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April 30, 2004

Mr. Thomas M. Dorman  
Executive Director  
Public Service Commission  
211 Sower Boulevard  
P.O. Box 615  
Frankfort, KY 40602

**RECEIVED**

APR 30 2004

**PUBLIC SERVICE  
COMMISSION**

RE: Petition of Southeast Telephone, Inc., Case No. ~~2003-00115~~  
2004-00093

Dear Mr. Dorman:

Enclosed please find an Amended Motion to Dismiss or to Hold in Abeyance and Amended Answer to Motion to Compel, filed on behalf of Kentucky ALLTEL, Inc. ("ALLTEL") in the above-referenced case. An original and eleven (11) copies of the pleading are enclosed. Please file-stamp the extra copy and return it to me in the self-addressed, pre-stamped envelope I have enclosed for your convenience.

Thank you for your cooperation in this matter. Please do not hesitate to contact me with any questions you may have.

Sincerely,

WYATT, TARRANT & COMBS, LLP

Noelle M. Holladay

Enclosure

cc: Amy Dougherty  
Jonathon Amlung  
Kimberly Bennett  
James H. Newberry, Jr.  
Henry E. Kinser

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Nashville, TN 37203-1423  
615.244.0020

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New Albany, IN 47150-3610  
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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

APR 30 2004

PUBLIC SERVICE  
COMMISSION

In the Matter of:

SOUTHEAST TELEPHONE COMPANY	)	
Complainant	)	
	)	
v.	)	Case No. 2004-00093
	)	
KENTUCKY ALLTEL, INC.	)	
Respondent	)	

**AMENDED MOTION TO DISMISS OR TO HOLD IN ABEYANCE AND  
AMENDED ANSWER TO MOTION TO COMPEL**

COMES NOW, Kentucky ALLTEL, Inc. ("Kentucky ALLTEL") and, in support of its Amended Motion to Dismiss or to Hold in Abeyance and Amended Answer to Motion to Compel, said motion to compel having been filed by Southeast Telephone, Inc. ("Southeast") with the Kentucky Public Service Commission ("Commission") on March 19, 2004, states the following:

**I. AMENDED MOTION TO DISMISS OR TO HOLD IN ABEYANCE**

1. On March 19, 2004, Southeast filed a motion to compel, asserting among other things that Kentucky ALLTEL was in violation of various orders issued by the Commission in Docket No. 2003-00115. On March 23, 2004, the Commission issued its Order in this proceeding, treating the motion to compel filed in Case No. 2003-00115 as a Formal Complaint (hereinafter, "Complaint") and requiring Kentucky ALLTEL to satisfy the matters complained of or to answer the Complaint within ten days from the date of service of the Order.

2. On April 2, 2004, Kentucky ALLTEL filed its Motion to Dismiss and Answer to Motion to Compel, stating that, pursuant to 807 K.A.R. 5:001 Section 12(4)(a), the

Commission should dismiss the Complaint in its entirety and with prejudice as it fails to establish a prima facie case. Kentucky ALLTEL's Motion to Dismiss and Answer further stated that on March 30, 2004, Kentucky ALLTEL appealed the Commission's Orders in Case Number 2003-00115 to the United States District Court for the Eastern District of Kentucky Frankfort Division (Case No. 04-16). While the District Court has thus far denied Kentucky ALLTEL's request for preliminary injunctive relief, the matter has not yet been fully briefed heard on the merits.

3. Kentucky ALLTEL now files this Amended Motion to Dismiss or to Hold in Abeyance, requesting that the Commission alternatively hold the Complaint and determinations thereof in abeyance (as the Commission has also done with respect to its own 9-month Triennial Review Order ("TRO") proceeding in Case No. 2003-00379) pending expiration of the stay by the D.C. Circuit as discussed below.

4. On March 2, 2004, the United States Court of Appeals of the D.C. Circuit ("D.C. Circuit") issued an order (*United States Telecom Assoc. v. Federal Communications Commission and Bell Atlantic Telephone Co., et. al.*; Case No. 00-1012) vacating (subject to a temporary stay) significant portions of the FCC's TRO rules including delegation of the FCC's impairment analysis authority to state utility commissions.

5. In response to the D.C. Circuit's decision, the FCC issued letters on March 31, 2004, urging both incumbent local exchange carriers (like Kentucky ALLTEL) and competitive local exchange carriers ("CLECs," like Southeast) to enter into market-based negotiations with respect to continued use of UNEs, particularly UNE-P. Specifically, in the FCC's letter to United States Telecom Association ("USTA"), the FCC stated as follows:

Ongoing litigation has unsettled the market. We call upon the telecommunications industry to begin a period of commercial negotiations designed to restore certainty and preserve competition in the telecommunications market. We have asked telecommunications carriers to engage in a period of good faith negotiations to arrive at commercially acceptable arrangements for the availability of unbundled network elements.

The FCC sent a similar request to the Association for Local Telecommunications Services ("ALTS"), the national CLEC trade association, and ALTS responded, "[W]e recognize that the 1996 Telecom Act requires good faith negotiations. To that end, we commit to enter into a new round of negotiations in the hope that we could end the litigation and regulatory uncertainty that plagues this industry." (Attached hereto as Exhibit A are copies of the FCC's letters to USTA and ALTS.) Moreover, AT&T, to "advance" the requested private negotiations, has proposed to transition from UNE-P to facilities-based competition. (See AT&T's News Release dated April 29, 2004 attached as Exhibit B.)

