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November 9, 2007

RECEIVED

NOV 09 2007

PUBLIC SERVICE
COMMISSION

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602


Re: BellSouth Telecommunications, Inc.'s Notice of Intent to Disconnect
SouthEast Telephone, Inc. for Nonpayment
PSC 2005-00519

SouthEast Telephone, Inc., Complainant v. BellSouth
Telecommunications, Inc., Defendant
PSC 2005-00533

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned cases are the original and ten (10) copies of *BellSouth Telecommunications, Inc.'s, d/b/a AT&T Kentucky, Motion for the Issuance of a Damages Award on an Expedited Basis*. Exhibits A-C set forth amounts that SouthEast Telephone, Inc. owes AT&T Kentucky and thus are considered confidential pursuant to the Commission's Order issued in Case No. 2005-00533 on March 31, 2006. Additionally, both AT&T Kentucky's Motion and its proposed Order (Exhibit D) include confidential information (i.e. both documents specify amounts owed by SouthEast Telephone). Accordingly, AT&T Kentucky is filing both a redacted (public) and confidential version of both documents. A copy of the same is being served upon all parties and opposing counsel.

Sincerely,


Mary K. Keyer 

cc: Parties of Record

Enclosures

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EDITED

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

NOV 09 2007

PUBLIC SERVICE
COMMISSION

In the Matter of:

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

AND

SOUTHEAST TELEPHONE, INC.)
)
COMPLAINANT) CASE NO. 2005-00533
)
VS.)
)
BELLSOUTH TELECOMMUNICATIONS, INC.)
)
DEFENDANT)

**BELLSOUTH TELECOMMUNICATIONS, INC., D/B/A AT&T KENTUCKY'S MOTION
FOR THE ISSUANCE OF A DAMAGES AWARD ON AN EXPEDITED BASIS**

BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky ("AT&T Kentucky"), by counsel, respectfully requests that the Kentucky Public Service Commission ("Commission") issue an Order requiring SouthEast Telephone, Inc. ("SouthEast") to immediately pay AT&T Kentucky the damages AT&T Kentucky has sustained as a direct and proximate result of AT&T Kentucky's adherence to the Commission's Order dated August 16, 2006. ("271 Order"). In the 271 Order, the Commission ordered AT&T Kentucky to provide switching and transport elements to SouthEast pursuant to Section 271 of the Telecommunications Act of 1996 (the "Act"). On appeal, the United States District Court for the Eastern District of Kentucky found the Commission's 271

Order to be unlawful and remanded the matter to the Commission to determine the damages owed to AT&T Kentucky as a result of abiding by the unlawful 271 Order. (“*Opinion and Order*”).¹

Without question, the District Court has the authority under the Act (47 U.S.C. § 252(e)(6)) as well as pursuant to ordinary federal question jurisdiction (28 U.S.C. § 1331) to remand this matter to the Commission for a damages determination. *Id.* at 21; *BellSouth v. Georgia Public Service Commission*, 400 F.3d 1268, 1271 (11th Cir. 2005). Accordingly, the Commission should issue an Order that requires SouthEast to immediately pay AT&T Kentucky [REDACTED]. As explained herein, this figure represents: (i) the past due amount on SouthEast’s resale bill ([REDACTED]) as of November 8, 2007; plus (ii) the credit amount ([REDACTED]) that AT&T Kentucky provided to SouthEast in order to comply with the Commission’s unlawful 271 Order.² A summary of AT&T Kentucky’s damages as of November 8, 2007 is attached hereto as **Exhibit A**.³ In addition to being entitled to such damages as a matter of law, under the parties’ Interconnection Agreement (“ICA”), SouthEast has an ongoing obligation to continue to pay for the resale services that it has ordered from AT&T Kentucky. See ICA, Attachment 7, Sections 1.3 and 1.4.

