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March 16, 2005

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

Re: KMC Data LLC Notice of Election of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and Level 3 Communications L.L.C.
PSC 2005-00097

Dear Ms. O' Donnell:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of BellSouth's Motion to Dismiss Petition of KMC Data, LLC, to Adopt Interconnection Agreement.

Sincerely,

Cheryl R Winn

for Dorothy J. Chambers

Enclosures

cc: Parties of Record

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COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

KMC DATA LLC NOTICE OF ELECTION OF THE INTERCONNECTION AGREEMENT BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND LEVEL 3 COMMUNICATIONS LLC	))))	CASE NO. 2005-00097

BELLSOUTH'S MOTION TO DISMISS PETITION OF KMC DATA, LLC, TO ADOPT INTERCONNECTION AGREEMENT

BellSouth Telecommunications, Inc. ("BellSouth"), by and through its undersigned counsel, hereby opposes the Notice of Election of Interconnection Agreement ("Petition") filed by KMC Data, LLC ("KMC") and requests that it be dismissed. BellSouth is not obligated to allow adoption of the interconnection agreement entered in to between BellSouth and Level 3 Communications LLC ("Level 3") for at least two related reasons: First, the BellSouth/Level 3 agreement is not compliant with current law; second, KMC failed to seek adoption of the BellSouth/Level 3 agreement within a reasonable time of the approval of that agreement by the Kentucky Public Service Commission ("Commission"). Allowing KMC to adopt a stale and non-compliant agreement would perpetuate an illegal regime and thus conflict with Federal Communications Commission ("FCC") rules, precedent, and public policy. For these reasons, the attempted adoption would not be in the public interest, and BellSouth respectfully requests that the Commission dismiss the Petition.

A. The Attempted Adoption Conflicts with Controlling Law.

The crucial fact that KMC omits from its Petition is the fact that the BellSouth/Level 3 Interconnection Agreement that it seeks to adopt does not comply with current law. Thus,

KMC's attempt to adopt the Level 3 Agreement [1] is clearly contrary to Section 252(i) of the Telecommunications Act of 1996 ("the Act") and the FCC's rules, and thus the public interest.

The issue raised in the Petition and sought to be finessed by KMC is whether KMC can use Section 252(i) of the Act to "adopt" (or to compel BellSouth to execute) a new interconnection agreement that does not comply with Section 251. There can be no dispute that the pre-existing Level 3 Agreement that KMC seeks to adopt, which was approved by the Commission on July 8, 2004, contains terms and conditions that are not compliant with current law. Furthermore, the Level 3 Agreement has not been amended to become complaint with federal law that post-dates its submission to the Commission over one year ago on February 20, 2004. BellSouth does not agree to accept terms and conditions for KMC's new agreement that are no longer required by law or that are contrary to law.[2] KMC's position that Section 252(i) compels such a result is contrary to law and, if adopted, would undermine the important public policy the new legal regime seeks to promote.

KMC cannot disagree that the Level 3 agreement contains provisions that are no longer in accord with current law. For example, and at a minimum, Attachment 2 of the Level 3 agreement (Unbundled Network Elements) has not been updated to include provisions from the

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[1] Negotiated Interconnection Agreement between BellSouth Telecommunications, Inc., and Level 3 Communications, LLC, submitted for Commission approval pursuant to §252(e) of the Telecommunications Act of 1996 on February 20, 2004, *approved* by Order in Case No. 2004-00055 (July 8, 2004) (*"Level 3 Agreement"*).

[2] KMC itself acknowledges that the BellSouth/Level 3 Agreement contains, in addition to the items mentioned below, at least one other provision pertaining to certain FCC rules that are no longer effective. Petition at page 2. Interestingly, KMC asserts that, as to *that* provision, it "reserves the right to amend the Level 3 Agreement" to reflect the allegedly superceding FCC decision "once this adoption becomes effective." KMC is mistaken; it has no right to "adopt" an agreement that has provisions based on FCC rules that are no longer effective and then seek to "amend" it. See, e.g., *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Second Report and Order*, 19 FCC Rcd 13494 (2004) (abrogating "pick-and-choose" rule).

