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June 2, 2005

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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 in the above-captioned case are the original and ten (10) copies of Response of BellSouth Telecommunications, Inc. to Cinergy Communications Company's Petition for Rehearing Or, In the Alternative, Clarification.

Sincerely,

Dorothy J. Chambers

Enclosure

cc: Parties of Record

587641

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. TO CINERGY COMMUNICATIONS COMPANY'S PETITION FOR REHEARING OR, IN THE ALTERNATIVE, CLARIFICATION

BellSouth Telecommunications, Inc. ("BellSouth") for its Response to Cinergy Communications Company's ("Cinergy's") Petition for Rehearing Or, In The Alternative, Clarification states:

A. Cinergy's Petition for Rehearing

1. Cinergy's Grounds For Rehearing Were, Or With Reasonable Diligence Could Have Been, Previously Advanced By It.

Commission precedent regarding rehearing is unambiguous: rehearing is not an opportunity for a "second bite of the apple." A restatement of arguments previously presented and rejected does not justify rehearing.[1] Nor may Cinergy urge rehearing for reasons that, but for Cinergy's lack of diligence, could previously have been offered.[2] Indeed, this limitation is consistent with the statute authorizing rehearing, which limits any rehearing to the offer of

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[1] Order, *In the Matter of: The Alternative Rate Filing of Lake Columbia Utilities, Inc.*, Case No. 2000-458 (Ky. P.S.C. October 2, 2001).

[2] Order, *In the Matter of Saeid Shafizadeh v. Cingular Wireless*, Case No. 2003-00400 (Ky. P.S.C. April 26, 2005); Order, *In the Matter of: Adoption of Interconnection Agreement Provisions Between BellSouth Telecommunications, Inc. and Cinergy Communications Company by SouthEast Telephone, Inc.*, Case No. 2004-00235 (Ky. P.S.C. November 8, 2004).

"additional evidence that could not with reasonable diligence have been offered on the former hearing."[3]

Notwithstanding these limitations, Cinergy contents itself with recycling, or at best, slightly recasting, arguments previously advanced by it:

Petition for Rehearing		**Original Brief/Reply**	
Pg.	**Argument**	**Pg.**	**Argument**
2, 6	"'DSL over UNE-P' issue … is now within the exclusive jurisdiction of the Sixth Circuit Court of Appeals	5	"BellSouth sought federal judicial review of the order, divesting the Commission of further jurisdiction." (Original Brief).
3	Cinergy continues to believe Separation of Powers doctrine bars any legislative attempt to interfere with the authority of the executive or judicial branch…."	5	"[U]sing a legislative act to try to force the Commission to withdraw its order would be the very type of legislative encroachment which the Kentucky Supreme Court has found constitutionally impermissible under Sections 27 and 28 of the Kentucky Constitution." (Original Brief) *See also*, pages 3-4 of Reply.
2, 7	"BellSouth's collateral attack on the Commission's Order by Petition to the FCC – even as its appeal of that same order was pending in federal court – was in violation of 47 U.S.C. § 252, which places exclusive jurisdiction to review interconnection agreements in federal courts."	5-6	"What BellSouth may be trying to say is that it filed its FCC petition as a way to collaterally attack a state commission arbitration decision, even while direct review is pending." (Reply).
3	"Cinergy also continues to believe … that retroactive application of a statute to an existing contract – as opposed to one in negotiation or arbitration – is unlawful."	6	"There is another constitutional bar to what BellSouth is seeking…. Federal courts apply a three part test to determine whether application of a state statute results in an unconstitutional impairment of a contract." (Original Brief).
2-3	"It remains to be seen whether the Sixth Circuit will reverse the District Court and permit BellSouth to	2 n. 3.	"It bears repeating that BellSouth's broadband network was built with incentives from this Commission in

[3] KRS 278.400.

