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April 19, 2005

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

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

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of BellSouth Telecommunications, Inc.'s Brief in Response to Commission's March 30, 2005, Order.

Sincerely,

Dorothy J. Chambers

Enclosure

cc: Parties of Record

582066

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, KENTUCKY BROADBAND ACT	)))))	CASE NO. 2004-00501

BELLSOUTH TELECOMMUNICATIONS, INC.'S
BRIEF IN RESPONSE TO COMMISSION'S MARCH 30, 2005, ORDER

I. Introduction

BellSouth Telecommunications, Inc. ("BellSouth") by counsel, hereby files its brief in accordance with the Kentucky Public Service Commission's ("Commission") March 30, 2005, Order in this case.

As discussed herein, the Kentucky Broadband Act eliminates state regulation of broadband. Furthermore, the Federal Communications Commission's ("FCC") recent Declaratory Ruling[1] has the same result as the Kentucky Broadband Act, that is, the elimination of state requirements on 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. Moreover, as the FCC's recent Declaratory Ruling stated, that this Commission's 2002 Cinergy decision "undermine[s] the effectiveness of the

[1] Memorandum Opinion and Order and Notice of Inquiry, *BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commission 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. Mar. 25, 2005). (FCC Broadband Order).

incentives for deployment including the advancement of Section 706 goals that were at the heart of the Federal Communications Commission's mass market loop unbundling rules and therefore do not pass muster under Section 251(d)(3)(C) of the Act."

This Commission should recognize the overwhelming legal basis, as well as the sound policy reasons, requiring the withdrawal of the 2002 Cinergy Order, in order to give effect to the Kentucky Broadband Act and the FCC Declaratory Ruling. This Commission should post haste require CLEC parties to execute the appropriate amendment to their interconnection agreements.[2]

II. Procedural Background

This docket grows out of the passage of the Kentucky Broadband Act ("Broadband Act"), KRS 278.546, *et seq.* The Broadband Act, passed overwhelmingly by the Kentucky Legislature in the 2004 session of the General Assembly, was signed into law by Governor Ernie Fletcher, and became effective July 13, 2004. The Broadband Act prohibits and eliminates all state regulation of broadband services, including previously imposed state commission regulation. Following enactment of the Broadband Act, and in accordance with the change of law provisions in the affected CLEC Interconnection Agreements, BellSouth began negotiations with each of those CLECs to execute an appropriate amendment implementing the provisions of the Broadband Act.[3] On December 10, 2004, BellSouth filed the Petition that resulted in the initiation of this docket.

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[2] *See* Exhibit B to Complaint in this docket.

[3] Only one of the six CLECs with an impacted Interconnection Agreement, EveryCall Communications, signed an amendment to the Interconnection Agreement relating to the DSL over UNE-P change of law issue. As a result, by letter dated January 20, 2005, BellSouth withdrew its Petition as to EveryCall.

Following initiation of this docket, on December 22, 2004, the Commission issued a procedural order requiring CLECs to file written comments to BellSouth's Petition and setting an informal conference. Subsequent to the filing of comments and various proposals from CLECs for either further proceedings or consolidation of this proceeding with the generic change of law proceeding,[4] as well as attempts to raise alleged billing disputes, this Commission's Order of March 30, 2005, denied the request to consolidate, confirmed that any billing disputes should be handled in a complaint proceeding, and set a briefing schedule. This brief is filed in accordance therewith.

III. Argument

A. The Kentucky Legislature Found Streamlined Regulation Encourages Telecom Investment.

Section 1 of the Kentucky Broadband Act contains factual findings by the legislature that "[s]treamlined regulation in competitive markets encourages investment in the Commonwealth's telecommunications infrastructure," and that "[c]onsumers in the Commonwealth have many choices in telecommunications services because competition between various telecommunications technologies such as traditional telephony, cable television, Internet, and other wireless technologies has become commonplace." KRS 278.546(2)(3).

