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PUBLIC SERVICE
COMMISSION

VIA OVERNIGHT MAIL

Mr. Jeff Derouen
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602

Re: SouthEast Telephone, Inc., Complainant v. BellSouth
Telecommunications, Inc. d/b/a AT&T Kentucky, Defendant
PSC 2008-00279

Dear Mr. Derouen:

Enclosed for filing in the above-referenced case are the original and five (5) copies of AT&T Kentucky's Post-Hearing Brief.

Sincerely,


Mary K. Keyer

cc: Parties of Record

Enclosures

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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)	

AT&T KENTUCKY'S POST-HEARING BRIEF

BellSouth Telecommunications, Inc., d/b/a AT&T Kentucky ("AT&T Kentucky"), by its counsel, submits this post-hearing brief to address the issues identified by the Kentucky Public Service Commission ("Commission") in this case: (i) whether AT&T Kentucky unreasonably delayed, until December 1, 2008, the facilitation of SouthEast Telephone, Inc.'s ordering requests for commingled elements, and if so, the refunds or credit amounts due to SouthEast for AT&T Kentucky's failure to facilitate those orders prior to that date, and (ii) whether AT&T Kentucky may include the one-time installation fees per line as set forth in the parties' applicable agreements rather than a conversion fee when determining the billing adjustment to be issued for each line that qualifies for the new commingled elements.

INTRODUCTION

There is absolutely no dispute that AT&T Kentucky has developed processes for commingling approximately 200 different arrangements of loops and switch ports, and

that AT&T Kentucky has made these arrangements available to the competitive local exchange carrier (“CLEC”) community. There is also no dispute that in this case, SouthEast Telephone, Inc. (“SouthEast”), a small CLEC that serves mostly rural customers in Kentucky, wanted a commingling arrangement that *no* CLEC had ever requested or even suggested in the years that loop and port combinations had been available through UNE-P (unbundled network element – platform) or subsequently through commercial arrangements. It took SouthEast until mid-August 2008 to make clear what it wanted, and it then took AT&T Kentucky about eight weeks of intensive effort to develop and implement a brand new, unique process to accommodate SouthEast’s request.

Using hindsight, SouthEast essentially claims that AT&T Kentucky should have built Rome in a day, *i.e.*, that AT&T Kentucky should have quickly figured out what SouthEast wanted, *and* invented *and* implemented the new process within two weeks. SouthEast’s position ignores both (i) the technical challenges and manual effort that would be involved in creating a special process to order, provision and bill a special commingling request for a single CLEC,¹ and (ii) the delays caused by SouthEast’s own actions.

In mid-June 2008, without taking the admittedly “reasonable” step of consulting its AT&T Account Manager beforehand²—and intending to create a dispute with AT&T— SouthEast submitted a local service request (“LSR”) to AT&T that was not only technically infeasible to order through the current systems, but was not even what

¹ See, e.g., July 14 Hearing Transcript (“Tr.”) at 67, lines 6-8 (Darrell Maynard testified that there are “no really technical differences” between installing the commingled UCL-ND and what SouthEast uses now; “it’s just a matter of converting it, in our minds”); Tr. 80, lines 18-23 (matter was one of “minimal complexity”) (Maynard); accord, Tr. at 75-76.

² See Tr. at 37, lines 3-6.

SouthEast actually wanted to order.³ The order failed to go through, as SouthEast knew would happen.⁴ When informed on July 9 that AT&T Kentucky did not have a process in place to effectuate what SouthEast said it actually *did* want to do—commingle a non-designed, unbundled copper loop (“UCL-ND”) with a stand alone switch port—SouthEast immediately filed a complaint to “escalate” the dispute, claiming (erroneously) that AT&T Kentucky was preventing SouthEast and other CLECs from commingling unbundled elements as required by this Commission’s December 2007 *Change of Law Order*.⁵

SouthEast’s broad claim was baseless. In fact, at the time of the *Change of Law Order*, AT&T already had some 200 loop and port combinations that all CLECs, including SouthEast, could (and still can) order under their existing agreements. Until SouthEast’s June 2008 LSR, no CLEC had ever ordered any port/loop combination other than those already available. Nothing in the *Change of Law Order*, or in any applicable law, requires AT&T Kentucky to develop, at its own financial risk, ordering and provisioning processes for a single CLEC that may never be requested by any other CLEC. Nor must AT&T Kentucky anticipate—and develop a process for—every possible commingling scenario, whether or not it is ever likely to be requested. Even SouthEast President Darrell Maynard agreed that AT&T should not have to “develop[] processes to accommodate potential orders for every possible loop/port commingled arrangement before a CLEC ever request[s] it.”⁶ And if a CLEC does order a special

³ Tr. at page 37, lines 18-20 (“our best bet was just to place orders, put something in the system that would allow us to escalate something to be able to talk about”)(testimony of Darrell Maynard); *see also* Niziolek Direct at 20, lines 7-8.

⁴ Tr. at page 56, lines 16-18 (“we had no notion that, by placing that order, that they were going to complete it”) (cross-examination testimony of Darrell Maynard).

⁵ Tr. at page 37, line 19. *See* Complaint, ¶ 10.

⁶ Tr. at 56, lines 19-24.

process for a new product, as SouthEast did here, AT&T Kentucky is entitled to a reasonable time period in which to develop and implement it.⁷

SouthEast's Complaint — seeking enforcement of a Commission directive that AT&T already was complying with — appears to have been nothing more than a negotiating tactic, and it has been largely abandoned. But it did cause needless delay, since SouthEast continued to rely on its original order—which SouthEast now admits was “wrong”⁸—in a filing with this Commission *in the middle of August 2008*,⁹ thereby adding to the confusion about what SouthEast actually wanted to do and delaying AT&T Kentucky from developing a process to accommodate what SouthEast really wanted. Once AT&T Kentucky was sure (on August 21, 2008) about what SouthEast wanted, it moved expeditiously to develop a creative solution, which it communicated to SouthEast on November 6, 2008, effective with the next billing cycle beginning December 1, 2008.