6. As specifically requested by the FCC, on April 30, 2004, Kentucky ALLTEL offered to enter into voluntary commercial negotiations with Southeast with respect to use of Kentucky ALLTEL's unbundled switching in the provision of service to mass market customers, and Kentucky ALLTEL indicated that it would immediately begin providing interim UNE-P service to Southeast. (A copy of Kentucky ALLTEL's letter offer to Southeast is attached as Exhibit C.)

7. The Commission itself has recognized the significance of the D.C. Circuit's decision in its Order on March 16, 2004 in the 9-month TRO proceeding in Case No. 2003-00379. There, the Commission noted that the "ruling by the D.C. Circuit has called into question the continuation of this proceeding," and the Commission decided to place

on hold indefinitely its impairment proceedings pending further developments and changes in the federal law.

8. Further, Kentucky ALLTEL and Southeast contemplated such changes in law with respect to, for example, provision of UNE-P service, as the parties' arbitrated interconnection agreement provides as follows:

4.1 This Agreement is entered into as a result of private negotiations between the Parties, and arbitration pursuant to the Telecommunications Act of 1996 (the "Act"), and/or other applicable state laws or Commission rulings. If the actions of state or federal legislative bodies, courts, or regulatory agencies of competent jurisdiction invalidate, modify, or stay the enforcement of any provisions of this Agreement, the affected provision will be invalidated, modified, or stayed as required by action of the legislative body, court, or regulatory agency....

37. Reservation of Rights

37.1 [N]either Party waives, and each Party hereby expressly reserves, its rights: (a) to appeal or otherwise seek the reversal of and changes in any arbitration decision associated with this Agreement; (b) to challenge the lawfulness of this Agreement and any provision of this Agreement; (c) to seek changes in this Agreement (including, but not limited to, changes in rates, charges and the Services that must be offered) through changes in Applicable Law; and, (d) to challenge the lawfulness and propriety of, and to seek to change, any Applicable Law, including, but not limited to any rule, regulation, order or decision of the Commission, the FCC, or a court of applicable jurisdiction....

85.5 Except to the extent expressly provided otherwise in this Attachment, for elements or combinations of elements that are no longer offered by ALLTEL or hereafter ceases to be offered or required (including, but not limited to requirements and changes in requirements due to final orders as a result of any appeal of the arbitration order of the Kentucky PSC in case number 2003-00115 and final orders in the 9 month TRO proceeding by the Kentucky PSC, case number 2003-00379) pursuant to, or are not in compliance with, the terms set forth in this Agreement (for example, but not limited to, local channels or non-compliant EELs), Southeast will submit orders to rearrange or disconnect those arrangements or services within thirty (30) calendar days of the Effective Date of this

Agreement or the date those elements or combinations of elements cease to be offered or required to be offered, as relevant....

- 89.1 ALLTEL will only unbundle and provide local circuit switching for SOUTHEAST to the extent lawfully ordered by the Kentucky Public Service Commission with respect to providing voice-grade (DS-0) equivalents to Mass Market Customers, as defined by the FCC, and shall not provide unbundled local switching with respect to any Enterprise market customers, as defined by the FCC.

(Emphasis added.)

9. Southeast's Complaint should be dismissed, or in the alternative, held in abeyance as Kentucky ALLTEL is voluntarily agreeing to provide Southeast with interim UNE-P service while the parties conduct commercial negotiations pursuant to the FCC's request.

10. Kentucky ALLTEL reserves the right to plead further in this matter as it deems necessary and requests a hearing on these matters in the event that the Commission summarily does not grant Kentucky ALLTEL's Amended Motion.

## **II. AMENDED ANSWER**

11. Kentucky ALLTEL incorporates Paragraphs 1 through 10 above as if more fully set out herein.

12. Kentucky ALLTEL denies each and every material allegation contained in the Complaint except as herein admitted.

13. Kentucky ALLTEL incorporates by reference all of the denials and affirmations set forth in its initial Answer filed with the Commission on April 2, 2004.

14. Affirmatively, Kentucky ALLTEL states that Section 14 of the parties' arbitrated interconnection agreement requires any dispute between the parties regarding the interpretation or enforcement of the agreement be addressed by good faith negotiation between the parties. Additionally, the party seeking to initiate such negotiation must

provide to the other party written notice of the dispute, and the other party then has ten days to respond. If the parties are unable to resolve the dispute within 45 days, either party may pursue any remedies available to it under the agreement, including instituting an appropriate proceeding before the Commission, FCC, or court of competent jurisdiction. As Southeast failed to follow the procedures set forth in Section 14 and instead filed the Complaint directly with the Commission, the Complaint should be dismissed.

15. Kentucky ALLTEL reserves the right to plead further in this matter as it deems necessary.

WHEREFORE, having responded to the Complaint, Kentucky ALLTEL prays that the Commission grant its Amended Motion to Dismiss or to Hold in Abeyance; dismiss the Complaint in its entirety and with prejudice or alternatively hold the Complaint and any enforcement thereof in abeyance pending expiration of the stay of the D.C. Circuit's decision; afford Kentucky ALLTEL an opportunity to be heard in the event that the Commission does not grant Kentucky ALLTEL's Amended Motion; and grant all other necessary and proper relief to which Kentucky ALLTEL may be entitled.

Dated this 30<sup>th</sup> day of April, 2004.

