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January 26, 2005

RECEIVED

Ms. Elizabeth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40602

JAN 27 2005

PUBLIC SERVICE
COMMISSION

Re: Petition to Establish Docket to Consider Amendments to Interconnection
Agreements Resulting from Change of Law, Kentucky Broadband Act, PSC
2004-00501

Dear Ms. O'Donnell:

Enclosed please find an original and ten (10) copies of Comments of Aero
Communications, LLC for filing in the docket referenced above. If there are any
questions, please contact me at 510 903-1304. Thank you.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kristopher E. Twomey".

Kristopher E. Twomey
Counsel to Aero Communications, LLC

cc: parties of record per PSC service list (by electronic mail)

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**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

In the Matter of:

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

COMMENTS OF AERO COMMUNICATIONS, LLC

Aero Communications, LLC (“Aero”), by and through counsel, hereby submits the following comments in opposition to BellSouth’s Petition (“Petition”):

I. Introduction

BellSouth’s petition in this docket should be denied, and the Commission should consider imposing sanctions on BellSouth for its conduct during this interconnection amendment process. Not only is BellSouth incorrect in its interpretation of the Kentucky Broadband Act, but it has effectively summarily imposed this interpretation thereby driving up Aero’s costs. BellSouth is currently in violation of its obligations under its interconnection agreement with Aero and this Petition seeks to retroactively approve BellSouth’s behavior. This Petition is yet another attempt by BellSouth to limit competition not only in the voice market, but in the broadband market as well. The Petition should be denied without prejudice. Moreover, BellSouth should be ordered to immediately restore services validly ordered under Aero’s interconnection agreement.

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II. BellSouth's Interpretation of the Kentucky Broadband Act is Wrong

A. Act Has Nothing to Do with UNE-P

Regardless of the procedural defects in the Petition, BellSouth is simply wrong in its interpretation of the Kentucky Broadband Act ("the Act").¹ The Act plainly states that the Commission, and any other public agency such as municipalities, may not regulate broadband services.

So for example, the Commission could not regulate download and upload speeds, pricing, network performance, packet loss or other issues related to the quality or price of broadband Internet services. Municipalities, likewise, could not impose "open access" on cable companies for their broadband platform.

Nothing in the Act says anything about this Commission's traditional and basic authority to protect local voice competition, however. The Commission retains all the authority it needs to regulate incumbent carrier's provision of the unbundled network element platform ("UNE-P") to wholesale customers. If the legislature truly intended its legislation to do as BellSouth claims, they could have made it clear by specifically striking down any ruling it so chose. For example, the Act could have said, "The Kentucky Public Service Commission may not require incumbent local exchange carriers to provide digital subscriber line transport on any loop for which a consumer has chosen a competitive local exchange carrier as his/her local voice services provider." That would have been clear, and Aero would have signed an amendment seeking to implement such a law. The Act does not contain the clear language that BellSouth alleges.

B. Act Only Limits Commission's Ability to Regulate Broadband Rates and Terms of Service

The Act forbids the Commission, or any other public agency, from engaging in regulations that the legislature has determined would be harmful to broadband

¹ Kentucky Statute, KRS 278.546, Chapter 167.

deployment. It does not contain anything about the regulation of local voice services. Instead, Section 3, Part 1 states,

(1) The provision of broadband services shall be market-based and not subject to state administrative regulation. Notwithstanding any other provision of law to the contrary except as provided in subsections (3) and (4) of this section, no agency of the state shall impose or implement any requirement upon a broadband service provider with respect to the following:

- (a) The availability of facilities or equipment used to provide broadband services; or
- (b) The rates, terms or conditions for, or entry into, the provision of broadband service.

Given a reasonable reading of the text in subpart (a), this means that the Commission may not force incumbents into deploying broadband more widely. For example, the Commission can not force an incumbent carrier to install DSL equipment in more rural central offices. For subpart (b), the Commission may not regulate any rates or terms of service for broadband providers. So for example, the Commission may not regulate the retail price of DSL services that BellSouth's affiliated ISP charges its end user residential and business customers. Nor may the Commission require broadband ISPs to seek authority from the Commission before offering broadband to the public. Neither of these parts relate to the regulation of local voice telephone service.

C. The Act Does Not Address Regulation of UNE-P

Section 3, Part 2 does not assist BellSouth's arguments either. It states,

(2) Any requirement imposed upon broadband service in existence as of July 15, 2004 is hereby voided upon enactment of Sections 1 to 3 of this Act. The provisions of this section do not limit or modify the duties of a local exchange carrier or an affiliate of a local exchange carrier to provide unbundled access to network elements or the commission's authority to arbitrate and enforce interconnection agreements, including provisions related to remote terminals and central office facilities, to the extent required under 47 U.S.C. Sections 251 and 252, and any regulations issued by the Federal Communications Commission at rates determined in accordance with the standards established by the Federal Communications Commission pursuant to 47 C.F.R. Sections 51.503 to 51.513, inclusive of any successor regulations. Nothing contained in Sections 1 to 3 of this Act shall be construed to

preclude the application of access or other lawful rates and charges to broadband providers. Nothing contained in Sections 1 to 3 of this Act shall preclude, with respect to broadband services, access for those service providers that use or make use of the publicly switched network.

