COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF BELLSOUTH TELECOMMUNICATIONS, INC. TO ESTABLISH GENERIC DOCKET TO CONSIDER AMENDMENTS TO INTERCONNECTION AGREEMENTS RESULTING FROM CHANGES OF LAW	)))))	CASE NO. 2004-00427

BELLSOUTH TELECOMMUNICATIONS INC.'S RESPONSE TO CINERGY COMMUNICATIONS COMPANY'S COMPLAINT AND MOTION FOR EMERGENCY ORDER PRESERVING STATUS QUO

BellSouth Telecommunications, Inc. ("BellSouth") respectfully requests that the Kentucky Public Service Commission ("Commission") deny Cinergy Communications Company's ("Cinergy") Complaint and Motion for Emergency Order Preserving Status Quo Concerning UNE-P Orders ("Motion") filed on February 28, 2005. Cinergy's motion misreads binding federal rules and this Commission should reject it. Without waiving BellSouth's position, because of the delay in the filing of emergency motions by certain CLECs, and to allow the Kentucky and other Commissions to have a full and adequate opportunity to consider the FCC's ruling in the Triennial Review Remand Order ("TRRO"), as described further herein, BellSouth today has issued carrier notification letter SN91085061, which addresses issues raised in Cinergy's motion.

BACKGROUND

On February 4, 2005, the Federal Communications Commission ("FCC") released its permanent unbundling rules in the Triennial Review Remand Order ("TRRO"). The *TRRO* identified a number of former Unbundled Network Elements ("UNEs"), such as switching, for

which there is no section 251 unbundling obligation.[1] In addition to switching, former UNEs include high capacity loops in specified central offices,[2] dedicated transport between a number of central offices having certain characteristics,[3] entrance facilities,[4] and dark fiber.[5] The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers, adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] In each instance, the FCC unequivocally stated that the transition period for each of these former UNEs -- loops, transport, and switching -- would commence on March 11, 2005.[7]

While the FCC explicitly addressed how to transition the embedded base of these former UNEs through change of law provisions in existing interconnection agreements, the FCC took a different direction with regard to the issue of "new adds." For new adds, the FCC's belief "that the impairment framework we adopt is self-effectuating" controls.[8] Instead of requiring that the ILECs continue to allow CLECs to order more of the former UNEs during the transition period, the FCC provided that no "new adds" would be allowed. For example, with regard to switching the FCC explained "[t]his transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit

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[1] *TRRO*, ¶ 199 ("Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide." (footnote omitted).

[2] *TRRO*, ¶¶ 174 (DS3 loops), 178 (DS1 loops).

[3] *TRRO*, ¶¶ 126 (DS1 transport), 129 (DS3 transport).

[4] *TRRO*, ¶ 137 (entrance facilities).

[5] *TRRO*, ¶¶ 133 (dark fiber transport), 182 (dark fiber loops).

[6] *TRRO*, ¶¶ 142 (transport), 195 (loops), 226 (switching).

[7] *TRRO*, ¶¶ 143 (transport), 196 (loops) 227 (switching).

[8] *TRRO*, ¶3.

switching."[9] The FCC made similar findings concerning certain transport routes and certain high capacity loops.[10] The FCC specifically found: "[t]his transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order."[11]

The FCC clearly intended these provisions regarding "new adds" to be self-effectuating. First, the FCC specifically stated that "[g]iven the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005 ...."[12] Second, the FCC expressly stated its order would not "... supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis ..."[13] conspicuously omitting any similar intent not to supercede conflicting provisions of existing interconnection agreements. Consequently, in order to have any meaning the *TRRO*'s provisions precluding the ordering of "new adds" have to have effect as of March 11, 2005.

