COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

SOUTHEAST TELEPHONE, INC	)	
	)	
Complainant,	)	
	)	
v.	)	CASE NO. 2008-00279
	)	
BELLSOUTH TELECOMMUNICATIONS, INC. d/b/a AT&T KENTUCKY	)	
	)	
	)	
Defendant	)	

POST-HEARING BRIEF OF SOUTHEAST TELEPHONE, INC.

SouthEast Telephone, Inc. ("SouthEast"), by counsel, for its post-hearing brief in this matter, states as follows:

INTRODUCTION

Prior to the hearing in this case, it appeared that only two issues remained. The first concerns whether BellSouth Telecommunications, Inc. d/b/a AT&T Kentucky ('AT&T") may deny to SouthEast even billing relief until over five months *after* SouthEast made its lawful (and still unmet) request for commingled elements. Paying the correct price for the network elements it requests is the least to which SouthEast is entitled by federal law, by the Commission's Order in PSC Case No. 2004-00427, *In the Matter of Petition of BellSouth Telecommunications, Inc. to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law* (Dec. 12, 2007) (the "*Change of Law Order*"), and by the parties' interconnection agreement, as amended in June 2008. The second issue is whether AT&T is entitled to charge $104.60 in "installation" charges for each customer line it converts (on paper) from the current local wholesale platform arrangement (port, cross-connect, and loop) to the commingled arrangement (port, cross-connect, and loop). These per-line charges for phantom

"installation" will effectively obliterate further months of the savings SouthEast would otherwise realize by switching to the commingled arrangement. The "installation" charges (although there is no "installation"), together with the months of delay in adjusting SouthEast's billing, effectively (and unlawfully) enable AT&T to continue collecting inflated profits long past the date when SouthEast requested commingled element arrangements that are much less expensive.

At hearing it became clear that a third issue remains: whether AT&T is actually going to provide the commingled arrangement. AT&T now appears to believe that its billing adjustment is not only an "interim" solution to the Complaint but a final one.[1] The emergence of this issue at hearing all but returns this case to square one.

Since June 2008 SouthEast has requested that AT&T provide the port commingled with the unbundled copper loop, nondesigned ("UCL-ND"). Until the hearing, SouthEast believed that the "interim" billing solution AT&T had belatedly put into place was, literally, an "interim" solution pending an actual changeover to the commingled port/UCL-ND. Since hearing testimony indicates that may not be the case, SouthEast respectfully requests the following relief:

- That the Commission order AT&T to provide the port commingled with the UCL-ND as SouthEast originally requested in June 2008;
- That the Commission order AT&T to credit SouthEast's account, beginning on July 1, 2008, with the difference between amounts charged for "local wholesale complete"

[1] Hearing Testimony of Deborah Niziolek ("Niziolek Hearing Testimony"), Transcript ("Tr") at 134 ("I do not believe we've actually started looking at a long-term fix"); Tr. at 140 ("... I am not aware of any formal request to actually build or develop something new made by your company....if you're interested in developing a product, you can follow the formal process and we can start looking at what it would cost to develop it").

("LWC") or "wholesale local platform" ("WLP")[2] under the "commercial agreement" and the amounts SouthEast was entitled to be charged for the commingled arrangement; and

- That the Commission order AT&T to charge its "conversion" rather than its "installation" charge for each line converted from LWC to the commingled arrangement.

BACKGROUND

The Initial Controversy

In the *Change of Law Order,* the Commission definitively ruled, over AT&T's objections, that competing local exchange carriers are entitled to order network elements AT&T is required to provide under 47 U.S.C. § 251 commingled with network elements AT&T is required to provide under 47 U.S.C. § 271. The decision interpreted longstanding FCC regulations, including 47 C.F.R. 51.309(f), which provides that "upon request an incumbent shall perform the functions necessary to commingle [a UNE or UNE combinations] with one or more facilities or services obtained at wholesale from an incumbent." *Change of Law Order,* at 12.

AT&T appealed the Commission's decision. *See BellSouth Telecommunications, Inc. v. Kentucky Public Service Comm'n, et al,* No. 3:08-cv-00007-DCR (E.D. Ky.). The decision is pending. However, as the *Change of Law Order* has not been enjoined, it remains in effect. KRS 278.390. On April 2, 2008, AT&T sent to SouthEast and, on information and belief, to other CLECs operating in Kentucky, a document alleged to contain amendments to the parties' current interconnection agreements that would conform those agreements to the requirements of *Change of Law Order.* In good faith, SouthEast executed that document and returned it to AT&T. A copy of the amendment is attached as Exhibit 1 to SouthEast's Complaint.

[2] AT&T has once again changed the name of the combination of elements needed to provide local service that it sells pursuant to its "commercial agreement."

On June 16, 2008, pursuant to the executed amendment, SouthEast began attempting to place orders for commingled Section 251 elements (UCL-ND) and Section 271 elements (the switch). Having previously spoken to AT&T representatives who told SouthEast that these two elements would not be provided *as* elements in a commingled arrangement, [3] and aware that the ordering "systems that they had had in place were not going to put two elements, two USOCs, Universal Service Ordering Codes, together that weren't already put into their system," [4] SouthEast placed its order with the "hope" that it would be completed,[5] but chiefly "just to get the discussion started."[6] As stated (repeatedly) at hearing, SouthEast agrees with AT&T that it submitted an erroneous order. However, SouthEast in its follow-up with AT&T employees explained what it had meant to order, and a July 9, 2008 email from Eileen Mastraccio, wholesale support Manager of AT&T,[7] demonstrates conclusively that, at least by July 9, AT&T not only knew what SouthEast wanted but had refused it. Ms. Mastracchio copied a response to the order from the "methods group" that states as follows:

> what [sic] they want is to commingle a UCL (unbundled Copper loop non design) with Commercial port on one order. I told them their [sic] is no such process. If they want to purchase UCL on one order and 2nd order for the standalone port. [sic] they can connect the two at their collo[.]

Ms. Mastraccio went on to note that SouthEast's current account manager, Cathy Crosswhite, had been "cc'd on this email."

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[3] Hearing Testimony of Darrell Maynard ("Maynard Hearing Testimony"), Tr. at 97.
[4] Maynard Hearing Testimony, Tr. at 96.
[5] Maynard Hearing Testimony, Tr. at 56.
[6] Maynard Hearing Testimony, Tr. at 47.
[7] Ms. Mastraccio's July 9 email to SouthEast is attached as Exhibit A to the Rebuttal Testimony of Darrell Maynard.

The next day, SouthEast received an email from Jennifer Bracken,[8] who had served as negotiator on SouthEast's most recent interconnection agreement. Ms. Bracken's email not only demonstrated complete understanding of what SouthEast had requested, but supplied a familiar argument for refusing to provide it – the same argument presented by AT&T in its court pleadings and during the parties' 2008 negotiations for a new interconnection agreement:

> I reviewed the rejected order and spoke with product. It seems that SETel's intent ... was for AT&T to do the actual physical work of attaching the elements. If that is the case, AT&T disagrees with this position. The issues addressed on Commingling within the COL [presumably a reference to the *Change of Law Order*] and the Joint Petitioners [sic] arbitration all focused on whether or not to allow CLECs to be able to commingle Section 251(c)(3) UNEs with 271 elements. AT&T's position is that this should not be allowed since it virtually recreates UNE-P on some level....From SETel's order and the language proposal, it appears that SETel is requesting that AT&T do the actual physical work of attaching the elements. AT&T will allow SETel to commingle 251(c)(3) UNEs with 271 elements as required by the COL order, but AT&T will not perform the actual attaching for the CLEC. SETel would order the circuits on 2 separate orders and AT&T will provision them to the Collocation Arrangement.

The response was identical to the statements SouthEast had heard during its interconnection agreement negotiations.[9] SouthEast finally took "no" for an answer.

The following week, on July 15, 2008, SouthEast filed its Complaint with the Commission. SouthEast asked the Commission to enforce its *Change of Law Order* by ordering "...AT&T immediately to accept SouthEast's orders for commingled elements, including those orders that AT&T has denied, without restriction and without reference to whether the location for which the order is submitted contains a collocation arrangement of SouthEast, and to perform the functions necessary to render those commingled elements operational."[10]

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[8] Ms. Bracken's July 10 email to SouthEast is attached as Exhibit B to the Rebuttal Testimony of Darrell Maynard.
[9] Maynard Hearing Testimony, at 40.
[10] SouthEast Complaint at 5.

