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November 29, 2007

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 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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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 RESPONSE TO MOTION
FOR ISSUANCE OF DAMAGES AWARD**

SouthEast Telephone, Inc., by counsel, pursuant to the Commission's Order dated November 17, 2007 in the above cases, responds to the motion of BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ("AT&T Kentucky") for issuance of an award of damages as follows:

INTRODUCTION

AT&T Kentucky, in its Motion, misrepresents the District Court Order¹ remanding the damages issue to the Commission (the "Remand Order"). The court ruled only on a jurisdictional issue – and on a very narrow jurisdictional issue, at that. The Court held only that

¹ *BellSouth Telecommunications, Inc. v. Kentucky Public Service Comm'n, et al.*, C.A. No. 06-65-KKC (E.D. Ky. September 18, 2007).

the PSC had no jurisdiction to act under Section 271 of the Telecommunications Act of 1996 (while nevertheless stating that AT&T Kentucky is fully subject to Section 271 duties). In the next breath, the Court discussed the breadth of PSC authority under state law. As to the issue of “damages, if any,” the court left the entire matter in the hands of the PSC [Remand Order, Slip Op. at 21].

AT&T Kentucky claims that the Remand Order does much more – that it “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” [AT&T Kentucky Motion at 6]. But there is no such directive in the Remand Order. The Court expressly declined to issue such a directive, rejecting outright AT&T Kentucky’s request that the Court “direct[] the PSC to order SouthEast to pay BellSouth the resale rates (with interest) for those services that SouthEast ordered as resale.”² The Remand Order could not be clearer: “the Court will not address the issue of damages.” Instead, the Court left the issue of damages, “if any,” entirely to the discretion of the PSC [Remand Order, Slip Op. at 21].

Thus, contrary to AT&T Kentucky’s contention, the Court specified no damages remedy for AT&T Kentucky. The court did *not* say that AT&T Kentucky is entitled to damages. The court did *not* say that AT&T Kentucky has been entitled to collect its resale rate for the Section 271 competitive checklist elements it is obligated to sell to SouthEast. The court did *not* instruct the PSC as to the manner in which it should calculate the “damages, *if any*” [Remand Order, Slip Op. at 21], to which AT&T Kentucky is entitled as a result of the PSC’s orders in these cases. Indeed, it expressly declined to do so.

² BellSouth Consolidated Reply in Support of Motion for Summary Judgment and Opposition to Cross-Motions for Summary Judgment, filed Jan. 26, 2007, at 45.

What the court *did* say is that, even though Section 271 does not authorize the PSC to implement it, AT&T Kentucky is nevertheless required by law to comply with it [Remand Order, Slip. Op. at 26]. Section 271 competitive checklist elements, which AT&T Kentucky is required to provide, are not the same thing as “resale service,” the rates for which are calculated under a separate section of the Act. SouthEast intended to order, and did order, Section 271 competitive checklist elements, not resale service. AT&T Kentucky is simply wrong in repeatedly claiming in its Motion, at 2 and 6, that SouthEast ordered “resale services.” SouthEast used the resale ordering system to submit orders for the Section 271 elements only because AT&T Kentucky wrongly denied SouthEast access to its network element ordering system.³

The Remand Order confirms that AT&T Kentucky was and is obligated to provide Section 271 competitive checklist elements. That conclusion, along with the court’s clear refusal to order damages based on resale, and the court’s indication that AT&T may not have suffered *any* damages -- requires rejection of AT&T Kentucky’s argument that it is retroactively entitled to its resale rate.

However, according to the Remand Order, the PSC cannot set rates pursuant to Section 271, and cannot, therefore, use such rates as a measure of damages. Consequently, the only reasonable manner in which the PSC can comply with the Remand Order and determine the measure of AT&T’s “damages, if any,” is to base its determination on a make whole theory – i.e., to calculate the actual difference between what SouthEast paid pursuant to the PSC’s Order and the provisioning cost to AT&T Kentucky. Unless the latter number exceeds the former, AT&T Kentucky should receive no damages at all. Moreover, any damages computation must

³ The PSC confirmed that SouthEast had, in fact, ordered Section 271 elements in its August 16, 2006 Order, at 12, in these dockets when it held that the preexisting Interconnection Agreement between the parties did not cover the Section 271 elements that SouthEast had ordered. The District Court never disturbed the PSC’s conclusion on this point, despite extensive briefing.

take into account the access charges to which SouthEast was entitled, but was unable to recover from interexchange carriers due to AT&T Kentucky's wrongful conduct.

