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DOUGLAS F. BRENT
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Brent@skp.com

November 8, 2004

Ms. Elizabeth O'Donnell
Executive Director
Public Service Commission
P.O. Box 615
Frankfort, KY 40602

RECEIVED

NOV 09 2004


PUBLIC SERVICE
COMMISSION

RE: 2004-00369

Dear Ms. O'Donnell:

Enclosed please find an original and ten copies of Dialog's Reply to BellSouth Telecommunications, Inc.'s Motion to Dismiss. Please indicate receipt of this filing by your office by placing a file stamp on the extra copy and returning to me via the enclosed, self-addressed, stamped envelope.

Sincerely yours,



Douglas F. Brent

DFB:jms

Enc.

Cc: All parties of record

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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NOV 09 2004

PUBLIC SERVICE
COMMISSION

In the Matter of:

ADOPTION OF INTERCONNECTION)
AGREEMENT BETWEEN BELLSOUTH)
TELECOMMUNICATIONS, INC.) CASE NO. 2004-00369
AND CINERGY COMMUNICATIONS COMPANY)
BY DIALOG TELECOMMUNICATIONS, INC.)

REPLY TO BELLSOUTH

I. Introduction.

Having tried unsuccessfully to use its existing agreement (which expires November 22, 2004) as the starting point to negotiate a new interconnection agreement with BellSouth, on September 21, 2004, pursuant to Section 252(i) of the Telecommunications Act of 1996 (the "Act"), 47 U.S.C. § 252(i), Dialog Telecommunications, Inc.¹ ("Dialog"), filed its Notice of Intent ("Notice") to adopt the currently effective interconnection agreement between BellSouth Telecommunications, Inc. ("BellSouth") and Cinergy Communications Company ("CCC"). The Notice should have come as no surprise to BellSouth, for it had been BellSouth's suggestion, *on July 1, 2004*, that Dialog consider adopting an existing agreement.² Dialog initially

¹ Dialog is a North Carolina-based CLEC competing with BellSouth exclusively in the Owensboro, Kentucky LATA.

² See July 1, 2004 email from Lynn Allen-Flood, BellSouth, to Jim Bellina, attached as Exhibit 1.

resisted this suggestion, making clear that it would prefer to "negotiate [a new agreement] if that is possible."³ Dialog then spent weeks urging BellSouth to enter negotiations with the existing agreement as the template for negotiations. This effort went nowhere, and Dialog subsequently concluded that adoption was the only alternative to "reinventing the wheel" by negotiating from the new 1,100 page interconnection template that BellSouth insisted would be the starting point for any negotiations. Thus, Dialog made the business decision to proceed with an adoption, and on September 2, 2004 informed BellSouth that it was adopting the CCC agreement.⁴ BellSouth immediately acknowledged this decision and reasserted its role as the party to "pull together" the agreement for filing with the commission.⁵ BellSouth further stated that the adopted agreement might require certain replacements to reflect the D.C. Circuit's USTA II decision. Dialog did not concede to this claim, but asked that BellSouth finalize its concerns and provide the agreement.⁶ On September 17, 2004 BellSouth sent a letter to Dialog confirming that the recently effective FCC "all

³ See July 1, 2004 email from Jim Bellina, Dialog, to Lynn Allen-Flood, attached as Exhibit 2.

⁴ See September 2, 2004 email from Jim Bellina, Dialog, to Lynn Allen Flood, attached as Exhibit 3.

⁵ See September 2, 2004 email from Lynn Allen Flood, BellSouth, to Jim Bellina, attached as Exhibit 4.

⁶ See September 2, 2004 email from Jim Bellina, Dialog, to Lynn Allen Flood, attached as Exhibit 5.

or nothing rule" requires a carrier seeking to adopt an approved agreement to adopt the agreement in its entirety.⁷ This was of course consistent with Dialog's request to adopt the CCC agreement. Yet, inexplicably, BellSouth had still not sent anything to Dialog concerning the CCC agreement, nor had it filed a notice with the Commission.

