COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

Petition of BellSouth Telecommunications, Inc.	)	
To Establish Generic Docket to Consider	)	
Amendments To Interconnection Agreements	)	Case No. 2004-00427
Resulting From Changes of Law	)	

POSTHEARING BRIEF OF SOUTHEAST TELEPHONE, INC.

SouthEast Telephone, Inc. ("SouthEast") by and through its counsel, hereby files its Posthearing Brief as directed by the Kentucky Public Service Commission ("Commission") in Orders dated August 10, 2005 and November 10, 2005.

INTRODUCTION

SouthEast is a rural Competitive Local Exchange Carrier ("CLEC") with its base of operations in Pikeville, Kentucky and a service area of 56 rural counties extending from its Pike County base of operations westward as far as Nelson County. Since its inception, SouthEast has foregone entering the low-cost, perhaps more lucrative, metropolitan markets such as Lexington and Louisville, and instead has chosen to bring competitive telecommunications services to those communities often forgotten or "left to last" by Incumbent Local Exchange Carriers ("ILECs") such as BellSouth Telecommunications, Inc. ("BellSouth").

SouthEast is a model example of the competition envisioned by the Telecommunications Act of 1996 ("the Act"). SouthEast began with the resale model, migrated to the Unbundled Network Element Platform ("UNE-P"), and had planned to transition in the near future to a facilities-based operation. As such, SouthEast flourished, growing from three employees in 1997 to 160 employees in 2005. However. SouthEast's development was prematurely slowed by

BellSouth's abrupt withdrawal, first of our ability to provision Digital Subscriber Line ("DSL") service over UNE-P lines, and then of UNE-P priced at Total Element Long-Run Incremental Cost ("TELRIC"). Unlike most CLECs in the industry, SouthEast continues to compete despite these challenging market conditions and continues to explore cost effective and innovative ways to install cutting edge infrastructure to serve our rural Kentucky customers.

DISCUSSION

The Commission must not countenance BellSouth's abusive efforts to take advantage of the FCC's decisions regarding Section 251 unbundling to evade its statutory obligations – and its commitments to this Commission – in connection with its entry into the long distance market pursuant to Section 271. BellSouth willfully ignores the clear distinction between Section 251 of the Act, which requires an FCC "impairment" analysis before network elements must be unbundled, and Section 271, which prescribes specific elements that Bell Operating Companies ("BOCs") must provide, with no "impairment" restrictions.

SouthEast submits that Congress' intent in drafting Section 271 with no "impairment" restriction was to ensure that, once the BOCs obtained long distance authority, both the local and long distance would remain "irrevocably" open. Thus, Section 271 sets a higher bar than Section 251 in order to ensure that CLECs such as SouthEast will be able to continue to compete in providing both local and long distance services, particularly to rural consumers, once BOCs obtain increased market clout due to their long distance entry at rates determined by the state commissions adept at promoting progress within their borders. Continued CLEC competition is possible only if network elements are available at reasonable rates subject to regulatory oversight – and as the Act recognizes, state public service commissions such as this Commission are in the best position to determine those rates at levels that will facilitate a level playing field for

competition between CLECs and ILECs. Most important, it is the telecommunications consumers that stand to benefit most from such vibrant competition.

I. ISSUE NO. 8: THE COMMISSION HAS AUTHORITY TO ENFORCE BELLSOUTH'S SECTION 271 OBLIGATIONS

State commissions play a major role in enforcing BOCs' Section 271 obligations pursuant to the Act and a consistent line of FCC precedents. The state commissions' role is not limited to considering whether a BOC has satisfied the Section 271 checklist conditions prior to long distance entry. Rather, state commissions have responsibilities for enforcing the BOCs' continuing compliance with those checklist conditions and preventing "backsliding" after long distance entry has occurred. Accordingly, contrary to BellSouth's arguments, this Commission has authority to ensure that BellSouth is offering the elements on the Section 271 checklist in a manner that complies with the "just and reasonable" requirements. This includes the terms and conditions for those elements – usually incorporated into a Section 252 interconnection agreement – as well as the rates for these elements, as discussed below.

