BELLSOUTH

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February 22, 2005

RECEIVED
FEB 23 2005
PUBLIC SERVICE COMMISSION

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

Re: Petition to Establish Docket to Consider Amendments to Interconnection Agreements Resulting from Change of Law, Kentucky Broadband Act
KPSC 2004-00501

Dear Ms. O'Donnell:

Enclosed for filing are the original and ten (10) copies of BellSouth's Response to CLEC Comments Regarding BellSouth's Change of Law Petition on the Kentucky Broadband Act.

Sincerely,

Dorothy J. Chambers

Enclosures

cc: Parties of Record

573601

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

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FEB 2 3 2005

PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION TO ESTABLISH DOCKET)
TO CONSIDER AMENDMENTS TO)
INTERCONNECTION AGREEMENTS) CASE NO. 2004-00501
RESULTING FROM CHANGE OF LAW,)
KENTUCKY BROADBAND ACT)

RESPONSE TO CLEC COMMENTS REGARDING BELLSOUTH'S CHANGE OF LAW PETITION ON THE KENTUCKY BROADBAND ACT

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, hereby responds to the Comments filed by Cinergy Communications Company ("Cinergy"),[1] SouthEast Telephone, Inc. ("SouthEast"), and Aero Communications, LLC ("Aero") (collectively, "CLEC Comments"). As set forth more fully below, because this Petition presents a purely legal issue based on the Kentucky Broadband Act, BellSouth requests the Kentucky Public Service Commission ("Commission") issue an order implementing the terms of the Broadband Act. In the alternative, BellSouth requests the Commission set a briefing schedule and, should the Commission find it helpful, set a date for oral argument.

I. Procedural Background

The Kentucky Broadband Act, KRS 278.546, *et seq.*, was passed overwhelmingly by the Kentucky Legislature in the 2004 session of the General Assembly, was signed into law by Governor Fletcher, and became effective July 13, 2004. That law prohibits and eliminates all state regulation of broadband services, including previously imposed PSC regulation. Following

[1] ITC^DeltaCom Communications, Inc. ("DeltaCom") submitted a letter supporting the Comments filed by Cinergy. As such, this Response also applies to the assertions made in DeltaCom's letter.

enactment of the Kentucky Broadband Act, and in accordance with the change of law provisions in the affected CLEC Interconnection Agreements, BellSouth began negotiations with each of those CLECs to execute an appropriate amendment implementing the provisions of the Kentucky Broadband Act. To date, only one of the six CLECs with an impacted Interconnection Agreement has amended its contract.[2] On December 9, 2004, BellSouth filed the Petition which resulted in the initiation of this docket. This proceeding concerns one straightforward legal issue: the impact of the Kentucky Broadband Act on the five CLEC interconnection agreements in question.

Following initiation of this docket, on December 22, 2004, the Commission issued a procedural order requiring CLECs to file written comments to BellSouth's Petition by January 20, 2005. The Commission's order also set an informal conference for January 27, 2005. Subsequently, Cinergy Communications requested a brief extension to file its comments and also requested, due to a conflict, that the informal conference be rescheduled. Discussions regarding the schedule occurred between counsel for the parties and Commission counsel and were confirmed in a January 10, 2005 letter by BellSouth's counsel. As indicated therein, BellSouth stated it had no objection to a modest extension to the dates the Commission had set, but also confirmed BellSouth's position that an informal conference was not necessary as BellSouth's Petition raised a strictly legal question which could best be resolved by legal briefs.

By Order dated January 21, 2005, the Commission modified its procedural schedule, setting January 27, 2005 for comments by CLECs, and resetting the informal conference to February 24, 2005. Comments now have been filed by Cinergy, Aero, and SouthEast. As noted,

[2] EveryCall Communications signed an amendment to the Interconnection Agreement relating to the DSL over UNE-P change of law issue. As a result, by letter dated January 20, 2005, BellSouth withdrew its Petition as to EveryCall.

ITC DeltaCom filed a letter in support of Cinergy's comments. BellSouth herein files its response to the comments of the CLEC parties.