After three weeks had passed with no notice filing from BellSouth, Dialog chose to file the notice of adoption on its own, as it had every right to do under Section 252(i). Two days later, BellSouth claimed that the CCC agreement was not available for adoption.⁸ To justify this about-face, BellSouth pointed to the FCC's *Interim Rules Order*, which had not even been in effect when Dialog properly notified BellSouth of its adoption of the CCC agreement or when BellSouth had agreed to "pull together" the agreement. Now, in a misguided effort to impede Dialog's federal statutory right to adopt a filed and effective interconnection agreement, BellSouth has filed a putative "motion to dismiss" Dialog's adoption notice. BellSouth claims Dialog is attempting to evade requirements of the 1996 Telecommunications Act and state law, and further claims Dialog's adoption request is not timely. Each of these

⁷ Letter from Lynn Allen Flood to Patrick L. Eudy, attached as Exhibit 6.

⁸ See September 23, 2004 email from Lynn Allen Flood, BellSouth, to Jim Bellina, attached as Exhibit 7.

erroneous arguments will be addressed below. As Dialog will explain, the Commission should reject BellSouth's effort to inhibit a small CLEC attempting to compete with BellSouth in rural areas of Kentucky. In addition, the Commission should be alarmed by BellSouth's misuse of KRS 278.5462 as a license to interfere with the very interconnection rights preserved under the term of that statute.

II. Dialog may adopt any effective Agreement.

As described in the petition, the referenced agreement, which is to be adopted in its entirety, was arbitrated in Case No. 2001-00432 and is posted on the Commission's publicly available Internet site for approved agreements. This agreement between Cinergy Communications Company and BellSouth is an effective agreement under federal law.

BellSouth's obligation to allow opt-in to an effective interconnection agreement is mandatory, not discretionary. 47 U.S.C. § 252(i); *See Global NAPS South, Inc. Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Dispute with Bell Atlantic-Virginia, Inc.*, CC Docket No. 99-198, Memorandum Opinion and Order, 15 FCC Rcd 23318, para. 4 (CCB 1999). The Kentucky Commission has previously acknowledged in numerous orders the statutory right contained in the Act for carriers to adopt

existing interconnection agreements by notice to the Commission. In this case BellSouth seeks to interfere with that right. Of course, BellSouth cannot modify a federal statutory right, nor can it ask the Commission to disregard one. But that is what BellSouth is asking here. Indeed, BellSouth currently takes the position that there are *no agreements* in Kentucky available for adoption by Dialog. But BellSouth's justification for this strident position does not withstand scrutiny.

First, BellSouth claims Dialog's adoption request is "completely at odds" with the FCC's August 20, 2004 *Interim Rules Order*. Motion at 1. This claim is wrong. Dialog's determination to opt-in to an effective agreement is not inconsistent with the purpose of the FCC's Interim Order. The FCC's express purpose in issuing the Interim Order was to promote "market stability." See *Interim Order* at para. 18. The FCC made clear that it intends to avoid marketplace disruption by maintaining existing unbundling obligations to minimize disruptive effects and marketplace uncertainty that would otherwise result from the abrupt elimination of particular unbundling requirements. *Id.* at para. 20. Dialog seeks no more than what the FCC is trying to preserve. Dialog is not seeking to *expand* unbundling in any manner beyond what was in place June 15, 2004. See *Id.* at para. 22. Dialog already has access to

the network elements that make up the UNE Platform - adopting the CCC agreement adds no element needed by Dialog that does not exist in the current agreement. Rather, Dialog's decision to adopt the effective CCC agreement was intended to accomplish one simple thing - Dialog needs a degree of regulatory certainty to bridge the brief time gap between expiration of Dialog's existing ICA and the implementation of new FCC rules that will determine BellSouth's future unbundling obligations. This temporary certainty is furnished through adoption of an effective agreement that will not expire before the new FCC rules are promulgated.⁹ Absent such interstitial relief Dialog will be forced into a non-negotiated "standard" agreement which is BellSouth's boilerplate template and is certain to require additional changes upon issuance of FCC rules. BellSouth desires to make these changes unilaterally based on its own view and interpretation of future FCC orders. Dialog submits this would not be consistent with BellSouth's duties under Section 251 or 252.

