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December 15, 2005

Ms. Elizabeth O'Donnell
Executive Director
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40601

RECEIVED

DEC 16 2005

PUBLIC SERVICE
COMMISSION

RE: 2004-00501

Dear Ms. O'Donnell:

Enclosed please find an original and 10 copies of Cinergy Communications Company's Response to BellSouth's Motion to Enforce in the above referenced proceeding.

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

Enc.

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

RECEIVED

In the Matter of:

DEC 16 2005

PETITION TO ESTABLISH DOCKET TO)
CONSIDER AMENDMENTS TO)
INTERCONNECTION AGREEMENTS)
RESULTING FROM CHANGE OF LAW,)
KENTUCKY BROADBAND ACT)

PUBLIC SERVICE)
COMMISSION)
CASE NO.)
2004-00501)

RESPONSE TO BELLSOUTH'S MOTION TO ENFORCE

Cinergy Communications Company ("Cinergy"), hereby responds to BellSouth's recent motion to enforce the Commission's April 29, 2005 Order. As discussed below, BellSouth's motion is not well-founded and cannot be granted. Any enforcement should be predicated upon an actual legal obligation which has not been met by the party against whom enforcement is sought. That is not the case here. The motion should be denied.

INTRODUCTION

On April 29, 2005, the Commission ruled 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 contract amendments deleting provisions for such service. In response to that Order, Cinergy promptly sought rehearing. Alternatively, Cinergy asked the Commission to clarify its Order as needed to prevent BellSouth from using the Order as an excuse to undermine the transition rate structure for Cinergy's embedded customer base. Cinergy filed a detailed memorandum

on May 23, 2005 in which it explained how, if applied literally, the contract amendment proposed by BellSouth would violate BellSouth's duties determined by the FCC under the *TRRO*; specifically, those related to transition pricing for Cinergy's embedded base of customers served with UNEs. Cinergy thoroughly explained why it would not accept the amendment prepared unilaterally by BellSouth, and requested that the Commission advise the parties that it would reject any proposed interconnection agreement amendments that remove billing surrogates currently applied to resale lines that are, in reality, embedded base UNE-P arrangements subject to transition pricing under the *TRRO*.¹

BellSouth responded to Cinergy's motion, opposing the request for rehearing while promising the Commission that it would not use the Commission's April 29 decision to eliminate UNE-P pricing for the non-DSL enable customer base. BellSouth Response, June 2, 2005, p. 7. BellSouth went on to assure the Commission that it was willing to work with Cinergy to convert non-DSL resale lines to UNE-P manually and without imposing non-recurring charges. BellSouth was quite specific in explaining that it would not attempt to misuse the Commission's April 29 order: "BellSouth's confirmation herein should provide sufficient assurance it will not use the Commission's Order to effect a change of price for such a resale line that does not carry DSL and is serving an embedded customer." *Id.*, p. 8. Nevertheless, BellSouth asked the Commission to "order the [BellSouth proposed] Amendment to be deemed effective twenty (20) days from its April 29, 2005 Order as to Cinergy and the other CLECs that

¹ The technical explanation for the relief Cinergy requested will not be repeated here. Cinergy respectfully refers the Commission to the May 23, 2005 motion at pp. 3-5, 9-10.

have delayed signing the Amendment as previously required by that Commission Order.”
Id., p. 8.

The Commission responded to Cinergy’s motion and BellSouth’s reply in the following ways:

- (1) the Commission declined to grant Cinergy’s petition for rehearing;
- (2) the Commission similarly declined BellSouth’s request to make the earlier proposed language effective as to Cinergy; and
- (3) the Commission granted Cinergy’s alternative request, ordering all carriers to “mutually agree on the methodology to accomplish this end without any material effect on or disruption of service to end users.”