Respectfully submitted,

**KENTUCKY ALLTEL, INC.**

By: Noelle M. Holladay  
James H. Newberry  
Noelle M. Holladay  
Wyatt, Tarrant & Combs, LLP  
Attorneys for Kentucky ALLTEL, Inc.  
1600 Lexington Financial Center  
Lexington, KY 40507-1746  
Telephone: 859-288-6333  
Facsimile: 859-259-0649

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing pleading was served upon the following via regular U.S. mail postage prepaid this 30<sup>th</sup> day of April, 2004:

Jonathon N. Amlung, Esq.  
1000 Republic Building  
429 W. Muhammad Ali Blvd.  
Louisville, KY 450202  
502/584-0439

Deborah T. Eversole, Esq.  
Kentucky Public Service Commission  
211 Sower Blvd.  
Frankfort, KY 40602  
502/564-7279

Noelle M. Holladay





Federal Communications Commission  
Washington, D.C. 20554

March 31, 2004

Walter B. McCormick Jr.  
President & CEO  
United States Telecom Association  
1401 H Street, N.W.  
Suite 600  
Washington, DC 20005-2164

Dear Mr. McCormick:

We write to urge your participation in a serious effort to reach mutually acceptable terms for offering unbundled network elements. Ongoing litigation has unsettled the market. We call upon the telecommunications industry to begin a period of commercial negotiations designed to restore certainty and preserve competition in the telecommunications market. We have asked telecommunications carriers to engage in a period of good faith negotiations to arrive at commercially acceptable arrangements for the availability of unbundled network elements. We trust the parties to utilize all means at their disposal, including the selection of a third-party mediator, to maximize the success of this effort. For our part, we intend to petition the D.C. Circuit for a 45-day extension of the stay of the court's mandate vacating the Commission's rules. We likewise will request that the Solicitor General seek a comparable extension of the deadline for filing a petition for certiorari. We seek your support in these two matters.

The express, limited purpose of these requests is to allow negotiations to take place and for the parties to reach commercial agreements. The Communications Act emphasizes the role of commercial negotiations as a tool in shaping a competitive communications marketplace. After years of litigation and uncertainty, such agreements are needed now more than ever. In the past, the Commission has been divided on these issues. Today, we come together with one voice to send a clear and unequivocal signal that the best interests of consumers are served by negotiation. We call on all sides to commit to working in good faith toward a prompt resolution.

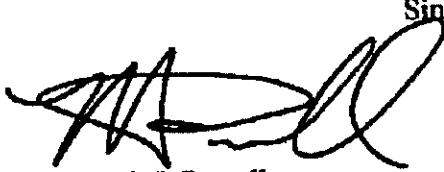
EXHIBIT

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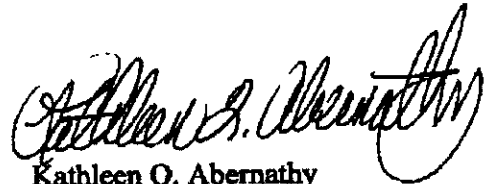
Walter B. McCormick, Jr.  
March 31, 2004  
Page 2

We urge you to participate fully in this important effort. Please indicate to us by Tuesday, April 6 whether your company or organization will participate and will support a stay of the court's mandate. In the end, we trust you share our view that America's telephone consumers are served best by ending this uncertainty and getting back to business. America's telephone consumers will be served by successfully negotiated agreements.

Sincerely,



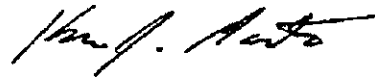
Michael K. Powell  
Chairman



Kathleen Q. Abernathy  
Commissioner



Michael J. Copps  
Commissioner



Kevin J. Martin  
Commissioner



Jonathan S. Adelstein  
Commissioner



Federal Communications Commission  
Washington, D.C. 20554

March 31, 2004

John Windhausen  
President  
Association for Local Telecommunications Services  
888 17th Street, N.W.  
Washington, DC 20006

Dear Mr. Windhausen:

We write to urge your participation in a serious effort to reach mutually acceptable terms for offering unbundled network elements. Ongoing litigation has unsettled the market. We call upon the telecommunications industry to begin a period of commercial negotiations designed to restore certainty and preserve competition in the telecommunications market. We have asked telecommunications carriers to engage in a period of good faith negotiations to arrive at commercially acceptable arrangements for the availability of unbundled network elements. We trust the parties to utilize all means at their disposal, including the selection of a third-party mediator, to maximize the success of this effort. For our part, we intend to petition the D.C. Circuit for a 45-day extension of the stay of the court's mandate vacating the Commission's rules. We likewise will request that the Solicitor General seek a comparable extension of the deadline for filing a petition for certiorari. We seek your support in these two matters.

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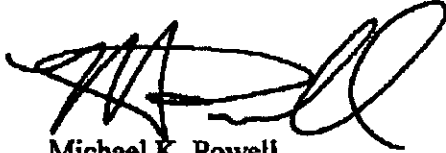
John Windhausen

March 31, 2004

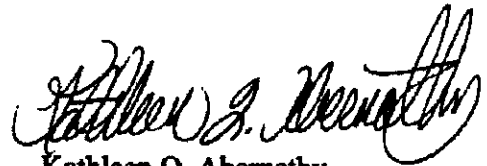
Page 2

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Sincerely,



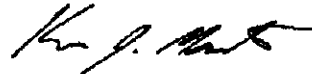
Michael K. Powell  
Chairman



Kathleen Q. Abernathy  
Commissioner



Michael J. Copps  
Commissioner



Kevin J. Martin  
Commissioner



Jonathan S. Adelstein  
Commissioner



## **News Release**

For more information:

Claudia Jones  
202-457-3933 (office)  
cbjones@att.com

### **AT&T Proposes Roadmap To Facilities-based Local Telecom Competition**

FOR RELEASE: THURSDAY, APRIL 29, 2004

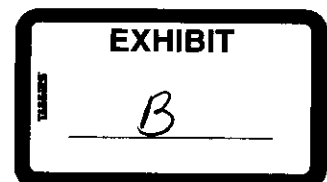
WASHINGTON – AT&T (NYSE: T) today proposed a groundbreaking offer to each of the four Bell companies -- Verizon, SBC, BellSouth and Qwest -- that would provide a smooth, equitable transition to facilities-based competition and protect millions of customers who have chosen AT&T as their local service provider. This is a comprehensive proposal that moves away from previously drawn battle-lines, and is intended to advance the private negotiations urged by the Federal Communications Commission (FCC).

AT&T is proposing the framework to foster a genuine migration from competition based on UNE-P to facilities-based competition using stand-alone unbundled loops -- the actual wires from the customer's premises to the Bell company central office.

"If the Bell companies accept this offer, the industry's leaders can turn confrontation into conciliation by solving one of the most significant controversies since the inception of the Telecommunications Act of 1996," said AT&T Chairman and Chief Executive Officer David W. Dorman. "This is a giant step forward that will relieve the Bell companies of the leasing obligations to which they most object and allow AT&T to expand the use of its own facilities to serve local customers."

More specifically, the proposal provides for increases in the price of UNE-P by at least \$3 in phases over the next 2 ½ years so as to impose a financial penalty on competitors that continue to rely on UNE-P. In exchange, however, competitors would be able to obtain operational and economic access to "last-mile" loop facilities on terms that are reasonable and fair.

In effect, the offer to the Bell companies is UNE-P price increases in exchange for reasonable reductions in the costs and necessary improvements in the provisioning required to support facilities-based competition. The framework also provides incentives for AT&T to accelerate deployment of its own facilities -- an objective of the FCC.



If the agreement is accepted, AT&T would enter into long-term commercial wholesale agreements with the Bell companies that will accelerate facilities deployment by addressing operational barriers associated with the provisioning of unbundled loops, increasing prices for UNE-P facilities, and reducing costs associated with the use of unbundled loops.

“This proposal provides the right incentives for both the Bell companies and for AT&T,” said Dorman. “This is a huge paradigm shift away from business as usual.”

“This proposal gives certainty to the millions of consumers and small businesses served by AT&T today,” Dorman noted, “and provides the opportunity for the benefits of competition to reach even more consumers and small business owners. In the interest of arriving at negotiated solutions in the spirit of that which the FCC urged, AT&T is willing to discuss and negotiate the terms of a facilities-based transition. We are hopeful that the Bell companies are also willing.”

“At bottom, the current negotiations cannot be about the terms of ending competition. We owe more to our customers, our employees, and our Nation,” Dorman concluded.

###

#### About AT&T

*For more than 125 years, AT&T (NYSE "T") has been known for unparalleled quality and reliability in communications. Backed by the research and development capabilities of AT&T Labs, the company is a global leader in local, long-distance, Internet and transaction-based voice and data services.*

#### Term Sheet

1. UNE-P would be available for all customers for four years, with no line limits. A two-year transition period would be established if the agreement is not renewed or extended.
2. A new, all-inclusive, statewide, per-line monthly charge for UNE-P would be established in each state on January 1, 2005, as described in paragraph 3. The 1/1/05 rates would remain in effect until (i) the RBOC establishes effective, efficient, and economic hot cut processes to handle commercial volumes, (ii) total hot cut charges of \$5 per line or \$3 per line for batch hot cuts (quantities of 10 or more) are implemented, (iii) cost-based transport is available to connect collocations to competitor switches and other network facilities, and (iv) other obstacles to the use of unbundled loops (such as the RBOC's inability to provide access to loops or a lack of collocation space) are eliminated.
  - a. State commissions or mutually acceptable third-parties would certify that these requirements have been satisfied and are being maintained during the term of the agreement. This certification would insure that the RBOC is able to perform hot cuts

in volumes and at a level of quality necessary to serve mass market customers using stand-alone loops.

3. Effective 1/1/05, a single, all-inclusive, statewide, per-line monthly charge for UNE-P will be established in each state based on AT&T's average UNE-P per-line cost in that state on March 1, 2004, plus an increase of \$1 per line for customer locations with four or fewer AT&T lines and \$2 per line for customer locations with more than four AT&T lines. This rate would increase by \$1 per line for each of the next two years, provided that the RBOC meets the UNE-L requirements described in paragraph 2, and subject to a per-line UNE-P monthly charge cap of \$26 for customer locations with four or fewer AT&T lines and \$27 for customer locations with more than four AT&T lines. Per-line surcharges would not apply for the first 120 days of any new UNE-P line.

A \$1 per-line credit for each UNE loop connected to competitive facilities would be applied to loop, collocation space, power, and transport charges effective 1/1/05, and an additional \$1 per line credit would be applied for each UNE loop connected to competitive facilities corresponding to each dollar increase in UNE-P charges after 1/1/05.