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[9] *TRRO*, ¶ 199; *see also* 47 C.F.R. § 51.319(d)(2)(iii) ("[r]equesting carrier may not obtain new local switching as an unbundled network element."). The new local switching rule makes clear that the prohibition against new UNE-Ps applies to new lines. Switching is defined to include line-side facilities, trunk side facilities, and all the features, functionalities and capabilities of the local switch. *TRRO,* ¶ 200. When a requesting carrier purchases the unbundled local switching element, it obtains all switching features in a single element on a per-line basis. *TRO,* at 433; the TRRO retained this definition (TRRO, n. 529). Thus, the switching UNE means the port and functionalities on a per-line basis and the prohibition against new adds applies to the *element* itself – thus, the federal rule applies to lines.

[10] *TRRO,* ¶ 142, 195; *see also* 47 C.F.R. § 51.319 (e)(2)(i), (ii), (iii), and (iv) (ILEC is not require to provide unbundled access to entrance facilities; requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements); *and* 47 C.F.R. § 51.319 (a)(4)(iii), (a)(5)(iii), and (a)(6) (requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements). Cinergy suggests that BellSouth has unilaterally determined which central offices qualify for unbundling relief pursuant to the *TRRO.* Cinergy is wrong. Attached as Exhibit 1 is BellSouth's letter to the FCC in which it specifies the nonimpairment wire centers. BellSouth stated plainly that "[t]o the extent any party is concerned about the methodology BellSouth has employed or the wire centers identified on the enclosed list in which the nonimpairment thresholds have been met, it should bring that concern to the [FCC's] attention." Thus, BellSouth is not seeking "unilaterally" to determine where no obligation to unbundle high-capacity loops, transport, and dark fiber exists.

[11] *TRRO*, ¶ 227 (footnote omitted).

[12] *TRRO*, ¶ 235.

[13] *TRRO*, ¶ 199. *Also* ¶¶ 148, 198.

Cinergy cannot circumvent the FCC's intention by relying on paragraphs 227 and 233 of the *TRRO.* Cinergy acknowledges that paragraph 227 provides that "[t]he transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) except as otherwise specified in this Order." Cinergy then cites to paragraph 233 of the *TRRO,* which addresses changes to interconnection agreements. Cinergy's attempt to bootstrap paragraph 233 onto paragraph 227 fails.

In citing paragraph 227, Cinergy ignored footnote 627, which modifies the "except as otherwise specified" clause. Footnote 627 makes clear that when the FCC stated "except as otherwise specified in the Order" it was referring to continued access to shared transport, signaling and call-related databases and was not making an implicit reference to the change of law process.

In addition, the clear meaning of the "except as otherwise specified" language in paragraph 227 is obvious from the very next paragraph of the *TRRO.* In paragraph 228, the FCC held that the "transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period." The availability of voluntarily negotiated interconnection agreements for interested carriers is also "otherwise specified in the Order" but has no impact on the prohibition against new adds. Consequently, if a CLEC and an ILEC had voluntarily negotiated an agreement pursuant to which the ILEC voluntarily agreed to provide UNE-P or switching, the FCC did not intend to interfere with that voluntarily adopted obligation. For instance, BellSouth has agreed to provide switching to customers with four lines or more in certain Metropolitan Statistical Areas (e.g., enterprise customers) at a market rate of $14. By including the "except as

otherwise specified" in paragraph 227 and acknowledging carriers' ability to freely negotiate alternative arrangements in paragraph 228, the FCC made clear that it did not intend to override those provisions.

Likewise, Cinergy's focus on the interconnection agreement portion of the sentence in paragraph 233, ignores the "consistent with our conclusions in this Order" clause. To be consistent with the conclusions in the Order, the transition plan for the embedded base of UNE-Ps will be implemented via the change of law process, but the prohibition against new UNE-Ps is self-effectuating. The first two sentences of paragraph 233 simply confirm that changes to the interconnection agreement should be consistent with the framework established in the *TRRO,* whether self-effectuating or via change of law.

