

S T O L L | K E E N O N | & | P A R K | L L P

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March 7, 2005

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PUBLIC SERVICE  
COMMISSION

Ms. Elizabeth O'Donnell  
Executive Director  
Kentucky Public Service Commission  
211 Sower Boulevard  
P.O. Box 615  
Frankfort, Kentucky 40601

**RE: 2004-00501**

Dear Ms. O'Donnell:

Enclosed please find an original and 10 copies of Cinergy Communications Company's Procedural Proposal.

An additional copy of this filing is enclosed. Please indicate receipt of this filing by your office by placing your file stamp on the extra copy and returning to me via the enclosed, self-addressed, stamped envelope.

Sincerely,



Douglas F. Brent  
Counsel for Cinergy Communications  
Company

DFB:jms

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

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MAR 07 2005

PUBLIC SERVICE  
COMMISSION

In the Matter of:

PETITION TO ESTABLISH DOCKET TO )  
CONSIDER AMENDMENTS TO ) CASE NO.  
INTERCONNECTION AGREEMENTS ) 2004-00501  
RESULTING FROM CHANGE OF LAW, )  
KENTUCKY BROADBAND ACT )

**PROCEDURAL PROPOSAL OF CINERGY COMMUNICATIONS COMPANY**

On February 24, 2005, Cinergy Communications Company (“CCC”) and other parties met with the Commission’s staff in an informal conference to discuss pending issues and motions in this proceeding. As agreed at that informal conference, CCC hereby offers its proposal concerning further procedures necessary to enable the Commission to reach a decision in this proceeding.

CCC does not agree that BellSouth’s petition raises strictly legal questions that may be handled solely through briefing. Rather, there is a factual dispute about how CCC uses or intends to use UNEs in conjunction with certain tariffed wholesale services and about whether such uses involve connecting, attaching or combining UNEs with those services. In order to dispose of the legal questions raised by BellSouth’s petition the Commission will first need an understanding of how these services work and how BellSouth’s tariffs apply to certain interconnection and network arrangements involving UNEs.

CCC intends to provide factual support for its legal position that BellSouth has an obligation to permit commingling of wholesale DSL with UNEs. Therefore, CCC requests that

the Commission enter an order providing for discovery and an evidentiary hearing in this matter. CCC proposes that the Commission issue an order providing for initial data requests, supplemental requests, prefiled direct and rebuttal testimony, and a hearing. CCC also requests that the Commission also allow time in the schedule to provide for depositions. A proposed schedule is set forth below. In addition, CCC requests that the Commission permit the filing of post hearing briefs.

Insofar as BellSouth contends that the Kentucky Broadband Act impairs CCC's existing contractual rights under an unexpired interconnection agreement, CCC expressly states that such construction is inconsistent with Section 19 of the Kentucky Constitution and reserves all rights to challenge such construction before a court of competent jurisdiction.

CCC also renews its request that this case be consolidated with Case No. 2004-00427, the generic change of law proceeding established at the request of BellSouth. Finally, CCC requests that the Commission immediately order BellSouth to resume paying the surrogate for access charges required by § 2.10.1.6 of the interconnection agreement.

## **I. EVIDENTIARY MATTERS FOR DISCOVERY AND HEARING**

Put simply, CCC asserts it has a right under its current interconnection agreement to purchase both UNEs and wholesale services and to commingle them. This right is further supported by a federal rule, 47 CFR § 51.309. The Kentucky Broadband Act cannot remove BellSouth's obligations created by the FCC and codified in federal regulations. In contrast, BellSouth denies that commingling is even at issue in this case. Thus, the Commission will need to develop facts to understand exactly what is meant by commingling. In order to develop such

facts, CCC identifies the following as examples of evidentiary matters to be discovered or presented at the hearing:

1. Technical configuration of wholesale DSL service provided under BellSouth's tariff FCC No. 1, including provision over (i) unbundled loops and (ii) UNE-P.
2. Technical aspects concerning the process to convert an existing end user from UNE-P to an arrangement involving an unbundled loop combined with switching provided by the CLEC or another party.
3. Information concerning the use and location of remote terminals/DSLAMs in the BellSouth network.
4. Factual investigation into the meaning of "in service telephone company provided exchange line facility" for purposes of FCC tariff No. 1, and whether unbundled copper loops meet this definition.