B. Kentucky Broadband Act Defines Broadband in the Same Terms Used by the FCC.

Section 2 contains the definitions used in the Kentucky Broadband Act. That section defines "broadband" as "any service that is used to deliver video or to provide

[4] As detailed in the Commission's March 30, 2005, Order, various CLECs opposed or supported these multiple proposals and stated a variety of positions on how this matter should be handled.

access to the Internet and that consists of the offering of the capability to transmit information at a rate that is generally not less than two hundred (200) kilobits per second in at least one direction; or any service that combines computer processing, information storage, and protocol conversion to enable users to access Internet content and services." *Id.* § 2(1).[5]

Most importantly, Section 3 of the Kentucky Broadband Act provides that:

> (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 provide*r 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.*
>
> (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

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[5] The Kentucky Broadband Act exactly mirrors the FCC's definition of "broadband." *See, e.g.*, Notice of Proposed Rulemaking and Order on Reconsideration, *Local Telephone Competition and Broadband Reporting*, 19 FCC Rcd 7364, 7365, ¶ 2 n.3 (2004) ("[W]e use the term 'broadband services' to refer to those services that deliver an information carrying capacity in excess of 200 kbps in at least one direction."). The FCC has long considered DSL a form of broadband service. *See, e.g.*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3783, ¶ 190 (1999) ("DSL-capable loops provide end users with broadband data transmission, which allows rapid access to the Internet.").

broadband services, access for those service providers that use or make use of the publicly switched network.

(3) The commission shall have jurisdiction to investigate and resolve consumer service complaints.

(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.

Id. § 3 (emphasis added).

C. The Kentucky Broadband Act Eliminates Any Commission Requirement on BellSouth to Offer Broadband DSL on Competitors' Voice Lines.

The Kentucky Broadband Act prevents the Commission from regulating broadband services, including BellSouth's DSL transmission service, which is offered under federal tariff. That means, among other things, that the Commission cannot regulate the terms and conditions of BellSouth's DSL service by requiring BellSouth to continue to provide that service on voice lines leased by CLECs as UNEs.

This Commission attempted to impose just such an obligation in the arbitration proceeding involving BellSouth and Cinergy Communications.[6] Therein, the Commission held that BellSouth was required to keep offering its DSL transmission service even where Cinergy had leased from BellSouth as UNEs (and thus obtained control over) the phone lines and equipment serving the customer in question. Furthermore, the Commission found no federal-law basis for imposing this requirement. The Commission's order stated that BellSouth's practice violated the Commission's understanding of Kentucky state law, as it was then. *See July 2002 Order* at 7-8 (concluding that BellSouth's practice "undercuts *our own long-held policy*")

[6] *See* Order, *Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, Case 2001-00432, 2002 Ky. PUC LEXIS 764 (Ky. P.S.C. July 12, 2002) ("July 2002 Order").

(emphasis added); *id.* at 7 (discussing "Kentucky customers"); *id.* at 2 (announcing that the FCC's contrary determination was not "preemptive"). A dissenting opinion made clear that the Commission was relying solely on state law here. *Id.* at 10 (opinion of Chairman Huelsmann) ("The majority today tells BellSouth that, while at the federal level you can refuse, at the Kentucky state level you cannot refuse.").

The Kentucky Broadband Act resolves the issue raised by the *Cinergy* case – whether this Commission may require BellSouth to provide broadband service to CLEC voice customers – and it does so even if federal law did not preempt such state-law requirement.[7] Under the Broadband Act, the Commission simply may not regulate BellSouth's broadband DSL service in the manner attempted in *Cinergy*. Section 3(1) of the Broadband Act states that broadband – the very subject of that case – is "*not subject to state administrative regulation.*" *Id.* § 3(1) (emphasis added). The Broadband Act further establishes in Section 3(2) that "*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.*" *Id.* § 3(2) (emphasis added). That statutory provision clearly applies to this Commission's decision in *Cinergy*, which took place before July 15, 2004, and which imposes requirements on a broadband service by requiring that BellSouth provide that service under certain terms and conditions, *i.e.*, on lines leased to CLECs such as Cinergy as UNEs.

