STOLL | KEENON | & | PARK | LLP

307 WASHINGTON STREET | FRANKFORT, KENTUCKY 40601-1823
(502) 875-6220 PHONE | (502) 875-6235 FAX | WWW SKP COM

DOUGLAS F. BRENT
502-568-5134
brent@skp.com

May 23, 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 Petition for Rehearing or, in the Alternative, Clarification of Order to Ensure Compliance with the FCC's Transition Period for the UNE-P "Embedded Customer Base."

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

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

PETITION OF CINERGY COMMUNICATIONS COMPANY FOR REHEARING OR, IN THE ALTERNATIVE, CLARIFICATION OF ORDER TO ENSURE COMPLIANCE WITH THE FCC'S TRANSITION PERIOD FOR THE UNE-P "EMBEDDED CUSTOMER BASE"

Cinergy Communications Company ("Cinergy"), for its Motion for Rehearing or, in the Alternative, Clarification of Order to Ensure Compliance with the FCC's Transition Period for the UNE-P "Embedded Customer Base," states as follows:

INTRODUCTION

On April 29, 2005, the Commission entered its Order in this case, ruling that incumbent local exchange carriers ("ILECs") are no longer required to provide digital subscriber line ("DSL") service over an unbundled network element ("UNE") loop used by a competing carrier to provide voice service. It also ordered the parties to the case to submit, within twenty days, contract amendments deleting provisions for such service. These amendments are required to be filed regardless of the remaining term of any existing agreement, without any requirement to negotiate alternate serving arrangements; regardless of the procedure for amendment specified in any agreement; and regardless of

any ILEC's failure to meet other lawful obligations by agreeing to timely amendments to its interconnection agreements.

As it has stated, Cinergy believes that the "DSL over UNE-P" issue, and the lawfulness of its existing interconnection agreement with BellSouth, is now within the exclusive jurisdiction of the Sixth Circuit Court of Appeals, where BellSouth's appeal of the Commission's Order approving the agreement[1] is now pending. Among the issues to be considered by that Court is an issue that is *unique to Kentucky:* whether BellSouth is entitled to violate not only its agreement with Cinergy, but whether it may also violate its agreement with this Commission to share access to its DSL facilities in Kentucky. In *Review of BellSouth Telecommunications, Inc.'s Price Regulation Plan,* P.S.C. No. 99-434 (Order dated August 3, 2000), BellSouth proposed that the Commission permit BellSouth to keep millions of dollars in excess earnings to which its customers were entitled to a refund. In return, BellSouth offered a commitment to deploy DSL facilities in Kentucky and to share with its competitors access to those facilities. The Commission's acceptance of BellSouth's proposal in its August 3, 2000 Order has no counterpart elsewhere, and was cited by the court in *BellSouth v. Cinergy,* 297 F. Supp. 2d at 949 (internal citation omitted), in affirming Cinergy's right to DSL over UNE-P in the first place: "BellSouth stated that it would 'make these same capabilities available to its competitors on a wholesale basis and therefore, would not have any competitive advantage.'... The commission accepted BellSouth's proposal." It remains to be seen whether the Sixth Circuit will reverse the District Court and permit BellSouth to violate

---

[1] *Petition of Cinergy Communications Co. for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to U.S.C. Section 252,* Case No. 2001-00432 (Ky. PSC. Orders dated July 12, 2002; October 15, 2002; February 28, 2003), *aff'd, BellSouth Telecommunications, Inc. v. Cinergy,* 297 F. Supp. 2d 946 (E.D. Ky. 2003). The case is now on appeal in *BellSouth Telecommunications, Inc. v. Cinergy,* No. 04-5128 (6th Cir.).

its voluntary agreement with the Kentucky Commission – but unilateral surrender by the Commission is as unnecessary as it is inappropriate.

Cinergy also continues to believe that the Separation of Powers doctrine bars any legislative attempt to interfere with the authority of either the executive or judicial branch, and that retroactive application of a statute to an existing contract – as opposed to one currently in negotiation or arbitration – is unlawful. Intent to abrogate existing contracts does not even appear in the Kentucky Broadband Act, KRS 278.546 *et seq.* In fact, the statute states the opposite, expressly preserving the Commission's authority to "enforce interconnection agreements." KRS 278.5462. Enforcement of the terms of its interconnection agreement is all that Cinergy requests, and the Kentucky Broadband Act clearly permits that.