A. The Commission Can Require BellSouth To Include Section 271 Elements in Section 252 Interconnection Agreements

1. BellSouth Is Still Obligated to Offer Unbundled Switching and Transport Pursuant to Section 271(c)(2)(B)(v) and (vi)

BellSouth is required to offer certain elements pursuant to Section 271 of the Act, even if those elements are not required Unbundled Network Elements ("UNEs") under the Section 251 "impairment" standard, as even BellSouth concedes. Unlike Section 251, Section 271 leaves no room for FCC discretion, but rather prescribes a specific list of checklist elements that BOCs like BellSouth are required to offer once they receive long distance authority. 1/ The FCC, in the *TRO*, specifically rejected BOC arguments that the Section 271 checklist elements incorporates

1/ *Compare* 47 U.S.C. § 271(c)(2)(B) *with* 47 U.S.C. §§ 251(c)(3), 251(d)(2), and 252(d)(1).

by reference the "impairment" standard of Section 251. Instead, the FCC held that Section 271 "establish[es] an independent obligation for BOCs to provide access to loops, switching, transport, and signaling regardless of any unbundling analysis under section 251." 2/ The FCC further determined that BellSouth and the other BOCs must provide Section 271 elements at rates that are "just and reasonable" in accordance with Section 201 of the Act, rather than at the typically lower TELRIC rates required for Section 251 UNEs. 3/ The U.S. Court of Appeals for the D.C. Circuit specifically upheld these rulings. 4/

BellSouth misleadingly contends that a PSC requirement that it offer the switching and transport elements pursuant to Section 271 would have the effect of "circumventing" the FCC's decision in the *TRRO* to eliminate Section 251 unbundling requirements for UNE-P. BellSouth is wrong. In the *TRRO*, the FCC did not address, or make any changes to, the continuing obligations of BellSouth and other BOCs to offer the elements specified in Section 271. Rather, the *TRRO*'s conclusions are based entirely on the FCC's analysis of the "impairment" requirement under Section 251 of the Act. 5/ Indeed, the FCC notably declined to use its forbearance authority to eliminate Section 271 unbundling requirements with respect to the loop, switching, and transport elements, notwithstanding several BOCs' requests that it do so, and notwithstanding the FCC's willingness to use forbearance to remove unbundling requirements for certain broadband elements. 6/

2/ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 15978, ¶ 654 (2003) ("*TRO*"), *aff'd in pertinent part, rev'd in other parts, United States Tel. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.), *cert. denied*, 538 U.S. 940 (2003).

3/ *TRO*, ¶¶ 656-664.

4/ *United States Tel. Ass'n v. FCC*, 359 F.3d 554, (D.C. Cir.), *cert. denied*, 538 U.S. 940 (2003).

5/ *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd 2533 (2005) ("*TRRO*").

6/ *See Petition for Forbearance of the Verizon Telephone Companies Pursuant to*

In addition, the differences between Section 251 UNEs and the elements specifically enumerated in Section 271 further undercuts BellSouth's contention that a requirement to provide the switching and transport elements of UNE-P would conflict with the *TRRO*'s elimination of those elements as UNEs at TELRIC rates. The fact that Section 271 elements are to be priced at "just and reasonable" rates distinguishes those elements significantly from TELRIC-priced Section 251 UNEs. Consistently, the FCC's rationale in the *TRRO* for finding that switching no longer meets the Section 251 impairment for switching – that "continued availability ... would impose significant costs in the form of decreased investment incentives" – does not apply if RBOCs provide the element only at "just and reasonable" rates, which may well be lower than TELRIC rates. 7/

There is also no serious factual basis for BellSouth's assertion, based on the FCC's national "non-impairment" finding, that if CLECs don't like BellSouth's market-based offering of 271 elements, they can buy those elements elsewhere in the competitive marketplace. BellSouth's argument defies reality. There are certainly no alternative vendors of the local switching or shared transport elements in the rural areas served by SouthEast – and no realistic way to provide telecom service to customers in our service area without relying at least in part on BellSouth's 271 elements.