## **II. PLAN FOR DISCOVERY**

CCC proposes the following schedule for prehearing procedures and requests that the Commission schedule a hearing for a date approximately one week after filing of rebuttal testimony:

1. Each party may, on or before April 11, 2005, serve upon any other party an initial request for production of documents and written interrogatories to be answered by the party served within 10 days of service.

2. Each party may, on or before April 29, 2005, serve upon any other party a supplemental request for production of documents and written interrogatories to be answered by the party served within 10 days of service.

3. Each party may, on or before May 11, 2005, take the testimony of any person by deposition upon oral examination pursuant to notice or by agreement.

4. On or before May 20, 2005, each party shall file with the Commission in verified form the direct testimony of each witness that it expects to call at the formal hearing.

5. On or before May 31, 2005, each party shall file with the Commission in verified form the testimony of each rebuttal witness that it expects to call at the formal hearing.

### **III. OTHER ISSUES**

As set forth in its initial comments dated January 26, 2005, CCC objects to BellSouth's attempt to force CCC to respond to two separate BellSouth "change of law" petitions affecting the same interconnection agreement. CCC renews its request that the Commission examine all change of law issues -- whether arising under federal or state law -- in the same proceeding. In addition, upon information and belief, every respondent in the instant proceeding was named in the BellSouth petition that led to the establishment of Case No. 2004-00427. Thus, every party to the instant case is already a respondent in the other proceeding. Administrative economy would best be served by combining the two proceedings, rather than by permitting

BellSouth to isolate a single issue from all other change of law issues and forcing CCC and other CLECs to participate in two different proceedings.

Regarding CCC's pending request that BellSouth be required to "carry on [its] obligations" under the ICA until the completion of dispute resolution, BellSouth's latest intransigence, through refusing to issue credits to CCC for access charge surrogates, is more of the same war of attrition BellSouth has waged since the Commission's arbitration decision in favor of CCC. BellSouth is wrong to claim that this issue has been brought up by CCC in this case to delay and distract the Commission. § 2.10.1.6.1. of the agreement relates to BellSouth's obligation to compensate CCC when it provides wholesale DSL over resale lines instead of over UNEs as required by the agreement. This section of the agreement speaks directly to BellSouth's obligations related to wholesale DSL over UNE-P. Thus, this issue is relevant to this proceeding and CCC chose to raise it in response to BellSouth's petition. The Commission should order BellSouth to honor its ICA and immediately resume paying CCC the surrogates for access charges required under § 2.10.1.6.1.

#### **IV. CONCLUSION.**

For the Commission to determine whether the Kentucky Broadband Act affects BellSouth's interconnection agreement with CCC, the Commission will need to develop a factual record related to the process of commingling UNEs with tariffed wholesale services. If BellSouth has an obligation under federal law or under its interconnection agreement with CCC to permit commingling, the Kentucky Broadband Act will not require a "change of law"


amendment to the agreement. CCC requests that the Commission issue an order adopting the procedural schedule set forth herein.

Respectfully submitted,

CINERGY COMMUNICATIONS COMPANY

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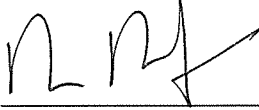
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ATTORNEYS FOR RESPONDENT  
CINERGY COMMUNICATIONS COMPANY

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing Comments of Cinergy Communications Company was served upon the parties of record this 7<sup>th</sup> day of March, 2005.



\_\_\_\_\_  
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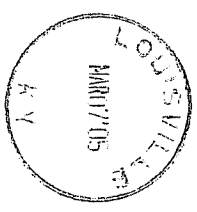
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