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April 29, 2005

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 Reply 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,

C Kent Hatfield (me)

C. Kent Hatfield
Counsel for Cinergy Communications Company

CKH:jms

Enc.

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

REPLY BRIEF OF CINERGY COMMUNICATIONS COMPANY

Cinergy Communications Company ("CCC"), pursuant to the Commission's March 30, 2005 Order in this proceeding, hereby submits its reply brief.

I. INTRODUCTION AND SUMMARY

In its March 30, 2005 order the Commission asked for briefs on a narrow legal question: how do the "Kentucky Broadband Act" (the "Act") and an unrelated FCC preemption order affect unexpired interconnection agreements?

The answer is simple. The Act has no retroactive effect on unexpired agreements approved prior to its passage. The recent FCC order, however, requires the parties to negotiate contract changes.

In its brief, CCC explained that neither the Act nor the FCC's recent preemption order have any automatic effect on currently effective interconnection agreements, including CCC's agreement with BellSouth. Thus, these actions do not grant BellSouth the right to amend the agreements without negotiation, and they cannot be the basis for BellSouth to cajole the Commission into issuing an order granting such a right. CCC showed that regardless of any

prospective effect of the Act, the United States and Kentucky Constitutions forbid the application of the Act in any way that would impair CCC's agreement with Bellsouth. Moreover, the separation of powers doctrine, strictly applied in Kentucky, prevents the legislative branch from reversing an executive agency's decision. CCC further demonstrated that, 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. This is because the FCC does not review state arbitration orders and federal court decisions, so it cannot "reverse" such decisions.

Thus, neither the new statute nor the FCC order requires the Commission to "withdraw" an arbitration order. And while the Act cannot be read to impair an existing agreement or reverse a Commission order approving it, the FCC's recent order did effect a change in law, to which CCC promptly responded by making a contract modification proposal to BellSouth.

BellSouth digresses from the narrow legal question posed by the Commission, focusing instead on the mechanics of the Act. Citing no legal authority other than the Act itself, BellSouth then claims there is an "overwhelming legal basis" for the Commission to "withdraw" the 2002 *Cinergy* Order. BellSouth is incorrect. The Commission has no basis to "withdraw" a final order upheld on direct review. BellSouth has appealed that decision, and the decision of the Federal District Court for the Eastern District of Kentucky upholding it, to the Sixth Circuit. The Commission does not violate the Act by declining to follow BellSouth's instructions. And the general question of how to adhere to the strictures of the Act is not the question parties were asked to brief, so CCC limits its reply to the far narrower question posed by the Commission's March 30, 2005 order.

II. EVEN IF THE "KENTUCKY BROADBAND ACT" PROHIBITS REGULATION OF BROADBAND, IT DOES NOT PERMIT OR REQUIRE THE COMMISSION TO "WITHDRAW" AN ARBITRATION ORDER.

A. Legislative Intent and Statutory Interpretation are Not the Issues before the Commission.

As CCC predicted, BellSouth's brief is devoted to gloating that the Kentucky legislature and the FCC have stopped the Commission from interfering with BellSouth's method for consolidating its domination of the voice market in Kentucky. BellSouth devotes most of its fifteen pages to a numbing recitation of the manifold ways in which BellSouth contends the General Assembly has hog-tied the Commission. BellSouth even explains how certain sections of the Act that ostensibly keep BellSouth in check are, in reality, meaningless statutory decorations and/or trapdoors for customers and competitors. For example, Bellsouth argues that KRS 278.5462(2) (which by its terms preserves ILEC duties to provide UNEs) does not establish an affirmative right "to anything," and the Commission's jurisdiction to "investigate" and "resolve" complaints under 278.5462 (3) does not include the power to actually exercise that jurisdiction by imposing obligations on providers. *See* BellSouth Br. at 11-12.