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47 U.S.C. § 160(c), Memorandum Opinion and Order, 19 FCC Rcd 21946 (2004); Public Notice, "FCC Grants Qwest Forbearance Relief in Omaha MSA," FCC 05-170, WC Docket No. 04-233, (released Sept. 16, 2005) (while finding the Omaha MSA competitive and granting forbearance from most other dominant carrier regulations, the Commission declined to forbear from BOC's "section 271 obligations to provide wholesale access to local loops, local transport, and local switching at just and reasonable prices") (Order not yet released).

7/ *TRRO*, ¶ 199.

In sum, there is no basis for BellSouth's contention that it is now exempt from the obligation to provide CLECs with the switching and transport components of the loop-switch-transport group of elements formerly known as UNE-P.

2. This Commission and the FCC Share Authority To Enforce BellSouth's Section 271 Obligations

The Commission should reject BellSouth's incorrect contention that the FCC has exclusive authority to enforce BellSouth's Section 271 obligations, and that this Commission has no authority in that regard. The FCC has made it clear on a number of occasions that state commissions play an important role in enforcing the BOCs' Section 271 unbundling duties. For example, in the FCC order granting BellSouth long distance authority in Kentucky and other states, the FCC made it clear that if BellSouth were later accused of "backsliding" – *i.e.*, failing to comply with Section 271 preconditions – the problem could be addressed by "cooperative state and federal oversight and enforcement." 8/

Moreover, the FCC has long held that "[c]omplaints involving a BOC's alleged noncompliance with specific commitments the BOC may have made to a state commission . . . should be directed to that state commission[.]" 9/ BellSouth made specific commitments to this Commission, in connection with the company's application for Section 271 long distance authority, that it would provide local switching and shared transport as unbundled elements. In particular, BellSouth witness Cynthia K. Cox specifically represented to this Commission that BellSouth would offer unbundled transport in compliance with item #5 of the Section 271

8/ *Joint Application of BellSouth Corp., et al., for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, 17 FCC Rcd 17595, ¶ 304 (2002) ("*FCC's Kentucky 271 Order*"); *see also id.* at ¶ 301 & n.1171 (referring to earlier FCC orders' discussion of the "post-approval enforcement framework," including enforcement actions by state commissions).

9/ *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, ¶ 452 (1999) ("*FCC's New York 271 Order*"), *aff'd, AT&T v. FCC*, 200 F.3d 607 (D.C. Cir. 2000).

checklist, 10/ as well unbundled local circuit switching as in compliance with item #6 of the Section 271 checklist, including the features and capabilities needed for UNE-P. 11/ Ms. Cox specifically stated that these offerings were mandated under the Section 271 checklist requirements, and not merely pursuant to Section 251. The Commission relied on these representations in recommending that BellSouth's Section 271 application be granted. 12/ Now that BellSouth is refusing to comply "with specific commitments [that it made to this] Commission," the Commission has authority to take appropriate enforcement action. 13/ This proceeding gives the Commission an entirely appropriate opportunity to enforce BellSouth's commitments by requiring it to offer the switching and transport elements mandated by the statute.

Finally, BellSouth's reliance on Judge Hood's *dictum* in the *BellSouth v. Cinergy* interlocutory preliminary injunction order is disingenuous in the extreme. 14/ BellSouth itself conceded in its summary judgment brief in that case that the Section 271 issue was "irrelevant" to the case, since the Commission orders under review "made no mention of section 271." 15/ Accordingly, the court's off-hand mention of the Section 271 issue in that interlocutory order was unnecessary and can be considered nothing more than a non-binding *dictum*. However, if

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10/ Direct Testimony of Cynthia K. Cox, Senior Director-State Regulatory, BellSouth, Case No. 2001-00105, at 48-51 (filed May 18, 2001).

