BELLSOUTH

BellSouth Telecommunications, Inc.
601 W. Chestnut Street
Room 407
Louisville, KY 40203

Dorothy.Chambers@BellSouth.com

Dorothy J. Chambers
General Counsel/Kentucky

502 582 8219
Fax 502 582 1573

April 27, 2005

RECEIVED

APR 28 2005

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 in the above-captioned case are the original and ten (10) copies of BellSouth Telecommunications, Inc.'s Response to Briefs of Cinergy Communications Company and SouthEast Telephone, Inc.

Sincerely,

Dorothy J. Chambers

Enclosures

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

Response of BellSouth Telecommunications, Inc.

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, respectfully responds to the Briefs of Cinergy Communications Company ("Cinergy") and SouthEast Telephone, Inc. ("SouthEast").

Introduction

More than a year ago the Kentucky General Assembly enacted House Bill 627.[1] Designed to implement "market-based competition that offers consumers of telecommunications services the most innovative and economical services"[2] and to "encourage investment in the Commonwealth telecommunications infrastructure,"[3] the bill prohibits administrative agencies from imposing requirements, including those at issue here, upon broadband service providers such as BellSouth concerning "the availability of equipment or facilities used to provide broadband service."[4]

---

[1] 2004 Ky. Acts ch. 167.

[2] KRS 278.546(4).

[3] KRS 278.546(2)

[4] KRS 278.5462(1)(a).

In March, 2005 the Federal Communications Commission unambiguously declared that state mandates requiring incumbent local exchange carriers to provide DSL service over a UNE the CLEC is employing to provide voice services to the end user violate federal law.[5] Specifically, the FCC found that the practices Cinergy and SouthEast seek to perpetuate run counter to the FCC's efforts to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"[6] and to "remove barriers to infrastructure investment."[7]

Despite the passage of more than a year since the enactment of HB 627, Cinergy and SouthEast continue to operate under contractual provisions imposed by the Commission in 2002.[8] Whatever the law at the time of the Commission's earlier decision, there can be no dispute that continuing to require BellSouth to provide DSL service over UNEs used by Cinergy and SouthEast to provide voice service is now contrary to federal and state law. Although Cinergy and SouthEast raise a number of arguments as to why they should be permitted to place their private commercial interests ahead of the efforts of the General Assembly and the FCC to ensure the widespread deployment of broadband access, in the final analysis they consist of a disagreement with the policy decisions made by the General Assembly and the FCC. Yet, public policy is established by the General Assembly and not Cinergy and SouthEast.[9] Cinergy further

---

[5] *In the Matter of: BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Service By Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC Docket No. 03-251, FCC 05-75 (rel. March 25, 2005) at ¶¶ 21, 30. ("Declaratory Order.")

[6] *Id.* at ¶ 29.

[7] *Id.*

[8] Order, *Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252*, P.S.C. Case No. 2001-0432 (Ky. P.S.C. July 12, 2002) at 2, 6-7.

[9] *Commonwealth ex rel. Cowan v. Wilkinson*, 828 S.W.2d 610, 614 (Ky. 1992) ("***The establishment of public policy is granted to the legislature alone***. It is beyond the power of a court to vitiate an act of the legislature on the grounds that public policy promulgated therein is contrary to what the court considers to be in the public interest. ***It is the prerogative of the legislature to declare that acts constitute a violation of public policy.***) (emphasis supplied.)

compounds its error by launching a baseless attack in its brief[10] on the General Assembly and BellSouth.

After a year of delay by Cinergy and SouthEast this Commission should not permit them to impede further the implementation of the Broadband Act within the Commonwealth.[11]

Argument

A. The Commission Is Bound By The Statutory Directives Of The General Assembly And The Orders Of The FCC.

Underlying Cinergy's brief is the belief, ill-founded at best, that the Commission may act and make policy contrary to the directives of the General Assembly and the FCC.[12] With regard to state law, the Commission should take this opportunity to remind Cinergy that the Commission "is a creature of statute and has only such powers as granted by the General

