RECEIVED

MAY 2 3 2005

PUBLIC SERVICE
COMMISSION

COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of

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

MOTION FOR REHEARING

Time Warner Telecom of Ohio, LLC ("TWT"), by counsel and pursuant to KRS 278.400, hereby seeks rehearing of the Commission's April 29, 2005 Order in this proceeding. As shown below, the Commission's order is arbitrary and capricious as applied to TWT, is unsupported by any record evidence, and insofar as it revokes a prior waiver of a regulatory requirement, fails to satisfy the explicit statutory requirements for revocation of such a waiver. The Commission should modify its order to correct these defects.

INTRODUCTION

TWT is a facilities-based competitive carrier providing service in portions of Northern Kentucky. In its Kentucky service area TWT competes with various CLECs and with one incumbent, Cincinnati Bell Telephone Company. On April 29, 2005, the Commission entered an Order in this case, ruling that BellSouth should no longer be permitted to withhold customer-specific service agreements ("CSAs") from public disclosure. The Commission's decision to revoke an exemption for BellSouth was based on record evidence that BellSouth had entered into more than 1,000 agreements and that BellSouth's practice of not filing CSAs (a practice that the Commission had permitted for

BellSouth and no other incumbent carrier) had harmed BellSouth customers and had made it difficult for competing carriers to exercise their federal rights to resell BellSouth's retail services at a discounted rate. These concerns, which formed the basis for the Commission to take action related to BellSouth, have no application whatsoever to TWT. First, TWT is not an incumbent required to provide service at the wholesale discount as prescribed by Section 251(c)(4). Second, TWT's contracting practices were not at issue in this proceeding – no customer had complained about TWT and there had been no findings in any earlier case that TWT customers had been disadvantaged by any negotiated service agreement. Indeed, there was no testimony or other evidence to even suggest that CLECs had done anything that had harmed a customer. To the contrary, there was ILEC testimony that CLECs employ strategies that generally enable them to provide service at rates that are lower than those of the incumbent.[1] This was hardly evidence of a problem requiring regulatory intervention by the Commission. Yet, the Commission has decided to intervene anyway. In attempting to craft a remedy to address BellSouth's conduct, the Commission has gone far beyond what is necessary, heaping new, burdensome and unnecessary requirements on TWT and other carriers whose conduct is not even at issue. The Commission's order is not only a solution looking for a problem; it is a radical departure from twenty years of reduced regulation for competitive carriers.

ARGUMENT

I. THE COMMISSION'S ORDER VIOLATES KRS 278.512 (5) BY REVOKING AN EXEMPTION GRANTED TO CLECS WITHOUT SATISFYING THE REQUIREMENTS OF THE STATUTE.

A. The Commission Earlier Waived the Filing Requirement for all Non-Dominant Carriers Including CLECs.

---

1 *E.g.*, prefiled testimony of Scott Ringo (CBT) dated April 29, 2003 at p. 16.

Since 1984, the Commission has tailored its regulatory requirements to take into consideration the differences between dominant providers with market power, like BellSouth, and competitive carriers lacking any market power, like TWT. This order abandons those distinctions.

Under Kentucky law, utilities are required to file general schedules of rates with the Commission. KRS 278.160 (1). To the extent that such schedules are actually filed, they bind the utility and the customer. TWT files a general schedule with the Commission, and those services and rates contained therein are available to customers in TWT's service area.

KRS 278.160 permits the Commission to prescribe rules related to how schedules will be filed. The Commission promulgated such rules long before the beginnings of competition for telecommunications services. Under the Commission's rules, utilities are permitted to meet individualized needs through special contracts. Pursuant to a Commission regulation, 807 KAR 5:011, Section 13, such contracts are filed with the Commission.

However, for competitive telecommunications services provided by non-incumbent carriers, the Commission waived the filing requirement nearly five years ago. The waiver was made possible by the General Assembly in 1992. The legislature recognized that the market for telecommunications was becoming competitive, and gave the Commission the discretion to exempt telecommunications services from any or all of the provisions of Chapter 278. *See* KRS 278.512 (2). The Commission exercised that discretion in Administrative Case No. 370, a generic proceeding to determine whether CLECs should be exempt from certain regulatory requirements.[2] In opening the case *seven years ago* the Commission stated "[w]hen evaluating the reasonableness of regulatory exemption, the

---

[2] *Exemptions for Providers of Local Exchange Service other than Incumbent Local Exchange Carriers*, Administrative Case No. 370 (January 8, 1998).

Commission is bound by KRS 278.512 and 278.514."[2] 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 long-distance carriers. 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.[3] In making this determination, the Commission referred specifically to the *lack of market power of CLECs.*[4]

Nearly two years later, and again on its own motion pursuant to KRS 278.512 and 278.514, the Commission reopened Administrative Case No. 370 and clarified the broad scope of the exemptions, confirming they applied to various administrative regulations. The Commission then spelled out which rules were being waived, and made clear it was waiving certain tariffing requirements. CLECs were still required to file their general schedules under KRS 278.160. However, the Commission ruled 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.[5] The Commission identified 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. By intentionally omitting this regulation, while stating that CLECs were exempt from all other tariffing requirements, the Commission made clear that CLECs, who lacked

---

[2] *Id.*
[3] *Id.*
[4] *Id.* at pp. 2-3.
[5] Administrative Case No. 370 (August 8, 2000), p. 3.

market power, should continue to file tariffs for generally available services but would be exempt from filing individually negotiated service arrangements.

