HOGAN & HARTSON

Hogan & Hartson LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004
+1.202.637.5600 Tel
+1.202.637.5910 Fax

www.hhlaw.com



March 16, 2007

David L. Sieradzki
Partner
+1.202.637.6462
dlsieradzki@hhlaw.com

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

Re: *Petition of SouthEast Tel., Inc. for Arbitration of Certain Terms and Conditions of Proposed Agreement with BellSouth Telecommunications, Inc. Concerning Interconnection Under the Telecommunications Act of 1996*, Case No. 2006-00316

Dear Ms. O'Donnell:

The attached Post-Hearing Brief on behalf of SouthEast Telephone, Inc. ("SouthEast") was transmitted to and received by the Commission and all parties in this case via e-mail on February 23, 2007, the date specified in the Commission's procedural order in this case. Due to an administrative oversight, it appears that hard copies may not have been sent to accompany the e-mailed version. I appreciate your acceptance of the enclosed hard copy of the Brief and my apologies for any inconvenience.

Respectfully submitted,

David Sieradzki

David L. Sieradzki
Counsel for SouthEast Telephone, Inc.

cc: Mary K. Keyer
Andrew D. Shore
Amy E. Dougherty

**COMMONWEALTH OF KENTUCKY**
**BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

| | | |
|---|---|---|
| PETITION OF SOUTHEAST TELEPHONE, INC., FOR ARBITRATION OF CERTAIN TERMS AND CONDITIONS OF PROPOSED AGREEMENT WITH BELLSOUTH TELECOMMUNICATIONS, INC. CONCERNING INTERCONNECTION UNDER THE TELECOMMUNICATIONS ACT OF 1996 | ) ) ) ) ) ) | Case No. 2006-00316 |

# SOUTHEAST TELEPHONE, INC.'S POST-HEARING BRIEF


Bethany Bowersock
SOUTHEAST TELEPHONE, INC.
106 Power Drive
Pikeville, KY 41502

David L. Sieradzki
HOGAN & HARTSON, LLP
555 – 13th St., N.W.
Washington, D.C. 20004
(202) 637-6462
DLSieradzki@hhlaw.com

Counsel for SouthEast Telephone, Inc.


February 23, 2007

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SouthEast Telephone, Inc. ("SouthEast") respectfully submits this Post-Hearing Brief in support of its Petition for Arbitration.

## INTRODUCTION

Consumers in rural Kentucky – like consumers across the country and around the globe – increasingly need and demand broadband as well as voice telecommunications services. However, while broadband network deployment is accelerating rapidly in many metropolitan areas, consumers in rural America do not have the same access to these advanced facilities. The FCC recently released data demonstrating that, in general, consumers in areas with the lowest population density – *i.e.*, rural areas – have the lowest penetration of broadband service and tend to enjoy the fewest competitive options. 1/ In Kentucky in particular, the FCC's data show that consumers in 20% of Kentucky's Zip codes have no competitive alternatives for high-speed service, while 15% of Kentuckians live in areas with no access to xDSL service at all. 2/

Without a doubt, competition is the most reliable method to get these services out to consumers. Competition gives service providers strong incentives to construct network facilities, deploy innovative technologies, improve service quality, and reduce costs for consumers. SouthEast believes that, in order to bring the benefits of broadband services and telecommunications competition to all consumers in Kentucky – not just those in metropolitan areas – barriers to investment must be removed, and any market failures should be addressed through narrowly-tailored remedies that will maximize freedom for all market players. Eliminating barriers to voice competition will also enable the deployment of broadband services (as well as facilities supporting delivery of video and other information services), since carriers

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1/ FCC Wireline Comp. Bur., Industry Analysis & Technology Div., "High-Speed Services for Internet Access: Status as of June 30, 2006," Table 18 (released Jan. 31, 2007) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-270128A1.pdf).

2/ *Id.*, Tables 14 & 17.

obtain synergies and achieve cost reductions when they provide these services together, as consumers increasingly expect. 3/ These cost reductions are needed most in rural areas where costs are highest.

This proceeding presents an opportunity for the Commission to ensure that the rural consumer in Kentucky will not be left behind. Of course, this proceeding is an arbitration to resolve specific Interconnection Agreement issues in dispute between two individual carriers, SouthEast and BellSouth Telecommunications, Inc. (now AT&T South) ("BellSouth"), pursuant to Section 252 of the Telecommunications Act of 1996 ("Act"). But if the Commission sets the right course on these issues, SouthEast -- and any other competitive local exchange carriers ("CLECs") who may opt into the same interconnection terms in the future -- will have the opportunity to invest in the needed voice and broadband infrastructure in rural areas, and help close the digital divide. This competition, in turn, will give BellSouth incentives to accelerate its deployment of facilities and services in the rural communities of Kentucky.

SouthEast is virtually unique as a CLEC focusing on building facilities to provide both voice-grade ("POTS") and advanced services to mass market customers in rural areas. First, the company is following a unique business plan to deploy and sell broadband services to consumers in rural areas primarily in reliance on its own facilities and, if necessary, interconnecting to unbundled sub-loops at BellSouth's remote terminals. Deployment of "new technology [that has become available] over the past two years" will enable the company to "start that facilities-based build-out ... to provide both POTS ... and broadband" using "as little of BellSouth's network as possible." 4/ In order to reach that point, SouthEast will need access to certain interconnection arrangements and support services (Issues A-4 and A-9 in this proceeding). While these

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3/ Hearing Tr. at 151 (testimony of SouthEast witness Joseph Gillan).
4/ Hearing Tr. at 34-35 (testimony of SouthEast witness James Keller).

arrangements clearly are technically feasible for BellSouth to offer, they have not been a major focus of CLEC activity up until now.