---

[10] Cinergy's Brief in large part is an exercise in substituting hyperbole for analysis and derision for authority. Thus, it writes "BellSouth has continued its relentless campaign to shred previous infrastructure sharing commitments and drive both CLECs and unaffiliated ISPs off of BellSouth's network and out of the state" and that BellSouth "will further argue that the Kentucky legislature and the FCC have now endorsed BellSouth's method of smothering voice competition in Kentucky by fencing off access to broadband transmission and Internet access." Cinergy Brief at 2. Cinergy characterizes the General Assembly's enactment of HB 627 as "partially achiev[ing] BellSouth's post § 271 approval goal of limiting the Commission's ability to do anything about BellSouth's policies which have 'the effect of chilling local competition for advanced services.'" Cinergy Brief at 4. Finally, in its most blatant attack on the General Assembly and its policy decisions, Cinergy, without citing any authority, states "[i]t is impossible to construe a purported *deregulation* statute as an exercise of police power." Cinergy Brief at 7 (emphasis in original.) But "the police power is a matter of legislate[ve] prerogative, and in this field the Legislature has wide discretionary powers." *Fuson v. Howard*, 305 Ky. 843, 205 S.W.2d 1018, 1021 (Ky. 1947). In fact, it "is the least limitable of governmental powers." *Roe v. Commonwealth*, 405 S.W.2d 25, 27 (Ky. 1966). As such, the decision to deregulate telecommunications services and to substitute competition is a permissible exercise of the police power. *Illinois Bell Telephone Company v. Illinois Commerce Commission*, 669 N.E.2d 919, 931 (Ill App. Ct. 1996). Even a cursory review of Cinergy's brief makes clear that its disagreement is not so much with BellSouth as with the General Assembly and the FCC.

[11] SouthEast seeks to delay the resolution of this case further by arguing that the Commission should consider the effect of the Declaratory Order in a separate proceeding because the then non-existent Declaratory Order was not mentioned in BellSouth's petition to establish this case. SouthEast Brief at 2-3. SouthEast neglects to cite any Commission rules requiring the Commission to blind itself to developments subsequent to a petition initiating a proceeding such as this. Nor does SouthEast contend it would be prejudiced by the Commission considering an authoritative declaration by the FCC concerning federal law on the contract provision at issue here. Instead, other than promoting administrative inefficiency, SouthEast's request seems designed only to further its continuing efforts at delay.

[12] *See, e.g.*, Cinergy Brief at 4 ("But the Act is not kryptonite – the Commission's powers have not been completely neutralized ... and the Commission is not compelled by the Act to withdraw an order that was legally correct and upheld on direct review.")

Assembly."[13] That grant is "strictly construed and will neither be interpreted by implication nor inference."[14] At a minimum this means the Commission may not deviate from the clear commands of HB 627 whatever the rationale offered by Cinergy and SouthEast for doing so.[15]

Nor does its authority under federal law permit the Commission to side-step the directives of the FCC. To the contrary, to the extent that the Commission's interpretation of federal law conflicts with that of the FCC, the FCC's regulations and orders control under the Supremacy Clause.[16] Here, the FCC unambiguously proclaimed in its Declaratory Order that the contractual provisions SouthEast and Cinergy seek to resuscitate impermissibly interfere with the FCC's efforts to promote the deployment of broadband facilities and thus violate federal law.[17]

The Commission should ignore the blandishments of Cinergy and SouthEast and apply the plain terms of HB 627 and the Declaratory Order.

B. HB 627 Unequivocally Voids Existing State Requirements, Such As Those At Issue Here, Concerning the Availability of Facilities or Equipment Used to Provide Broadband Services.

1. Cinergy Misreads HB 627.

The plain language of the HB 627 makes clear the General Assembly's intent in enacting the bill was to eliminate any authority the Public Service Commission had to regulate broadband services. The Act generally forbids state regulation of broadband services and specifically prohibits state agencies from imposing requirements upon broadband service providers

---

[13] *Boone County Water & Sewer District v. Public Service Commission*, 949 S.W.2d 588, 591 (Ky. 1997). *See also, Public Service Commission v. Jackson County Rural Electric Cooperative, Inc.*, 50 S.W.3d 764, 767 (Ky. App. 2000).

[14] *South Central Bell Telephone Company v. Utility Regulatory Commission*, 637 S.W.2d 649, 653 (Ky. 1982).