11/ *Id.* at 51-57.

12/ *See Investigation Concerning the Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996*, Case No. 2001-00105, Advisory Opinion, at 33-34 (Ky. PSC, April 26, 2002); *see also FCC's Kentucky 271 Order*, ¶ 7 (noting that its grant of long distance authority to BellSouth relied in significant part on this Commission's recommendation regarding Section 271 compliance).

13/ *FCC's New York 271 Order*, ¶ 452.

14/ *BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, Civil Action No. 3:05-CV-16-JMH, Memorandum Opinion and Order, at 12 (D.Ky., April 22, 2005).

15/ BellSouth Memorandum in Support of Motion for Summary Judgment, *BellSouth Telecommunications, Inc. v. Cinergy Communications Co.*, at 19 (filed Oct 13, 2005).

and when the U.S. District Court is properly presented with the issue of the Commission's authority over BellSouth's compliance with its Section 271 obligations, the court is likely to affirm that the Commission indeed possesses such authority, for the reasons set forth above.

By contrast, the Commission itself has squarely considered this issue and has properly concluded that it *does* retain authority to require BellSouth to comply with its Section 271 obligations. In its the recent *NewSouth-BellSouth Arbitration Order*, the Commission specifically rejected BellSouth's contention that "this Commission may not regulate the rates, terms, and conditions for elements required to be provided by BellSouth pursuant to Section 271." 16/ The Commission should follow its own binding *holding* regarding its Section 271 authority, rather than non-binding *dictum* in an interlocutory, preliminary decision regarding an issue that BellSouth concedes was "irrelevant" to the case at hand.

3. The Commission Has Authority to Require BellSouth to Include Section 271 Elements in Interconnection Agreements with CLECs

Section 271 specifically requires BOCs to be providing the elements specified in the checklist through interconnection agreements "that have been approved under Section 252." 17/ While Section 271 establishes obligations to provide specific elements that are independent of the Section 251 requirements, Section 271 explicitly incorporates by reference the process of entering interconnection agreements under Section 252, subject to the authority of state commissions. 18/

To be sure, Section 252 interconnection agreements are primarily intended to address rates, terms, and conditions for Section 251 UNEs. However, the FCC has recognized that

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16/ *Joint Petition for Arbitration of NewSouth Communications Corp., et al., of an Interconnection Agreement with BellSouth Telecommunications, Inc.*, Case No. 2004-00044, Order at 10 (Sept. 26, 2005) ("*NewSouth-BellSouth Arbitration Order*").

17/ 47 U.S.C. § 271(c)(1)(A); *see also* § 271(c)(2)(A)(i) and (ii).

18/ *Id.*; *TRO*, ¶ 654.

Section 252 interconnection agreements, which must be filed with and approved by state commissions, may include provisions that are not subject to Section 251 requirements. For example, the FCC significantly declined to grant a petitioning BOC's request for a ruling that interconnection agreements may not include provisions governing services or elements that are not subject to Section 251. 19/ Rather, the FCC deferred to the discretion of state commissions on whether to include rates, terms and conditions for services and elements that are closely related to those UNEs. 20/ The rates and terms for the Section 271 switching and transport elements are unquestionably closely linked to the rates and terms for the Section 251 loop UNE, and the FCC has left this Commission discretion to arbitrate the rates, terms, and conditions for all of these elements in Section 252 interconnection agreements.

Consistently, in a recent rulemaking decision, the FCC held that state commissions retain authority to determine specific rate levels for a category of traffic deemed to be "interstate" and subject to the Section 201 pricing standard, as long as those state-determined rates are not inconsistent with the Section 201 rate caps adopted by the FCC. 21/ More recently, BellSouth

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19/ *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements under Section 252(a)(1)*, Memorandum Opinion and Order, 17 FCC Rcd 19377, ¶ 10 (2002) ("*Qwest 252 Order*").

