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

COMPLAINT AND MOTION FOR EMERGENCY
ORDER PRESERVING STATUS QUO

Pursuant to KRS 278.260(1), 278.270, 278.280 and 807 KAR 5:001, Section 12, Cinergy Communications Company ("CCC") files this Complaint and Motion for Emergency Order Preserving Status Quo because BellSouth has stated that it intends to take actions on or after March 11, 2005 that will cause irreparable harm to CCC and that will breach BellSouth's currently effective, Commission-approved interconnection agreement ("Agreement") with CCC. In order to avoid the harm to CCC and to the public interest that will result from BellSouth's threatened actions, CCC requests that the Commission investigate BellSouth's threatened action and, pursuant to 807 KAR 5:001, Section 12 (4) (b), issue an order requiring BellSouth to answer this complaint in a period shorter than 10 days, and **no later than March 7, 2005.** In addition, CCC requests that the Commission order BellSouth to continue accepting and processing CCC's UNE-P orders, as well as orders for other UNEs provided by the Agreement, including for moves, adds, and changes to CCC's existing embedded customer base, under the rates,

terms and conditions of the Agreement, until further order of the Commission. CCC further requests that the Commission direct BellSouth to comply with the change of law provisions of the Agreement with regard to implementation of the FCC's recently issued Triennial Review Remand Order ("*TRRO*").

INTRODUCTION

The instant proceeding arises from a petition filed by BellSouth on November 1, 2004, wherein BellSouth asked the Commission to establish a generic proceeding to "determine what changes recent decisions from the Federal Communications Commission ("FCC")…require in existing approved interconnection agreements between BellSouth and competitive local exchange carriers ("CLECs") in Kentucky." BellSouth petition at 1. BellSouth served its petition on CCC and every other CLEC which has an interconnection agreement with BellSouth. The Commission made CCC and other CLECs parties to the proceeding. CCC complied with the Commission's procedural order and entered an appearance. At no time did CCC object to BellSouth's request that changes in law be considered as part of a generic proceeding.

BellSouth's petition evidences an understanding that changes in law should lead to negotiations to develop appropriate amendments to existing interconnection agreements. *See* BellSouth petition, ¶¶ 4-6. Moreover, in filing its petition pursuant to KRS 278.260, BellSouth acknowledged the role of the Commission in determining how changes in law shall be incorporated into existing contractual relationships with CLECs. Indeed, in its petition BellSouth asked the Commission to hold a hearing and make a decision that would effectively "set the standard for every agreement…" BellSouth petition at ¶ 9. BellSouth stated that "a generic proceeding should work to the benefit of

the CLECs as well as the Commission and BellSouth, since everyone will have an opportunity to be heard on the issues before these matters are initially decided." *Id.* BellSouth's petition purported to identify twenty three different issues for the Commission to consider and determine, including the effect of "Final Rules," *i.e.* "[s]hould all Interconnection Agreements ("ICAs") negotiated or arbitrated under Section 251 and 252 of the 96 Act be deemed amended on the effective date of the Final FCC Unbundling Rules, to the extent any rates, terms or requirements set forth in such rules are in conflict with, in addition to, or otherwise different from the rates, terms, and requirements set forth in those ICA?" BellSouth Petition, Exhibit A, Issue No. 1.

Despite BellSouth's acknowledgement that changes in law should be implemented through a process of negotiation, with disputes resolved by state commissions, approximately two weeks ago BellSouth abruptly chose to begin disregarding these governing principles. BellSouth has distributed a Carrier Notification letter to CCC and other CLECs which states BellSouth will reject UNE-P orders beginning March 11, 2005 pursuant to its interpretation of the *TRRO*. The same letter states that BellSouth will stop providing high capacity UNE loops, including copper loops capable of providing High-bit Rate Digital Subscriber Line (HDSL) services, in "certain" central offices. The letter further provides that BellSouth will stop providing UNE transport between "certain" central offices without identifying where those offices are and whether any are in Kentucky. BellSouth appears determined to unilaterally determine which wire centers and transport routes meet the impairment thresholds established in the TRRO and then to impose such determinations without negotiation.

