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 IN OPPOSITION TO CINERGY'S PETITION FOR DECLARATORY RULING

INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, hereby, files its Response in Opposition ("Response") to Cinergy Communications Company's June 13, 2005 Petition for Declaratory Ruling ("Petition").

Cinergy's request that this Commission require BellSouth to continue taking orders for new UNE-P, including UNE-P adds, moves and changes, to its embedded base customers *should* be denied.[1] Cinergy's Petition is inconsistent with the text of the *TRRO or Order on Remand*,[2] which bars all new "UNE-P arrangements," not just those used to serve new customers. *TRRO* ¶ 227. Even beyond the clear language of the FCC's Order prohibiting the relief Cinergy here seeks, Cinergy's request also is inconsistent with the core policy behind the FCC's decision. Instead of weaning carriers away from the UNE platform and toward alternative methods of

[1] BellSouth has agreed to allow CLECs to issue feature change orders for existing customers, i.e., orders for new features such as call waiting, call forwarding, etc.

[2] *Order on Remand, Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, 2005 WL 289015 (2005), *petitions for review pending, Covad Communications Co., et al. v. FCC, et al.*, Nos. 05-1095 et al. (D.C. Cir.) ("*TRRO*").

competition, as the FCC plainly intended, granting Cinergy's petition would allow CLECs in Kentucky to expand the very activities the FCC has found to be anticompetitive.[3] Furthermore, Cinergy's claim of harm rests on a refusal to employ the many lawful means of competing that Congress and the FCC have provided. Cinergy's Petition should be denied.

PROCEDURAL BACKGROUND

The FCC's February 4, 2005 Order on Remand, among other things, prohibited competitive LECs from continuing to place new orders for switching (and thus the UNE platform) and also created a twelve-month transition plan for CLECs' embedded base of customers. In accordance with the language in the Order on Remand that incumbent local exchange companies no longer have an obligation to provide UNE-P switching as of March 11, 2005, BellSouth notified CLECs that as of March 11, 2005, BellSouth no longer would accept new switching orders to those facilities that were not required by the FCC Order. Two complaints were filed by certain CLECs, including a complaint and motion filed by Cinergy asking this Commission to order BellSouth to continue to accept and process UNE-P orders. This Commission issued two Orders, dated March 10, 2005, rejecting BellSouth's position that the FCC's Order on Remand was effective on March 11, 2005.

BellSouth filed a complaint in Federal District Court seeking, among other things, an Emergency Motion for Preliminary Injunction from the Commission's Orders. On April 22, 2005, Federal District Court Judge Hood granted BellSouth's Motion for Preliminary Injunction, enjoining defendants from enforcing portions of the two March 10, 2005 Commission Orders,

[3] *See Order* at 17, *BellSouth Telecomms, Inc. v. Cinergy Communications Co.*, No. 3:05-CV-16-JMH (E.D. Ky. Apr. 22, 2005) ("*Preliminary Injunction Order*") (noting that the CLECs have no valid interest "in a practice the FCC has stated is 'anti-competitive'").

that had required BellSouth to continue to process new orders for UNE-P switching.[4] The Court found, after a thorough review of the language of the FCC Order on Remand, that BellSouth has a strong likelihood of success on the merits. The Court further determined that the FCC's language likely would lead the Court to conclude that the Order on Remand is self-effectuating for new orders.[5] Cinergy then filed a Motion for Clarification of the Court's April 22 Order asking the Court to clarify whether the Court's Order applied to "new adds" for existing customers. Judge Hood granted Cinergy's motion on June 3, 2005, and provided clarification that the Court's April 22 Order did not address the question of "new orders" from existing customers. Judge Hood noted that the Kentucky Public Service Commission had not decided whether the transition plan included new orders from existing customers. The Court's June 3, 2005 Order also confirmed that it enjoined enforcement of the Commission Orders but that those Orders had not yet decided this issue.

Cinergy's June 13 Petition for Declaratory Ruling filed in the present proceeding followed the Court's Clarification Order.[6] The present pleading responds to Cinergy's Petition.

ARGUMENT

I. Cinergy's Request is Contrary to Federal Law.

Cinergy's argument is inconsistent with the text of the Order on Remand. Contrary to Cinergy's contention, the FCC repeatedly stated that, during the transition period it was creating, CLECs such as Cinergy could not add new switching UNEs and new UNE Platform arrangements, *not* only that CLECs could not add new customers using the UNE Platform.