Throughout these proceedings, AT&T Kentucky has abided by the Commission’s orders, including the unlawful 271 Order, and the parties’ ICA. Based on principles of

¹ Opinion and Order, *BellSouth Telecommunications, Inc. v. Kentucky Public Service Commission, et al.*, Civil Action No. 06-65-KKC, United States District Court, Eastern District of Kentucky (September 18, 2007).

² AT&T Kentucky is in the process of reversing the credit amount previously provided to SouthEast in order to comply with the Commission’s 271 Order. Accordingly, SouthEast’s November resale bill should include an additional current charge of [REDACTED].

³ As demonstrated by Exhibit B, the amount owed by SouthEast varies each month. Accordingly, AT&T Kentucky reserves the right to update its damages computation.

fairness and equity, the law and federal court orders regarding the issues in this case, the amount of time that has passed (over 2 ½ years), and the amount of monies owed to AT&T Kentucky, AT&T Kentucky requests that the Commission issue a damages award on an expedited basis.

BACKGROUND

The Federal Communications Commission (“FCC”) in its *Order on Remand* held that competitive local exchange carriers (“CLECs”) “are not impaired in the deployment of switches” and that unbundling of such elements was no longer required.⁴ The *Order on Remand* became effective March 11, 2005. The FCC provided for a one-year transition period up to March 11, 2006, for CLECs to transition their *existing* UNE-P customers to other arrangements, but did *not* allow for the ordering of *new* UNE-P services. On February 11, 2005, in response to the FCC’s *Order on Remand*, AT&T Kentucky notified all CLECs that it would no longer accept new switching orders to those facilities not required by the FCC’s *Order on Remand*.

At the request of some CLECs, the Commission rejected AT&T Kentucky’s position that the *Order on Remand* was immediately effective on March 11, 2005, and on March 10, 2005, issued two orders requiring AT&T Kentucky to continue to provide *new* UNE Platform (“UNE-P”) switching orders for an indefinite period.⁵ On April 22, 2005, the U.S. District Court for the Eastern District of Kentucky granted AT&T Kentucky a preliminary injunction against enforcement of the Commission Order by

⁴ Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290, at ¶ 112 (FCC Feb. 4, 2005) (“Order on Remand”)

⁵ See *In re Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 2004-00427, and *In re Joint Petition of NewSouth Communications Corp., et al.*, Docket No. 2004-00044.

affirming the FCC's order of no new UNE-Ps.⁶ In March 2006, the District Court granted a permanent injunction against the aforementioned Commission Order.

Following the *Cinergy Order*, AT&T again notified all CLECs that effective April 27, 2005, that it would no longer accept new orders for UNE-P services. Nevertheless, SouthEast once again ignored the law, the court's order, and AT&T's letter, and continued to attempt to order new UNE-P services. AT&T Kentucky rejected those orders in accordance with the law. SouthEast then began ordering resale services under its ICA with AT&T Kentucky, but refused to pay the resale rates provided for in the ICA. Instead, in another attempt to ignore and skirt the law, as well as its obligations under its ICA to pay for services ordered, SouthEast withheld monies due for such services in an effort to pay rates equivalent to TELRIC rates for UNE-P services that were no longer available by law.⁷ This self-help began as of April 27, 2005, the date by which AT&T notified all its CLEC customers that no new UNE-P orders would be accepted.

After numerous unsuccessful attempts by AT&T Kentucky to get SouthEast to pay the past due amounts for the resale services, AT&T Kentucky notified the

⁶ See *BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order* (E.D. Ky. Apr. 22, 2005) ("*Cinergy Order*"). See also *Memorandum Opinion and Order* (E.D. Ky., Mar. 20, 2006).

⁷ SouthEast has not even paid AT&T Kentucky at the TELRIC rate, or the TELRIC plus \$1 rate pursuant to the Commission's *271 Order*. In a bizarre and convoluted manner, SouthEast has refused to pay amounts that SouthEast claims represent lost revenue. Under SouthEast's illogic, if the resale services it ordered from AT&T Kentucky were considered unbundled network elements ("UNEs"), then SouthEast would have collected certain access charges that it was unable to collect because it has ordered resale services. On its face, this brazen and egregious self-help by SouthEast should not be tolerated and the Commission should require SouthEast to immediately pay such withheld amounts.