Finally, 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 the federal courts. The Sixth Circuit, not this Commission, should resolve this jurisdictional issue, as well as the Constitutional questions presented by this case.

Cinergy requests rehearing on all of these key questions.

However, existing agreements will soon expire, even as BellSouth continues to tighten its chokehold over the local exchange market and the standards governing terms and conditions to compete in that market. Consequently, it is of utmost urgency that, if the Commission does not vacate its Order, it must clarify it to prevent BellSouth from using the Order as an excuse to evade *completely independent* obligations related to

Cinergy's embedded base that arise under the TRRO[2] and are unaffected by the Commission's Order.

On May 19, 2005, BellSouth wrote to the Commission and enclosed the interconnection agreement amendments it has reached with two CLECs, ITC^DeltaCom and Momentum Telecom, whose agreements contain DSL over UNE-P language merely because those carriers had exercised their federal rights to adopt, *in its entirety*, Cinergy's agreement with BellSouth. Those CLECs hardly have a concrete stake in this proceeding, because, unlike Cinergy, neither is an Internet Service Provider who actually uses BellSouth DSL transport in Kentucky. Therefore, changes to Section 2.10 are likely inconsequential to those carriers.[3] The Commission should not infer that these CLECs' acquiescence to BellSouth's contract change signifies much of anything. Rather, those amendments were purely ministerial.

Cinergy has not agreed to the BellSouth proposal, because it goes far beyond what would be required to comply with the Commission Order (assuming that Order were lawful, which it is not). In a nutshell, BellSouth's proposed language would have the effect of forcing Cinergy to pay resale rates for all the lines it purchases from BellSouth, regardless of whether those lines carry DSL transport. BellSouth's error is in proposing to comply with the Commission's Order in this case by totally eliminating the discounts and access charge surrogates (collectively, "billing surrogates") currently applied to UNE-P lines actually provisioned as resale lines. The Commission will recall that this provisioning situation exists because of BellSouth's claim that it would have to expend

---

[2] *Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (Feb. 4, 2005) "TRRO").

[3] ITC^DeltaCom has advised the Commission that it has no local customers in Kentucky. Momentum has similarly advised that it does not purchase wholesale DSL in Kentucky.

funds for software modifications in order to provision wholesale DSL over UNE loops (or UNE-P). Accordingly, as an accommodation to BellSouth, Cinergy agreed to accept DSL over "resale" lines and to receive credits in return to recover the difference between "resale" and "UNE" rates.

However, only some of the lines currently provisioned as "resale" (but billed at UNE rates pursuant to Cinergy's unquestioned right to those UNEs pursuant to the transition period for the "embedded base") are carrying wholesale DSL. UNE loops which do not carry wholesale DSL require no conversion to comply with the Commission's Order. And since *these lines are serving embedded base customers, they should be continue to be priced under the transition rates in the TRRO regardless of the Commission's decision in this case with regard to DSL.*

BellSouth has proposed a new Section 2.10.1 to the Cinergy Agreement, which basically requires that DSL be ordered only on resale lines, billed at the resale rate. That requirement may seem innocuous. However, BellSouth also proposes to delete Sections 2.10.1 through 2.10.1.8 of Attachment 2 to the existing Agreement. Those sections are the ones which implement the billing surrogates which apply to *all* the resale lines ordered by Cinergy, not only those carrying DSL. This flash cut elimination of the billing surrogates on all of these resale lines, were it to occur, would have the effect of converting Cinergy's embedded base of UNE-P to resale, depriving Cinergy of the benefits of the transition plan provided under the *TRRO.*

Even if the Commission does not grant rehearing, it is crucial that it ensure that BellSouth understands it will not be permitted to use the Commission's Order in this case to eliminate existing rights to UNE-P pricing for the embedded customer base.