BellSouth also states that the fundamental thrust of the relief granted by the *Interim Rules Order* is to maintain the status quo in certain respects without expanding unbundling

⁹ Counsel for Dialog has also suggested that BellSouth merely agree to extend the term of the current agreement sufficiently to allow meaningful negotiation of a new agreement once permanent federal rules are in place. BellSouth has refused to agree to such an extension.

beyond what was in place on June 15, 2004. For that reason the interim approach is intended to restrict the ability of *new* carriers to enter during the interim period. See BellSouth Motion at 2; *Interim Rules Order* at para. 22-23. Dialog agrees. But Dialog is not a new carrier. Dialog already interconnects with BellSouth. Moreover, as discussed above, Dialog does not seek to expand unbundling - Dialog seeks only to preserve the *status quo* until permanent FCC rules provide a foundation for meaningful negotiation with BellSouth. While the *Interim Rules Order* could clearly have the effect of restricting some adoptions, the conditions described in para. 22-23 of the *Order* simply do not apply here.

III. Dialog timely exercised its adoption rights.

In its motion, BellSouth acknowledges the FCC's Interim Rules were not effective until September 13, 2004. See BellSouth Motion at 2, n. 2. BellSouth argues that since Dialog filed its notice of adoption after September 13 (the petition was dated September 20), the notice to adopt must be rejected. *Id.* This claim is ironic. In its motion BellSouth places great significance on the effective date of the rules, while omitting to tell the Commission that Dialog had notified BellSouth of its intent to adopt the CCC agreement on September 2, 2004, well before the FCC order became effective through publication in the

Federal Register. Dialog's September 2 notice invoked and complied with 47 U.S.C. § 252(i).

BellSouth similarly fails to disclose that BellSouth had urged Dialog to consider an adoption, and had *agreed in writing* that Dialog was eligible to adopt the Cinergy agreement, subject to certain changes BellSouth claimed were required to implement USTA II. See Exhibit 1.

As discussed above, BellSouth agreed to promptly return a version of the agreement for filing with the Commission. However, contrary to what it promised, BellSouth then appears to have purposefully waited until after September 13, to justify a claim that neither the CCC agreement (nor any other agreement) was available for adoption. But by the time BellSouth revealed this opinion, Dialog had already chosen to file a second adoption notice, this time at the Commission, as it became obvious that BellSouth did not intend to acknowledge Dialog's adoption absent a Commission order. As noted above, Dialog's notice to BellSouth on September 2 satisfied the statute, and the later filing at the Commission clearly relates back to September 2. Moreover, given Dialog's justified reliance on BellSouth's statements, BellSouth should be estopped from claiming Dialog's notice was untimely.

BellSouth also claims the adoption is untimely under FCC Rule 51.809(c). But that regulation does not state any specific time to govern when a "reasonable period of time" has elapsed. While Dialog would tend to agree that adoption of a nearly expired agreement might be viewed as an untimely, futile exercise, the CCC agreement does not expire until 2006. Moreover, BellSouth's own internal operating procedures appear to contemplate adoption of any effective agreement with at least six months remaining before expiration. See Exhibit 4. Indeed, Section 13 of Dialog's current agreement with BellSouth provides for adoption of agreements that have a remaining term of six months. So too does the standard template currently posted on BellSouth's Interconnection website.