FCC's *Triennial Review Order* ("*TRO*") decision;[3] it has not been updated to incorporate the FCC's Order on Reconsideration of the *TRO*,[4] where the FCC found that BellSouth is entitled to unbundling relief for loops consisting of fiber to the minimum point of entry ("MPOE") that serve multiple dwelling units ("MDUs") that are predominately residential; and it has not been updated to include the appropriate provisions to effectuate the FCC's Second Report and Order in CC Docket No. 01-338,[5] where the FCC held that Competitive Local Exchange Carriers ("CLECs") can only adopt the *entire agreement* of another CLEC pursuant to Section 252(i), subject to the restrictions set forth in 47 CFR § 51.809. Finally, the Level 3 agreement is not compliant with the D.C. Circuit's vacatur of portions of the TRO and the FCC's recent *Interim Rules* order.[6]

A Commission ruling in KMC's favor would accomplish precisely what the FCC sought to avoid, *i.e.*, an unwarranted perpetuation "for months or even years" of rules that are clearly illegal. It would leave KMC, and every other CLEC, free to execute new agreements that simply do not comply with the law.

The FCC recently confirmed that carriers should not be able to perpetuate non-compliant regimes through the adoption of non-compliant interconnection agreements in its *Interim Order.*

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[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 & 98-147, *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd 16978 (2003) ("Triennial Review Order" or "TRO").

[4] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 & 98-147, *Order on Reconsideration*, 19 FCC Rcd 15856 (2004).

[5] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Second Report and Order*, 19 FCC Rcd 13494 (2004).

[6] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; CC Docket No. 01-338; Order and Notice of Proposed Rulemaking, FCC 04-179 (2004).

Specifically, the FCC held that, although it had "frozen" provisions related to certain elements in interconnection agreements in existence as of June 15, 2004, "*competitive LECs may not opt into the contract provisions 'frozen' in place by this interim approach.*" *Interim Order,* at ¶ 22 (emphasis supplied). The rationale for the FCC's holding is precisely the rationale that should apply to this case – that "the fundamental thrust of the interim relief provided [in the *Interim Order*] 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 permitting carriers to adopt an agreement containing outdated provisions during the interim period, and it would be directly contrary to the FCC's mandate in the *Interim Order* that CLECs not be permitted to perpetuate noncompliant regimes via the opt-in. *Id.*

BellSouth submitted to counsel for KMC the attached letter, dated December 8, 2004, in which BellSouth outlines what it believes to be KMC's lawful options. Those would include adoption of BellSouth's proposed (standard) interconnection agreement for new CLECs in Kentucky or adoption of other agreements that are compliant with current law. See Attachment, letter from Jim Tamplin, Manager-Interconnection Services, BellSouth, to counsel for KMC, December 8, 2004, at p. 2.

The Commission should not permit KMC to ignore controlling law on adoption of interconnection agreements and should dismiss this proceeding.

B. KMC Failed to Seek Adoption of the Level 3 Agreement Within A "Reasonable Period of Time."

Section 252(i) of the Act provides that a local exchange carrier must make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement. Under the FCC's rules implementing

this section, a CLEC must adopt an agreement in its entirety, and it must adopt an agreement within a reasonable period of time after it is available for pubic inspection under section 252(f) of the Act.[7] Section 252(i) does not provide an independent standard for cobbling together interconnection agreements piece by piece. Rather, the primary purpose of Section 251(i) is to prevent the discrimination that would occur if one party were allowed to operate under an agreement that, within a reasonable period of time thereafter, was not made available to another, similarly situated party.[8] KMC is simply not similarly situated to Level 3, at a minimum due to the passage of time and significant changes in the law.

The FCC implemented section 252(i) in Rule 51.809(c). Rule 51.809(c) explicitly provides that an Incumbent Local Exchange Carrier ("ILEC") only is obligated to make agreements available for 252(i) adoption "for a reasonable period of time after the approved agreement is available for public inspection." The "reasonable period of time to adopt an agreement" expires at such time as the agreement is no longer compliant with existing law. Because the Level 3 agreement is not compliant with the *TRO*, the *Interim Order*, and other intervening FCC orders, it is not available for adoption.

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[7] *See In the Matter of Review of the Section 251 Unbundling Obligations of the Incumbent Local Exchange Carriers,* CC Docket No. 01-338, Second Report and Order (July 13, 2004) (*"Second Report and Order"*). In its *First Report and Order* (*see n. 2, infra),* the FCC interpreted Section 252(i) to permit CLECs to adopt certain terms and conditions of another CLEC's approved agreement without having to adopt other terms and conditions they did not want -- the so-called "pick and choose" rule. At the time it interpreted Section 252(i) in this manner, the FCC "had no practical experience with the actual mechanics of interconnection agreements." *See Second Report and Order*, ¶9. The FCC recently reconsidered this interpretation in light of several years of practical experience. On July 13, 2004, the FCC rejected the "pick and choose rule, and now requires a CLEC invoking section 252(i) to adopt the entire agreement, not just the terms and conditions it likes.