20/ The FCC thus deferred to state commissions regarding the scope of their Section 252 authority, and refused to grant Qwest's request for a ruling that, "in the case of voluntary agreements that contain both provisions relating to elements and services subject to Sections 251, and elements or services not subject to the statute, the Section 252(a)(1) filing and approval process should extend only to rates and service descriptions regarding the former." Qwest Communications International Inc. Petition for Declaratory Ruling, WC Docket No. 02-89, at 37 (filed Apr. 23, 2002). While the FCC in that Order held that "settlement contracts that do not affect an incumbent LEC's ongoing obligations relating to Section 251 need not be filed," *Qwest 252 Order*, ¶ 12, and that "only those agreements that contain an ongoing obligation relating to section 251(b) or (c) must be filed under 252(a)(1)," *id.*, n.26, this does not necessarily preclude state commissions from requiring that interconnection agreements containing an ongoing obligation relating to Section 251(b) or (c) must *also* include rates and terms for non-Section 251 elements.

21/ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, ¶ 80 (2001). *But see id.*, ¶ 82 (state commissions have no authority to set rates at levels that exceed the FCC's rate caps adopted pursuant to Section 201).

had to withdraw a petition in which it had asked the FCC to forbear from requiring it to specify terms and conditions for Section 271 elements in Section 252 interconnection agreements. 22/

In sum, there is ample authority supporting the inclusion of BellSouth's Section 271 elements within interconnection agreements that are subject to arbitration by the Commission under Section 252 of the Act.

B. The Commission Has Authority to Establish "Just and Reasonable" Rates for BellSouth's Section 271 Elements As Part Of Section 252 Interconnection Agreements

As discussed above, the Commission retains authority to arbitrate the terms and conditions of Section 271 elements in the context of interconnection agreements arbitrated pursuant to the procedural requirements of Section 252. This necessarily includes authority over the "just and reasonable" rates for these elements.

BellSouth continues to be obligated to offer the Section 271 elements at regulated rates pursuant to the "just and reasonable" standard of Section 201. Contrary to BellSouth's contention, "just and reasonable" plainly does not mean whatever a monopolist decides to charge through so-called "commercial agreements" that it imposes on captive customers. If the statute meant to give carriers unfettered authority to impose whatever rates they liked, there would be no need for a "just and reasonable" requirement. And if the FCC had meant to totally deregulate the rates for Section 271 elements, it would have so stated explicitly. Rather, the FCC must have intended the "just and reasonable" requirement to have a substantive impact, and to be determined by regulators – not by carriers in their sole discretion.

22/ *See* BellSouth Corporation's Petition for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Section 252 with Respect to Non-251 Agreements, WC Docket No. 04-313 (filed May 27, 2004); Letter from Bennett L. Ross, General Counsel-D.C., BellSouth, to Marlene Dortch, Secretary, FCC, WC Docket No. 04-313 (filed July 22, 2005) (withdrawing petition). To be sure, BellSouth continues to maintain that Section 271 elements need not be included in Section 252 interconnection agreements; but the fact that BellSouth, in effect, was compelled to withdraw the petition provides at least a preliminary indication of the FCC's position on this hotly disputed issue.

To be sure, as BellSouth points out, rate regulation under the requirements of Section 201 (as well as enforcement of the nondiscrimination requirements of Section 202) have traditionally been within the purview of the FCC. However, that purview is not necessarily exclusive. As noted above, the FCC in several cases has deferred to state commissions with regard to their authority, in the context of Section 252 arbitration and rate proceedings, to determine the "just and reasonable" rates, terms, and conditions for elements and services subject to the Section 201 pricing standard. 23/

C. The Commission Should Set BellSouth's Rates for Switching and Shared Transport Based on TELRIC and/or Access Charge Rate Levels

The Commission should use its own ratemaking experience in determining the "just and reasonable" rates, terms, and conditions for BellSouth's Section 271 elements – particularly the switching and shared transport elements of UNE-P. SouthEast respectfully suggests that, on an interim basis and pending further arbitration proceedings, the Commission could consider three possible methodologies for setting the "just and reasonable" rates for these elements.

