BELLSOUTH

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October 15, 2004

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

Re: Adoption of Interconnection Agreement Provision Between BellSouth Telecommunications, Inc. and Cinergy Communications Company by SouthEast Telephone, Inc.
PSC 2004-00235

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of BellSouth Telecommunications, Inc.'s Motion for Rehearing.

Sincerely,

Dorothy J. Chambers

Enclosures

cc: Parties of Record

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ADOPTION OF INTERCONNECTION AGREEMENT PROVISION BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND CINERGY COMMUNICATIONS COMPANY BY SOUTHEAST TELEPHONE, INC.	))))))	CASE NO. 2004-00235

BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR REHEARING

INTRODUCTION

Pursuant to KRS 278.400, BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, respectfully seeks rehearing of the Commission's September 29, 2004 decision which approved the request of SouthEast Telephone, Inc. ("SouthEast") to adopt the dispute resolution provisions of the Interconnection Agreement between BellSouth and Cinergy Communications Company ("Cinergy").

PROCEDURAL BACKGROUND

On June 8, 2004, SouthEast filed a notice of intent to adopt the Resolution of Disputes Provision contained in the Interconnection Agreement between Cinergy and BellSouth. BellSouth filed an objection on June 22, 2004, to SouthEast's Request to Adopt. The Commission Staff issued data requests to SouthEast and BellSouth on August 10, 2004, which were responded to by both parties on August 30, 2004. Thereafter, the Commission issued its September 29, 2004 Order, which is the subject of this Motion for Rehearing.

ARGUMENT

1. This Commission Must Apply Existing FCC Rules to Pending Matters.

As the Commission noted in its September 29, 2004 Order, approximately one month after SouthEast filed its notice of adoption, and BellSouth contested the adoption, the FCC issued a new rule regarding 47 U.S.C. §252(i) "pick and choose" rules.[1] As the Commission recognized in its September 29, 2004 Order, the FCC's new rules require CLECs to opt into an entire agreement rather than to "pick and choose" specific provisions for adoption. However, the Commission's September 29, 2004 Order erroneously concluded that SouthEast's adoption notice should be reviewed under the law as it existed when SouthEast's notice was filed. By applying old law to a pending matter, the Commission rendered a ruling that is plainly at odds with current law.

This Commission correctly noted BellSouth contends that the adoption notice was not appropriate under either the old or new FCC rules. BellSouth believes that dispute resolution procedures clearly are not, and never were, an interconnection service or network element which could be adopted, even under the old "pick and choose" rules.[2] However, as both BellSouth and SouthEast acknowledge, the FCC's

[1] Second Report and Order, in the Matter of Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, cc Docket No. 01-338, FCC 04-164 (Rel. July 13, 2004).

[2] BellSouth's initial objection to SouthEast's attempt to adopt the Dispute Resolution Provisions in the Cinergy Interconnection Agreement was based on two arguments. First, the Resolution of Disputes Provision of the Cinergy Interconnection Agreement is not an interconnection service or network element subject to adoption pursuant to 252(i) of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. §252(i). Furthermore, the Dispute Resolution Provision is not an interconnection service or unbundled network element. The resolution of dispute section is contained in the general terms and conditions of the Cinergy Interconnection Agreement, while interconnection services are addressed in Attachment 3 and UNEs are addressed in Attachment 2 to the Cinergy Interconnection Agreement. Second, the current Interconnection Agreement between SouthEast and BellSouth requires that SouthEast approach BellSouth regarding an amendment to its Interconnection Agreement prior to filing a notice of adoption with the Commission. SouthEast has not disputed that it failed to comply with the provisions of its existing Interconnection Agreement. The Commission's September 29, 2004 Order concluded that dispute resolution procedures are "an integral term and condition of a contract" and, therefore, directly related to the provision of interconnection service or network elements. The Commission's Order did not address BellSouth's second argument noted herein.

rules in effect at the time of this Commission's consideration are applicable to the present matter.[3]

2. Federal Appellate Courts Consistently Apply the FCC Regulations that Are in Effect When an Interconnection Agreement is Reviewed, Regardless of Whether They are Recently Reinstated or Newly Promulgated Regulations.

