COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF CINERGY COMMUNICATIONS	)	
COMPANY FOR ARBITRATIONS OF AN	)	CASE NO.
INTERCONNECTION AGREEMENT WITH	)	2001-00432
BELLSOUTH TELECOMMUNICATIONS, INC.	)	
PURSUANT TO U.S.C. SECTION 252	)	

O R D E R

On December 10, 2001, Cinergy Communications Company ("Cinergy") filed a petition requesting that this Commission arbitrate disputed issues concerning its interconnection agreement with BellSouth Telecommunications, Inc. ("BellSouth"). The parties have met with Commission Staff in an informal conference, a hearing was held on May 22, 2002, and post-hearing briefs have been filed. The case is now ripe for decision.

The parties dispute whether BellSouth should be required to furnish to Cinergy, on an unbundled network element ("UNE") basis, certain network elements, including the digital subscriber line access multiplexer ("DSLAM") port and broadband transport, that will enable Cinergy to configure and provide innovative services in Kentucky. Cinergy proposes to use these UNEs to offer a network service providing three or four voice lines and high speed Internet access using the copper pair loop. Cinergy also objects to BellSouth's current policy of refusing to provide its digital subscriber line ("DSL") Internet service to customers who choose a competitive local exchange carrier ("CLEC") that provides voice service over the UNE platform ("UNE-P"). BellSouth contends that it cannot, as a matter of law, be required to provide the UNEs requested.

It also notes that the FCC has not required it to provide DSL over facilities leased by a competitor.[1]

We have jurisdiction over the UNE issues presented pursuant to 47 U.S.C. **§** 252(e) (giving state commissions authority over, *inter alia,* interconnection disputes) and § 251(d)(3) (giving state commissions authority to establish access and interconnection obligations of incumbent local exchange carriers ("ILEC"), including unbundling obligations in addition to those imposed by the Federal Communications Commission ["FCC"]). We also have jurisdiction over the issue of whether BellSouth acts reasonably in refusing to provide DSL service to CLEC UNE-P customers under, *inter alia,* 47 U.S.C. § 252(e) and KRS 278.280. The FCC's determination on this issue is not, and does not purport to be, preemptive. The state commission in Florida previously prohibited as anti-competitive and discriminatory the practice to which Cinergy objects here.[2]

COLLATERAL ESTOPPEL

We first address the issue of whether the doctrine of collateral estoppel bars consideration of Cinergy's complaint concerning BellSouth's refusal to provide DSL service when a customer is served by a CLEC over UNE-P. The complaint brought by Cinergy here, that BellSouth's practice is discriminatory and anti-competitive, was brought by several CLECs in *In the Matter of Joint Application by BellSouth Corp., et al.*

[1] BellSouth Post-Hearing Brief at 2 (citation omitted).

[2] *In re: Petition by Florida Digital Network, Inc. for Arbitration of Certain Terms and Conditions of Proposed Interconnection and Resale Agreement with BellSouth Telecommunications, Inc. under the Telecommunications Act of 1996*, Docket No. 010098-TP (June 5, 2002).

For Provision of In-Region, InterLATA Services in Georgia and Louisiana, CC Docket No. 02-35 (May 15, 2002). The FCC rejected the argument that the practice is discriminatory, and has imposed no requirement that an ILEC must provide DSL service over UNE-P lines.

Both BellSouth and Cinergy state, in their post-hearing briefs, that collateral estoppel does not apply here because Cinergy itself did not raise the issue in the FCC proceeding.[3] We agree, and find that the issue is not subject to the collateral estoppel doctrine.

ACCESS TO PACKET-SWITCHING UNES FOR THE PROVISION OF BROADBAND SERVICE

Our legal analysis begins with applicable provisions of the Telecommunications Act of 1996, 47 U.S.C. § 251(c)(3) (requiring an ILEC to furnish "nondiscriminatory access to network elements on an unbundled basis") and 47 U.S.C. § 251(d) (requiring the FCC to consider, in promulgating regulations, whether access to such UNEs "as are proprietary in nature" is "necessary" and whether the failure to provide access to those UNEs would "impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer"). As UNEs used to provide broadband services are at issue here, we must also take into consideration the recent decision of the United States Court of Appeals for the District of Columbia Circuit, 290 F.3d 415 (D.C. Cir. 2002) (invalidating certain unbundling requirements established by the FCC and finding relevant to the issue of unbundling packet-switching the market penetration

[3] *See, e.g.,* BellSouth's Post-Hearing Brief at 1-2 (citations omitted).

of cable companies). The parties interpret these authorities, as well as others, very differently.