In any event, to the extent the Commission is inclined to consider any damages claim of SouthEast, it should not do so in connection with this proceeding. SouthEast did not raise such issue before either the Commission or the District Court, and should not be permitted to delay final resolution of this matter further by attempting to introduce new claims on remand. Again, the remand from the District Court is limited to a determination and award of damages to AT&T Kentucky.

Commission on December 6, 2005, that it intended to disconnect SouthEast for non-payment. SouthEast filed with the Commission a complaint and request for an emergency injunction against AT&T Kentucky.⁸ The Commission disallowed the disconnection and on December 16, 2005, ordered AT&T Kentucky to consider SouthEast's account current while the dispute was pending.

The Commission then issued its *271 Order* finding that AT&T Kentucky must provide switching and transport elements to SouthEast pursuant to § 271 and determining that the appropriate rate for the services ordered by SouthEast was TELRIC plus \$1 from April 27, 2005, until the parties could agree on a new rate or until the Commission could establish one.⁹ In sum, since April 2005 up until the date of the District Court's *Opinion and Order* issued in September 2007, (approximately 2 ½ years), SouthEast Telephone has received and utilized resale services from AT&T Kentucky without paying the resale rate pursuant to its mutually negotiated and executed ICA.¹⁰ As previously noted, the District Court found the Commission's *271 Order* to be unlawful and enjoined it from enforcement and remanded the action to the Commission for an award of damages due AT&T Kentucky.

DISCUSSION

Simply stated, the Commission should, on an expedited basis, issue an Order requiring SouthEast to immediately pay for the resale services that it ordered under its

⁸ See *SouthEast Telephone, Inc. v. BellSouth Telecommunications, Inc.*, Case No. 2005-00533.

⁹ The Commission did not order AT&T Kentucky to provision UNE-P services to SouthEast as such an order clearly would have been a direct violation of the *Cinergy Order*.

¹⁰ Since the *Opinion and Order*, AT&T Kentucky has continued to bill SouthEast the appropriate resale rates for the resale services ordered and has stopped issuing credits to make up the difference between those rates and the TELRIC plus \$1 rate previously ordered by the Commission.

ICA with AT&T Kentucky. There is no factual dispute here – the District Court has essentially directed the Commission to do one thing: namely order SouthEast to pay AT&T Kentucky for the resale services Southeast ordered from AT&T Kentucky. To allow this case to drag out further would be an injustice to AT&T Kentucky, which has complied with the law and with its obligations under the parties' ICA from the time the FCC's *Order on Remand* was issued in February 2005 until today, and would disregard and undermine the direction of the District Court. Since April 27, 2005, SouthEast ordered, and AT&T Kentucky provided, resale services available to SouthEast under its ICA. Yet, SouthEast has *never* paid AT&T Kentucky for such services in accordance with its ICA. Instead of doing what other CLECs did and comply with the law, SouthEast exercised self-help in withholding valid payments that were due AT&T Kentucky under the parties' negotiated ICA. AT&T Kentucky was required to continue to provide SouthEast all functions and services during the pendency of these proceedings even though SouthEast has failed to pay over what now amounts to millions of dollars for resold services ordered by and provided to SouthEast. The time has come to cease SouthEast's gaming of this Commission, federal law and AT&T Kentucky. SouthEast should now be required to pay the damages owed to AT&T Kentucky immediately.

In accordance with the parties' ICA, AT&T Kentucky has billed SouthEast for resale services ordered by SouthEast. Of course, SouthEast has refused to pay for the services it ordered. Because of SouthEast's refusal to pay for services it ordered, the past due amount on SouthEast's resale bill has continued to grow. Stated differently, the difference between what AT&T Kentucky has billed SouthEast for resale services

ordered by SouthEast and the amount SouthEast has paid for such services has grown over the last 2 ½ years. SouthEast's billing history for its resale account is set forth as **Exhibit B**. Accordingly, SouthEast should be ordered to pay the past due amount on its resale bill. As previously noted, this amount exceeds [REDACTED].