ARGUMENT

I. THE COMMISSION SHOULD GRANT REHEARING BECAUSE EXISTING CONTRACTS HAVE NOT BEEN ABROGATED OR OVERTURNED BY A COURT OF COMPETENT JURISDICTION.

A. The Commission Lacked Jurisdiction to Render its Order.

The DSL over UNE-P issue with regard to Cinergy's agreement with BellSouth Telecommunications, Inc. ("BellSouth") is now within the exclusive jurisdiction of the United States Court of Appeals for the Sixth Circuit. As the Commission is aware, its Order requiring DSL over UNE-P was appealed by BellSouth and upheld in *BellSouth v. Cinergy,* 297 F. Supp. 2d 496 (E.D. Ky., 2003) and then appealed to the Sixth Circuit.

As the Commission has recognized, it has no authority to modify or amend an Order for which judicial review is pending. *See In the Matter of Joint Petition of Kentucky-American Water Co., Thames Water Aqua Holdings GmbH, RWE Aktiensgeselschaft, Thames Water Aqua US Holdings, Inc., Apollo Acquisition Co. and American Water Works Co., Inc. for Approval of a Change of Control of Kentucky-American Water Co.,* PSC Case No. 2002-00317, at 7 (Oct. 16, 2002) ('The actions for review of our Orders of May 30, 2002 and July 10, 2002 deprive us of any jurisdiction to modify or amend those Orders"). *See also Union Light Heat & Power Co. v. Public Service Comm'n,* 271 S.W. 361, 365-66 (1954) (explaining that an administrative agency, like a court, may reconsider and change its orders "during the time it retains control over any question under submission to it").

BellSouth should have taken its arguments to the Sixth Circuit, not to this Commission.

BellSouth also improperly collaterally attacked the Commission's Order by appealing it to the FCC even while its action in the federal court – the forum with *exclusive* jurisdiction to review an interconnection agreement pursuant to Section 252 of the Telecommunications Act -- was pending. Although the FCC's action on that petition is jurisdictionally suspect, *even the FCC did not believe its decision was self-effectuating.* In response to comments that the courts had jurisdiction over the subject matter of BellSouth's petition, the FCC explained that its ruling is only a "declaratory order" to be used "in the existing federal court proceedings brought pursuant to section 252(e)(6) of the Act." [4] Instead of following the FCC's instructions, though, BellSouth returned to this Commission.

The Commission should reconsider its decision to assist BellSouth in its extra-legal maneuvers and should leave the matter to the Sixth Circuit, the forum with jurisdiction and the forum in which the affected parties may obtain a judicial ruling on the serious constitutional[5] and jurisdictional issues presented by this case.

B. The Kentucky Broadband Act Does Not, and Could Not, Mandate the Result Reached by the Commission.

The Commission concluded, in its Order, at 4, that the Kentucky Broadband Act and the FCC's policies "cause[] this Commission to determine that the interconnection agreements in question in this proceeding must be altered." This conclusion is not warranted. It is, in fact, unlawful.

---

[4] *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 March 25, 2005) ("FCC Preemption Order"), at n. 64 and accompanying text.

[5] The Commission did not, in its Order, address the Constitutional issues raised by Cinergy except to describe them in passing. Of course, the Commission lacks authority to rule on Constitutional issues. But that does not mean those issues should be ignored. Dismissing this case in deference to the Sixth Circuit would resolve this somewhat awkward problem. Deferral is mandated here in any event, since the Sixth Circuit already has jurisdiction.

As we have seen, the FCC intended its decision to be used by ILECs in pending *judicial* proceedings. Moreover, the Kentucky Broadband Act is not meant to be applied retroactively to abrogate existing agreements. ***In the same subsection*** declaring that "any requirement imposed upon broadband service .. is hereby voided," the statute provides that "[t]he provisions of this section do not limit ... the commission's authority to arbitrate and *enforce interconnection agreements*." KRS 278.5462(2). 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."