Proceedings on the Complaint

In its Complaint, SouthEast asserted, among other things, that the *Change of Law Order* explicitly states that the Commission will enforce 47 C.F.R. 51.309(f), which requires AT&T, "'upon request'" by a competitor, to "***'perform the functions necessary to commingle [a UNE or UNE combinations] with one or more facilities or services obtained at wholesale from an incumbent.'"*** *Change of Law Order,* at 12, *quoting* 47 C.F.R. 51.309(f) (emphasis added). SouthEast's Complaint estimated (conservatively) that in order to comply with AT&T's demands to obtain "commingled" elements, it would be required to collocate in 125 central offices, at a cost of well over six million dollars, including application fees, cable installations, space preparation, construction costs, and equipment costs, even without reference to the additional costs for remote terminals served from each office.[11]

AT&T filed an Answer on August 1 in which it admitted its obligation to commingle elements, but offered a new delaying tactic. Its contended now that the Complaint should be dismissed as "impermissibly vague," arguing (incredibly) that "AT&T Kentucky has made several efforts to discuss this matter with SouthEast in an effort to explore what exactly SouthEast is trying to achieve but SouthEast refused to provide any further information or clarification to AT&T Kentucky."[12]

Continuing this theme, AT&T filed testimony indicating that AT&T did not know what SouthEast wanted until a conference call with SouthEast on August 21, 2008.[13] However, AT&T's sole witness who filed this testimony was not involved in any discussions with

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[11] *See* SouthEast Complaint; Affidavit of Wes Maynard, Exhibit 2 to Complaint, at ¶ 5.
[12] Answer of AT&T Kentucky, at 1.
[13] Direct Testimony of Deborah Niziolek, at 8.

SouthEast; did not become involved in this case until "maybe" January 2009;[14] and has never spoken about this case with either Ms. Mastraccio or Ms. Bracken, two of the key AT&T employees who discussed the request with SouthEast.[15]

On September 11, 2008, the parties met at the Commission for an informal conference. AT&T now agreed it had to provide commingled elements. AT&T now agreed that it understood what SouthEast wanted. Now, however, AT&T emphasized the alleged difficulty of providing the commingled UCL-ND and port.[16] During the informal conference, in a letter filed subsequent to the conference, and in pleadings subsequently filed pursuant to Staff direction, SouthEast indicated that it was skeptical of AT&T's claimed difficulties in filling the orders – and reasonably so, in light of AT&T's having already filled over 1,700 orders for the copper loop, nondesigned, when SouthEast ordered that loop to combine with its own port.[17] SouthEast stated, however, that it would not make an issue of AT&T's delay in actually providing the commingled arrangement in return for bill credits that would at least make it whole.[18] A WLP line costs SouthEast $45.74 per line in Zone 3, where 81% of its customers reside (Loop $30.59, Port $8.15, Usage $7.00). A commingled arrangement by which SouthEast buys from AT&T a commingled port and a copper loop, nondesign, costs $21.71 in Zone 3 (Loop & Cross-Connect

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[14] Niziolek Hearing Testimony, Tr. 150.
[15] Niziolek Hearing Testimony, Tr. 152.
[16] September 25, 2008 Informal Conference Memorandum (as later modified by AT&T and SouthEast in separate filings).
[17] Maynard Hearing Testimony, at 36.
[18] *See, e.g., Motion of SouthEast Telephone, Inc. for Intermediate Relief,* filed September 25, 2008,at 3, responding to AT&T's claim that it needs more time to comply by explaining it is "injured each and every day that AT&T's compliance with the Commission's Order is delayed," and at 4, urging the Commission to require AT&T to issue bill credits retroactive to July 1, 2009, to "bring AT&T into at least nominal compliance with the law and its contractual obligations." In that same motion, at 5, SouthEast also urged the Commission to maintain the case on its docket to oversee AT&T's development of the "allegedly complex process by which it will fill orders for commingled elements it already sells separately."

$13.22 and Port $8.49).[19] The financial loss that has accrued and continues to accrue to SouthEast for every month that it is denied the pricing to which it is entitled is tremendous.

Nevertheless, while SouthEast emphasized the unfair financial burden AT&T's delay was imposing on SouthEast, SouthEast never relinquished its claim that it is entitled to have its orders *actually filled.* SouthEast said it "believe[d] the matter before the Commission is resolved only to the extent that [AT&T] appears no longer to dispute SouthEast's legal right to obtain commingled elements," and explained that the Complaint will not be resolved "*until AT&T is actually providing the commingled elements* that are the subject of this case."[20] (Emphasis added.)

The Hearing

At the July 14 hearing, each party presented one witness. SouthEast presented Darrell Maynard, its hands-on President. AT&T presented Deborah Niziolek, an Associate Director in AT&T's wholesale product policy group who admitted the following: She has no expertise with regard to the loops requested.[21] She was not involved in any discussions with SouthEast concerning its commingling orders.[22] She does not know Cathy Crosswhite,[23] the AT&T employee who was SouthEast's account manager in June-July of 2008. Her office, unlike the offices of those with whom SouthEast dealt, is in Illinois.[24] She was not involved in developing the "interim solution" to provide bill credits pending provision of the commingled arrangement

[19] Direct Testimony of Darrell Maynard, at 5.
[20] September 30, 2008 Comments of SouthEast Telephone Concerning the Informal Conference Memorandum.
[21] Niziolek Hearing Testimony, Tr. 144-45 (Q. "Do you have any reason to believe that this unbundled copper loop – nondesigned will not carry adequate voice service?" A. "As I attested to earlier, I'm not a network expert....I don't know...")
[22] Niziolek Hearing Testimony, Tr. at 110-11.
[23] Niziolek Hearing Testimony, Tr. at 112.
[24] Niziolek Hearing Testimony, at 111.

requested.[25] She had not been brought into the case until "maybe" January 2009.[26] Although she knows Jennifer Bracken, the AT&T interconnection agreement negotiator who, on July 10, 2009, informed SouthEast by email that AT&T could not be legally required to provide commingled elements, Ms. Bracken, who is located in Texas, does not report to her,[27] and she did not even speak to Ms. Bracken with regard to this case.[28] She does not know Eileen Mastraccio, the AT&T Wholesale Products Manager who sent the July 9 email telling SouthEast that the port and UCL-ND would have to be ordered separately and would be available only where SouthEast had collocated its equipment.[29] Not until the morning of the hearing, in fact, did AT&T's witness know that her testimony misstated a key fact: that SouthEast has ordered many hundreds of copper loops, nondesigned from AT&T and uses them in connection with the SouthEast's own port.[30] Until the day of the hearing, her testimony stated that SouthEast had not ordered *any* of these loops.

AT&T's witness also stated that SouthEast has *not yet ordered the commingled arrangement it wants, and that there is no effort underway to develop it.* On the stand, Ms. Niziolek said she was "not aware of any formal request to actually build or develop something new made by your company," and stated that, "[I]f you're interested in developing a product,

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[25] Niziolek Hearing Testimony, Tr. at 130-31; 151.
[26] Niziolek Hearing Testimony, Tr. at 150.
[27] Niziolek Hearing Testimony, Tr. at 114.
[28] Niziolek Hearing Testimony, Tr. at 152.
[29] Niziolek Hearing Testimony, at 111 (Q: "Does Eileen Mastracchio, who I understand is a Manager for Wholesale Products, report to you?" A. "I'm sorry. I don't know who she is.")
[30] Niziolek Hearing Testimony, at 104 (deleting erroneous portions of her prefiled testimony denying that SouthEast had ordered the copper loop, nondesigned previously "based on further confirmation that I received this morning. We did, in fact, confirm that SouthEast Tel had been ordering some of these loops that we did not think they had been ordering."). In fact, SouthEast has ordered, and is currently using, over 1,700 of them.

you can follow the formal process and ***we can start looking at what it would cost to develop it.***"[31]

In short, unless Ms. Niziolek is in error (and no one from AT&T has stated that she is), it is almost as if SouthEast's past fourteen months of pleading for the port commingled with the UCL-ND have never occurred.

ARGUMENT

I. SOUTHEAST IS ENTITLED TO A BILLING ADJUSTMENT FOR THE TRANSITION FROM THE WLP/LWC TO THE COMMINGLED ARRANGEMENT BEGINNING JULY 1, 2008.

AT&T contends that it is entitled to WLP pricing for July, August, September, October, and November 2008, the five months between the first of the month following SouthEast's order for commingled elements and the month in which AT&T finally recognized – at least through its billing system – the network configuration SouthEast had ordered. AT&T claims it is entitled to this additional money because its delay was reasonable. The argument has rung hollow from the beginning. The testimony at the hearing in this case confirms how hollow it is. Delay is the name of the game. Every month of delay is more profit for AT&T, and less money for SouthEast - money that takes away from SouthEast's ability to build out its network and leaves it dependent on AT&T.

Roadblock after successive roadblock was placed in SouthEast's path as it sought to obtain commingled arrangements. First, AT&T claimed it was not legally required to fill any such order. Then it alleged it did not know what SouthEast wanted. Then it said it was very, very difficult to *do* what SouthEast wanted.

