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April 19, 2005

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

RE: 2004-00501

Dear Ms. O'Donnell:

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

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

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

BRIEF OF CINERGY COMMUNICATIONS COMPANY

Cinergy Communications Company ("CCC"), pursuant to the Commission's March 30, 2005 Order in this proceeding, hereby submits its brief describing how existing, unexpired interconnection agreements are affected by:

1) the so-called "Kentucky Broadband Act"[1]; and

2) the recent FCC order granting BellSouth's request to preempt the authority of the Kentucky Public Service Commission.

The statutory changes in Kentucky have no direct effect on any effective interconnection agreement, including CCC's agreement with BellSouth. As applied to existing interconnection agreements, the FCC order can do no more than require parties to negotiate contract revisions to incorporate changes in law. Neither the statute nor the FCC order requires the Commission to "withdraw the 2002 Cinergy Order" at BellSouth's demand.[2]

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[1] *2004 Ky. Acts ch. 167, sec. 1*, effective July 13, 2004 (codified as KRS 278.546, 278.5461 and 278.5462) (the "Act").

[2] *See* letter from Dorothy Chambers, BellSouth, to Elizabeth O'Donnell, dated March 30, 2005.

In filing this petition, BellSouth has continued its relentless campaign to shred previous infrastructure sharing commitments[3] and drive both CLECs and unaffiliated ISPs off of BellSouth's network and out of the state. BellSouth will likely argue that the Commission is now powerless to hold BellSouth to its commitments to share broadband infrastructure in Kentucky, and will further argue that the Kentucky legislature and the FCC have now endorsed BellSouth's method of smothering statewide voice competition in Kentucky by fencing off access to broadband transmission and Internet access. But even assuming the truth of such arguments, neither is dispositive as to what should happen regarding the existing contractual relationship between BellSouth and CCC. This is because as Southeast Telephone explained to the Commission in its initial comments in this case, "the Kentucky Broadband Act has not effectuated a change of law that renders amendments to existing interconnection agreements between BellSouth and respondent CLECs necessary."

I. INTRODUCTION

On December 9, 2004, BellSouth filed its petition asking the Commission to consider a single question: what *changes* does the Kentucky Broadband Act require in the existing approved interconnection agreements between BellSouth and the Competitive Local Exchange Carriers? Petition at p. 1 (emphasis supplied). BellSouth claimed that the "intent and effect" of

[3] It bears repeating that BellSouth's broadband network was built with incentives from this Commission in the form of excess revenues. As the Commission explained in the Southeast Telephone arbitration, "We ultimately agreed to allow BellSouth to keep excess revenues, as well as to implement rate increases, in exchange for its deployment of DSL technology into rural Kentucky." *Petition By Southeast Telephone, Inc., For Arbitration of Certain Terms and Conditions of a Proposed Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. §252*, Case No. 2001-045 (rel. June 29, 2001). Part of the bargain BellSouth struck with the Commission and Attorney General was to make broadband capabilities available to its competitors on a wholesale basis. BellSouth of course, broke that promise, and now wants to shed its contractual obligations to CCC, armoring itself with The Kentucky Broadband Act.

the Act is to "prevent state regulation of broadband services, including BellSouth's DSL transmission service..." Petition at p. 5. BellSouth then claimed that the Act "voided" the Commission's decision in the Cinergy arbitration. *See Id.* Of course, that arbitration decision is embodied in a filed contract between BellSouth and CCC, the Commission's order approving the agreement was upheld on review,[4] and BellSouth's appeal of the district court's decision is pending at the Sixth Circuit. The petition explained that BellSouth had sent change of law requests to six different CLEC requests, requesting to amend their interconnection agreements with BellSouth to "reflect the *changes* brought about by the Kentucky Broadband Act." *Id.*, p. 6. (emphasis added) CCC, while willing to negotiate with BellSouth, disputes that the Kentucky Broadband act changes anything about it its approved and effective interconnection agreement. The Act can only affect the Commission's ability to arbitrate a CCC interconnection agreement in the future. Thus, in its initial comments in this proceeding, CCC described how BellSouth's petition in this case was simply another time-consuming legal maneuver devised to avoid contractual obligations to CCC.