Under Kentucky law, that is how it should be. *See* Ky. Const. § 19 (1) ("No ex post facto law, nor any law impairing the obligation of contracts, shall be enacted"); *Akers v. Baldwin,* 736 S.W.2d 294, 310 (Ky. 1987) ("The General Assembly can specify prospectively what rights are granted or denied by use of certain language in contracts in the future, but they cannot affect vested property rights");[6] *Peach v. 21 Brands Distillery,* 580 S.W.2d 235, 236 (Ky. App. 1979) (explaining that, even when contracts are not involved, "courts apply a strict rule of construction against retrospective operation and presume that legislatures intended a prospective application"); *Dumesnil v. Reeves,* 142 S.W.2d 132, 134 (Ky., 1940) (declaring that a statute should be construed to apply to "transactions taking place after it was passed" to avoid "impos[ing] an unexpected liability that if known might have induced those concerned to avoid it and to use their money in other ways").

---

[6] *Akers* was overruled in *Ward v. Harding,* 860 S.W.2d 280 (Ky. 1993), but not for the point of law for which it is cited here. *Akers* had upheld certain mineral rights in broad form deeds; the court in *Ward* did not uphold those rights. However, its decision was based not on some extra-constitutional argument that retroactive abrogation of contract is permitted, but on its determination that the rights upheld in *Akers* did not actually reflect the intent of the parties.

If Cinergy's contract expired today, this would be a different case. But Cinergy's contract has not expired. Nor has it been overturned by a court of competent jurisdiction – although it is currently pending before one. The Commission should take the General Assembly at its word and enforce the agreement rather than presuming retroactive application in derogation of law.

II. IN THE ALTERNATIVE, THE COMMISSION SHOULD CLARIFY ITS ORDER TO STATE THAT IT WILL REJECT ANY CONTRACT LANGUAGE THAT WOULD HAVE THE EFFECT OF UNDERMINING THE TRANSITION RATES FOR THE "EMBEDDED CUSTOMER BASE."

As Cinergy has explained in this petition, and in its previous filings in this case, there are serious constitutional, statutory, and policy problems warranting rehearing. But if the Commission decides not to reconsider its decision in this case, Cinergy requests that the Commission clarify its Order to state that it will reject any proposed interconnection agreement amendments that purport to comply with the Commission's Order by removing billing surrogates currently applied to resale lines that are, in reality, embedded base UNE-P arrangements subject to transition pricing under the *TRRO*.

To explain, many of Cinergy's business customers order several local voice lines from Cinergy, and also order DSL-based Internet access. To provide the requested service, Cinergy need only obtain BellSouth DSL transport on *one* of the lines.

BellSouth claims it can only provision DSL on a resale line. *See* Affidavit of Patrick L. Heck ("Heck Affidavit"), Exhibit hereto, at par. 6. The resale line used for DSL also carries inbound voice traffic, so the line must be included in the customer's hunt group. However, that resale line cannot be in the customer's hunt group unless the other lines in the group are provisioned as resale lines too. Thus, the entire group must

be provisioned as resale lines, even though the other lines in the group *carry no DSL*. If BellSouth could actually provision wholesale DSL on UNE loops, which it claims it cannot, every single line would have been ordered as UNE-P to begin with.

Logically, if the Commission's Order requires Cinergy to begin ordering DSL only on resale lines, that should have no effect whatsoever on pricing for UNE-P lines which carry no DSL and are provisioned as resale lines merely to accommodate BellSouth. With this understanding, it becomes clear that BellSouth's proposal to simply remove the billing surrogates on all "resale" lines is not the right approach, is certainly not compelled by the Commission's Order, and would do violence to the transition rates Cinergy is entitled to under the *TRRO*. Moreover, if the Commission errs by permitting this flash cut re-pricing of all "resale" lines based on the false premise that each of these lines carries DSL, there could be devastating effects for Cinergy.

Despite many setbacks, Cinergy is on target to complete its conversion to facilities-based service by March 2006 (when its current interconnection agreement expires); but being forced to switch to resale rates for all embedded lines only to maintain the ability to purchase tariffed DSL transport from BellSouth *on some of those lines* would immediately render unprofitable its service to many customers. Heck Affidavit, Exhibit hereto, at 5. Cinergy will immediately begin losing at least *$100 per month each* for twenty percent of those customers Heck Affidavit at 5. Certainly its build out will suffer due to the cash drain inherent in serving these customers unprofitably.