Second, SouthEast Telephone is one of the very few CLECs left that is still focusing on serving the mass market (residential and small business customers) in rural areas. Few, if any, CLECs are still pursuing the business strategy to which SouthEast remains committed. 5/ The remaining CLECs are either focusing on medium- to large-business customers in large metropolitan areas or are operating under an "announced strategy of market exit." 6/ A number of factors may be responsible for these developments, including BellSouth's ultra-high network element rates in rural areas (and possibly BellSouth's substantially lower rates in urban areas, as well as the lower cost of CLECs' constructing their own network facilities); the FCC's *Triennial Review Remand Order* narrowing the scope of unbundled network elements ("UNEs") available at Total Element Long-Run Incremental Cost ("TELRIC") rates under Sections 251(c)(3) and 252(d)(1) of the Act; and the mergers of MCI/Verizon, SBC/AT&T and AT&T/BellSouth, which eliminated MCI and the old AT&T (the long-distance carrier and CLEC) as mass market competitors. Also, this arbitration proceeding is somewhat unique because it is one of the first to consider "just and reasonable" rates under the Section 271 pricing standard, as well as TELRIC rates for the UNEs and other elements and services that continue to be subject to Sections 251(c) and 252(d)(1).

Third, "you have a unique set of conditions here. You have a carrier [SouthEast] that's already into the rural areas and ... has new technology for a next-generation plan. So they have both an incentive and a need to try and make sure that they have an arrangement to continue in

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5/ Hearing Tr. at 140-41 (Gillan testimony).
6/ *Id.* at 152.

business to give them that ability to transition to meet different customer needs." 7/ But "for a significant while, ... the ability to provide [POTS] service is going to be absolutely critical if you're going to continue to have competition." 8/ In order to remain in business serving its existing customers and make the investments needed for the planned transition to a new business model, SouthEast continues to need access to BellSouth's legacy network elements – including those in Issues A-2 (loops) and A-3 (platform ports) – at "just and reasonable" rates, terms, and conditions, over the term of the Interconnection Agreement.

We demonstrate below that the Commission has full authority to adopt SouthEast's pro-competitive and pro-consumer positions on the disputed issues in this arbitration. We also point out the strong record evidence in support of SouthEast's positions on each of the unresolved issues presented for arbitration – including extensive cost support and data analysis that have not even been addressed, let alone rebutted, by BellSouth. SouthEast also has demonstrated powerful public interest considerations – above all, the need for greater competition in both broadband and voice telecommunications, to benefit consumers in rural Kentucky.

## I. THE COMMISSION HAS AUTHORITY TO ARBITRATE THE DISPUTED ISSUES IN THIS PROCEEDING

This Commission can and must apply its authority to develop fair resolutions to the issues in dispute here in order to serve the interests of consumers and the public interest. BellSouth takes the position that SouthEast has no legal rights to request, and that the Commission has no authority to arbitrate, any of the interconnection services and elements in dispute in this proceeding. 9/ Instead, BellSouth apparently believes it is entitled to impose whatever terms and

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7/ *Id.* at 142.
8/ *Id.*
9/ See, e.g., BellSouth Response to SouthEast Arbitration Petition (filed July 18, 2006), at 6 (on Issue A-2, "there is no need to 'establish' loop rates"); *id.* at 7 (on Issue A-3, "no port rate should be established"); *id.*

conditions it wants. BellSouth has demonstrated this belief by its "refusal to take this case seriously." 10/ Prior to the commencement of this arbitration, BellSouth never really engaged in any give-and-take negotiations with SouthEast but simply insisted on its standardized terms on a take-it-or-leave-it basis. 11/ Once the arbitration proceeding began, the company unlawfully "refus[ed]... to furnish cost data that would be relevant to setting rates," 47 C.F.R. § 51.301(c)(8)(ii), and objected to most of SouthEast's data requests on the grounds that the issues they covered were not proper subjects of arbitration. 12/ And BellSouth's lone witness offered no more than peremptory testimony, with no factual data or analysis at all, and no specific terms to counter SouthEast's proposals, regarding the key issues in dispute. 13/ "BellSouth's arbitration position is no different than its negotiating terms, which is simply: 'Just Say No.'" 14/

The Commission should reject the unfounded legal positions on which BellSouth purports to justify its refusal, in effect, to participate fully in negotiations with SouthEast or in this arbitration proceeding before the Commission. First, BellSouth wrongly contends that the Commission lacks authority to arbitrate terms for Section 271 Competitive Checklist elements, such as the "port" component of the loop-switching-transport group of elements (Issue A-4 in the

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(on Issue A-4, "terms governing such an arrangement should not be included in the interconnection agreement"), *id.* at 9 (Issue A-9 "is not an appropriate issue for a Section 252 arbitration").

10/ Gillan Rebuttal Testimony at 2.

11/ *See* SouthEast Arbitration Petition at 4.

12/ *See* BellSouth's Responses and Objections to SouthEast's First Set of Data Requests (filed Sept. 29, 2006) (refusing to respond to 48 of 49 interrogatories).

13/ *See* Tipton Direct Testimony (offering only 11 pages of prefiled direct testimony and no exhibits, in response to the hundreds of pages of prefiled direct testimony and exhibits filed by SouthEast's five witnesses); Hearing Tr. at 180-82 (witness Tipton admitted that the figures in her prefiled testimony did not take into account SouthEast's proposed zone boundary modifications and were not supported by any exhibit demonstrating the basis for those numbers).

14/ Gillan Rebuttal Testimony at 2.

arbitration). 15/ The Act plainly requires BellSouth to offer the Section 271 Competitive Checklist elements pursuant to "binding agreements that have been approved under section 252 specifying the terms and conditions" of these elements. 47 U.S.C. § 271(c)(1)(A). The Commission has rejected BellSouth's position twice, 16/ and both the Commission and SouthEast have filed briefs setting out in detail the basis for the Commission's authority over the "just and reasonable" terms for Section 271 elements under arbitrated Interconnection Agreements. 17/ SouthEast will not burden the record by reiterating these arguments here (although we do respectfully request that the Commission's and SouthEast's briefs be incorporated by reference herein). Suffice it to say that BellSouth cannot be allowed to defy the Commission's established precedents.

Moreover, the Section 271 "just and reasonable" pricing standard is not an empty vessel that lets BellSouth set so-called "market rates" at whatever level it wants. 18/ Nor does the fact that BellSouth succeeded in compelling other CLECs to enter so-called "commercial agreements," mean that such agreements qualify as "arms-length" or that their provisions are "just and reasonable." 19/ The Commission correctly articulated BellSouth's obligations to offer commingled groups of loop-switching-transport elements, and the Commission's

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15/ *See, e.g.*, BellSouth's Response in opposition to SouthEast's Motion to Compel and for a Continuance (Oct. 20, 2006).