Thus, by filing its Motion, Cinergy has ignored the FCC's clear statement of intent and its complaint concerning BellSouth's announced intent to reject orders for these former UNEs on March 11, 2005 is meritless. Cinergy's Motion raises two arguments. First, Cinergy argues that BellSouth has an obligation under the parties' existing interconnection agreement to continue to accept orders for these former UNEs until those interconnection agreements are changed. Second, Cinergy contends BellSouth has a continuing responsibility under section 271 of the 1996 Telecommunications Act to continue to provide these UNEs. Neither argument is correct.

Despite BellSouth's posting of its Carrier Notification letter on February 11, 2005, various CLECs[14] have delayed in filing requests with this and other Commissions for "emergency relief." In order to give this Commission adequate opportunity to consider the

[14] Cinergy's Emergency Motion was filed in this proceeding on February 28, 2005. The Joint Petitioners', Newsouth Communications Corp., Nuvox Communications, Inc., KMC Telecom III LLC, and Xspedius [Affiliates], Emergency Motion was filed March 1, 2005 in Case No. 2004-00044. An additional emergency petition was filed by AmeriMex Communications Corp. ("AmeriMex") on or about March 7, 2005, also seeking emergency relief.

important issue of whether the FCC language in the TRRO actually means what it says, that is, that there are to be no "new adds," BellSouth has issued Carrier Notification SN91085061.[15]

ARGUMENT

A. The FCC's Bar On "New Adds" Is Self-Effectuating And Relieves BellSouth Of Any Obligation Under Its Interconnection Agreements To Provide These Former UNEs To Cinergy.

BellSouth does not dispute that the parties are operating under an interconnection agreement that contains change of law provisions. Despite Cinergy's focus on the contractual language in that agreement, that is not the issue here.[16] If the FCC had held that Cinergy could continue to add more former UNEs until the interconnection agreements were changed pursuant to the change of law provisions found in interconnection agreements, or even if it had been silent on the question of "new adds," then presumably no dispute would exist between Cinergy and BellSouth. Neither situation is the case here, however, and Cinergy's motion disregards what the FCC actually said in the *TRRO*.

The new rules unequivocally state carriers may not obtain new UNEs, and the FCC said unequivocally that there would be a transition period for embedded UNEs that would begin on March 11, 2005 and that would last 12 months: "we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order."[17] The FCC made almost identical

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[15] *See,* http://interconnection.bellsouth.com/notifications/carrier/index.html.

[16] Likewise Cinergy's suggestion that its petition arose from an earlier petition seeking to establish a generic proceeding filed by BellSouth cannot stand. Cinergy conveniently ignores that, prior to the issuance of the *TRRO*, the FCC issued its *Interim Rules Order* and that BellSouth's generic petition was filed shortly thereafter, specifically referencing that order. With the issuance of the *TRRO,* the FCC expressly supplanted its interim unbundling requirements. *TRRO,* ¶ 236. Consequently, Cinergy's suggestion that BellSouth has somehow evidenced some "understanding" that all changes in law, including self-effectuating changes wrought by the FCC, must be implemented through negotiation, is without merit.

[17] *TRRO,* ¶199.

findings with respect to high-capacity loops and transport, holding that its transition rules "do not permit competitive LECs to add new [high capacity loops and transport on an unbundled basis] . . . where the Commission has determined that no section 251(c)(3) unbundling requirement exists."[18] The FCC also said unequivocally that this "transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[19] The FCC's determination is straightforward and clear.