---

[4] *See Preliminary Injunction Order* at 19.

[5] *See* Order at 6-7.

[6] *See Order* at 4-5, *BellSouth Telecommn, Inc. v. Cinergy Communications Co.,* No. 3:05-CV-16-JMH (E.D. Ky. June 3, 2005) (*"Clarification Order"*).

In particular, the FCC explained that its transition plan "does not permit competitive LECs to add *new UNE-P arrangements* using unbundled access to local circuit switching pursuant to section 251(c)(3)." *TRRO* ¶ 227 (emphasis added); *see also id.* ¶ 5 ("This transition plan applies only to the embedded base, and does not permit competitive LECs to add *new switching UNEs*") (emphasis added). The FCC's rules likewise provide that, *without exception*, "[r]equesting carriers may not obtain new local switching as an unbundled network element." 47 C.F.R. § 51.319(d)(2)(iii).[7] When a CLEC orders a new UNE-P line to serve an existing customer, it is ordering new local switching (and a "new UNE-P arrangement"), which is prohibited under the plain language of the FCC's order and rules. *See BellSouth Telecomms., Inc v. Mississippi Pub. Serv. Comm'n*, 3:05CV173LN, 2005 WL 1076643, at *3, *6 (S.D. Miss. Apr. 13, 2005) (stating that "the FCC's intent in the TRRO is an unqualified elimination of new UNE-P orders as of March 11, 2005, irrespective of change of law provisions in the parties' interconnection agreements" and precluding, without reservation, the Mississippi PSC from "enforcing that part of its order requiring BellSouth to continue to process new orders for UNE-P switching"); *BellSouth Telecomms., Inc. v MCImetro Access Transmission Servs., LLC*, 1:05-CV-0674-CC, 2005 WL 807062, at *2 (N.D. Ga. Apr. 5, 2005) ("The FCC's decision to create a limited transition that applied only to the *embedded base* and required higher payments *even for those existing facilities* cannot be squared with the PSC's conclusion that the FCC permitted an indefinite transition during which competitive LECS could order new facilities and did not specify a rate that competitors would pay to serve them.") (emphasis added). Cinergy's Petition ignores the FCC Rules and these federal district court decisions.

In urging a different conclusion, Cinergy cites two paragraphs in which the FCC counsels that CLECs must shift their "customers" away from the UNE-Platform within twelve months

[7] It its Petition, Cinergy fails to even mention, much less address, the straightforward language in the FCC's Rules.

from March 11, 2005.[8] But those statements do not contradict or undermine the language in the FCC's decisions proscribing *all* new UNE Platform arrangements. The FCC's decision establishes that (1) existing customers must be transitioned away within one year and (2) during that year, no new UNE Platform arrangements can be obtained. Those two conclusions are fully consistent with each other. In contrast to Cinergy's position, moreover, reading the FCC's decision to adopt those two conclusions is consistent with the FCC's clear statement that no new "UNE-P arrangements" are permitted and with the FCC rule stating that "[r]equesting carriers may not obtain new local switching as an unbundled network element."

Although the text of the FCC's decision provides ample basis to deny this Petition, Cinergy's position also is inconsistent with the over-arching federal policy here. As the FCC stressed, the purpose of its transition plan is to encourage the CLECs to move away from unlawful unbundling rules. *Id.* ¶ 227.

Under Cinergy's position, CLECs would be free to add new UNE-Platform arrangements for existing customers right up until 11 months and 29 days after the *TRRO* went into effect, even though Cinergy and all other CLECs are supposed to be using the 12-month transition period to "perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cutovers or other conversions."[9] Cinergy's request would therefore frustrate the FCC's goal of moving away from the UNE Platform and encouraging carriers to negotiate alternative, commercially reasonable substitutes for that anticompetitive practice. As noted, BellSouth and numerous other CLECs in Kentucky have successfully negotiated commercial agreements.

[8] Cinergy's Petition at 4 (citing *TRRO* ¶¶ 199, 216).
[9] *TRRO* ¶ 227.

Cinergy also cites the decisions of a few state commissions that have required ILECs to provide new UNE arrangements for existing customers.[10] But other state commissions as well as federal courts have specifically determined ILECs are not required to keep providing new UNE arrangements for existing customers. For instance, the California Commission decision on this point is especially well-reasoned and persuasive. As that Commission said,[11] "we note that the FCC has clearly stated that 'Incumbent LECs have *no* obligation to provide competitive LECs with unbundled access to mass market local circuit switching.'"[12] Moreover,

> it is clear that the FCC desires an end to the UNE-P, for it states '... we exercise our "at a minimum" authority and conclude that the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, *justify a nationwide bar on such unbundling*.'