AT&T's alleged "confusion" lasted, it says, until late August 2008.[32] This confusion

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[31] Niziolek Hearing Testimony, Tr. at 140 (emphasis added).

allegedly was caused by SouthEast, which AT&T chides for having failed to find the "right" people at AT&T with whom its order should have been discussed. AT&T's witness indicated that the account manager should have been contacted.[33] At hearing, AT&T claimed that someone on an internet list should have been contacted.[34] But there is no contact on that internet list for problems with placing a commingled order. Further, neither Ms. Mastracchio's email (explaining that the two products will be provided only to a collocation) nor Ms. Bracken's (explaining that AT&T is not required by law to commingle) shows any uncertainty or refers SouthEast to a list of contacts available on the Internet. If AT&T's own employees did not know they should refer SouthEast elsewhere rather than responding themselves, there no reason on earth that SouthEast should have known it. Moreover, as one of these people is a wholesale manager and the other was an interconnection agreement negotiator, it was reasonable to expect that they were knowledgeable on the issue and could provide SouthEast with AT&T's corporate response. Indeed, Ms. Bracken specifically *said* that her response was AT&T's corporate position: "It seems that SETel's intent...was for AT&T to do the actual physical work of attaching the elements. If that is the case, *AT&T disagrees* with this position."[35] (Emphasis added.)

AT&T also takes SouthEast to task for failure to talk to its AT&T account manager.[36] But (even putting to one side for a moment the patently obvious fact that talking to *anyone* else at

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[32] Niziolek Direct Testimony, at 8 (citing an August 21, 2008 phone conversation in which AT&T [gratuitously] explained to SouthEast the technical paramaters of the UCL-ND and indicating that it was not until then that AT&T determined at last that SouthEast did, in fact, want to order that loop). Of course, Ms. Mastracchio's and Ms. Bracken's emails, dated approximately six weeks earlier, demonstrate perfect understanding.
[33] Niziolek Direct Testimony, at 16.
[34] *See* AT&T Hearing Exhibit #1.
[35] July 10, 2008 Email from Jennifer Bracken, Exhibit B to Rebuttal Testimony of Darrell Maynard.
[36] Niziolek Direct Testimony, at 16.

AT&T would have been a waste of time) SouthEast's account manager in June/July of 2008 [37] was in fact copied on Ms. Mastraccio's email.[38] Although she presumably read the email, she did not contradict anything in it, and there is no reason for SouthEast to have expected that she would. AT&T's employees, from methods group to wholesale manager to negotiator had presented a united front.

As of late August 2008 the "confusion" rationalization for further delay gave way to a new one: the claim that SouthEast's having ordered the UCL-ND in a commingled arrangement is so exotic, even "unnatural,"[39] that unheard-of complexities have resulted, causing further delays. Further complicating matters, AT&T refers to these well-established network elements as, when combined, constituting a new "product," development of which takes somewhere in the neighborhood of an entire *year,*[40] causing AT&T to do things that will "affect[] every CLEC," possibly "adversely,"[41] and to gather together people who apparently rarely see each other and are quite busy elsewhere,[42] thereby taking much time and causing numerous extraordinary costs that, ominously, will be charged to the CLEC that caused the upheaval.[43]

The evidence demonstrates that, in fact, AT&T was doing its best to *avoid* providing the

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[37] As Mr. Maynard ruefully observed at the hearing (noting that SouthEast's AT&T contacts are numerous, depending on whether the issue is repair, provisioning for resold services, provisioning of DSL, etc.), "...we do have several Account Managers, and they do seem to change, you know." Maynard Hearing Testimony, Tr. at 78.

[38] *See* Exhibit A, Maynard Rebuttal Testimony.

[39] Niziolek Hearing Testimony, Tr. at 123.

[40] Niziolek Hearing Testimony, Tr. at 129.

[41] Niziolek Hearing Testimony, Tr. at 129-30. There is, of course, absolutely no indication that any CLEC objects to SouthEast's order or any reason to think that it could hurt any CLEC in any way. CompSouth is a party to this case and could certainly register an objection if any existed. In fact, unsurprisingly, CompSouth supports CLECs' rights to obtain commingled elements.

[42] Niziolek Hearing Testimony, Tr. at 130.

[43] Niziolek Hearing Testimony at 136-37 (describing a "new product request" that involved months of "development" efforts and an end result that was so expensive that the CLEC simply surrendered).

commingled arrangement requested rather than working diligently through alleged confusion and hardship to fill an order that presented unprecedented difficulties. In fact, in June 2008, when SouthEast began trying to obtain commingled elements, AT&T was [1] in the process of appealing the Commission's Orders that required commingled Section 251 and Section 271 elements;[44] [2] operating based upon the legal theory that providing the commingled loop and port was barred by law as being a reconstitution of the unbundled network platform once required to be provided pursuant to 47 U.S.C. §251 at total element long-run incremental pricing;[45] and [3] claiming that its commingling obligation required only that it provide the elements separated *physically* so that SouthEast would have to collocate, at great expense, at every central office where it had requested the elements. This is, of course, not "commingling" at all. The evidence also indicates that AT&T's employees understood perfectly well what SouthEast wanted, despite the errors in SouthEast's submitted electronic and manual orders. Finally, the evidence demonstrates that there is no great complexity involved in providing a bill credit (which, it now appears, is all AT&T plans to do), and *certainly* that there is no great complexity in retroactively crediting SouthEast to July 2008 – over six months after the Commission had ruled that AT&T must provide commingled elements. The calculation is simple.

The emails sent to SouthEast by Ms. Mastraccio and Ms. Bracken must be taken at face

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[44] *See BellSouth Telecommunications, Inc. v. Kentucky Public Service Comm'n,* No. 3:08-CV-00007-DCR (E.D. Ky.) (appealing the Commission's *Change of Law Order*); *BellSouth Telecommunications, Inc. v. Kentucky Public Service Comn'n,* No. 3:09-CV-00014-DCR (E.D. Ky.) (appealing the Commission's Order in PSC Docket No. 2006-00316, the AT&T/SouthEast interconnection arbitration).

[45] It is worth noting that, on June 18, 2008, at the very time SouthEast was attempting to place its commingling orders, the Eleventh Circuit Court of Appeals, which has jurisdiction over AT&T's home turf, upheld commingling and rejected (among others) this same "virtual UNE-P" argument. *See Nuvox Communications, Inc. v. BellSouth Communications, Inc.*, 530 F.3d 1330 (11th Cir. 2008).

value. AT&T was never confused. To the contrary: the emails accurately describe what SouthEast wanted to order, and expressed AT&T's official position on that order. AT&T cannot explain these emails away,[46] and they directly contradict AT&T's contention that it has been trying to "facilitate SouthEast Telephone's commingling request" from the time it received that request "on or about June 16, 2008."[47] Instead, it was denying that request and repeating the same rationale against commingling that it offered to the Federal District Court for the Eastern District of Kentucky and to the Eleventh Circuit Court of Appeals.[48] By August 1, 2008, however, this Commission had taken jurisdiction of SouthEast's Complaint and the Eleventh Circuit had ruled against AT&T on the issue; and, in its Answer, AT&T admitted it was required by Commission Orders to commingle. Now, however, it claimed it did not know what SouthEast wanted. By September 11, 2008, it was emphasizing the alleged difficulty of doing what SouthEast wanted. The rationale shifted, but the goal remained the same: delay, delay, delay.

Possibly the most outrageous rationale offered by AT&T for its delay is that SouthEast has made such an exotic request that it simply blindsided AT&T who, it claims, never imagined that a CLEC would ever request such a thing. SouthEast has been using this same loop (which is offered in the parties' interconnection agreement) for years, and currently uses over 1,700 of

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[46] AT&T's witness finally agreed on the stand that, when Ms. Bracken wrote her July 10 email giving AT&T's legal argument as to why it would not provide commingled Section 251 and Section 271 elements, "at the time this e-mail was written, that was the understanding." Niziolek Hearing Testimony, Tr. at 117. Ms. Niziolek's prefiled direct testimony, at page 4, however, states that "[f]rom the time AT&T received SouthEast Telephone's first request for a commingling arrangement on or about June 16, 2008 ... AT&T personnel spent a significant amount of time working on a process to facilititate SouthEast Telephone's commingling request." SouthEast submits that, unless denying the obligation to fill a request can be deemed part and parcel of "working on a process to facilitate" that request, these two statements are contradictory.

[47] Niziolek Direct Prefiled Testimony, at 4.

