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October 10, 2003

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KENTUCKY PUBLIC SERVICE COMMISSION

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") Comments. 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

DFB:jms

Enc.

Cc: Parties of Record

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

SEP 10 2003

In the Matter of

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

COMMENTS

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"), by counsel, hereby respond¹ to staff's
invitation to file comments in advance of the October 23
hearing in this matter.

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

¹ In filing these comments the CLEC respondents do not waive any argument that they are non-parties not subject to any obligation to participate in this case. These comments are offered solely to respond to questions of law raised during the October 1 informal conference.

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. None of CLEC Respondents are currently parties.

In choosing not to participate in the case the CLECs joined the majority of ILECs in Kentucky who chose not to participate in the case. However, at the informal conference and the industry workshop, some ILECs remaining in the proceeding have raised questions about whether CLECs who chose not to participate in this case are in compliance and whether they will obey the Commission when it makes a decision in this case. One ILEC has asked staff about the applicability of Administrative Case No. 370, prompting discussion about whether CLECs are required to file special contracts and whether they are in fact filing them. These questions have become a distraction in the proceeding insofar as 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 an incumbent. Because of the effort to cast suspicion upon the CLEC industry generally, the Respondent CLECs offer the following comments to place the current case in the appropriate legal context.

I. Regulation of CLECs in Kentucky.

Since 1984 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 IXCs entered the interLATA market in competition with AT&T. Carriers smaller than AT&T 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. Subsequent statutory changes allowed the Commission even greater discretion to exempt competitive services and providers from regulation unnecessary to protect the public. See KRS 278.512. The Commission has expressed confidence in the power of competition to ensure that rates and practices of telecommunications utilities without market power will be reasonable as required by KRS 278.030.

This confidence has extended to the market for local services. More than five years ago, the Commission made a generalized factual finding that CLECs lacked market power and therefore would not be rate regulated by the Commission.² Then, on its own motion, as permitted by KRS 278.512(2), the

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

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 The Commission stated in its order that one consideration in determining the public interest is the reduction of resources dedicated to regulatory activities *no longer required to protect the public*. While eliminating filing requirements the Commission noted that regardless of any exemptions *eventually granted* in this proceeding, customers would continue to have the option of filing complaints and the Commission would retain jurisdiction to hear them.⁵

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 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]

³ *Id.*

⁴ *Id.* at pp. 2-3.

⁵ *Id.* p. 4.

administrative regulations with the exception of those specifically enumerated in the order.⁶ The Commission then listed seven separate administrative regulations that would not be waived. The regulation providing for filing of special contracts, 807 KAR 5:011, Section 13, was not included among the regulations that would continue to apply to CLECs. The intentional omission of this regulation, combined with the Commission's unambiguous statement that CLECs were exempt from all other tariffing requirements, makes clear that the Commission intended that CLECs, who lacked market power, should continue to file tariffs for generally available services but would be relieved of filing individually negotiated service arrangements. Such a distinction was completely sensible given that the Commission expressly reserved jurisdiction to hear customer complaints.

II. The Waiver Order for BellSouth.

Two years after issuing this broad relief to CLECs, the PSC expressed concern about the "potential for discriminatory practices through such individual rate determinations" offered through special contracts by BellSouth.⁷ However, shortly thereafter, in Case No. 2001-00077, BellSouth was granted a

⁶ Administrative Case No. 370, (August 8, 2000), p. 3.

⁷ *Review of BellSouth Telecommunications, Inc.'s Price Regulation Plan*, Case No. 99-434 (August 3, 2000), pp. 16-17.

waiver from the special contract filing requirement of 807 KAR 5:011, Section 13.

As an ILEC with market power, BellSouth had not been subject to the Commission's deregulatory actions in Administrative Case No. 370. The Commission has said that in granting BellSouth a waiver, it intended to ensure that BellSouth was not unfairly subject to regulatory requirements that disadvantaged it as opposed to its competitors.⁸ The predicate for such relief was clearly the fact that BellSouth's competitors, the CLECs, were not subject to the contract filing requirement that would be waived for BellSouth.

III. The Legal Standard for Modifying Waivers.

In Administrative Case 370 the Commission determined unambiguously that the existence of competitive alternatives was sufficient to protect CLEC customers from unfair treatment, poor service quality, and excessive prices. Five years later, there is nothing to suggest that the Commission has lost confidence in its findings about CLECs. In opening the current proceeding the Commission described allegations of unfair treatment, poor service quality and unreasonable price

⁸ *Contract Service Arrangements*, Case No. 2002-00456, (December 19, 2002), p. 2.

discrimination, but these allegations all relate to practices of an incumbent.

Administrative Case 370 involved waivers of legal requirements arising from findings of fact, as required by KRS 278.512. If the Commission intends to vacate or modify any exemptions granted to CLECs in that proceeding there is a process set forth in the statute. 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. Nothing within the orders in the current proceeding suggests the Commission has lost the slightest bit of confidence in what it did in Administrative Case 370. The orders in the current proceeding make clear that if the Commission has any doubts, they arise from findings in a completely unrelated case concerning BellSouth, Case 2001-00077. Interestingly, while that case is cited as a specific precipitating factor for the current case, ("our action in that docket may well have disadvantaged telecommunications customers and CLECs...") there is no discussion about Administrative Case 370, or whether CLEC practices related to contracts have ever harmed a customer. Accordingly, there is nothing to suggest that the public

interest now requires that CLECs file individually negotiated agreements for competitive services.

IV. Conclusion.

The CLECs believe the Commission made a sensible decision to waive certain filing requirements for non-incumbent providers of local service. During the five years since the waiver 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. If the Commission determines to modify the waiver there is a statutory procedure for doing so. 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. The Commission should not re-regulate CLECs simply because customers are complaining about the contracting practices of the largest ILEC in the state. The CLECs respectfully request that if the Commission intends to re-regulate it should first provide some explanation for why the Commission's earlier findings in Administrative Case 370 are no longer valid.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing was served this 10th day of October, 2003 first class, United States mail, postage prepaid, upon those persons listed on the attached service list.



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