AT&T Kentucky's express duty pursuant to its rules and pursuant to the applicable statutes -- could not be clearer, as the Commission appropriately found.

AT&T Kentucky Motion offers no new analysis to refute the Commission's careful reasoning. Instead, AT&T Kentucky merely re-hashes its original, discredited arguments concerning its Section 251 stand-alone obligations, which miss the mark entirely. AT&T Kentucky is flat wrong in arguing that, by enforcing the FCC's commingling rules, the Commission would be "resurrecting UNE-P." All elements in a Section 251 UNE-P arrangement were subject to the TELRIC pricing standard. By contrast, when Section 251 UNEs are commingled with Section 271 elements, the latter are subject to the "just and reasonable and nondiscriminatory pricing standard of sections 201 and 202" – which, according to the FCC, "advances Congress's intent that Bell companies provide meaningful access to network

elements" [TRO, ¶ 663]. Given the critical importance of pricing, the commingling of a Section 251 loop with Section 271 unbundled switching most certainly is not "equivalent" to UNE-P.

As authority for its position, AT&T Kentucky offers only a decision by another state commission (Tennessee), while conceding in a footnote that the United States District Court in *NuVox Communications v. Edgar*, 511 F. Supp.2d 1198 (N.D. Fla. 2007) agrees with the Kentucky Commission.[2] Indeed, the Court in *Nuvox* reversed the Florida Commission on the commingling issue, following the unassailable logic of the North Carolina commission instead, which had reasoned that "the dictionary definition of 'wholesale' fits 271 elements, and secondly note[d] that the FCC itself agrees." *Id.* at 1203 (internal citations omitted). The *Nuvox* court also cited the Utah and Colorado commissions' holding that '"there can be no dispute' that 271 elements are wholesale elements" and are therefore subject to commingling with 251 UNEs and 251 UNE combinations *Id.* The *Nuvox* court, like this Commission, also rejected the argument that the FCC errata cited by AT&T Kentucky invalidated its obligation to commingle Section 251 UNEs and UNE combinations with other wholesale elements and services required by law other than Section 251. Indeed, the Court declared that AT&T Kentucky "provide[d] *no* support which would enable this Court to reach any other conclusion." *Id.* at 1203 (emphasis added).

The same is true here.

AT&T's motion must be denied.

[2] AT&T Kentucky also notes that it has appealed that decision to the Eleventh Circuit Court of Appeals.

CONCLUSION

This Commission's decision on commingling is correct. AT&T Kentucky bases its opposition to that decision not on any reasonable interpretation of the law but on its determination to impose artificial restrictions on its competitors' ability to obtain elements and services in ways that will enable them to compete efficiently. Its motion should be denied.

Respectfully submitted,

/s/
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