The Broadband Act, moreover, states unequivocally that "no agency of the state shall impose or implement any requirement" that relates to the "[t]he availability of facilities or equipment used to provide broadband services" or to the "rates, terms or

[7] Of course, as discussed herein, the FCC also has confirmed that this Commission's 2002 Cinergy decision must be vacated because it exceeds state authority and is inconsistent with the FCC unbundling rules and policies. *See* Section IV of this Brief.

conditions for, or entry into, the provision of broadband service." *Id.* § 3(1). Under any rational understanding, a rule mandating that BellSouth provide its broadband transmission service to CLEC UNE voice customers involves a requirement that relates to both the "availability of facilities or equipment" and to the "rates, terms, or conditions" under which BellSouth offers its service.

That conclusion is not affected by attempted support of the Commission's decision referencing potential effects on voice service. *See* July 2002 Order at 7 (discussing "market power in the voice market"); Reconsideration Order at 5 (ordering clause 1) stating that PSC's goal is to further "competitive voice service in Kentucky"). Regardless of motivation, there is no question that the 2002 Cinergy Order *regulates* broadband (i.e., DSL) service. Clearly, the Commission's 2002 Cinergy Order dictated the terms and conditions under which BellSouth offers its broadband service. *See, e.g.*, *id.* at 3 (stating that the issue was about "DSL over the UNE-P"); *id.* at 4 (holding that "BellSouth may not refuse to provide DSL" in relevant circumstances); *id.* (finding that it is "feasible" to "provide DSL and voice over the same loop"). Id. at 5 (ordering clause 1) ("BellSouth shall not refuse to provide any DSL service to a customer on the basis that a customer receives UNE-P-based voice service from a CLEC.") A plain reading of this Order reveals that it regulates the terms and conditions of broadband service, which is precisely what the Broadband Act forbids.

Nor do any of the exceptions in the Broadband Act permit this sort of regulation of BellSouth's DSL service.

First, Section 3(2) provides that the Broadband Act does 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, . . . to the extent required under 47 U.S.C Sections 251 and 252, and any regulations issued by the Federal Communications Commission . . . ." *Id.* § 3(2).

This provision is not pertinent because there is no question here of the Commission's authority to require access to unbundled elements to the extent required by *federal* law, or to enforce *federal* law in the course of an arbitration proceeding.[8] As discussed above, the Order did not even purport to rely upon federal law in imposing obligations on BellSouth in the *Cinergy* proceeding. Moreover, the Order could not have relied upon federal law to support such obligations because the FCC has repeatedly refused to interpret sections 251 and 252 to impose the same requirements that were adopted in the 2002 Order.

In the *Triennial Review* proceeding, for example, the FCC faced the same legal issue that is presented here: whether ILECs should be required to provide broadband services to CLEC UNE voice customers. CompTel had complained that "a customer that wishes to obtain xDSL service from the ILEC while obtaining local voice service

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[8] It is not the offering of UNE loops to Cinergy, but the requirement to provide a tariffed broadband service under certain terms and conditions that is at issue here. The requirements at issue here also do not implicate federal requirements that ILECs permit CLECs to engage in "line-splitting." Line-splitting involves a *second CLEC* offering broadband service on a CLEC voice line. *See*, FCC's Broadband Opinion released March 25, 2005. *See also,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978, 17130, ¶ 251 (2003) ("line splitting" "describe[s] the scenario where one competitive LEC provides narrowband voice service over the low frequency portion of a loop and a second competitive LEC provides xDSL service over the high frequency portion of that same loop") ("*Triennial Review Order*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), *petitions for cert. pending*, Nos. 04-12, 04-15 & 04-18 (U.S. filed June 30, 2004). Here, the KPSC has sought to require BellSouth, an ILEC, to provide broadband service on a CLEC UNE line.