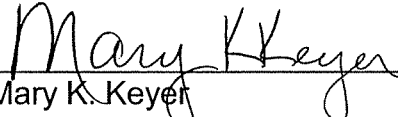
Additionally, SouthEast must be required to pay the credit amount AT&T Kentucky provided to SouthEast in order to comply with the Commission's unlawful 271 Order. Because SouthEast continued to order resale services, AT&T Kentucky continued to bill SouthEast for resale services. However, in order to comply with the Commission's 271 Order (which required AT&T Kentucky to charge SouthEast TELRIC + \$1 for resale services), AT&T Kentucky issued SouthEast periodic credits that totaled over [REDACTED]. That is, the resale rates that were billed, less the credit amounts given to SouthEast, equated to a TELRIC + \$1 rate for the resale services ordered by SouthEast.¹¹ The credits given to SouthEast, and the month when such credits were issued, are set forth in **Exhibit C**.

CONCLUSION

As directed by the District Court, the Commission should enter an Order requiring SouthEast to immediately pay: (i) the past due balance on its resale bill; and (ii) the credit amount that AT&T Kentucky gave to SouthEast in order to implement the Commission's unlawful 271 Order. A proposed Order is attached hereto as **Exhibit D**. To delay the issuance of such an Order only emboldens SouthEast to continue ignoring the law and breaching its obligations under the parties' ICA.

¹¹ As previously noted, the credit amount should appear on SouthEast's November resale bill. Thus depending on the timing of the Commission's Order requiring SouthEast to pay AT&T Kentucky, the Commission could simply order SouthEast to pay its resale bill.

Respectfully submitted,



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**Exhibits A, B, and C are
proprietary. There are no
edited versions.**

EXHIBIT D – PROPOSED ORDER

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

AND

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

VS.)

BELLSOUTH TELECOMMUNICATIONS, INC.)
)
DEFENDANT)

ORDER

By Order issued by the United States District Court for the Eastern District of Kentucky (“*Opinion and Order*”),¹ this matter was remanded to the Commission for a determination of damages sustained by BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky (“AT&T Kentucky”). The District Court has the authority under the federal Telecommunications Act of 1996 (the “Act”) as well as pursuant to ordinary federal question jurisdiction to remand this matter to the Commission for a damages

¹ Opinion and Order, *BellSouth Telecommunications, Inc. v. Kentucky Public Service Commission, et al.*, Civil Action No. 06-65-KKC, United States District Court, Eastern District of Kentucky (September 18, 2007).

determination. *Opinion and Order* at 21; *BellSouth v. Georgia Public Service Commission*, 400 F.3d 1268, 1271 (11th Cir. 2005). In its *Opinion and Order*, the District Court found that the Commission lacked the authority to act pursuant to § 271 of the Telecommunications Act of 1996 (the “Act”) and therefore enjoined enforcement of the Commission’s Order issued in these companion cases on August 16, 2006 (“271 Order”).

On November 9, 2007, AT&T Kentucky filed a motion for a damages award. In support of its motion, AT&T Kentucky identified with specificity the damages AT&T Kentucky has sustained as a direct and proximate result of AT&T Kentucky’s adherence to the Commission’s *271 Order*. Basically, AT&T Kentucky asserts that SouthEast Telephone, Inc. (“SouthEast”) owes AT&T Kentucky: (i) the past due balance on SouthEast’s resale account as of November 8, 2007 (██████████); and (ii) the credit amount that AT&T Kentucky gave to SouthEast in order to comply with the *271 Order* (██████████).² Based on a review of the record in this matter and the arguments made by the parties, the Commission agrees and therefore orders SouthEast to immediately pay AT&T Kentucky ██████████ plus any additional amounts that have become past due on SouthEast’s resale account since November 8, 2007. In addition to being entitled to such damages as a matter of law, the Commission finds that under the parties’ Interconnection Agreement (“ICA”), SouthEast has an obligation to pay for the resale services that it has ordered from AT&T Kentucky. See ICA, Attachment 7, Sections 1.3 and 1.4.