[8] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16139, at ¶ 1314 (1996) (*"First Report and Order")), modified on recon.,* 11 FCC Rcd 13042 (1996), *aff'd in part, vacated in part, Competitive Telecommunications Ass'n v. FCC,* 117 F.3d 1068 (8th Cir. 1997) and *Iowa Utils. Bd. v. FCC,* 120 F.3d 753 (8th Cir. 1997), *aff'd in part, rev'd in part, Level 3 v. Iowa Utils. Bd.,* 525 U.S. 366 (1999), *decision on remand, Iowa Utils. Bd. v. FCC,* 219 F.3d 744 (8th Cir. 2000), *aff'd in part, rev'd in part, Verizon Communications Inc. v. FCC,* 535 U.S. 467 (2002).

The FCC explained its rationale for the limitation contained in Rule 51.903(c) in its First Report and Order. Given the reality that "pricing and network configuration choices are likely to change over time," the FCC stated that "it would not make sense to permit a subsequent carrier to impose an agreement or term upon an incumbent LEC if the technical requirements of implementing that agreement or term have changed." *See* First Report and Order, ¶ 1319.

After the First Report and Order, the FCC extended this rationale to conclude that changes in law, in addition to changes in technical requirements, must be considered in applying the "reasonable period of time" limitation in Rule 51.809(c).[9] In the *ISP* case, the FCC established a new interim compensation regime for ISP traffic. The Commission recognized the danger of perpetuating the old regime via carriers opting into agreements that predated the Commission's decision. To prevent this inequitable result, the Commission held that "[w]e conclude that any 'reasonable period of time' for making available rates applicable to the exchange of ISP-bound traffic expires upon the [FCC's] adoption in this Order of an intercarrier compensation mechanism for ISP-bound traffic." *Id.* at fn. 155. In conjunction with its holding, the FCC noted that "[t]o permit a carrier to opt into a reciprocal compensation rate higher than the caps we impose here [i.e., opt-in to an old non-compliant agreement] during that window would seriously undermine our effort to curtail regulatory arbitrage and to begin a transition from dependence on intercarrier compensation and toward greater reliance on end-user recovery." *Id.* at fn. 154. The FCC recognized that prior law would be inappropriately perpetuated if carriers were permitted, subsequent to the Order, to use section 252(i) to opt into agreements that predated its Order.

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[9] *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 16 FCC Rcd 9151, *Order On Remand and Report and Order* (April 18, 2001) ("ISP Order").

Moreover, in its *TRO*, the FCC, as in its *ISP Order*, explicitly recognized the importance of quickly transitioning to a new legal regime – in this case, one that governs access to unbundled network elements – and the concomitant danger of undue delay in implementation. Based on this concern, the FCC declined to rule that the change of law provisions in existing agreements would not be triggered until after exhaustion of all appeals. It stated:

> Given that the prior UNE rules have been vacated and replaced today by new rules, ***we believe that it would be unreasonable and contrary to public policy to preserve our prior rules for months or even years pending any reconsideration or appeal of this Order.***

See TRO, ¶ 705 (emphasis added). *See also id.*, ¶ 703 (finding that "delay in the implementation of the new rules we adopt in this Order will have an adverse impact on investment and sustainable competition in the telecommunications industry").

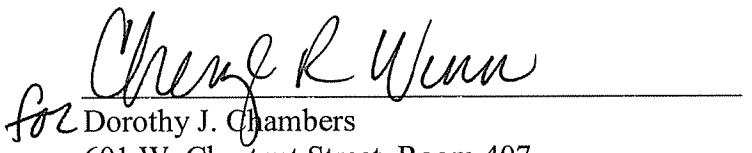
The "reasonable period of time" within which KMC could adopt the Level 3 agreement has long since expired. The Commission must not allow KMC to adopt a stale agreement.

C. Conclusion

The rationale set forth in all of these FCC rulings controls KMC's request to partially (or wholly) opt in to the Level 3 agreement. The reasonable time to opt-in to an agreement expires when that agreement is no longer compliant with current law. To allow carriers to continue to opt-in to agreements that contain provisions that are noncompliant with current law would be contrary to public policy in that it would perpetuate a non-compliant regime and prevent the industry from moving forward under new rules.