B. The Commission Identified No Evidence that CLEC Contracting Practices Harm Consumers, other Carriers, or Competition.

The Commission concluded, in its Order, at pp. 6-7, that BellSouth's practices related to special contracts had harmed some customers. The Commission also speculated that CLECs intending to resell BellSouth services would be harmed without the ability to review CSAs subject to resale under the Section 271 competitive checklist. However, the Commission did not find that any local carrier other than BellSouth had actually harmed a customer. This is not surprising. 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. This absence of evidence is crucial, because the Commission's April 29 Order revokes an exemption granted to an entire class of carriers, without a finding that any member of that class has done anything that would support even an individualized remedy the type of which the Commission applied to BellSouth.

C. The Commission May Not Revoke a Waiver under KRS 278.512 Unless There is "Clear and Satisfactory Evidence" That Earlier Findings Were Invalid or are No Longer in The Public Interest.

There are two fundamental legal problems which the Commission should address on rehearing. First, in its Order, the Commission barely acknowledges the waiver issues raised by the CLECs, even though then Chairman Huelsmann specifically asked for post-hearing briefs on this issue. Curiously, the Commission does not deny that it had waived the special contract filing requirement for CLECs, nor does the Commission state that it is revoking the waiver. Rather, apparently determined to put all carriers, ILEC and CLEC alike, into the same regulatory barrel, the Commission simply sidesteps the issue. This is reversible error. It is fundamental that as part of a rulemaking an agency must demonstrate the rationality of its decision-making process by responding to those comments that are relevant and significant. *See Grand Canyon Air Tour Coalition v. FAA*, 154 F.3d 455, 468 (D.C. Cir. 1998). The Commission is not free to simply disregard the comments which set forth legal positions the agency is trying to maneuver around. As the D.C. Circuit has stated in the context of vacating FCC rules adopted after rulemaking: "a dialogue is a two-way street: the opportunity to comment is meaningless unless the agency responds to significant points raised by a party." See *Home Box Office, Inc. v. FCC, 185 U.S. App. D.C. 142 (D.C. Cir., 1977).* Once the CLECs reminded the Commission that it had waived the CSA filing requirement, both through their prehearing comments and through post-hearing briefs specifically requested by the Commission, the Commission was obliged to actually take those comments and legal arguments into account, rather than to merely gloss over them in an order which set forth a changed interpretation that could affect dozens of carriers.

The second problem is failure to adhere to the statute governing how the Commission may revoke a waiver it granted previously. 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. This statutory language sets a high bar – it implements the well-understood principle that an agency should not arbitrarily depart from prior pronouncements, changing rules without a reasoned explanation for the change. *See Motor Vehicle Mfrs. Assoc v State Farm,* 463 U.S. 29 (1983). In this case, lack of any evidence to support revocation of the waiver results in a decision that it arbitrary under Section 2 of the Kentucky Constitution and therefore erroneous. *See Kaelin v. City of Louisville*, 643 S.W. 2d 590, 591 (Ky. 1982) (findings of fact must be based on an evaluation of the evidence and conclusions must be supported by substantial evidence).

There is absolutely nothing in the record of this case to support revocation of the waiver. No party asked the Commission to remove any exemptions, no customers testified at the hearing, and none who filed a brief claimed they had been harmed by anyone other than an ILEC. (Of course, the general waiver in Administrative Case 370 did not apply to ILECs anyway.) Therefore, as a legal matter there was no evidentiary basis for the Commission to set aside its earlier findings in Administrative Case 370. Having issued an Order seven 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) (interpretation made by an agency related to unambiguous statute and applied over a long period of time cannot be unilaterally

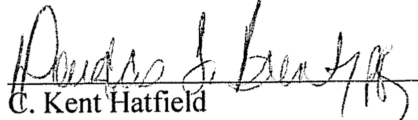
revoked). The Commission may not abandon its alternative regulation of CLEC CSAs without "clear and satisfactory evidence." KRS 278.512(5); *Kaelin v. City of Louisville.*

Granting rehearing does not necessarily require the Commission to disturb any findings it made related to BellSouth. The initial Order in this proceeding was predicated solely upon specific allegations and complaints directed at BellSouth. TWT takes no position on whether the Commission's Order is correct in revoking BellSouth's filing exemption for CSAs. Regardless, KRS 278.512(6) contemplates different treatment among utilities. In this case there was no record evidence to support *increased* regulation of CLEC contracts. The statute does not require the Commission to treat all telecommunications utilities alike. With respect to CSA filing requirements, the statute clearly permits the Commission to require more of a dominant provider like BellSouth than it does of a CLEC: "In granting or vacating exemptions, the . . . Commission . . . may treat services and utilities differently if reasonable and not detrimental to the public interest."

II. CONCLUSION.

The Commission erred in revoking a waiver of CSA filing requirements for non-incumbent providers of local service. Reversing course was not only unnecessary, but not possible without record evidence to show that the Commission's previous findings were invalid or 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 suggested, much less proved, that the Commission should reinstate a filing requirement for CLEC CSAs. The Commission should grant rehearing and find that CLECs are not required to file CSAs with the Commission.

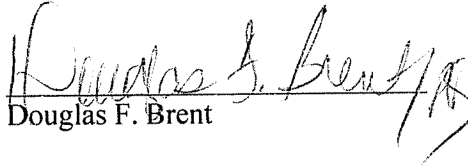
Respectfully submitted,



C. Kent Hatfield
Douglas F. Brent
STOLL, KEENON & PARK, LLP
2650 AEGON Center
400 West Market Street
Louisville, Kentucky 40202
(502) 568-9100

CERTIFICATE OF SERVICE

A copy of the foregoing was served this 23rd[t] day of May, 2005 first class, United States mail, postage prepaid, upon those persons listed on the Commission's service list posted by the Commission on its website as of May 23, 2005.



Douglas F. Brent