

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION TO ESTABLISH DOCKET TO)	
CONSIDER AMENDMENTS TO)	CASE NO.
INTERCONNECTION AGREEMENTS)	2004-00501
RESULTING FROM CHANGE OF LAW,)	
KENTUCKY BROADBAND ACT)	

O R D E R

On December 10, 2004, BellSouth Telecommunications, Inc. ("BellSouth") filed a petition to establish a docket to consider amendments to interconnection agreements resulting from the change of law entitled Kentucky Broadband Act, KRS 278.546, 278.5461, and 278.5462. In its petition, BellSouth named the following specific competitive local exchange carriers ("CLECs"): Cinergy Communications Company ("Cinergy"), SouthEast Telephone, Inc. ("SouthEast"), Aero Communications, LLC ("Aero"), EveryCall Communications, Inc. ("EveryCall"),¹ ITC^Deltacom Communications, Inc. ("ITC^Deltacom"), and Momentum Business Solutions, Inc.

On December 22, 2004, the Commission established a procedural schedule which provided the CLECs an opportunity to submit comments and appear at an informal conference. The Attorney General was also made a party to this proceeding.

¹ On January 21, 2005, BellSouth withdrew its petition in relation to EveryCall because BellSouth and EveryCall reached agreement. BellSouth submitted an amendment to its interconnection agreement with EveryCall.

Cinergy, ITC^Deltacom, Aero, and SouthEast filed initial comments prior to the informal conference. The informal conference was held at the Commission's offices on February 24, 2005. After consideration of parties' input regarding procedural matters, the Commission, on March 30, 2005, found that the effect of the Kentucky Broadband Act on existing interconnection agreements is a question of law and may be addressed adequately by the filing of briefs by the parties. The Commission also requested that the parties address the effect of the Federal Communications Commission's ("FCC") recent order regarding BellSouth's request that state commissions be prohibited from regulating broadband.² The Commission also determined that this matter would be submitted for Commission decision upon submittal of the parties' legal briefs and that the Commission would address appropriate changes, if any, to the parties' interconnection agreements.

Legal briefs have been submitted by BellSouth, SouthEast, and Cinergy. Reply briefs have also been submitted. In deliberating the decisions contained herein, the Commission fully considered these legal briefs and comments previously filed by other parties.

BellSouth contends that the Kentucky Broadband Act "eliminates state regulation of broadband" and that the FCC's recent order has "the same effect as the Kentucky Broadband Act."³ According to BellSouth, this Kentucky statute and the FCC ruling

² Memorandum Opinion and Order and Notice of Inquiry, BellSouth Telecommunications, Inc. Request for Declaratory Ruling That State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers, WC Docket No. 03-251, FCC 05-78 (rel. March 25, 2005) ("FCC Order").

³ BellSouth's Brief at 1.

have eliminated the Commission's authority to require "an incumbent local exchange company to provide digital subscriber line ("DSL") service over an unbundled network element ("UNE") that a competitive local exchange company ("CLEC") is using to provide voice services to an end-user."⁴ Encouragement to invest in the telecommunications infrastructure in Kentucky was, as BellSouth sees it, the goal of the Kentucky Broadband Act. BellSouth asserts that none of the limitations contained in the Kentucky Broadband Act provide for broadband service to CLEC voice customers who are served by UNE. DSL is not required by federal law to be provided under these circumstances.

BellSouth also asserts that the FCC clearly rejected Cinergy's assertion that commingling rules would apply to providing wholesale DSL services over a UNE loop facility. BellSouth asks that this Commission direct parties to this proceeding to "immediately implement the terms of the Kentucky Broadband Act by executing an appropriate and lawful interconnection agreement amendment."⁵

Cinergy alleges that "statutory changes in Kentucky have no direct effect on any effective interconnection agreement" and, further, "the FCC order can do no more than require parties to negotiate contract revisions to incorporate changes in law."⁶ Cinergy believes that the Kentucky statutes may not be applied retroactively and that the FCC did not abrogate Cinergy's contract with BellSouth. SouthEast also contends that the

⁴ Id.

⁵ Id. at 17.

⁶ Cinergy's Brief at 1.

Kentucky Broadband Act “does not remove this Commission’s oversight of the local telecommunications voice market.”⁷

The Commission, having considered the record in this proceeding, finds that state commissions no longer have authority to require an ILEC to provide DSL service to an end-user customer over the same unbundled network element loop facility that a CLEC uses to provide voice services to that same customer. To determine otherwise would be inconsistent with the Kentucky Broadband Act and with the FCC’s policies. KRS 278.5462 requires that the provision of broadband services shall not be subject to state administrative regulation. This prohibition, coupled with the FCC’s determinations, causes this Commission to determine that the interconnection agreements in question in this proceeding must be altered. The FCC has found that we have an obligation to ensure that agreements meet the requirements of 47 U.S.C. § 251, including regulations prescribed by the FCC.⁸ The FCC specifically rejected Cinergy’s argument that the FCC’s “commingling rules apply to the provisioning of wholesale DSL services over a UNE loop facility.”⁹ We concur. Moreover, the Commission finds that competitive carriers have the alternative of line splitting available to them.¹⁰

⁷ SouthEast’s Brief at 1.

⁸ FCC Order at ¶ 20.

⁹ Id. at ¶ 35.

¹⁰ Id. at ¶ 31.

IT IS THEREFORE ORDERED that:

1. Incumbent local exchange carriers are not required to provide DSL service to an end-user customer over the same unbundled network element loop facility that a CLEC uses to provide voice services to that same customer.
2. Within 20 days of the date of this Order, parties shall submit amendments to their interconnection agreements reflecting the Commission's decision herein.
3. This proceeding is removed from the Commission's active docket.

Done at Frankfort, Kentucky, this 29th day of April, 2005.

By the Commission

Commissioner W. Gregory Coker did not participate in the deliberations or decision concerning this case.

ATTEST:



Executive Director