One option would be for the Commission to set the rates for these elements, at least initially, based on the pre-existing TELRIC rates for the switching and transport UNEs. The Commission conducted a detailed proceeding to establish BellSouth's rates for these elements under the TELRIC standard, 24/ and while the FCC's *TRO* and *TRRO* decisions do not require the rates for these elements to be set at TELRIC rates, they also do not preclude the possibility that such rate levels be considered "just and reasonable."

A second option would be to take the *TRRO* as a starting point. In that order, the FCC held that the pre-existing TELRIC rates plus $1.00 per month would a reasonable interim rate

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23/ *See supra* Section I.B.3 and cases cited therein.

24/ *See, e.g., Inquiry into the Development of Deaveraged Rates for Unbundled Network Elements*, Administrative Case No. 382, Order (Dec. 18, 2001).

level during the one-year transition period following the effective date of the *TRRO*. 25/ The FCC apparently believed that this rate level would be "just and reasonable" for these Section 271 elements during the interim period after the elements had been removed from the mandatory Section 251 UNE list and before the state commissions had completed arbitrations on the new "just and reasonable" rate levels for these elements. 26/

A third option would be to derive the "just and reasonable" rates for the switching and transport components of UNE-P – also referred to as the "platform port" charges – based on what the FCC has determined to be "just and reasonable' rates for BellSouth's interstate access charges pursuant to Section 201. SouthEast believes that, under this standard, a flat rate of $5.50 per month could be a reasonable rate for platform port elements (including both switching and shared transport). The FCC specifically stated in the *TRO* that "a BOC might satisfy [the 'just and reasonable'] this standard by demonstrating that the rate for a section 271 network element is *at or below* the rate at which the BOC offers comparable functions to similarly situated purchasing carriers under its interstate access tariff, to the extent such analogues exist." 27/

A rate at or below $5.50 per month for the Platform Port arguably would satisfy the "just and reasonable" standard:

- The local switching and switched transport components of BellSouth's interstate switched access charges are analogous to the local switching and shared transport elements of the Platform Port.

25/ *TRRO*, ¶ 228.

26/ *Id.*, n.630 ("UNE-P arrangements no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable change of law processes.")

27/ *TRO*, ¶ 664 (emphasis added).

- Under the FCC's most recent access charge pricing rules plan, BellSouth is supposed to have reduced these interstate access charges to a target rate of $0.0055 per minute or less, collectively and on average. 28/

- A widely accepted factor for converting from minute-of-use charges to flat-rate charges in the UNE-P context is 1000 minutes of use per month. 29/

- A rate of $0.0055 per minute times 1000 minutes per month equals **$5.50 per month**.

If the Commission were to set the platform port elements rate at $5.50 per month, that rate, like the unbundled local switching rates in the current Agreement, would include access to all vertical features at no additional charge. The same rate would apply throughout the state of Kentucky, regardless of whether CLECs use platform ports to serve mass market or enterprise customers. 30/ No other recurring monthly or per-minute charges would apply to the platform port, switching, or transport components of the Platform combination, except applicable charges relating to SouthEast's use of BellSouth's OSS and SS7 signalling elements, which would continue to apply at the levels provided in current interconnection agreements.

Finally, SouthEast suggests that the Commission could require, on an interim basis and pending further arbitration proceedings, that BellSouth retain the same non-price terms and conditions for the Section 271 elements as the terms and conditions in pre-existing interconnection agreements that previously applied to the same elements when BellSouth offered

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28/ *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962, ¶¶ 142, 151 (2000) (subsequent history omitted) ("*CALLS Order*").