16/ *Joint Petition for Arbitration of NewSouth Comms. Corp., et al.*, Case No. 2004-00044 (March 14, 2006) ("*NewSouth Order*"); *BellSouth Telecomms, Inc.'s Notice of Intent to Disconnect SouthEast Tel., Inc. for Non-Payment; SouthEast Tel., Inc. v. BellSouth Telecomms., Inc.*, Case Nos. 2005-00519 & 2005-00533 (August 16, 2005) ("*SouthEast No-Disconnects Order*").

17/ *BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n*, Case No. 3:06-cv-0065-KKC (U.S. District Court for the Eastern District of Kentucky).

18/ *See* SouthEast Brief in Response to BellSouth Motion for Summary Judgment and Cross-Motion for Summary Judgment, *BellSouth Telecomms., Inc. v. Kentucky Pub. Serv. Comm'n*, Case No. 3:06-cv-0065-KKC, at 25-31 (filed Dec. 28, 2006); SouthEast Reply Brief in Support of Cross-Motions for Summary Judgment at 10-12 (filed Feb. 15, 2007).

19/ *See* SouthEast Reply Brief at 12; *contra*, Hearing Tr. at 167 (Tipton testimony regarding commercial agreements with other CLECs).

responsibility to enforce those obligations, in the *NewSouth* and *SouthEast No-Disconnects* orders, and in its recent filings before the U.S. District Court.

In any event, most of the disputed issues in this proceeding are required pursuant to Section 251 (as well as Section 271), and are undoubtedly the proper subject of arbitrated Interconnection Agreements. The *Triennial Review Order* and the *Triennial Review Remand Order* make it clear that CLECs would be "impaired" without access to mass market unbundled loops (Issue A-2 here), and these elements (including sub-loops, conditioned loops, and access to line splitting) remain subject to Sections 251(c)(3) and 252(d)(1), as well as the FCC's implementing orders and regulations. 20/ Network-to-network interconnection and collocation arrangements (Issue A-4) are subject to Sections 251(c)(2) and (c)(6), and so the UNE impairment analysis is irrelevant to these elements. 21/ And nondiscriminatory operational support systems, including maintenance and repair (Issue A-8) and access to network information (Issue A-9), have been subject to the FCC's rules since 1996 and have never been challenged in court. 22/ BellSouth's challenges to the Commission's authority over these elements is meritless.

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20/ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, ¶¶ 248-54 (2003) ("*Triennial Review Order*"), Errata, 18 FCC Rcd 19020 (2003); *aff'd in 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); *on remand, Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533 (2005) ("*Triennial Review Remand Order*"), *aff'd, Covad Comms. Corp. v. FCC*, 450 F.3d 528 (2006).

21/ 47 U.S.C. §§ 251(c)(2) and (c)(6); 47 C.F.R. §§ 51.205, 51.323; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 15435 (2001) ("*Collocation Remand Order*"), *aff'd sub nom. Verizon v. FCC*, 292 F.3d 903 (D.C. Cir. 2002).

22/ 47 C.F.R. § 51.319(g); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶ 516-528 (1996) ("*Local Competition Order*"), *subsequent history omitted. See also* 47 C.F.R. § 51.307(e) ("An incumbent local exchange carrier shall provide to a requesting telecommunications carrier technical information about the incumbent local exchange carrier's network facilities sufficient to allow the requesting carrier to achieve access to unbundled network elements consistent with the requirements of this section.").

The Commission should not take seriously BellSouth's unfounded contention that SouthEast's arbitration petition is improper due to the manner in which the disputed issues were addressed during the pre-arbitration negotiation process. 23/ To the contrary, it is BellSouth that unreasonably refused to negotiate in good faith, in violation of Section 251(c)(1) of the Act. An interconnection "negotiation" under Section 252(a) is not supposed to be a process in which one CLEC is forced to agree to every term and condition that the ILEC has imposed on other CLECs. (That would be more akin to a tariff process.) But from the very beginning of SouthEast's attempts to negotiate a new Interconnection Agreement two years ago, BellSouth refused to take any of SouthEast's proposals seriously. SouthEast sent BellSouth numerous letters and e-mails throughout 2005 and 2006 offering a variety of different proposals regarding the rates, terms and conditions with regard to each of the issues presented here. BellSouth categorically rejected SouthEast's proposals and declined to engage in any of the give-and-take that typically characterize good-faith negotiations; instead, BellSouth never deviated substantively from the terms and conditions in its standard cookie-cutter Interconnection Agreement and so-called "Commercial Agreement." BellSouth's attempt to use its market dominance to impose a contract of adhesion does not constitute good-faith negotiations. Nor do BellSouth's continuing threats to cut off SouthEast's ability to access elements by a date certain constitute "good faith negotiations." 24/ These threats constitute a form of duress.

In sum, the disputed issues are properly presented in this arbitration proceeding, and the Commission has the authority and the statutory responsibility to resolve them in the public interest.

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23/ *See, e.g.*, BellSouth Response to Pet. for Arbitration (filed July 18, 2006) at 4 (accusing SouthEast of raising issues for the first time in the arbitration petition and of failing to negotiate in good faith).
24/ *See No-Disconnects Order*.