BellSouth's course of action, in particular the refusal to accept UNE orders required by contract, could paralyze CCC's business operations by precluding it from performing basic services for its existing, embedded customer base, such as requests to make moves, adds, or changes to the customers' existing accounts, as well as by prohibiting CCC from obtaining new customers. Additionally, BellSouth's unilateral proclamations that it will reject UNE-P orders on March 11, 2005 will breach CCC's Agreement in at least three respects: (i) by rejecting UNE-P orders that BellSouth is obligated by the Agreement to accept and process; (ii) by refusing to comply with the change of law procedure established by the Agreement; and (iii) by refusing to process new orders that CCC is entitled to place by purchasing unbundled local switching under Section 271 of the Federal Act. Contrary to statements in BellSouth's Carrier Notification SN91085039 that was issued to competitive local exchange carriers ("CLECs") on February 11, 2005, including CCC, the *TRRO* does not excuse or justify BellSouth's stated intention of rejecting CCC's UNE-P orders beginning March 11, 2005 and ignoring the change of law process with respect to such UNE-P orders.

CCC wishes to continue placing UNE-P orders (including orders to make moves, adds, or changes to the accounts of CCC's existing, embedded customers) in Kentucky after March 10, 2005. Unless this Commission declares that BellSouth may not reject such UNE-P orders, and instead must comply with the change of law provision in its Agreement, CCC will sustain immediate and irreparable injury. Kentucky consumers currently benefiting from the local service CCC offers in Kentucky also will be injured by BellSouth's planned illegal actions. CCC therefore request that the Commission consider this matter on an emergency basis and grant the relief requested in this Motion,

i.e., find that BellSouth must honor its agreement until changes are negotiated, on or **before March 7, 2005**.

PARTIES

1. CCC is a utility within the meaning of KRS 278.010 (3)(e) and is authorized to provide local exchange service in Kentucky. CCC is a "telecommunications carrier" and "local exchange carrier" under the Telecommunications Act of 1996 ("Federal Act"). CCC has a currently-effective, Commission-approved interconnection agreement with BellSouth.

2. BellSouth is a utility within the meaning of KRS 278.010(3)(e) and it provides local exchange service in Kentucky as an incumbent local exchange carrier ("ILEC"), as defined in Section 251(h) of the Federal Act.

JURISDICTION

3. CCC and BellSouth are subject to the jurisdiction of the Commission with respect to the matters raised in this Motion.

4. The Commission has jurisdiction with respect to the matters raised in this Motion under KRS 278.040 and KRS 278.260.

5. The Commission also has jurisdiction under the Federal Act under 47 U.S.C. § 251(d) (3) (conferring authority to State commissions to enforce any regulation, order or policy that is consistent with the requirements of Section 251) with respect to the matters raised in this Motion.

FACTS

6. CCC has entered into an interconnection agreement with BellSouth. The Agreement was approved by this Commission and upheld on review by the United States

District Court for the Eastern District of Kentucky. The Agreement generally provides that BellSouth shall provision network elements including UNE-P, high capacity loops, transport and EELs. In addition, the Agreement requires BellSouth to provide its tariffed wholesale DSL transport service over the same physical loops on which CCC provides voice service using UNE-P. The Agreement also provides the price for these network elements.

7. The Agreement also specifies the steps to be taken if a party wishes to amend the Agreement because of a change in the law. Section 17.3 of the Agreement states, "In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of Cinergy Communications Company or BellSouth to perform any material terms of this Agreement, Cinergy Communications Company or BellSouth may, on fifteen (15) days' written notice require that such terms be renegotiated, and the parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event such new terms are not renegotiated within sixty (60) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in this Agreement." (See attached **Exhibit 1**).

8. When the parties are unable to agree on how to implement a change in the law, they are directed to pursue dispute resolution. Section 11 of the Agreement, entitled Resolution of Disputes, provides, "Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party shall petition the Commission for a resolution of the dispute. For issues over which the Commission does

not have authority, the Parties may avail themselves of any available legal remedies in the appropriate forum. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement. Furthermore, the Parties agree to carry on their respective obligations under this Agreement, while any dispute resolution is pending." (See attached **Exhibit 1**).