Cinergy claims that it is entitled to, and should as a matter of policy be permitted to obtain, the UNEs necessary to enable it to provide to residential and small business customers new products using broadband technology. It notes that it proposes to use these UNEs to provide in Kentucky, as it plans to provide in Indiana, telecommunications services that are not offered by BellSouth. It also argues that it will be impaired in its ability to provide those telecommunications services unless it can obtain packet-switching UNEs from BellSouth because it is cost-prohibitive to buy and co-locate its own equipment. Cinergy contends that this Commission should reject BellSouth's argument that Cinergy is not entitled to the UNEs because it did not share the risk in building them. Cinergy argues that there was little risk to BellSouth in its DSL buildout because it built these facilities with several million dollars that would otherwise, under BellSouth's price cap plan, have been returned to ratepayers.[4] Cinergy lacks such a subsidy. Cinergy also notes that BellSouth stated, in its request to retain the money that would otherwise have been refunded to its customers, that it would not be financially reasonable to build out DSL facilities into rural areas and that, absent the subsidy, it would not do so.[5] According to Cinergy, BellSouth has thus made Cinergy's "business case" for not building its own facilities into rural areas. Cinergy also quotes

[4] Post-Hearing Brief of Cinergy Communications Company ("Cinergy Post-Hearing Brief"), at 13-14, *citing* Case No. 1999-00434, *In the Matter of Review of BellSouth Telecommunications, Inc.'s Price Regulation Plan* (Order dated August 3, 2000).

[5] Cinergy Post-Hearing Brief at 14.

prices for the purchase of necessary equipment to demonstrate that building its own facilities is not a viable option.

BellSouth, on the other hand, asserts that it cannot lawfully be required to provide to CLECs packet-switching UNEs. BellSouth contends that Cinergy does not need these UNEs to provide the services it seeks to offer, and contends that Cinergy should buy its own equipment and co-locate that equipment in BellSouth's central offices. Cinergy is not entitled to purchase these elements because, BellSouth argues, it shared none of the economic risk in the build-out. BellSouth asserts that it has no incumbent advantage in the broadband market, and cites *USTA v. Federal Communications Comm'n* in support of its argument that being forced to provide UNEs to support DSL service creates a disincentive to invest in new technology.

BellSouth also cites *USTA* in support of its argument that Cinergy is not "impaired" under 47 U.S.C. § 251(d) in its attempt to offer DSL because it has produced no evidence regarding the competition BellSouth faces from cable services offering broadband. BellSouth notes that neither the FCC nor other state commissions in its region have ordered the unbundling of packet switching. It also argues that inability to obtain packet-switching as a UNE from BellSouth will not "impair" Cinergy's ability to offer the telecommunications services it seeks to offer because [1] BellSouth faces broadband competition from cable providers,[6] and [2] Cinergy can expend the capital to build its own facilities for a reasonable price that will enable it to survive financially. It states that the prices Cinergy has quoted are exaggerated and that they include payments to BellSouth that, in fact, Cinergy would not be required to remit.

[6] BellSouth's Post-Hearing Brief at 13.

BellSouth correctly summarizes the D.C. Circuit's concerns regarding the wisdom of the FCC's having unbundled packet-switching without having first examined the entire competitive context. It is not, however, clear that the D.C. Circuit ruled that the level of a CLEC's "impairment" under the statute is to be based upon an analysis of the competition faced by the ILEC. Nevertheless, we conclude that the court's discussion of cable competition is to the point here, as is its concern that unbundling packet-switching will create a disincentive for ILEC investment in these technologies. Cinergy argues that BellSouth's risk in its broadband rollout has been considerably alleviated by its retention of monies that it would otherwise have refunded to its customers. Cinergy also questions the applicability of the D.C. Circuit's *USTA* rationale in Kentucky, where BellSouth's incentive to invest was underwritten by Kentucky ratepayers. The argument is persuasive, as far as it goes. However, we must look to the long-term effects upon Kentucky of creating a packet-switching UNE. Future investments by BellSouth, beyond those mandated in, and subsidized pursuant to, Case No. 1999-00434, would be discouraged. Moreover, Kentucky's other ILECs might question the wisdom of investment in packet-switching if the returns on such investment would be required to be shared with competitors.