Cinergy contends that notwithstanding the clear language of the *TRRO* -- there will be a transition period, it will begin on March 11, 2005, and there will be no "new adds" during that transition period -- the FCC really didn't mean what it said. Evidently Cinergy believes that BellSouth is obligated to continue to provide new UNE-Ps until its contract with BellSouth is amended pursuant to change of law provisions therein. Cinergy's belief is wholly inconsistent with the language of the *TRRO* and is flatly contradicted by the federal rules.[20]

First, the FCC understood that existing interconnection agreements often contained "change of law" provisions. For instance, the FCC specifically contemplated that the contract provisions for the transition of the embedded base of former UNEs would be effectuated through the change of law process. Further, the FCC provided that throughout the 12-month transition period (during which the FCC clearly said there would be no "new adds") CLECs would continue to have access to the embedded UNE-Ps during the transition period, but at the commission-approved TELRIC rate "plus one dollar", until the migration of the embedded base

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[18] *TRRO,* ¶ 142, 195; *see also* 47 C.F.R. § 51.319 (e)(2)(i), (ii), (iii), and (iv) (ILEC is not require to provide unbundled access to entrance facilities; requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements); *and* 47 C.F.R. § 51.319 (a)(4)(iii), (a)(5)(iii), and (a)(6) (requesting carrier may not obtain new DS1, DS3, and dark fiber transport as unbundled network elements).

[19] *Id.*

[20] Notably, Cinergy's Motion is devoid of a single reference to the *rules.*

was complete.[21] Finally, the FCC made the increase in the rates of the former UNEs retroactive to the effective date of the order to preclude gaming by the CLECs during the negotiation process.[22]

The FCC's obvious reason for making the increased rates retroactive is to keep CLECs from unnecessarily delaying the amendment process and gaming the system by postponing the date for the higher rates applicable to the embedded base of UNE-Ps. It is equally clear that the FCC did not directly address amending existing interconnection agreements to eliminate any requirement that incumbent local exchange carriers ("ILECs") provide new UNE-Ps. If the FCC had intended to allow CLECs to continue to add new UNE-Ps until the interconnection agreements were amended, it could have easily said so. It did not. Instead, it made specific provision that the transition period did not authorize new adds.[23] The only reasonable, logical and legally sound conclusion is that the provisions prohibiting new adds was intended by the FCC to be self-effectuating.

There is no question that the FCC has the legal authority to create a self-effectuating change to existing interconnection agreements as it has done here. Indeed, in the TRO, the FCC decided not to make its decisions self-executing. *See TRO*, ¶ 700 ("many of our decisions in this order will not be self-executing"). The FCC's authority to make self-effectuating changes exists under the *Mobile-Sierra* doctrine, which allows the FCC to negate any contract terms of

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[21] *Id.*

[22] *TRRO*, n. 630. Thus, if Cinergy ultimately executed a interconnection agreement amendment on May 11, 2005, the transition period rates would apply as of March 11, 2005 and Cinergy would need to make a true-up payment to BellSouth.

[23] Cinergy professes confusion about whether it can make changes to services provided to its existing base of customers. Motion, ¶ 16. BellSouth will permit feature changes on the embedded base; however, the FCC was clear that CLECs could not continue to *increase* its embedded base. *See* 51.319(d)(2)(iii).

regulated carriers so long as the FCC makes adequate public interest findings.[24] Thus, "[f]or all contracts filed with the FCC, it is well-established that 'the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest.'" *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999) (*quoting Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).[25]

The FCC was very clear in the *TRRO* that access to UNEs without impairment was contrary to the public interest and must stop. Notably, the FCC held that "it is now clear . . . that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment."[26] Also, the FCC held "we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine facilities-based competition."[27] Likewise, the FCC held that "the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives."[28]

The FCC has applied *Mobile-Sierra* to require a fresh look at contracts between ILECs and CMRS providers executed before the 1996 Telecommunications Act in light of the reciprocal compensation provisions of §251(b)(5) of the Act. In relevant part, citing *Western*

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[24] Because the FCC has the power to make contracts self-effectuating, Cinergy's reliance on this Commission's decisions in Case No. 2001-224 and 2001-261 cannot stand. The cases that Cinergy relies upon were arbitration decisions in which this Commission decided which parties' proposed language would apply in agreements that had not yet been executed, and are clearly distinguishable from the facts presented here, where the FCC has – after eight years of an unlawful unbundling regime – ordered that unlawful regime cease.