[15] *Public Service Commission*, 860 S.W.2d 296, 298-299 (Ky. App. 1993).

[16] Slip opinion, *BellSouth Telecommunications, Inc. v. Cinergy Communications Company*, Civil Action No. 05-CV-16 at 11-12 (E.D. Ky. April 22, 2005) (granting preliminary injunction). *See also, MCI Telecommunications Corporation v. Bell Atlantic Pennsylvania*, 271 F.3d 491, 516 (3rd Cir. 2001).

[17] Declaratory Order at ¶¶ 21, 30.

concerning "[t]he availability of facilities or equipment used to provide broadband services."[18] Unquestionably, the statute bars state agencies from imposing new requirements upon broadband service providers and also voids any such requirements that existed prior to enactment of the Broadband Act. Indeed, the Act provides that "[a]ny requirement imposed upon broadband service in existence as of July 15, 2004, is hereby voided ...."[19] Simply stated, the General Assembly could not have acted with greater clarity in both voiding the Commission's restrictions at issue and prohibiting the Commission from entering any similar restrictions in the future.

Seeking to escape the clear import of the language, Cinergy asks the Commission to construe HB 627 to have no application to regulations imposed by the Commission prior to its enactment.[20] Cinergy's misreading of HB 627 nullifies the Broadband Act's plain language and frustrates the General Assembly's clear intent.

Cinergy maintains that the "only logical reading" of HB 627 is one that preserves Commission decisions that existed at the time of enactment.[21] Of course, no such language can be found in the Act and in fact the statute expressly provides to the contrary.[22] Instead, Cinergy grasps at a fundamentally-flawed reading of KRS 278.5462(2). Specifically, Cinergy argues:

> KRS 278.5462(2), which purports to "void" "any requirement imposed upon broadband service in existence as of July 15, 2004, provides in its very next sentence that this section of the law does not "limit or modify" the duties of BellSouth with respect to UNEs, nor the "commission's authority to arbitrate and enforce interconnection agreements . . ."[23]

---

[18] KRS 278.5462(1)(a)

[19] KRS 278.5462(2)

[20] *See* Cinergy Brief at 4.

[21] *Id.*

[22] KRS 278.5462(2).

[23] *Id.*

But when viewed in its entirety, it is clear that KRS 278.5462(2) does not support Cinergy's argument. The pertinent provision provides:

> 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. secs. 251 and 252, and any regulations issued by the Federal Communications Commission pursuant to 47 C.F.R. secs. 51.503 to 51.513*, inclusive of any successor regulations.[24]

Thus, subsection (2) preserves BellSouth's duties and the Commission's authority only to the extent such is required by Sections 251 and 252 and any regulations issued by the Federal Communications Commission. The questions, then, are what duties are imposed upon BellSouth and what authority is granted to the Commission under these federal provisions.

BellSouth addressed these issues in its initial brief and incorporates that argument by reference here.[25] Simply stated, because Sections 251 and 252 and applicable FCC regulations, as authoritatively determined by the FCC, prohibit the very provisions Cinergy seeks to save, the Commission's authority to "arbitrate" agreements "to the extent required under 47 U.S.C. secs. 251 and 252, and any regulations issued by the Federal Communications Commission" does not authorize the Commission to require BellSouth to provide DSL service on CLEC UNE lines. Accordingly, the Commission must reject Cinergy's argument.

---

[24] KRS 278.5462(2) (emphasis supplied).

[25] BellSouth Brief at 7-11.

2. HB 627 Does Not Violate the Constitutions of Kentucky Or The United States.

(a) HB 627 Does Not Violate Constitutional Requirements For Separation Of Powers.