Id. (quoting *TRRO* ¶ 2004) (emphasis added by California commission)).

As well,

> [o]ther parts of the [*TRRO*] also support this interpretation. In particular, the FCC also states: '... we establish a transition plan to migrate *the embedded base of unbundled local circuit switching used to serve mass market customers to an alternative service arrangement*.' ... Note that this last statement refers to 'the embedded base of unbundled local circuit switching;' it does *not* refer to an '*embedded base of customers*.'

Id. (emphasis in original).

Thus, the California Commission held:

> since there is no obligation and a national bar on the provision of UNE-P, we conclude that 'new arrangements' refers to any new UNE-P arrangement, whether to provide service for new customers or to provide a new arrangement to existing services. The [*TRRO*] clearly bars both.

---

[10] Cinergy's Petition at 5-6.

[11] Assigned Commissioner's Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders, *Petition of Verizon California Inc.*, App. No. 04-03-014 (Cal. PUC Mar. 11, 2005), available at http://www.cpuc.ca.gov/word_pdf/RULINGS/44496.pdf On March 17, 2005, the California Public Utility Commission voted to adopt the Assigned Commissioner's ruling in its entirety.

[12] *Id.* at 7 (quoting *TRRO* ¶ 5) (emphasis added by California commission).

Id.[13] *Furthermore, as noted,* he federal court decisions in Georgia and Mississippi support BellSouth's position on this issue.

II. Cinergy's Claims of Harm Remain Unpersuasive.

Cinergy's claims of harm are no more persuasive now than they were when Cinergy first filed its Emergency Petition in this docket. The core fact remains that, separate and apart from the UNE Platform, Congress and the FCC have given Cinergy many *lawful* ways to accommodate its customers' demands in both the short- and long-term. Cinergy claims that, without relief from this Commission, it would be "forced to surrender many of its existing customers to BellSouth."[14] Cinergy's statement should not be allowed to mislead this Commission. Cinergy will not be forced to surrender existing customers to BellSouth. On the contrary, Cinergy has multiple alternatives to serve existing customers. For example, Cinergy could enter into a commercial agreement with BellSouth as more than 120 BellSouth competitors in BellSouth's nine-state region now have signed for access to BellSouth's facilities. The federal act also requires that BellSouth resell its local voice service to Cinergy, and to do so at a statutory discount rate established by the Commission (and designed to remove all costs related to offering services at retail from the rate paid by a CLEC).[15] With either a commercial agreement or resale, additional lines could be provided to an end user by Cinergy, and there would be no disruption to the end user. Furthermore, even in instances where Cinergy's customer desires to have "hunting" between different lines, Cinergy can provide this feature by ordering all the relevant lines under the statutory resale rules. Cinergy's only response to this

[13] On the theory that the parties needed "additional time to negotiate the applicable ICA amendments necessary to transition and to continue to serve the CLECS embedded customer base," the California commission did ask SBC to "continue processing CLEC orders involving additional UNE-Ps for the embedded base of customers who already have UNE-Ps, until no later than May 1, 2005." *Id.* at 9.
[14] Cinergy's Petition at p. 7.
[15] *See* 47 U.S.C. §§ 251(c)(4), 252(d)(3).

acknowledged fact is the unsupported assertion that it "loses money" using resale.[16] If Cinergy's bald assertion is correct, either Cinergy is inefficient (and has greater wholesale costs than BellSouth) or Cinergy's complaint is with Congress, which established the methodology for determining resale rates. In either event, Cinergy's argument identifies no harm that justifies ignoring the plain language of the FCC's *TRRO* prohibiting all new UNE Platform arrangements.

CONCLUSION

Consistent with the FCC's Order on Remand and the decisions of the Federal District Courts in both Georgia and Mississippi, this Commission should confirm that, without exception, CLECs may not add new UNE-P arrangements for existing customers. Accordingly, this Commission should deny Cinergy's Petition.

Respectfully submitted,

DOROTHY J. CHAMBERS
601 W. Chestnut Street, Room 407
P. O. Box 32410
Louisville, KY 40232
(502) 582-8219

R. DOUGLAS LACKEY
ANDREW D. SHORE
MEREDITH E. MAYS
Suite 4300, BellSouth Center
675 W. Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0750

COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

589786

[16] *Id.*