



KRISTOPHER E. TWOMEY
TELECOM/INTERNET LAW ■ REGULATORY CONSULTING

July 14, 2005

RECEIVED

Ms. Beth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
Frankfort, KY 40602-0615

JUL 15 2005

PUBLIC SERVICE
COMMISSION

Re: Petition of Aero Communications Regarding Case No. 2004-00501

Dear Ms. O'Donnell:

Please find enclosed an original and four (4) copies of Aero Communications, LLC's Petition for an Order Further Clarifying the Commission's June 13, 2005 Order, to Ensure Compliance with FCC Transition Period for the UNE-P "Embedded Customer Base." Please contact me at the California office with any questions.

Sincerely,

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

Kristopher E. Twomey
Counsel to Aero Communications, LLC

cc: Todd Heinrich

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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)	Case No. 2004-00501
RESULTING FROM CHANGE OF LAW,)	
KENTUCKY BROADBAND ACT)	

**PETITION OF AERO COMMUNICATIONS, LLC FOR AN ORDER FURTHER
CLARIFYING COMMISSION’S JUNE 13, 2005 ORDER, TO ENSURE
COMPLIANCE WITH FCC TRANSITION PERIOD FOR THE UNE-P
“EMBEDDED CUSTOMER BASE”**

Aero Communications, LLC (“Aero”), by and through counsel, hereby submits the following Petition for Case No. 2004-00501:

I. Background

Aero has been a party to the above-entitled docket from its inception. The Kentucky Public Service Commission (“Commission”) issued an order in this docket on April 29, 2005 (“April 29 Order”) eliminating BellSouth’s obligation to provide Digital Subscriber Line service (“DSL”) over Unbundled Network Element Platform (“UNE-P”) loops. To enact this Order, the Commission required parties to amend their interconnection agreements accordingly with BellSouth. Aero has attempted to negotiate with BellSouth to ensure that Aero’s embedded base customers do not face massive rate increases. Negotiations have thus far failed.

The Commission issued its most recent order on June 13, 2005, addressing the Cinergy Communications Company (“Cinergy”) Petition for Rehearing, or, in the alternative, Clarification of Order (“Cinergy Order”). The Cinergy Order affects rights and obligations between BellSouth Telecommunications, Inc. (“BellSouth”) and Aero as well. The Cinergy Order rejected the carrier’s request for a rehearing, but granted Cinergy’s motion for clarification. Aero seeks further clarification and an order compelling BellSouth to revise its amendment to conform with the April 29 Order, the

spirit of the Cinergy Order, and the direct requirements of the Triennial Review Remand Order.

II. Introduction

After the April 29 Order, Aero decided to accelerate its plans to build out additional collocation facilities at BellSouth central offices. Through this network build, Aero will be able to move most of its embedded base of roughly 125 DSL on UNE-P customers (“the embedded base”) to Aero-owned facilities. Aero is currently progressing with its collocation plans and expects to be able to move the customers in approximately four months, assuming no major problems arise and that BellSouth meets its proposed facility construction dates.

Aero also entered into negotiations with BellSouth to amend the interconnection agreement between the parties to reflect the April 29 Order. Aero’s goal in these negotiations was to ensure that the status quo be maintained for the embedded base while those customers were being transitioned to Aero’s facilities.¹ These negotiations quickly hit a snag. Because the embedded base was served via UNE-P, Aero provided all calling features to its customers as part of its package of services. BellSouth agreed to allow Aero to continue providing services to the embedded base during the transition, but via resale. This actually did not present a major change because prior to the April 29 Order, all DSL over UNE-P customers were actually being served by resold lines, and BellSouth was providing a credit for the difference between the resale and UNE-P price. Aero agreed that BellSouth should no longer be required to pay credits to Aero, but asked that the calling features be provided without charge during the approximately four month transition period. BellSouth refused and demanded that all calling features be paid for in full. The net effect of this would be to raise the price to embedded base customers by as much as fifty dollars per month, per customer.²

Aero refused to accept such changes and has refused to sign such an amendment. The negotiations have now hit a complete standstill as BellSouth refuses to, in earnest, negotiate an amendment. Instead, BellSouth has offered the amendment on a take-it-or-

¹ To the extent that any of BellSouth’s filings during this negotiation period implied or suggested that Aero was not actively engaged in negotiations, they are incorrect.

² See attached Affidavit of Todd Heinrich, Chief Executive Officer, Aero Communications, LLC.

leave-it basis. This, despite the fact that it costs BellSouth virtually nothing to continue providing calling features to the embedded base.

Perhaps BellSouth believes that if Aero's embedded base customers are alerted to such a massive price increase, the customers will return to BellSouth. BellSouth should not be allowed to use the interconnection agreement amendment process as part of a customer win-back strategy.