Having created a false (and unnecessary) dispute about AT&T's compliance with the *Change of Law Order*, and having prolonged the confusion about what it was trying to order, SouthEast now claims that AT&T Kentucky took too long to develop the special new billing adjustment process, and that SouthEast is entitled to billing credits as of July 1, 2008—just two weeks after SouthEast submitted its first LSR, even though that first LSR was wrong by SouthEast's own admission.¹⁰ But a special process to accommodate a new and unique commingling request cannot be developed overnight,

⁷ See Niziolek Direct at pages 19-20.

⁸ Tr. 49, lines 18-19 (statement of Deborah T. Eversole, counsel to SouthEast).

⁹ See Exhibit 1 (page 3 of 12) to Response of SouthEast Telephone, Inc. to AT&T Kentucky's Answer, dated August 12, 2008. SouthEast admitted at the hearing that the original order was wrong. Tr. page 45, lines 8-19 (“we will stipulate that we had the wrong number on that order . . . we don't dispute that this is an incorrect number, and we don't dispute that we attached it to pleadings in this case”) (statement of Deborah T. Eversole, counsel to SouthEast).

¹⁰ The orders were placed on June 16 and 18, 2008, and SouthEast claims that it should receive billing credits beginning July 1, 2008.

or even in two weeks: SouthEast's own witness, Darrell Maynard, admitted that it would take SouthEast itself, a small CLEC that operates only in Kentucky, "four weeks at least" to develop a special process to accomplish what SouthEast wanted.¹¹ He further admitted that it "would be really hard to say for a company the size of AT&T."¹² As AT&T's witness, Deborah Fuentes Niziolek, explained, it can take AT&T a year or more to develop a special ordering and provisioning process, and the eight weeks it took AT&T Kentucky to create a special billing arrangement for SouthEast was entirely reasonable in the circumstances.

Equally unrealistic is SouthEast's claim that, having received what it wanted by December 1, 2008—a unique billing arrangement that reflects the financial results of a commingled UCL-ND with a standalone port—the billing for that arrangement should not take into account the one-time costs associated with it. That position is flatly at odds with the agreement SouthEast entered into only weeks before the events at issue here, which requires SouthEast to pay the costs of commingling arrangements provided in accordance with the *Change of Law Order*.¹³ Moreover, SouthEast's position is not commercially reasonable. As Ms. Fuentes Niziolek explained, "in order to accurately replicate the financial result of the commingled arrangement SouthEast Telephone seeks, AT&T considers all charges in the parties' agreements that would apply to the commingled arrangement if it were provisioned. That includes the lower pricing of the

¹¹ Tr. at 73, lines 21-25; Tr. at 76, lines 12-20.

¹² Tr. at 76, lines 16-17.

¹³ See the last sentence of Paragraph 11.1 of the Amendment to the Interconnection Agreement between SouthEast Telephone, Inc. and AT&T Kentucky (attached as Exhibit 1 to SouthEast's Complaint). Paragraph 11.1 effectuates the Commission's *Change of Law Order* by enabling SouthEast to commingle Section 251 elements with wholesale elements available under Section 271 of the Federal Telecommunications Act of 1996. It also makes clear that "SouthEast must comply with all rates, terms or conditions applicable to such wholesale Telecommunications Services or facilities." This provision was in effect during the period relevant to the issues in this case.

monthly recurring charges for the UCL-ND as well as the one time non-recurring charges associated with the UCL-ND and port.”¹⁴ SouthEast, however, demands the benefits of commingling with none of the burdens; it appears to think that commingling is an entitlement that should be provided immediately, and free of charge.

For the reasons set out below, the Commission should find that (i) AT&T Kentucky did not unreasonably delay the facilitation of SouthEast’s ordering requests for commingled elements and no additional credits are due SouthEast for any time prior to December 1, 2008, and (ii) AT&T Kentucky may include the one-time installation fees per line as set forth in the parties’ applicable agreements when determining the billing adjustment to be issued for each line that utilizes the new commingled elements as requested by SouthEast.

STATEMENT OF FACTS

Commingling. In the context of wholesale telecommunications services, the term “commingling” has historically applied to the coupling of unbundled loops ordered from the interconnection agreement and special access transport requested through a tariff.¹⁵ This Commission has stated that “[c]ommingling elements allows for the connecting, attaching, or otherwise linking of an unbundled network element (“UNE”), or a UNE combination, including local switching, to one or more facilities or services that a requesting carrier, such as SouthEast, has obtained at wholesale from an incumbent LEC, such as AT&T Kentucky, pursuant to any other method except unbundling under [section 251(c)(3) of the Act].”¹⁶

¹⁴ Niziolek Rebuttal at page 5, lines 5-11.

¹⁵ Niziolek Direct at 5, lines 17-20.

¹⁶ See this Commission’s June 11, 2009 Order in this Case, at page 3.

The Commission's Change of Law Order. In December 2007, this Commission ruled in its generic change of law docket (Case No. 2004-00427) that AT&T Kentucky has an obligation to commingle a network element obtained pursuant to Section 251 of the Federal Telecommunications Act of 1996 ("the Act") with wholesale services or facilities, including services or facilities made available under Section 271 of the Act (the "*Change of Law Order*"). That commingling obligation has been incorporated in an amendment to SouthEast's interconnection agreement with AT&T, which SouthEast signed on May 9, 2008 and was effective during the relevant time period.¹⁷ While AT&T Kentucky has filed suit challenging the *Change of Law Order* as unlawful, AT&T Kentucky acknowledges its present obligation to commingle Section 251 elements and Section 271 checklist items.

