

**BellSouth Telecommunications, Inc.**  
601 W. Chestnut Street  
Room 407  
Louisville, KY 40203

Dorothy.Chambers@BellSouth.com

**Dorothy J. Chambers**  
General Counsel/Kentucky

502 582 8219  
Fax 502 582 1573

October 1, 2004

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

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PUBLIC SERVICE  
COMMISSION

Re: Adoption of Interconnection Agreement Between BellSouth  
Telecommunications, Inc. and Cinergy Communications Company by  
Dialog Telecommunications, Inc.  
KPSC 2004-00369

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of BellSouth Telecommunications, Inc.'s Response and Motion to Dismiss Dialog Telecommunications, Inc.'s Notice of Intent to Adopt Cinergy Interconnection Agreement.

Sincerely,

  
Dorothy J. Chambers

Enclosures

cc: Parties of Record

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

ADOPTION OF INTERCONNECTION )  
AGREEMENT BETWEEN BELLSOUTH ) CASE NO. 2004-00369  
TELECOMMUNICATIONS, INC. AND )  
CINERGY COMMUNICATIONS COMPANY )  
BY DIALOG TELECOMMUNICATIONS, INC. )

**BELLSOUTH TELECOMMUNICATIONS, INC.’S  
RESPONSE AND MOTION TO DISMISS  
DIALOG TELECOMMUNICATIONS, INC.’S NOTICE OF  
INTENT TO ADOPT CINERGY INTERCONNECTION AGREEMENT**

BellSouth Telecommunications, Inc. (“BellSouth”), by counsel, hereby responds and respectfully moves to dismiss the September 20, 2004 Dialog Telecommunications, Inc. (“Dialog’s”) Notice of Intent (“Notice”) to Adopt the Cinergy Communications Company/BellSouth interconnection agreement (“Cinergy ICA”). Dialog’s request is an attempt to make an “end-run” around the requirements set forth in the 1996 Telecommunications Act (the “Act”), the rules established by the Federal Communications Commission (“FCC”) implementing the Act, and also runs afoul of Kentucky’s recent Broadband Parity Act, KRS 278.546.

As explained below, Dialog’s adoption request is completely at odds with the FCC’s *Interim Rules Order*,<sup>1</sup> is untimely under the FCC’s adoption rule, and also is contrary to current Kentucky law. This Commission should reject Dialog’s attempt to adopt an Interconnection Agreement that is contrary to federal and state law.

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<sup>1</sup> Order and Notice of Proposed Rulemaking, *In the Matter of Unbundled Access to Network Elements, Review of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179, (rel. August 20, 2004) (“*Interim Rules Order*”).

First, Dialog's Notice should be dismissed because the FCC's Interim Rules<sup>2</sup> preclude Dialog from adopting the Cinergy ICA. The FCC's interim rules, released August 20, 2004 and effective September 13, 2004, state unequivocally that the elements vacated by the D.C. Circuit Court of Appeals have *not* been reinstated.<sup>3</sup> Instead, the FCC imposed a 6-month freeze on CLECs' ability to have access to the vacated elements pursuant to the terms and conditions under which CLECs were being provided service as of June 15, 2004. The FCC expressly declined to permit existing CLECs to expand their rights as of that date by subsequently opting into agreements, such as the Cinergy ICA, that contain the vacated elements. *Interim Rules Order* at ¶¶ 22-23 ("We also hold that competitive LECs may not opt into the contract provisions 'frozen' in place by this interim approach. The fundamental thrust of the interim relief provided here is to maintain the *status quo* in certain respects without expanding unbundling beyond that which was in place on June 15, 2004. This aim would not be served by a requirement permitting new carriers to enter during the interim period. . . . Most significantly, the interim approach forecloses the implementation and propagation of the vacated rules."). Further, due to the FCC's elimination of the "pick and choose" rules under Section 252(i)

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<sup>2</sup> On August 20, 2004, the FCC released its *Interim Rules Order* in response to the United States Court of Appeals for the District of Columbia's March 2, 2004 Order in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"). On September 13, 2004, the FCC's interim rules were published in the Federal Register and are, thus, now in effect. As will be explained further herein, the FCC's interim rules clearly state that the elements that were vacated by the D.C. Circuit Court have not been reinstated. The FCC also imposed a 6-month freeze on existing competitive local exchange carriers' ("CLECs") access to the vacated elements, including prohibiting CLECs from opting into agreements that contain the vacated elements. See *Interim Rules Order* at ¶¶ 22-23. The FCC further declined to permit new CLECs to enter into agreements (by adoption or otherwise) containing the vacated elements as such would be inconsistent with maintaining the *status quo*. See *Interim Rules Order* at ¶ 22.