from a competing carrier often is rejected by the ILEC."[9] CompTel urged the FCC to establish a "low-frequency portion of the loop" UNE (an arrangement substantively identical to what the PSC required here) to "end these tying arrangements" in order to "permit subscribers to obtain xDSL and voice services from the providers they choose."[10]

The FCC "disagree[d]" with CompTel's claims and held that the proper way to handle this issue was for a "narrowband service-only competitive LEC to take full advantage of an unbundled loop's capabilities by *partnering with a second competitive LEC that will offer xDSL service*" or by offering its own competing broadband service. *Triennial Review Order,* 18 FCC Rcd at 17141, ¶ 270 (emphasis added). Under the FCC's decision, therefore, a CLEC that does not wish to invest in broadband capabilities should "partner[] with a second competitive LEC"; the Commission rejected the claim that it should force the ILEC into offering broadband services. *Id.*; *see also id.* at 17140-41, ¶ 269 ("In the event that customer ceases purchasing voice services from the incumbent LEC, *either the new voice provider or the xDSL provider, or both, must purchase the full stand-alone loop to continue providing xDSL service.*") (emphasis added).

In sum, the *Triennial Review Order* made very clear that the FCC's national broadband policy was that either the CLEC voice provider or a partnering CLEC broadband provider – not an ILEC being forced to offer service against its will – should provide broadband services to the CLEC voice customer. *See also id.* at 17135, ¶ 261 (proper policy should encourage CLECs to develop their own "bundled voice and xDSL

[9] Comments of the Competitive Telecommunications Association, CC Docket Nos. 01-338, *et al.*, at 43 (FCC filed Apr. 5, 2002).
[10] *Id.*

service offering"; rejecting line sharing as anti-competitive because it would "discourage innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings").

Indeed, even before the *Triennial Review Order*, the FCC repeatedly concluded that BellSouth's policy was not merely consistent with federal law, but also affirmatively *non*discriminatory. For instance, in the *Georgia/Louisiana 271 Order*[11], the FCC not only rejected claims that BellSouth's policy violated federal law, but also found that "furthermore," in light of the ability of CLECs to engage in line-splitting, it "cannot agree" with the claims made by AT&T, CompTel, and others that the same policy at issue here is "discriminatory." *Georgia/Louisiana 271 Order*, 17 FCC Rcd at 9100-01, ¶ 157 & n.562. The Commission reiterated these conclusions in the *BellSouth Five-State 271 Order*[12] – the order that granted BellSouth the authority to offer long-distance services in Kentucky – where it again emphasized the ability for CLECs to engage in line splitting and again affirmatively rejected claims of discrimination. *BellSouth Five-State 271 Order*, 17 FCC Rcd at 17683, ¶ 164; *see also Florida/Tennessee 271 Order,* 17 FCC Rcd at 25921-22, ¶ 177 (rejecting claim that the same policy was contrary to the public interest).[13]

In sum, because the FCC's rules establish that 47 U.S.C. §§ 251 and 252 do *not* impose the obligations that the 2002 Order mandated here, a state commission's duty

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[11] Memorandum Opinion and Order, *Joint Application by BellSouth Corporation, et al. for Provision of In-Region, InterLATA Services In Georgia and Louisiana*, 17 FCC Rcd 9018 (2002)("*Georgia/Louisiana 271 Order*").

[12] Memorandum Opinion and Order, *Joint Application by BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina*, 17 FCC Rcd 17595 (2002)("*BellSouth Five State 271 Order*").