When an FCC or Commission order contains only general requirements, as does the Commission's *Change of Law Order*, AT&T Kentucky develops processes for ordering the specific arrangements that carriers typically need or want.¹⁸ In fact, even before this Commission's *Change of Law Order*, AT&T had entered into commercial agreements providing for more than 200 different loop and port combinations that are available to all CLECs, including SouthEast.¹⁹ AT&T Kentucky currently offers 44 stand-alone switch ports and 13 loop types in Kentucky, resulting in 572 possible

¹⁷ Paragraph 11.1 of the Change of Law amendment to the parties' interconnection agreement (attached as Exhibit 1 to SouthEast's Complaint) states that:

Commingling means the connecting, attaching, or otherwise linking of a Network Element, or a Combination, to one or more Telecommunications Services or facilities that SouthEast has obtained at wholesale from AT&T, or the combining of a Network Element or Combination with one or more such wholesale Telecommunications Services or facilities, including those services or facilities available pursuant to Section 271 of the Act. SouthEast must comply with all rates, terms or conditions applicable to such wholesale Telecommunications Services or facilities.

¹⁸ Niziolek Direct at 9, lines 8-20.

¹⁹ *Ibid.*

scenarios that a CLEC could conceivably request.²⁰ Until SouthEast's June 2008 request, no CLEC had ever requested any loop/port arrangement, commingled or otherwise, other than the 200-plus options AT&T had available at the time the *Change of Law Order* was issued.²¹ Because AT&T Kentucky cannot predict every possible arrangement that a CLEC may want to order, because of the time and expense involved in developing any process that requires ordering, provisioning and billing changes, and because of the time and resources AT&T Kentucky already devotes to implementing, maintaining and updating processes for the products and services that CLECs and retail customers are actually demanding, AT&T Kentucky does not develop processes and pursue systems changes for orders that may never be placed or that may be requested at some indefinite future date by only one CLEC.

The Established Process For CLECs To Request New Products. Under ordinary circumstances, if a CLEC wishes to request a product or service that is not currently offered by AT&T Kentucky, the CLEC submits a written request to its Account Manager, asking AT&T Kentucky to develop and implement such a product or service. This process—known as a “bona fide request,” or “BFR”—is set forth in the CLECs’ interconnection agreements.²² The BFR must provide AT&T Kentucky with all information necessary for AT&T Kentucky to evaluate the request, including a technical description of the requested product or service; proposed implementation date; a brief description of how the product or service will be utilized; and the desired specifications.²³

²⁰ Niziolek Direct at 9, lines 15-17.

²¹ Niziolek Rebuttal at 2, lines 13-16.

²² Niziolek Direct at 10, lines 7-9.

²³ Niziolek Direct at 10, lines 10-19.

AT&T Kentucky acknowledges receipt of the request and, if necessary, identifies any further information it needs to evaluate it. AT&T Kentucky then informs the CLEC whether or not (a) the request is technically feasible and (b) the request qualifies as something AT&T Kentucky is required to provide. If so, the analysis includes a timeline for the project and the estimated cost to the CLEC for product development as well as the estimated recurring and nonrecurring costs for the product itself. If the CLEC agrees to the costs and timeline for the project, and decides to proceed, AT&T Kentucky commences work to implement the product.²⁴

Because of the cost, technical requirements, and commitment of resources, it can take as long as a year or more to develop a new product and the processes necessary to support it.²⁵ The product manager must coordinate with the Operational Support Systems (“OSS”) group (which handles ordering interfaces for the CLECs), the network groups responsible for provisioning (which involves engineering, design, and assignment of facilities on the front end and maintenance on the back end), and the billing group (to make sure the billing system will recognize the product and be able to accurately bill the customer for it). Each group is responsible for determining and developing what is necessary for such an order to be processed, provisioned and billed. Such coordination takes a great deal of time because of the number of tasks and people involved including, among other things, establishing methods and procedures, assigning and training personnel, and if necessary (and to the extent approved through the Change Management Process), modifying systems, which could involve IT programming and costs. All this time, money and resources must be planned for and

²⁴ Niziolek Direct at 10-11.

²⁵ Niziolek Direct at 11, lines 13-15.

appropriated by the various departments and the participating CLECs.²⁶ Any special request must also be coordinated with AT&T Kentucky's ongoing business and the various updates that benefit all CLECs.²⁷

SouthEast's Initial, Erroneous Orders. SouthEast did not follow the "bona fide request" process. Instead, on June 16, 2008, SouthEast placed an order through AT&T's electronic ordering system for a commingled sub-loop distribution (ordering code "UCS2X") and a stand-alone switch port. As SouthEast intended,²⁸ the order did not go through because it was not for an established combination of elements, and AT&T's Local Service Center employees are trained to process established services, not to invent, on the spot, new "one-off" special arrangements.²⁹ In addition, the order was not technically feasible because it required a sub-loop feeder—an element not available to SouthEast under its agreements—to complete the transmission path.³⁰

On June 18 or 19, 2008, SouthEast manually submitted an order for the same two elements.³¹ SouthEast knew at the time that the order was for the wrong elements and could not be processed. As Darrell Maynard testified,³² "we ordered different elements from different ordering systems in there and there was, at my recollection, not a joint ordering system that would allow what we were trying to do." Not only that, but "it was even a wrong location that we should have placed the order because the data was

²⁶ Niziolek Direct at 11-12.

²⁷ Niziolek Rebuttal at 10-11.