² In its motion, AT&T Kentucky stated that it was in the process of reversing the credit amount previously provided to SouthEast. Accordingly, if the credit amount has not been added to SouthEast’s resale bill as an additional charge, then SouthEast must pay the credit amount in addition to the past due balance on its resale account.

In its *Order on Remand*, the Federal Communications Commission (“FCC”) held that competitive local exchange carriers (“CLECs”) “are not impaired in the deployment of switches” and that unbundling of such elements was no longer required.³ The *Order on Remand* became effective March 11, 2005. The FCC provided for a one-year transition period up to March 11, 2006, for CLECs to transition their *existing* UNE-P customers to other arrangements, but did *not* allow for the ordering of *new* UNE-P services. On February 11, 2005, in response to the FCC’s *Order on Remand*, AT&T Kentucky notified all CLECs that it would no longer accept new switching orders to those facilities not required by the FCC’s *Order on Remand*.

At the request of some CLECs, the Commission rejected AT&T Kentucky’s (then known as BellSouth) position that the *Order on Remand* was immediately effective on March 11, 2005, and on March 10, 2005, issued two orders requiring AT&T Kentucky to continue to provide *new* UNE Platform (“UNE-P”) switching orders for an indefinite period.⁴ On April 22, 2005, the U.S. District Court for the Eastern District of Kentucky granted AT&T Kentucky a preliminary injunction against enforcement of the Commission Order by affirming the FCC’s order of no new UNE-Ps.⁵ In March 2006, the District Court granted a permanent injunction against the aforementioned Commission Order.

³ Order on Remand, *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290, at ¶ 112 (FCC Feb. 4, 2005) (“Order on Remand”)

⁴ See *In re Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*, Docket No. 2004-00427, and *In re Joint Petition of NewSouth Communications Corp., et al.*, Docket No. 2004-00044.

⁵ See *BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, Civil Action No. 3:05-CV-16-JMH, *Memorandum Opinion and Order* (E.D. Ky. Apr. 22, 2005) (“*Cinergy Order*”). See also *Memorandum Opinion and Order* (E.D. Ky., Mar. 20, 2006).

Following the *Cinergy Order*, AT&T again notified all CLECs that effective April 27, 2005, it would no longer accept new orders for UNE-P services. Nevertheless, SouthEast continued to attempt to order new UNE-P services. AT&T Kentucky rejected those orders. SouthEast then began ordering resale services under its ICA with AT&T Kentucky, but refused to pay the resale rates provided for in the ICA. Instead, SouthEast “short paid” its resale bill in an effort to pay UNE-P rates for resale services.⁶ This self-help began as of April 27, 2005, the date by which AT&T notified all its CLEC customers that no new UNE-P orders would be accepted.

After numerous unsuccessful attempts by AT&T Kentucky to get SouthEast to pay the past due amounts for the resale services, AT&T Kentucky notified the Commission on December 6, 2005, that it intended to disconnect SouthEast for non-payment. SouthEast filed with the Commission a complaint and request for an emergency injunction against AT&T Kentucky.⁷ The Commission disallowed the disconnection and on December 16, 2005, ordered AT&T Kentucky to consider SouthEast’s account current while the dispute was pending.