<u>DATE</u>	<u>CUMULATIVE UNE-P PER-LINE SURCHARGE: CUSTOMERS with 4 lines or less</u>	<u>Cumulative UNE-P per-line Surcharge: Customers WITH MORE THAN 4 LINES</u>	<u>CUMULATIVE UNE-L PER-LINE CREDIT</u>
1/1/05	\$1 plus avg. state UNE-P cost = monthly charge	\$2 plus avg. state UNE-P cost = monthly charge	\$1/line
1/1/06	\$2 plus avg. state UNE-P cost = monthly charge	\$3 plus avg. state UNE-P cost = monthly charge	\$2/line
1/1/07	\$3 plus avg. state UNE-P cost = monthly charge	\$4 plus avg. state UNE-P cost = monthly charge	\$3/line

*Rates reflect an all-inclusive per-line monthly charge for UNE-P that includes loop, port, switching (including AIN features), transport, DUF (where applicable), reciprocal compensation, transit to other carriers, database information, surcharges (excluding LNP), and other miscellaneous charges.*

Except as otherwise specified below, all other UNE rates shall remain at their March 1, 2004 levels.

4. In order to foster faster migration to facilities competition, additional UNE-P surcharges and UNE-L credits may be negotiated between the parties based on UNE-P volumes and line density within serving areas within each state.
5. To encourage the sale of non-primary lines and recovery of greater wholesale and retail revenue from utilization of existing loop assets, each additional UNE-P line purchased by customers with four or fewer AT&T lines at a single location will be available at a 35% discount off of the applicable monthly rate.
6. Access to the full functionality of fiber and hybrid loops migrated to competitive switching or other facilities will be negotiated between the parties.
7. The RBOC will permit AT&T to provide voice service using the same line used by the RBOC to provide DSL services and will not discriminate in the terms and conditions on which DSL services are provided to customers of AT&T voice services.

8. Improved operational processes, simplified performance metrics, and appropriate self-executing remedies will be negotiated between the parties.
9. There will be no prohibitions or limitations on the use of alternative technologies or facilities, whether stand-alone RBOC loops or non-RBOC facilities.
10. The agreement will comply with all applicable laws and regulations, including the Telecommunications Act of 1996. The foregoing terms would be incorporated into the existing interconnection agreements between the parties, and would continue to apply during the term of the agreement regardless of any subsequent change in law.



ALLTEL COMMUNICATIONS  
One Allied Drive  
Little Rock, Arkansas 72202



**Stephen B. Rowell**  
*Sr. Vice President*  
*State Government Affairs*

501-905-8460  
501-905-4443 fax

VIA ELECTRONIC MAIL:  
liz.thacker@setel.com

Southeast Telephone, Inc.  
Attention: Ms. Liz Thacker  
106 Scott Avenue  
Pikeville, Kentucky 41501

Re: Initiation of Negotiations for Market-Based UNE-P Service

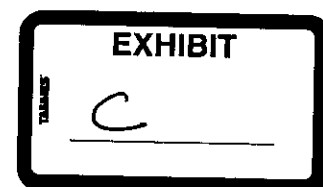
Dear Ms. Thacker:

The Federal Communications Commission (FCC) has urged both incumbent local exchange carriers, like Kentucky ALLTEL, Inc. (ALLTEL), and competitive local exchange carriers, like Southeast Telephone, Inc. (Southeast), to immediately enter into negotiations with respect to continued use of UNEs and particularly UNE-P. (Copies of the FCC's letters to USTA and ALTS are attached as Attachment 1.) The FCC's requests were in response to the March 2, 2004 D.C. Circuit Court decision vacating aspects of the FCC Triennial Review Order (TRO) and determining that the FCC cannot delegate impairment analysis authority to the state utility commissions.

In accordance with the FCC's requests, ALLTEL is offering to enter into negotiations with Southeast with respect to the use of ALLTEL's unbundled switching in the provision of service to mass market customers and, on an interim basis, while these negotiations occur, ALLTEL is agreeing to provide interim UNE-P service to Southeast in response to Southeast's request.

The arbitrated interconnection agreement between ALLTEL and Southeast does not address all relevant details of the parties' interconnection relationship (*e.g.*, what areas Southeast is seeking to serve, to what extent Southeast is impaired without access to ALLTEL unbundled switching, and where the defining cross-over is between mass market and enterprise market customers). Accordingly, certain additional features of this arrangement not addressed in the interconnection agreement would include the following:

- (i) Fayette County and the immediately adjacent UNE Rate Zone 1s and all areas west of Green County, Kentucky would be excluded as a result of representations by Southeast in a filing with the FCC and in conversations with ALLTEL that Southeast does not seek to provide service in all areas of Kentucky. (A copy of Southeast's FCC filing is attached as Attachment 2.)



- (ii) "Mass market customers" would be defined as those customers that utilize four or fewer DSO lines because neither the arbitrated interconnection agreement nor any order of the Kentucky Commission defines the cross-over point between mass market and enterprise market customers.
- (iii) The Verizon UNE-P rates as set forth in the arbitrated interconnection agreement would apply until the earlier of the date that (i) the parties reach agreement on different market-based rates for UNE-P service or (ii) the vacatur of the FCC TRO rules becomes effective.

On or before May 10, 2004, ALLTEL will provide Southeast an outline of ALLTEL's proposed terms and pricing for a market-based agreement and will be available to complete these negotiations expeditiously. While ALLTEL anticipates that the parties will successfully negotiate a resolution of this matter, in the event they do not, ALLTEL reserves the right to discontinue or reconfigure the services to Southeast upon the vacatur of the TRO, additional changes in federal law, or other applicable requirements, including but not limited to those set forth in Sections 4, 37, 85 and 89 of the arbitrated interconnection agreement.