[13] Memorandum Opinion and Order, *Application by BellSouth Corporation, et al., for Authorization To Provide In-Region, InterLATA Services in Florida and Tennessee*, 17 FCC Rcd 25828 (2002) ("*Florida/Tennessee 271 Order*").

to "arbitrate" agreements to "the extent required under 47 U.S.C Sections 251 and 252, and any regulations issued by the Federal Communications Commission" does not authorize this Commission to require BellSouth to provide DSL service on CLEC UNE lines. KRS 278.5462(2); *see also* 47 U.S.C. § 252(c) (specifying that a state commission's duty to arbitrate requires ensuring compliance with section 251 and the FCC's rules implementing that provision).

Second, KRS 278.5462 of the Broadband Act states that "[n]othing 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." *Id.* § 3(2). This exception clearly does not apply to this case, as it affects only "access . . . rates and charges" or "other lawful" charges that might be paid by broadband providers. This case does not involve any question of whether BellSouth may assess any "rate" or "charge" on a CLEC. In this regard, BellSouth notes that an "access" charge is a term of art referring to the charges that carriers have to pay to local carriers when they originate or terminate calls on a local network.[14] That concept is inapplicable to this case.

Third, KRS 278.5462(2) provides that "[n]othing 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." *Id.* § 3(2). This provision does not apply here because the CLECs are not seeking access to a service provided over the "publicly switched network." Broadband services such as DSL do not use the "publicly switched network." The "publicly switched network" refers to the traditional circuit switches that have been used to direct voice phone calls from one

[14] *See generally* Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221 (1999).

location to another. So too, traditional dial-up Internet connections make use of the publicly switched network.[15] Broadband DSL services, however, involve a dedicated connection that avoids the publicly switched network and relies on separate "packet switched" facilities to direct traffic on the Internet. Thus, the FCC commonly distinguishes broadband services from those provided over the publicly switched network.[16] Courts have recognized the difference as well.[17]

Moreover, if KRS 5462(2) were taken to mean that "service providers" have a right to "access" BellSouth's very equipment and lines, it would become an exception that swallows the rule. In any event, this exception does not establish an affirmative right to anything. It merely states that the Kentucky Broadband Act does not "*preclude*" access; it does not create any authority for the Commission to create *new* access obligations, much less obligations that contradict federal law.

Fourth, KRS 5642(3) provides that "[t]he commission shall have jurisdiction to investigate and resolve consumer service complaints." This exception is not pertinent to CLEC claims, as those are not complaints by "consumer[s]." Beyond that, the

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[15] *See, e.g.*, Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3025-26, ¶ 11 n.18 (2002) ("Dial-up or narrowband Internet access utilizes the same public switched telephone network (PSTN) infrastructure that telephone subscribers use to place traditional circuit-switched voice calls.").

[16] *See, e.g.*, Memorandum Opinion and Order, *Petition for Declaratory Ruling that pulver.com's Free World Dialuplis Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd 3307, 3307-08, ¶ 2 n.3 (2004) (specifically stating that the ruling applies only to "broadband connection[s]," not to any "communications that originate or terminate on the public switched telephone network"); Report and Order and Further Notice Of Inquiry, *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, 16 FCC Rcd 6417, 6484, ¶ 177 (1999) (discussing distinction between "packet-switched" internet services and those dial-up services that use the "publicly switched network"); Staff Working Paper, *Internet Over Cable*, 1998 FCC LEXIS 4518, at *17 (FCC rel. Sept. 3, 1998) ("The communications and communications services made possible by the Internet are fundamentally unlike those provided in the past over the *technologically separate public switched telephone network*.") (emphasis added).

[17] *See, e.g., Microsoft Corp. v. Multi-Tech Sys., Inc.*, 357 F.3d 1340, 1344 n.2 (Fed. Cir. 2004) ("A 'circuit-switched network,' such as the Public Switched Telephone Network, is one in which a connection is established from one user to the other such that the users have exclusive and full use of the circuit until the connection is released. . . . In contrast, a 'packet-switched network,' such as the Internet, is one in which data packets are relayed through various stations on a network.").