[48] *See* citations in notes 44 and 45.

them. Nevertheless, Ms. Niziolek testified as follows:

> Unfortunately, the loop being requested here has not been designed or already developed to work with a port that exists today. It's an unnatural, if you will, combination. It's not one that CLECs normally ask for or have normally identified as something they want. [49]

Ms. Niziolek also testified that, "To this day, *no CLEC, except for SouthEast Telephone*, has requested any loop/port arrangement commingled or otherwise, other than what AT&T Kentucky had available at the time the Change of Law order was issued."[50] She also answered affirmatively Staff Counsel's query as to whether "SouthEast is the only CLEC that has specifically requested UCL-ND product..." in the 22 states in which AT&T is the incumbent. [51]

Interestingly, Saturn Telecommunication Services, Inc., of Florida, alleges, in a Complaint filed before the Federal Communications Commission six days after the hearing held in this case, that it also tried to order the copper loop, nondesigned in a commingled arrangement – *at AT&T's own suggestion* – four years ago.[52]

The delay in this case is not due to any lack of diligence or effort on SouthEast's part, and attaching a port to an unbundled copper loop nondesign is not "unnatural." It works, and SouthEast's network is a testament to that. SouthEast was entitled to commingled elements from the time the Commission issued its *Change of Law Order* saying so (and, in fact, interpreting federal regulations requiring commingling that predate the *Change of Law Order* itself).

As Mr. Maynard has explained, "SouthEast has ordered at least 1,740 nondesigned

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[49] Niziolek Hearing Testimony, Tr. at 123.
[50] Niziolek Rebuttal Testimony, at 2.
[51] Niziolek Hearing Testimony, Tr. at 128-29.
[52] *In the Matter of Saturn Telecommunication Services, Inc. v. BellSouth Telecommunications, Inc.*, File No. EB-09-MD-008 (Complaint dated July 20, 2009) (Excerpt, with FCC docketing letter, attached hereto as Exhibit A). Saturn also alleges, among other things, that it *still* has not obtained the commingled arrangements it was led to believe it would be permitted to purchase and that it has suffered severe financial injury as a result.

copper loops to combine with SouthEast's own port, and in those instances, we have encountered no difficulty or delay at all."[53] However, since that same UCL-ND was now to be commingled with AT&T's port rather than attached to SouthEast's, suddenly there arose an alleged need to investigate each customer line for which SouthEast requested the UCL-ND to determine whether it "qualified." In addition, UCL-ND suddenly was no longer a "product" in itself; now it was part of a "new" product (rather than an old product that simply had been ordered together with another old product) whose development could consume an entire year. On the witness stand, Ms. Niziolek described the alleged complexity of it all, asserting that "internally finding the correct organizations and the process to go through to develop a product is extremely extensive. There is an official product development procedure to follow at AT&T and it's more than just a one or two-page schematic, explaining what to do. I mean, it's a very detailed process..."[54]

Of course, it is merely a fortuitous coincidence that the longer such a process takes, the more expensive it is for the CLEC.

Allegations of difficulty and expense in "product development" appear common with AT&T. When pressed at hearing as to whether, in her experience she knew of a product that had been requested by a CLEC, developed, and actually sold to CLECs, AT&T's witness ***could not think of one,***[55] although her expertise within AT&T is "product policy," a manager who "work[s] with our Product Managers."[56] She then provided a chilling description of what, in her experience, had happened in Ohio to a CLEC that placed a "product" request: after the "high level" analysis and then an "analysis piece" to provide details (that "probably took six to eight

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[53] Rebuttal Testimony of Darrell Maynard, at 9.
[54] Niziolek Hearing Testimony, Tr. at 130-31.
[55] Niziolek Hearing Testimony, Tr. at 138-39.
[56] Niziolek Hearing Testimony, Tr. at 149.

months"), the requested product was so expensive the CLEC dropped the request.[57]

Mr. Maynard testified at hearing that SouthEast could develop an ordering process such as the one it requested from AT&T "within four weeks at least anyway."[58] AT&T's bureaucracy cannot possibly be as unwieldy as AT&T claims – and even if it were, there is no reason for SouthEast to suffer financially for it. Nor should AT&T be entitled to profit from such inefficiency.

SouthEast is entitled to bill credits dating from July 1, 2008.

II. AT&T IS NOT ENTITLED TO CHARGE AN "INSTALLATION" CHARGE FOR THE REQUESTED CONVERSION AND IS CERTAINLY NOT ENTITLED TO CHARGE "INSTALLATION" FEES FOR ITS BILL CREDIT "INTERIM SOLUTION."

AT&T plans to charge SouthEast $104.60 for each customer line its billing system will now recognize as a line to be "credited" as being "qualified" to be a port-UCL-ND commingled arrangement. This is AT&T's "installation" charge for all of the elements that exist in the arrangement, the same charge it imposes on an order to serve a ***new*** customer: $44.97 for the UCL-ND; $34.95 for the port; and $24.68 for the cross-connect.[59] The *TRO*[60] makes it clear that the FCC never contemplated such fees for changes to circuits already used by a CLEC to serve customers. *See TRO,* ¶ 587 (discussing the "risk of wasteful and unnecessary charges ... associated with establishing a service for the first time" that an incumbent might charge for a conversion, thereby "unjustly enrich[ing] an incumbent LEC"). The FCC also found that such

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[57] Niziolek Hearing Testimony, Tr. at 136-37.
[58] Maynard Hearing Testimony, Tr. at 76.
[59] *See* AT&T Response to Item 1 of the Staff's Second Set of Data Requests (noting that the "installation" charge for the cross-connect had not been previously discussed with SouthEast). SouthEast had previously been told that the "installation" charges would apply to the loop and the port only, and would total $79.92.
[60] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16978 (2003), *aff'd in part and rev'd in part, United States Telecommunications Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004).

charges are discriminatory and therefore "inconsistent with section 202 of the Act." *Id.* Here, AT&T plans to charge SouthEast to "install" the loop, the port, and the cross-connect that it already uses to serve its existing customers, even though SouthEast has already paid installation charges on these circuits and even though there is no current plan to modify them in any way.

AT&T's $10.00 "conversion" charge, applicable to both "switch-as-is" and "switch with change" conversions,[61] not its initial "installation" charge, should apply, since these are the same lines with which SouthEast already serves its customers. AT&T offers no credible evidence to the contrary.

When asked the difference between "conversion" and "installation" charges, AT&T's witness said on the stand that a "conversion" charge, as opposed to an "installation" charge, must be a "like to like" conversion.[62] But when asked whether the LWC and the port-UCL-ND commingled arrangement are so similar that conversion from one to the other is a "like for like" conversion, the witness responded, "Honestly, I don't know. I don't know. I'm sorry."[63]

AT&T's demand for $104.60 per line to "install" equipment when it will not actually "install" anything and when it has offered not even a speck of cost support is outrageous. It is particularly outrageous because, approximately a year and a half ago, AT&T charged SouthEast $300,759.46 ($10 per line) to convert its lines from resale service to the "local wholesale platform," the network element combination provided under AT&T's "commercial agreement."[64] SouthEast signed that "commercial agreement" after Judge Caldwell vacated the Commission's order requiring AT&T to provide §271 elements at the total element long run

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[61] *See* attached rate sheet from the parties' interconnection agreement, Exhibit B hereto.
[62] Niziolek Hearing Testimony, Tr. at 147.
[63] Niziolek Hearing Testimony, Tr. at 148. Later, cued by the AT&T attorney on re-direct, Ms. Niziolek said that the arrangement would not be "like for like."
[64] Maynard Direct Testimony, at 7.

incremental price plus one dollar.[65] Now AT&T demands many hundreds of thousands more to convert SouthEast's lines *again* – and this time it says it will charge "installation" fees although SouthEast paid for installation when the equipment actually was installed.[66] When asked whether, if AT&T succeeds in its quest to have the Commission's commingling orders overturned, it will charge yet another "conversion" or perhaps "installation" charge to "theoretically" return SouthEast's same lines to the WLP/LWC, AT&T's witness responded, "You know, I don't know."[67] Unfortunately, it is all too possible that this is exactly what AT&T would do. Experience teaches that every attempt by SouthEast to compete against AT&T on a reasonably priced basis is met by yet another creative and exorbitant AT&T bill backed by threats of disconnection.

AT&T should not be allowed to charge fees that do not have even an abstract grounding in reality. AT&T's witness admitted that she had "no idea" whether the installation charges accurately reflected AT&T's cost,[68] and did not even know if $104 per line was an accurate charge *even if* the lines were physically altered,[69] an activity AT&T has no present intention to perform anyway. In short, AT&T has not offered a shred of evidence in support of the $104.60 per customer line it proposes to charge for allegedly "installing" new equipment.

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[65] *BellSouth Telecommunications, Inc. v. Kentucky Public Service Comm'n,* No. 06-65-KKC, 2007 WL 2736544 (E.D. Ky. 2007). Although the Commission had ordered AT&T to provide network elements, AT&T only permitted SouthEast access to the resale system. Thus, when SouthEast finally signed AT&T's alleged "commercial agreement," AT&T's records showed that SouthEast's lines were "resale," and required SouthEast, under threat of disconnection, to pay conversion charges to switch from resale to network elements.