The Commission then issued its *271 Order* finding that AT&T Kentucky must provide switching and transport elements to SouthEast pursuant to § 271 of the Act and determining that the appropriate rate for the services ordered by SouthEast was

⁶ AT&T Kentucky points out that SouthEast failed to pay AT&T Kentucky at the TELRIC rate, or the TELRIC plus \$1 rate pursuant to the Commission’s *271 Order*. Specifically, SouthEast refused to pay amounts that SouthEast claims represent lost revenue. Under SouthEast’s theory, if the resale services it ordered from AT&T Kentucky were considered unbundled network elements (“UNEs”), then SouthEast would have collected certain access charges that it was unable to collect because it has ordered resale services. The Commission disagrees with SouthEast’s “lost revenue” theory. On its face, this brazen and egregious self-help by SouthEast will not be tolerated. In any event, SouthEast’s self-help is not permitted by the billing dispute provision of the parties’ ICA and is completely at odds with SouthEast’s contractual obligation to timely pay for services that it orders from AT&T Kentucky.

⁷ See *SouthEast Telephone, Inc. v. BellSouth Telecommunications, Inc.*, Case No. 2005-00533.

TELRIC plus \$1 from April 27, 2005, until the parties could agree on a new rate or until the Commission could establish one.⁸ As previously noted, the District Court found the Commission's *271 Order* to be unlawful and enjoined it from enforcement and remanded the action to the Commission for an award of damages due AT&T Kentucky.

There is no factual dispute here – the District Court has essentially directed the Commission to require SouthEast to pay AT&T Kentucky for the resale services Southeast ordered from AT&T Kentucky. AT&T Kentucky's damages motion plainly and clearly demonstrates the damages that AT&T Kentucky has sustained as a result of the *271 Order*.

In accordance with the parties' ICA, AT&T Kentucky has billed SouthEast for resale services ordered by SouthEast. SouthEast has refused to pay for the resale services it ordered. Because of SouthEast's refusal to pay for services it ordered, the past due amount on SouthEast's resale bill has continued to grow. Stated differently, the difference between what AT&T Kentucky has billed SouthEast for resale services ordered by SouthEast and the amount SouthEast has paid for such services has grown over the last 2 ½ years. SouthEast's billing history for its resale account is set forth as Exhibit B to AT&T Kentucky's motion. Accordingly, the Commission finds that SouthEast must pay the past due amount on its resale bill.

Additionally, the Commission finds that SouthEast must be required to pay the credit amount AT&T Kentucky provided to SouthEast in order to comply with the Commission's unlawful *271 Order*. That is, the resale rates that were billed, less the credit amounts given to SouthEast, equated to a TELRIC + \$1 rate for the resale

⁸ The Commission did not order AT&T Kentucky to provision UNE-P services to SouthEast as such an order clearly would have been a direct violation of the *Cinergy Order*.

services ordered by SouthEast. See Exhibit B to AT&T Kentucky's damages motion. Because the credits were given in order to comply with an Order that has been deemed unlawful and unenforceable, it naturally and logically follows that SouthEast must pay AT&T Kentucky the amount previously credited.

IT IS HEREBY ORDERED that:

1. AT&T Kentucky's Motion for an Award of Damages is granted.
2. SouthEast must immediately pay the past due balance on its resale bill.
3. If the credit amount that AT&T Kentucky previously gave to SouthEast in order to implement the Commission's *271 Order* has not been added to SouthEast's resale bill as an additional charge, then SouthEast must immediately pay the credit amount in addition to paying the past due balance on its resale bill.

Done at Frankfort, Kentucky, this ____ day of November, 2007

By the Commission

ATTEST:

Executive Director

CERTIFICATE OF SERVICE
KPSC 2005-00519 and KPSC 2005-00533

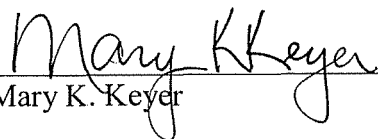
It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by mailing a copy thereof, this 9th day of November 2007.

Darrell Maynard
SouthEast Telephone, Inc.
106 Power Drive
P. O. Box 1001
Pikeville, KY 41502-1001

Hon. Jonathon N. Amlung
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Bethany Bowersock
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Hon. David L. Sieradzki
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Mary K. Keyer