[25] *Citing, in turn, FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956) *and United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956) (the FCC has the power to set aside any contract which it determines to be "unjust, unreasonable, unduly discriminatory, or preferential.").

[26] *TRRO*, ¶ 218.

[27] *TRRO*, ¶ 218.

[28] *TRRO*, ¶ 199.

Union Tel. Co. v. FCC, the FCC explained that "[c]ourts have held the Commission has the power ... to modify ... provisions of private contracts when necessary to serve the public interest." *First Report and Order,* 11 FCC Rcd 15499, ¶ 1095 (1996) (additional citations omitted).[29]

That these interconnection agreements are filed with and approved by the state commissions, rather than the FCC, has no impact on the FCC's ability to change these contracts when it is in the public interest to do so. While *Cable & Wireless P.L.C. v. FCC* applied to "all contracts filed with the FCC,"[30] the reference to "filing" means that decision applies to all contracts and other agreements *that are subject to the FCC's authority not just contracts actually filed with the FCC. See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 380, 381 (1999). Thus, as the Supreme Court made clear in *Iowa Utilities Bd.,* state commissions perform their functions subject to FCC rules designed to implement the statute and establish the public interest. The FCC has enacted new rules designed to further the public interest by finding "the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives"[31]. As a matter of national public policy, unbundled switching adversely impacts the public by creating disincentives for the creation of facilities-based competition – which competition has been found to be the fundamental objective of the Act. The FCC has spoken – and Cinergy cannot ignore its message.

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[29] In the *Local Competition Order,* the FCC modified pre-existing agreements as of the effective dates of its new rules – just as it did in the *TRRO.*

[30] *Cable & Wireless,* 166 F.3d at 1231.

[31] *See* n. 16, *IBD Mobile Communications, Inc. v. COMSAT Corp*, Memorandum Opinion and Order, 16 FCC Rcd 11474, ¶ 16 n. 50 (2001). (The FCC explained that "Sierra-Mobile analysis does not apply to interconnection agreements." This simply cannot apply, particularly where the FCC's current order, by its own terms, appears to dictate a different requirement).

The FCC has full authority to issue a self-effectuating order that eliminated CLECs' ability to add new UNE-P customers after March 11, 2005. That existing interconnection agreements have not been formally modified to implement that finding is irrelevant. Through the *TRRO* the FCC has exercised its authority in a manner that trumps Cinergy's individual contract and BellSouth has no obligation to provide new UNE-Ps to Cinergy on or after March 11, 2005.

B. Cinergy Is Not Entitled To UNE-P Under Section 271.

Cinergy also alleges that the Commission should perpetuate the UNE-P because "section 271 of the Federal Act independently supports Cinergy's right to obtain UNE-P from BellSouth ...." *Cinergy Complaint*, at 24. This argument also misses the mark. While BellSouth is obligated to continue to provide unbundled local switching under section 271, section 271 switching (1) is not combined with a loop; (2) is subject to the exclusive jurisdiction of the FCC; and (3) is not provided via interconnection agreements. Thus, Cinergy is not entitled to new UNE-P orders after March 11, 2005 under section 271 of the Act.

1. BellSouth is not obligated to combine Section 251 and Section 271 elements.

The most fundamental fallacy in Cinergy's section 271 argument is that Cinergy wants to buy UNE-P - (a loop combined with local switching) despite the fact that BellSouth is not obligated to combine either section 271 elements with other section 271 elements, or section 271 elements with section 251 UNEs.