Because the plain language of HB 627 clearly eliminates state regulation of broadband services, Cinergy attempts to avoid the consequences of HB 627 by asserting that the Act violates both the Kentucky and United States Constitutions.[26] The Broadband Act does not violate either the state or federal Constitution.[27]

Cinergy first contends that by enacting HB 627 the General Assembly violated the separation of powers principles embodied in Sections 27 and 28 of the Kentucky Constitution as well as the Constitution of the United States.[28] Specifically, Cinergy argues that the General Assembly overstepped its constitutional authority by enacting HB 627 while the Commission's arbitration order was under judicial review. Cinergy attempts to support its position by citing to general statements of law. Most particularly, Cinergy points to *Smothers v. Lewis*[29] for the proposition that "a legislative enactment which 'locks horns' with the power of the judiciary to perform 'inherent functions'" violates Sections 27 and 28, and for the notion that "[o]nce the administrative action has ended and the right to appeal arises the legislature is void of any right

[26] Cinergy Brief at 5-7.

[27] Before tackling any of the arguments Cinergy has raised in support of its constitutional claims, it is first necessary to address a jurisdictional deficiency that plagues them all. The Kentucky Supreme Court has held that administrative agencies, like the Commission, lack the authority to rule on the constitutionality of statutes. *Popplewell's Alligator Dock No. 1, Inc. v. Revenue Cabinet*, 133 S.W.3d 456, 470 (Ky. 2004); *Com. v. DLX, Inc.*, 42 S.W.3d 624, 626 (Ky. 2001). This is precisely what Cinergy has asked the Commission to do here by challenging the constitutionality of the Broadband Act. Cinergy would no doubt argue that it is not presenting a facial challenge to the Broadband Act, but, rather, that it is simply asking the Commission not to accept BellSouth's "interpretation." However, the plain language of the Broadband Act and statements taken directly from Cinergy's brief disprove that argument. As set forth above, the Broadband Act clearly eliminates regulation of broadband services. There is simply nothing for the Commission to interpret.

[28] Cinergy Brief at 5-6.

[29] *Smothers v. Lewis*, 672 S.W.2d 62 (Ky. 1984).

to control a subsequent appellate process."[30] Cinergy fails to provide any analysis as to why these general statements of law apply in this case where the legislation affects proceedings before an executive branch agency and not the courts. Its failure is understandable.

At issue in *Smothers* was a statute that purported to limit the ability of the ***courts*** to enjoin the enforcement of an order of the Alcoholic Beverage Control Board revoking a liquor license during an appeal. As such, the statute purported to control the procedures to be employed and the relief to be granted by the courts. Unlike its authority with respect to the judiciary,[31] the General Assembly enjoys broad authority with respect to executive branch agencies.[32] In fact, all such agencies, including the Commission, are creatures of statute[33] and live and die by legislative grace. As such, Cinergy's reliance upon *Smothers* is a matter of comparing apples with oranges.

Cinergy also misconceives the nature of the Broadband Act. By enacting HB 627, the General Assembly was not sitting as a federal Court of Appeals reviewing Judge Hood's decision.[34] Rather, the Broadband Act deregulated the provision of broadband service under Kentucky law and provided that any prior restrictions or requirements, whether properly or improperly imposed by agencies under then-existing state law, were void after the effective date of the Act. As such, the General Assembly changed state law, something it is free to do at

---

[30] Cinergy Brief at 5 (quoting *Smothers*, 672 S.W.2d at 64.)

[31] *Commonwealth v. Philpott*, 75 S.W.3d 209, 216 n.11 (2002).

[32] *See, Kentucky Association of Realtors, Inc. v. Musselman*, 817 S.W.2d 213, 216-217 (Ky. 1991) (applying reasonableness standard in assessing legislative restrictions on executive branch power.)

[33] *Boone County Water & Sewer District v. Public Service Commission*, 949 S.W.2d 588, 591 (Ky. 1997). *See also, Public Service Commission v. Jackson County Rural Electric Cooperative, Inc.*, 50 S.W.3d 764, 767 (Ky. App. 2000).

[34] In fact, such a court would be required to apply the law as it existed at the time of its decision and the decisions by the District Court or the Commission. *U.S. West Communications, Inc. v. Jennings*, 304 F.3d 950, 956 (9th Cir. 2002) (court reviewing state commission orders under 47 U.S.C. 252 must apply the law as it exists at the time of the court decision. That is, it would have to look to both HB 627 and the FCC's Declaratory Order.

anytime.[35] Indeed, Cinergy is incorrect in its apparent belief that the General Assembly cannot change state law in response to decisions of the Courts. Clearly, the General Assembly has authority to set state law and policy as to broadband and has done so by its enactment of the Broadband Act.

