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January 21, 2004

Mr. Thomas M. Dorman
Kentucky Public Service Commission
211 Sower Boulevard
P.O. Box 615
Frankfort, Kentucky 40601

RE: Case No., 2002-456, Inquiry into use of Contract Service Arrangements by Telecommunications Carriers

Dear Mr. Dorman:

Enclosed please find the original and ten copies of Cinergy Communications Company, ICG Telecom Group, Intermedia Communications, Inc., NuVox Communications, Inc., MCI Telecommunications, MCImetro Access Transmission Services, LLC and Time Warner Telecom (collectively, "CLEC Respondents") Post-Hearing Brief. Please indicate receipt of this filing by your office by placing a file stamp on the extra copy and returning to me via the enclosed, self-addressed, stamped envelope.

Sincerely yours,

Douglas F. Brent

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of

INQUIRY INTO THE USE OF	)	
CONTRACT SERVICE ARRANGEMENTS	)	
BY TELECOMMUNICATIONS	)	**CASE NO. 2002-00456**
CARRIERS IN KENTUCKY	)	

POST HEARING BRIEF OF THE CLEC RESPONDENTS

Cinergy Communications Company, ICG Telecom Group, Intermedia Communications, Inc., NuVox Communications, Inc., MCI Telecommunications, MCImetro Access Transmission Services, LLC and Time Warner Telecom (collectively, "CLEC Respondents[1]"), by counsel, hereby respond to Chairman Huelsman's request for briefing made at the conclusion of the October 23, 2003 hearing in this matter. This brief addresses the applicability of KRS 278.170 and discusses the significance of Administrative Case No. 370. The CLEC Respondents also filed extensive prehearing comments on October 10, 2003 addressing the policy behind reduced

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[1] The CLEC Respondents are all utilities authorized to provide service in Kentucky subject to the relaxed regulatory requirements applicable to all CLECs and other non-incumbent service providers. Four of the CLEC respondents were named as respondents to the original order in this case - these CLECs responded to the Commission's initial data request, and thereafter withdrew from participation in accordance with the procedure set forth in the December 19, 2002 order. Two of the CLEC respondents were not named in the initial order and chose not to join the case.

regulation for CLEC services, including contract service arrangements, and respectfully direct the Commission to those comments.

I. INTRODUCTION.

As a preliminary matter, CLEC practices are not a primary concern of this case and were never truly at issue - this case originated as a result of customer complaints against BellSouth Telecommunications, an ILEC. It is therefore not surprising that during the lengthy hearing in this matter there was no testimony or other evidence introduced to even suggest that any contracting practices of a CLEC are unreasonable, detrimental to the public interest, or in any way harmful to any ratepayer in Kentucky. To the contrary, the prefiled testimony and other evidence introduced at the hearing tended to show only that there is robust competition in the exchange territories of the major ILECs, and that CLECs are an important factor in making ILECs more competitive. But what is crucial is the complete absence of any evidence that CLEC contracts have harmed customers, competition, or the public interest. This absence of evidence is important because, as discussed more fully below, if the Commission is asked to modify or vacate any prior order granting a regulatory exemption to a carrier, it may do so only upon

finding, by clear and satisfactory evidence, that its earlier findings were invalid or that previously granted modifications are no longer in the public interest.

II. ADMINISTRATIVE CASE 370 EXEMPTED THE CLECS FROM FILING CONTRACT ARRANGEMENTS

A. The History of Reduced Regulation of CLECs in Kentucky.

For the past *twenty* years the Kentucky Commission has made careful regulatory distinctions between monopoly carriers with market power and competitive carriers without it. These distinctions were first drawn in Administrative Case No. 273 as competitive long distance carriers like MCI and Sprint entered the interLATA market in competition with AT&T. New entrants were classified as non-dominant and were subject to less stringent regulation.

The tradition of reduced regulation for competitive services continued as markets evolved and local competition was introduced. Statutory changes in 1992 allowed the Commission even greater discretion to exempt competitive services and providers from regulation unnecessary to protect the public. See KRS 278.512.

Six years ago, the Commission opened Administrative Case No. 370, a generic proceeding to determine whether CLECs

should be exempt from certain regulatory requirements.[2] In opening the case the Commission stated "[w]hen evaluating the reasonableness of regulatory exemption, the Commission is bound by KRS 278.512 and 278.514."[3] The Commission then made a generalized factual finding that CLECs lacked market power and therefore would not be rate regulated by the Commission. This decision was informed by the Commission's experience in regulating other competitive carriers that lacked market power, i.e. non-dominant IXCs. Then, on its own motion, as permitted by KRS 278.512(2), the Commission determined to exempt CLECs from the filing requirements regarding initial operations, transfers of control and financing.[4] In making this determination, the Commission referred specifically to the *lack of market power of CLECs*.[5] While eliminating these filing requirements, the Commission noted that regardless of any exemptions granted in the proceeding, customers would continue to have the option of filing complaints against CLECs, and the Commission would retain jurisdiction to hear them.[6]

Nearly two years later, and again on its own motion pursuant to KRS 278.512 and 278.514, the Commission reopened

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[2] *Exemptions for Providers of Local Exchange Service other than Incumbent Local Exchange Carriers*, Administrative Case No. 370 (January 8, 1998).
[3] *Id.*
[4] *Id.*
[5] *Id.* at pp. 2-3.