Please direct any questions regarding these negotiations to the undersigned at 501-905-8460, and direct any questions regarding initiation of service and implementation of the interconnection agreement to Mr. Jimmy Dolan at 501-905-7873. Mr. Dolan has Southeast's passwords and can enable Southeast's access to ALLTEL Express.

Sincerely,



Stephen B. Rowell

cc: C. Kent Hatfield, Esq.  
Stoll, Keenon & Park, LLP  
2650 AEGON Center  
400 West Market Street  
Louisville, KY 40202



Federal Communications Commission  
Washington, D.C. 20554

March 31, 2004

Walter B. McCormick Jr.  
President & CEO  
United States Telecom Association  
1401 H Street, N.W.  
Suite 600  
Washington, DC 20005-2164

Dear Mr. McCormick:

We write to urge your participation in a serious effort to reach mutually acceptable terms for offering unbundled network elements. Ongoing litigation has unsettled the market. We call upon the telecommunications industry to begin a period of commercial negotiations designed to restore certainty and preserve competition in the telecommunications market. We have asked telecommunications carriers to engage in a period of good faith negotiations to arrive at commercially acceptable arrangements for the availability of unbundled network elements. We trust the parties to utilize all means at their disposal, including the selection of a third-party mediator, to maximize the success of this effort. For our part, we intend to petition the D.C. Circuit for a 45-day extension of the stay of the court's mandate vacating the Commission's rules. We likewise will request that the Solicitor General seek a comparable extension of the deadline for filing a petition for certiorari. We seek your support in these two matters.

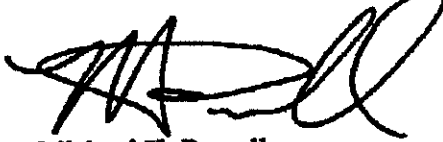
The express, limited purpose of these requests is to allow negotiations to take place and for the parties to reach commercial agreements. The Communications Act emphasizes the role of commercial negotiations as a tool in shaping a competitive communications marketplace. After years of litigation and uncertainty, such agreements are needed now more than ever. In the past, the Commission has been divided on these issues. Today, we come together with one voice to send a clear and unequivocal signal that the best interests of consumers are served by negotiation. We call on all sides to commit to working in good faith toward a prompt resolution.

ATTACHMENT 1

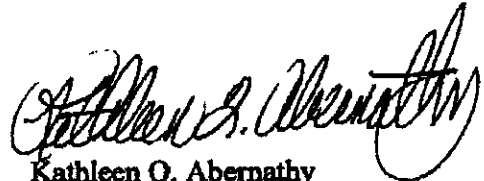
Walter B. McCormick, Jr.  
March 31, 2004  
Page 2

We urge you to participate fully in this important effort. Please indicate to us by Tuesday, April 6 whether your company or organization will participate and will support a stay of the court's mandate. In the end, we trust you share our view that America's telephone consumers are served best by ending this uncertainty and getting back to business. America's telephone consumers will be served by successfully negotiated agreements.

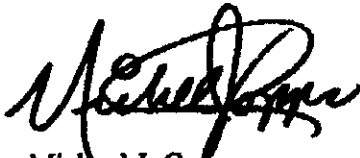
Sincerely,



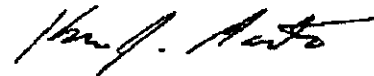
Michael K. Powell  
Chairman



Kathleen Q. Abernathy  
Commissioner



Michael J. Copps  
Commissioner



Kevin J. Martin  
Commissioner



Jonathan S. Adelstein  
Commissioner



Federal Communications Commission  
Washington, D.C. 20554

March 31, 2004

John Windhausen  
President  
Association for Local Telecommunications Services  
888 17th Street, N.W.  
Washington, DC 20006

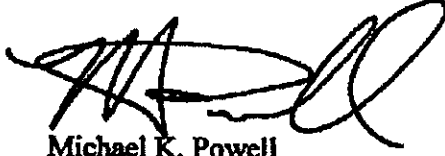
Dear Mr. Windhausen:

We write to urge your participation in a serious effort to reach mutually acceptable terms for offering unbundled network elements. Ongoing litigation has unsettled the market. We call upon the telecommunications industry to begin a period of commercial negotiations designed to restore certainty and preserve competition in the telecommunications market. We have asked telecommunications carriers to engage in a period of good faith negotiations to arrive at commercially acceptable arrangements for the availability of unbundled network elements. We trust the parties to utilize all means at their disposal, including the selection of a third-party mediator, to maximize the success of this effort. For our part, we intend to petition the D.C. Circuit for a 45-day extension of the stay of the court's mandate vacating the Commission's rules. We likewise will request that the Solicitor General seek a comparable extension of the deadline for filing a petition for certiorari. We seek your support in these two matters.

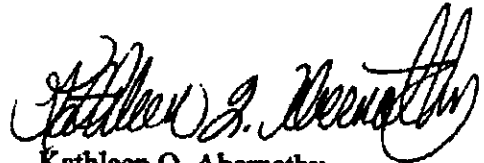
The express, limited purpose of these requests is to allow negotiations to take place and for the parties to reach commercial agreements. The Communications Act emphasizes the role of commercial negotiations as a tool in shaping a competitive communications marketplace. After years of litigation and uncertainty, such agreements are needed now more than ever. In the past, the Commission has been divided on these issues. Today, we come together with one voice to send a clear and unequivocal signal that the best interests of consumers are served by negotiation. We call on all sides to commit to working in good faith toward a prompt resolution.