(b) HB 627 Does Not Violate The Contracts Clause.

Cinergy follows its separation of powers argument by contending that HB 627 is an unconstitutional impairment of the contract between BellSouth and Cinergy. The Commission should reject this argument for two reasons. First, the interconnection agreement between BellSouth and Cinergy is not an ordinary contract. Second, Cinergy fails to prove the elements necessary to show that application of HB 627 violates the Contract Clause.

Interconnection agreements such as that between BellSouth and Cinergy are not ordinary contracts between private parties. Because BellSouth must negotiate these agreements and because competitors can insist upon imposition of the FCC's rules, courts have properly concluded that "[a]n interconnection agreement is not an ordinary private contract . . . An interconnection agreement is not to be construed as a traditional contract but as an instrument arising within the context of ongoing federal and state regulation."[36] Thus, unlike private contracts, BellSouth is not free to walk away if it does not like a particular term required by federal law. As such, it is far from clear that Contract Clause is applicable to contract terms

[35] *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 23, 97 S.Ct. 1505, 1518 (1977) ("As early as *Fletcher v. Peck*, the Court considered the argument that 'one legislature cannot abridge the powers of a succeeding legislature.... It is often stated that "the legislature cannot bargain away the police power of a State.'")

[36] *e.spire Communications, Inc. v. New Mexico Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004); *see also Verizon Md., Inc. v. Global Naps, Inc.*, 377 F.3d 355, 364 (4th Cir. 2004) (interconnection agreements are a "creation of federal law" and are "the vehicles chosen by Congress to implement the duties imposed in § 251.").

imposed by such regulatory action.[37] Indeed, "the more heavily regulated an industry, the less reasonable it is to expect that contractual relationships will not be altered by legislation."[38]

In any event, even if the interconnection agreement were construed as a private contract, Cinergy's Contract Clause argument fails because Cinergy cannot satisfy the elements necessary to show an unconstitutional impairment. As Cinergy concedes, the courts require a three part showing in support of a Contract Clause claim: (1) that state law substantially impairs a contractual relationship; (2) that the legislative enactment is an improper exercise of the state's police power; and (3) that the adjustment of contractual rights is inappropriate.[39] Cinergy fails to make any of the requisite showings.

First, HB 627 cannot reasonably be said to impair a contractual relationship[40] because under Kentucky law such contracts are subject to being modified by subsequent legislative or regulatory action.[41] As such, Cinergy's Contract Clause argument fails coming out of the starting gate. Moreover, it is not every impairment that assumes a constitutional magnitude. Rather, it is only substantial impairments – a showing Cinergy has not attempted, much less made – that give rise to the constitutional analysis.[42]

Second, Cinergy likewise cannot make the requisite showing under the next prong of the test. Although it argues that HB 627 is not a legitimate exercise by the General Assembly of the

---

[37] *See, Keystone Bituminous Coal Association v. DeBendictis*, 480 U.S. 470, 502-503, 107 S.Ct. 1232, 1251 (1987) ("[O]ur cases construing the Contracts Clause[] indicate that its primary focus was upon legislation that was designed to repudiate or adjust pre-existing debtor creditor relationships that obligors were unable to satisfy.")

[38] *Koster v. City of Davenport*, 183 F.3d 762, 767 (8th Cir. 1999).

[39] Cinergy Brief at 6-7 (citing *Golden Rule Insurance Co. v. Stephens*, 912 F.Supp. 261 (E.D. Ky. 1995)).

[40] *Toledo Area AFL-CIO Council v. Pizza*, 154 F.3d 307, 323 (6th Cir. 1998) ("In assessing the extent of the impairment, we consider the industry in which the complaining party is involved."); *Koster v. City of Davenport*, 183 F.3d 762, 767 (8th Cir. 1999) ("the more heavily regulated an industry, the less reasonable it is to expect that contractual relationships will not be altered by legislation.")

[41] *National-Southwire Aluminum Company v. Big Rivers Electric Corporation*, 785 S.W.2d 503, 517 (Ky. App. 1990); *Board of Education of Jefferson County v. William Dohrman, Inc.*, 620 S.W.2d 328, 329 (Ky. App. 1981).