Petition for Rehearing		Original Brief/Reply	
Pg.	**Argument**	**Pg.**	**Argument**
	violate its voluntary agreement with the Kentucky Commission...."		the form of excess revenues.... BellSouth of course, broke that promise, and now wants to shed its contractual obligations to CCC, armoring itself with The Kentucky Broadband Act." (Original Brief)
8	"Under Kentucky law, that is how it should be. *See* Ky. Const. § 19(1) (No ex post facto law .. shall be enacted).	6	"The Kentucky Constitution, at Section 19, similarly provides that "No *ex post facto* law ... shall be enacted." (Original Brief).
8	"the FCC intended its decision to be used by ILECs in pending *judicial* proceedings." (emphasis in original)	8	"In offering this otherwise gratuitous speculation, the FCC appears to have distinguished between, on the one hand, those states (*e.g.*, FL, LA, GA) where a challenged state commission related to DSL decision (sic) is *currently under* district court review and, on the other, the one state, Kentucky, where district court review is already final...." (Original Brief).
8	"[T]he Kentucky Broadband Act is not meant to be applied retroactively to abrogate existing agreements.... The two provisions combined can only mean that requirements on broadband service may not as of the effective date of the statute, be imposed; but that existing interconnection agreements should continue to be "enforced." *See also*, Original Brief at 2.	4	"KRS 278.5462(2), which purports to "void" any requirement imposed upon broadband service ... provides in the very next sentence that this section of the law does not "limit or modify" ... the 'commission's authority to arbitrate and enforce interconnection agreements." (Original Brief). *See also*, Reply at 5.

Cinergy's Petition represents nothing more than its disagreement with the Commission's decision, the Kentucky Broadband Act (HB 627)[4] and the Federal Communications

[4] KRS 278.546 *et seq.*

Commission's Declaratory Order.[5] Certainly, Cinergy nowhere ventures to demonstrate that the Commission "overlooked a material fact in the record, or a controlling statute or decision, or has misconceived the issues presented ... or the law applicable thereto."[6] Indeed, it does not even attempt to address the authority cited by BellSouth in its briefs that supports the Commission's resolution of each of the issues contrary to Cinergy's position.

Cinergy's Petition for Rehearing should be denied.

2. The Commission Properly Resolved Each Of The Challenges To Its Order Mounted By Cinergy.

(a) Cinergy's Arguments Have Been Addressed By BellSouth.

Even if Cinergy had presented a credible case for rehearing, and it did not, its arguments do not warrant reversal or modification of the Commission's April 29, 2005 Order. The authority and arguments supporting the Commission's decision are set out in detail in BellSouth's briefs filed in this matter and need not be repeated in detail here. Nevertheless, the following is worthy of repetition:

- The plain language of HB 627 eliminates the Public Service Commission's authority to regulate broadband services. Specifically, KRS 278.5462(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 FCC's Declaratory Order makes clear that federal law does not require the provisions at issue here.[7]

- The Kentucky Broadband Act is not an impermissible intrusion by the General Assembly into the realm of the Judiciary or the Executive.[8]

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[5] *In the Matter of: BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services By Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers*, WC Docket No. 03-251, FCC 05-78 (rel. March 25, 2005) ("Declaratory Order.")

[6] CR 76.32(1)(b). Although the appellate rules are not applicable to Petitions for Rehearing before the Commission, CR 76.32(1)(b) provides a useful analog for analyzing and rejecting Cinergy's Petition.

[7] Response of BellSouth Telecommunications, Inc. at 4-6.

[8] Response of BellSouth Telecommunications, Inc. at 6-8.

- The Act does not violate the Contracts Clause of the federal or state constitutions. Because of the special nature of interconnection agreements,[9] there is no impairment of a contractual relationship. Also, the Broadband Bill is a proper exercise of the Commonwealth's regulatory power and the adjustment of rights by the law is appropriate.[10]

- The FCC's Declaratory Order is not the product of an executive branch agency's impermissible review of the decision of an Article III court. Nor did the FCC intend to carve Kentucky out from the reach of its decision.[11]

- The FCC has authoritatively determined that the perpetuation of the type of regulatory regime sought by Cinergy impermissibly interferes with the FCC's efforts to promote the deployment of broadband facilities and thus violates federal law.[12]

The Commission properly decided this matter.