CCC's reply will not address BellSouth's irrelevant discussion about the workings of the statute. Those issues are not currently before the Commission in this case. But BellSouth's brief simply proves too much when it claims that the Act "resolves the issue raised by the *Cinergy* case..." BellSouth Br., p. 6. BellSouth is telling the Commission that the Act is a legislative annulment of a Commission decision. But as CCC explained in its brief, to view the effect of the Act in this way would require the Commission to be complicit in the very type of legislative encroachment on the Commission's authority which the Kentucky Supreme Court has found

impermissible under Sections 27 and 28 of the Kentucky Constitution. *See LRC v. Brown*, 664 S.W.2d 907, 913-14 (1984) (reaffirming strict application of separation of powers including the long-held principle that the General Assembly *may not perform or undertake to perform executive or judicial acts*, except in such instances as may be expressly or by necessary implication directed or permitted by the constitution) (internal citation omitted). Applying the Supreme Court's analysis of separation of powers in *LRC v. Brown*, the legislature has no more power to rewrite an Executive Branch agency's decision than the Commission has to pass legislation.

To be clear, CCC is not asserting that the General Assembly cannot change the law. Clearly it can, and it has. Rather, CCC is asserting that the Act may only be applied in a manner consistent with what the Constitution requires.

B. The Statute Does Not Eliminate BellSouth's Obligation to Negotiate Changes to Interconnection Agreements.

Relying on its claims about the Act, BellSouth seeks to avoid negotiation, insisting that it can force a unilateral change on CCC. BellSouth's insistence is based on the false premise that state law has *reversed* the Commission's decision and *voided* the contract. *See* BellSouth Br. at 17. BellSouth is wrong. The decision has not been "reversed." CCC's interconnection agreement with BellSouth was approved by the Commission and upheld on direct review. Thus, a change in law requires the parties to negotiate an amendment to the agreement. And as discussed below and in Cinergy's initial brief, the changes in law requiring negotiation are those flowing from the FCC preemption order. The Act itself does not affect the Cinergy agreement.

As part of its strategy to force the Commission to comply with an imaginary statutory directive and void an interconnection agreement, BellSouth claims this docket "grows out of the passage of the Kentucky Broadband Act." BellSouth Br, p. 2. If BellSouth is suggesting that

this case is a necessary consequence of the statutory change, BellSouth is wrong. The legislature could have directed the Commission to open a docket to implement the new statute, but it did not. Whatever the consequences of the Act, they can manifest themselves without a generic case. But the current proceeding, arising from a BellSouth petition filed well before the FCC issued its preemption order, is just another part of BellSouth's agenda to speed the demise of voice competition in Kentucky.[1]

This is not to call the Act a dead letter. Clearly it has prospective effect, and CCC is not suggesting that the Act is to be ignored in any future arbitration proceeding between BellSouth and any CLEC, including CCC. But the language in the Act which purports to void *requirements* can only be read to mean that requirements imposed in the past cannot be reimposed in the future. If, as BellSouth suggests, the General Assembly intended to "reverse" a Commission order, which of course, it cannot, the legislature could easily have inserted the word "order" into HB 627.

III. THE RECENT FCC ORDER, WHILE PRODUCING A CHANGE IN LAW, DOES NOT OVERRULE THE DISTRICT COURT'S DECISION.

BellSouth deliberately mischaracterizes the FCC declaratory ruling proceeding as an "appeal" of the Kentucky Commission's decision. *See* BellSouth Br. at 14. This is nonsense. Prior to filing its petition at the FCC, BellSouth had already sought review of the *Cinergy* decision in the federal district court. The "appeal" was in federal court, not at the FCC. What

[1] BellSouth has been remarkably successful in leveraging its near monopoly on local and DSL-based services. Less than two years after reentering the interLATA market, BellSouth is now the largest long distance provider in the region. According to BellSouth's April 21, 2005 quarterly earnings press release, during the first quarter of 2005, BellSouth added a record 253,000 net DSL customers and currently serves more than 2.3 million customers. BellSouth added 455,000 mass-market long distance customers during the first quarter of 2005, and now serves nearly 6.5 million mass-market long distance customers. These customers represent more than a 50 percent penetration of BellSouth's mass-market base and spend an average of approximately $17 per month on long distance with BellSouth.

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 was pending.