[42] *General Motors Corporation v. Romein*, 503 U.S. 181, 186, 112 S.Ct. 1105, 1109 (1992).

police power because "[i]t is impossible to construe a purported *deregulation* statute as an exercise of the police power,"[43] Cinergy fails to supply any authority for this remarkable proposition.[44] Certainly, the General Assembly enjoys broad latitude in the manner and the extent to which it chooses to address matters encompassed within the police power[45] and that the authority to regulate "modes of conducting business of public utilities has been primarily a legislative function of the state."[46] Here, the General Assembly found that broadband services will best be provided to citizens throughout the Commonwealth by the competitive market and the fact Cinergy disagrees with the determination made – and that is all it offers in support of its position – is an inadequate basis for concluding that HB 627 is an improper exercise of the police power.

Third, Cinergy fails to hazard an argument under the final prong of Contract Clause test. Its failure is fatal to its claim, particularly in light of the principle that where the State is not a party to the agreement, as here, the "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure"[47] under the Contract Clause. Finally, even if no deference were due, the provisions of HB 627 are both reasonable and appropriate. The General Assembly's express declaration that in deregulating broadband service it was seeking to encourage investment in the Commonwealth's telecommunications structure[48] and so as to

---

[43] Cinergy Brief at 7 (emphasis in original).

[44] Under Cinergy's definition of the police power the General Assembly would be required to regulate all aspects of life, commerce and society within the Commonwealth. It could not, as it has with many aspects of life, choose to leave the matter unregulated. To state such a proposition is to refute it. In any event, other jurisdictions have recognized that deregulation is a permissible exercise of police power. *See*, *Illinois Bell Telephone Company v. Illinois Commerce Commission*, 669 N.E.2d 919, 931 (Ill. App. Ct. 1996).

[45] *Fuson v. Howard*, 305 Ky. 843, 205 S.W.2d 1018, 1021 (Ky. 1947).

[46] *City of Florence v. Owen Electric Cooperative, Inc.*, 832 S.W.2d 876, 881 (Ky. 1992). *See also*, *Southern Bell Telephone & Telegraph Co. v. City of Louisville*, 96 S.W.2d 695, 697 (Ky. 1936) ("The authority to regulate rates of public utilities is primarily a legislative function of the state, and the right is essentially a police power.").

[47] *United States Trust Company of New York v. New Jersey*, 431 U.S. 1, 23, 97 S.Ct. 1505, 1518 (1977).

[48] KRS 278.456(2).

provide "the most innovative and economical services,"[49] coupled with the fact that application of the statute to the contract provision at issue here is consistent with federal efforts to achieve the same goals[50] and that other alternatives exist for both consumers[51] and CLECs[52] makes indisputable that the General Assembly has acted in a constitutional fashion.

Cinergy's Contract Clause argument fails.

C. Cinergy and SouthEast Are Not At Liberty To Perpetuate A Regulatory Regime At Odds With Federal Law As Set Out In The FCC's Declaratory Order.

Cinergy cannot reasonably dispute that the Commission's understanding of federal law at the time it imposed upon BellSouth the contractual requirements at issue here was incorrect. Instead, it limits its arguments concerning the FCC's Declaratory Order to explaining how – in its view – the Commission can ignore the FCC's authoritative pronouncements on federal law. Not surprisingly, its efforts fail.

Cinergy first seeks to create a constitutional conflict where none exists. It thus, argues that application by the Commission of the FCC's clear directive to these proceedings somehow would reduce the United States District Court's decision in the original appeal of the Commission's 2002 decision to an advisory opinion and result in an executive branch agency reviewing the decisions of an Article III court. In particular, Cinergy cites two federal decisions, *Chicago & Southern Airlines*[53] and *Town of Deerfield*[54] for the proposition that Judge Hood's decision, which was entered prior to both the enactment of HB 627 and the release of the Declaratory Order, strait-jackets the Commission. Cinergy twice errs.

---

[49] KRS 278.456(4).

[50] Declaratory Order at ¶ 30.

[51] KRS 278.456(3).