ARGUMENT

I. **THE COURT DID NOT SPECIFY THAT AT&T KENTUCKY IS ENTITLED TO ANY DAMAGES AT ALL, MUCH LESS TO DAMAGES COMPUTED BY REFERENCE TO THE RESALE RATE, AND LEFT THE MATTER ENTIRELY IN THE HANDS OF THE PSC.**

AT&T Kentucky asserts that “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” [AT&T Kentucky Motion at 6]. The District Court directed the Commission to do no such thing. In fact, the Court expressly declined to address the issue, and clearly contemplated that AT&T Kentucky *may not have suffered any damages at all*, remanding the question of damages to the PSC “to determine the amount of damages, *if any*,” incurred as a result of the PSC’s Order [Remand Order, Slip Op. at 26 (emphasis added)]. If the Court thought the resale rate a proper measure of damages, it could have said so, and it certainly would not have indicated the potential for a lack of any damages award at all.

The Court did mention AT&T Kentucky’s assertion that it is entitled to its resale rate as a measure of damages, but it did not endorse that assertion. Instead, it explicitly stated that it did *not* endorse that measure, or indeed any measure, of damages. It left the matter entirely to the PSC:

BellSouth also requests the Court to order SouthEast to pay BellSouth the resale rates for those services that SouthEast ordered. Having determined that the PSC lacks authority under § 271, the court will not address the issue of damages. ... [T]he Court will remand the matter to the PSC to determine the amount of damages, if any, owed to BellSouth.

Remand Order, Slip Op. at 21.

The Court did not, therefore, “direct” the Commission to order SouthEast to pay resale rates for Section 271 competitive checklist elements, as AT&T Kentucky contends. In any event, as is further explained below, given the Court’s confirmation that AT&T Kentucky is required to provide competitive checklist elements under § 271 [Remand Order, Slip Op. at 26], it is more reasonable to find that no damages are owed at all than to calculate damages by reference to the Act’s separate avoided cost rate for resale service.

AT&T Kentucky’s contention that it is entitled to damages based on its resale rate – indeed, its contention that the Remand Order entitles it to any measure of damages at all -- must be rejected.

II. THE COURT CONFIRMED THAT SOUTHEAST IS ENTITLED TO OBTAIN SECTION 271 COMPETITIVE CHECKLIST ELEMENTS FROM AT&T KENTUCKY, DIRECTLY REFUTING THE CONTENTION THAT THE RATE FOR “SERVICE” RATHER THAN FOR “ELEMENTS” IS THE PROPER MEASURE OF DAMAGES.

There is no basis for AT&T Kentucky’s claims that it is entitled to its resale rate for all the months that it unreasonably compelled SouthEast to use the resale ordering system to purchase the Section 271 competitive checklist elements that AT&T Kentucky was obligated to provide pursuant to 47 U.S.C. § 271 (c)(2)(B). The court’s Remand Order makes it abundantly clear that SouthEast was, in fact, entitled to Section 271 competitive checklist elements and was *not* required to make do with resale service. The Court held that AT&T Kentucky is required to do precisely what the PSC ordered it to do -- provide Section 271 competitive checklist elements under Section 271 of the Act, at just and reasonable rates, to SouthEast:

...as a BOC, BellSouth is subject to § 271 duties. The Court, by holding that the PSC Orders are unlawful, in no way suggests that BellSouth is not subject to §

271 duties. Instead, the Court **merely** concludes that the PSC did not have authority to act pursuant to § 271.

Remand Order, Slip Op. at 26 (emphasis added).

The Court's recognition of SouthEast's right to obtain Section 271 competitive checklist elements from AT&T Kentucky is further underscored by its decision not to dismiss, but to hold in abeyance until the Federal Communications Commission has an opportunity to consider it, SouthEast's counterclaim that AT&T Kentucky violates federal law by refusing to provide Section 271 competitive checklist elements at just and reasonable rates [Remand Order, Slip Op. at 27].⁴

The Section 271 competitive checklist elements which SouthEast ordered and to which SouthEast was entitled are most certainly not resale service. Resale service does not constitute the lease of facilities to SouthEast so that SouthEast may offer local exchange and exchange access services. It is simply the resale of AT&T Kentucky's retail service at an avoided cost discount, under Sections 251(c)(4) and 252(d)(2). The Court's Remand Order acknowledging AT&T Kentucky's obligation to provide Section 271 competitive checklist elements therefore makes it clear that the damages estimate cannot be based on the rates and terms specified under the Act for a completely different arrangement, i.e., resale.