Even if we were inclined to unbundle packet-switching, we would not do so on the record in this case. We have no evidence in the record of cable or other broadband penetration in the relevant markets. Nor do we believe Cinergy has demonstrated that obtaining additional UNEs from BellSouth is "necessary" to enable it to provide service. While Cinergy is entitled to purchase DSL-capable loops, it should purchase its own additional equipment to provide the broadband services it seeks to offer.

ISSUES RAISED BY BELLSOUTH'S REFUSAL TO PROVIDE BROADBAND SERVICES TO A CUSTOMER OF A CLEC PROVIDING SERVICE BY UNE-P OR TO ISSUE A BILL FOR BELLSOUTH DSL SERVICES TO CUSTOMERS OF RESELLERS

Cinergy objects to BellSouth's policy of refusing to provide DSL service to a customer who obtains his voice service from a CLEC that provides service by means of UNE-P. The practice is, Cinergy claims, anticompetitive in that it enables BellSouth to leverage its FastAccess ISP service, which cannot be resold by a CLEC, to leverage control over the voice market. Cinergy claims that it has lost customers to this practice. Cinergy also objects to BellSouth's billing system, pursuant to which a customer who has a competitor's phone number can be billed for BellSouth's DSL service only by credit card.

BellSouth defends its policy of cutting off its DSL service to a customer who switches his voice service to a CLEC that buys UNE-P from BellSouth. First, BellSouth notes that the FCC has not prohibited the practice. Next, BellSouth argues that, since it will provide DSL service over a *resold* line, it is not necessary for CLECs and their customers for DSL service to be available over a *UNE-P* line. BellSouth desires to provide DSL services over only those lines over which it retains ownership and control.

We are not persuaded by BellSouth's arguments. Its practice of tying its DSL service to its own voice service to increase its already considerable market power in the voice market has a chilling effect on competition and limits the prerogative of Kentucky customers to choose their own telecommunications carriers. Further, since the passage of the Telecommunications Act of 1996 we have supported CLECs' rights to obtain the UNE-P to provide voice service. BellSouth's practice of denying DSL to a CLEC's UNE-

P customers undercuts our own long-held policy and, in the long run, will result in fewer viable CLECs, and thus fewer customer options. Accordingly, this practice must cease.

Next, we address issues involving BellSouth's billing system as it relates to DSL service to CLEC customers.[7] The billing system does not permit DSL services to be billed separately to customers of CLECs. In order to retain their DSL services, customers who switch to a reseller CLEC must be billed by credit card. BellSouth states it should not be required to change its billing system to provide a written bill to a customer who has not chosen BellSouth for his voice service, and explains that Internet service providers routinely bill via customer credit cards.

We do not find it necessary to require BellSouth to change its billing system as requested by Cinergy. BellSouth correctly notes that its alternative billing method for CLEC customers, billing by credit card, is common in the industry. BellSouth's status as an ILEC should not require special measures in this regard.

The Commission being sufficiently advised, IT IS THEREFORE ORDERED that:

1. Cinergy's request for unbundled packet-switching is denied.

2. BellSouth shall not refuse to provide its DSL service to a customer on the basis that the customer receives voice service from a CLEC that provides service by means of UNE-P.

3. Cinergy's request that BellSouth alter its billing system to permit DSL billing by some means other than by BellSouth telephone number or credit card is denied.

[7] We note that the DSL customers at issue are those served by resold lines rather than by UNE-P. As described elsewhere in this Order, BellSouth refuses to provide DSL to customers whose CLECs provide service by UNE-P.

4. Within 20 days of the date of this Order, the parties shall file their final interconnection agreement containing terms consistent with this Order.

Done at Frankfort, Kentucky, this 12th day of July, 2002.