## II. THE COMMISSION SHOULD ADOPT SOUTHEAST'S POSITIONS ON THE DISPUTED ISSUES IN THIS PROCEEDING

### A. Issue A-2: Geographically Disaggregated Loop Rates

*What monthly recurring rates should be established in each pricing Zone for the voice-grade Local Loop element?*

#### 1. SouthEast's Loop Rate Deaveraging Proposal Complies With the Law and Advances the Public Interest

SouthEast witness Joseph Gillan presented detailed testimony setting forth the basis for the company's proposed deaveraged loop rates in various UNE zones. 25/ BellSouth refused to provide cost data regarding the costs it incurs on a geographically deaveraged basis in separate wire centers. Accordingly, Mr. Gillan's analysis is based on publicly available data – specifically, the relative forward-looking costs in each wire center as determined by the Commission, as well as the amounts of federal universal service fund ("USF") high-cost support disbursed per line in each wire center (which itself tracks relative cost). Mr. Gillan's proposal would group BellSouth's Kentucky wire centers into zones based on the ascending order of USF high-cost support disbursed in each zone, with Zone 1 comprising wire centers receiving no support per line, Zone 2 comprising wire centers receiving support less than or equal to $2.00 per line, and Zone 3 comprising wire centers receiving more than $2.00 of support per line. 26/ He explained that the proposed rates -- $15.96 in the new Zone 1, $16.90 in the new Zone 2, and $21.75 in the new Zone 3 – are targeted to preserve BellSouth's existing averaged loop rate of $17.26 per month, and that the proposed unbundled loop rates in each zone be determined by

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25/ Gillan Direct Testimony at 18-24; Gillan Rebuttal Testimony at 3-6; Hearing Tr. at 113-15, 118-157.

26/ Gillan Direct Testimony at 24. By comparison to the zone structure established in 2001, Mr. Gillan's proposal would, on the whole, place more wire centers in Zone 3 (resulting in a significantly lower average cost) and fewer wire centers in Zone 1 (resulting in a slightly higher average cost). *See* Exhibit JPG-4. BellSouth witness Pam Tipton mischaracterized Mr. Gillan's approach in her testimony. Hearing Tr. at 192.

taking into account the average amount of support per line available in that zone that generates a cost-based range of deaveraged zone rates. 27/

SouthEast's deaveraging proposal is consistent with the FCC's orders and TELRIC rules. SouthEast's proposal groups BellSouth's wire centers into "three zones [that] reflect geographic differences" that "more closely reflect the actual costs of providing" unbundled loops. 28/ Mr. Gillan's Exhibit JPG-4 (submitted with his Rebuttal Testimony) clearly demonstrates the forward-looking cost basis for establishing an ascending ranking of wire centers and grouping them into zones, using the forward-looking cost-based universal service support amounts distributed among BellSouth's high-cost zones pursuant to the FCC's rules. 29/

SouthEast's proposal also is fully consistent with this Commission's established policies. Although the proposal specifies a different grouping of wire centers into zones and different rate levels from those set during Administrative Case No. 382, the proposal specified "three geographic zones established based upon the ascending ranking of individual wire center costs." 30/ The fact that SouthEast's proposed rates depart from those established in the *2001 Deaveraging Order* does not detract from their TELRIC compliance. The Commission in 2001 never purported to develop a specific TELRIC cost-based rationale for its grouping of each of the BellSouth wire centers into zones, or for the specific loop rates selected in these zones. Rather, the Commission made it clear that "although no specific criteria was used to split the

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27/ Gillan Direct Testimony at 24.

28/ *Local Competition Order*, ¶¶ 764-65; 47 C.F.R. § 51.507(f).

29/ 47 C.F.R. § 54.309(b); *Federal-State Joint Board on Universal Service*, Ninth Report & Order, 14 FCC Rcd 14302, ¶ 70 (1999) (high-cost model support available to "non-rural" ILECs such as BellSouth is "targeted so that support is only available to carriers serving those wire centers with forward-looking costs in excess of the benchmark, and so that the amount available in a particular wire center depends on the relative cost of providing service in that particular wire center."), *aff'd in pertinent part and remanded in part, Qwest Corp. v. FCC*, 258 F.3d 1191 (10th Cir. 2001).

30/ *Inquiry Into the Development of Deaveraged Rates for Unbundled Network Elements*, Admin. Case No. 382, Order, at 34 (issued Dec. 18, 2001) ("*2001 Deaveraging Order*").

costs, many factors and variations have been considered." 31/ Consistently, the FCC's TELRIC rules do not dictate specific rate outcomes; they merely establish general "basic principles" and recognize that "different states may reach different results that are each within the range of what a reasonable application of TELRIC principles would produce." 32/ SouthEast's proposed zone rates also comply with the more liberal "just and reasonable" standard that also applies to these elements pursuant to Section 271. 33/

Most importantly, Mr. Gillan showed that that the proposed rates "will promote competition in the most rural areas of Kentucky. 34/ This policy objective approach is consistent with this Commission's stated goal in setting the deaveraged zone rates in 2001: "to expand local competition to all areas of the state." 35/ *Id.* However, the zone pricing framework established in 2001 did not have that desired effect; the result of that structure was that, in the BellSouth's rural service area, "there's far more exchanges that don't have any lines reported by a competitor than do have lines reported by SouthEast." 36/ By contrast, the unbundled loop rates proposed by SouthEast here "flatten" the deaveraged "rate gradient between the lowest-cost zone and the highest-cost zone," are consistent with BellSouth's geographically flat rate structure for most services, and as a competitive matter "makes more sense for Kentucky consumers." 37/

### 2. BellSouth's Objections to SouthEast's Loop Rate Deaveraging Proposal Are Unfounded

BellSouth's main objections to SouthEast's loop rate deaveraging proposal are that they depart from the rates established in 2001, that they would result in SouthEast's paying different

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31/ *Id.* at 34.
32/ *Joint Application by BellSouth Corp., et al., for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, 17 FCC Rcd 17595, ¶ 30 (2002).
33/ *See* Gillan Direct Testimony at 7-16; Hearing Tr. at 113, 118.
34/ Hearing Tr. at 140.
35/ *2001 Deaveraging Order* at 34.
36/ Hearing Tr. at 146.
37/ Gillan Direct Testimony at 21; Hearing Tr. at 115, 155.

rates than those in other CLECs' interconnection agreements, and that it would be burdensome for BellSouth to maintain two sets of geographic zones for charges to different CLECs. 38/ None of these arguments has any merit.