Aero has only sought this "concession" (BellSouth is actually legally required to maintain the status quo for some time, as discussed below) until the interconnection agreement expires in approximately *six months*. Aero has asked BellSouth to reconsider its request in light of the Cinergy Order, but BellSouth has refused. Because of BellSouth's unreasonable and legally unsustainable stance, Aero is now forced to Petition the Commission for, in essence, a clarification of its clarification to protect Kentucky consumers from large price increases.

III. Argument

As Cinergy stated in its Petition, the Federal Communications Commission ("FCC") Triennial Review Remand Order ("TRRO") establishes a transition period to ensure that "embedded" UNE-P customers are not forced to immediately pay higher rates.³ The Commission, by granting Cinergy's alternative request for clarification, clearly agreed with this understanding of the TRRO. By addressing the relationship between Cinergy and BellSouth in the Cinergy Order only, BellSouth is interpreting the ruling in such a way would contradict and override the FCC requirement that embedded customers such as Aero's be protected during the transition period.

In the Cinergy Order, the Commission stated that as long as BellSouth upholds its commitment to continue to credit non-DSL lines (which would have been over UNE-P but for BellSouth's choice to put them over resale lines), they are in compliance. This requirement is crafted specifically to deal with Cinergy's business customer arrangements, as those customers order multiple lines (or a "hunt group"), one of which carries DSL over UNE-P voice, the others just voice. The Commission concluded that

³ *Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of incumbent Local Exchange Carriers*, WC Docket No. 01-338, FCC 04-290 (Feb. 4, 2005).

those voice-only lines should be protected as embedded, and credited so that the cost for these lines does not increase until the end of the transition period.

In the ordering paragraph, however, the Commission states that, “BellSouth must continue to treat those lines which, but for the presence of DSL, would have been UNE-P in a manner that prices those at the UNE-P rates during this transition period.”⁴ Aero argues that this is a broader statement addressing the non-Cinergy-specific requirement for BellSouth to maintain *status quo* pricing for *all* embedded customers for all carriers. The Commission appropriately seems to be invoking the TRRO as the authority requiring such a transition period, although it does not cite the TRRO specifically. This is further implied in the Cinergy Order, as the Commission does refer specifically to the “transition period.”⁵

Aero’s current UNE-P customers, unlike Cinergy’s, are all residential customers who all subscribe to DSL service. Thus, if the language fact-specific to Cinergy is read to apply literally and generally to all carriers, as BellSouth has argued, would exclude these Aero embedded customers from rate protection during the transition period. This interpretation is not in the spirit of the TRRO, and is unduly harmful to Kentucky consumers.

The TRRO establishes a twelve-month period, within which Incumbent Local Exchange Carriers (“ILECs”) like BellSouth, “must continue providing access to mass market unbundled local circuit switching at a rate of TELRIC plus one dollar for the competitive LEC to serve those customers until the incumbent LECs successfully convert those customers to the new arrangements.”⁶ This rate protection is *independent* of whether the customer is using the line for voice or DSL. The stated purpose of the transition plan is to facilitate the transition from UNE-P to alternative transport options, in light of the removal of significant dedicated transport unbundling obligations.⁷ Despite the substantial capital and manpower required, Aero is complying with the TRRO’s demands and moving quickly to establish collocation facilities with BellSouth.

⁴ Order, *In the Matter of: Petition to Establish Docket to Consider Amendments to Interconnection Agreements Resulting from Change of Law, Kentucky Broadband Act*, Case No. 2004-00501 (Ky. P.S.C. June 13, 2005) at p. 3.

⁵ *Id.*

⁶ TRRO at paragraph 216.

⁷ TRRO at paragraph 142.

For its part, BellSouth is seeking to squeeze Aero for every last nickel, and threaten Aero's customer base, before the facility change is complete.

As the FCC acknowledged in the TRRO, Aero needs the guaranteed protection of this transition period to restructure its network and the rates at which it provides its service. More importantly, Aero's Kentucky customers deserve an opportunity to consider their options, without incurring significant and immediate price increases in the meantime. While it has been settled that the Commission can no longer require BellSouth to provide DSL over UNE-P to Aero, the Commission can and must protect Kentucky consumers by ensuring that their rates not increase as dramatically as BellSouth would require.