²⁸ Mr. Maynard admitted that "we knew" there was no process to order what SouthEast wanted and that changes would have to be made to AT&T's ordering systems because "the systems [AT&T] had in place were not going to put two elements, two USOCs, ... together that weren't already put into their system." Tr. at 96, lines 13-16

²⁹ Tr. at 52 (statement of Mary K. Keyer, counsel for AT&T Kentucky); see also Niziolek Direct at page 16, line 21 to page 17, line 3. Indeed, SouthEast "did not expect our AT&T contact in the wholesale side to know" what to do with SouthEast's unusual and "complex" order. Tr. at 83, lines 17-20, and 82, line 17 (Maynard redirect).

³⁰ Niziolek Direct at 17, lines 8-11.

³¹ See Exh. 1 to SouthEast's Response to AT&T Kentucky's Answer in this Case, filed August 13, 2009.

³² Tr. at 46, lines 14-18.

incomplete for this particular customer[.]”³³ Mr. Maynard admitted that “we had no notion that, by placing that order, that they were going to complete it,”³⁴ and that SouthEast’s own actions had caused “confusion.”³⁵

SouthEast’s Conflicting Statements About What It Really Wanted. After submitting the two erroneous orders for sub-loop arrangements described above, SouthEast told AT&T Kentucky that it actually wanted something else: to commingle a UCL-ND with a commercial port on one order. The commingled arrangement SouthEast desired was an entirely new arrangement that no AT&T Kentucky customer had ever requested.³⁶ The UCL-ND loop was created specifically for CLECs to use for xDSL (*i.e.*, data) services; due to the risk of diminished voice quality and the lack of ubiquitous availability, it was not designed to be used in place of a voice-grade loop for “plain old telephone service.”³⁷ The UCL-ND was not included among the 200 or so port/loop options offered in AT&T Kentucky’s Local Wholesale Complete (“LWC”) program because CLECs had shown no interest in using the UCL-ND in a loop/port combination. In fact, even when the unbundled network element platform (“UNE-P”) was a required UNE offering, the arrangement SouthEast now wants was not requested by SouthEast or any other CLEC in any of the 22 states where AT&T Kentucky or its ILEC affiliates operate.³⁸ There is no need for a UCL-ND port/loop combination, since

³³ Tr. at 46, lines 22-25.

³⁴ Tr. at page 56, lines 16-18 (cross-examination testimony of Darrell Maynard).

³⁵ Tr. at 46, line 18.

³⁶ Niziolek Direct at 9, line 21 to 10, line 2 (“To this day, one and a half years after the Commission ordered commingling of Section 251 with Section 271 elements, no carrier other than SouthEast Telephone has indicated any interest in such an arrangement, much less the arrangement that is the subject matter of this docket”).

³⁷ Niziolek Direct at 9, lines 1-5.

³⁸ Niziolek Direct at 6, lines 13-21; page 9, lines 5-7.

the same functionality is already available to SouthEast and other CLECs through the Local Wholesale Complete agreement.³⁹

As a result, AT&T Kentucky did not have a process in place for commingling a UCL-ND with a switch port. As Ms. Fuentes Niziolek explained, “the loop being requested here has not been designed or already developed to work with a port that exists today. It’s an unnatural . . . combination. It’s not one that CLECs normally ask for or have normally identified as something that they want.”⁴⁰ “[T]he [UCL-ND] loop . . . was not developed to be used in the manner in which SouthEast Tel had proposed it to be used.”⁴¹ Thus, “AT&T had no reasonable expectation that a customer would request [a UCL-ND loop] to be commingled with a switch port to provide voice-grade service.”⁴²

Accordingly, when SouthEast told AT&T it wanted to commingle a UCL-ND with a standalone port, AT&T Kentucky responded (on July 9, 2008) that there was no process to accommodate such an order.⁴³ SouthEast filed a Complaint six days later.

Notwithstanding its attempt to change its order, SouthEast continued to refer to, and rely upon, the erroneous June orders. On August 13, 2008, SouthEast filed a response to AT&T Kentucky’s Answer, stating unequivocally that “[o]n June 19, 2008, SouthEast **placed a manual order, a copy of which is attached hereto as Exhibit 1**” (emphasis added). SouthEast incorrectly claimed that the June 2008 manual order was for a “Loop—USOC UEQ2X (Unbundled Copper Loop Non Designed)” coupled with a “Port—USOC UEPRC (Unbundled Exchange Port).” But the actual order that SouthEast referenced and attached as Exhibit 1 to its Response **did not order an**

³⁹ Niziolek Direct at 6, lines 6-8.

⁴⁰ Tr. at page 123, lines 8-13.

⁴¹ Tr. at page 136, lines 5-7 (Niziolek, responding to cross-examination by Ms. Bowman).

⁴² Tr. at page 107, lines 14-18 (Niziolek).

⁴³ See email string attached as Exhibit 2 to SouthEast’s Response to AT&T Kentucky’s Answer.

unbundled copper loop, non-designed—it ordered a sub-loop distribution. The “Remarks” box at the bottom of the second page of the LSR (see AT&T Kentucky Hearing Exh. 3, page 2 of 12) emphatically states: “PLEASE NOTE REQUESTING USOC OF **UCS2X**”⁴⁴ (emphasis added). The element designated by the code “UCS2X” is not a non-designed unbundled copper loop; it is a sub-loop distribution.⁴⁵

August 21 Conversation Resolves SouthEast’s Inconsistencies. During an August 21, 2008 telephone conference, AT&T Kentucky personnel discussed with SouthEast the technical parameters of UCL-ND and its limited availability, to make sure SouthEast did in fact want such a configuration. SouthEast personnel confirmed that the commingled arrangement they desired was a UCL-ND with a 2-wire residential commercial port,⁴⁶ and AT&T Kentucky then went to work immediately to determine how such an arrangement could be ordered, provisioned and billed.⁴⁷

Due to the technical constraints and limited availability of the UCL-ND, AT&T Kentucky asked SouthEast for the specifications of the arrangement it was requesting, the locations where it was requesting it, and how it was going to be used.⁴⁸ During this investigatory stage, AT&T Kentucky learned that SouthEast was interested only in the financial aspects of such an arrangement, and had no specific interest in, or need for, the technical aspects or functionality of the UCL-ND loop; SouthEast wanted that loop because it was less expensive than the loops available on LWC.⁴⁹

⁴⁴ It is undisputed that the [USOC] of UCS2X refers to a sub-loop distribution, and not to a non-designed, unbundled copper loop—the UCL-ND that SouthEast actually wanted to order. See Tr. at 44-45.

