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**

COMMENTS OF SOUTHEAST TELEPHONE, INC.

On December 10, 2004, BellSouth Telecommunications, Inc. ("BellSouth") petitioned this Commission to establish a docket to consider amendments to certain interconnection agreements ("ICAs") resulting from the passage of the so-called Kentucky Broadband Act. On December 22, 2004, the Public Service Commission ("Commission") entered an Order requesting comments on BellSouth's petition from several Competitive Local Exchange Carriers ("CLECs") named in the petition. SouthEast Telephone, Inc. ("SouthEast"), by and through counsel, hereby submits the following comments in opposition to BellSouth's Petition, and objects to the establishment of a docket in this matter.

I. INTRODUCTION

The Kentucky Broadband Act ("the Act"), which became effective on July 13, 2004, is codified in KRS 278.546, KRS 278.5461 and KRS 278.5462. The history leading to the passage of this legislation is important to note in this proceeding.

As this Commission is aware, BellSouth played an extremely large part in introducing and shaping the bills introduced in the state legislature leading to the passage of the Act. Specifically, BellSouth caused to be introduced Senate Bill 215 and House Bill 627 in the Kentucky legislature in the 2004 Session. Senate Bill 215 was introduced with the apparent

attempt at removing this Commission's oversight of telephone rates in Kentucky as well as broadband rates and service across Kentucky. House Bill 627, which ultimately passed as the Kentucky Broadband Act, simply sought to remove PSC regulation over broadband access. BellSouth influenced the introduction of these pieces of legislation in direct response to two decisions by this Commission adverse to BellSouth: the *IgLou* case[1] and the *Cinergy* case[2]. In the *IgLou* case, this Commission confirmed in writing for the first time its jurisdiction over digital subscriber line ("DSL") rates and service in Kentucky and found that BellSouth had been discriminating against non-affiliated ISPs with its DSL rate structure. In the *Cinergy* case, this Commission held that BellSouth could 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.

With the introduction of the bills leading to the ultimate passage of the Act, BellSouth hoped to accomplish legislatively what they had failed to accomplish administratively and judicially, i.e., (1) remove PSC regulation of DSL rates and service (the *IgLou* case) and (2) free them from the burden of being forced to provide wholesale DSL service to a customer who receives voice service from a competing UNE-P voice provider (the *Cinergy* case). As amended and passed, the Act only removes Commission oversight of DSL rates and, to some degree, service. It does not, however, implicate the *Cinergy* decision, nor does it represent a change of law triggering the need for a new docket at this Commission to consider amendments to existing valid interconnection agreements.

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[1] *IgLou Internet Services, Inc. v. BellSouth Telecommunications, Inc.*, Kentucky Public Service Commission Case Number 1999-484.

[2] *In the Matter of: Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to U.S.C. Section 252*, Kentucky Public Service Commission Case Number 2001-00432.

II. DSL SERVICE AS IT RELATES TO THE REGULATION OF THE VOICE MARKET WITHIN KENTUCKY

The requirement of providing DSL transmission service to customers who switch their voice service to a UNE-P competitor is not regulation of broadband itself, but a by-product of regulating a competitive local service market still in its infancy. Such a requirement is simply a precaution to protect the developing competitive voice market, and remains squarely within the jurisdiction of this Commission. State oversight was anticipated by the drafters of the Telecommunications Act of 1996. "When Congress enacted the Telecommunications Act of 1996, it did not expressly preempt state regulation of interconnection. In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement ***additional requirements that would foster local interconnection and competition.***" Michigan Bell Telephone Co. v. MCImetro, 323 F.3d 348 at 358 (6th Cir. 2003). In recognizing the authority of the Commission to impose "relatively modest interconnection conditions so as to ameliorate a chilling effect on competition for local telecommunications regulated by the Commission," Hon. Joseph M. Hood wrote:

> Quite clearly, the 1996 Act makes room for state regulations, orders and requirements of state commissions as long as they do not 'substantially prevent' implementation of federal statutory requirements. The PSC's order, challenged here by BellSouth, embodies just such a requirement.[3]

The Act has no effect on the power of this Commission to enforce its decision in the *Cinergy* case because it does not remove this Commission's oversight of the local telecommunications voice market, which was the central idea in the *Cinergy* case and its subsequent appeals.

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[3] BellSouth Telecommunications, Inc. v. Cinergy Communications Company, 297 F. Supp.2d. 946 (E.D.Ky. 2003) (quoting 47 U.S.C. § 251(d)(3)(c))

Kentucky is not alone in imposing the requirement that the ILEC may not refuse to provide its federally tariffed DSL service to customers who switch voice service to a UNE-P competitor. Other states, such as Louisiana, Maryland and California, all have imposed similar requirements on the premise that they were regulating the provision of local telephone service, a matter that is within their state jurisdiction. *See, e.g., In re: BellSouth's Provision of ADSL Service to End-Users Over CLEC Loops-Pursuant to the Commission's Directive in Order U-22252-E. (LPSC Order R-26173); In the Matter of The Complaint of CloseCall America, Inc. v. Verizon Maryland Inc. (MPSC Order No. 79638); Telscape Communications, Inc. v. Pacific Bell Telephone Co. (Ca. PUC Case No. 02-11-011).*

III. TRIENNIAL REVIEW ORDER AND "COMMINGLING"

The Kentucky Broadband Act provides that "no agency of the state shall impose or implement any requirement upon a broadband service provider with respect to the following: the availability of facilities or equipment used to provide broadband services or the rates, terms or conditions or, or entry into, the provision of broadband service." KRS 278.546(1). Assuming, as BellSouth is arguing, that this verbiage was intended by the Kentucky legislature to prohibit this Commission from enforcing its Orders such as in the *Cinergy* case, then federal law still applies to prohibit BellSouth from discriminating against CLEC customers who wish to obtain BellSouth DSL over a UNE-L or UNE-P line.

