





statewide-averaged access charges. <sup>2/</sup> Occasionally, however, SouthEast receives requests for service in urban areas, and due to a strict application of the general “bright line” rule, SouthEast is unable to respond to those customer requests without losing its ability to charge more cost-oriented access rates, pursuant to the “rural exemption,” in the rural areas that it predominantly serves. These circumstances are different from those that the Commission considered when it adopted the rule. <sup>3/</sup> While “administrative simplicity is an important consideration” in establishing a general, “bright line” rule, <sup>4/</sup> a more nuanced analysis is appropriate in considering a waiver request premised on a particular party’s special circumstances. As discussed below, SouthEast is willing to abide by waiver conditions that would: (1) require SouthEast to charge access rates at or below those of the non-rural ILEC with respect to its service provided in urban areas; and (2) provide that SouthEast would continue to qualify for the waiver *only* if at least 95% of its customer lines, access revenues, and/or minutes continue to originate in rural areas.

*Special Circumstances Test.* The Commission should reject the opposing parties’ attempts to defeat the waiver SouthEast seeks. AT&T and BellSouth contend that SouthEast’s waiver petition would undermine the general

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<sup>2/</sup> *Access Charge Reform*, Seventh Report and Order, 16 FCC Rcd 9923, 9951 (¶ 67) (2001). Cf. AT&T at 3-4 (suggesting that a grant of SouthEast’s petition would undermine the administrative ease that concerned the Commission when it adopted the rural exemption rule); BellSouth at 2-3 (same).

<sup>3/</sup> Petition at 5.

<sup>4/</sup> *Id.*, 16 FCC Rcd at 9954 (¶ 75).

rule. <sup>5/</sup> But by their nature, waivers permit departures from general rules in particularized circumstances, and it is highly unlikely, especially if the Commission adopts waiver conditions such as those discussed below, that a significant number of parties could qualify for similarly narrow waivers – much less, as BellSouth fancifully suggests, that this narrow waiver could produce “a flood of similar requests” that could “effectively eliminate the rule.” <sup>6/</sup> AT&T contends that a waiver would be inappropriate because SouthEast’s conditions are not “unique.” <sup>7/</sup> But a carrier need not demonstrate that its circumstances are “unique,” only that they are “special” and that, under those circumstances, application of the general rule would not serve the public interest. <sup>8/</sup> SouthEast has shown that it faces unusual circumstances that justify a departure from the general rule. <sup>9/</sup>

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<sup>5/</sup> AT&T at 3-4; BellSouth at 3.

<sup>6/</sup> BellSouth at 3.

<sup>7/</sup> AT&T at 3.

<sup>8/</sup> See, e.g., *Telephone Number Portability*, 19 FCC Rcd 875, 877 (¶ 6) (2004); *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (identifying “special circumstances” as the standard for granting a waiver of Commission rules). Contrary to AT&T’s contention, AT&T at 3, the Commission has frequently granted similar waivers to multiple, similarly situated carriers. See, e.g., *Revision of the Commission’s Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, 17 FCC Rcd 14841, 14844-45 (¶¶ 10-13) (2002) (granting a waiver of an E911 deadline to a number of similarly situated carriers); *Request for Review of the Decision of the Universal Service Administrator by Ysleta Independent School District*, 18 FCC Rcd 26407, 26436-38 (¶¶ 66-73) (2003) (granting a waiver of a universal service schools and libraries filing deadline to a number of similarly situated applicants).

<sup>9/</sup> See Petition at 5 (“SouthEast’s service area is entirely rural and it has no business plan to expand service to metropolitan areas, but from time to time it receives requests from customers for service in metropolitan locations.”); see also *id.* at 3 (“From time to time, customers based in SouthEast’s rural area ask the company for service to customer locations in those metropolitan areas – typically in the case of small businesses based in rural Kentucky but with a small sales office in one of the large cities. SouthEast also receives service requests from parents living in rural Kentucky who wish to obtain telephone service for their children who

Reconsideration versus Waiver. While SouthEast does not necessarily disagree with RICA's proposal to revise the rural exemption rule so that rural access charge rates apply to all CLEC traffic in rural areas served by non-rural ILECs, <sup>10/</sup> the Commission need not expand the scope of the exception as broadly as RICA proposes. Instead, the Commission could adopt a much more limited reconsideration order and achieve the results SouthEast is seeking: *i.e.*, it could change the rule to permit CLECs to charge NECA access rates in rural areas served by non-rural ILECs *only* if the CLECs maintain 95% or more of their customer lines (and/or revenues, and/or originating minutes) in those rural areas. Moreover, the Commission need not reconsider the rule at all in order to grant the waiver petition requested here. SouthEast seeks a much narrower exception from the rule than the generic change proposed by RICA. Even if the Commission were to decline to reconsider any aspect of the existing rule, the waiver proposed here is appropriate for SouthEast, a rural CLEC that provides only a *de minimis* amount of service to urban areas.

Waiver Conditions. The Commission could adopt waiver conditions that would fully address any legitimate concerns raised by opposing parties. For example, the opposing parties suggest the possibility that SouthEast's proposed

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attend college in the metropolitan areas. The Order's restrictive definition of 'rural CLEC' forces SouthEast into a dilemma – either (i) to decline to provide service, thus severely impairing our competitiveness vis-à-vis BellSouth, our principal competitor; or (ii) to provide service to the metropolitan customer location and thereby lose eligibility for the access charge "rural exemption" throughout our service area.").

