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PUBLIC SERVICE
COMMISSION

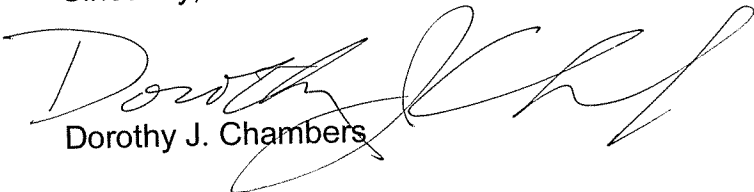
Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602

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 are the original and ten (10) copies of BellSouth's Additional
Comments in Support of Its Change of Law Petition on the Kentucky Broadband Act.

Sincerely,


Dorothy J. Chambers

Enclosures

cc: Parties of Record

575763

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 |) | |

**BELLSOUTH’S ADDITIONAL COMMENTS IN SUPPORT OF ITS
CHANGE OF LAW PETITION ON THE KENTUCKY BROADBAND ACT**

BellSouth Telecommunications, Inc. (“BellSouth”), by counsel, and in response to the Commission Staff’s invitation for additional comments on issues discussed at the informal conference, respectfully submits its additional comments in support of its Change of Law petition on the Kentucky Broadband Act, KRS 278.546 *et seq.*, (the “Broadband Act”).¹ There is no need for an evidentiary hearing or a discovery schedule in this docket. Despite having had ample opportunity to raise possible factual issues in both comments and at the informal conference held in this docket, the CLECs have raised no relevant factual issues in their attempts to delay implementation of the Kentucky Broadband Act. The time for inaction has passed. BellSouth’s change of law petition presents a purely legal issue based on the Act and this Commission should act post haste to implement the Act.

¹ BellSouth will address the various emergency motions for relief in separate pleadings to be filed with the Commission and will limit its comment herein to the limited scope of this docket: implementation of the Kentucky Broadband Act. As noted herein, merging this docket, involving one issue and five CLECs, into a proceeding with many issues and hundreds of CLECs is proposed for, and would accomplish only one thing: delay.

The Act enjoyed the support of the Governor and overwhelmingly passed the General Assembly during the 2004 session with an effective date of July 13, 2004. The Act clearly and unequivocally prohibits and eliminates all state regulation of broadband services, including any previously imposed Kentucky Public Service Commission (the “Commission”) regulation. Nearly eight months have passed since the effective date of the Act, yet the affected CLECs are still stalling on the implementation of the Act. The pattern of stalling and delay must end, it is past due time to implement the law. Continued delay subverts the clear intent and effect of the Act.

The DSL over UNE-P provisions in the five CLEC agreements at issue here are a direct result of the Commission’s 2002 Cinergy Order. Now that the Kentucky Broadband Act no longer permits, and in fact, voids, this type of state regulation of broadband service, the DSL over UNE-P provisions should be deleted through an appropriate amendment, such as Exhibit B to BellSouth’s Petition. BellSouth again requests the Kentucky Public Service Commission (“Commission”) to put an end to unnecessary delay and issue an order implementing the terms of the Act. In the alternative, BellSouth requests the Commission expeditiously set a briefing schedule and, should the Commission find it helpful, set a date for oral argument.

I. The Broadband Act presents a Single Legal Issue Impacting the Interconnection Agreements for Only Five CLECs.

The CLECs collectively have employed numerous diversionary tactics in attempting to avoid the clear intent of the Act – elimination of any state regulation of broadband. For example, Cinergy attempted to insert “perhaps two dozen issues that will need to be arbitrated based upon change of law”² The attempt by Cinergy is to meld

² See January 19, 2005 Cinergy Comments at 5.

this change of law petition presenting but one legal issue affecting five CLECs into a “regulatory sea change’ affecting hundreds of CLECs. The only purpose in combining this distinct issue into a docket involving hundreds of parties and concerning a multitude of issues is to further delay implementation of the Broadband Act. This Commission should reject this brazen attempt at delay.