9. In August 2003, the FCC released its Triennial Review Order ("*TRO*"), which found impairment nationally with regard to mass market local switching, but requested a granular review by state public service commissions of the conditions for competitive local exchange service in geographic markets in each state. These rulings were vacated and remanded by *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") on March 2, 2004. The D.C. Circuit's mandate initially was scheduled to issue on May 1, 2004, but the court later granted an extension to June 15, 2004. During the time before the mandate issued, great uncertainty arose as to whether BellSouth would continue to process UNE-P orders.

10. The FCC issued the *TRRO* on February 4, 2005. The FCC determined on a nationwide basis that ILECs are not obligated to provide unbundled local switching pursuant to Section 251(c)(3) of the Federal Act, but did not prohibit CLECs from continuing to obtain unbundled local switching at "just and reasonable" rates pursuant to Section 271 of the Federal Act. The FCC adopted a transition plan that calls for CLECs to move to alternative service arrangements within twelve months of the effective date of the *TRRO*. (*TRRO* § 227.)

11. With respect to new UNE-P orders after the effective date of the *TRRO*, the FCC stated: "The 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**." (*TRRO* § 227.)(emphasis added)

12. The *TRRO* does not purport to abrogate the change of law provisions of carriers' interconnection agreements. To the contrary, the *TRRO* directs carriers to implement its rulings by negotiating changes to their interconnection agreements:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

(*TRRO* § 233, footnotes omitted.)

13. BellSouth issued Carrier Notification Letter SN91085039 on February 11, 2005. Among other things, BellSouth stated, "To be clear, in the event one of the above options [Commercial Agreement] is not selected and a CLEC submits a request for new UNE-P on March 11, 2005 or after, the order will be returned to the CLEC for clarification and resubmission under one of the available options set forth above. CLECs that have already signed a Commercial Agreement may continue to request new service pursuant to their Commercial Agreement. BellSouth made revisions to the letter on February 25, 2005 and republished the letter. A true and correct copy of the February 11,

2005 Carrier Notification SN91085039 (as republished and re-dated February 25) is attached hereto as **Exhibit 2**.

14. CCC attempted to get clarification in writing from BellSouth as to whether or not it intended to continue to accept new orders for UNE-P and other services after the effective date of the TRRO. That correspondence is attached hereto as **Exhibit 3**. BellSouth refused to provide a response, and instead relied upon the statements in the Carrier Notification. CCC warned BellSouth that the Carrier Notification amounted to an anticipatory breach of the Agreement as well as a violation of the change of law and dispute resolution provisions of the Agreement. CCC stated that, if necessary, it would seek relief to force BellSouth to comply with its contractual obligations.

15. Because BellSouth's proposed commercial agreement contained objectionable language and did not include access to the DSL transport service which this Commission and a federal court ordered BellSouth to provide, CCC has not executed the commercial agreement to date. However, CCC has repeatedly advised BellSouth that it is willing to engage in negotiations to arrive at a commercial agreement.

16. CCC believes that BellSouth's refusal to accept new orders will prevent CCC from obtaining new customers, and BellSouth's refusal to accept moves, adds, and changes for orders submitted on behalf of CCC's existing, embedded customer base will result in inadequate service for those existing customers. For example, if a CCC customer requests "call forwarding always" to his or her vacation home on March 1, 2005, and then asks CCC on March 12, 2005 to remove the call forwarding so that calls revert to their usual location, CCC will be unable to remove the call forwarding feature from the customer's account because of BellSouth's rejection of CCC's change request.

Likewise, a growing business customer that is expanding its workforce or relocating across the street will not be able to add lines or move its service. Under all of these examples, the only solution for the customer is to terminate CCC's service and request service from BellSouth.

BELLSOUTH'S REFUSAL TO ACCEPT AND PROCESS ORDERS

17. The Agreement requires BellSouth to provide UNE-P to CCC at the rates specified in the Agreement. Unless and until the Agreement is amended pursuant to the change of law process specified in the Agreement, BellSouth must continue to accept and provision CCC's UNE-P orders at the specified rates. By stating that it will not accept UNE-P orders beginning March 11, 2005, BellSouth has anticipatorily breached the Agreement.