⁴⁵ Even if SouthEast *had* ordered a non-designed, unbundled copper loop, that loop was not available at the location requested by SouthEast in its June order. See Niziolek Rebuttal at page 9, lines 20-21.

⁴⁶ Niziolek Direct at 8, lines 11-15.

⁴⁷ Niziolek Direct at 17, line 20; Niziolek Rebuttal at page 11, lines 16-18.

⁴⁸ Niziolek Direct at 12, lines 12-15.

⁴⁹ Niziolek Direct at 12, lines 16-19. Although SouthEast did claim at the hearing that the UCL-ND was part of SouthEast’s “migration path” to a more permanent network configuration (Tr. at 81-82), that was

Within about two weeks after August 21, AT&T Kentucky determined that actually implementing the specific arrangement SouthEast had requested would require significant development time and cost, much like the development of a new service.⁵⁰ Because SouthEast was the only carrier interested in this particular arrangement, and because SouthEast's interest was based on price, not functionality, AT&T investigated the possibility of developing an alternative that could accomplish SouthEast's financial goal without requiring months of development. This involved considerable effort by five AT&T Kentucky employees, working to "do something very quickly" when the larger project could "take potentially a year" to develop and implement.⁵¹

By early November 2008, AT&T Kentucky had worked out a process to give SouthEast the result it wanted with much less development work. Under this process, AT&T Kentucky would adjust SouthEast's monthly bills as if the commingled UCL-ND and port had been ordered, provisioned and billed, but without actually provisioning the commingled elements. SouthEast would continue to order an LWC line (as it did before) and, if the commingled arrangement was available at that location, AT&T Kentucky would treat that line, from a billing perspective, as if it were ordered as a

the first time AT&T had heard about it. See Tr. at 141, lines 11-14 (Niziolek Recross-Examination) ("I must be very honest; this morning was the first I ever heard of possibly wanting a permanent fix because of some other things that you were doing with your network. I was not aware of that. I'm not sure any of my team was aware of that either . . ."). At the September 11, 2008 informal conference with Staff, SouthEast's lawyer stated that the issue was "merely a money issue," and did not mention that SouthEast might require a UCL-ND to effectuate any new "business model." (See Intra-Agency Memorandum dated September 25, 2008, memorializing a September 11, 2008 informal conference in this proceeding; Tr. at 36, line 10.) In any case, Mr. Maynard acknowledged that there was no technical or functional reason for SouthEast's request for the UCL-ND. See Tr. at 34, lines 24-25; Tr. at 35, lines 3-5 and 19-23; Tr. at 101, lines 22-25; Tr. at 102, lines 1-5.

⁵⁰ Niziolek Direct at 17, line 20, to 18, line 2.

⁵¹ Tr. at 132-133 (Niziolek).

commingled UCL-ND loop with a 2-wire residential or business port.⁵² For SouthEast's existing lines, the billing adjustment process was designed to mirror the physical activities that AT&T Kentucky would have to undertake to move those lines from a LWC arrangement to the commingled arrangement—AT&T Kentucky would adjust the pricing, including both monthly recurring charges and nonrecurring charges, to accurately reflect what SouthEast would pay for the commingled arrangement.⁵³

The special process is “completely manual,” requiring “hands-on” resources to complete each required step.⁵⁴ Each month SouthEast submits to AT&T Kentucky a spreadsheet with the telephone numbers that were ordered by SouthEast as part of the LWC. AT&T Kentucky validates whether these numbers can be served by a UCL-ND loop, and the applicable telephone numbers are sent to a group within AT&T that extracts the billing data for these numbers. Billing data is provided to the process coordinator, who prepares the information for dissemination to both AT&T's billing group and to SouthEast. This includes calculating the billing adjustment, formatting the file to add user-friendly explanations, and formatting the file to meet AT&T Kentucky's billing requirements. Finally, the calculated adjustment is sent to the billing organization responsible for completing SouthEast's billing adjustment. Five AT&T employees are involved in this manual process for each phase of monthly bill adjustments.⁵⁵

All told, it took AT&T Kentucky approximately eight weeks to develop this process. AT&T Kentucky communicated the interim solution to SouthEast on

⁵² UCL-ND was not available at the location requested by SouthEast in its June 2008 order, so SouthEast could not have commingled the elements it wanted at that location even if its June orders had been correct.

⁵³ Niziolek Direct at 13, lines 7-21.

⁵⁴ Niziolek Direct at 14, lines 5-21.

⁵⁵ Niziolek Direct at 14, lines 20-21.

November 6, 2008,⁵⁶ and began applying the billing adjustments in the next billing period, starting December 1, 2008.⁵⁷

The Installation Charge As A Component Of The Billing Adjustment. In order to accurately replicate the financial result of the commingled arrangement, AT&T considers all charges in the parties' agreements that would apply to the commingled arrangement if it were provisioned. This includes the lower pricing of the monthly recurring charges for the UCL-ND as well as the one time non-recurring charges associated with the UCL-ND and port.⁵⁸

If AT&T were to actually provision the commingled arrangement, AT&T would have to physically disconnect the LWC loop and reconnect the commingled arrangement utilizing the UCL-ND loop that SouthEast requested. This would be an installation, not simply a conversion, and the applicable installation and associated charges set forth in the parties' agreements would apply.⁵⁹ The non-recurring installation charges that AT&T Kentucky has considered in the billing adjustment process are set out in the parties' interconnection and commercial agreements.⁶⁰ If

⁵⁶ Niziolek Direct at 18, lines 9-13.