Administrative Case No. 370 and clarified that the filing exemptions granted in 1998 extended to various administrative regulations. The Commission stated that CLECs were still required to provide tariffs to the Commission pursuant to KRS 278.160. However, they would *be exempt from all other tariffing requirements* and other requirements of [the] administrative regulations with the exception of those specifically enumerated in the Order.[7] The Commission then listed seven separate administrative regulations that would continue to apply to CLECs. The Commission did not include the regulation providing for filing of special contracts, 807 KAR 5:011, Section 13. The intentional omission of this regulation, combined with the Commission's unambiguous statement that CLECs were exempt from all other tariffing requirements, made clear that the Commission intended that CLECs, who lacked market power, should continue to file tariffs for generally available services but would be exempt from filing individually negotiated service arrangements. Such a distinction was completely sensible given that the Commission expressly reserved jurisdiction to hear customer complaints. Six years later, there is nothing to suggest that this decision was unwise.

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[6] *Id.* p. 4.
[7] Administrative Case No. 370 (August 8, 2000), p. 3.

B. KRS 278.512(5) Provides the Legal Standard for Vacating Exemptions.

In Administrative Case 370 the Commission made findings then determined unambiguously that the existence of competitive alternatives was sufficient to protect CLEC customers from unfair treatment, poor service quality, and excessive prices. The Commission then used a statutory tool, KRS 278.512(2), to grant various exemptions to CLECs. Another section of the statute applies to any proceeding to revoice these exemptions. KRS 278.512(5) allows the Commission to vacate or modify the orders in Administrative Case 370 only if it determines by "clear and satisfactory evidence" that the findings upon which the order was based are no longer valid, or that the exemption(s) or modifications are no longer in the public interest.[8] No party to this case has specifically asked the Commission to remove any exemptions, and as a legal matter there is no evidentiary basis for the Commission to set aside its earlier findings in Administrative Case 370. Having issued an Order six years ago finding that CLECs lack market power and are granted a legal exemption from numerous regulatory requirements, the Commission may not unilaterally change course now. See GTE v. Revenue Cabinet, 889 S.W. 2d 788, 792 (1994). The CLECs have relied on a well thought out

[8] The Order initiating this case alludes to KRS 278.512 as one of the "guiding principles" in this proceeding, along with the Telecommunications Act of 1996. The CLEC Respondents suggest

exemption, and no party has seriously urged that such exemption be removed. The Commission may not abandon its alternative regulation of CLEC CSAs without "clear and satisfactory evidence." KRS 278.512(5).

C. KRS 278.512(6) Authorizes the Commission to Treat CLECs Differently.

The initial Order in this proceeding was predicated upon specific allegations and complaints directed at a single ILEC. That ILEC, BellSouth, has previously been granted exemptions to certain filing requirements, and the real issue in this case is whether such exemptions should remain. The ILECs would like to have the same flexibility granted to the CLECs, and apparently see this case as an opportunity to either to retain and expand upon exemptions they already have obtained (in the case of BellSouth), or seek exemptions already granted to others (in the case of Cincinnati Bell and ALLTEL). But there is no requirement that the Commission treat ILECs and CLECs alike. KRS 278.512(6) permits the Commission to treat services and utilities differently, if reasonable and not detrimental to the public interest. Despite any ILEC rhetoric to the contrary, this case does not have to be about finding a unified filing regime and applying it to all carriers. The statute contemplates different treatment among utilities. And

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that the statute does more than provide a guiding principle. It prescribes a very well defined legal standard for vacating or modifying waivers. KRS 278.512(5).

while there may not be evidence to support *reduced* regulation of ILEC CSAs, clearly there is no record evidence to support *increased* regulation of CLEC contracts. An all day hearing proved only that CLECs provide competitive alternatives to monopoly services, and that customers use such alternatives. The Commission may choose to address ILEC contracting practices without reversing its six-year old decision to lightly regulate CLECs.

III. KRS 278.170 IS NOT A LIMITATION ON THE COMMISSION'S ABILITY TO GRANT REGULATORY EXEMPTIONS TO CLECS.

Any concern that KRS 278.170 limits the ability of the Commission to exempt filing of special contracts may be disposed of easily. First, this statute does not prohibit price discrimination through the use of contracts. The statute only prohibits unreasonable preferences or advantages. In determining any question of fact arising under this section, see KRS 278.170(4), the Commission may read KRS 278.170(1) in conjunction with KRS 278.512, which permits the Commission to exempt services or telecommunications providers from any or all provisions of Chapter 278. Second, the Commission's findings in Administrative Case No. 370 that CLECs lack market power lead to the conclusion that a CLEC lacks the ability to be unreasonably discriminatory. Pricing discrimination is inherent in competitive markets.

IV. CONCLUSION.

The Commission made a sensible decision to waive certain filing requirements for non-incumbent providers of local service. During the six years since the exemption was granted, nothing has happened to suggest that additional supervision of CLEC special contracts is required. CLECs have reasonably relied on what the Commission said in its orders. Reversing course is not only unnecessary, but not possible without record evidence to show that previous findings are no longer valid, or that the previous modification is no longer in the public interest. KRS 278.512(5). Under the Commission's own standards articulated in Administrative Case 370, regulatory activities for competitive carriers should only be required when necessary to protect the public. Nothing in the record of this proceeding even suggests, much less proves, that the Commission should reinstate a filing requirement for CLEC CSAs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was served this 21st day of January, 2004 first class, United States mail, postage prepaid, upon those persons listed on the attached service list.

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