⁴ This decision directing the parties to the FCC for resolution and retaining jurisdiction over the issue also emphasizes that the Remand Order overturned the PSC decision on grounds of Section 271 *jurisdiction* rather than Section 271 *merits*. It is also worth noting that the Court did not disturb or address this Commission's factual conclusion that the services SouthEast ordered from AT&T Kentucky constituted Section 271 competitive checklist elements, not resale. The PSC held that "[t]he issue raised by this complaint is whether BellSouth must make the port-loop-switch elements available to SouthEast at an appropriate rate pursuant to Section 271" [PSC August 16, 2006 Order, p.11], and set an interim rate pursuant to Section 271 that should apply "for services purchased from BellSouth through the resale system." [*Id.*, p.12.] While the Remand Order overturned the PSC's order with respect to the rate, it said nothing about the factual conclusion that SouthEast ordered Section 271 elements, and confirmed the PSC's conclusion that AT&T Kentucky must make these Section 271 elements available.

Nor does AT&T Kentucky's refusal to permit SouthEast to order Section 271 competitive checklist elements support its current contention that it is entitled to the resale rate as a measure of damages. AT&T Kentucky's recalcitrance is in violation of Section 271 and FCC Orders upholding competing carriers' right to obtain Section 271 competitive checklist elements at "just and reasonable rates" from RBOCs.⁵ AT&T Kentucky's claim, in its Motion, at 2, that it has "abided by the Commission's orders, including the unlawful *271 Order*" is simply untrue. The Commission, like the court, found that *AT&T Kentucky is required to provide Section 271 competitive checklist elements*.

Instead of complying, AT&T Kentucky responded to the law requiring it as an RBOC to provide Section 271 competitive checklist elements (including the loop, switching, and transport elements) by digging in its heels. It would permit SouthEast only to submit orders through its resale ordering system. It also wrongly denied SouthEast its right to the access charges to which a CLEC is entitled when it purchases lines under the Section 271 competitive checklist framework. But the FCC has drawn precisely this distinction between network elements and resale. See *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order*, ¶ 332, 11 FCC Rcd 15499, 15668 (1996) ("...carriers solely using unbundled network elements can offer exchange access services. These services, however, are not available for resale under section 251(c)(4) of the 1996 Act").⁶ SouthEast is, was, and

⁵ See, e.g., *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003), *aff'd in pertinent part and remanded in part*, *United States Tel. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 125 S.Ct. 313 (2004) ("Triennial Review Order"), at ¶ 407 ("...BOCs have an independent obligation, under section 271 (c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates") and ¶ 656 (Section 271 UNEs are to be "priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202").

⁶ See also *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, 16 FCC Rcd 9923 (2001), *aff'd sub nom. AT&T Corp. v. FCC*, 292 F.3d 808 (D.C. Cir. 2002) (confirming CLECs' right to receive access charges).

has been entitled by law to Section 271 competitive checklist elements. Now, AT&T seeks to use its unreasonable denial of access to the network element ordering system, and its improper practice of compelling SouthEast to submit orders as “resale,” to buttress its claims that it is entitled to receive the resale rate even as it deprives SouthEast of the access revenues to which it is entitled. AT&T Kentucky should not be allowed to benefit from its own refusal to abide by the Act, by the FCC’s orders, or by the District Court’s Order by continuing to assert that it is entitled to provide access only to the resale ordering system when a competing carrier requests Section 271 competitive checklist elements.

AT&T Kentucky has been rebuked by the PSC and the courts for this sort of self-serving, disingenuous behavior before. *See BellSouth Telecommunications, Inv. v. Public Service Comm’n of Kentucky*, 380 F.Supp.2d 820 (E.D. Ky. 2004), *aff’d*, 142 Fed.Appx. 886 (6th Cir. 2005) (rejecting BellSouth’s claim that it was entitled to termination charges for cessation of a special access contract when the competing carrier had entered into that contract *only* because BellSouth had refused to comply with PSC Orders requiring it to provide unbundled network elements, and holding that BellSouth should not benefit from its refusal to comply). Here, once again, a competing carrier has been forced by AT&T Kentucky to accept terms other than those to which it is entitled by law. Here, once again, AT&T Kentucky seeks to benefit from its stubborn refusal to comply with the law. It should not be permitted to do so.

Regardless of PSC jurisdiction to *enforce* Section 271, AT&T Kentucky is most certainly obligated to *comply* with it. It has not done so. Its assertion that it is now entitled to its resale rate for all the months that it refused to comply with its Section 271 duties conflicts with the Court’s Remand Order expressly affirming AT&T Kentucky’s obligation to fulfill those duties and must be rejected.