First, the Commission should resolve the parties' dispute regarding the appropriate geographically deaveraged loop rates based on the record in this proceeding, not based on obsolete rates from the 2001 proceedings. The Commission must reject BellSouth's position that the rates set over six years ago cannot be reexamined in this arbitration proceeding. For one thing, it is clear that circumstances – including the forward-looking costs incurred by BellSouth – have changed dramatically since 2001. SouthEast witnesses Joseph Gillan and Steven Turner established conclusively that numerous factors affecting BellSouth's costs have changed since 2001, and even BellSouth's witness Pamela Tipton conceded this point. 39/ The FCC's Common Carrier Bureau recognized that "changing circumstances may, at some point, require a cost case to be reopened." 40/ Consistently, while the Florida Public Service Commission "contemplated that the rates [set in a generic UNE pricing proceeding] would be in operation for some period of time before we revisited them," the commission also "did contemplate that UNE rates set in our generic proceedings would likely need to be revisited over

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38/ *See, e.g.*, Tipton Direct Testimony at 4; Hearing Tr. at 168.

39/ *See* Hearing Tr. at 198 (Tipton testimony) (conceding that "some equipment prices are falling"; "our labor costs have increased"; "the UNE loop studies ... when they were performed ... don't contemplate the synergies that take place at staffing levels at headquarters" as a result of the merger with AT&T). *See also* Turner Direct Testimony at 30-36 (discussing cost changes due to reduced cost of telecommunications equipment over time, efficiency gains as a result of mergers, and the growth of overall demand for the full scope of services offered by BellSouth over its network resulting in reductions in the per-unit costs of shared facilities and infrastructure); Hearing Tr. at 150-51 (Gillan testimony) ("while the cost per employee might be going up, the number of employees is going down, and it's not clear what the net effect will be.").

40/ *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*, Memorandum Opinion and Order, 18 FCC Rcd 17722, ¶ 22 (Com. Car. Bur. 2003). The FCC recognized in 1996 the possibility that some system might "be appropriate to ensure that rates reflect expected changes in costs over time," but did not adopt any specific conclusions on this issue. *Local Competition Order*, ¶¶ 837, 838.

time as the markets change[.]" 41/ In this case, the Commission is not trapped in a 2001 time warp. Rather, it can and must render a judgment on the reasonable rates and terms today and during the next several years during which the Interconnection Agreement under arbitration will be in effect.

Also, while generic pricing proceedings are a permissible way to establish UNE rates, they are not the only way to proceed. SouthEast witness Steven Turner recommended "that the Commission be prepared to initiate a generic § 251 cost proceeding for loop rates, if additional reforms to those recommended by Mr. Gillan are needed." 42/ However, while a generic proceeding in the future may well be advisable, it is not necessary to open a generic cost docket to resolve the issues presented here. 43/ Most importantly, however, is that the rates proposed here are grounded in the same cost analysis the Commission used in 2001. The assignments of zones and rates per zone are new, but the cost data are the same.

SouthEast is not proposing changes in the average loop rates that were generated based on the comprehensive cost models under review in the 2001 proceeding. 44/ SouthEast is proposing to keep that average in place and only to adjust the system for zone deaveraging, which (unlike the averaged loop rate level) was not based on a rigorous TELRIC cost model: "although no specific criteria was used to split the costs, many factors and variations have been considered." 45/ In all events, Section 252 requires the Commission to "reach a decision on the

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41/ *Petition for Arbitration of Certain Unresolved Issues Associated With Negotiations For Interconnection, Collocation, And Resale Agreement With Florida Digital Network, Inc. by Sprint-Florida, Inc.*, Docket No. 041464-TP, Order No. PSC-05-0793-PHO-TP, Prehearing Order at 15 (Fla. PSC, Commissioner Terry Deason, Hearing Officer, August 1, 2005). In that case Commissioner Deason denied discovery regarding costs in an arbitration proceeding because no showing had been made regarding changes in costs and market circumstances since the generic pricing proceeding. By contrast, here such a showing has been made conclusively and even BellSouth has conceded the point.

42/ Turner Direct Testimony at 37.

43/ Hearing Tr. at 149 (Gillan testimony).

44/ Hearing Tr. at 113-14 (Gillan testimony).

45/ Turner Direct Testimony at 34.

unresolved issues" presented in an arbitration petition and to "conclude the resolution of any unresolved issues" within a specified time frame. 47 U.S.C. § 252(b)(4)(B) & (C). Here, the zone deaveraging question is an "unresolved issue" that the Commission has a responsibility to address; and as discussed above, SouthEast's proposal reflects cost differences and promotes the public interest more effectively than the rates adopted in 2001.

The Commission's adoption of SouthEast's proposal would not unreasonably discriminate against other CLECs who are not party to the interconnection agreement being arbitrated here, or any other party. BellSouth is simply wrong in contending that SouthEast's proposals would "increase[e] substantially the majority of the loops for other CLECs." 46/ The Commission's decision in this arbitration proceeding will have no impact whatsoever upon CLECs with preexisting interconnection agreements, and more generally would not affect any other CLEC unless it opts into the terms of SouthEast's arbitrated interconnection agreement. 47/ And SouthEast's proposal is limited to the rates for analog loops – the loops used to serve mass market customers. Most CLECs compete for business customers using higher capacity digital loops, and nothing in Southeast's proposal affects those charges.

Under Section 252's system of individually negotiated and arbitrated interconnection agreements, different CLECs' interconnection agreements inevitably will include different rates. 48/ Section 252 anticipates and addresses this potential problem by giving all CLECs the opportunity to opt in to another party's interconnection agreement. 47 U.S.C. § 252(i). The

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46/ Hearing Tr. at 28 (opening statement of BellSouth counsel Mary Keyer).
47/ *See* Hearing Tr. at 115, 139 (Gillan testimony).
48/ *Id.* at 153 ("The Telecom Act itself ... created this environment where carriers can have different rate schedules based on their interconnection agreement. This happens all the time when BellSouth changes a rate. Some people get it in their interconnection agreement soon; other people get it in their interconnection agreement much later. Over the past several years, there are constant situations where carriers in a particular market, in a particular state, are paying different prices.")

rates proposed here are not unreasonably discriminatory because any other CLEC is free to opt into the identical rate schedule. 49/