We urge you to participate fully in this important effort. Please indicate to us by Tuesday, April 6 whether your company or organization will participate and will support a stay of the court's mandate. In the end, we trust you share our view that America's telephone consumers are served best by ending this uncertainty and getting back to business. America's telephone consumers will be served by successfully negotiated agreements.

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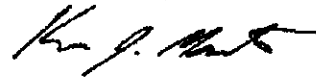
Michael K. Powell  
Chairman



Kathleen Q. Abernathy  
Commissioner



Michael J. Copps  
Commissioner



Kevin J. Martin  
Commissioner



Jonathan S. Adelstein  
Commissioner

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
  ) )  
Access Charge Reform )      CC Docket No. 96-262  
  ) )

PETITION FOR WAIVER

SOUTHEAST TELEPHONE, INC.

David L. Sieradzki  
Carol E. Simpson  
HOGAN & HARTSON L.L.P.  
555 Thirteenth St., N.W.  
Washington, D.C. 20554  
(202) 637-5600

Its Counsel

March 30, 2004

ATTACHMENT 2

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	

**PETITION FOR WAIVER**

SouthEast Telephone, Inc. ("SouthEast"), by counsel and pursuant to Section 1.3 of the Commission's rules, respectfully requests a waiver of 47 C.F.R. § 61.26(a)(6). Specifically, SouthEast seeks a waiver of the rule that rural competitive local exchange carriers ("CLECs") are ineligible for the "rural exemption" identified in the *CLEC Access Charge Order* if they serve any non-rural customers. Special circumstances exist that justify a waiver in this case, and a waiver is consistent with the public interest.

Introduction. Headquartered in Pikeville, Kentucky, SouthEast provides local narrowband and broadband voice services as a CLEC to approximately 12,000 business and residential access lines, as well as long distance and both narrowband and broadband Internet services, in portions of the Appalachian mountain region of southeastern Kentucky. Since its inception in 1996, SouthEast has shown a commitment not only to providing outstanding telecommunications service, but also to meaningful involvement in the communities it serves. SouthEast provides local exchange service using a combination of resale of BellSouth services, use of the unbundled network element platform ("UNE-P")



purchased from BellSouth, and SouthEast's own facilities. The Kentucky Public Service Commission has designated SouthEast as an Eligible Telecommunications Carrier for the provision of universal service in its high-cost service area.

The Commission's *CLEC Access Charge Order* adopted new rules regarding the maximum just and reasonable access charges that CLECs may collect through their tariffs. <sup>1/</sup> While the *Order* generally limits CLECs' tariffed access charges in a given area to the rates charged by the incumbent local exchange carrier ("ILEC") in that area, the *Order* includes a "rural exemption" to prevent unfairness to CLECs operating in rural areas served by price cap ILECs. <sup>2/</sup> The "rural exemption" – which permits certain "rural CLECs" to charge access rates higher than those of the ILEC – is intended to prevent under-compensation of rural CLECs in circumstances where the ILEC charges geographically averaged access rates for both rural and non-rural areas, while the CLEC has no comparable urban service to subsidize its rural operations. <sup>3/</sup> The *Order* provides that a CLEC is considered "rural" for purposes of the exemption only if no part of its service area falls within "any incorporated place of 50,000 or more" or within "an urbanized area, as defined by the Census Bureau." <sup>4/</sup>

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<sup>1/</sup> *Access Charge Reform*, Seventh Report and Order, CC Docket No. 96-262, 16 FCC Rcd 9923 (2001) ("*CLEC Access Charge Order*" or "*Order*").

<sup>2/</sup> *Id.* at 9949-56 (¶¶ 64-81); *see also* 47 C.F.R. § 61.26(e).

<sup>3/</sup> *Id.* at 9950 (¶¶ 65-66).

<sup>4/</sup> *Id.* at 9954 (¶ 76).

SouthEast presently qualifies as, and operates as, a “rural CLEC” as defined in the *Order*. SouthEast serves customers with offerings that include interstate access service only in areas defined as “rural” under the definition in the *CLEC Access Charge Order*, and the company has no present intention to expand its service area into urbanized areas such as Lexington and Louisville metropolitan areas. However, the restrictive definition in the *Order* creates a severe dilemma for the company. From time to time, customers based in SouthEast’s rural area ask the company for service to customer locations in those metropolitan areas – typically in the case of small businesses based in rural Kentucky but with a small sales office in one of the large cities. SouthEast also receives service requests from parents living in rural Kentucky who wish to obtain telephone service for their children who have attend college in the metropolitan areas. The *Order*’s restrictive definition of “rural CLEC” forces SouthEast into a dilemma – either (i) to decline to provide service, thus severely impairing our competitiveness vis-à-vis BellSouth, our principal competitor; or (ii) to provide service to the metropolitan customer location and thereby lose eligibility for the access charge “rural exemption” throughout our service area.