29/ *See, e.g.*, B.J. Gregg, *A Survey of Unbundled Network Element Prices in the United States*, at 5 (National Regulatory Research Institute: Feb. 2005); B.J. Gregg, *A Survey of Unbundled Network Element Prices in the United States (Updated Aug. 2005)*, at 5 (National Regulatory Research Institute: Aug. 2005)at 6 (available at http://www.cad.state.wv.us/Une%20Page.htm).

30/ These requirements follows logically from the FCC's requirement that BellSouth offer the local switching and switched transport components of interstate access at identical rate levels, regardless whether carriers use them to serve enterprise or mass market customers, and that the rates be uniform throughout each state. BellSouth incurs identical switching and transport costs when providing service for mass market and enterprise end-user customers, and therefore it would be unreasonably discriminatory, in violation of Section 202 of the Act, for BellSouth to apply different prices.

them as UNEs. SouthEast also recommends that proxy rate methodologies analogous to those set forth above could be used to set rates for the Section 271 elements not included in the platform port, such as line sharing.

II. ISSUE NO. 14: THE COMMISSION HAS AUTHORITY TO REQUIRE BELLSOUTH TO PROVIDE COMMINGLED LOOP, SWITCHING, AND SHARED TRANSPORT ON A COMMINGLED BASIS, AND SHOULD DO SO TO PRESERVE COMPETITIVE OPPORTUNITIES

The Commission has already ruled – correctly – that it has authority to require BellSouth to offer Section 271 elements (*e.g.*, switching and transport) "commingled" with Section 251 UNEs (*e.g.*, loops):

> The TRO and subsequent FCC orders have not relieved BellSouth of its obligation to commingle UNEs or combinations of UNEs that it is required to make available pursuant to Section 271. If BellSouth prevails, commingling would be eliminated. This elimination is not required by the FCC. Moreover, the network facilities used by BellSouth to provide access which it is obligated to provide pursuant to Section 271 are within this Commonwealth and are used to provide intrastate service. Accordingly, BellSouth has not been relieved from obligations to commingle these facilities as requested by Joint Petitioners. 31/

As the Commission observed, the FCC, in the *TRO*, required ILECs to allow CLECs to commingle Section 251 UNEs with facilities or services subject to the Section 201 "just and reasonable" requirement – including, but not necessarily limited to, interstate special access. "Thus, we find that a restriction on commingling would constitute an 'unjust and unreasonable practice' under 201 of the Act, as well as an 'undue and unreasonable prejudice or advantage' under section 202 of the Act." 32/ The Commission went on to "require that incumbent LECs permit commingling of UNEs and UNE combinations with other wholesale facilities and services, including" – but not limited to – "any services offered for resale pursuant to section

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31/ *NewSouth-BellSouth Arbitration Order* at 10.

32/ *TRO*, ¶ 581.

251(c)(4) of the Act." 33/ The *TRRO* did not undermine the *TRO*'s "commingling" ruling. To the contrary, the FCC specifically upheld the CLECs' right to commingle Section 201-priced elements with Section 251 UNEs, and even to convert Section 201-priced elements into UNEs where such elements pass the "impairment" test. 34/

Moreover, this Commission has independent authority to conclude that it would be "unjust and unreasonable" for BellSouth to disconnect or break apart elements that are already combined in its network, such as the loop, switching, and transport components of UNE-P. Notwithstanding the debate over the FCC's arguably divergent mentions of the BOCs' "commingling" and "combination" obligations in the *TRRO*, it is clear that the FCC never said anything about precluding state commissions from adopting a "no disconnect" rule pursuant to Section 271. 35/ Consistently, the U.S. Supreme Court, in upholding the FCC's UNE combination rule, found that "§ 251(c)(3) is ambiguous on whether leased network elements [*i.e.*, Section 251 UNEs] may or must be separated . . . ." Nonetheless, the Supreme Court concluded that it was "well within the bounds of the *reasonable* for the [FCC] to opt in favor of ensuring against an anticompetitive practice" of "disconnect[ing] previously connected elements,