The *TRRO* will end UNE-P for embedded base customers no later than March 2006 in any event, and the DSL over UNE-P issue will clearly become moot. But the issue is hardly moot today. Therefore, the Commission should reject any proposed

contract language that would permit a rate increase (other than to the *TRRO* transition rate) or elimination of any billing surrogate for any resale line which: 1) serves part of the embedded customer base; and 2) does not carry DSL. In addition, the Commission should not permit BellSouth to demand physical conversion of those facilities to UNE-P. Rather, the Commission should only permit BellSouth to deduct from the monthly credit (referenced in Section 2.10 of the current Agreement) an amount equal to the number of lines carrying DSL multiplied by the cost of a resale line with no features. Arithmetically, this would be the equivalent of Cinergy ordering a new resale line for each customer who uses Internet access, then moving the DSL to that line. This would avoid disruption to Cinergy's customers and would ensure that BellSouth is paid the resale rate for all lines carrying DSL.

CONCLUSION

Because of the serious legal shortcomings of the Commission's Order, Cinergy respectfully requests that the Commission withdraw that Order, dismiss this case, and direct the parties to take their arguments as to the future of the affected interconnection agreements to the Sixth Circuit, which has jurisdiction over the issue. In the alternative, Cinergy respectfully requests that the Commission clarify its Order to explain that it will reject any proposed contract amendments that would have the effect of changing the pricing for any resale line serving an embedded customer and not carrying DSL.

Respectfully submitted,

Robert A. Bye
Vice President
and General Counsel
CINERGY COMMUNICATIONS CO,
8829 Bond St.
Overland Park, KS 66214
(913) 754-3333
(913) 754-1732 Facsimile

C. Kent Hatfield
Douglas F. Brent
Deborah T. Eversole
STOLL, KEENON & PARK, LLP
2650 AEGON Center
400 West Market Street
Louisville, Kentucky 40202
(502) 568-9100
(502) 568-5700 Facsimile

ATTORNEYS FOR CINERGY COMMUNICATIONS COMPANY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Petition for Rehearing of Cinergy Communications Company was served upon the parties of record this 23rd day of May, 2005.

Douglas F. Brent

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, KY 40602

Honorable Rick Richardson
Vice President/General Counsel
Momentum Telecom, Inc.
2700 Corporate Drive
Suite 200
Birmingham, AL 35243

Robert Culpepper
BellSouth Interconnection Services
675 West Peachtree St., N.E.
Suite 430
Atlanta, GA 30375

Jean Houck
ITC^DeltaCom Communications, Inc.
7037 Old Madison Pike
Suite 400
Huntsville, AL 35806

Honorable Kristopher E. Twomey
Attorney at Law
2501 Ninth St., Suite 102
Berkeley, CA 94710

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

Ms. Nanette Edwards
Senior Manger – Regulatory Attorney
ITC^DeltaComm Communications, Inc.
4092 S. Memorial Parkway
Huntsville, AL 35802

Honorable Dennis G. Howard II
Assistant Attorney General
Office of the Attorney General
Utility & Rate Intervention Division
1024 Capital Center Drive
Suite 200
Frankfort, KY 40601-8204

Honorable Dorothy J. Chambers
General Counsel/Kentucky
BellSouth Telecommunications, Inc.
601 West Chestnut Street, Room 410
P.O. Box 32410
Louisville, KY 40232

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

Todd Heinrich
Aero Communications, LLC
1301 Broadway
Suite 100
Paducah, KY 42001

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

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

AFFIDAVIT OF PATRICK L. HECK

I, Patrick L. Heck, Chief Technology Officer for Cinergy Communications Company ("CCC"), being first duly sworn, do hereby swear that that the following set forth below is true:

1. I am the Chief Technology Officer for CCC. I graduated from the University of Evansville in 1985 with a degree in Computer Science and earned a Masters Degree in Computer Science from the University of Virginia in 1988. I was accepted into the Ph.D. program at the University of Virginia and have completed all required courses. In August of 1994 I, with the help of some Evansville area businessmen, started World Connection Services, a successful residential and commercial Internet Service Provider where I served as President from 1994 to 2000. Under my direction, World Connection Services grew from a small ISP serving Evansville into a regional ISP serving Southwestern Indiana and Western Kentucky with approximately 8,000 subscribers. In 1998, World Connection Services was acquired by Q-Comm Corporation, the parent company of CCC. In 2000, World Connection Services, then named Network WCS, was merged into CCC and I took on the responsibilities of the Chief Technology Officer.