In no way has the Commission imposed any requirement on broadband service. The Commission has simply sought to prevent BellSouth from harming local voice competition by tying DSL service to local voice services. In fact, the Commission's policy on UNE-P really splits the local voice service component from the broadband component. If the Commission required BellSouth to provide BellSouth's affiliated ISP's retail DSL services to all CLECs' UNE-P customers for free as a mechanism to spur local voice competition, this Act would prevent that. Such is not the case, however. The language above also expressly affirms the Commission's authority to regulate competitor's access to UNEs and arbitrate and enforce interconnection agreements.

III. The Commission May Regulate Local Voice Competition by Requiring DSL on UNE-P Circuits

A. Granting BellSouth's Petition is Bad Policy

BellSouth's Petition essentially argues that the Act grants BellSouth the right to "tie" DSL to its local voice services. It seems unlikely that the legislation would grant BellSouth immunity from what is arguably an antitrust violation. Through the arbitration process, this Commission chose to protect voice competition by allowing consumers the right to both choose a UNE-P based competitor to provide voice services, and allow that consumer to receive broadband via DSL on that circuit. The alternative situation, one that BellSouth is trying to impose again, is that if a consumer wishes to receive DSL, that consumer must choose BellSouth as his/her local voice provider. The Commission recognized that such a policy would inhibit the growth of local competition. By requiring DSL over UNE-P, therefore, this Commission is regulating competition in the local voice services market only. This policy has nothing to do with regulating the speed or quality

of broadband service or any other action that would violate the Act. The Commission should dismiss this Petition on this basis alone.

BellSouth's Petition seeks to force this Commission into bad policy, a policy that this Commission has already found to be in consumers' best interest. BellSouth's Petition would eliminate the ability for a consumer or business to choose a competitive local exchange carrier using UNE-P and maintain the ability to have DSL. In effect then, BellSouth claims that the KY Broadband Act allows BellSouth to retaliate against consumers who would dare to choose a UNE-P CLEC as his/her voice carrier. If a consumer dares choose a competitor, BellSouth simply refuses to allow that consumer to receive DSL. The Commission has already determined that this is bad policy.

B. This Is Part of a Larger Attempt to Destroy Competition

The idiocy of this as a business strategy for BellSouth is also relevant here. If this Petition was granted, a consumer seeking an alternative to BellSouth for local voice, and also desiring broadband, would not be able to stay on BellSouth's network. The only alternative would be for the consumer to seek such services from their local cable company (assuming cable broadband is available in their area). Why would BellSouth argue for a policy that would reduce traffic on its network and drive revenue to its main competition? Given this market reality, BellSouth's Petition should be seen for what it is, a thinly veiled attempt to harm CLECs and ISPs.

This is another in a series of attempts by BellSouth to avoid its obligation to provide DSL over UNE-P to its competitors in Kentucky. BellSouth so dislikes this obligation, that it has filed a petition for declaratory ruling ("Preemption Petition") at the Federal Communications Commission ("FCC") to overrule any state that seeks to protect local competition through such measures.² The FCC is the proper forum for such a request, and as of yet, the FCC has not yet ruled on the Preemption Petition. Instead,

² *In the Matter of 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 CLEC UNE Voice Customers*, FCC WC Docket No. 03-251.

BellSouth is proceeding as if the FCC had already issued a declaratory ruling to preempt state commissions from supporting local voice competition with such regulations.

In considering this Petition, the Commission should also take notice of BellSouth's pending petition for forbearance at the FCC ("DSL Transport Forbearance Petition.")³ In that petition, BellSouth asks the FCC to eliminate the requirement for tariffing DSL Transport. This would allow BellSouth to impose "negotiated" contract prices for DSL Transport on Internet service providers. BellSouth would then have the ability to price the remaining ISPs out of the broadband market entirely. In fact, a BellSouth spokesman went so far as to say that because BellSouth's-affiliated ISP already controls 90% of the market, granting the petition would have limited effect on competition.⁴ So the DSL Transport Forbearance Petition basically asks the FCC to hand BellSouth the final nails to drive into the coffin of independent ISPs. When the instant Petition is considered in light of the DSL Transport Forbearance Petition and the Preemption Petition, BellSouth's true intentions are clear—eliminate competition both for voice service and broadband service, allow the telco/cable duopoly to control the communications market. This is bad for Kentucky consumers and bad for small businesses.

IV. BellSouth Is Violating Its Obligation To Commingle UNEs and Non-UNEs

Aero concurs with Cinergy's analysis of the "commingling" issue. Aero has been purchasing a valid UNE product and commingling DSL Transport from BellSouth's federal access tariff. Not only is this legal, it is required specifically by BellSouth's lawful tariff. Given the tenuous nature of UNE-P, and the improving economics of purchasing full unbundled loops ("UNE-L") and providing voice and data packaged deals, Aero is also in the process of converting its UNE-P customers to UNE-L.