The Commission recently directed BellSouth to follow its agreement with CCC and to negotiate to incorporate changes of law required by the FCC's Triennial Review Remand Order. That Order, in Case No. 2001-00427, applies with equal force to any changes of law that may be required related to DSL services. But as shown below, the FCC's order preempting the Commission does not abrogate CCC's contract with BellSouth. And since the Kentucky statute, regardless of its reach, may not be applied retroactively without violating both the United States and Kentucky Constitutions, the Act has no immediate effect on existing agreements. Therefore, the Commission should close this proceeding.

II. THE "KENTUCKY BROADBAND ACT" NEITHER REQUIRES NOR PERMITS THE COMMISSION TO "WITHDRAW" AN ARBITRATION ORDER

BellSouth's delight at the passage of the Broadband Act has been understandable. The Act does not impose a single requirement on BellSouth or other incumbents, yet partially achieves BellSouth's post § 271 approval goal of limiting the Commission's ability to do anything about those BellSouth policies which have "the effect of chilling local competition for advanced services."[5] But the Act is not kryptonite – the Commission's powers have not been completely neutralized, and despite BellSouth's insistence, the Commission is not compelled by the Act to withdraw an order that was legally correct and upheld on direct review.

A. The Act Specifically Recognizes the Commission's Continued Role in Arbitration and Enforcement of Interconnection Agreements.

For all its shortcomings, the Kentucky Broadband Act at least recognizes and does not purport to interfere with the Commission's federally-delegated authority to arbitrate and enforce interconnection agreements under § 252 of the Federal Communications Act. 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..." The only logical reading of this section is one that preserves any commission decision under § 252 which existed at the time of enactment. If the General Assembly had intended to usurp a specific Commission order, it could have easily chosen language to make that intent unmistakable. Yet, the Legislature declined to do so,

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[4] *BellSouth v. Cinergy*, 297 F. Supp. 2d 496 (E.D. Ky. 2003).

[5] See Investigation Concerning the Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc., Case No.l 2001-00105 (April 26, 2002).

probably because legislative language targeting a single Commission order would have run headfirst into the separation of powers doctrine embodied in Sections 27 and 28 of the Kentucky Constitution.[6]

B. The Act May Not be Read to Impair an Existing, Unexpired Interconnection Agreement.

The new legislation supplies a new standard for Commission regulation, arguably eliminating prior standards, but it does not and cannot affect binding decisions rendered by the agency. BellSouth asks that the Commission "give effect" to the Kentucky Broadband Act by revoking its own arbitration order issued in Case No. 2001-00432. See March 30, 2005 letter from Dorothy J. Chambers to Beth O'Donnell. There is of course no basis for the Commission to "withdraw" an order in the manner suggested by BellSouth.

First, BellSouth sought federal judicial review of the order, divesting the Commission of further jurisdiction in the matter.[7] Regardless, using 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. *See Smothers v. Lewis*, 672 S.W. 2d 62 (1984) (holding unconstitutional a legislative enactment which "locks horns" with the power of the judiciary to perform "inherent functions"). The Generally Assembly similarly lacks jurisdiction to try to influence a matter under judicial review. As the court made clear in *Smothers*, 672 S.W. 2d 62, 64,"[o]nce the administrative action has ended and the right to appeal arises the legislature is void of any right to control a subsequent appellate judicial proceeding. The federal constitution

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[6] *See LRC v. Brown*, Ky., 664 S.W. 2d 907 (1984); s*ee also Bd. of Trs. of the Judicial Form Ret. Sys. v. AG of Ky.*, 132 S.W.3d 770, 783 (Ky. 2003)

[7]

compels the same result. The passage of the Act has no effect whatsoever on the federal district court decision upholding the Commission's arbitration order in Case No. 2001-00432. If the Act had been intended to force the district court to reopen a final judgment entered prior to passage of the Act, the statute would be held unconstitutional under Article III of the United States Constitution. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995) (holding unconstitutional a Securities Act revision intended to direct the reopening of final judgments in certain private securities litigation). "When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than "reverse a determination once made, in a particular case." *Id. at 225*, (quoting The Federalist No. 81, at 545).