⁵⁷ Niziolek Rebuttal at 4, lines 13-15.

⁵⁸ Niziolek Rebuttal at 5 lines 5-11.

⁵⁹ Niziolek Rebuttal at 6 lines 11-17.

⁶⁰ Attachment 2 (Rate Exhibit) of the Parties' Interconnection Agreement identifies the non-recurring charge for an unbundled copper loop/non-designed (first \$44.97 and additional \$20.89). There is also a nonrecurring disconnect charge of \$25.64 (first) and \$6.65 (additional) that applies when a loop is disconnected. In addition, the single 2-wire cross connect element has nonrecurring charges of \$24.68 (first) and \$23.68 (additional) and nonrecurring disconnect charges of \$12.14 (first) and \$10.95 (additional). Exhibit A of Attachment 1 of the Parties' Market-based Rates Agreement identifies a nonrecurring charge of \$34.95 (first) and \$12.48 (additional) for the standalone 2-wire commercial port; there is no nonrecurring disconnect charge associated with the 2-wire commercial port.

AT&T Kentucky were provisioning this specific commingled arrangement, SouthEast would be required to pay all applicable rates, including the installation rates.⁶¹

ARGUMENT

As the Statement of Facts makes clear, SouthEast had some 200 different port/loop combinations available to it in June 2008. It chose instead to order a completely new combination that no other CLEC had ever requested. And it did so in a way that caused significant confusion. In the face of SouthEast's admitted "mistakes with the numbers"⁶² and its subsequent inconsistent statements, it would have made no sense whatsoever for AT&T Kentucky to have guessed which process SouthEast *really* wanted, or to have begun work on *two* new processes, hoping that one of them might see the light of day. Once the confusion was cleared up in mid-August 2008, it took AT&T Kentucky about two weeks (until early September) to determine that a permanent physical installation of the commingled elements would take many months to implement and was not necessary to accomplish what SouthEast wanted: to pay for a less expensive port/loop combination than what it was then ordering under AT&T Kentucky's LWC. It turned out that SouthEast did not need any different functionality than it already had; it just wanted to save money.⁶³

⁶¹ Niziolek Rebuttal at 7, lines 10-21.

⁶² Tr. at 45, lines 12-13 (statement of Deborah T. Eversole at the hearing).

⁶³ Although at the hearing SouthEast suggested a "technical" need for the change, SouthEast had never told AT&T Kentucky any such thing. See Tr. at 141, lines 11-14 (Niziolek Recross-Examination) ("I must be very honest; this morning was the first I ever heard of possibly wanting a permanent fix because of some other things that you were doing with your network.") Nor did SouthEast explain why it waited until the hearing to mention the issue. In any case, Mr. Maynard admitted—repeatedly—that there is no different functionality that SouthEast receives—or requires—from a UCL-ND/port combination (Tr. at 34, lines 24-25; Tr. at 35, lines 3-5 and 19-23; Tr. at 101, lines 22-25; Tr. at 102, lines 1-5), and that SouthEast could migrate to their facilities-based model today using the Local Wholesale Complete agreement. (Tr. at 35, lines 3-5.) Furthermore, during the time AT&T Kentucky was working to develop the interim process, SouthEast told AT&T—and this Commission's Staff—that the issue was "merely a money issue," and did not mention that SouthEast required a UCL-ND to effectuate any new "business model." (See Intra-Agency Memorandum dated September 25, 2008, memorializing a September 11,

Through significant manual effort, AT&T Kentucky was able to figure out a way to bill SouthEast as if the commingled elements had been ordered and provisioned, but without requiring SouthEast to order them (which had proved to be difficult) and without actually installing them. This took about eight weeks (until early November 2008), and the new billing procedure went into effect on December 1, 2008, long before any permanent process could have been implemented. In the meantime, AT&T Kentucky continued to bill SouthEast at the usual commercial rates under the applicable agreements.

Now, however, exercising 20:20 hindsight, SouthEast claims that the special billing arrangement was a simple fix that should have been available almost immediately—as of July 1—and that it was unreasonable for SouthEast to have had to wait until December 1. It also argues that it should not have to pay any of the one-time installation charges that are associated with the provisioning of the commingled elements that are saving it money in the long run. These arguments are entirely without merit and should be rejected.

A. AT&T Acted Reasonably In Developing A Special Commingling Process To Be Effective As Of December 1, 2008.

“Reasonableness” is not a concept to be evaluated in the abstract, or based on a hypothetical ideal of behavior. It requires the fact finder to “consider all the facts and circumstances in deciding” whether a particular act was reasonable. *Hilco Capital, LP v. Federal Ins. Co.*, 2009 WL 2426674, at *6 (Del. Aug. 10, 2009) (applying Missouri law). Accord, *In re East Ky. Power Cooperative, Inc.*, Case No. 2006-00463, 2007 WL

2008 informal conference in this proceeding; Tr. at 36, line 10.) In fact, as AT&T’s counsel demonstrated on cross-examination of Mr. Maynard, SouthEast does not “need” the functionality of the non-designed unbundled copper loop. (See Tr. at 36, lines 5-16.)

2728394, at *4 (Ky. P.S.C. September 19, 2007). The record before this Commission establishes that, in the particular circumstances presented here, AT&T acted reasonably to create a new special billing process that enabled SouthEast to realize the financial benefits of a unique and unprecedented commingling arrangement in a timely and appropriate manner. In fact, it is SouthEast's own actions—and its demand to get “something for nothing”—that are unreasonable.

