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December 17, 2007

RECEIVED

DEC 17 2007

PUBLIC SERVICE
COMMISSION

Ms. Elizabeth O'Donnell
Executive Director
Public Service Commission
P.O. Box 615
Frankfort, KY 40602

**RE: *BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect
SouthEast Telephone, Inc. for Non-Payment
Case No. 2005-00519
And
SouthEast Telephone, Inc. v. BellSouth Telecommunications, Inc.
Case No. 2005-00533***

Dear Ms. O'Donnell:

Enclosed please find an original and ten copies of SouthEast Telephone, Inc.'s Further Response to AT&T Kentucky and Supplement Response to Motion for Issuance of Damages Award in the above referenced cases.

Please indicate receipt of this filing by your office by placing a file stamp on the extra copy and returning to me via our runner.

Very truly yours,

STOLL KEENON OGDEN PLLC

Deborah T. Eversole

DFB:jms
Enc.

cc: Mary Keyer, BellSouth

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DEC 17 2007

PUBLIC SERVICE COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

BELLSOUTH TELECOMMUNICATIONS, INC'S)	
NOTICE OF INTENT TO DISCONNECT)	CASE NO.
SOUTHEAST TELEPHONE, INC. FOR NON-)	2005-00519
PAYMENT)	

And

SOUTHEAST TELEPHONE, INC.)	
)	
COMPLAINANT)	CASE NO.
)	2005-00533

vs.

BELLSOUTH TELECOMMUNICATIONS, INC.)
)
DEFENDANT)

SOUTHEAST TELEPHONE, INC.'S FURTHER RESPONSE TO AT&T KENTUCKY AND SUPPLEMENT TO RESPONSE TO MOTION FOR ISSUANCE OF DAMAGES AWARD

SouthEast Telephone, Inc., by counsel, for its Further Response to BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky") and Supplement to its prior Response to Motion for Issuance of Damages Award, states as follows:

* * * * *

The chief purpose of this filing is to call the Commission's attention to the common-sense damages ruling given from the bench in *BellSouth Telecommunications, Inc. v. Georgia Public Service Comm'n, et al.*, Nos. 1:06-CV-00162-CC and 1:06-CV-00972-CC (N.D. Ga., Transcript of Oral Argument dated November 27, 2007) [relevant pages attached hereto]. The Court ruled, as did the federal court in the order on remand under consideration here, *BellSouth*

Telecommunications, Inc. v. Kentucky Public Service Comm'n, et al., C.A. No. 06-65-KKC (E.D. Ky. September 18, 2007) (the "Remand Order"), that a state public service commission lacks jurisdiction under Section 271 of the Telecommunications Act of 1996. Then the Court held that "for the reasons stated by the Georgia Public Service Commission, BellSouth should not be awarded damages in this case" [Transcript at 63]. The reasons stated by the Georgia Commission, are found at page 42 of the Transcript:

[W]hat's at issue is whether the Public Service Commission had the authority to set the just and reasonable rates, not whether the rates set by the Commission were in fact just and reasonable. ...I don't think it would be appropriate in this instance to order damages when the question is whether the PSC had the authority to and not whether the rates were not just and reasonable.

[Transcript at 42].

In short, the ruling in Georgia, like the ruling in Kentucky, was a ruling only on jurisdiction. Thus, in Georgia, as in Kentucky, there is no finding that the rate itself was unjust or unreasonable, and the same reasoning applies.

Although the Remand Order in this case differs in that it directs this Commission to "determine the amount of damages, *if any*, owed to BellSouth," Remand Order, Slip. Op. at 21, the Kentucky court expressly said it "*will not address* the issue of damages." *Id.* (Emphasis added.) Furthermore, the court clearly recognized that there may not be "any" damages that are proper in this case. Thus, this Commission is free to adopt the unassailable logic of the Georgia District Court: in the absence of a ruling as to whether the rates themselves were just and reasonable (as opposed to whether the Commission had authority to set them), there is no basis to conclude that any damages are due. As SouthEast explained in its Response filed on November 29, however, AT&T Kentucky should nevertheless be given the opportunity to show, if it can, that its property was "confiscated" (i.e., that it suffered actual out-of-pocket costs) by

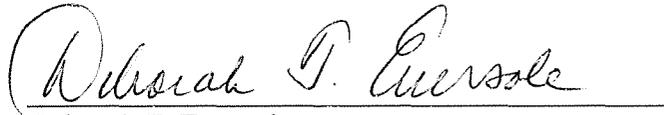
the Commission's orders requiring the interim rate of TELRIC plus one dollar for network elements. This is the only reasonable measurement of "damages" in this case.

In brief response to AT&T's Reply to SouthEast's initial Response on the damages issue, SouthEast reiterates only that this is most certainly not -- as AT&T Kentucky insists -- a "simple breach of contract situation" [AT&T Reply at 2]. AT&T contends that SouthEast ordered resale service under the contract and simply refused to pay. But as this Commission confirmed in its August 16, 2006 Order in these dockets, at 12, SouthEast did not order resale service; it ordered 271 *network elements*, something required by law to be available, but a product that was not in the parties' contract. Consequently, the entire controversy involves issues that were *by definition* non-contractual. If there is no contract, there is no breach. Furthermore, as AT&T Kentucky concedes, the Commission, in the August 16 Order, "ordered AT&T Kentucky to provide *switching and transport elements* to SouthEast Telephone." [AT&T Reply at 3 (emphasis added)]. AT&T Kentucky nevertheless provided only its resale service ordering system to SouthEast. Ironically, AT&T Kentucky now characterizes SouthEast's forced use of the only system available to it, while paying the rate the Commission ordered, as (among other things) "brazen," "intentional," and "unlawful self-help" [AT&T Reply at 7]. But if AT&T Kentucky had not engaged in "self-help" by refusing to provide the proper ordering system as the Commission directed, the allegedly "brazen" behavior so deplored by AT&T Kentucky would not have occurred.