EXHIBIT

2. In my position as Chief Technology Officer, it is my responsibility to research and analyze the technologies that are to be deployed in order to provide service to our customers. In addition, it is my responsibility to insure that a business case can be made for deployment of a particular technology. In order to make these recommendations, it is important for me to understand the regulatory environment as well as the contracts with our vendors including BellSouth.

PURPOSE OF AFFIDAVIT

3. This affidavit highlights CCC's need for a transition period for the embedded base of CCC customers who are served using UNE-P and who also use Cinergy-provided Internet access service provisioned by CCC using BellSouth's wholesale DSL. These so-called "DSL over UNE-P" customers are actually provisioned on BellSouth's resale platform, for the convenience of BellSouth and with the agreement of CCC.. There will be considerable market disruption and/or loss of service for these customers if CCC is not granted a transition period for moving these customers to alternative services.

DECLARATION

4. CCC has always recognized that UNE-P (also known as the Unbundled Network Element Platform) was a transition strategy for CLECs entering into the local service market. UNE-P gives CLECs a running start for building a telecommunications business. By utilizing UNE-P facilities, CCC has been able to sell local voice services to small business and residential customers. Additionally, CCC has targeted most of its selling efforts to specific markets. As CCC has developed a customer base in certain markets, CCC has undertaken the building of facilities. These facilities allow CCC to utilize unbundled copper loops and UNE DS1s so that CCC is less dependent on the use of

BellSouth's UNE-P facilities. The customers served by UNE-P are then transitioned over to CCC's facilities so that BellSouth is no longer required to provide switching services. An important part of our targeted marking efforts have included broadband Internet. The only viable option for broadband Internet to customers served by UNE-P in Kentucky has been BellSouth's wholesale ADSL service.

5. CCC's current interconnection agreement with BellSouth was signed in March 2003 and has a three-year term. In reliance upon the terms and conditions of this agreement, and in reliance on the Kentucky Public Service Commission's approval of the agreement, *see BellSouth v. Cinergy,* 297 F. Supp. 2d 946 (E.D. Ky. 2003), CCC began working on a facilities-based business plan immediately upon entering into the agreement, targeting March of 2006 as the completion date for moving customers served via UNE-P and wholesale ADSL to CCC's own facilities.

6. At the time BellSouth and CCC were negotiating contract language to implement DSL over UNE-P, BellSouth's billing systems were not capable of supporting ADSL over UNE-P. CCC agreed to an interim solution whereby the UNE-P lines would be provisioned on resale and a credit would be given back to account for the price difference as well as the loss of access revenue which cannot be billed by a CLEC on the resale platform. As part of that agreement, once BellSouth completed all necessary billing changes it was to convert CCC's lines to UNE-P at no charge. BellSouth has never notified CCC that the necessary billing changes have been made and all DSL related lines remain on resale.

7. CCC, along with our sister company Kentucky Data Link, has built its own long-haul fiber-optic networking linking many cities in Kentucky. Currently, this fiber-

optic network covers most cities served by BellSouth including Bowling Green, Frankfort, Henderson, Hopkinsville, Louisville, Madisonville, Mayfield, Murray, Owensboro, and Paducah.

8. A very high-level summary of the work necessary to provide facilities-based services is as follows:

a. Research the processes for providing services.

b. File necessary paperwork/applications with BellSouth.

c. Research and test equipment options.

d. Install equipment in the collocation space at the Central Office.

e. Install and provision transport from the collocation space at the Central Office back to another network point within CCC's network.

f. Provision interconnection trunking from BellSouth to CCC switching equipment for local service and E911.

This process outlined above can take between 9 months and 12 months under the best of conditions. The upfront cost to bring up a single collocation for service can range from $100,000 to just over $500,000. These expenses include application fees and non-recurring charges paid to BellSouth for necessary services, labor, and capital expenses.