II. The Commission’s 2002 Cinergy Order Regulated Broadband.

Consistent with the pattern of delay, the CLECs now argue (because the Act clearly prohibits regulation of broadband) that the Commission is regulating voice, not broadband, by requiring BellSouth to provide DSL over lines leased as unbundled network elements (“UNEs”). Such a contorted interpretation is simply not supported by the Commission’s Cinergy Order. The Order plainly states the issue was about “DSL over UNE-P” and held “BellSouth may not refuse to provide DSL.”³ The Order further stated, “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 the CLEC.”

Section 4 of the Kentucky Broadband Act provides that BellSouth must continue to provide DSL to CLECs just as it does to ISPs. BellSouth, in fact, has and continues to provide DSL to ISPs and CLECs alike pursuant to Section 28 of its FCC No. 1 tariff, and did so before the Broadband Act was effective. This particular section was added to the Broadband Act as an amendment to clarify an alleged misunderstanding that the Federal DSL tariff was only available to CLECs that were also ISPs. What this means is that BellSouth will provide its DSL service over lines where it is the underlying dialtone

³ July, 2002 Cinergy Order at 3.

provider, i.e., over a retail or resale line.⁴ However, the 2002 Cinergy Order required BellSouth to provide DSL to Cinergy in a manner different from its FCC tariff by providing DSL service over UNE-P lines. Clearly, the language, intent and effect of the 2002 Cinergy decision, premised on Kentucky state law, were to regulate the terms and conditions of broadband service in a manner inconsistent with BellSouth's FCC tariff. Again, the Commission should end the CLEC's diversion and delay in implementation of the Broadband Act and require the Respondent CLECs, consistent with the Broadband Act, to adopt the Amendment (Exhibit B to BellSouth's Petition in this proceeding) to their Interconnection Agreement.

III. Implementation of the Kentucky Broadband Act has Nothing to Do with Commingling.

Instead of addressing the fact that the Broadband Act does, indeed, prohibit state regulation of broadband and that the Broadband Act impacts the broadband provisions of its interconnection agreement, Cinergy also stretches to find a new basis for delay in the implementation of the Act. Cinergy's commingling argument is yet another meritless argument thrown out to avoid the inevitable conclusion that the Broadband Act applies to the broadband provisions of its interconnection agreement. Cinergy argues the commingling rules adopted in the *Triennial Review Order*⁵, apply to its service on lines

⁴ These terms were available to Cinergy in the arbitration which resulted in the Commission's 2002 Cinergy Order. Kentucky Public Service Commission Order dated July 12, 2002, Case No. 2001-432, *Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*.

⁵ 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 (2003) ("Triennial Review Order"), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Circuit 2004).

leased as UNE's.⁶ As BellSouth has previously stated, commingling is a federal issue which properly should be addressed to the Federal Communications Commission ("FCC").⁷ Moreover, Cinergy's reliance on its commingling argument is misplaced. When the FCC was asked to consider the request that incumbent local exchange carriers ("ILECs") be required to offer DSL transmission on UNE lines, the FCC flatly rejected the request.⁸ The FCC's analysis in the TRO on provision of DSL to CLECs is fatal to the commingling argument.

IV. The TRRO and its March 11, 2005 Elimination of UNE-Ps does not Impact the Kentucky Broadband Change of Law Proceeding.

At the informal conference, the CLECs unearthed yet another reason this Commission should allow the CLECs to delay implementation of the Act, that is, with the elimination of UNE-P consistent with the Triennial Review Remand Order ("TRRO"), they will lose DSL customers since they will not be able to move or make changes to said lines. Again, this is nothing more than an attempt to drag the implementation of the Broadband Act into a larger and more complicated proceeding, thus further delaying the inevitable implementation of the Act.

Today, BellSouth provisions DSL to the CLECs via resale lines and credits the CLEC accounts to effectively make the DSL over resale lines UNE-P equivalents from a cost perspective. Implementing the Act simply eliminates these credits thereby making these lines resale lines in all respects. In fact, implementation of the Broadband Act

⁶ Cinergy also attacks BellSouth's tariff provisions incorporating the commingling rules. BellSouth Tariff F.C.C. No. 1, Section 2.2.3. Of course, arguments as to these FCC tariff provisions properly should be addressed to the FCC not this Commission.