Application of the existing FCC Rules to this pending matter is appropriate and is consistent with the determinations of the federal appellate courts in similar situations. For example, as the U.S. Court of Appeals for the Ninth Circuit held in U.S. West Comm. Inc. v. Jennings, 304 F.3d 950 (9th Cir. 2002), existing FCC rules apply regardless of whether the action was filed before or after the issuance of the particular FCC ruling. Because the rules effectuate reasonable interpretations of the Act, they do not have an impermissible, retroactive effect when applied to pending actions. 304 F.3d at 958. Several of the issues before the Court in Jennings depended on whether FCC regulations implementing the Act should be applied to the pending case. These regulations had gone into effect **after** the state utility commission arbitrated and approved the Interconnection Agreements. Nevertheless, the Court of Appeals recognized that a decision-maker must apply the rules in effect at the time the review is made, not regulations that had been in effect earlier, even if the matter was pending before the rules change.

> Because the role of the federal courts is to determine whether the [interconnection] agreements comply with the Act, and because the FCC properly has exercised its authority to implement the Act by means of promulgating regulations, we conclude that we must ensure that the interconnection agreements comply with current FCC regulations, regardless of whether those regulations were in effect

[3] In response to the Commission Staff's data requests to both parties, SouthEast conceded that the FCC ruling, "likely affects SouthEast's request in this proceeding." SouthEast also acknowledged that the FCC, "intended its ruling to apply to all pending and future ICA matters." See SouthEast Response to Request No. 1.

> when the ACC [Arizona Corporation Commission] approved the agreements.

304 F.3d at 956.

Other appellate courts, similarly, have reached the conclusion that when an interconnection agreement is reviewed, it should be decided in accordance with the FCC regulations in effect at the time of that review. See, e.g., Indiana Bell Tel. Co. v. McCarty, 362 F.3d 378 (7th Cir. 2004). In McCarty, the Court noted, "the Act is dynamic legislation, subject to ever-evolving interpretation based on FCC and court pronouncements." 362 F.3d 393. In McCarty, after the parties had finished briefing their appeals, the FCC issued the Triennial Review Order. Quoting the Jennings Court, the U.S. Court of Appeals for the Seventh Circuit also found it was obligated "to 'ensure that the interconnection agreements comply with current FCC regulations, regardless of whether those regulations were in effect when the [state commission] approved the agreements.'" 362 F.3d at 394, quoting Jennings, 304 F.3d at 956. See, also, GTE South, Inc. v. Morrison, 99 F.3d 733, 740-41 (4th Cir. 1999) (No retroactivity principles prevent the application of the FCC's pricing rules; "[a] regulation 'does not operate retrospectively merely because it is applied in a case arising from conduct antedating the [regulation's] enactment.'". 99 F.3d at 741, quoting Landgraf v. USI Filson Prods., 511 U.S. 244, 269 (1994).

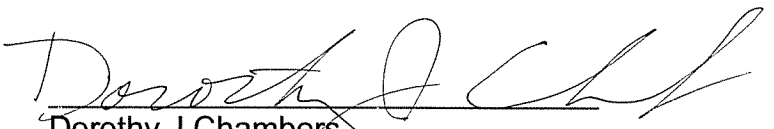
CONCLUSION

The Commission should deny SouthEast's request to adopt dispute resolution procedures. SouthEast's attempt to adopt dispute resolution procedures from the Cinergy Interconnection Agreement fails under both the FCC's old "pick and choose" rules and also under the current FCC rules. Under the old "pick and choose" rules,

dispute resolution provisions were not adoptable inasmuch as resolution provisions are neither an interconnection service nor network elements pursuant to Section 252(i) of the Act. However, even if that were not the case, it is incorrect and contrary to legal authorities for this Commission to apply previous FCC regulations to a pending matter involving an interconnection agreement, regardless of whether those regulations were in effect when the CLEC's notice to adopt was filed. The U.S. appellate courts that have considered and addressed whether current FCC regulations should be applied to pending matters consistently have ruled that FCC regulations in effect at the time of review must be applied in order to ensure that interconnection agreements comply with those FCC regulations.

For these reasons, BellSouth respectfully requests the Commission to reconsider its September 29, 2004 decision and deny the adoption request filed by SouthEast in this matter.

Respectfully submitted,



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CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by mailing a copy thereof, this 15th day of October, 2004.

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