By the Commission

CONCURRING AND DISSENTING OPINION OF CHAIRMAN MARTIN J. HUELSMANN

I concur in the majority opinions on the collateral estoppel, access to packet switching and billing issues. I am, however, forced to dissent on the issue of BellSouth's refusal to provide Broadband services to a customer of a CLEC who is providing voice service via UNE-P. First, I believe that in July of 2002 one of the most important things for regulators to consider is "regulatory certainty." Utilities are constantly being regulated both at a federal and state level. In order for the utilities to effectively function in today's society, it is necessary that they know what the regulators are going to do. On May 15, 2002, the FCC ruled that the refusal to provide DSL service over a CLEC's UNE-P line was not anti-competitive and discriminatory. The FCC said, "We reject these claims because, under our rules, the incumbent LEC has no

obligation to provide DSL service over the competitive LEC's leased facilities..(w)e cannot agree with commenters that BellSouth's policy is discriminatory."[8]

The majority today tells BellSouth that, while at the federal level you can refuse, at the Kentucky state level you cannot refuse. Such is pure and simple regulatory uncertainty. This Commission in the past has given deference to the FCC and ruled consistently with the FCC. On August 3, 2000, BellSouth agreed to certain commitments for DSL deployment (30 central offices). They deployed in not only 30, but in over 90 offices. With this decision not only do we have regulatory uncertainty but we have a situation in which there is less incentive for BellSouth to deploy broadband throughout the state. Economic development will be curtailed.

Secondly, there is an absence of any testimony showing any harm to Cinergy. What Cinergy wants to do is receive UNE rates rather than resale rates. There is no evidence in the record concerning the total costs to be paid by Cinergy to sell service by means of UNE-P; the record is devoid of <u>any</u> evidence on provisioning, maintenance and other variable costs that Cinergy will have to pay. Accordingly, I do not find even a scintilla of evidence presented by Cinergy, much less a preponderance, to show that Cinergy would be losing money by purchasing BellSouth's voice service at the resale rate.

Next, I must state my concern with practices in which Cinergy has engaged. The record reflects that Cinergy has purposely sold ADSL to 50 customers only in anticipation of a favorable ruling of this Commission and to test the product. Cinergy

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[8] Memorandum Opinion and Order, In the Matter of Joint Application by BellSouth Corp., et al. For Provision of In-Region, Inter ALTA Services in Georgia and Louisiana, CC Docket No. 02-35 (May 15, 2002), at Section 175.

says that if this Commission rules against it, it will be forced to either return these customers to BellSouth or to raise rates to an uncompetitive level. I can only assume that prior to selling their services they gave full disclosure to their customers.

In addition, Cinergy consistently stated in the hearing that is a "small company" that has no business plan when it comes to selling DSL. I have serious reservations as to why a company would sell something without having any business plan. I also find it inconceivable that, in 2002:

1) A CLEC would plan to sell DSL without a market research study on the desire for DSL.

2) A CLEC planning to sell DSL would be unaware of, and apparently not care about, the national "take rate" for DSL.

3) A CLEC would assume, for its business case, that over the first two years it offered DSL, 50 percent of the DSL customers would be residential at a cost of $79.95 and 50 percent at $49.95 residential.

4) A CLEC's CEO would not know the number of lines in Kentucky (he has been in this business since 1984).

5) The witness of a CLEC making an argument before a state commission would not have read, or become familiar with, an FCC decision on the same issue (here, the Georgia/Louisiana 271 case where the FCC rejected the argument that refusal to provision DSL over a CLEC's UNE-P line is discriminatory).

6) A CLEC wishing to sell DSL would not know what "super app" means.

7) A CLEC would state that a majority of its customers demand high speed Internet access, yet be unable to describe who those customers are.

8) A CLEC would admit that it has no business case for ADSL for residential.

Last, but certainly not least, BellSouth's decision to deny its DSL service to a customer who chooses a CLEC is a business decision. I find persuasive BellSouth's argument that it is entitled to provide its DSL service over only those lines it controls. Moreover, BellSouth's policy does not deny a customer the option to choose a CLEC for voice service; it simply requires a CLEC wishing to keep a customer to become a reseller of BellSouth service rather than a UNE-P provider.

Accordingly, I would deny Cinergy's request.

Martin J. Huelsmann
Chairman

ATTEST:

Executive Director