³ *In the Matter of Petition of BellSouth Telecommunications, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Application of Computer Inquiry and Title II Requirements*, FCC WC Docket 04-405. Filed October 27, 2004.

⁴ "'The change would not reduce competition,' Curtin says, 'because more than 90 percent of DSL users in BellSouth's area are BellSouth retail customers and only 10 percent are served by other ISPs.'" Charlotte Wolter, *BellSouth Petition a Threat to VoIP, Says Pulver*, XChange Magazine, November 19, 2004, available at <http://www.x-changemag.com/hotnews/4bh19114724.html>.

BellSouth, however, refuses to allow commingling of UNE-L and DSL Transport, again despite clear requirements to do so in its federal tariff. This issue has been raised in teleconference negotiations between the parties but no resolution, or explanation, has been provided. In effect then, BellSouth is forcing Aero to comply with its interpretation of the law and simultaneously preventing Aero from changing its business to adapt to regulatory changes. This Commission should step in and stop this abuse.

Moreover, and ironically, the Act seemingly codifies these very obligations,

(4) No telephone utility shall refuse to provide wholesale digital subscriber line service to competing local exchange carriers on the same terms and conditions, filed in tariff with the Federal Communications Commission, that it provides to Internet service providers.

BellSouth is refusing to commingle just such services and, is in violation of this section of the Act.

V. BellSouth is Violating the Clear Terms of its Interconnection Agreement with Aero

To fully appreciate the depths that BellSouth has reached here, one must consider the “negotiation process” attempted. After the Act was signed into law, BellSouth sent a letter and an amendment requesting changes in alleged compliance with the Act. Aero reviewed the amendment, and the Act, and refused to accept it. Aero believed then, as now, that the Act in no way affected BellSouth’s obligation to allow DSL for UNE-P consumers. BellSouth then offered Aero a “deal” to help with the transition BellSouth believed it was entitled to. The customers would be converted from DSL over UNE-P to DSL over resale and credits would be issued to cover the difference between the resale and UNE-P rates. These credits would be carried for 12 months. At that time, the consumers’ services would theoretically be terminated if Aero did not have facilities in place for a transition. These credits were completely unrealistic and assumed a downward demand curve, rather than a reasonable rate of customer growth. Moreover, despite the fact that Aero’s customer base was expanding, BellSouth proposed a declining base to account for “churn.” BellSouth insisted on this even though Aero had not experienced

churn for these customers. Aero offered to accept this tortured interpretation of the Act if a reasonable credit procedure was put in place and a reasonable transition plan for its customers could be negotiated. BellSouth refused and instead, is trying to impose its proposed changes without Aero's consent, thereby raising Aero's prices on a per customer basis more than \$75 per month, effectively eliminating any profit.⁵

In a nutshell then, here is how the amendment "negotiation" process proceeded:

- Self-serving change of law amendment offered;
- Aero refuses on reasonable grounds;
- Impossibly bad compromise offered by BellSouth;
- Aero provides counter-proposal;
- BellSouth refuses;
- BellSouth seeks to impose terms of proposed amendment without Aero's consent;
- Petition filed at Commission to bless BellSouth's behavior.

Section 17's change of law provisions use the general dispute resolution procedure found in Section 11 of the interconnection agreement. This requires an aggrieved party to petition the Commission for resolution of a dispute. And in the interim, "the Parties agree to carry on their respective obligations under this Agreement, while any dispute resolution is pending." Here, BellSouth has it backwards. BellSouth tried to unilaterally impose a change of law provision and is now seeking a petition to resolve the dispute.

The negotiation process envisioned by the interconnection agreement is designed specifically to avoid this result. If an incumbent carrier can impose its will based on its interpretation of changes of law, the competitor loses any possible leverage in negotiation. An incumbent can, as is the case here, unilaterally change the terms of the deal without regard to the competitors' customers or its business plan. BellSouth should be sanctioned for this behavior.

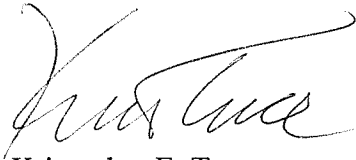
⁵ This number is obtained by adding the cost of the features of the switch. With UNE-P, all features of the switch are included in the price. With resale, each feature is charged separately. The total wholesale cost of these features for a typical customer is \$76.50.

V. Conclusion

For the foregoing reasons, Aero respectfully requests that the Commission dismiss the Petition in Case No. 2004-00501 without prejudice.

It should also be noted that Aero has several issues regarding the services provided under its interconnection agreement with BellSouth. This issue is one of five issues that the parties were negotiating. Depending on the procedural resolution of this Petition, Aero reserves the right to seek relief from BellSouth's violation of its interconnection agreement for any or all of these issues through the formal complaint process and/or civil action.

Respectfully submitted,



Kristopher E. Twomey

Counsel to Aero Communications, LLC