Broadband Act merely grants the Commission jurisdiction to "investigate" and "resolve" service complaints, it does not state (nor could it without being self-defeating) that the Commission may exercise that jurisdiction by imposing obligations on broadband providers. Rather, in investigating and resolving such issues, the Commission is still bound by the Legislature's explicit judgment that "[t]he provision of broadband services shall be market-based and not subject to state administrative regulation."

Finally, KRS 278.5462(4) of the Kentucky Broadband Act provides that "[n]o 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." *Id.* § 3(4). This provision does not apply to this case either. It merely establishes a non-discrimination rule: If a "telephone utility" is offering wholesale DSL service to "Internet service providers" under the terms of its federal tariff, it must then offer the same terms and conditions to "competing local exchange carriers." But BellSouth's federal tariff for DSL service makes clear that it would not provide service to anyone in this context.[18] BellSouth's tariff authorizes it to provide DSL transmission only where a line is "served" by an "*existing, in-service, [BellSouth-provided] exchange line facility.*"[19]

Indeed, this Commission acknowledged in its brief to the district court that BellSouth would not provide service in this circumstance under its federal tariff. It stated that BellSouth's federal tariff is "inconsistent with the PSC's ruling."[20] The

[18] BellSouth Tariff, F.C.C. No. 1, Section 28.1.1(A).
[19] BellSouth's Initial Brief on the Merits at 28, Civ. Action No. 03-23-JMH (E.D. Ky. filed June 23, 2003).
[20] BellSouth's Reply Brief at 16, Civ. Action No. 03-23-JMH (E.D. Ky. filed Sept. 5, 2003) (quoting KPSC's Brief on the Merits at 21, Civ. Action No. 03-23-JMH (E.D. Ky. filed Aug. 15, 2003) ("PSC Br.")).

Commission's argument thus was not that it was enforcing nondiscrimination under the federal tariff, but rather that the federal tariff is not binding. *See* PSC Br. 21-22.

IV. The FCC Specifically Determined the 2002 Cinergy Decision is Inconsistent with and Substantially Prevents the Implementation of Federal Unbundling Rules and Policies Developed by the FCC in the *Triennial Review Order*, Exceed[s] the Act's Reservation of State Authority With Regard with Unbundling Determinations

The FCC's Memorandum Opinion and Order (the "FCC Order") released and effective March 25, 2005, granted BellSouth's Emergency Request for a Declaratory Ruling. The issue BellSouth raised in its Emergency Request for Declaratory Ruling is whether a state utility commission, such as the Kentucky Commission, may require an ILEC, such as BellSouth, to provide DSL service to an end user customer that receives voice service from a CLEC that is using UNEs leased by BellSouth. Accordingly, BellSouth's Emergency Request directly implicates the issue presented by this case. Indeed, in discussing the state commission decisions that BellSouth claimed were unlawful, the FCC specifically mentioned the Kentucky PSC's decision at issue in this case, noting that "in a . . . section 252 interconnection agreement arbitration between BellSouth and Cinergy Communications Company ("Cinergy"), the Kentucky Commission ordered BellSouth to provide DSL service to customers receiving service over LEC UNE-P lines.[21] The FCC further noted that BellSouth had brought this case to appeal the Kentucky Commission's decision.[22]

The FCC then held, in no uncertain terms, that the Kentucky PSC's decision here, as well as similar decisions in other states, violated federal law -- in particular, the FCC's holdings in its 2003 *Triennial Review Order*. The FCC held that "the state rulings

[21] FCC Order ¶ 11.
[22] *Id.* ¶ 12.

raised by BellSouth's petition" -- which, as noted, include the Kentucky Commission's 2002 Cinergy ruling at issue here -- "are inconsistent with and substantially prevent the implementation of federal unbundling rules and policies developed by the Federal Communications Commission in the *Triennial Review Order*, and t*hose rulings therefore exceed the Act's reservation of state authority with regard to unbundling determinations.*"[23]