IV. KRS 278.5462 does not bar the adoption.

BellSouth's final objection to Dialog's adoption is based upon HB 627, a recent Kentucky statutory change enacted after relentless lobbying by BellSouth. The so-called "Broadband Parity Bill" limits "state administrative regulation" of "[t]he provision of broadband services." KRS 278.5462 (1). Incumbent monopoly carriers were the only industry supporters of this bill, which they claimed was needed to compete with cable companies providing broadband. Of course, it is hardly a secret that BellSouth supported this bill as a means to legislatively

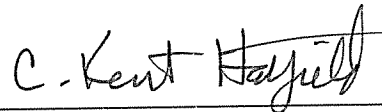
overturn the Commission's pro-competitive arbitration decision in Case No. 2001-00432, involving Cinergy Communications. The effect of the statute on that decision, if any, is not at issue here. And while it is understandable that BellSouth is eager to have the new statute applied in a way that limits competitors, the "Broadband Parity Act" simply has no application here. First, by its very terms KRS 278.5462(2) recognizes and avoids any attempt to limit BellSouth's duties under Section 252 of the Communications Act. Second, if there comes a time that a network service provider requests DSL transport in a situation where BellSouth believes it no longer obligated to provide such access, that may be an appropriate time to invoke the statute. Dialog does not purchase DSL transport and Dialog's choice of the CCC agreement is not based on its language related to DSL transport.¹⁰ Finally, if BellSouth believes the new statute affects existing interconnection agreements it may look to the change of law process. But nothing about the new statute limits Dialog's rights under Section 252(i).

Wherefore, DIALOG respectfully requests that the Commission issue an order on or before November 22, 2004:

¹⁰ The Commission is of course fully aware of BellSouth's anticompetitive practices of refusing to provide its own broadband service to customers served via UNE-P and of punitively disconnecting existing broadband customers who try to exercise choice for voice service. That these practices have harmed Dialog will come as no surprise to the Commission.

- 1) Acknowledging the adoption by DIALOG and denying BellSouth's motion;
- 2) making the agreement effective as of the date of the order;
- 3) requiring BellSouth to file with the Commission a true and complete copy of the approved agreement; and
- 4) To the extent required, ordering DIALOG and BellSouth to sign and file an adoption agreement as set forth in Exhibit 2 to Dialog's Notice.

Respectfully Submitted:



C. Kent Hatfield
Douglas F. Brent
STOLL, KEENON & PARK, LLP
2650 AEGON Center
Louisville, KY 40202
502-568-9100

CERTIFICATE OF SERVICE

It is hereby certified that this 5th day of November, 2004
I have served the within Reply on the following by deposit in
the U. S. Mail, first class.

Douglas F. Brent /ckrt
Douglas F. Brent

Dorothy J. Chambers
General Counsel/Kentucky
BellSouth Telecommunications, Inc.
601 W. Chestnut Street
Room 407
Louisville, KY 40203

R. Douglas Lackey
Robert A. Culpepper
Suite 4300
675 W. Peachtree St., NE
Atlanta, GA 30375

EXHIBIT 1

From: Allen-Flood, Lynn [mailto:Lynn.Allen-Flood@BELLSOUTH.COM]
Sent: Thursday, July 01, 2004 9:15 PM
To: Jim Bellina; pat@calldialog.com
Cc: Allen-Flood, Lynn
Subject: RE: Proposed Interconnection Agreement

Jim,

The current agreement between Dialog and BST is 3 years old. As stated previously, BellSouth is not agreeable to starting negotiations from a 3 year old document. I have provided Dialog with BellSouth's proposed agreement as a starting point.

Have you considered adopting an existing agreement? If Dialog is interested in that, peruse the website at <http://cpr.bellsouth.com/index7.htm>. An adopted agreement has to have at least 6 months before expiration, from the time the adoption is effective.

If you would like to discuss this further, give me a call.

Lynn Allen-Flood
Interconnection Services
BellSouth Telecommunications, Inc.
404-927-1376

EXHIBIT 2

-----Original Message-----

From: Jim Bellina [mailto:jim@calldialog.com]
Sent: Thursday, July 01, 2004 11:19 PM
To: Allen-Flood, Lynn; pat@calldialog.com
Subject: RE: Proposed Interconnection Agreement

I do not accept that we must start from a BST template just because that's what BST wants, or even because that's what BST has always done - it is much more reasonable to begin with our existing agreement as I have previously proposed.

Unless you have another solution, it seems that we are at a standstill on this point.

I am looking at existing agreements, but they are rather cumbersome to review. I'd much prefer to simply negotiate one if that is possible.