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33/ *Id.*, ¶ 584. To be sure, Section 271 elements are not subject to the ILECs duty to permit CLECs to "combine" UNEs, which is specifically referred to in Section 251. 47 U.S.C. § 251(c)(3); *TRO*, ¶ 656 n.1989. But this cannot be read to eliminate the ILECs clear duty to "commingle" Section 251 UNEs with other wholesale elements services, the Section 271 switching and transport elements. The Commission correctly paid no heed to verbiage in an earlier, uncorrected released draft that the FCC subsequently modified by Erratum. *See NewSouth-BellSouth Arbitration Order* at 10. The only binding version of an FCC order is the final version published in the FCC Record and the Federal Register.

34/ *TRRO*, ¶¶ 229-232; *see also id.* at ¶ 142 n.398 (commingling in context of preexisting EEL combinations).

35/ This Commission has authority to require BellSouth to provide Section 251 and Section 271 elements on a commingled basis even if one were to ignore the FCC's commingling mandate and read in isolation the ambiguous footnote stating that the FCC "decline[d] to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under section 251." *TRO*, ¶ 656 n.1989. Just because the FCC "declined" to adopt a particular requirement does not necessarily mean that state commissions are precluded from doing so.

over the objection of the requesting carrier, not for any productive reason, but just to impose wasteful reconnection costs on new entrants." 36/

To be sure, the rationale for the "no disconnecting previously connected elements" rule based on the text of Section 251(c)(3) may not apply here. However, that was not the primary basis for the Supreme Court's ruling, since the Court found that statutory provision to be ambiguous and that it did not necessarily compel the "no disconnect" rule. Rather, the Supreme Court upheld as "*reasonable*" the FCC's determination that it would be anticompetitive and discriminatory for ILECs to disconnect previously connected elements in the network. In the *NewSouth-BellSouth Arbitration Order*, this Commission rationally reached the same conclusion that the Supreme Court upheld, pursuant to the Commission's authority to determine the terms and conditions for Section 271 elements. The Commission should reaffirm that reasonable conclusion in this case.

III. ISSUE NO. 17: BELLSOUTH IS OBLIGATED TO PROVIDE LINE SHARING TO NEW CUSTOMERS

SouthEast strongly agrees with CompSouth that Section 271 obligates BellSouth to continue providing line sharing at "just and reasonable" rates. Line sharing is extremely important issue for SouthEast – line sharing is critical to our ability to provide broadband services to customers in the rural part of Kentucky that we serve. Accordingly, SouthEast adopts and incorporates by reference the legal reasoning in the CompSouth brief on this point.

CONCLUSION

SouthEast intends to continue bringing innovative and high-quality telecommunications services to the rural consumers in the underserved areas of the Bluegrass. These consumers, by virtue of the area where they choose to live, have been "left behind" by

36/ *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 395 (1999) (emphasis added).

BellSouth and others for too long. SouthEast implores the Commission to ensure that BellSouth honors the Section 271 obligations that it willingly accepted when seeking entry into the long distance market within our Commonwealth and now seems all to eager to shed when it is convenient to do so. With unbundled access to elements such as local loops, transport and switching, as mandated by the statute, at "just and reasonable" rates determined by this Commission, SouthEast and other CLECs can continue to provide consumers with telecommunications choices. Continued access to these valuable and essential network elements will ensure that CLECs can continue to provide service to consumers not only in the large metropolitan areas of central Kentucky, but in the small towns and hollows of Kentucky where the only alternative to the ILEC will be the hometown phone company.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Response to Bellsouth's Motion For Summary Judgment has been filed electronically as permitted by the procedural order governing Case No. 2004-00427 this 22nd day of November, 2005.

JONATHON N. AMLUNG