ARGUMENT

Cinergy viewed the Commission’s Order as a clear instruction to work with BellSouth to agree on every aspect of the methodology to convert resale lines for the embedded base to UNE-P arrangements as a means to ensure those lines were properly treated as part of the embedded base. To paraphrase an argument from BellSouth’s current motion, to Cinergy it was as obvious as the acropolis of Athens that the methodology would have to be incorporated into the parties’ agreement. Moreover, since the Commission had declined to force BellSouth’s contract language on Cinergy, the only way to read the April and June Orders together was to conclude that the parties would need to develop a conversion process and amend the interconnection agreement consistent with the process and the requirements of the *TRRO*. Cinergy has worked in good faith to do exactly that. Over the past several months Cinergy has compiled a list of all lines in hunt groups that require conversions and submitted that listing to BellSouth to

schedule a conversion. Cinergy has also proposed a fair transition that upholds the intent of the parties to move to the new platform without injuring Cinergy or its customers. BellSouth has rejected that plan in favor of a plan that requires Cinergy to incur losses until lines can be converted and provides no incentive to BellSouth to insure that conversions are done in a timely fashion.

BellSouth's motion to enforce, however, disregards everything which happened after the Commission's April 29, 2005 Order, and is phrased as if no party had said another word after that date. For example, BellSouth's motion is replete with references to the section of the original Order which required amendments within 20 days. These arguments purposely ignore the Commission's subsequent Order granting alternative relief to Cinergy, in which the Commission ordered BellSouth to work with other carriers on a methodology to accomplish what Cinergy requested. Moreover, BellSouth glosses over the fact that the Commission has already declined a BellSouth request to "deem effective" the contract language urged by BellSouth today. Thus, nothing about the April 29, 2005 Order is susceptible to the type of "enforcement" BellSouth is looking for now.

BellSouth is not incorrect to state that under Kentucky law orders of the Commission continue in force until revoked or modified. But it does not follow that BellSouth is somehow entitled to "enforcement" of the April Order. In this case, the Commission modified its April Order in June when it granted the alternative relief requested by Cinergy. BellSouth's hyper-technical argument that the grant of alternative relief does "not excuse either Cinergy's or Southeast's failure to comply with the Commission's April 29, 2005 Order" is wrong because it simply ignores what the Commission did after being assured by BellSouth that it was not intending to violate the

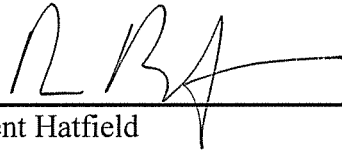
TRRO. If that is the position BellSouth intended to adopt all along, it is no wonder CLECs have had so much difficulty negotiating a transition for those lines affected by the “DSL over UNE-P” issue. Moreover, for BellSouth to insist upon such a strict reading today puts its earlier assurances to the Commission and Cinergy in a whole new light. Basically, BellSouth now acts as if it never promised anything to the Commission, and as if the Commission denied Cinergy’s petition for rehearing but did nothing else. As the Commission is aware, and should remind BellSouth, the June 13 order surely modified the April 29 order, by requiring the parties to agree on a new methodology. Thus, BellSouth’s argument that the April 29 order “continues in force” simply rings hollow. The order was modified. The order simply cannot be read in isolation in the manner urged by BellSouth, and the order is not “in force” in a way that would make it capable of the “enforcement” sought by BellSouth. *See* KRS 278.390 (“Every order entered by the commission shall continue in force until . . . revoked *or modified* by the commission.”) (emphasis added). It is quite disingenuous for BellSouth to accuse Cinergy of “blatant delaying tactics and refusal to comply with the Commission’s April 29, 2005 Order” in the very same motion where BellSouth admits deep in a footnote that it hopes to withhold the billing credits to Cinergy the Commission has already ordered BellSouth to provide for all resale lines which ought to be priced at the UNE-P rate.

CONCLUSION

Through its peculiar “motion to enforce,” BellSouth is once again asking the Commission to impose BellSouth’s defective contract amendment language on Cinergy. The Commission has already declined to do this. While BellSouth has criticized other carriers for trying to take another bite at the rehearing apple, that is exactly what

BellSouth is trying to do here. Cinergy remains ready to negotiate with BellSouth over appropriate language to implement the changes required under the *TRRO* and the Kentucky Broadband Act. However, Cinergy opposes BellSouth's misuse of this proceeding in another effort to avoid negotiation and to impose contract language inconsistent with what is required from BellSouth under this Commission's orders. The motion to enforce must be denied.

Respectfully submitted,



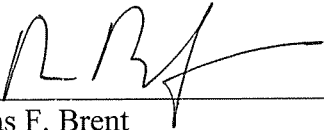
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CERTIFICATE OF SERVICE

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 15th day of December, 2005.



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