(b) Cinergy's Newly Found Authority In Support Of Arguments Already Rejected By The Commission Is Neither Properly Before the Commission Nor Pertinent.

Likewise, the limited new authority cited by Cinergy in its Petition for Rehearing in support of the arguments it previously raised does not advance its cause. Of course, all of the cases cited were available at the time Cinergy briefed this matter and as such they are not a proper basis for rehearing.[13] In any event, the authority cited is inapposite.

Citing the Commission's order in the Kentucky-American Water Company transfer case[14] and the Kentucky Supreme Court's decision in *Union Light, Heat & Power Company v.*

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[9] Response of BellSouth Telecommunications, Inc. at 9. *See also*, *e.spire Communications, Inc. v. New Mexico Pub. Regulation Comm'n*, 392 F.3d 1204, 1207 (10th Cir. 2004) ("An interconnection agreement is not to be construed as a traditional contract."); *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.").

[10] Response of BellSouth Telecommunications, Inc. at 9-12.

[11] Response of BellSouth Telecommunications, Inc. at 12-15.

[12] Declaratory Order at ¶¶ 21, 30.

[13] Order, *In the Matter of: Adoption of Interconnection Agreement Provisions Between BellSouth Telecommunications, Inc. and Cinergy Communications Company by SouthEast Telephone, Inc.*, Case No. 2004-00235 (Ky. P.S.C. November 8, 2004).

[14] *In the Matter of: Joint Petition of Kentucky- American Water Company, et al. for Approval of Change of Control of Kentucky-American Water Company*, Case No. 2002-00317 (Ky. P.S.C. October 16, 2002).

Public Service Commission,[15] Cinergy first argues that BellSouth's appeal of the Commission's decision in a different case, Case No. 2001-00432, to the United States District Court divested the Commission of jurisdiction over that order.[16] Without regard to the correctness of Cinergy's understanding of those two decisions, this case is not an attempt by the Commission to modify its Order in Case No. 2001-00432. Rather, this case is a different proceeding, with additional parties and involves developments subsequent to the original decision by the Commission. More fundamentally, the Commission's order provides only prospective relief. Certainly, the Commission did not view its decision in this case as amending its order in Case No. 2001-00432:

> The Commission, having considered the record in this proceeding, finds that state commissions ***no longer have authority*** to require an ILEC to provide DSL service to an end-user over the same unbundled network element loop facility that a CLEC uses to provide voice services to the same customer.[17]

Finally, in support of its argument that the Broadband Act does not apply to existing interconnection agreements, Cinergy cites two Kentucky decisions.[18] Both deal with whether ambiguous statutes may be given retroactive effect.[19] But, even if Cinergy is correct in characterizing the application of the Broadband Act in this proceeding as having a retroactive effect, both decisions recognize that statutes will be construed to have a retroactive effect if the

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[15] 271 S.W.2d 361 (Ky. 1954).

[16] Cinergy Petition at 6.

[17] 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 at 4 (Ky. P.S.C. April 29, 2005) (emphasis supplied).

[18] *Peach v. 21 Brands Distillery*, 580 S.W.2d 235 (Ky. App. 1979); *Dumesnil v. Reeves*, 142 S.W.2d 132 (Ky. 1940). Cinergy also cites a third decision, *Akers v. Baldwin*, 736 S.W.2d 294 (Ky. 1987). It deals with the prohibition against the unconstitutional impairment of contractual obligations. As discussed above and in BellSouth's Response, application of the Broadband Act does not give rise to constitutional problems.

[19] Cinergy Petition for Rehearing at 8.

General Assembly so directs.[20] Here, the General Assembly unambiguously intended to free the provision of broadband service from all regulation without regard to the date the regulatory requirement was imposed: "[a]ny requirement imposed upon broadband service in existence as July 15, 2004, is hereby voided ...."[21] As a result, *Peach* and *Dumesnil* are inapplicable.[22]

B. Cinergy's Petition for Clarification

BellSouth Will Not Use the Commission's Decision to Eliminate UNE-P Pricing for the Non-DSL Embedded Customer Base.