The "intent" of the Kentucky Broadband Act by BellSouth's interpretation would leave CLECs only one alternative to provide DSL to their customers – purchase the wholesale DSL product from BellSouth and have it provisioned upon a resold line. "In the event that the customer ceases purchasing voice service from the incumbent LEC, either the new voice

provider [SouthEast] or the xDSL provider, or both, must purchase the full stand-alone loop to continue providing xDSL service." Triennial Review Order, ¶269.

By restricting the DSL provisioning alternatives to resold lines, BellSouth is able to drive up the CLEC's investment costs and retain the Carrier Access Billing on the resold lines of which the ILEC retains ownership.

However, the "effect" of the Kentucky Broadband Act may not be all that BellSouth had anticipated. An important part of the Act reads as follows:

> No telephone utility shall refuse to provide wholesale digital subscriber line service to competing local exchange carriers on the same terms and conditions, filed in tariff with the Federal Communications Commission, that it provides to Internet service providers.
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> KRS 278.5462(4)

BellSouth's DSL transmission service, by their own admission, "is offered under federal tariff," and it is available to CLECs on the same terms and conditions that are offered to Internet Service Providers. Therefore, when a customer stops purchasing local voice service from BellSouth and switches to a CLEC, the CLEC may purchase the entire local loop from BellSouth, then purchase BellSouth's wholesale DSL product from the Federal Tariff as anticipated in KRS 278.5462(4) to provide the new customer with both voice and data services. The type of line that the new CLEC customer is serviced on, whether resold or UNE-P, should be of no relevance to BellSouth, since they are being compensated for both the entire local loop and the wholesale DSL at the same rate they would be compensated at by an ISP.

As noted in Cinergy's comments already filed in this proceeding, BellSouth is compelled to allow CLECs to "commingle" wholesale DSL with UNE-P.

In ¶579 of the Triennial Review Order, the concept of "commingling" is introduced and endorsed as being "affirmatively permitted" for requested carriers.

> By commingling, we mean the connecting, attaching, or otherwise linking of a UNE, or a UNE combination, to one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC pursuant to any method other than unbundling under section 251(c)(3) of the Act, or the combining of a UNE or UNE combination with one or more such wholesale services. **Thus, an incumbent shall permit a requesting telecommunications carrier to commingle a UNE or a UNE combination with one or more facilities or services that a requesting carrier has obtained at wholesale from an incumbent LEC** pursuant to a method other than unbundling under section 251(c)(3) of the Act.
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> TRO ¶ 579, pg.365 (Emphasis supplied)

This mandate is codified in 47 CFR §51.309, which became effective October 2, 2003.

Based on the foregoing, there should be no question that the incumbent carrier (BellSouth) is required to permit a CLEC to commingle a UNE (the entire local loop) with a service (DSL service) obtained at wholesale from the incumbent LEC pursuant to a method (Federal Tariff) other than unbundling under section 251(c)(3). This specific notion is set forth in 47 CFR §51.309, and further supported by Kentucky's own Broadband Act at KRS 278.5462(4).

There has been no change of law in Kentucky that affects BellSouth's currently existing duty to provide DSL on lines leased to CLECs as UNEs. For the sake of argument, however, assuming that Kentucky's Broadband Act *did* attempt to relieve BellSouth of its obligations, federal law still applies to compel BellSouth to continue providing DSL to those customers.

IV. CONCLUSION

The Commission should dismiss the BellSouth Petition in Case No. 2004-00501 in that the Kentucky Broadband Act has not effectuated a change of law that renders amendments to existing interconnection agreements between BellSouth and respondent CLECs necessary. In

regulating the competitive local service market, the Commission was within their jurisdiction to require BellSouth to provide DSL on voice lines lease by CLECs as UNEs. Section (4) of KRS 278.5462 requires BellSouth to provide wholesale DSL to CLECs on the same terms and conditions, filed in the tariff with the FCC, that it provides to ISPs. This allows the CLEC to now become both the voice provider and the data provider, setting up a traditional ISP/ILEC relationship between the CLEC and BellSouth. Furthermore, regardless of BellSouth's supposed intent of KRS 278.5462 as to its application to the *Cinergy* decision and ILEC provisioning of DSL on UNE lines in particular, there is Federal precedent that requires BellSouth to provide their federally tariffed DSL service to CLECs for "commingling" with UNEs. The "commingling" requirement was codified as 47 C.F.R. § 51.309 and is the preemptive regulation that must be applied in the determination of BellSouth's obligation to provide DSL service to CLECs within the Commonwealth.

Respectfully submitted,

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CERTIFICATION

I hereby certify that a true and correct copy of the foregoing was mailed, this the 27th day of January, 2005, to:

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