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JUN 09 2005

PUBLIC SERVICE
COMMISSION

June 9, 2005

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 Time Warner Telecom of Ohio's Reply to BellSouth. 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

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JUN 09 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) CASE NO. 2002-00456
CARRIERS IN KENTUCKY)

TIME WARNER TELECOM'S REPLY TO BELLSOUTH

Time Warner Telecom of Ohio, LLC ("TWT") filed a motion for rehearing under KRS 278.400, asking the Commission to modify its April 29, 2005 order requiring TWT and other competitive carriers to begin filing certain customer-specific contracts. TWT's motion explains how the PSC's order is legally erroneous because it fails to satisfy KRS 278.512(5), which sets the standard the Commission must meet in order to vacate the competitive exemption it granted under KRS 278.512(2). BellSouth, which does not even compete with TWT in Kentucky, has filed a response in opposition to TWT's motion. BellSouth's response avoids discussion of the legal arguments raised in TWT's motion. Instead, BellSouth attempts to confuse matters by arguing that TWT's motion is based on "false assumptions." But the only false assumptions before the Commission are those being peddled by BellSouth, to which TWT will briefly reply.

First, BellSouth claims the Commission "consistently has required" the filing of CSAs by CLECs and that the Commission's staff has been clear and consistent in its interpretation and understanding "of the Commission orders in this regard." *BellSouth Response at 2*. Which Orders? What interpretations? BellSouth cannot identify a single

order which stands for the proposition it advances in its response. This is not surprising – the only orders which speak to CLEC obligations related to filing contracts are the ones in Administrative Case No. 370 which *waived those obligations*. Those orders, which the Commission issued pursuant to KRS 278.512(2), should remain the law until and unless the Commission finds evidence – of which there is none – that would necessitate modifying them. Moreover, the Commission must speak through its orders. Staff interpretations, no matter how well intentioned, cannot be determinative when the Commission has clearly spoken on the issue.

BellSouth's belated claim is desperate and unsupported. If BellSouth thought the CLECs were wrong on the law it has had every opportunity to explain why, yet BellSouth said nothing. Indeed, when the Commission Chairman sought legal analysis on the very points which are now the heart of TWT's motion for rehearing, BellSouth offered none.

At the conclusion of the October 23, 2003 hearing, Chairman Huelsmann acknowledged that some carriers claimed they had been granted an exemption from filing CSAs. The Chairman was quite specific in asking for legal briefs concerning the effect of Administrative Case No. 370, explaining on the record that he was not familiar with the case relied on by the CLECs because the decisions at issue occurred "before my time" at the Commission. Responding to the Chairman's direction, some parties addressed the legal question in their post-hearing briefs. BellSouth did not.

Apparently, BellSouth could not explain away the express waiver language in the Commission's orders cited by TWT and other CLECs, so BellSouth chose not to brief that issue. After all, crediting the CLECs' argument could not have helped BellSouth. Accordingly, BellSouth's twenty nine page post-hearing brief did not even acknowledge the

important question posed by the Chairman. Not surprisingly, BellSouth's eleventh hour argument in response to TWT's motion for rehearing finds no support in the Commission's orders. It must be disregarded.

The second false assumption in BellSouth's response is that the Commission's order passes muster because it "struck a balance for a level playing field among competitors." *BellSouth response at 3*. But that is not the standard of review for the Commission's order. As the Commission itself acknowledged in Administrative Case No. 370, "[w]hen evaluating the reasonableness of a regulatory exemption, the Commission is *bound by KRS 278.512 and 278.514.*"¹ Clearly, the Commission must follow the statute if it intends to change the rules. The statutory test is not about "level playing fields." Rather, it requires "clear and satisfactory evidence" that a previously granted exemption is no longer in the public interest.

No such evidence is cited by the Commission in its order, and none exists in the record of this case. No party even attempted to introduce such evidence. For example, at hearing, *not one party, attorney, or Commissioner asked a single question* concerning the contracts filed by various CLECs in response to the Commission's order initiating the case. Moreover, no party testified that TWT or any other CLEC was harming customers, competition, or the public interest by not publicly filing customer-specific agreements. In contrast, the effects of BellSouth's contracting practices were substantially documented. And while customers had complained about BellSouth's discrimination, no other carrier's conduct was at issue. Therefore, it is not surprising that the record contains no evidence to support increased regulation of CLECs. BellSouth asks the Commission to simply paper over this lack of evidence and punish TWT for BellSouth's conduct.

¹ Exemptions for Providers of Local Exchange Service other than Incumbent Local Exchange Carriers, Administrative Case No. 370 (January 8, 1998).

In any event, BellSouth's parity argument is a red herring. Federal and state law both provide that BOCs and other incumbent providers may have different legal obligations than CLECs. As the Commission notes in the Order, BellSouth has an obligation under federal law to make its CSAs available for resale. That obligation is unique to BellSouth and applies to no other ILEC or CLEC in Kentucky. In addition, as TWT explained in its post-hearing brief and its motion for rehearing, KRS 278.512(6) is very specific in allowing the Commission to treat telecommunications utilities differently if reasonable and not detrimental to the public interest. *If the Commission lacked a statutory basis to treat CLECs differently than ILECs it never could have opened Administrative Case No. 370.* BellSouth ignores this.

The Commission made evidentiary findings to support a revocation of BellSouth's waiver. The Commission determined that the public interest requires that BellSouth no longer be permitted to operate using unfiled agreements. There were no evidentiary findings related to other carriers. Thus, under KRS 278.512 (6), BellSouth may be treated differently than TWT or other competitive carriers.

BellSouth's attempt to smudge TWT's motion would have the PSC completely ignore its past orders and the requirements of Chapter 278. This invitation should be rejected. KRS 278.512 sets the standard the Commission must follow in considering whether to vacate a waiver granted to competitive telecommunications services. The Commission cannot subtract from those requirements. *See Public Service Com'n v. Attorney General of Ky.*, 860 S.W. 2d 296 (Ky. Ct. App. 1993). The Commission should grant rehearing and modify its Order to find that CLECs are not required to file CSAs with the Commission. Obviously, such modification would permit those CLECs who choose to file to continue to do so.

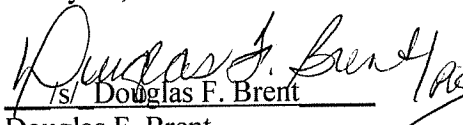
Respectfully submitted,


/s/ Douglas F. Brent

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CERTIFICATE OF SERVICE

A copy of the foregoing was served this 8th day of June, 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.


/s/ Douglas F. Brent
Douglas F. Brent