For these reasons, BellSouth respectfully requests that the Commission dismiss the Petition and deny all relief sought by KMC therein.

Respectfully submitted, this 16th day of March 2005.



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December 8, 2004

Mr. Brad Mutschelknaus
Ms. Denise N. Smith
Ms. Karly E. Baraga
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Dear Counsel:

This is in response to your four letters dated December 6, 2004, that BellSouth received regarding a request of KMC Data LLC ("KMC Data") to adopt the Interconnection Agreement between BellSouth and AT&T Communications of the South Central States, LLC ("AT&T") for the states of Alabama and Louisiana, to adopt the Interconnection Agreement between BellSouth and Global NAPS, Inc. ("Global NAPS") for the state of Florida and to adopt the Interconnection Agreement between BellSouth and ITC DeltaCom Communications, Inc. ("ITC DeltaCom") for the state of Georgia.

BellSouth acknowledges receipt of KMC Data's requests for adoption but disagrees with the assumptions upon which KMC Data bases its request and the manner in which the request is made. Furthermore, BellSouth is unable to accommodate KMC Data's request to adopt these agreements at this time.

First, the Interim Rules Order provided that an adoption of another party's interconnection agreement that contains rates, terms and conditions for mass market switching, enterprise market loops and high-capacity dedicated transport, that comprise the frozen elements addressed in the Interim Rules Order, is not permitted at this time. Specifically, paragraph 22 of the Interim Rules Order states:

> 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 June15, 2004. This aim would not be served by a requirement permitting new carriers to enter during the interim period.

In addition, paragraph 23 of the Interim Rules Order states:

> [I]f the vacated rules were still in place, competing carriers could expand their contractual rights by seeking arbitration of new contracts, or by opting into other carriers' new contracts. The interim approach adopted here, in contrast, does not enable competing carriers to do either.

The intent of the Interim Rules Order was to freeze in place what carriers had as of June 15th and not to permit a new carrier to obtain vacated elements to which they were not entitled as of June 15th.

Second, 47 C.F.R. § 51.809(c) states that interconnection agreements are to be made available to requesting carriers for adoption only for a reasonable period of time after such agreements are approved by the applicable state commission. Since the execution of the AT&T, Global NAPS and ITC DeltaCom agreements, there have been substantial changes in law, including but not limited to the D.C. Circuit Court of Appeals vacatur ("Vacatur") of certain portions of the FCC's Triennial Review Order ("TRO"), and the FCC's Interim Rules Order regarding interim unbundling rules, as referenced and discussed above. Given the significant changes that have occurred rendering the AT&T, Global NAPS and ITC DeltaCom Interconnection Agreements noncompliant with existing law, KMC Data's request to adopt those agreements has not been made within a reasonable period of time as required by the FCC's rules and is not adoptable in accordance with the FCC's rules and orders.

Although an adoption of the AT&T, Global NAPS and ITC DeltaCom interconnection agreements is not an option at this time, BellSouth can provide KMC Data with BellSouth's proposed Interconnection Agreement for new CLECs for the states of Alabama, Florida, Georgia and Louisiana.

Alternatively, in light of the discussion above, KMC Data may review other agreements that are compliant with current law and that are available for adoption for the states of Alabama, Florida, Georgia and Louisiana. Such contracts can be found on BellSouth's public Web site at:

http://cpr.bellsouth.com/clec/docs/all_states/index7.htm

Please advise BellSouth as to how KMC Data would like to proceed and BellSouth can prepare the adoption requests and make available the appropriate agreements to be executed by the Parties. BellSouth will fully cooperate with KMC Data to complete these agreements and establish the necessary billing accounts once KMC Data and BellSouth have executed an agreement. The executed agreements will be effective on the date agreed to by the Parties in the Interconnection Agreement or the adoption agreement, as applicable.

Please contact me at your earliest convenience. BellSouth looks forward to working with KMC Data in reaching a mutually agreeable Interconnection Agreement.

Should you have any questions, please feel free to contact me.

Sincerely,

Jim Tamplin
Manager - Interconnection Services

cc: Rhona Reynolds, Esq.
Marva Brown Johnson, KMC Data LLC
Raymond Pifer, KMC Data LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on the individuals on the attached Service List by mailing a copy thereof, this 16th day of March 2005.

Cheryl R Winn

Cheryl R. Winn

SERVICE LIST – PSC 2005-00097

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