Without giving AT&T Kentucky any heads-up, SouthEast submitted a local service request on June 16, 2008 (and again on June 18) for an arrangement that was not among the 200 or so commingled products already available to it, was not technically feasible, and was not even what SouthEast really wanted. The order requested that AT&T Kentucky commingle sub-loop distribution with a switch port, ignoring the fact that a sub-loop feeder — an essential element placed between the sub-loop distribution and the port to connect the two — was neither ordered by, nor available to, SouthEast under any agreement it has with AT&T Kentucky. SouthEast knew when it placed the order in June that it could not be filled as submitted,⁶⁴ and in fact SouthEast intended that the order be rejected so SouthEast could “escalate” its dispute with AT&T.

Although SouthEast later told AT&T that it wanted to commingle a different loop (the UCL-ND) than the one it had identified in its local service request (the sub-loop distribution), AT&T did not immediately start to work on a special process because (i) the UCL-ND commingling request was itself out of the ordinary, since a UCL-ND loop is not typically used for voice services; (ii) the UCL-ND was not available at the location where SouthEast requested the commingling; and (iii) SouthEast continued to refer to

⁶⁴ Tr. at 96, lines 7-16.

its original, erroneous order well into August, after commencing this litigation.⁶⁵ Given two false alarms, and the inconsistency between what SouthEast *ordered* and what it *said* it wanted, it was entirely reasonable for AT&T Kentucky to sort out the conflicting statements before commencing an expensive and labor-intensive effort to develop an unusual, brand-new special process for one CLEC.⁶⁶

It was not until the August 21, 2008 telephone conference with SouthEast that AT&T finally confirmed that SouthEast did in fact want to commingle the UCL-ND with a stand alone port, notwithstanding all the limitations of the non-designed loop. Even when it was clear what SouthEast wanted, AT&T Kentucky could not immediately provide the requested arrangement because there was no process in place to implement it. Once again, this was completely reasonable: no CLEC (including SouthEast) had ever sought to commingle a UCL-ND with a standalone port, and AT&T had no expectation that any CLEC would ever order such a combination. As soon as it confirmed what SouthEast wanted, AT&T Kentucky began to investigate what would be required to develop a process that allowed for the ordering, provisioning and billing of the UCL-ND/switch port arrangement. When AT&T Kentucky determined, in early September 2008, that a permanent solution (*i.e.* a physical installation of the combined elements) would require substantial time and money, AT&T Kentucky went to the trouble of developing an interim solution under which SouthEast Telephone could more quickly obtain the financial results of the arrangement it was requesting.⁶⁷

Over the next eight weeks, AT&T Kentucky devoted substantial resources to figuring out a way for SouthEast to realize the cost savings it wanted without actually

⁶⁵ Niziolek Direct at page 17, lines 11-15.

⁶⁶ Niziolek Rebuttal at 9-10.

⁶⁷ Niziolek Direct at page 20, lines 18-22.

having to physically install the specific loops that SouthEast wanted to commingle. As Ms. Fuentes Niziolek explained,

several steps are required prior to determining which telephone numbers qualify for the adjustments. This is not a simple means of altering the billing arrangement[,] nor does AT&T simply change the billing. For example, various employees (five) in various different organizations (as many as five) needed to work together to determine what steps AT&T needed to take in order to provide SouthEast Telephone with the financial benefit of the commingled arrangement it requested. These groups of employees were not simply waiting in the wings either; the project manager needed to find the right folks, work through the issue, then train them on what needed to be done. The time required to develop this process is a fair and reasonable reflection of the complicated nature of the systems and processes of a large company such as AT&T.⁶⁸

The eight weeks it took to develop the process—from early September 2008 to early November 2008—was a much shorter period of time than the many months it usually takes to develop a new ordering, provisioning and billing process for a new product.⁶⁹ Indeed, a billing change alone “would take months,” since billing changes typically require the input and agreement of all participating CLECs and ILECs.⁷⁰ While SouthEast argues that the commingling process should have been in place by July 1, 2008, SouthEast’s own President admitted that it would take SouthEast, a small CLEC, “four weeks at least” to come up with a unique process to accommodate a special commingling request like the one SouthEast made.⁷¹ As the evidence demonstrates,

⁶⁸ Niziolek Rebuttal at page 11, line 22 to page 12, line 13.

⁶⁹ Mr. Maynard testified that, since UCL-ND ports and stand alone switches are already available, SouthEast was not actually ordering a “new” product: since “they’re using the same exact circuits for both services . . . there are no really technical differences between installing one or installing the other, and it’s just a matter of converting it, in our minds.” Tr. at 67, lines 4-8. This is a gross oversimplification; it is also incorrect. As Ms. Fuentes Niziolek explained, a “commingled arrangement” is effectively a new product, and not simply the combining of two existing products, especially where “the loop being requested [] has not been designed or already developed to work with a port that exists today.” Tr. at 123, lines 7-11. As a result, AT&T Kentucky was required to develop a new “theoretical product” in order to implement the billing adjustments SouthEast wanted. Tr. 125, lines 17-19.

⁷⁰ Tr. 109, lines 16-25 (Niziolek).

⁷¹ Tr. 76, lines 12-20.

four weeks is an unrealistic expectation under the circumstances.⁷² But even assuming for the sake of argument that a process *could* have been developed in four weeks, Mr. Maynard's admission undermines SouthEast's position: even if SouthEast's June 2008 orders had correctly identified the loop/port combination SouthEast wanted (they did not), and even if SouthEast had not continued to sow confusion about the orders (as it did), and even if the UCL-ND had been available at the location SouthEast identified in its order (it was not), it simply would not have been possible for AT&T Kentucky to have developed an entirely new process to implement the commingling request and issue the appropriate billing credits by July 1.