⁷ BellSouth's February 22, 2005, Response to CLEC Comments Regarding BellSouth's Change of Law Petition on the Kentucky Broadband Act @ 8.

⁸ TRO ¶ 270.

should eliminate any CLEC confusion or concerns expressed about the TRRO since the TRRO elimination of UNE-P does not impact resale lines. With implementation of the Broadband Act, these five CLECs will be able to make moves or changes to these resale lines regardless of the TRRO. The only impact is a financial one: BellSouth will cease to provide the CLECs with these credits but the voice lines will stay in place with the same features – an end user will not be impacted, unless the CLEC elects not to provide the service to its customers. The CLEC will continue to have the ability to provide BellSouth’s wholesale DSL service to its customers if it so chooses. Elimination of UNE-P has no bearing on the change of law issue raised by the Broadband Act. The only service impacted by this change of law proceeding is DSL, a broadband service.

V. The Order of the U.S. District Court for the Eastern District of Kentucky Upholding the Commission’s 2002 Cinergy Order did not Preclude Kentucky from Enacting its Broadband Act.

Finally, at the informal conference, counsel for Cinergy lobbed its latest attempt to delay the inevitable implementation of the Act when counsel asserted that once Judge Hood upheld the Commission’s Cinergy Order, the General Assembly could not act to change the outcome of the decision by passing the Kentucky Broadband Act. If the CLEC’s previous argument was “smoke” this final argument is “mirrors”. The CLECs reliance upon *Town of Deerfield v. Federal Communications Commission*, 992 F.2d 420 (2d Cir. 1993) is wholly misplaced. Nothing in the *Deerfield* decision supports Cinergy’s contention that the federal court decision somehow preempted the General Assembly’s right to enact the law of the Commonwealth of Kentucky. A brief discussion of the *Deerfield* case below demonstrates it is factually distinguishable from the instant matter and has no application in this proceeding.

In *Deerfield*, a state court reviewed an existing regulation of the FCC to determine whether it had preempted a Town of Deerfield ordinance enacted after the date of the FCC regulation. The FCC declined to become involved in the matter prior to and during the pending state court action. The state court determined that the FCC regulation had not preempted the Town's ordinance. Subsequent federal court action deferred to the state court judgment concluding that the issue of preemption had been fully and fairly litigated in the state court system. After the state court proceeding had concluded but during the pendency of an appeal of the federal court decision, the FCC belatedly ruled that Town's zoning ordinance was preempted by its regulation. The Town appealed the FCC ruling and the Second Circuit Court of Appeals found in favor of the Town of Deerfield concluding that by making a preemption determination only after the courts had made a determination on its existing regulation and the preemption issue, the FCC violated the jurisdiction of an Article III court judgment not being subject to review by a different branch of the government.

The *Deerfield* decision has no authoritative or persuasive impact in the instant matter. Here, state law **was silent** as to broadband regulation when the federal court affirmed the Commission's exercise of authority over broadband. After the federal court decision, the General Assembly passed a law prohibiting all state regulation of broadband and voided any such regulation prior to the effective date of the statute. There is no question of collateral estoppel or res judicata because state law changed after the federal court involvement. The federal court made no decision on the interpretation of the Kentucky Broadband Act; it could not, the law had not yet been passed. Accordingly, the

Deerfield decision offers no support for CLEC's position or for further delaying or denying the immediate implementation of the Kentucky Broadband Act.

CONCLUSION

For the foregoing reasons, as well as those set forth in BellSouth's Telecommunications, Inc.'s petition and responses to the CLECs' comments, the Commission should issue an Order directing the parties to this proceeding to implement the terms of the Kentucky Broadband Act by executing an appropriate interconnection agreement amendment that conforms with the amendment attached as Exhibit "B" to BellSouth's Petition. In the alternative, the Commission should set a briefing and/or oral argument schedule in this docket.

Respectfully submitted, this 7th day of March, 2005.



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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 7th day of March, 2005.


Dorothy J. Chambers

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