There is another constitutional bar to what BellSouth is seeking. The United States Constitution provides that "No State shall...pass any...Law impairing the Obligation of Contracts." U.S. Const., Art I, § 10. The Kentucky Constitution, at Section 19, similarly provides that "No *ex post facto* law, nor any law impairing the obligation of contracts, shall be enacted." As Kentucky's highest court stated in *Kentucky Utilities Co. v. Carlisle Ice Co.*, "[a]ny law which changes the intention and legal effect of the original parties, giving to one greater or the other less interest or benefit in the contract, impairs its obligation." 131 S.W. 2d 585, 594 (Ky Ct. App. 1939) (citation omitted).

Federal courts apply a three part test to determine whether application of a state statute results in an unconstitutional impairment of a contract. *See Golden Rule Insurance Co. v. Stephens*, 912 F. Supp. 261 (E.D. Ky 1995). First, the court must evaluate whether the state law in fact operates as a substantial impairment of a contractual relationship. If KRS 278.5462(2) "voids" any requirement contained in a contract, as a factual matter the contract is impaired. And in a constitutional sense, "change," *see* BellSouth petition at p. 1, and "impair" are

equivalent terms. *See Adams v. Greene*, 206 S.W. 759 (Ky. 1918). Second, the court will examine whether in enacting a requirement the legislature is exercising its police power, *rather than providing a benefit to special interests*. *Id.* at 912 F. Supp 267, citing *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 412 (1983). An exercise of the police power means exercising power with a legitimate public purpose, such as "the remedying of a broad and general social or economic program." *Energy Reserves*, 459 U.S. at 411-412. It is impossible to construe a purported *deregulation* statute as an exercise of police power. The Kentucky Broadband Act *eviscerates* regulatory power the Commission was using to *require* broadband deployment – it can hardly be described as remedial legislation and cannot pass the "police power" test. The Act is *special interest legislation* to protect incumbent carriers. Since only if a legitimate public purpose has been identified will the court determine whether an adjustment of contractual rights is appropriate, the Act does not pass muster under any of the three parts of the test.

III. THE RECENT FCC ORDER DOES NOT OVERRULE THE DISTRICT COURT'S DECISION NOR DOES IT ABROGATE ANY INTERCONNECTION AGREEMENTS

On March 25, 2005, The Federal Communications Commission issued an opinion in which it concluded that § 252(e)(6) of the federal act does not prevent the FCC from issuing an order or declaratory ruling that a state arbitration decision conflicts with federal law.[8] The FCC then ruled that state commissions may not require ILECs to provide "digital subscriber line

[8] Memorandum Opinion and Order and Notice of Inquiry, BellSouth Telecommunications, Inc. Request for Declaratory Ruling, WC Docket No. 03-251, par. 20, (March 25, 2005).

service (DSL) service[9] to an end user customer over the same unbundled network element (UNE) loop facility that a competitive LEC uses to provide voice service to that end user. The FCC went on to state in a footnote: "[w]e anticipate that parties will use the conclusions in this Order in the existing federal court proceedings *brought pursuant to* section 252(e)(6) of the Act.[10] 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 is *currently under* district court review and, on the other, the one state, Kentucky, where district court review is already final and subject matter jurisdiction before the U.S. court of appeals is not based on § 252 (e)(6). In making this distinction, the FCC appears to have recognized that its decision can have no effect on a final order from a federal district court. This is because Congress may not vest review of the decisions of Article III courts in officials of the Executive Branch. *See, e.g., Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948); *see also Town of Deerfield v. FCC*, 992 F.2d 420, 428 (2d Cir. 1993).. "Since neither the legislative branch nor the executive branch has the power to review judgments of an Article III court, an administrative agency such as the FCC . . . similarly has no such power. Nor may an administrative agency choose simply to ignore a federal-court judgment."