On November 6, 2008, AT&T Kentucky met with SouthEast via conference call to explain the interim process and to notify SouthEast that it would take effect as of December 1, 2008. AT&T also explained that for existing LWC lines as well as for new orders placed after December 1, 2008, AT&T Kentucky would need to review each line to confirm whether it qualified for UCL-ND pricing. If the UCL-ND was available, AT&T Kentucky would begin processing bill adjustments in January 2009 (for the qualified December 2008 commingled arrangements).⁷³ The interim process took effect as scheduled, and since December 1 SouthEast has benefitted from the cost-savings associated with commingling the less expensive UCL-ND loop (where it is available)

⁷² Mr. Maynard's unreasonable prediction of how long it should have taken AT&T Kentucky to implement the special process is based on a misunderstanding of the process. For example, Mr. Maynard stated that the "the billing system is in fact 'converted' from WLP to commingled elements." (Maynard Direct Testimony, page 6, lines 15-16.) That is incorrect. It appears that Mr. Maynard believes that migration of the existing WLP lines to the commingled elements requires simply a billing conversion, like resale to UNE-P. It does not. In a resale to UNE-P, the exact same facilities can be used. That is not the case here. If AT&T Kentucky were able to actually provide SouthEast Telephone with the commingled arrangement it wanted, AT&T Kentucky would not be able to re-use the same facilities that are in use today on the WLP lines, but would have to provision a different loop. (See Niziolek Rebuttal at page 5, line 22 to page 6, line 8.)

⁷³ Niziolek Direct at 21, lines 1-7.

with the stand alone switch port. In light of AT&T Kentucky's substantial (and successful) efforts to *speed* the implementation of SouthEast's process, and SouthEast's own contribution to the delay it is complaining about, there is simply no reasonable basis for SouthEast to argue that AT&T Kentucky took too long.

B. The Billing Adjustments May Properly Take Into Account The Installation Charges For The Commingled Elements.

At the hearing, SouthEast admitted that the billing credits at issue here should "represent the difference between what the commingled arrangement would cost if [AT&T Kentucky] could provision it versus what the local wholesale complete arrangement costs [SouthEast] . . . today."⁷⁴ If the commingled arrangement could be provisioned, the "cost" would include the one-time installation charges per line provided for in the parties' agreements.⁷⁵ In order to accurately replicate the financial result of the commingled arrangement SouthEast Telephone seeks, AT&T Kentucky considers all charges in the parties' agreements that would apply to the commingled arrangement if it were provisioned. That includes the lower pricing of the monthly recurring charges for the UCL-ND as well as the one time non-recurring charges associated with the UCL-ND and port.⁷⁶ Indeed, the provision of the interconnection agreement that implements the Commission's *Change of Law Order*—requiring the commingling of Section 251 elements and Section 271 checklist elements that SouthEast requests here—makes clear that "SouthEast must comply with all rates, terms, or conditions applicable to such wholesale Telecommunications Services or facilities."⁷⁷

⁷⁴ Tr. at 99, lines 10-19 (cross-examination testimony of Darrell Maynard).

⁷⁵ Tr. at 125; *see also* fn. 60 *supra*.

⁷⁶ Niziolek Rebuttal at 5, lines 5-11.

⁷⁷ Amendment to Interconnection Agreement between SouthEast Telephone, Inc. and AT&T Kentucky, ¶ 11.1 at page 11 of 21 (attached as Exhibit 1 to SouthEast's Complaint in this Case).

Notwithstanding this admission and the unambiguous terms of its agreement, SouthEast contends that because the commingled elements are not actually being installed, SouthEast should not have to pay any installation charges at all. But the one-time installation charges are what enable SouthEast to realize the long-term cost savings of the commingling. The billing arrangement was designed to reflect *all* costs (and cost savings) that would result from an actual provisioning of the commingled elements. Those costs include the applicable installation charges. SouthEast's claim that the commingled elements already exist, and that no physical installation would be required, is simply incorrect. As Ms. Fuentes Niziolek explained, if AT&T were to actually provision the commingled arrangement SouthEast Telephone requested, AT&T would have to physically disconnect the LWC loop and reconnect the commingled arrangement utilizing the UCL-ND loop. This would be an installation, not simply a conversion, and the applicable installation and associated charges set forth in the parties' agreements would apply.⁷⁸

SouthEast cannot reasonably suggest that it is entitled to the benefits of the "theoretical" arrangement without taking into account its costs. Indeed, the reason AT&T Kentucky came up with a "theoretical" installation for billing purposes is that it could be implemented much more quickly than an actual provisioning of the new combination. SouthEast appears to have no problem with the theoretical arrangement to the extent it results in lower pricing through the billing adjustment process; but having accepted the lower "theoretical" recurring charges, SouthEast objects to having to pay "theoretical" installation charges. The argument is absurd. If SouthEast does not want to accept the non-recurring charges because there is no physical installation

⁷⁸ Niziolek Rebuttal at page 6, lines 10-17.

of the commingled elements, it should not be allowed to accept the lower monthly recurring pricing of the UCL-ND. If SouthEast *does* want to lower its recurring costs, it should accept responsibility for the one-time charges—including installation charges—that would apply if its new theoretical commingling arrangement were provisioned.

CONCLUSION

For the foregoing reasons, the Commission should find that (i) AT&T Kentucky did not unreasonably delay the facilitation of SouthEast's ordering requests for commingled elements, and (ii) AT&T Kentucky may include installation fees per line as set forth in the parties' applicable agreements when determining the billing adjustment to be issued for each line that utilizes the new commingled elements as requested by SouthEast.

Respectfully submitted,



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CERTIFICATE OF SERVICE – PSC 2008-00279

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by U.S. Mail this 27th day of August, 2009.

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