The FCC further concluded that decisions such as the Kentucky Commission's were contrary not only to its express determinations, but also to the core federal policies underlying those legal conclusions. The FCC explained that it had rejected a requirement that incumbent LECs offer DSL service to competitive LEC UNE voice customers so that competitive LECs would have enhanced incentives to deploy their own DSL or other broadband service. As the FCC stated, it rejected requests to impose such an obligation "in order to advance the goals of the Act by spurring 'innovative arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings.'"[24] Under the decisions of the Kentucky Commission and these other state commissions, however, "incumbent LECs and competitive LECs would face a decidedly different set of incentives for the deployment of broadband facilities," thus "undermin[ing] the effectiveness of the incentives for deployment" created by the FCC's *Triennial Review Order*.[25]

Because all of the state commission decisions at issue were contrary to the *Triennial Review Order*, the FCC found it "*unnecessary* . . . to reach conclusions on the

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[23] *Id.* ¶ 17 (emphasis added).
[24] *Id.* ¶ 30 (quoting *Triennial Review Order* ¶ 261).
[25] *Id.*

other grounds on which BellSouth seeks relief from these state orders, including arguments concerning interstate tariffs and information services statutory classification."[26]

The FCC also emphatically has rejected Cinergy's commingling arguments which have been at the heart of Cinergy's argument in this docket:[27]

> Commingling. Based on the language and clear intent of the *Triennial Review Order*, we reject Cinergy's assertion that our commingling rules apply to the provisioning of wholesale DSL services over a UNE loop facility. . . . Thus, the purpose of this provision is to allow a requesting carrier the opportunity to provide service to its customers by 'connecting, attaching or otherwise linking' facilities obtained by UNE offerings and wholesale services. [28]

The FCC concluded, "that the Commission's commingling requirements do not apply where a competitive LEC leases an entire loop facility and seeks to have an incumbent LEC provide services over the competitive LEC's facility."[29]

CONCLUSION

In adopting the Kentucky Broadband Act, the Kentucky Legislature and Governor Ernie Fletcher recognized that state administrative regulation of broadband discourages investment in Kentucky's telecommunications infrastructure. The FCC now also has directly held that the Kentucky Commission's 2002 Cinergy Order regulating broadband violates federal law, is directly contrary to the goals of the Federal Telecommunications Act, and also undermines the effectiveness of incentives for deployment of broadband facilities. The overwhelming conclusion to be drawn is that the 2002 Cinergy decision,

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[26] *Id.* ¶ 17.
[27] *See* Cinergy Comments dated January 19, 2005, and Motion to Suspend and Investigate Tariff and to Consolidate dated February 8, 2005, and Procedural Proposal of Cinergy Communications dated March 7, 2005.
[28] *Id.* ¶ 35 [footnotes omitted.]
[29] *Id.* [footnotes omitted, emphasis added.]

reached by previous Commissioners, appointed in a previous administration, reached a result contrary to federal law and that now also has been reversed by state law.

Accordingly, this Commission should correct its 2002 Cinergy decision, and direct the parties to this proceeding to immediately implement the terms of the Kentucky Broadband Act by executing an appropriate and lawful interconnection agreement amendment in conformance with the amendment attached as Exhibit B to BellSouth's Petition.

Respectfully submitted,

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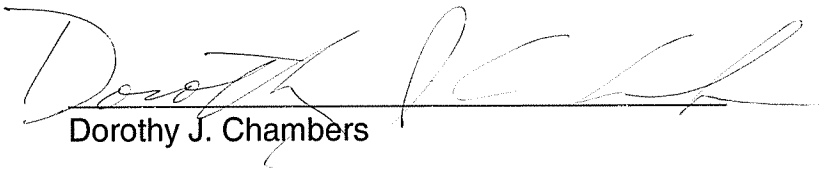
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the individuals on the attached Service List by mailing a copy thereof, this 19th day of April 2005.



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