Finally, the use of different sets of geographic zones for different purposes is administratively feasible for BellSouth to implement and is consistent with the FCC's and this Commission's expectations. Indeed, BellSouth implements different sets of geographic rate zone boundaries for different purposes all the time. This Commission in 2001 rejected BellSouth's "proposal [that] geographically deaverages rates by assigning wire centers to existing retail rate groups." 50/ As a result, BellSouth must charge its retail end users deaveraged rates for certain services based on a completely different zone plan than it uses for CLEC unbundled loops. Similarly, the FCC recognized that the deaveraging rate zones that state commissions establish for unbundled loops in interconnection agreements under Section 251(c) "may use existing density-related zone pricing plans" used for physical collocation under federal special access tariffs pursuant to 47 C.F.R. § 69.123, but are not required to do so. The FCC rules provide that state commissions also may opt for "not using such existing plans," and instead to use "other such cost-related zone plans established pursuant to state law." 47 C.F.R. § 51.507(f)(1) & (2). Thus, the FCC has made it clear that UNE loop zones need not match the density rate zones used for federally-tariffed special access service.

In sum, the Commission should adopt SouthEast's proposed zone plan and deaveraged loop rates for purposes of this Interconnection Agreement.

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49/ *Id.* at 115.

50/ *2001 Deaveraging Order* at 33. SouthEast does not propose zones that track these retail rate zones at all. Hearing Tr. at 114 (Gillan testimony).

## B. Issue A-3: Rate for the "Port" Component of the Loop-Switching-Transport Group of Elements

*What monthly recurring rate should be established for the "Port" component of the loop-switching-port combination of elements?*

The "port" rate proposed by SouthEast is just and reasonable and should be adopted by the Commission. Mr. Gillan developed the rate based on data on BellSouth's embedded local switching costs, publicly available through the FCC's Automated Reporting Management Information System ("ARMIS"). 51/ The cost analysis considered central office switching expense, annual switch-related depreciation expense, and a reasonable markup to provide a contribution to BellSouth's common costs and a return on its investment in central office switching. 52/ The "just and reasonable" monthly rate calculated through this analysis, $4.32 per port per month, is well below the $5.50 rate that SouthEast originally proposed in its arbitration petition, is consistent with the flat-rate structure adopted by the FCC's Common Carrier Bureau and many other state commissions, and is comparable to or greater than the "just and reasonable" rates adopted by the FCC and many other state commissions. 53/

BellSouth presented no data, evidence, or analysis at all on the appropriate level of "port" charges, and offered no substantive response to Mr. Gillan's analysis. 54/ BellSouth refused to respond to SouthEast's data requests on this issue. 55/ Instead, BellSouth relies entirely on its argument that rates for Section 271 Competitive Checklist elements are not properly subject to arbitrated interconnection agreements. If the Commission rejects that argument – as it should – it will have no alternative to adopting SouthEast's proposal on this issue. "If any party refuses or

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51/ Gillan Direct Testimony at 28.
52/ *Id.* at 28-30. Mr. Gillan did not rely on a methodology derived from BellSouth's access charges in his testimony, and although such an approach initially was suggested in SouthEast's arbitration petition, SouthEast no longer relies on it.
53/ *Id.* at 31-35.
54/ Hearing Tr. at 185-87 (Tipton testimony); BellSouth's Responses and Objections to SouthEast's First Set of Data Requests, Item Nos. 6-12 (refusing to respond to data requests regarding switching costs).
55/ *See, e.g.*, BellSouth Responses and Objections to SouthEast's First Set of Data Requests, Item #7.

fails unreasonably to respond on a timely basis to any reasonable request" for "information necessary to reach a decision on unresolved issues," then "the State commission may proceed on the basis of the best information available to it from whatever source derived." 47 U.S.C. § 252(b)(4)(B).

### C. Issue A-4: Adjacent Off-Site Collocation

> *What rates, terms and conditions should govern an interconnection arrangement in which BellSouth's offering of UNE-L interconnected to SouthEast's network at an "Adjacent Meet Point" – also known as "adjacent off-site collocation"?*

SouthEast presented a comprehensive proposal regarding a form of adjacent off-site collocation to be implemented in BellSouth central offices, as well as remote terminals. Mr. Turner offered detailed testimony on this issue, including specific terms and conditions, rates for ten different recurring and non-recurring rate elements, model central office layouts used to calculate collocation investments, and a full-fledged collocation cost model. 56/ BellSouth provided no substantive response to any of the evidence and proposals submitted by Mr. Turner. 57/

Instead, BellSouth's only response – if you can call it that – is a legal claim that the arrangement sought by SouthEast is not specifically required under any FCC orders. BellSouth's claim is without merit. The FCC's pertinent orders broaden the ILECs' collocation obligations, rather than narrowing them as BellSouth suggests. The *Advanced Services Order* directs ILECs "to permit collocation in adjacent controlled environmental vaults or similar structures to the extent technically feasible.... [T]he incumbent LEC must permit the new entrant to construct or otherwise procure such an adjacent structure, subject only to reasonable safety and maintenance

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56/ Turner Direct Testimony.
57/ Hearing Tr. at 189 (Tipton testimony).

requirements." 58/ While this Order specifically provides that ILECs must allow adjacent collocation in circumstances where space for physical collocation is exhausted, there is nothing in the Order that suggests that ILECs may withhold adjacent collocation, even if it is technically feasible, unless space inside the central office is exhausted. Such a contention makes no sense and is contrary to the plain sense of the *Advanced Services Order*. To the contrary, that Order makes clear that its specific rules are a floor, not a ceiling, and that state commissions may require ILECs to provide other forms of collocation where such arrangements are technically feasible. 59/

Similarly, the *Advanced Services Reconsideration Order* states: "Ameritech states that allowing competitive LECs to construct controlled environmental vaults on land surrounding an incumbent LEC structure would be inconsistent with the language of section 251(c)(6) of the Communication Act, the public interest, and the definition of 'premises' in section 51.5 of our rules. Ameritech's argument regarding the language of section 251(c)(6) is similar to the argument the D.C. Circuit rejected in *GTE v. FCC*, where the court made clear that our adjacent collocation requirements are permissible under section 251(c)(6). Consistent with the court's opinion, we conclude that the language of section 251(c)(6) does not restrict mandatory physical

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58/ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 4761, ¶ 44 (1999) ("*Advanced Services Order*"), *aff'd in part and remanded in part sub nom. GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000).