II. The Kentucky Broadband Act Should be Implemented in the Broadband Provisions of the Interconnection Agreements.

This docket was initiated to address a single legal issue: the effect of the Kentucky Broadband Act on the Interconnection Agreements of the CLEC parties to this case. Following the adoption of the Kentucky Broadband Act, effective July 13, 2004, in accordance with its interconnection agreements with the CLECs in question, BellSouth initiated the change of law process with those CLECs. BellSouth gave notice, negotiated, and continues to operate under the existing terms of those interconnection agreements. The clear intent and effect of the Kentucky Broadband Act is to prevent state agencies from regulating broadband services and to eliminate any previous state regulation of broadband, including the requirement previously imposed by the Public Service Commission on BellSouth's broadband service to provide broadband via digital subscriber line ("DSL") transmission service on lines leased as unbundled network elements ("UNEs"). Now, seven months after the effective date of the Broadband Act, which clearly stated the determination by the Kentucky legislature, and in accord with the leadership of the Kentucky Governor, the effect of the Broadband Act has yet to be felt by BellSouth or CLECs operating in Kentucky, except for the sole CLEC that has amended its interconnection agreement in accordance with the Kentucky Broadband Act.

The Kentucky Broadband Act plainly and unquestionably eliminated any state regulation of broadband services: "[t]he provision of broadband services shall be market-based and not subject to state administrative regulation. Notwithstanding any other provision of law to the contrary . . . no agency of the state shall impose or implement any requirement upon a broadband

service provider with respect to the following: (a) The availability of facilities or equipment used to provide broadband services; or (b) The rates, terms or conditions for, or entry into, the provision of broadband service."[3] Clearly, the Act prohibits state administrative regulation over broadband (DSL transmission) service offered by BellSouth pursuant to its federal access tariff. Additionally, upon its enactment, the Kentucky Broadband Act voided any and all existing state requirements imposed upon broadband service: "[a]ny requirement imposed upon broadband service in existence as of July 15, 2004, is hereby voided upon enactment of KRS 278.546 to 278.5462."[4]

Rather than address this single legal question which is at issue in this case, the CLEC comments seek to create diversion and delay in an effort to stall this Commission in reaching the inevitable conclusion that the Kentucky Legislature now has determined state agencies may not impose or implement requirements on broadband services. For example, Cinergy, while conceding that this docket presents a single narrow issue,[5] suggests it is a waste of time to isolate this single legal issue and instead urges combining this one state law issue, affecting five CLECs, with the change of law proceedings involving dozens of federal law issues, which Cinergy refers to as a "regulatory sea change," affecting hundreds of CLECs in Kentucky. A better example of dilatory tactics can scarcely be imagined.

Clearly, the comments of Cinergy and the other CLECs demonstrate their intent is to continue to delay implementation of the Kentucky Broadband Act of 2004. Despite the clear and focused scope of the Commission's procedural schedule, Cinergy inappropriately and improperly has attempted to assert: (1) a counterclaim for arbitration of its commingling argument; (2) a motion to consolidate this proceeding with "perhaps two dozen issues that will need to be

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[3] KRS 278.5462(1)
[4] KRS 278.5462(2)
[5] See January 19, 2005 Cinergy Comments, at 6.

arbitrated based upon change of law . . . ."; and (3) a motion for injunctive relief based on the unsubstantiated assertion that BellSouth is "unilaterally withholding" certain credits in violation of the parties' interconnection agreement. This is a change of law proceeding, not a complaint case. Cinergy's attempt to improperly expand a narrow, focused change of law proceeding into a generic proceeding addressing a host of unrelated issues must be recognized for what it is and rejected.[6]

While Cinergy failed to even address the Kentucky Broadband Act's prohibition of state regulation of broadband services, Aero and SouthEast engaged in other "sleight of hand" efforts to divert attention from the Kentucky Broadband Act. For example, SouthEast states that the Federal Telecommunications Act permits state regulations so long as they do not "substantially prevent implementation of federal requirements.[7] As discussed below (*infra* Part III), there is no federal requirement for BellSouth (or any ILEC) to provide broadband services, such as DSL transmission, over leased UNE lines. As such, there is no conflict or inconsistency between the Kentucky Broadband Act and the FCC's broadband unbundling requirements (or more accurately, lack thereof). The very point of this proceeding is that Kentucky's state law now has changed since the time of that order. In enacting the Kentucky Broadband Act, the Kentucky Legislature made the policy determination that state agencies in Kentucky are no longer permitted, even if they once were, to regulate broadband. KRS 278.5462(1). And any existing state regulation of broadband was voided upon enactment of the Kentucky Broadband Act. KRS

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[6] If Cinergy wishes to file a petition for compulsory arbitration, Cinergy first must follow the dispute resolution provisions for complaints under its existing Interconnection Agreement.