<sup>3</sup> Of course, the example, Aero Communications, LLC's adoption of a Kentucky Alltel Interconnection Agreement, cited by Dialog in its Notice, clearly is distinguishable. Aero filed its notice of adoption on August 20, 2004, before the September 13, 2004 effective date of the FCC's Interim Rules. Dialog's September 20, 2004 Notice of Adoption at issue in the present proceeding was filed **after** the effective date of the Interim Rules and for that alone reason, Dialog's Notice to Adopt must be rejected.

of the 1996 Act,<sup>4</sup> CLECs are required to adopt agreements only in their entirety.<sup>5</sup> Because the Cinergy ICA contains terms and conditions for the vacated elements that are now frozen, the Cinergy ICA is *not* available for adoption per the FCC's interim rules.

Second, even if the FCC's interim rules did not expressly prohibit the adoption of the Cinergy ICA, Dialog's attempt to adopt the Cinergy ICA has not been made within a reasonable period of time. FCC Rule 51.809(c) provides that BellSouth is only obligated to make interconnection agreements available for 252(i) adoption "*for a reasonable period of time* after the approved agreement is available for public inspection." 47 C.F.R. § 51.809(c) (emphasis added). The reasonable period of time to adopt the Cinergy ICA has long since expired. Specifically, the Cinergy ICA predates the FCC's Triennial Review Order ("TRO") and contains terms that are not compliant with the TRO. For example, the "safe harbors" for a CLEC's obtaining access to enhanced extended links ("EELs) has been replaced with different service eligibility requirements. Further, entrance facilities and certain broadband loops are no longer subject to unbundling. These changes were not vacated by the D.C. Circuit Court in the USTA II decision and remain valid law today. The TRO was released on August 20, 2003, and became effective on October 2, 2003. Accordingly, as of October 2, 2003, the Cinergy ICA was no longer compliant with the law. In addition, since that time the law has changed further in light of the USTA II decision and the FCC's interim rules. Without question, it is

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<sup>4</sup> Second Report and Order, *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 04-164 (released on July 13, 2004 and effective on August 23, 2004) ("*Adoption Order*") at ¶1 ("[i]n this Order we adopt a different rule in place of the current pick-and-choose rule. Specifically, we adopt an 'all-or-nothing rule' that requires a requesting carrier ... to adopt the agreement in its entirety, taking all rates, terms, and conditions from the adopted agreement.")

<sup>5</sup> Dialog states that it "intends to be bound by the terms of the unexpired agreement, anticipating that the terms of the agreement will be reproduced in their entirety, substituting DIALOG in the place of [Cinegry] in the Agreement." Notice at p.2.

unreasonable for a CLEC to attempt to adopt an interconnection agreement that is non-compliant with applicable law. Thus, the reasonable period of time to adopt the Cinergy ICA expired one year ago.

It is clear that the FCC's interim rules, effective September 13, 2004, preclude Dialog's attempt one week later, on September 20, 2004, to adopt the Cinergy Interconnection Agreement. Even if all of the above facts were not incontrovertible reasons why Dialog's Notice to Adopt must be rejected, which they in fact are, Dialog also is precluded from adoption of the Cinergy Interconnection Agreement because that Agreement now clearly is contrary to state law. The Cinergy Agreement contains provisions which had been required obligating BellSouth to offer its DSL broadband transmission service even when Cinergy leased the phone lines and equipment serving the customer in question as UNEs and thus, Cinergy had obtained control over those lines and equipment. This provision in the Cinergy Interconnection Agreement was based not on federal law, but on the Commission's understanding, at that time, of Kentucky state law.<sup>6</sup> However, the Kentucky Broadband Parity Act, which was passed overwhelmingly by both the Kentucky Senate and House of Representatives during the 2004 Legislative Session and signed into law by Governor Fletcher and becoming effective July 13, 2004, specifically prohibits the imposition of state regulation over broadband facilities and renders the provisions in the Cinergy Interconnection Agreement regarding access to DSL over UNE-P lines invalid. The Broadband Act provides very simply that a state agency may not regulate BellSouth's broadband DSL service such as occurred in the Cinergy arbitration. See, Section 3(1) of the Kentucky Broadband Act, broadband "is not