59/ *Id.*, ¶ 45 ("We recognize that different incumbent LECs make different collocation arrangements available on a region by region, state by state, and even central office by central office basis. Based on the record, we now conclude that the deployment by any incumbent LEC of a collocation arrangement gives rise to a rebuttable presumption in favor of a competitive LEC seeking collocation in any incumbent LEC premises that such an arrangement is technically feasible. Such a presumption of technical feasibility, we find, will encourage all LECs to explore a wide variety of collocation arrangements and to make such arrangements available in a reasonable and timely fashion. We believe this "best practices" approach will promote competition. Thus, for example, a competitive LEC seeking collocation from an incumbent LEC in New York may, pursuant to this rule, request a collocation arrangement that is made available to competitors by a different incumbent LEC in Texas, and the burden rests with the New York incumbent LEC to prove that the Texas arrangement is not technically feasible."); *see* Turner Direct Testimony at 7.

collocation to places within incumbent LEC structures." 60/ SouthEast is not asking BellSouth to provide us with "land and buildings in which [BellSouth] has no interest" (*i.e.*, ownership or control). 61/ We are merely asking that, when we procure such adjacent structures ourselves, BellSouth permit us to interconnect with BellSouth main distribution frames inside the central office in a manner comparable to that used in other adjacent collocation arrangements.

Moreover, BellSouth's contention that the arrangement "really isn't even a form of collocation" because it involves interconnection adjacent to, rather than inside, the central office, 62/ is not only wrong, it is irrelevant. Both network interconnection at a technically feasible point and collocation are required under the Act (47 U.S.C. § 251(c)(2) and (c)(6), respectively), and both must be offered at TELRIC rates. 47 U.S.C. § 252(d)(1). Both § 251(c)(2) and § 251(c)(6) collocation may be used to exchange traffic or to obtain access to network elements such as sub-loops. 63/

The off-site adjacent collocation arrangement proposed by SouthEast is undoubtedly technically feasible. Record evidence demonstrates that BellSouth's affiliated ILECs are already providing access to this form of adjacent collocation. 64/ There is no material difference between the way BellSouth deploys its network in Kentucky and the way ILECs deploy facilities in other states. 65/ Indeed, even BellSouth's witness concedes that the company is offering

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60/ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Order on Reconsideration, 15 FCC Rcd 17806, ¶¶ 41-42 (2000) ("*Advanced Services Reconsideration Order*"); *contra*, Tipton Rebuttal Testimony at 14.

61/ *Advanced Services Reconsideration Order*, ¶ 44.

62/ *Id.* at 168-69.

63/ *Local Competition Order*, ¶ 270 (collocation for access to network elements); 47 C.F.R. § 51.319(b)(1) (access to sub-loops at any feasible interconnection point).

64/ Hearing Tr. at 90 (Turner testimony) ("there was testimony given by both AT&T and Verizon witnesses to providing adjacent off-site collocation in California, and the witness on behalf of AT&T in that case indicated that they also make the form of collocation available in Texas. I've actually observed this form of collocation being used by a company in Texas with AT&T as well.").

65/ *Id.* at 99.

access to adjacent on-site collocation, 66/ and it is significantly easier for it to provide the off-site form of adjacent collocation than the on-site form that BellSouth and other ILECs already provide. 67/ "With off-site collocation, the incumbent LEC has to do significantly less for the CLEC than they do with adjacent on-site collocation." *Id.*

BellSouth has not shown that the form of adjacent collocation sought by SouthEast is technically infeasible. Toward the end of the hearing, Ms. Tipton suggested that such an arrangement could lead to the exhaustion of cable at central office cable vaults or entrance facility conduit structures. 68/ But she provided no specific support for this contention, nor did she provide any evidence that any specific central office in the relevant service area is anywhere near such exhaust. The FCC established a "rebuttable presumption in favor of a competitive LEC seeking collocation... that such an arrangement is technically feasible." 69/ The off-the-cuff comments of BellSouth's witness fail to provide sufficient evidence to rebut the presumption that the arrangement is technically feasible.

### D. Issue A-8: Dispatched/No Trouble Found Charges

*What rates, terms, and conditions should apply to the Parties' respective "Dispatched/No Trouble Found" charges?*

BellSouth has an obligation to provide operations support services for the elements and services that it provides SouthEast, including nondiscriminatory maintenance and repair of network facilities. SouthEast witness Robin Kendrick presented testimony explaining the very serious problems that SouthEast and its customers frequently experience as a result of

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66/ Hearing Tr. at 189 (Tipton testimony) ("Q: So, in come circumstances, BellSouth does provide adjacent collocation that is in a central office where space is exhausted? A: Yes....").
67/ Hearing Tr. at 99 (Turner testimony).
68/ Hearing Tr. at 190-91. Significantly, it is common in cable vaults for entrance structure to be pre-drilled and then temporarily plugged such that new conduits can be added easily as the need arises. To the extent that existing capacity did not exist within existing structures, but if holes did exist, BellSouth could certainly charge collocators for the cost to open up and expand these structures.
69/ *Advanced Services Order*, ¶ 45.

BellSouth's failure to address repair problems on the first dispatch and the need for additional, sometimes multiple, subsequent dispatches. 70/ Ms. Kendrick also explained that SouthEast has no access to BellSouth's performance data regarding these maintenance and repair dispatches, and that BellSouth does not even provide an itemized bill for "Dispatched/No Trouble Found" charges applied at the end of the month, making it impossible for SouthEast to verify BellSouth's charges by comparison with SouthEast's records. *Id.* at 4. BellSouth's so-called "self-effectuating enforcement mechanism system" ("SEEMS") clearly is not working for SouthEast; indeed, SouthEast does not even have access to BellSouth's "SEEMS" data.