With respect to combining 271 elements, the FCC held in the TRO that "[w]e decline to require BOCs, pursuant to section 271, to combine network elements that no longer are required to be unbundled under Section 251." *TRO*, at fn. 1990. The FCC went on to hold that "[u]nlike Section 251(c)(3), items 4 – 6 and 10 of section 271's competitive checklist contain no mention

of 'combining' and, as noted above, does not refer back to the combination requirement set forth in section 251(c)(3)." *Id.*

Likewise, the FCC has held that BOCs are not obligated to combine 271 and 251 elements. In the errata to the TRO, the FCC explicitly removed any requirement to combine 271 elements with non-271 elements by removing the clause "any network elements unbundled pursuant to Section 271" from paragraph 584. *Errata*, at ¶ 27. Cinergy recognizes that it is not entitled to a combination of 271 and 251 elements in its own Complaint. *Cinergy Complaint*, at ¶ 26 ("although the FCC in the TRO declined to require Bellsouth to combine section 271 local switching with other UNEs pursuant to section 251(c)(3) ....").

For these reasons, Cinergy's claim that it is entitled to UNE-P under section 271 has no merit. While BellSouth is obligated under 271 to provide local switching, it has no obligation to provide a UNE-P combination.

2. BellSouth is not obligated to provide elements at TELRIC under 271.

Cinergy claims that not only is it entitled to UNE-P under section 271, but that it is entitled to new UNE-P orders at the TELRIC rates set forth in the interconnection agreements. *Cinergy Complaint*, at ¶ 27. Cinergy bases this claim on an alleged finding by the Commission that the TELRIC rates are "just and reasonable" under Kentucky law. This argument is fatally flawed because it mixes apples and oranges. The FCC and the D.C. Circuit clearly held that the 251(d) pricing rules do not apply to section 271 elements. *See TRO*, at ¶ 656-657; *USTA II,* at 52-53. Rather, 271 elements are priced under the *federal* section 202 pricing standard of "just and reasonable." Section 271 elements, therefore, are not priced at TELRIC. *USTA II,* at 52-53. To the extent Cinergy argues that "just and reasonable" under state law equates with TELRIC, that finding would be pre-empted under federal law. In short, there is no authority under which

the Commission can require BellSouth to provide new UNE-P circuits at TELRIC rates after March 11, 2005.

3. Section 271 elements fall within the exclusive jurisdiction of the FCC.

Lastly, the Commission does not have authority to enforce obligations under section 271. Section 271 enforcement rests solely with the FCC. Section 271(d)(6). Consequently, even were BellSouth obligated to provide new UNE-P orders under Section 271 (which it is not), such a claim must be made to the FCC and not to a state commission. This Commission has no jurisdiction to order performance under Section 271.[32]

C. If BellSouth Is Ordered To Provide New UNE-P Circuits After March 11, 2005, It Is Entitled To A Retroactive True-Up To An Appropriate Rate.

For all the reasons set forth in this pleading, BellSouth is not obligated to provide new UNE-P circuits after March 11, 2005. If, however, Cinergy is granted any emergency relief to which it is not entitled or Cinergy or other CLECs place orders for "new adds" after March 11, 2005, BellSouth should be allowed to recover the revenues it loses as a result of the placement of these unlawful orders. This Commission should explicitly direct that in the event Cinergy or other CLECs order new UNEs on or after March 11, 2005, and BellSouth ultimately prevails in its legal claim, Cinergy must compensate BellSouth for those UNE-P orders at an appropriate rate retroactive to March 11, 2005.

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[32] Cinergy suggests that "there is a tangible basis for negotiation . . . regarding BellSouth's continuing obligation to provide Section 271." This suggestion is without basis. The Act "lists only a limited number of issues on which incumbents are mandated to negotiate [under Section 251 (b)(c)]." *MCI Telecommunications, Corp. v. BellSouth Telecommunications, Inc.*, 298 F.3d 1269, 1274 (11th Cir. 2002). Cinergy cannot force BellSouth involuntarily to negotiate issues concerning Section 271 for inclusion in a Section 252 interconnection agreement, which BellSouth has not and does not agree to negotiate. *See also Coserv Limited Liab. Corp. v. Southwestern Bell Telephone*, 350 F.3d 482, 487 (5th Cir. 2003) ("[a]n ILEC is clearly free to refuse to negotiate any issue other than those it has to duty to negotiate under the Act when a CLEC requests negotiation pursuant to §§ 251 and 252.").