[7] SouthEast's January 27, 2005 comments, at 3.

278.5462(2). The 2002 Cinergy Order[8] dictated the terms and conditions under which BellSouth was required to offer its broadband service. The DSL over UNE-P provisions in the five CLEC agreements here are a direct result of the Commission's 2002 Cinergy Order. Now that the Kentucky Broadband Act no longer permits, and in fact, voids, this type of state regulation of broadband service, the DSL over UNE-P provisions should be deleted through an appropriate amendment, such as Exhibit B to BellSouth's Petition.

Another diversionary tactic employed by the CLECs in this case is the suggestion that the 2002 Cinergy Order should stand because it does not "really" regulate broadband. For example, SouthEast argues that the 2002 Cinergy Order is not voided by the Kentucky Broadband Act because that Order did not really intend to regulate broadband.[9] On the contrary, however, the plain language of the 2002 Cinergy Order demonstrates that, at its core, that decision was a requirement imposed on BellSouth's broadband services. For example, the Order stated the issue was about "DSL over UNE-P".[10] The Order also held "BellSouth may not refuse to provide DSL."[11] The Order found it "feasible" for DSL and voice to be provided over the same loop."[12] The Order further stated, "Bellsouth shall not refuse to provide any DSL service to a customer on the basis that a customer receives UNE-P-based voice service from the CLEC." The clear language, intent and effect of the Commission's Cinergy decision in 2002, based on state law, was to regulate the terms and conditions of broadband service.

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[8] 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 2001-000432, 2002 Ky. PUC Lexis 764 (Ky. P.S.C. July 12, 2002) ("2002 Cinergy Order"). Federal preemption of conflicting state law is the subject of BellSouth's pending Emergency Request for Declaratory Ruling, W.C. Docket No. 03-251 (filed Dec. 23, 2003). The appeal of the Cinergy case pending at the U.S. Ct. of Appeals for the 6th Circuit is being held in abeyance pending the FCC's resolution of this request.

[9] January 27, 2005 SouthEast Comments at 2-3.

[10] July, 2002 Cinergy Order at 3.

[11] Id.

[12] Id. at 5.

Kentucky law has long recognized, "If it walks like a duck and quacks like a duck, it is a duck." Ky. Milk Marketing and Antimonopoly Comm. v. The Kroger Co., 691 S.W.2d 893, 897 (Ky. 1985). (Kentucky Supreme Court affirmed trial court judgment, holding that despite the fact that the stated purpose of the Milk Marketing Law was as an antimonopoly law, because the law in actuality, as administered by the Commission, was a retail mark-up law, the result was a retail mark-up law.) See also, Louisville & Jefferson County Planning Comm. v. Schmidt, 83 S.W.3d 449 (Ky. 2001) (A board's denomination of its action as a "waiver" does not escape the fact that the "waiver" actually is a variance made impermissible by the legislature. The Kentucky Supreme Court again reaffirmed the old adage, " 'if it walks like a duck and quacks like a duck . . . .' The waivers, meeting the statutory definition for variances, are in fact, variances, and hence, void.") 83 S.W.3d at 455.

The 2002 Cinergy Order "walks, talks and quacks" like state regulation of broadband, and that, in fact, is what it is. Kentucky law now clearly prohibits a state agency from so regulating the terms and conditions of broadband service and voids any requirement imposed upon broadband service in effect as of July 15, 2004.[13] It is high time to recognize the 2002 Cinergy decision for the broadband regulation it is, and to implement the Kentucky Broadband Act.