SouthEast offers simple, common-sense solutions to these problems – in essence, a simpler, more straightforward, set of business-to-business enforcement mechanisms separate from the SEEMS process. First, SouthEast asks for an itemized monthly list of all service calls for which BellSouth bills SouthEast for "Dispatched/No Trouble Found" charges. *Id.* at 5. It certainly is not unreasonable for SouthEast to know what it is paying for; and the fact that other CLECs have no sought such itemization does not mean the request is unreasonable. Second, as an enforcement mechanism with real "teeth," SouthEast proposes that, when BellSouth dispatches a repair truck and finds no problem on the line, but later discovers the fault on its own network, SouthEast be allowed to bill the same charge to BellSouth. In essence, this is a form of liquidated damages remedy or enforcement mechanism for BellSouth's serious deficiencies in providing maintenance and repair services to SouthEast's customers – or in tolerating and failing to remedy "intermittent" service quality problems on its network. 71/ Again, just because other CLECs may be more willing to tolerate BellSouth's negligent network maintenance does not

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70/ Kendrick Direct Testimony at 2-4, 7.

71/ *Id.* at 5-6; *compare* Tipton Direct Testimony at 26-27 and Hearing Tr. (Tipton testimony) at 169-70 (deprecating Ms. Kendrick's proposals).

mean that SouthEast should be forced to do so. SouthEast's proposals are reasonable and should be adopted.

Finally, Ms. Tipton's claim that SouthEast did not raise this issue during the pre-arbitration negotiation period is simply incorrect as a factual matter. 72/ SouthEast addressed this issue in letters dated April 13, 2005, Feb. 23, 2006 and other occasions. SouthEast will supplement the record in this proceeding with copies of these letters under separate cover.

### E. Issue A-9: Data on Remote Terminal Locations and Subtending Customer Locations

*Must BellSouth provide data on the location and type of certain network facilities and the number of customer lines and geographic service area of such facilities? If so, at what rate?*

SouthEast witness James Keller testified to SouthEast's need for data on the actual geographic location of BellSouth's remote terminals ("RTs") and the telephone numbers and end user customer locations associated with such RTs. Mr. Keller explained that such information is necessary for SouthEast to plan and build out its forward-looking broadband network to reach rural consumers. Mr. Keller specified the need for a comprehensive data set in advance, rather than having to request the information piecemeal on a customer by customer basis. 73/

The FCC's rules require BellSouth to provide this information to SouthEast: "An incumbent local exchange carrier shall provide to a requesting telecommunications carrier technical information about the incumbent local exchange carrier's network facilities sufficient to allow the requesting carrier to achieve access to unbundled network elements consistent with the requirements of this section." 47 C.F.R. § 51.307(e). Contrary to BellSouth's suggestion, this issue is properly presented in this proceeding and need not go through a "New Business

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72/ Tipton Direct Testimony at 10.
73/ Keller Direct Testimony at 2-5; Hearing Tr. at 34-63.

Request" or bona fide request process. 74/ "We also find that incumbent LECs may not require requesting carriers to satisfy a 'bona fide request' process as part of their duty to negotiate in good faith." 75/

SouthEast welcomes BellSouth's apparent offer to provide SouthEast access to the same information that BellSouth has regarding RT locations and subtending customers. 76/ If BellSouth has an electronic database with the actual geographic locations of its RTs (corresponding to codes like "p145a brushy fork rd" or "p100 somerset rd"), in a commonly usable format -- such as those used by MapQuest, 911 dispatchers, or whatever other system BellSouth uses -- then BellSouth should provide the identical database to SouthEast on whatever medium is most convenient (CD-ROM or other). 77/ It is simply not credible that a major American corporation like AT&T/BellSouth would be so irresponsible as not to have a comprehensive record of the locations of expensive equipment such as RTs. However, if BellSouth's technicians use large maps to locate these RTs, then copies of the same maps should be provided to SouthEast.

BellSouth has provided no information in the record of this proceeding regarding the appropriate rates for the provision of this information. 78/ In the absence of such data, the Commission should "proceed on the basis of the best information available to it from whatever source derived," 47 U.S.C. § 252(b)(4)(B), and should require BellSouth to provide such data at no charge or at the rates suggested in Mr. Keller's Direct Testimony (at 4-5).

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74/ Tipton Direct Testimony at 11.
75/ *Local Competition Order*, ¶ 156.
76/ Tipton Rebuttal Testimony at 30.
77/ *See* Exhibit PAT-1, attached to Tipton Rebuttal Testimony; SouthEast Exhibit 2 (identified in Hearing Tr. at 41).
78/ *See* BellSouth Responses and Objections to SouthEast's First Set of Data Requests, Item Nos. 42-45 (refusing to answer questions regarding the computer systems used to store and update RT information or the cost of exporting or downloading such information)

### F. Resolved Issues

SouthEast and BellSouth have reached negotiated mutually satisfactory resolutions of Issues A-1 (interconnection agreement to use as the starting point for negotiations), A-5 (reciprocal compensation), and A-6 (high-capacity transmission). Accordingly, those issues do not need to be addressed by the Commission at this time. 79/ SouthEast hereby waives Issue A-7, regarding the rules of construction of terms in the Interconnection Agreement.

## CONCLUSION

For the foregoing reasons, SouthEast respectfully submits that the Commission should arbitrate the terms and conditions of a new Interconnection Agreement between BellSouth and SouthEast consistent with the positions set forth herein.

Respectfully submitted,

Bethany Bowersock
SOUTHEAST TELEPHONE, INC.
106 Power Drive
Pikeville, KY 41502

David L. Sieradzki
HOGAN & HARTSON, LLP
555 – 13th St., N.W.
Washington, D.C. 20004
(202) 637-6462
DLSieradzki@hhlaw.com

Counsel for SouthEast Telephone, Inc.

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79/ Note that the parties have agreed that SouthEast's draft may be used as the starting point, as long as it is updated for changes in law, but the parties have not agreed to what exactly those changes of law require. *See* Hearing Tr. at 12-13. The Commission may need to revisit this issue in the future. *See also* Arbitration Petition at 5-8 (seeking incorporation of the open issues in the *Change of Law* proceeding, Case No. 2004-00427, and the *NewSouth* arbitration proceeding, Case No. 2004-00044, into the instant arbitration proceeding).