

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF CINERGY COMMUNICATIONS)	
COMPANY FOR ARBITRATION OF AN)	CASE NO.
INTERCONNECTION AGREEMENT WITH)	2001-00432
BELLSOUTH TELECOMMUNICATIONS, INC.)	
PURSUANT TO U.S.C. SECTION 252)	

O R D E R

On July 12, 2002, the Commission, by Order, addressed the disputed issues between Cinergy Communications Company (Cinergy) and BellSouth Telecommunications, Inc. (BellSouth) in this arbitration proceeding. The parties disputed whether BellSouth should be required to furnish to Cinergy, on an unbundled network element (UNE) basis, certain network elements, including the digital subscriber line access multiplexer (DSLAM) port and broadband transport. The Commission concluded that unbundling packet-switching would create a disincentive for investment in these technologies by incumbent local exchange carriers (ILECs). The provision of packet-switching as a UNE may, in the long term, discourage future investments by BellSouth and by Kentucky's other ILECs if those investments would be required to be shared with competitors. Thus, as a matter of public interest, the Commission denied Cinergy's request to unbundle packet-switching as a UNE.

The parties also disputed whether BellSouth should continue its current policy of refusing to provide its digital subscriber line (DSL) service to customers who choose a competitive LEC (CLEC) for voice utilizing the UNE platform (UNE-P). The Commission found that BellSouth's practice of denying DSL to a CLEC's UNE-P

customers undercuts the Commission's long-held policy of encouraging UNE-based voice competition and, in the long run, would result in fewer viable CLECs and fewer customer options. The Commission ordered the practice to cease.

BellSouth and Cinergy have both applied for clarification or rehearing of the Commission's Order. Cinergy has requested rehearing of the issue of unbundling packet-switching as a UNE. BellSouth and Cinergy both have requested clarification of the Commission's decision concerning provision of BellSouth DSL service over CLEC UNE-P lines. BellSouth prefers that the Commission reconsider its decision but, in the alternative, asks for clarification. On August 21, 2002, the Commission granted the motions for clarification of BellSouth and Cinergy in order to clarify the July 12, 2002 Order. The Commission's determinations in this arbitration proceeding are clarified herein.

Cinergy asserts that the Commission failed to apply the necessary and impair analysis required by 47 U.S.C. Section 251(d)(2) and as delineated by the U. S. Court of Appeals for the District of Columbia in United States Telephone Association v. Federal Communications Commission, 290 F.3d 415 (D.C. Circuit 2002). However, the Commission's July 12, 2002 Order clearly states that the record in this case does not establish that Cinergy's obtaining UNEs in addition to DSL-capable loops is necessary to enable it to provide service. That Order also explains that packet-switching will not be required to be unbundled in Kentucky as a matter of public interest. The Commission expressed concern that unbundling packet-switching would create

disincentives for ILEC investment and, accordingly, would be detrimental to Kentucky. Cinergy has presented no new evidence which would alter the Commission's decision.¹

Next, Cinergy asks that the Commission's July 12, 2002 Order be clarified to indicate that BellSouth may not refuse to provide its DSL service whether via the BellSouth product, FastAccess, or through a wholesale DSL transport that BellSouth provides to all network service providers. BellSouth, on the other hand, asks that the Commission clarify the Order to indicate that BellSouth may not refuse to provide FastAccess service to a customer on the basis that that customer receives voice service from a CLEC that provides service via UNE-P. Moreover, BellSouth requests that this be limited to circumstances in which the customer has FastAccess service before he switches from BellSouth to a CLEC for voice service. BellSouth states its intention to comply with the Order to this extent, but to install a new loop facility over which it will provide FastAccess. BellSouth states that it plans to impose upon CLEC customers an additional charge beyond that imposed on its own voice customers.

BellSouth also asserts that the issue of DSL over the UNE-P was not properly before the Commission. We disagree. The issue is directly related to Cinergy's Issue

¹ In the future, the Commission may consider evidence regarding the cable industry in Kentucky and the viability of alternatives for the delivery of voice-over broadband. However, an arbitration proceeding, limited by 47 U.S.C. Section 252 (b)(4)(C) to 9 months from the request to negotiate, is not an appropriate avenue for such an inquiry.

No. 7 in the original petition; it was addressed in many filings and at the hearing in this proceeding. Moreover, the determinations reflect the policy of this Commission.²

Our decision reflects our concern for voice customers in Kentucky as well as for the preservation of telecommunications competition and the availability of DSL to Kentucky's citizens. However, we have considered our earlier ruling in this case and modify it as follows: As we do not regulate information services, we will not require BellSouth to provide BellSouth.net's retail FastAccess service. However, a Kentucky customer must be able to obtain DSL service regardless of the voice carrier he chooses. Accordingly, BellSouth may not refuse to provide DSL pursuant to a request from an Internet service provider who serves, or who wishes to serve, a customer who has chosen to receive voice service from a CLEC that provides service over the UNE-P.

As a final matter, the Commission finds BellSouth's proposal to provide DSL to CLEC customers over a separate loop, and to charge accordingly, unacceptable. Additional facilities would create inefficiencies and would create unnecessary costs for the customer. There is no evidence that the provision of DSL and voice over the same loop is not technically feasible. There is, however, every indication that imposing charges upon CLEC voice customers that BellSouth voice customers would not have to pay would have the same anti-competitive result as the practice our original Order rejected.

² See Administrative Case No. 382, An Inquiry Into the Development of Deaveraged Rates for Unbundled Network Elements, Order dated December 18, 2001 at 36 which states, The Commission also makes clear in this Order that ordinarily combined UNEs must also be made available where line-splitting occurs. Line-splitting must be made available to all CLECs on a nondiscriminatory basis. Moreover, BellSouth may not discontinue the provision of line-splitting when a CLEC provides voice service through UNE-P, regardless of which xDSL provider is used. BellSouth did not contest this Commission ruling.

The Commission, having considered the motions and having been otherwise sufficiently advised, HEREBY ORDERS that:

1. To protect the provision of competitive voice service in Kentucky, 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 a CLEC.

2. BellSouth shall not require a DSL customer to pay loop costs of a separate loop simply because the customer receives voice from a competitor on a UNE-P basis.

3. Within 20 days of the date of this Order, the parties shall file their final interconnection agreement containing terms consistent with the July 12, 2002 Order as modified by this Order.

Done at Frankfort, Kentucky, this 15th day of October, 2002.

By the Commission

ATTEST:


Executive Director