[66] AT&T's witness would not quite admit even that the port is already in place on these preexisting lines, admitting only that "[t]he port could be there; yes." Niziolek Hearing Testimony, Tr. at 126.

[67] Niziolek Hearing Testimony, Tr. at 127.

[68] Niziolek Hearing Testimony, Tr. at 144.

[69] Niziolek Hearing Testimony, at 141 ("Q.: Then, in your estimation, $104 for installation charges per line would not cover the cost of providing this product physically? A. I don't know.")

Ironically, AT&T's witness herself referred at hearing to "cost" as something that should be borne by the "cost-causer."[70] By that same reasoning, if SouthEast has not "caused" the "cost" of any "installation," it should not be required to pay that nonexistent "cost." The fact is that AT&T is not "installing" anything. It cannot charge an "installation" charge.

III. THE COMMISSION SHOULD ORDER AT&T TO DEVELOP THE ACTUAL COMMINGLED PRODUCT SOUTHEAST HAS ORDERED.

As quickly as it possibly can, SouthEast is converting its customer services to its own facilities. It has for years served many of its customers through a combination of its own switch and the UCL-ND purchased from AT&T.[71] While financial issues prohibit SouthEast from immediately attaching a switch of its own to the loops at issue in this case, the actual conversion to UCL-ND is a step toward the facilities-based arrangement SouthEast ultimately plans to have in place throughout its system.[72] Mr. Maynard testified that the unbundled copper loop nondesign is not only much cheaper than the loop AT&T sells as part of its "WLP/LWC," but that it is fully functional for SouthEast's purposes:

> Because of the way technology is today, our POTS ["plain old telephone service"] that we deliver today, delivers just as effectively over that copper loop as it does a $30 loop that we currently have paid for in the past. So, you know, there is obviously an effort to reduce our cost. It's a lower-based loop that we've been using for quite a while to deliver our own voice-grade services over, and we just felt that, since that was available in a 251 element, that we should be allowed to commingle it with their port instead of our port in a non-collocated environment while we were waiting to acquire enough customer base in a particular areas to allow us to put in our own facilities that we could use that then with our own port....[73]

SouthEast is entitled to the commingled UCL-ND and port *now*. There is no reason for

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[70] Niziolek Hearing Testimony, at 134-35.
[71] Maynard Hearing Testimony, at 34.
[72] Maynard Hearing Testimony, Tr. at 34-35.
[73] Maynard Hearing Testimony, Tr. at 75. Mr. Maynard also explained that "we ultimately use that circuit when we do our own facilities-based services, both broadband and local service." Tr. at 98.

SouthEast to have to place additional orders later on to obtain the actual UCL-ND (at whatever additional charge AT&T might impose for those future orders) when SouthEast is ready to attach its own port.[74] SouthEast's goal in this case is to obtain the actual commingled arrangement.

Thus, SouthEast was taken aback at hearing when Ms. Niziolek testified on behalf of AT&T that it is her understanding that *despite* the efforts of the past fourteen months, there still is no actual plan to provide SouthEast with the commingled port and UCL-ND, and "if you're interested in developing a product, you can follow the formal process and we can start looking at what it would cost to develop it."[75] This statement is not only surprising; it is chilling, considering the fate that appears generally to await "products" subjected to AT&T's formal "product development" process and the potential "costs" to "develop" that alleged "product."

The Commission should reject AT&T's entire "product" concept and order AT&T to cease avoiding its obligations by further bureaucratic excuses and delays. SouthEast's orders are simple. They involve two *existing* products – network elements that must, pursuant to law, be sold on a "commingled" basis, "unbundled" as to price.[76] AT&T's ordering system should allow both products to be purchased on one order; the products thereby sold should *work* (that is, remain connected); and AT&T should not be permitted to avoid its legal obligations based on transparent claims that its own bureaucracy is so complicated that so simple a request cannot be met without years of effort and untold amounts of money to be paid by the requester.

SouthEast is entitled to the commingled arrangement it has requested, both as a billing

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[74] Maynard Hearing Testimony, Tr. at 35.
[75] Niziolek Hearing Testimony, Tr. at 140.
[76] Section 251 mandates unbundling the loop, and Section 271 mandates unbundling the switch. As for the meaning of "unbundling," *see AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 394 (1999) (rejecting an RBOC attack on the Section 251 unbundled network element platform on the basis that "unbundling" means "physically separating," and explaining that "[t]he dictionary definition of 'unbundle[d]' (and the only definition given, we might add) matches the FCC's interpretation of the word: 'to give separate prices for equipment and supporting services.'").

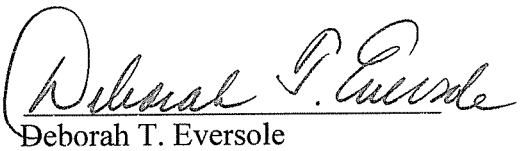
and as a practical matter. No "product development" costs should be imposed. Both products already exist. Indeed, SouthEast already uses them. And, if anything at all is to be "installed," only actual cost-based charges should be imposed, and they should be imposed *only* for an actual physical "installation."

CONCLUSION

The Commission's *Change of Law Order* requires AT&T to provide the port commingled with the UCL-ND. AT&T has offered no reasonable excuse for its five months of delay in providing at least the financial benefit of the commingled arrangement requested. Certainly it has offered no reasonable excuse for, at this late date, indicating that the commingled port and UCL-ND might not be provided at all. Finally, it has offered absolutely no cost justification for the "installation" charge it proposes. Both the delays and the installation charge are merely ways to increase SouthEast's bill and to ensure that, in the end, SouthEast pays as much as, or even more than, it would have paid if it had continued to accept the wholesale local platform.

For the foregoing reasons, SouthEast respectfully requests that the Commission order AT&T to provide the commingled arrangement requested and order AT&T to credit SouthEast's account with the difference between the wholesale local platform price that was billed for SouthEast's lines and the commingled arrangement price that *should* have been billed, since July 1, 2008, offset by the $10 conversion charge specified by the parties' interconnection agreement.

Respectfully submitted,



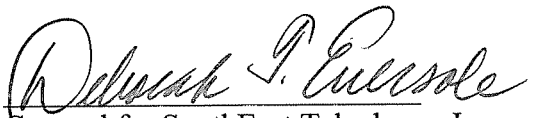
Deborah T. Eversole
Douglas F. Brent
STOLL KEENON OGDEN, PLLC
2000 PNC Plaza
500 West Jefferson Street
Louisville, Kentucky 40202
(502) 333-6000

Bethany Bowersock
SouthEast Telephone, Inc.
106 Power Drive
Pikeville, KY 41502
(606) 437-3097

Counsel for SouthEast Telephone, Inc.

CERTIFICATE OF SERVICE

I hereby certify that, on this 28th day of August, 2009, a full and complete copy of the foregoing was sent by United States Mail, postage prepaid, to Mary K. Keyer, 601 W. Chestnut Street, Room 407, Louisville, Kentucky, 40203; Lisa S. Foshee, 675 W. Peachtree Street, N.W., Atlanta, Georgia 30375; and by hand delivery to Douglas F. Brent, Stoll Keenon Ogden, PLLC, 2000 PNC Plaza, 500 West Jefferson Street, Louisville, KY 40202.



Counsel for SouthEast Telephone, Inc.

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

In the Matter of SATURN TELECOMMUNICATION SERVICES, INC., a Florida corporation, Complainant, v. BELLSOUTH TELECOMMUNICATIONS, INC., a Florida corporation, d/b/a AT&T FLORIDA, Respondent.	)	**File No.**_____

FORMAL COMPLAINT

Mark Amarant, President and CEO
Keith Kramer, Executive Vice President
SATURN TELECOMMUNICATION SERVICES, INC.
FCC Registration Number: 0018687350
12399 SW 53 Street
Cooper City, FL 33330
Telephone: (954) 252-1003
Facsimile: (786) 363-0103
E-Mail: mamarant@ststelecom.com
E-mail: kkramer@ststelecom.com

Complainant

Alan C. Gold, Esquire
FCC Registration Number: 0018661306
Florida Bar Number 304875
James L. Parado, Esquire
Florida Bar Number 580910
Charles S. Coffey, Esquire
Florida Bar Number 30182
ALAN C. GOLD, P.A.
1501 Sunset Drive
Second Floor
Coral Gables, FL 33143
Telephone: (305) 667-0475
Facsimile: (305) 663-0799
E-mail: agold@acgoldlaw.com
E-mail: jparado@acgoldlaw.com
E-mail: ccoffey@acgoldlaw.com

Counsel for Complainant

Dated: July 20, 2009

36. On February 4, 2005, the FCC released its TRRO[46], which, in part, established the permanent rule related to unbundled local circuit switching, and in turn eliminated UNE-P. In the TRRO, the FCC issued a national finding of "no impairment" for unbundled local circuit switching and established a transition period whereby CLECs were required to migrate from UNE-P to other service-delivery methods.[47]

37. On February 11, 2005, BellSouth released its carrier notification letter SN91085039, outlining the requirements related to the elimination of UNE-P and the conditions of the transition period.[48]

38. During February 2005 Kramer questioned Lepkowski and Ducote regarding their training and expertise on unbundled local elements due to the fact that in prior discussions with these two BellSouth employees (i) the primary focus was on Special Access products, and (ii) they have been unable to answer questions regarding UNEs.[49]

39. Lepkowski and Ducote both assured Kramer that they had already commenced training on UNEs and would have both the knowledge and available resources to assist STS in the development of the commingled network. STS was never advised otherwise.[50]

B. Bellsouth Designs A Commingled Network Utilizing Unbundled Copper Loops Non Designed

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[45] See Affidavit of Keith Kramer, ¶17-- KK00036-KK00049.
[46] *In the Matter of Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Local Exchange Carriers, Order on Remand,* WC Docket No. 04-313, CC Docket No. 01-338; FCC 04-290.
[47] TRRO ¶ 199.
[48] See Affidavit of Keith Kramer, ¶18--documents RC00001-RC00005.
[49] See Affidavit of Keith Kramer, ¶19.
[50] See Affidavit of Keith Kramer, ¶19--document KK00052.