**III. THE PROPER MEASURE OF AT&T KENTUCKY'S
"DAMAGES, IF ANY," IS ITS LOSS, "IF ANY," SUSTAINED
AS A RESULT OF THE COMMISSION'S ORDERS.**

The Remand Order clearly instructs the Commission to determine "damages, if any" owed to AT&T Kentucky as a result of the Commission's having acted under Section 271. The term "damages" is defined by Black's Law Dictionary (8th Ed. 2005) as money to be paid as "compensation for loss or injury." The only proper measure of damages here is "actual damages," defined by Black's as an amount "to compensate for a proven injury or loss; damages that *repay actual losses*." (Emphasis added.) There is no indication in the Court's Order that anything other than "actual" damages are appropriate. The Remand Order reflects the District Court's intention that the PSC cure any monetary injury that it has caused by acting under Section 271, and should not be read more broadly to include a measurement of AT&T Kentucky's alleged damages based on "expectations" and the like – particularly since the court indicated that AT&T Kentucky may have sustained no "damages" at all.

Moreover, Kentucky law on the "damages" issue must be taken into account. The Commission has no jurisdiction to award "damages," *per se*. See *Tyra Hinshaw v. Kentucky Utilities Co.*, PSC No. 2007-00096, at 2-3 (Order dated March 27, 2007), and cases cited therein, including *Carr v. Cincinnati Bell, Inc.*, 651 S.W.2d 126, 128 (Ky. App. 1983).⁷ The Commission can, however, restore to a utility monies lost *if* that loss is confiscatory and is

⁷ The Commission can, of course, enforce carrier interconnection agreements, but AT&T Kentucky can hardly rely on the parties' contract to support an argument that it was entitled to its resale rate when SouthEast requested 271 competitive checklist elements. The PSC has already held that the interconnection agreement did not apply to this dispute, consistent with AT&T Kentucky's position that it did not have to follow the dispute resolution provisions in the interconnection agreement [PSC Order of August 16, 2006, at 11]. Moreover, SouthEast is entitled to assert its rights under governing law – and the governing law is Section 271. As the PSC knows, AT&T Kentucky took immediate advantage when a mere *change* in law freed it from providing UNE-P pursuant to Section § 251, casting aside without hesitation its pre-existing contractual obligations to the contrary. AT&T Kentucky cannot have it both ways.

ascertainable by actual figures. For example, in *Kentucky Power Co. v. Energy Regulatory Comm'n of Kentucky*, 623 S.W.2d 904 (Ky. 1981), the Commission was ordered to permit a utility to implement a surcharge to recoup loss of past revenue, when additional revenue (\$7,020,366) had been approved by the Commission itself but miscalculations by staff had resulted in confiscatory rates that produced \$4,006,049 less than the Commission had approved.

Thus, the question before the Commission is: how much money did the PSC's issuance of Orders pursuant to Section 271 cause AT&T Kentucky to lose?

AT&T Kentucky claims it "lost" the money it *would have* received if it had been able to charge the resale rate for wholesale services. As we have seen, the resale rate was inappropriate under Section 271 of the Act, the FCC's Orders, the PSC's Orders, and now the Remand Order: whatever AT&T should have been permitted to charge for Section 271 competitive checklist elements, it was certainly not the "resale" rate for "service" that is materially different from lease of competitive checklist elements, and the price of which is calculated under another section of the Act.

Next, there may be some "just and reasonable rate" for Section 271 UNEs pursuant to Sections 201 and 202 that is a different rate than the interim charge set by the PSC, TELRIC plus \$1. However, the Court has held that Section 271 does not authorize the PSC to set that rate, and the FCC *has* not set that rate. Thus, if the PSC attempted to use a "just and reasonable" Section 271 rate as a measure of damages, its only recourse would be to guess what the FCC's rate would be. The use of any such guesstimate in the calculation of damages is highly speculative – far too speculative to support a damages award, even if the PSC were a court. *See Pauline's Chicken Villa, Inc. v. KFC Corp.*, 701 S.W.2d 399, 401 (Ky. 1985) ("The rule in this state is that which is set out in *Restatement (Second) Contracts*, § 352: 'Damages are not recoverable for loss

beyond an amount that the evidence permits to be established with reasonable certainty.”); *Commonwealth Dept. of Highways v. Jent*, 525 S.W.2d 121, 122 (Ky. 1975) (“Even if it is conceded that the appellant negligently caused the water flow across appellees’ properties, the appellees’ claim on this point still fails because there is no evidence of diminution of value of appellees’ properties as a result thereof. ... The jury should not be allowed to engage in speculation or guesswork as to the probable damages resulting from the allegedly negligent construction where no evidence is offered on the point.”); *Kentucky West Virginia Gas Co. v. Frazier*, 195 S.W.2d 271, 273 (Ky. 1946) (“We have heretofore held that facts must be shown which afford a basis for measuring or computing damages with reasonable certainty.”); *Barley’s Adm’x v. Clover Splint Coal Co.*, 150 S.W.2d 670, 671 (Ky. 1941) (addressing claim for wrongful death damages due to coal company’s delay in summoning doctor: “[T]he damages sought to be recovered in this action are uncertain, contingent, and speculative and such damages cannot be recovered either in actions *ex contractu* or actions *ex delicto*.”).