Cinergy also seeks clarification of what it refers to as BellSouth's "independent obligations" related to Cinergy's embedded base.[23] At issue is whether Cinergy should pay resale or UNE-P rates for the lines provisioned as resale but not carrying DSL (the so-called "billing surrogate" issue).[24] At present, Cinergy has been receiving credits for lines provisioned as resale, both those provisioned with DSL as well as other lines that are not provisioned with DSL but are associated to the DSL provisioned line through hunting. Because of BellSouth's systems issues, the "non-DSL" lines were ordered as resale lines and then financially treated as if they were UNE-P lines with Cinergy receiving credits equivalent to UNE-P rates. BellSouth believes it is appropriate to clarify its position and intent as to those lines that do not carry DSL

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[20] *Peach*, 582 S.W.2d at 236 ("Whether a statute is to operate retrospectively, or prospectively only, may depend on legislative intent...."); (" *Dumesnil*, 142 S.W.2d at 134("statutes are not to be given a retroactive effect, even when the Legislature has the power to enact such a statute, unless such intention clearly appears from the statute itself.") *See also*, KRS 446.080(3) ("No statute shall be construed to be retroactive, ***unless express so declared***) (emphasis supplied); *Magic Coal Company v. Fox*, 19 S.W.3d 88, 94 (Ky. 2000) (giving retroactive effect to statute where General Assembly expressed a clear legislative intent to do so.)

[21] KRS 278.5462(2).

[22] *Peach* is pertinent in one respect. There the court of appeals explained that "a retrospective law is one which creates and imposes a new duty in respect to transactions or considerations already past." 580 S.W.2d at 236. Here, the Broadband Act does not impose any new duties or liabilities. To the contrary, it removes all regulatory obligations. In any event, it affects only BellSouth's obligation after the effective date of the Act to provide DSL service over the same facility used by a CLEC to provide voice service.

[23] Cinergy Petition at 3-5; 9-11.

[24] BellSouth's reference to "Cinergy" in this discussion encompasses Aero Communications, LLC and SouthEast Telephone, Inc. To the extent they also are impacted by the billing surrogate issue, BellSouth's commitment also is applicable as to them.

transport and that Cinergy would have ordered as UNE-P if not for these systems issues. BellSouth commits that it will convert these non-DSL resale lines to UNE-P if those lines would have been ordered as UNE-P but for BellSouth's systems issues. BellSouth is willing to work with Cinergy to convert these lines manually and without imposing the normal non-recurring charges on Cinergy. These lines will be treated not as new UNE-P orders, but as part of the embedded customer base for purposes of the TRRO and will be subject to the TRRO transition rates. BellSouth's confirmation herein should provide sufficient assurance it will not use the Commission's Order to effect a change of price for such a resale line that does not carry DSL and is serving an embedded customer.

CONCLUSION

For the reasons stated herein, this Commission should reject Cinergy's Petition for Rehearing and, upon the assurances BellSouth has made herein, should reject as unnecessary any further rehearing or clarification of its April 29, 2005 Order. BellSouth respectfully requests the Commission order the Amendment to be deemed effective twenty (20) days from its April 29, 2005 Order as to Cinergy and the other CLECs that have delayed signing the Amendment as previously required by that Commission Order.

Respectfully submitted,

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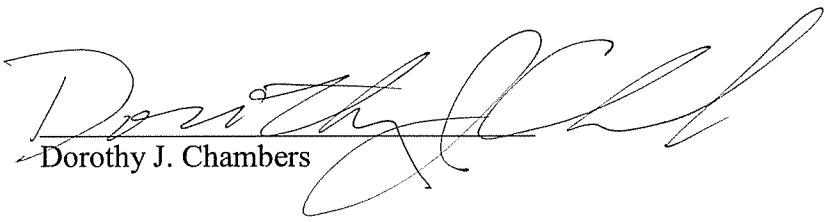
CERTIFICATE OF SERVICE

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 2nd day of June, 2005.



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