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[13] KRS 278.5462(1)(2)

III. Cinergy's Commingling Argument is a Diversionary Tactic and is Contrary to the Plain Terms of the *Triennial Review Order.*[14]

As noted, Cinergy tellingly fails to even address the fact that the Kentucky Broadband Act applies in a very straightforward manner to the broadband provisions of its interconnection agreement. Instead, Cinergy stretches to find a new basis, the commingling rules adopted in the *Triennial Review Order*[15], as a life raft to continue to keep afloat DSL transmission service on lines leased as UNE's.[16] First and foremost, commingling is a federal issue which properly should be addressed to the FCC, not put into service as a life raft in a change of law proceeding concerning a new state law.

Moreover, Cinergy's commingling argument actually is a hastily constructed raft, not even seaworthy since it is constructed without reference to the relevant portions of the TRO.[17] When the FCC was asked to consider the request that incumbent local exchange carriers ("ILECs") be required to offer DSL transmission on UNE lines – the same result that Cinergy seeks here with its ill-conceived commingling argument, the Federal Communications Commission ("FCC") flatly rejected the request. In the TRO, CompTel had specifically raised the question of whether ILECs should be required to provide DSL transmission over lines leased

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[14] The commingling provisions of the TRO do not require BellSouth to provide DSL over leased unbundled network elements. Moreover, even if there were a colorable argument on commingling, such an argument properly belongs before the FCC. In fact, Cinergy raised this very issue at the FCC in their "Rocket Docket." Request for Acceptance of Filing of Formal Complaint under the Enforcement Bureau's Accelerated Docket Procedures, *Cinergy Communications Co. v. BellSouth Telecommunications, Inc.*, filed with the FCC on May 13, 2004. The FCC denied the request (June 18, 2004) for accelerated treatment but Cinergy may file a formal complaint under Section 208 if it actually believes this is a meritorious claim.

[15] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* 18 FCC Rcd 16978 (2003)("*Triennial Review Order*"), *vacated in part and remanded, United States Telecom Ass'n v. FCC.* 359 F.3d 554 (D.C. Circuit 2004).

[16] Cinergy also attacks BellSouth's tariff provisions incorporating the commingling rules. BellSouth Tariff F.C.C. No. 1, Section 2.2.3. Of course, arguments as to these FCC tariff provisions properly should be addressed to the FCC not this Commission.

[17] Cinergy is not requesting to connect or otherwise attach a UNE to a special access service; instead, it wants to lease an entire loop as a UNE and then force BellSouth to provide a tariffed service *over* that leased UNE. While this specific scenario was addressed and rejected by the FCC, see *Triennial Review Order* ¶ 270 and ¶¶ 259-263, as discussed herein, the commingling rules upon which Cinergy relies are not applicable and do not address this situation. See, *Triennial Review Order,* ¶¶ 579-584.

by CLECs as UNEs in order to prevent allegedly anticompetitive "tying" of voice and data services. As with Cinergy's argument here, CompTel argued it should be permitted to use leased UNE lines for DSL transmission. The FCC unequivocally rejected CompTel's request in paragraph 270 of the *Triennial Review Order*, and, moreover, indicated there, and in surrounding paragraphs, that the correct policy is not to require ILECs to provide DSL functionalities over loops leased to a CLEC, but rather to encourage CLECs, either by themselves or through line-splitting arrangements, to offer both voice and data services to end-user customers.[18]

Furthermore, Cinergy's commingling argument is completely contrary to the FCC's established deregulatory policy for broadband deployment. As the FCC stated, ILECs should not be required to provide DSL transmission services to CLEC UNE customers because such a requirement

> would likely *discourage* innovative [line-splitting] arrangements between voice and data competitive LECs and greater product differentiation between the incumbent LECs' and the competitive LECs' offerings. *We find that such results would run counter to the statutes' express goal of encouraging competition and innovation in all telecommunications markets.*[19]

Triennial Review Order, ¶ 261 (emphasis added). As a federal court recently explained, in these parts of the *Triennial Review Order*, the Commission

> already [has] examined possible competitive benefits from requiring ILECs to provide their DSL service to CLEC customers, and it has determined not only that such a regulatory requirement would bring no benefit, but also that it would discourage investment and innovation and thus harm consumers.