40. The focus during February 2005 then switched to the particular BellSouth Serving Wire Centers ("SWCs") in which STS would place its collocation equipment in the commingled network. The SWCs in which STS placed its collocation equipment would serve as nodes. These nodes would allow STS to reach other SWCs where STS had UNE-P customers by using EELs and Interoffice Transport.[51]

41. Selection of the SWCs for the nodes was a crucial decision for STS because it determined the cost of interoffice transport that STS would incur for its commingled network. Since customers connected directly to the nodes would not require interoffice transport and the associated costs, STS had to choose the SWCs where it had the highest concentration of UNE-P customers to be migrated to the commingled network to serve as nodes.[52]

42. Lepkowski volunteered to take the information on STS'S nodes, begin a service inquiry which was required to see if BellSouth could engineer the SMARTring with 8 nodes, and contact a BellSouth commingling manager and other BellSouth product managers to confirm that Ducote and his network design was functional.[53]

43. Also in February 2005, Amarant was investigating the conversion costs for converting the UNE-P lines to this commingled network.[54]

44. On February 25, 2005, Ducote sent Amarant an e-mail containing schedules setting forth the number of lines to be converted at the various SWCs. The totals were 18,296 DS0 lines, 890 DS 1 lines, and 28 DS 3 lines.[55]

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[51] See Affidavit of Keith Kramer, ¶19.
[52] See Affidavit of Keith Kramer, ¶19.
[53] See Affidavit of Keith Kramer, ¶19.
[54] See Affidavit of Keith Kramer, ¶19.

45. Based on conversations with both Lepkowski and Ducote, STS was assured that (i) the commingled network could be built, (ii) STS'S embedded base of UNE-P customers could be migrated to the commingled network prior to the termination of the transition period set forth in the TRRO, and (iii), the network could be built and operated profitably.[56]

46. In April 2005 Kramer traveled to BellSouth's office in Atlanta to meet with Ducote and Lepkowski to discuss the commingled network that BellSouth was designing for STS. During the Atlanta meeting both Lepkowski and Ducote drew out the network design on a white board. This meeting included but was not limited to detailed discussions on the following topics: (i) costs of the network, including, without limitation, the initial (non-recurring) and operating (recurring) costs, (ii) numbers of lines at the SWCs and (iii) diagrams of the commingled network architecture. At this meeting both STS and AT&T agreed that STS would require an OC-48 SMARTring with OC-12 overlays for additional nodes. STS agreed with BellSouth's proposal that the network would be comprised of local loops from the customer's premise (either a DS1 or a DS0 Loop[57]) to either a 1/0 [58] or 3/1 mux[59] either directly connected to STS'S collocation or indirectly connected to STS'S collocation through the interoffice transport hub and spoke design at either a DS1 or DS3 level.[60]

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[55] See Affidavit of Keith Kramer, ¶19, documents KK00023-KK00033.
[56] See Affidavit of Keith Kramer, ¶16, documents KK0004-KK00056.
[57] A Digital Signal (DS) 0 is a 64 kbps voice grade channel and Digital Signal (DS) 1 is a 1,544 mbps channel equivalent to 24 DS0s.
[58] This refers to a multiplexer that combines multiple DS0s onto a DS1.
[59] This refers to a multiplexer that combines numerous DS1s onto a DS3.
[60] See Affidavit of Keith Kramer, ¶20--document KK00063- KK00064.

47. Prior to the Atlanta meeting, on April 19 and 20, 2005 Kramer wrote Bellsouth's Contract Negotiator, Kyle Todtschinder ("Todtschinder") explaining that "Daryl (Ducote) was coming up with a network design, based on the new rules (TRRO)" and wanted to discuss how the BellSouth designed network would comply with the rules[61]

48. On April 28, 2005, Ducote sent Kramer and STS'S Chief Technical Officer, Gil Cohen, ("Cohen") an e-mail with copies to Lepkowski and Amarant confirming the "main topic discussed, Commingling" at the Atlanta meeting, and the tremendous cost savings to STS of this BellSouth designed commingled network. Attached to the e-mail were various schedules including one which showed the lines to be converted on each SWC, which included 18,296 DS0 lines, and diagrams showing the proposed commingled network with the local loop from the end user to the SWC being a DS0 in most cases and a DS1 in the remaining situations.[62]

49. On May 2, 2005 Ducote wrote Kramer to discuss the ordering process for the commingled network including the "ordering of a DS0 to the end user.[63]

50. Also in May 2005, Kramer reviewed the Triennial Review Order (TRO)[64], particularly with regards to commingling as well as the related FCC rules and regulations. After his review, Kramer contacted BellSouth's local contract manager ("LCM") who serviced STS, Ann Foster ("Foster"), and requested a copy of BellSouth's commingling guidelines. Foster replied that there were currently no commingling guidelines available, however they were being finalized.[65]

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[61] See Affidavit of Keith Kramer, ¶20--document KK00063-KK00069.
[62] See Affidavit of Keith Kramer, ¶20. See documents KK00036-KK00049
[63] See Affidavit of Keith Kramer ¶21, See documents KK00053-KK00056
[64] See TRO.
[65] See Affidavit of Keith Kramer, ¶21--documents KK00060.

51. During May 2005, Kramer began focusing on what was the most effective and least costly DS0 that STS could utilize as the local loop in the commingled network. In response to Kramer's inquiry, Ducote sent Kramer technical information from BellSouth's document TR-73600, describing only the following loops: (i) Unbundled Copper loops Non-Designed ("UCL-ND"), and (ii) Service Level 1 ("SL1"). No mention was made of utilizing Service Level 2 ("SL2") or Unbundled Copper Loops Designed ("UCL-D").[66]

52. On or about May 28, 2005 Kramer, Amarant, Cohen, and Kevin Collins ("Collins"), a STS engineer, flew to Birmingham, Alabama to meet with Lepkowski, Ducote, and Michael Hurst ("Hurst"), the BellSouth Commingling Manager.[67]

53. During the May meeting in Birmingham, Lepkowski discussed the Commingled Network with STS, drew diagrams of BellSouth's proposed network design and discussed implementation of the commingled network.[68]

54. Lepkowski expressed to Kramer and Amarant how excited he was about this commingled network and the opportunities to market it to all other CLECs and that it could start a new wave of special access sales.[69]

55. AT the meeting STS questioned what would be the most efficient equipment to collocate in BellSouth's SWCs that would accommodate the commingled network arrangement as well as comply with the necessary requirements of section 251(c)(6)

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[66] See Affidavit of Keith Kramer, ¶22--documents. KK00093 and KK00094.
[67] See Affidavit of Keith Kramer, ¶22--documents KK00098-KK00101; See Affidavit of Gil Cohen, ¶3.
[68] See Affidavit of Keith Kramer, ¶23; See Affidavit of Gil Cohen, ¶4.
[69] See Affidavit of Keith Kramer, ¶67--document KK00451; See Affidavit of Mark Amarant ¶ 3.

of the Act.[70] Cohen inquired as to whether a patch panel[71] would meet both criteria. Hurst left the room to confer with other BellSouth personnel and after a substantial period of time, Hurst returned to the meeting and stated that the patch panel would be compliant with section 251(c) (6) of the Act and would work in a commingled network utilizing DS0s and DS 1s.[72]

56. On May 31, 2005, Hurst confirmed his understanding of this commingled network in writing stating; "From the proposed configurations that were reviewed with me today for STS Telecom, it is my understanding that they will have voice grade/DS0 and DS1 UNE loops connected to and riding Special Access channelized interoffice facilities connected to a ring. In my opinion STS Telecom would be in full compliance with their Triennial Review Order based interconnection agreement that stipulates that high capacity loop transport must terminate into a collocation that meets 51.318(c) if it terminates the channelized DS3 facilities into a virtual collocation and further cross-connects to the ring."[73]

57. On June 2, 2005, Ducote writes STS that they "are also still investigating the migration/conversion process discussed in our (Birmingham) meeting and hope to

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[70] Section 251(c)(6) of the Act imposes on incumbent local exchange carriers (ILECS) the "duty to provide, on rates terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier....".