9. Based upon this business plan, CCC invested more than $6.4 million in facilities in the last two fiscal years and is on target to spend $4.8 million this fiscal year.

10. CCC, along with Kentucky Data Link, has opened 28 collocations in the BellSouth Central Offices in the state of Kentucky. Not all work has been completed that would allow CCC to provide local services to customers served out of these Central Offices.

11. CCC has built an effective sales organization and support structure, and has developed name recognition and goodwill in many cities in the state of Kentucky. CCC has active sales offices in Louisville, Bowling Green, Owensboro, and Paducah. CCC also sells services in the cities of Frankfort, Madisonville, Murray, Mayfield, Hopkinsville, and Henderson out of these offices.

12. Developing and implementing a facilities-based business takes years to complete. CCC has been on a fast pace to build out facilities. BellSouth has built its business over many decades. To believe that a new company can replicate BellSouth's facilities in less than three years is ludicrous. While simultaneously building out these facilities, CCC has also had to do extensive equipment testing. Testing itself takes months to complete. Because the telecom industry has been in such turmoil in the last few years, CCC has had to go through multiple iterations with different vendors as companies failed and dropped product lines. Despite all of these issues, CCC is on target to complete its conversion to facilities by March of 2006.

13. BellSouth will not provision orders for new DSL over UNE-P customers. That fact should not affect CCC's embedded base of customers. Yet BellSouth is proposing to affect them anyway. CCC has over 400 Kentucky customers currently provisioned by BellSouth as resale instead of as UNE-P, due solely to the accommodation CCC granted BellSouth. Often these customers have several voice lines, plus one voice line with DSL. Under CCC's interconnection agreement all the customers' lines are to be treated as if they are UNEs rather than resale lines. As discussed above, this virtual arrangement is effected through billing credits issued by BellSouth to CCC. However,

BellSouth proposes to simply stop issuing these credits, even for lines with no DSL, and leave these customers on the resale platform.

14. Eliminating the credit on all lines will immediately make all of the affected customers unprofitable. More than 20% of the customers will be unprofitable by more than $100 per month. This will have a devastating effect on CCC because the profit from the existing customer base served via UNE-P and wholesale ADSL helps fund current operations and capital investments. The loss of that revenue would prevent CCC from completing its build out of facilities according to the business plan. Entire markets will be denied access to facilities based competition.

15. CCC is entitled to transition rates under the *TRRO* for all of these customer lines, because they serve its embedded base. But this should not require a physical conversion to UNEs during the transition period. Rather, going forward, for a multi-line customer, the DSL may be provisioned as if it were on a stand-alone resale line with no features, *priced at the higher resale rate*. Any physical conversion would be unnecessary, unduly disruptive, and only temporary anyway, because CCC will ultimately have to transition the lines to its own facilities or some platform other than UNE-P.

16. Instead of requiring all the machinations that would be necessary to move these customer lines onto UNE-P and then move them again to CCC facilities, it would be easier to resolve this matter by adjusting the credit. This can be done by multiplying the number of 1FB lines with DSL by the cost of a resale line with no features. This amount would then be deducted from the monthly credit. As CCC migrates its base to CCC facilities,

the credits would go away. The credits would ultimately stop after March 10, 2006, because those lines would be converted to resale after that date per the TRRO.

CONCLUSION

17. If BellSouth is permitted to discontinue providing DSL over UNE-P to existing customers without a transition, CCC will suffer immediate and irreparable damage in the form of disruption to its business plan; necessity of closure of some offices; and loss of reputation and good will. Moreover, customers will be affected because their services will need to be moved twice within the next year making loss of service a probability. This unjust result can be avoided by simply modifying the credit to reflect the change of law that DSL must now be provisioned on a stand-alone resale line.

Patrick L. Heck

STATE OF INDIANA)
)
COUNTY OF VANDERBURGH)

Subscribed and sworn to before me by Patrick L. Heck on this 18 day of May, 2005.

My Commission Expires: 03/20/2011

Dianne Herrmann
NOTARY PUBLIC