Levine v. BellSouth Corp., 302 F. Supp. 2d 1358, 1371 (S.D. Fla. 2004). Significantly, Cinergy does not even discuss these directly relevant portions of the *Triennial Review Order*.[20] Nor does Cinergy attempt to explain or reconcile these portions of the TRO

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[18] See *Triennial Review Order*, ¶¶ 259 through 263.
[19] *Triennial Review Order*, ¶ 261 (emphasis added).
[20] Instead, Cinergy diverts attention by focusing on irrelevant portions of the TRO. See, footnote 17, *supra*.

with its commingling argument. Cinergy's silence on these points underscores that Cinergy's commingling argument is sunk by the applicable FCC analysis on this point.

IV. This Change of Law Proceeding Involves a Purely Legal Issue and the Factual Allegations Raised by the CLECs are Irrelevant to and Not Properly Presented in this Change of Law Proceeding.

Despite the Commission's focused request for comments regarding BellSouth's change of law Petition, as noted, some of the CLECs also included in their Comments unsubstantiated factual allegations that have no bearing on the change of law issue and are brought up solely to delay and distract from consideration of the legal determination to be made in this docket.[21] The only germane issue is whether BellSouth's proposed interconnection amendment should be accepted by the CLECs in accordance with the change of law provisions of such CLECs' interconnection agreements.[22] Accordingly, because the comments filed by the CLECs raise no relevant factual issues, the Commission should proceed to decide the purely legal issue raised by BellSouth's Petition. To the extent further input would be helpful to the Commission's decision, BellSouth urges that a briefing and/or oral argument schedule be set.

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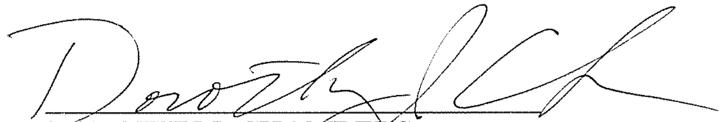
[21] Any CLEC that believes it has any valid complaints regarding billing matters or services provided pursuant to its interconnection agreements should raise those issues with BellSouth. If the CLEC is not satisfied with BellSouth's response, the CLEC may pursue other remedies such as filing a complaint with this Commission. However, issues involving billing matters or services are not relevant to this change of law proceeding.

[22] Furthermore, the allegations raised by the CLECs in their respective comments are premature for adjudication because the CLECs have not begun, much less exhausted, the dispute resolution mechanisms in the interconnection agreements with respect to the allegations raised, thus the allegations are not ripe for adjudication by the Commission. And, even if the Commission were to determine the issues were ripe for adjudication, which they are not, the "factual" issues raised by the CLECs relate solely to billing and service issues and are not related to BellSouth's change of law Petition. Nevertheless, BellSouth denies the various and sundry allegations raised by the CLECs in their comments and further affirmatively states the allegations are unsubstantiated and inaccurate. BellSouth reserves the right to address the specific allegations should they ever properly be brought before the PSC.

CONCLUSION

For the reasons set forth herein, the Commission should issue an Order directing the parties to this proceeding to implement the terms of the Kentucky Broadband Act by executing an appropriate interconnection agreement amendment that conforms with the amendment attached as Exhibit "B" to BellSouth's Petition. In the alternative, the Commission should set a briefing and/or oral argument schedule in this docket.

Respectfully submitted, this 22nd day of February 2005.



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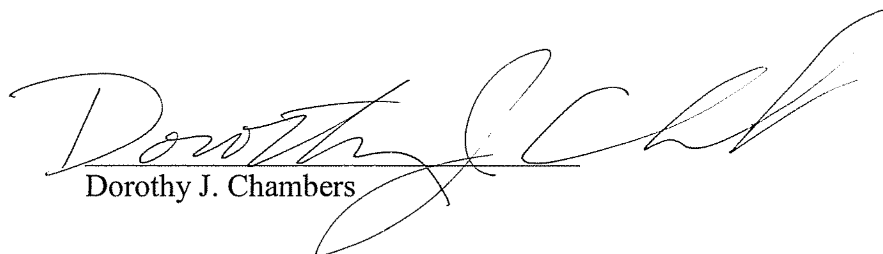
CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served on the individuals on the attached service list by mailing a copy thereof, this 22nd day of February, 2005.



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