<sup>10/</sup> RICA at 1; *see also* RICA Petition for Reconsideration and/or Clarification of Access Charge Seventh Report and Order, CC Docket No. 96-262, at 10-11 (filed June 20, 2001).

standard for *de minimis* service to non-rural areas – 5% or less of its customers – leaves open the possibility that rural CLECs may target a few urban customers that generate a great deal of traffic, such as call centers. <sup>11/</sup> First, SouthEast does not propose to charge “rural exemption” access charges when it provides access service to IXCs that serve SouthEast’s customers in urban areas. Rather, SouthEast would charge access rates that mirror those of BellSouth in urban areas. SouthEast would not object to a waiver condition requiring as much.

Moreover, the Commission could adopt additional waiver conditions that would fully address the parties’ legitimate concerns. For example, SouthEast proposed a 5% restriction on its non-rural customer base (*i.e.*, 95% or more of SouthEast’s customer base would have to continue be in the rural areas in order for it to continue to enjoy the “rural exemption”). A similar 5% limitation could be applied to the quantity of traffic and/or the number of originating minutes, as well as the number of customer lines, whichever is less. In other words, the Commission could adopt a condition providing that the waiver would remain in effect only if fewer than 5% of SouthEast’s customer lines are in non-rural areas, less than 5% of its interstate access minutes originate from non-rural areas, and less than 5% of its interstate access revenues originate from non-rural areas. SouthEast is emphatically not attempting to “game” the access charge regime by seeking high-

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<sup>11/</sup> AT&T at 4 (expressing concern that a company would “seek out a few customers in metropolitan areas that generate a large volume of traffic for which the ‘rural’ CLEC could then assess access rates on IXCs that far exceed the level that would have been charged for the same service under the Commission’s prescribed benchmark rates”); *accord*, BellSouth at 2; ALLTEL at 3.

volume urban customers, [12/](#) so any method the Commission chooses to impose to address commenters' concerns is welcome.

Finally, ALLTEL and BellSouth suggest that follow-up reports would be necessary in order to ensure that SouthEast does not expand its service into urban markets. [13/](#) SouthEast would not object to a waiver condition requiring annual follow-up reports. Although such reporting might be burdensome if required generically of all carriers subject to the rule, [14/](#) the administrative burdens are substantially less when considered in the context of an individual party's waiver request. More fundamentally, such a reporting and monitoring process is unnecessary in any event, since SouthEast would lose eligibility for the rural exemption, and would subject itself to enforcement liability, if it were to fail to comply with a 5% restriction and any other conditions the Commission should decide to impose.

*Corrections to Factual Misstatements.* The Commission should disregard ALLTEL's irrelevant and incorrect factual allegations. ALLTEL is flat wrong in suggesting that, because SouthEast has reserved a block of ten thousand telephone numbers in the Lexington market, it must intend to expand its service into the Lexington market. [15/](#) To the contrary, SouthEast was assigned that block of numbers several years ago, prior to the implementation of thousands-block

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[12/](#) *Contra*, AT&T at 5.

[13/](#) ALLTEL at 5; BellSouth at 2-3.

[14/](#) *Id.*

[15/](#) ALLTEL at 3-4.

number pooling, when it was impossible for SouthEast to obtain access to any quantity of numbers less than a full NXX (10,000 numbers). At the time, SouthEast had no choice but to obtain an entire NXX block in order to provide dial-up Internet access and other non-local exchange services to a handful of customers.

ALLTEL is also mistaken in suggesting that, because SouthEast owns a switch located in Lexington, the company therefore must intend to expand its service area into Lexington. [16/](#) To the contrary, SouthEast has no plans to provide facilities-based local service in Lexington; it uses its switching facilities in Lexington exclusively to provide long distance and Internet access services. [17/](#)

Finally, ALLTEL is simply wrong in contending that SouthEast included Lexington and other non-rural areas as part of its proposed service area in its UNE-P arbitration with ALLTEL. [18/](#) In fact, SouthEast excluded those areas from its service area.

*No Anti-Competitive Resale Restriction.* ALLTEL suggests that, rather than receiving a waiver, SouthEast should be compelled to serve any non-rural

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[16/](#) *Id.*

[17/](#) The switch is approximately seven years old and was originally a wireless switch that SouthEast converted for long distance use; it is not the type of equipment that a carrier would install in order to provide facilities-based local exchange service. SouthEast has opted to locate its long-distance switch in Lexington due to Lexington's central location, enabling SouthEast to make the most efficient use of its facilities, minimize its costs of interconnection with other carriers, and provide the best possible service to its rural customers. SouthEast's switch is connected to switches and other network points-of-presence operated by other carriers, including ILEC tandem switches that are located in Lexington but are used to serve customers in outlying rural areas, including some of the areas SouthEast serves.

[18/](#) ALLTEL at 3.

customers exclusively via resale, rather than using UNEs. <sup>19/</sup> This would unjustly deprive SouthEast of access revenues. Moreover, ALLTEL neglects to mention that, to date, it has failed to comply with its legal obligation to make discounted wholesale service available to SouthEast for resale. ALLTEL, in effect, is attempting to compel SouthEast to rely exclusively on resale (and to forego access revenues) when serving its handful of prospective customers in Lexington, while at the same time is failing to make the resale option available to SouthEast. The Commission should reject such attempts to thwart competition.

Conclusion. For the reasons stated above and in its petition for waiver, SouthEast respectfully requests that the Commission grant its request for a waiver of 47 C.F.R. § 61.26(a)(6).

Respectfully submitted,

SOUTHEAST TELEPHONE, INC.

By: \_\_\_\_\_

David L. Sieradzki  
Carol E. Simpson  
HOGAN & HARTSON L.L.P.  
555 Thirteenth St., N.W.  
Washington, D.C. 20554  
(202) 637-5600

Its Counsel

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<sup>19/</sup> *Id.* at 4.