[52] Declaratory Order at ¶¶ 6-7.

[53] 333 U.S. 103, 68 S.Ct. 431 (1948).

[54] 992 F.2d 420 (2d Cir. 1993).

First, even if they were applicable – and they are not – nothing in *Chicago & Southern Airlines* or *Town of Deerfield* precludes this Commission from acting on its own to correct its misunderstanding of federal law. Nor does Cinergy offer any reason why the Commission should not do so, particularly when state law requires it reach the same result.[55]

Second, Cinergy misreads *Chicago & Southern Airlines* and *Town of Deerfield*. At issue in *Chicago & Southern Airlines* was a decision by the Civil Aeronautics Board denying the airline a certificate of convenience and necessity to establish a foreign air route.[56] By statute, the order remained subject to review by the President who enjoyed broad authority to accept or reject the Board's decision.[57] The Supreme Court held that the court of appeals lacked jurisdiction to consider the appeal, explaining that Board decisions "are not mature and therefore not susceptible to judicial review at anytime before they are finalized by Presidential approval."[58] *Chicago & Southern Airlines* thus involved application of the ripeness doctrine for purposes of judicial review, something not even remotely at issue in these proceedings before the Commission.

Cinergy's reliance upon *Town of Deerfield* is equally misplaced. That case involved a petition for direct review of an FCC declaratory order before the appropriate federal circuit court of appeals. Thus, the decision is inapplicable to proceedings before a state administrative body where the correctness of the FCC's pronouncement is not at issue. Further, to the extent Cinergy

---

[55] KRS 278.5462(2) ("Any requirement imposed upon broadband service in existence as of July 15, 2004 is hereby voided ....") Despite the clear requirements of HB 627, SouthEast in effect argues in its brief that having removed the provision of broadband services from regulation in KRS 278.5462(1) and having voided all pre-existing regulatory requirements imposed broadband service in KRS 278.5462(2), the General Assembly nevertheless implicitly "repealed" subsections (1) and (2) of the statute by enacting subsection (4) of the same statute. SouthEast Brief at 1-2. But "[i]t is a rule of statutory construction that a statute should be construed so that no part of it is meaningless or ineffectual." *General Motors Corporation v. Book Chevrolet, Inc.*, 979 S.W.2d 918, 919 (Ky. 1998). Moreover, nothing in BellSouth's federal tariff requires, much less permits, it to offer service in violation of federal law, including the Declaratory Order.

[56] 333 U.S. at 105, 68 S.Ct. at 433.

[57] 333 U.S. at 105-106, 68 S.Ct. at 433.

[58] 333 U.S. at 114, 68 S.Ct. at 437.

seeks to attack the lawfulness of the Declaratory Order this proceeding is not the forum to do so.[59]

More fundamentally, *Town of Deerfield* has no applicability where, as here, the original proceedings for judicial review remain ongoing. Indeed, in *Town of Deerfield*, the homeowner sought to invoke the FCC's declaratory ruling twice (once in state court and once in federal court) unsuccessfully litigated the question.[60] Both proceedings were final and no longer subject to appeal by the time the FCC issued its ruling.[61] Here, by contrast, BellSouth's original action for judicial review remains pending before the United States Court of Appeals for the Sixth Circuit. In such a case, there is no separation of powers problem because "each court, at every level, must decide according to existing laws."[62] Thus, *Town of Deerfield* has no possible application here since the original action for review here, unlike in *Deerfield,* is still pending before the appellate court.

Finally, Cinergy's argument concerning the *Sierra-Mobile* doctrine also is without merit. Under Kentucky law,[63] contracts involving matters falling within the Commission's jurisdiction remain subject to modification without regard to the *Sierra-Mobile* doctrine.[64] This is particularly the case where, as here, the contract provisions at issue were not freely negotiated

---

[59] *FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468, 104 S.Ct. 1936, 1939-1940 (1984).

[60] 922 F.2d at 425-426.