BellSouth filed its FCC petition on December 9, 2003, long after briefing and oral argument in the district court. The district court decision was issued on December 29, 2003, prior to the due date for comments on the BellSouth FCC petition. Thus, in its comments to the FCC opposing the BellSouth petition, *which were not even acknowledged* by the FCC in its 24 page preemption order containing more than 100 footnotes, the Kentucky Commission correctly described the BellSouth FCC petition as "an improper collateral attack on a federal court order." WC Dkt. 03-251, Ky. PSC Comments at p. 1 (January 28, 2004).

The FCC has now 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, and the FCC has, as BellSouth states, concluded that the Kentucky Commission's decision is not consistent with federal law. Thus, absent reversal of the FCC's decision, CCC agrees that it must amend its agreement with BellSouth. CCC will negotiate with BellSouth, and has already made a written proposal to deal with "broadband" issues, but nothing in the FCC's preemption order grants BellSouth a license to tear up the change of law language in the interconnection agreement and force a unilateral amendment on CCC.

IV. THE COMMISSION SHOULD DISMISS BELLSOUTH'S PETITION AND ORDER BELLSOUTH TO NEGOTIATE IN GOOD FAITH

As discussed above, CCC does not dispute that the legislature can change the law. CCC also acknowledges the FCC may preempt state authority. Both bodies have acted to prevent the Commission from making the same pro-competitive decision in the future as was made in the *Cinergy* case, thereby -- to paraphrase FCC Commissioners Copps and Adlestein -- slapping

federal-state relations and flashing the green light for broadband tying arrangements.[2] But even though these bodies may change the law the Commission must apply going forward, neither the legislature nor the FCC may vacate a PSC arbitration order or a federal court's decision, and neither can impair CCC's contract.

Finally, CCC is compelled to comment on the irony, if not hypocrisy, of BellSouth's arguments about the automatic effect of the legislative and regulatory changes. BellSouth's about face is best illustrated by a brief return to the beginning of the Commission's arbitration case which led to the agreement BellSouth has spent the last three years trying to undermine.

Early in 2002, in its response to Cinergy's arbitration petition in Case No. 2001-00432, BellSouth had this to say about what should happen in the event of a change in law:

> **Issue 3: Should any negotiated amendment to this agreement based upon a change in legislative, regulatory, judicial or other legal action be applied retroactively to the date of such change? (Section 17.3)**
>
> No. It is neither appropriate nor necessary for amendments to interconnection agreements that are negotiated due to *legislative, regulatory*, judicial or other legal action to be retroactive to the date of such action. *The relationship between BellSouth and Cinergy (like all CLECs) is, pursuant to the 1996 Act, governed by an interconnection agreement.* The parties *may agree* to apply an amendment made due to *legislative, regulatory*, judicial or other legal action retroactively. ... [T]he agreement requires BellSouth to *negotiate in good faith* concerning changes Cinergy believes are necessitated by any *legislative, regulatory*, judicial, or other legal action. If Cinergy believes BellSouth is delaying in bad faith, it has a remedy. The Agreement provides that any dispute concerning such a request shall be referred to the dispute resolution procedure set forth in the Agreement.
>
> BellSouth Response to Cinergy Petition for Arbitration (January 3, 2002) (emphasis supplied).

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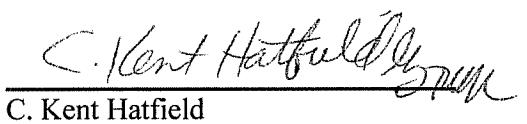
[2] See Memorandum Opinion and Order and Notice of Inquiry, BellSouth Telecommunications, Inc. Request for Declaratory Ruling that State Commissions May Not Regulate Broadband Internet Access Services by Requiring BellSouth to Provide Wholesale or Retail Broadband Services to Competitive LEC UNE Voice Customers (WC Docket No. 03-251) (FCC 05-78)(rel. Mar. 25, 2005)(joint statement dissenting in part).

BellSouth now finds the shoe on the other foot. Legislative and regulatory action favorable to BellSouth has occurred. Suddenly, automatic, unilateral, retroactive changes seem just fine. But BellSouth was right the first time. Disputes over BellSouth's request for changes to the Interconnection Agreement should be referred to the dispute resolution process in the agreement, and BellSouth should negotiate with CCC in good faith. This case should be closed.

Respectfully submitted,



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Brief of Cinergy Communications Company was served upon the parties of record this 29th[th] day of April, 2005.

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