18. The Agreement requires BellSouth to provide high cap loop and transport as well as entrance facilities at the rates specified in the Agreement. Unless and until the Agreement is amended pursuant to the change of law process specified in the Agreement, BellSouth must continue to accept and provision CCC's high cap loop and transport and entrance facility orders at the specified rates. By stating that it will not accept these orders beginning March 11, 2005, BellSouth has anticipatorily breached the Agreement.

19. The *TRRO* does not excuse or justify BellSouth's stated intention of refusing to accept CCC's UNE-P or other orders beginning March 11, 2005, because the *TRRO* explicitly requires that its rulings be implemented through changes to parties' interconnection agreements. Implementing the change of law with respect to new UNE-P orders will not be an academic exercise because the parties will need to address, among

other issues, BellSouth's duty to continue to provide UNE-P to CCC at current rates under Section 271 of the Federal Act.

BELLSOUTH'S REFUSAL TO FOLLOW THE CHANGE OF LAW PROCESS

20. The Agreement does not permit parties to implement changes in law unilaterally. To the contrary, the Agreement requires that a party wishing to implement a change in law take specified steps, including (i) ensuring that the governmental action in question has taken effect; (ii) providing notice of the change of law to the other party; (iii) undertaking negotiations for the specified period; and (iv) if necessary, pursuing dispute resolution. By stating its intention to ignore the change of law provision in the parties' Agreement and take unilateral action to modify that Agreement, BellSouth has anticipatorily breached the Agreement.

21. The *TRRO* does not excuse or justify BellSouth's failure to comply with the change of law provisions of the Agreement. Section 227 of the *TRRO* states that the twelve month transition period "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***." (Emphasis added.) The *TRRO* requires that parties "implement the Commission's findings" by making "changes to their interconnection agreements consistent with our conclusions in this Order." (*TRRO* § 233.) The *TRRO* does not exclude its provisions relating to new UNE-P orders from this requirement, nor does it preclude the continued processing of new UNE-P orders by CLECs purchasing unbundled local switching at "just and reasonable" rates under Section 271 of the Federal Act. Although some interconnection agreements may permit

BellSouth to implement changes in law immediately[1], the Agreement between BellSouth and CCC does not. Under the *TRRO* and the Agreement, therefore, BellSouth must undertake the change of law process to implement the changes specified in the *TRRO* with respect to (among other issues) new UNE-P orders.

22. Foremost among the difficult issues that the parties must resolve through negotiation and arbitration is whether BellSouth can use the *TRRO* to evade its independent UNE unbundling obligations and associated rates under Section 271 of the Federal Act. It was precisely because parties and state commissions must resolve this and other issues that the FCC mandated that the terms of the *TRRO* be implemented through changes to the parties' interconnection agreement. And, as shown below, it also serves as an independent ground for continuing to enforce the Agreement as written and approved.

23. The Commission has already anticipated the possibility that an ILEC might use a change in law as an excuse to unilaterally cease performance under an approved interconnection agreement. In arbitrations, the Commission has twice addressed the impropriety of ILEC attempts to force contractual changes without negotiating with a CLEC counter-party to the agreement.[2] In both cases, Verizon had attempted to insert language into its interconnection agreement that would provide for a unilateral amendment based upon change of law. The Commission rejected Verizon's attempt to unilaterally change its agreements, and instead required the parties to undergo

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[1] CCC believes it is highly unlikely that any arbitrated agreement in Kentucky permits an ILEC to unilaterally implement changes, because the Commission has expressly prohibited ILECs from filing an interconnection agreement that would permit such action. *See* ¶ 23, *infra.*

[2] *Petition of Brandenburg Telecom,* Case No. 2001-224 (November 15, 2001); *Petition of South Central Telecom*, Case No. 2001-00261 (January 15, 2002).

good faith renegotiation. Moreover, the Commission determined that an amendment was required only where a contractual provision was rendered *unlawful*, not merely when a legal obligation is removed – such as the removal of unbundling obligations for specific elements that remain in the parties' agreement. The language of both Orders is identical and provides as follows: "The Commission finds that [negotiation] produces a firm commitment from both parties. At the same time it requires the parties to amend the contract prospectively whenever that is necessary for it to remain in conformity with the law. Therefore, the contract should provide that changes in applicable law should be incorporated into the contract through the negotiation process that either party may initiate. Further, the Commission notes that such negotiations need not occur unless the change in law actually renders a contractual provision unlawful. A change in law that merely reduces or removes an obligation is not cause for renegotiation during the term of the contract. "