The retroactive payment is important not only as a legal matter but as a policy matter. The FCC was unequivocal in its holding that no CLEC is entitled to new UNE-P circuits after March 11, 2005. Short of an order denying Cinergy's complaint, the *only* way for the Commission to comply with the FCC's order is to require Cinergy to pay BellSouth the difference between the UNE-P rate and an appropriate rate back to March 11, 2005. Other states have adopted true-ups. For instance, the Texas Commission adopted an interim agreement that does not require SBC to add new UNE-P orders and includes a true-up provision.[33] The Michigan Commission has decided to complete expedited proceedings in 45 days, during which new orders can apparently be issued subject to a true-up.[34] A true-up is the only way to equalize the risk between the parties – if ordered to provision new UNEs after March 11, BellSouth unquestionably is bearing the risk associated with the continuation of an unlawful unbundling regime. Cinergy should bear the risk of a true-up if its position is determined to be wrong.

A true-up is also necessary in the interests of fairness. The FCC has also been clear that commercial negotiations can produce pro-competitive and pro-consumer outcomes.[35] BellSouth has successfully negotiated, to date, 48 commercial agreements with CLECs for the purchase of a wholesale local voice platform service, which agreements cover in excess of 310,000 access

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[33] *See* Exhibit 2 for orders from the Texas PUC. The orders from the Texas Commission appear to diverge from action taken by the Georgia Commission, which, in addressing a motion similar to the one filed by Cinergy, ruled against BellSouth. The Georgia Commission has not yet released a written order. The Alabama Commission has required BellSouth to provide MCI with access to new UNE-Ps until it can address this matter at its April 2005 meeting.

[34] *See* Exhibit 3 for an order from the Michigan Commission.

[35] Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein On Triennial Review Next Steps, March 31, 2004; *see also* FCC Chairman Michael K. Powell's Comments on SBC's Commercial Agreement With Sage Telecom Concerning The Access To Unbundled Network Elements, April 5, 2004 (expressing hope "for further negotiations and contracts - so that America's telephone consumers have the certainty they deserve"); FCC Chairman Michael K. Powell Announces Plans For Local Telephone Competition Rules, June 14, 2004 (strongly encouraging "carriers to find common ground through negotiation" because "[c]ommercial agreements remain the best way for all parties to control their destiny").

lines. If this Commission disregards the self-effectuating portion of the *TRRO,* the progress BellSouth has achieved in reaching commercial agreements could come to a halt, at least in the near term. If CLECs know that they can continue adding new unbundled network elements at TELRIC rates until the amendment and arbitration process is completed, which can take up to twelve months under the *TRRO*, they will have no reason to pay more than TELRIC by entering into a commercial agreement at this juncture. Significantly, allowing CLECs to continue adding unbundled network elements until the amendment and arbitration process has been completed, even though they are not impaired, unfairly prejudices those carriers that have entered into commercial agreements. Carriers that entered into commercial agreements will be forced to compete for new customers against CLECs that can undercut their prices solely by virtue of these CLECs getting to pay TELRIC rates, unless this Commission requires a true-up.

CONCLUSION

For the reasons set forth therein, the Commission, in accordance with the Final Rules, should not order BellSouth to provide new UNE-P circuits after March 11, 2005. If, however, this Commission requires new UNEs after March 11, 2005, or CLECs place orders for "new adds" after March 11, 2005, in accordance with BellSouth's Carrier Notification SN91085061

issued March 7, 2005, this Commission should order a retroactive true-up back to March 11, 2005.

Respectfully submitted, this 7th day of March 2005.

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