We are left with actual monetary cost to AT&T Kentucky, “if any,” the most reasonably supportable measure available under the reasoning of the Remand Order; the measure most consistent with the District Court’s clear acknowledgement of the possibility that AT&T Kentucky may not have suffered any damages at all; and the measure that is permitted under Kentucky law governing the Commission. To receive damages, AT&T Kentucky must prove damages by coming forward with evidence to demonstrate that its property has been confiscated

in that it did, in fact, fail to recover its costs (as opposed to speculative profits) as a result of the PSC's Orders.⁸

The Commission must proceed on the basis of actual figures available to it. No one can definitively re-draft history to establish the rate that would have resulted (and therefore would serve as the measure of AT&T Kentucky's "damages") had the PSC not taken jurisdiction, and it is particularly inappropriate and speculative to attempt such a thing here. Pursuant to both the Remand Order and Kentucky law, the proper measure of AT&T Kentucky's "damages, if any," is the amount of money, "if any," that receipt of the TELRIC plus \$1 rate actually cost AT&T Kentucky.

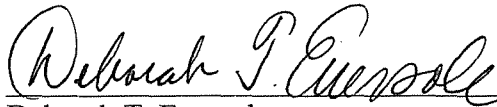
CONCLUSION

The Remand Order addresses only Section 271 jurisdiction. It does not address substance, except insofar as it confirms the obligation of AT&T Kentucky to provide Section 271 competitive checklist elements to SouthEast. The Remand Order says nothing to disturb the PSC's factual conclusions that SouthEast intended to, and did, order Section 271 competitive checklist elements rather than resale service. In short, AT&T Kentucky cannot reasonably

⁸ Another speculative, and therefore inappropriate, alternative is to measure damages by the amount AT&T Kentucky would have received under its outrageously priced "Commercial Agreement." Such a measurement is highly speculative because, in order to accept these rates as the proper measure of damages, one would have to re-draft history on the assumption that, had the PSC not acted under Section 271, SouthEast would have accepted the agreement as is, paying those rates to the present date rather than petitioning the FCC to obtain just and reasonable rates. That would not have been the case. Indeed, SouthEast turned to the PSC for relief in the first place because it was unwilling to subject itself to such a monopolistic contract of adhesion. It is true that SouthEast has now, under duress, entered into a "Commercial Agreement" with AT&T Kentucky; but SouthEast also has reserved the right to seek relief from the FCC if AT&T does not agree to reasonable modifications to the agreement going forward. Indeed, if the PSC had not accepted jurisdiction over this dispute, SouthEast might have turned to the FCC for relief earlier. In any case, the PSC cannot now set damages by attempting to guess at the just and reasonable rate the FCC would have set in an action that never occurred, or that the FCC might set in the future in a proceeding that has not yet happened. To avoid guessing, the PSC could decide to hold the damages issue in abeyance until either [a] the FCC determines a just and reasonable rate pursuant to SouthEast's pending action, or [b] AT&T agrees to reasonable rate before the FCC reaches a decision, and then use that rate to calculate damages. However, this solution also is problematic as it seems to conflict with the District Court's Remand Order directing the PSC to determine the damages itself.

contend that it is entitled to resale rates based on its unlawful denial of access to the network ordering system when SouthEast sought to purchase Section 271 elements. Further, the court's decision to remand the issue of "damages, if any," to the Commission establishes that the Commission has full discretion to determine how to measure the damages to be awarded or, indeed, to determine that *no* damages should be awarded, based on a lack of demonstrable loss to AT&T Kentucky. For these, and other reasons stated herein, SouthEast respectfully requests that the Commission enter its Order finding that, unless AT&T Kentucky comes forward with evidence to demonstrate that its cost exceeded the payments it received, it has sustained no damages to which it is entitled pursuant to the Remand Order.

Respectfully submitted,

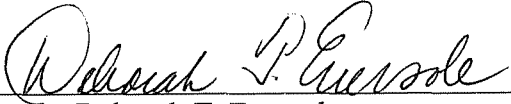


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CERTIFICATE OF SERVICE

I hereby certify that this 29th day of November, 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