[71] See: Affidavit of Gil Cohen ¶ 4; alsot Generally speaking a patch panel is a mounted hardware unit containing an assembly of port locations in a communications.....system. In a network, a patch panel serves as a sort of static switchboard, using cables-or patch panel cords or cables-to interconnect equipment with the network. http//searchnetworking.techtatget.com/sDefinition/0,,sid7_gci3433942,00.html

[72] See Affidavit of Keith Kramer, ¶23; See Affidavit of Gil Cohen, ¶¶ 4 and 5.

[73] See Affidavit of Keith Kramer, ¶23--document KK00153.

have a conference call early next week to discuss this."[74] In the e-mail Ducote also discussed the use of Unbundled Copper Loops Non-Designed and SL1s, and referred STS to Tech Ref TR-73600. No mention was made of SL2s.

58. In June 2005, after several requests for the information to Foster at BellSouth were ignored, Ducote sent STS a Copy of BellSouth's UNE-P to UNE-L Bulk Migration Process. In the accompanying e-mail, Ducote explained the relevancy of document, stating; "To me it indicates that you can use the lower rated loop out of your agreement. That is you can use a 2 wire Unbundled VoiceLoop-SL1 or a 2-wire Unbundled Copper Loop Non Design." Ducote ended the e-mail stating "I am currently waiting for more information on a migration process."[75] It is clear that in order to sell STS this expensive Special Access SMARTring, BellSouth was representing to STS that more expensive UNE loops such as SL2s were not required in this BellSouth designed commingled network.

C. The Parties Begin To Implement the Commingled Network

59. In July 2005, Mr. Ducote sent STS a letter from his superior, Assistant Vice President Marcus Cathey ("Cathey") at BellSouth, demanding that STS abide by the TRRO and transition UNE-P arrangements from UNEs to special access, including a remittance to BellSouth of the 15% rate increase retroactive to March 11, 2005. STS was shocked at the tone of the letter since the FCC's TRRO provided for a twelve (12) month transition period beginning on the effective date of the TRRO (March 12, 2005)[76] and Cathey was apparently demanding that STS immediately transition to

[74] See Affidavit of Keith Kramer, ¶23--documents KK00154-KK00155.
[75] See Affidavit of Keith Kramer ¶24--documents KK00156--KK00159.
[76] TRRO, ¶ 235.

FEDERAL COMMUNICATIONS COMMISSION
Enforcement Bureau
Market Disputes Resolution Division
445 12th St., S.W.
Washington, D.C. 20554
Fax No. (202) 418-0435

July 30, 2009

By U.S. Mail and E-Mail

NOTICE OF FORMAL COMPLAINT

THIS LETTER CONTAINS IMPORTANT INFORMATION REGARDING FILING DEADLINES AND PROCEDURES. PLEASE REVIEW IT CAREFULLY.

Saturn Telecommunication Services, Inc.,	)	
	)	
Complainant,	)	
	)	
v.	)	File No. EB-09-MD-008
	)	
BellSouth Telecommunications, Inc., d/b/a AT&T Florida,	)	
	)	
Defendant.	)	

Alan C. Gold
James L. Parado
Charles S. Coffey
ALAN C. GOLD, P. A.
1501 Sunset Drive
Second Floor
Coral Gables, FL 33143
Counsel for Complainant

Geoffrey M. Klineberg
Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C.
1615 M Street, N.W.
Suite 400
Washington, DC 20036
Counsel for Defendant

Dear Counsel:

On July 21, 2009, Complainant Saturn Telecommunication Services, Inc. ("Saturn") filed a formal complaint with this Commission against BellSouth Telecommunications, Inc. d/b/a AT&T Florida ("AT&T") under section 208 of the Communications Act of 1934, as amended (the "Act"), 47 U.S.C. § 208. AT&T should already have a copy of the complaint as served by hand delivery by

Saturn. *See* 47 C.F.R. § 1.735(d).[1] If that is not the case, AT&T should immediately contact the Commission counsel identified below.

The Commission has promulgated comprehensive rules regarding formal complaints. *See* 47 C.F.R. §§ 1.720-1.736. *See also Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed when Formal Complaints Are Filed Against Common Carriers*, Report and Order, 12 FCC Rcd 22497 (1997) ("*Formal Complaints Order*"), Order on Reconsideration, 16 FCC Rcd 5681 (2001) ("*Formal Complaints Recon Order*"). We strongly encourage the parties to read the formal complaint rules, the *Formal Complaints Order*, and the *Formal Complaints Recon Order* fully and carefully.

Pursuant to sections 4(i), 4(j), and 208 of the Act, 47 U.S.C. §§ 154(i), 154(j), 208, sections 1.3, 1.724, 1.726, 1.729, and 1.733 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.724, 1.726, 1.729, 1.733, and the authority delegated by sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311, we modify and extend certain of the filing deadlines and other requirements set forth in the formal complaint rules, as specified below:

We waive the portions of sections 1.726(a) and 1.729(a) of the Commission's rules that limit the complainant to addressing, in its reply and supplemental interrogatories, only the "specific factual allegations and legal arguments made by the defendant *in support of its affirmative defenses*." 47 C.F.R. §§ 1.726(a), 1.729(a) (emphasis added). Instead, **Saturn must file a reply**, and the reply **must** address any factual allegation or legal argument in the answer, regardless of whether it purports to support an affirmative defense. The supplemental interrogatories (if any) may address any factual allegation or legal argument in the answer, regardless of whether it purports to support an affirmative defense. This waiver will expedite our consideration of this matter by accelerating the creation of a full record.

In addition, we waive the portions of sections 1.724(c) and 1.726(c) of the Commission's rules that require an answer and reply to contain proposed findings of fact and conclusions of law. Experience has shown that proposed findings of fact and conclusions of law included in these pleadings are of limited value. The answer and reply still must include comprehensive factual support and a thorough legal analysis, as required in sections 1.724(b)-(c) and 1.726(a), (c).

In accordance with the formal complaint rules as modified above, and in accordance with the filing dates agreed to by the parties,[2] we set the following schedule for this proceeding:

1) AT&T shall, on or before **September 4, 2009**, file and serve an answer to the complaint that complies with 47 C.F.R. § 1.724. Responses to any motions filed with the complaint shall be submitted with the answer.[3]

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[1] Accordingly, unless AT&T requests otherwise, we will not mail a copy of the complaint to AT&T.

[2] *See* Order granting STS's Agreed Motion for Extension of Conversion Deadline for Filing the Formal Complaint and Deadline for Respondent AT&T to File Response, File Nos. EB-09-MD-008 and EB-08-MDIC-0034 (dated June 17, 2009) ("Order").

[3] Except in rare circumstances, ***motions to dismiss should not be filed***. *Formal Complaints Recon Order*, 16 FCC Rcd at 5696 ("We find this practice of filing a separate motion to dismiss to be unnecessary, in virtually all cases...[T]he

2) On or before **September 4, 2009**, AT&T shall file and serve its request for interrogatories, if any, and shall file and serve any opposition and objections to Saturn's request for interrogatories. 47 C.F.R. § 1.729, as modified above.

3) Saturn shall, on or before **September 21, 2009**, file and serve a reply to the answer that complies with 47 C.F.R. § 1.726 as modified above.

4) Saturn shall, on or before **September 21, 2009**, file and serve its second request for interrogatories, if any, and file and serve any opposition and objections to AT&T'S request for interrogatories, if any. *See* 47 C.F.R. § 1.729 as modified above.

5) AT&T shall, on or before **September 30, 2009**, file any opposition and objections to Saturn's second request for interrogatories, if any. 47 C.F.R. § 1.729.

6) The parties shall meet on or before **October 9, 2009**. One purpose of that meeting is to resolve or narrow as many issues as possible prior to the initial status conference to be held in this proceeding. The parties shall discuss matters including, but not limited to, settlement prospects, discovery, factual and legal issues in dispute, pleading schedules, and the creation of a joint statement of stipulated facts, disputed facts, and key legal issues. *See* 47 C.F.R. § 1.733(b)(1).