BELLSOUTH'S DUTY TO PROVIDE UNE-P UNDER SECTION 271 OF TA '96

24. Even if BellSouth were empowered by the *TRRO* unilaterally to change CCC's UNE-P rights that arise out of section 251(c)(3) (which it is not), BellSouth would not be entitled to change the unbundling and UNE rate sections of the Agreements unilaterally because Section 271 of the Federal Act independently supports CCC's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the Agreements.

25. As the FCC affirmed in the *TRO,* so long as BellSouth wishes to continue to provide in-region interLATA services under section 271 of the 1996 Act, it "must continue to comply with any conditions required for [§271] approval" (*TRO* § 665), and

that is so whether or not a particular network element must be made available under Section 251. One of the central requirements of Section 271 is that a Bell Operating Company enter into "binding agreements that have been approved under Section 252 specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities." (Federal Act, § 271(c)(1)(A).) Those agreements must provide access to facilities that meet the requirements of the so-called section 271 checklist. (*Id.* §271(c)(2)(A)(ii).) That checklist requires that the agreement must provide for local switching. (*Id.* § 271(C)(2)(B)(vi).) To satisfy the requirements of the checklist the interconnection agreement must provide switching at a rate deemed just and reasonable. (*Id.*; *TRO,* ¶¶ 662-664.).

26. There is thus a tangible basis for negotiation and dispute resolution regarding BellSouth's continuing obligation to provide Section 271 local switching as part of the UNE-P combination. 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) (*see* TRO ¶ 655 & n.l989), and that decision was upheld in *USTA II*, the D.C. Circuit noted that the general nondiscrimination requirement of section 202 could provide an independent basis for requiring the combination of Section 271 switching with other UNEs. *USTA II*, 359 F.3d at 590. This is but one issue for negotiation and dispute resolution.

27. Providing unbundled mass market switching in isolation provides nothing of value to CLECs because BellSouth owns the loop plant that serves consumers in its service territory. If BellSouth were to provide unbundled switching to CLECs in isolation, while providing switching to its retail business combined with all the other

elements needed to provide service, BellSouth would discriminate against CLECs in violation of Section 202 of the Federal Act. Thus, there is plainly a dispute between BellSouth and the CLECs regarding BellSouth's obligation to provide Section 271 switching in combination with the other elements that make up UNE-P. As noted above, this Commission has necessarily determined that the UNE rates in the Agreements are "just and reasonable" under Kentucky law. CCC submit, therefore, that until this Commission or the FCC reaches some other conclusion, the rates in the Agreement should be determined to be "just and reasonable" under section 271. If BellSouth disagrees, its remedy is not to unilaterally cease provisioning UNE-P effective March 11, 2005, but to initiate proper change of law and dispute resolution processes with CCC to address its concerns.

PRAYER FOR RELIEF

WHEREFORE, for the foregoing reasons, CCC respectfully requests that the Commission:

(1) Order BellSouth to continue accepting and processing CCC's UNE-P orders, including new orders, moves, adds, and changes to CCC's existing embedded customer base, under the rates, terms and conditions of the Agreement;

(2) Order BellSouth to continue accepting and processing CCC's high cap loop, high cap transport, and EEL orders under the rates, terms and conditions of the Agreement;

(3) Order BellSouth to comply with the change of law provisions of the Agreement with regard to the implementation of the *TRRO*;

(4) Order such further relief as the Commission deems just and appropriate.

Dated this 28th day of February, 2005.

Respectfully submitted

By_____/s/_____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Complaint and Motion of Cinergy Communications Company was served by mail upon Dorothy Chambers, counsel for BellSouth Telecommunications, Inc., and has been filed electronically as permitted by the procedural order governing Case No. 2004-00427 this 28thth day of February, 2005.

/s/
Douglas F. Brent