V. Conclusion

By this Petition, Aero seeks further clarification of the Commission's June 13, 2005 Order, so that Aero's embedded customers are protected from significant rate increases during the transition period. BellSouth has refused to agree to maintain current UNE-P rates for Aero's customers during the transition period, instead seeking extra money out of Aero's customers' pockets for service features that were included for free, and that cost BellSouth a negligible amount to supply. The purpose of the FCC TRRO transition period is to protect *all* embedded customers. Aero understands that any language framing this protection in such a manner (specific to Cinergy's relationship with BellSouth) that would contradict the FCC Order and harm Kentucky consumers, was not intended. Aero, therefore, respectfully requests that this Commission clarify that its Cinergy Order indeed requires BellSouth to maintain prior UNE-P rates for *all* Aero embedded customers during the transition period. The Commission should issue an order that it will reject any contract amendments that would have the effect of materially increasing customer costs for any carrier's DSL over UNE-P embedded base.

Respectfully submitted,

Kristopher E. Twomey
Andrew M. Ganz
Counsel to Aero Communications, LLC

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AFFIDAVIT OF TODD HEINRICH

I, Todd Heinrich, Chief Executive Officer (“CEO”) of Aero Communications, LLC (“Aero”), being first duly sworn, do hereby swear that the following is true:

1. I am CEO of Aero. I have been with Aero since it was established in 1999. I handle various aspects of Aero’s overall operations, including management of company growth, additional services and methods of future service deployment.

Purpose of Affidavit

2. This Affidavit explains the negative impact a rejection of Aero’s Petition would have; particularly on Aero’s Kentucky customers. Specifically, this Affidavit will illustrate how allowing BellSouth to increase rates for Aero’s embedded UNE-P customers during the “transition period” will increase costs to these customers significantly, while maintaining the status quo during the transition period would cost BellSouth nothing.

Declaration

3. Aero’s bundled voice and DSL product has been a small, but important service offering contributing to help Aero build a strong customer base in Kentucky. Nevertheless, Aero understands and respects the Commission’s order in this docket,

especially in light of the Federal Communication Commission's ("FCC's") Triennial Review Remand Order ("TRRO") and order in the BellSouth Broadband Services to Competitive LEC UNE Voice Customers docket.

4. Aero has already anticipated the probability that it would have to move on from the UNE-P "era", and has already begun to file collocation applications in BellSouth territory. Aero is steadily moving in the direction of establishing their own telecommunications facilities to provide service to its Kentucky customers.

5. As Cinergy discussed in its most recent Petition and Declaration in this docket, this transition process is a long one. Although Aero has already made significant headway in its move from UNE-P to its own facilities, we are not nearly finished. Also, similar to Cinergy, we expect to complete our transition to full Aero-owned facilities sometime in 2006.

6. Aero currently has approximately one hundred twenty five (125) customers receiving DSL over UNE-P lines from BellSouth ("embedded customers").

7. Aero also has an interconnection agreement ("ICA") in place with BellSouth that is set to expire in early 2006. Under this ICA, Aero purchases UNE-P, which includes all voice calling features at no additional charge as part of the package. Aero passes this arrangement along to its customers as a flat-fee service plan. In other words, under their plan with Aero, customers receive DSL and local voice, along with call waiting, voice mail, and other features at no additional charge.

8. If BellSouth is allowed to implement the amendment they have demanded to the ICA, these features will no longer be included in the package. Aero will incur an

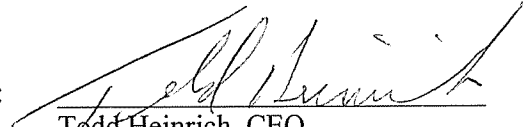
additional charge of \$50 or more for these features; and will have no choice but to pass these price increases along to its embedded customers.

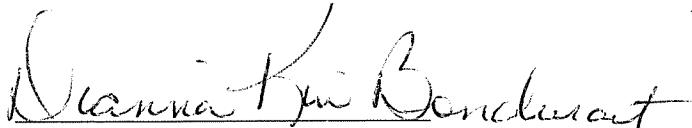
Conclusion

9. Although I personally believe that Aero and its embedded customers are entitled to remain at current UNE-P rates during the transition period outlined by the FCC in its TRRO, I am not a lawyer. I do know that it seems unfair to put Aero and its embedded customers in a position where we must *immediately* incur substantial new costs based on a change in the law. Aero needs at least some transition time to finalize and implement our new service offerings, so that it we can offer competitive rates and services to our embedded base of customers. Aero's customers should be entitled to some time as well, to assess their options among the competition, rather than either incur immediate hefty increases, or be forced to switch providers in haste. It seems to me this is precisely why the FCC created a transition period. The Commission can easily implement this plan by ordering BellSouth to maintain current UNE-P rates, or at the very least, provide the calling features for no charge, until Aero's transition to its own facilities is complete.

STATE OF KENTUCKY }
COUNTY OF McCRACKEN }

Subscribed and sworn to before me by Dianna Kim Bendureant on this 5th
day of July, 2005.

By: 
Todd Heinrich, CEO
Aero Communications, LLC


Notary Public

My commission expires: / /
April 23, 2007