7) The parties shall file a joint statement of all proposals agreed to and any disputes remaining with respect to the matters listed in 47 C.F.R. § 1.733(b)(1)(i)-(iv) as a result of the parties' meeting. At the same time, the parties also shall submit a joint statement of stipulated facts, disputed facts, and key legal issues. *See* 47 C.F.R. §§ 1.732(h), 1.733(b)(1)(v), 1.733(b)(2). Both joint statements must be filed on or before **October 19, 2009**. *See* 47 C.F.R. § 1.733(b)(2). The parties may submit these two joint statements in a single document, as long as each is separately identified therein. **We strongly encourage the parties to devote substantial effort to developing comprehensive and detailed joint statements**. *See Formal Complaints Recon Order*, 16 FCC Rcd at 5696-97.

8) An initial status conference in this proceeding will be held at the Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554 shortly after the joint statements are filed. We strongly encourage each party to have present at the conference a client representative with knowledge of the central facts and authority to settle the dispute. *See* 47 C.F.R. § 1.733. The parties should be prepared to spend at least four hours in conference.

The parties shall file with the Commission Secretary all written submissions in this proceeding, including letters and e-mails to Commission counsel, and all such submissions shall prominently contain the File Number captioned above. *See, e.g.*, 47 C.F.R. § 1.7. The parties shall serve all filings either by e-mail, hand delivery, facsimile transmission, overnight delivery, or e-mail, followed by regular U.S. mail delivery, together with a proof of all such service, in accordance with 47 C.F.R. § 1.735(f) (as modified here to permit e-mail delivery). The parties shall also submit

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Commission's rules are designed so that a defendant's answer is a comprehensive pleading containing complete factual and legal analysis, including a thorough explanation of every ground for dismissing or denying the complaint...[W]e remind defendants that the grounds for a motion to dismiss ordinarily should be raised in the answer alone rather than in a separate pleading.").

courtesy copies of all filings via e-mail and, if the filing is more than thirty pages long, either hand-delivery or overnight delivery to the Commission counsel identified below and the Chief of the Market Disputes Resolution Division.

The parties should note that this proceeding is restricted for *ex parte* purposes pursuant to 47 C.F.R. Part 1, Subpart H. Further, the parties shall retain all records that may be relevant to the complaint, including electronic records, until the Commission's decision in this proceeding is final and no longer subject to judicial review. *See* 47 U.S.C. §§ 154(i), 208(a); 47 C.F.R. § 42.7.

Lisa Saks and Lia Royle are Commission counsel for this proceeding. Ms. Saks may be reached at (202) 418-7335 (phone), (202) 418-0435 (fax), and lisa.saks@fcc.gov. Ms. Royle may be reached at (202) 418-7391 (phone), (202) 418-0435 (fax), and lia.royle@fcc.gov.

This letter ruling is issued pursuant to sections 4(i), 4(j), and 208 of the Act, 47 U.S.C. §§ 154(i), 154(j), 208, sections 1.3 and 1.720-1.736 of the Commission's rules, 47 C.F.R. §§ 1.3, 1.720-1.736, and the authority delegated in sections 0.111 and 0.311 of the Commission's rules, 47 C.F.R. §§ 0.111, 0.311.

FEDERAL COMMUNICATIONS COMMISSION

Alexander P. Starr
Chief, Market Disputes Resolution Division
Enforcement Bureau
alex.starr@fcc.gov

SERVICES - Kentucky													Att: 1 Exh: A			
CATEGORY	RATE ELEMENTS	Interim	Zone	BCS	USOC	RATES($)					Svc Order Submitted Elec per LSR	Svc Order Submitted Manually per LSR	Incremental Charge - Manual Svc Order vs. Electronic-1st	Incremental Charge - Manual Svc Order vs. Electronic-Add'l	Incremental Charge - Manual Svc Order vs. Electronic-Disc 1st	Incremental Charge - Manual Svc Order vs. Electronic-Disc Add'l
						Rec	Nonrecurring		Nonrecurring Disconnect		OSS Rates($)					
							First	Add'l	First	Add'l	SOMEC	SOMAN	SOMAN	SOMAN	SOMAN	SOMAN
	Tandem Trunk Port - Shared, Per MOU (Melded)					0.000117538										
	Wholesale Common Transport															
	Common Transport - Per Mile, Per MOU					0.000003										
	Common Transport - Facilities Termination Per MOU					0.0007466										
DS0 WHOLESALE LOCAL PLATFORM SERVICE																
	> For New Install scenarios the Nonrecurring charges are listed in the First and Additional NRC columns for each Port USOC. For Existing Platform scenarios, the Nonrecurring charges are listed in the NRC - Conversions section. Additional NRCs may apply also and are categorized accordingly.															
	> End Office and Tandem Switching Usage and Wholesale Common Transport Usage rates in the Port section of this rate exhibit shall apply to DS0 Wholesale Local Platform Service except for the Coin Service which has a flat rate usage charge (USOC: URECU).															
	DS0 WHOLESALE LOCAL PLATFORM SERVICE (Residence)															
	DS0 Loop Rates															
	2-Wire Voice Grade Loop (SL1) - Zone 1		1	UEPRX	UEPLX	9.64										
	2-Wire Voice Grade Loop (SL1) - Zone 2		2	UEPRX	UEPLX	14.37										
	2-Wire Voice Grade Loop (SL1) - Zone 3		3	UEPRX	UEPLX	30.59										
	2-Wire Voice Grade Line Port (Res)															
	2-Wire voice port - residence			UEPRX	UEPRL	8.15	34.95	12.48								
	2-Wire voice port with Caller ID - res			UEPRX	UEPRC	8.15	34.95	12.48								
	2-Wire voice port outgoing only - res			UEPRX	UEPRO	8.15	34.95	12.48								
	2-Wire voice Kentucky extended local dialing parity port with Caller ID - res			UEPRX	UEPRM	8.15	34.95	12.48								
	2-Wire voice res, low usage line port with Caller ID			UEPRX	UEPAP	8.15	34.95	12.48								
	2-Wire Voice Kentucky Residence Dialing Plan without Caller ID			UEPRX	UEPWE	8.15	34.95	12.48								
	All Features Offered			UEPRX	UEPVF	0.00	0.00	0.00								
	NONRECURRING CHARGES - Conversions															
	2-Wire Voice Grade Loop / Line Port Platform - Switch-as-is			UEPRX	USAC2		10.00	10.00								
	2-Wire Voice Grade Loop / Line Port Platform - Switch with change			UEPRX	USACC		10.00	10.00								
	2-Wire Voice Grade Loop / Line Port Platform - Installation Charge at QuickService location - Not Conversion of Existing Service			UEPRX	URECC		10.00									
	ADDITIONAL NRCs															
	NRC - 2-Wire Voice Grade Loop/Line Port Platform - Subsequent			UEPRX	USAS2		0.00	0.00								
	Unbundled Miscellaneous Rate Element, Tag Loop at End User Premise			UEPRX	URETL		8.33	0.83								
	Inside Wire Maintenance															
	Inside Wire Maintenance Plan			UEPRX	SEQ1X	4.50										
	OFF/ON PREMISES EXTENSION CHANNELS															
	2 Wire Analog Voice Grade Extension Loop – Non-Design		1	UEPRX	UEAEN	10.56	46.66	22.57								
	2 Wire Analog Voice Grade Extension Loop – Non-Design		2	UEPRX	UEAEN	15.34	46.66	22.57								
	2 Wire Analog Voice Grade Extension Loop – Non-Design		3	UEPRX	UEAEN	31.11	46.66	22.57								
	2 Wire Analog Voice Grade Extension Loop – Design		1	UEPRX	UEAED	12.67	134.89	81.67								
	2 Wire Analog Voice Grade Extension Loop – Design		2	UEPRX	UEAED	17.45	134.89	81.67								
	2 Wire Analog Voice Grade Extension Loop – Design		3	UEPRX	UEAED	33.22	134.89	81.67								
	INTEROFFICE TRANSPORT															
	Interoffice Transport - Dedicated - 2 Wire Voice Grade - Facility Termination			UEPRX	U1TV2	23.95	98.09	53.67								
	Interoffice Transport - Dedicated - 2 Wire Voice Grade – Per Mile or Fraction Mile			UEPRX	U1TVM	0.0095	0.00	0.00								
	DS0 WHOLESALE LOCAL PLATFORM SERVICE (Res-PBX)															
	DS0 Loop Rates															
	2-Wire Voice Grade Loop (SL 1) - Zone 1		1	UEPRG	UEPLX	9.64										
	2-Wire Voice Grade Loop (SL 1) - Zone 2		2	UEPRG	UEPLX	14.37										
	2-Wire Voice Grade Loop (SL 1) - Zone 3		3	UEPRG	UEPLX	30.59										
	2-Wire Voice Grade Line Port Rates (RES - PBX)															
	2-Wire voice 2-Way PBX Trunk Port - Res (E: 1/1/2005)			UEPRG	UEPRD	11.15	61.66	18.58								
	FEATURES															
	All Features Offered			UEPRG	UEPVF	0.00										