There is no question of contract enforcement here. There is only a question of whether AT&T Kentucky suffered any damages. But the Remand Order finds no fault with the rates that the Commission ordered and that SouthEast paid. In the absence of a finding that these rates were not just and reasonable (as opposed to a finding as to whether they were set by the proper

authority), and in the absence of evidence that AT&T Kentucky suffered out of pocket costs, AT&T Kentucky is entitled to no damages.

Respectfully submitted,

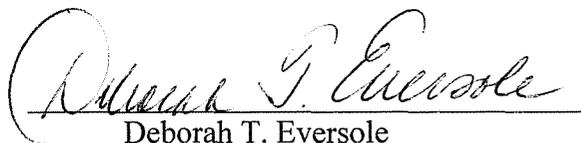


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CERTIFICATE OF SERVICE

I hereby certify that this 17th day of December, 2007, a copy of the foregoing was served, by U.S. Mail, postage prepaid, upon Mary K. Keyer, 601 W. Chestnut Street, Room 407, P.O. Box 32410, Louisville, Kentucky, 40203, and Robert Culpepper, Suite 4300, 675 W. Peachtree St., NW, Atlanta, Georgia, 30375.



Deborah T. Eversole

EXHIBIT

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF GEORGIA
3 ATLANTA DIVISION

3	BELLSOUTH TELECOMMUNICATIONS,)	
4	INC.,)	
	Plaintiff,)	
	-vs-)	No. 1:06-CV-00162-CC
5	THE GEORGIA PUBLIC SERVICE)	
6	COMMISSION, et al.,)	
	Defendants.)	
7)	
8	COMPETITIVE CARRIERS OF THE)	
	SOUTH, INC., et al.,)	
	Plaintiffs,)	
9	-vs-)	No. 1:06-CV-00972-CC
10	THE GEORGIA PUBLIC SERVICE)	
	COMMISSION, et al.,)	
	Defendants.)	

11 Transcript of the Oral Arguments
12 Before the Honorable Clarence Cooper
13 November 27, 2007
14 Atlanta, Georgia

15 APPEARANCES OF COUNSEL:

16	On behalf of BellSouth	
	Telecommunications, Inc:	Sean A. Lev, Esq. Meredith E. Mays, Esq.
17	On behalf of CompSouth, Inc.:	Bill Magness , Esq. Anne W. Lewis, Esq. Bryan P. Tyson, Esq.
18		
19	On behalf of CBeyond:	Charles E. Watkins, Esq.
20	On behalf of the Georgia Public	
21	Service Commission, et al.:	Daniel S. Walsh, Esq.

22
23 Amanda Lohnaas, RMR, CRR
24 Official Court Reporter
25 United States District Court
Atlanta, Georgia

□

1 (Tuesday, November 27, 2007, 9:35 a.m.)

25 the interconnection agreement.

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1 Here there's been no -- what's at issue is whether
2 the Public Service Commission had the authority to set the just
3 and reasonable rates, not whether the rates set by the
4 Commission were in fact just and reasonable. And so it's a
5 completely different analysis and I don't think that the prior
6 case has any bearing. It would be -- I don't think it would be
7 appropriate in this instance to order damages when the question
8 is whether the PSC had the authority to and not whether the
9 rates were not just and reasonable.

10 And finally, on the Section 271 jurisdiction issue,
11 there haven't -- there have been some comments in briefs of the
12 parties about the Public Service Commission trying to
13 circumvent the Court's jurisdiction and acting unlawfully and I
14 did just want to kind of defend my client's actions here as ...
15 being very conservative.

16 What the Public Service Commission did was it
17 acknowledged, when this issue was before it, that there was not
18 a clear answer to the question. So it took -- it decided that
19 it was going to assert jurisdiction but it sought review from
20 the FCC and said if we're stepping on your toes, let us know.
21 And we also asked them, we gave them our whole record of the
22 case and said if you don't think that the rates that we set are
23 just and reasonable, here's the record.

24 So I think the decision of the FCC would be of, you
25 know, good guidance for the Court if they ruled on the

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1 The Court having carefully reviewed the extensive
2 briefs filed in this action, and having considered the
3 applicable law, concludes that the Georgia Public Service
4 Commission does not have authority to set rates for Section 271
5 checklist items pursuant to Section 271.

6 As to the preemption issue, despite the brief
7 reference to state law in the Georgia Public Service
8 Commission's order setting rates, the Court nonetheless finds
9 that the Commission did not rely on state law to set rates as
10 to Section 271 items, and furthermore finds that state law
11 cannot be relied upon to support the Commission's rate setting
12 actions here in light of the federal statutory scheme involved
13 here. The Court therefore concludes that the Georgia Public
14 Service Commission's orders should be enjoined.

15 The Court furthermore agrees that the issues that are
16 not resolved by this ruling should be remanded to the Georgia
17 Public Service Commission.

18 Finally, the Court concludes that for the reasons
19 stated by the Georgia Public Service Commission, BellSouth
20 should not be awarded damages in this case.

21 I want counsel for BellSouth to prepare an order
22 consistent with the Court's ruling. The order should include
23 citations to applicable law and a thorough discussion of the
24 relevant facts. The proposed order should be shared with all
25 parties prior to submitting the same to the Court for its

□

1 signature.

2 The Court will give BellSouth 20 days in which to
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