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[9] Remarkably, the FCC's preemption order uses the term "DSL service" to refer not only to pure DSL transport, a telecommunications service, but also to refer to DSL-based Internet Access services like BellSouth's unregulated FastAccess service. The FCC's imprecision in this regard tends to show that in trying to determine whether certain state actions "substantially prevent" the implementation of the Act and the federal unbundling rules, the FCC failed completely to credit the nuances of the Kentucky Commission's Cinergy arbitration order, which declined to order BellSouth to sell Internet access services to Cinergy's voice customers, while implementing a narrower requirement (later characterized approvingly by the district court as "relatively modest") that BellSouth not withhold its tariffed DSL transport service from an ISP based on whether the ISP would use the DSL service on a UNE loop.

[10] *Id.*, n. 64.

BellSouth has already acknowledged that the FCC's preemption decision could not directly overrule the district court's order affirming the Commission. BellSouth said as much when it filed its motion asking the Sixth Circuit to hold its appeal in abeyance pending the FCC's decision: "Moreover, because BellSouth will comply with the Kentucky Public Service Commission ("Kentucky PSC" or "PSC") decision under review here *pending the resolution of this case*, no party will be prejudiced by BellSouth's request."

Finally, whatever the preemptive scope of the FCC's recent order, the order does not claim to change or abrogate any interconnection agreement. This is no surprise, because the FCC is given no role whatever with regard to interconnection agreements unless "a state commission fails to act to carry out its responsibility under this section in any proceeding..." 47 U.S.C. § 252(e)(5). The FCC has acknowledged as much, holding that the *Sierra-Mobile* doctrine,[11] under which federal agencies may, upon a heightened public interest showing, change terms in certain contracts over which they have jurisdiction, *does not apply to interconnection agreements negotiated under the Act:*

> ...The Sierra Mobile analysis does not apply to interconnection agreements reached pursuant to sections 251 and 252 of the Act, because the Act itself provides the standard of review of such agreements. *See* 47 U.S.C. § 252(e)(2).

IDB Mobile Communications, Inc. v. COMSAT Corp., Memorandum Opinion and Order, 16 FCC Rcd 11474, ¶ 16, n. 50 (2001) Thus, the only possible effect of the FCC order on CCC is to require further negotiation pursuant to the terms of the interconnection agreement.

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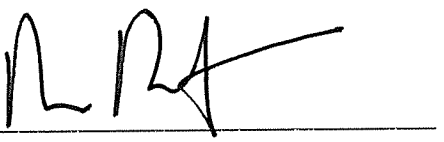
[11] *See FPC v. Sierra Pacific Power Co.,* 350 U.S. 348 (1956) and *United Gas Co. v. Mobile Gas Corp.,* 350 U.S. 332 344 (1956) (permitting federal agencies with jurisdiction over the contracts at issue to change unlawful contract rates and to modify contractual provisions upon a heightened showing of public interest in such modification).

IV. THE COMMISSION SHOULD DISMISS BELLSOUTH'S PETITION

In a letter dated the same day as the Commission order requesting briefs in this case, BellSouth wrote that the Commission should require the CLEC parties to execute [with BellSouth] an appropriate amendment to their interconnection agreements. BellSouth further stated "[n]o further proceedings or delay are appropriate." CCC does not disagree. CCC remains willing to amend its interconnection agreement with BellSouth, and has made a written proposal which deals with the "broadband" aspects of the current agreement. However, such amendment must be result of meaningful negotiations between the parties, not the result of being bludgeoned by inappropriate use of a state statute that has no application to the dispute between the parties. The change of law section in CCC's interconnection agreement requires no less. And the Commission has already ruled in Case No. 2004-00427 that parties must honor their contractual agreement to negotiate changes. The Commission should so rule here, and dismiss BellSouth's petition.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Brief of Cinergy Communications Company was served upon the parties of record this 19th day of April, 2005.

_____

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