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<sup>6</sup> See Order, Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc., pursuant to 47 U.S.C. Section 252, Case No. 2001-00432, 2002 Ky. PUCLEXIS 764 at 7-8 (Ky. P.S.C. July 12, 2002).

subject to state administrative regulation.” KRS 278.5462. Allowing Dialog to adopt the Cinergy Interconnection Agreement would be in violation of the clear prohibition of the Kentucky Broadband Act which states that, “no agency of the state shall impose or implement any requirement” that relates to the “availability of facilities or equipment used to provide broadband services” or to the “rates, terms or conditions for, or entry into, the provision of broadband service.” *Id.*, Section 3(1). Any rule mandating that BellSouth provide its broadband transmission service to a CLEC UNE voice customer, clearly involves a requirement that relates to both the “availability of facilities or equipment” and to the “rates, terms, or conditions” under which BellSouth offers its service. Thus, allowing Dialog to adopt the Cinergy Interconnection Agreement not only is contrary to the FCC’s rules promulgating Section 252(i) of the Act and the six month freeze imposed by the FCC’s Interim Rules, but also violates Kentucky law prohibiting additional state-imposed requirements on broadband.

### **CONCLUSION**

Accordingly, Dialog’s adoption effort, filed after the effective date of the FCC’s Interim Rules, must be rejected because the agreement Dialog attempts to adopt not only is inconsistent with the effective portions of the TRO, but also is in violation of current Kentucky law. Moreover, since the effective date of the TRO, the D.C. Circuit Court’s vacatur of certain UNE rules in *USTA II* has even further modified the UNEs to which CLECs are currently entitled. It would be contrary to public policy, it would perpetuate a non-compliant regime, and it would prevent the industry from moving forward to allow Dialog to adopt an interconnection agreement containing provisions that are not compliant with current law. *See Interim Rule Order* at ¶ 23 (“Most significantly, the

interim approach forecloses the implementation and propagation of the vacated rules.”). Dialog did not request to adopt the Cinergy ICA until September 20, 2004, clearly well **after** the required “reasonable time” for adoption had expired, and most significantly, after the effective date of the FCC’s Interim Rules. The adoption Notice also was filed well after the effective date of the Kentucky Broadband Act. For these reasons, this Commission must reject Dialog’s Notice to Adopt.

WHEREFORE, BellSouth respectfully requests that the Commission enter an Order:

- (1) Dismissing with prejudice the Notice of Intent filed by Dialog; and
- (2) Granting such further relief as the Commission deems fair and equitable.

Respectfully submitted, this 12<sup>th</sup> day of October, 2004.



DOROTHY J. CHAMBERS  
General Counsel -- Kentucky  
601 W. Chestnut Street, Room 407  
P.O. Box 32410  
Louisville, KY 40232  
(502) 582-8219

R. DOUGLAS LACKEY  
ROBERT A. CULPEPPER  
Suite 4300  
675 W. Peachtree St., NE  
Atlanta, GA 30375  
(404) 335-0841

COUNSEL FOR BELL SOUTH  
TELECOMMUNICATIONS, INC.

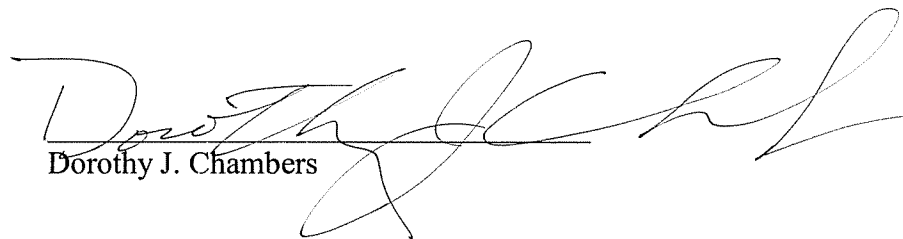
**CERTIFICATE OF SERVICE**

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by mailing a copy thereof, this 1st day of October, 2004.

Hon. Douglas F. Brent  
Stoll, Keenon & Park, LLP  
2650 AEGON Center  
400 West Market Street  
Louisville, KY 40202

Robert A. Bye  
Corporate Counsel  
Cinergy Communications Company  
8829 Bond Street  
Overland Park, KS 66214

Jim Belina  
President & CEO  
Dialog Telecommunications, Inc.  
756 Tyvola Road  
Suite 100  
Charlotte, NC 28217

  
Dorothy J. Chambers