SouthEast seeks a waiver of the definition of “rural CLEC” to enable it to continue operating subject to the access charge “rural exemption” in non-metropolitan areas so long as the vast majority (*i.e.*, 95% or more) of its customers are located outside metropolitan areas. We show below that SouthEast presents

“special circumstances [that] warrant a deviation” from the rule and that “such a deviation will serve the public interest.” <sup>5/</sup>

*Special Circumstances Justify a Grant of This Petition.* SouthEast presents a completely different set of circumstances than those the Commission considered when it adopted the *CLEC Access Charge Order*. The Commission considered the circumstance of a CLEC that operates exclusively in rural areas, including rural portions of “counties that border high population areas”; <sup>6/</sup> and it considered the circumstance of a CLEC with significant numbers of end users in both rural and non-rural areas. <sup>7/</sup> The *Order* deems the former type of CLEC eligible for the “rural exemption,” but not the latter type. For reasons of administrative simplicity, the Commission defined the “rural CLEC” category “based on the CLEC’s entire service area, not on a subscriber-by-subscriber basis.” <sup>8/</sup> However, this understandable desire to establish a clear, administratively simple, “bright line” rule precluded the Commission from considering circumstances faced by a carrier like SouthEast.

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<sup>5/</sup> *Telephone Number Portability*, Order, CC Docket No. 95-116, FCC 04-12, ¶ 6 (released Jan. 16, 2004); *see also WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

<sup>6/</sup> *CLEC Access Charge Order*, 16 FCC Rcd at 9954 (¶ 76).

<sup>7/</sup> *Id.* at 9954-55 (¶ 77).

<sup>8/</sup> *Id.* at 9954 (¶ 75); *see also id.* at 9955 n.158 (“we decline, for reasons of administrative simplicity, to get into a subscriber-by-subscriber analysis of where a CLEC’s end-user customers are located”).

SouthEast's circumstances are unusual. SouthEast's service area is entirely rural and it has no business plan to expand service to metropolitan areas, but from time to time it receives requests from customers for service in metropolitan locations. As noted above, the *Order's* definition of "rural CLEC" imposes a severe dilemma on SouthEast in these situations: it must either hobble its ability to offer customers competitive service, or must sacrifice large amounts of access revenues. In these circumstances, the rigidity of the Commission's eligibility standard creates the risk that genuinely deserving rural CLECs like SouthEast will be excluded from the rural exemption. The waiver remedy exists precisely to remedy the injustice created in cases like this one. <sup>9/</sup> SouthEast respectfully suggests that, under the circumstances, it would be unfair to disqualify it from the "rural exemption" with respect to its access services provided in rural areas due to incidental operations in non-rural areas.

*A Grant of This Petition Is in the Public Interest.* A grant of this Petition will serve the public interest because it will strengthen SouthEast's ability to provide competitive telecommunications service, including advanced services, in rural areas. This, of course, is the goal expressed by Congress in Section 254(b)(3) of the 1996 Act. As the Commission noted in the *CLEC Access Charge Order*, "CLECs often are more likely to deploy in rural areas the new facilities capable of

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<sup>9/</sup> See *WAIT Radio*, 418 F.2d at 1157 ("[An] agency's discretion to proceed in difficult areas through general rules is intimately linked to the existence of a safety valve procedure for consideration of an application for exemption based on special circumstances."); *id.* at 1159 (noting the need for a mechanism through which rules can "take into account considerations of hardship, equity, or more effective implementation of overall policy").

supporting advanced . . . telecommunications services than are non-rural ILECs, which are more likely first to deploy such facilities in their more concentrated, urban markets.” 10/ The primary reason for adopting the rural exemption, in fact, was to avoid a CLEC access charge scheme that would prevent rural CLECs from “bringing the benefits of new technologies to rural areas.” 11/ It would therefore be *contrary* to the public interest to deny the rural exemption to a carrier like SouthEast, which is doing exactly that.

SouthEast provides broadband, as well as narrowband, service to an ever-increasing number of customers. Since its inception, SouthEast has intended to become a totally facilities based telecommunications provider. Though primarily a reseller, SouthEast utilizes a “migration” business plan, competing against BellSouth using all three modes of competitive entry – resale, unbundled network elements, and its own facilities. SouthEast has given customers in rural eastern Kentucky a genuine choice in phone service and has increased those customers’ access to advanced services by utilizing technology suitable for the rural environment as it becomes readily available. In short, SouthEast embodies the type of rural service that the Commission sought to preserve when it adopted the rural exemption.

Furthermore, the concerns expressed in the *CLEC Access Charge Order* about improper application of the rural exemption are not implicated here.

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10/ *Id.* at 9950 (¶ 65).

11/ *Id.*

The Commission was primarily concerned that a non-rural CLEC might try to game the system by “splitting itself into two subsidiaries to qualify, in part, for the exemption rates where it would not otherwise do so.” <sup>12/</sup> That is emphatically not the case here. SouthEast is not a non-rural CLEC trying to sneak into the rural exemption – it is not trying to “have its cake and eat it too.” SouthEast is simply a rural CLEC that has the opportunity to serve a handful of non-rural customers. And while there is no question that the rural exemption should be available only to CLECs that are truly rural carriers, SouthEast respectfully suggests that the access charge regime should not strip a CLEC such as SouthEast of its rural status merely for taking on a *de minimis* number of non-rural customers.

Conclusion. For the foregoing reasons, the Commission should grant this Petition and waive its eligibility criteria for the CLEC access charge “rural exemption” as applied to SouthEast. Under the circumstances, applying the eligibility criteria will do more harm than good. Allowing SouthEast to continue to operate under the “rural exemption” in its rural areas will serve the public interest and does not violate, but rather enhances, the spirit and goals of the Commission’s CLEC access charge rules.

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<sup>12/</sup> *Id.* at 9954-55 (¶ 77).

Respectfully submitted,

SOUTHEAST TELEPHONE, INC.

By: \_\_\_\_\_

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Carol E. Simpson

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Its Counsel

March 30, 2004