I'm also working on yet another proposal for a commercial agreement that I expect to have to you early next week.

As an aside, have you heard the rumor that ATT is planning to make BST ports and switching available to other carriers under resale agreements for less than what BST has proposed to most carriers? I haven't been able to decide if this would be good or bad, but it would certainly change things.

I will be out of the office Monday, but look forward to your response.

Have a great holiday weekend
Jim

EXHIBIT 3

-----Original Message-----

From: Jim Bellina [<mailto:jim@calldialog.com>]
Sent: Thursday, September 02, 2004 5:30 PM
To: Allen-Flood, Lynn
Subject: adopting Cinergy

Pursuant to 47 USC § 252, the related rules and regulations of the FCC, and § 13 of our current interconnection agreement, Dialog Telecommunication elects to adopt in its entirety the interconnection agreement of BellSouth Telecommunications Inc. and Cinergy Communications Company for the state of Kentucky dated March 20, 2003 as amended August 22, 2003 and further amended April 30, 2004. This adoption to be effective no later than 10/1/04.

Thanks for your assistance, and if we don't speak again have a great weekend.
Jim

EXHIBIT 4

From: Allen-Flood, Lynn
[mailto:Lynn.Allen-Flood@BELLSOUTH.COM]
Sent: Thursday, September 02, 2004 5:52 PM
To: Jim Bellina
Cc: Allen-Flood, Lynn
Subject: RE: adopting Cinergy

Jim,

I can pull together this adoption for you but, because I haven't checked on this particular agreement, please keep in mind the following:

- the adopted agreement has to have at least 6 months before expiration
- any adoption has to be compliant with current law, thus, if Cinergy does not have current language in the UNE attachment (probably Att 2) reflecting the 3/2/04 Court Ruling, that attachment would be replaced to reflect BellSouth's current Att 2 (on BellSouth's website).
- there may be an isp compensation arrangement that would be specific to Cinergy. If that is the case, that particular attachment (probably Att 3) would also be replaced.
- any agreement or adoption would be effective 30 days from the date of last signature. This provides time for the rates to be added to the rate file before the effective date.

I'll be on vacation tomorrow and most of next week but will target to send you the proposed adoption the week following.

Thanks

EXHIBIT 5

From: Jim Bellina [<mailto:jim@calldialog.com>]
Sent: Thursday, September 02, 2004 6:04 PM
To: 'Allen-Flood, Lynn'
Subject: RE: adopting Cinergy

As always, I appreciate your position on this, but there is nothing that I've seen in the rules or our current interconnection agreement to support these restrictions. As with all things this is going to take longer to complete than we'd like, so I implore you finalize your concerns and provide them with all possible speed.

Enjoy your vacation,
Jim

EXHIBIT 6 follows

EXHIBIT 7

From: "Allen-Flood, Lynn" <Lynn.Allen-Flood@BELLSOUTH.COM>
To: "Jim Bellina" <jim@calldialog.com>
Date: 9/23/2004 1:17:06 PM
Subject: RE: adopting Cinergy

Jim,

As we discussed, the new rules say that the terms for the vacated elements are frozen for every clec, and there is no adoption of those elements from someone else's agreement. Because agreements are now only available in their entirety, Dialog cannot adopt Cinergy.

Call me when you have a chance and we can further discuss other options for a follow-on agreement.

Thank you,

Lynn

-----Original Message-----

From: Jim Bellina [mailto:jim@calldialog.com]
Sent: Thursday, September 02, 2004 5:30 PM
To: Allen-Flood, Lynn
Subject: adopting Cinergy

Pursuant to 47 USC § 252, the related rules and regulations of the FCC, and § 13 or our current interconnection agreement, Dialog Telecommunication elects to adopt in its entirety the interconnection agreement of BellSouth Telecommunications Inc. and Cinergy Communications Company for the state of Kentucky dated March 20, 2003 as amended August 22, 2003 and further amended April 30, 2004. This adoption to be effective no later than 10/1/04.

Thanks for your assistance, and if we don't speak again have a great weekend.

Jim