[61] *Id.*

[62] *Saco River Cellular, Inc. v. FCC*, 133 F.3d 25, 31 (D.C. Cir. 1998) *quoting Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 227, 115 S.Ct. 1447, 1457 (1995) (internal quotation marks omitted.) *See also, U.S. West Communications, Inc. v. Jennings*, 304 F.3d 950, 956 (9th Cir. 2002) (court reviewing state commission orders under 47 U.S.C. 252 must apply the law as it exists at the time of the court decision. *Accord, Indiana Bell Telephone Company v. McCarty*, 362 F.3d 378, 388 (7th Cir. 2004); *GTE South, Inc. v. Morrison*, 199 F.3d 733, 740-41 (4th Cir. 1999).

[63] *National-Southwire Aluminum Company v. Big Rivers Electric Corporation*, 785 S.W.2d 503, 517 (Ky. App. 1990) (contract for sale of electricity); *Board of Education of Jefferson County v. William Dohrman, Inc.*, 620 S.W.2d 328, 329 (Ky. App. 1981) (contract for sewerage services.)

[64] It appears the *Mobile-Sierra* doctrine has never been invoked by a Kentucky appellate court in a reported decision.

but were imposed upon BellSouth based upon the Commission's formerly erroneous understanding of federal law.

Conclusion

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

Respectfully submitted,

Dorothy J. Chambers
BELLSOUTH TELECOMMUNICATIONS, INC.
601 West Chestnut Street, Room 407
P.O. Box 32410
Louisville, Kentucky 40232
Telephone: 502-582-8219

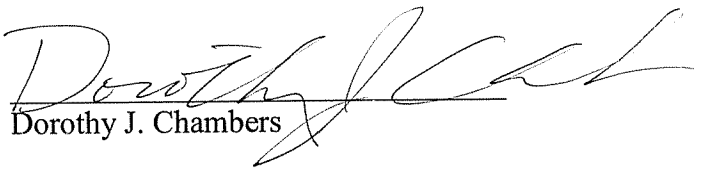
R. Douglas Lackey
Robert A. Culpepper
Suite 4300, BellSouth Center
675 W. Peachtree Street, N.E.
Atlanta, GA 30375

COUNSEL FOR PLAINTIFF:
BELLSOUTH TELECOMMUNICATIONS, INC.

583174

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served on the individuals on the attached service list by mailing a copy thereof, this 27th day of April, 2005.



Dorothy J. Chambers

SERVICE LIST – PSC 2004-00501

Honorable David M. Benck
Vice President/General Counsel
Momentum Telecom, Inc.
2700 Corporate Drive, Suite 200
Birmingham, AL 35243
dbenck@momentumtelecom.com

Robert A. Bye
Corporate Counsel
Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214
bye@cinergy.com

John Cinelli
1419 W. Lloyd Expressway, Suite 101
Evansville, IN 47110

Kyle Coats
EveryCall Communications, Inc.
10500 Coursey Boulevard, Suite 306
Baton Rouge, LA 70816

Alan Creighton
Momentum Telecom, Inc.
2700 Corporate Drive, Suite 200
Birmingham, AL 35243

Ms. Nanette Edwards
Senior Manager-Regulatory Attorney
ITC^DeltaCom Communications
7037 Old Madison Pike, Suite 400
Huntsville, AL 35806
nedwards@itcdeltacom.com

Todd Heinrich
Aero Communications, LLC
1301 Broadway, Suite 100
Paducah, KY 42001
todd@hcis.net

Honorable Dennis G. Howard II
Assistant Attorney General
Office of the Attorney General
Utility & Rate Intervention Div.
1024 Capital Center Drive, Ste. 200
Frankfort, KY 40601-8204
dennis.howard@ag.ky.gov

Darrell Maynard
President
SouthEast Telephone, Inc.
106 Power Drive
P.O. Box 1001
Pikeville, KY 41502-1001

Honorable Kristopher E. Twomey
Attorney at Law
LOKT Consulting
1519 E. 14th Street, Suite A
San Leandro, CA 94577
kris@lokt.net

Honorable C. Kent Hatfield
Hon. Douglas F. Brent
Stoll, Keenon & Park, LLP
2650 AEGON Center
400 West Market Street
Louisville, KY 40202
hatfield@skp.com

Honorable Jonathan N. Amlung
Attorney at Law
AMLUNG Law Offices
616 South 5th Street
Louisville, KY 40202
info@amlung.com