COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

EMERGENCY MOTION OF CINERGY COMMUNICATIONS FOR DECLARATORY RULING

Cinergy Communications Co., a/k/a Cinergy Communications Corp. ("Cinergy"), by counsel, for its Emergency Motion for Declaratory Ruling, states as follows:

INTRODUCTION

As this Commission is well aware, the Federal Communications Commission ("FCC"), in *Unbundled Access to Network Elements: Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-290 (FCC Feb. 4, 2005) (hereafter, the "TRRO"), has determined that competitive local exchange carriers ("CLECs") should no longer be entitled to switching and certain other unbundled network elements ("UNEs") under Section 251 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 47 U.S.C. §§ 151 *et seq.* This docket was opened for the purpose of determining the actions that must properly be taken by the parties and by this Commission to implement this change in law.

The determination that ***must*** precede any further meaningful negotiations to implement this change in law is the determination requested by this Motion: whether CLECs, who may no longer obtain certain UNEs from incumbent local exchange carriers ("ILECs") under Section

251 of the Act, may obtain those UNEs from BellSouth Telecommunications, Inc. ("BellSouth") pursuant to Section 271 of the Act. The question is urgent because, under the FCC's TRRO, interconnection agreements must be renegotiated to develop methods other than the Section 251 UNE platform by which CLECs may serve new customers. Cinergy believes that, as a matter of law, Section 271 UNEs constitute an alternative means of service that must be made available, commingled with other services, to replace BellSouth's prior Section 251 obligations in the parties' interconnection agreements. BellSouth does not agree. Accordingly, before meaningful negotiations may take place to implement the TRRO, the obligations of BellSouth to provide Section 271 UNEs must be declared by this Commission.

This Motion also presents three major subsidiary questions as follows:

- *Does this Commission have jurisdiction under Section 252 and KRS Chapter 278 to determine BellSouth's obligations under Section 271?*

- *What standards should govern the price to be charged by BellSouth for Section 271 UNEs?*

- *As the Court's recent ruling in BellSouth Telecommunications, Inc v. Cinergy Communications Co., C. A. No. 3:05-CV-16-JMH (E.D. Ky. April 22, 2005) enables BellSouth to cease providing Section 251 unbundled switching for new customers before prices for Section 271 UNEs are finalized in the parties' interconnection agreements, what should be the interim price for those UNEs?*

Cinergy believes that the reasonable and obvious answers to these questions are that BellSouth, which is clearly providing in-region long distance in this state, must continue to comply with its Section 271 unbundling obligations and FCC rulings; that this Commission's authority to oversee actual implementation of Section 271 obligations is not only necessarily implied in its general authority over interconnection agreements under Section 252 of the Act, but that the Commission's Section 252 role is invoked in Section 271 itself; that, as the FCC has said, the "nondiscriminatory," "just and reasonable" pricing standard of 47 U.S.C. §§ 201 and

202 applies to Section 271 UNEs and should be negotiated and, if necessary, arbitrated under Section 252; and that, as the CLECs' ability to obtain Section 251 switching for new customers has come to an abrupt end, and new prices for necessary elements and services under numerous existing interconnection agreements have not been finalized, Section 271 UNEs should be provided during the interim at TELRIC plus one dollar. The TELRIC-based prices set by this Commission have already been found to be "just and reasonable," to fully compensate BellSouth for its network, and to provide BellSouth with a reasonable profit.[1] The additional dollar, set by the FCC for imbedded-base CLEC customers served by Section 251 UNE-P, ensures that the interim price does not exceed what the FCC has most recently found to be "just and reasonable."

ARGUMENT

I. BELLSOUTH IS OBLIGATED BY SECTION 271 OF THE ACT TO PROVIDE UNES TO CLECS IN KENTUCKY.

Section 271 of the Telecommunications Act governs the entrance of Bell Operating Companies ("BOCs"), including BellSouth, into the in-region, long-distance market. Compliance with the requirements of this section, including the fourteen point checklist at 47 U.S.C. 271(c)(2), (the "Competitive Checklist") is mandatory for such entrance. The Competitive Checklist includes, among other things, these UNEs:

> ...
>
> {iv) ***Local loop transmission*** from the central office to the customer's premises, ***unbundled*** from local switching or other services.
>
> (v) ***Local transport*** from the trunk side of a wireline local exchange carrier switch ***unbundled*** from switching or other services.

[1] Since obtaining Section 271 authority to provide long-distance in Kentucky, BellSouth has repeatedly attacked the Commission's TELRIC prices. But Cinergy calls the Commission's attention to *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.,* 40 F. Supp. 2d 416 (E.D. Ky. 1999) in which BellSouth successfully *defended* as reasonable this Commission's TELRIC methodology against a CLEC's claim that the Commission-set prices were too high. Of course, that position was taken by BellSouth before it obtained Section 271 long-distance authority.

(vi) ***Local switching unbundled*** from transport, local loop transmission, or other services.

…

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

47 U.S.C. §271(c)(2)(B) (emphasis added).

Upon a showing that it was providing access to these UNEs and to other access and services required by this Section, BellSouth was granted authority by the FCC to enter the in-region, interLATA long-distance market in Kentucky.

But that is not the end of the matter. BellSouth's obligation to provide Section 271 UNEs did not cease the day it obtained the coveted long distance authorization. Instead, the obligation is ongoing, as the FCC has explained:

> … we continue to believe that the requirements of section 271(c)(2)(B) ***establish an independent obligation for BOCs*** to provide access to loops, switching, transport, and signaling ***regardless of any unbundling analysis under section 251.***

Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 (2003) ("TRO) at ¶ 653 (emphasis added).

As a result, the FCC's decision in the TRRO, which ended the obligations of *ILECs in general* to provide unbundled switching – based on a finding of a lack of the "impairment" that is necessary to require unbundling under Section 251 of the Act – has no effect whatever on the obligations of *BOCs in particular* to provide UNEs under Section 271. Put simply, federal law requires provision of switching and other UNEs by BOCs even in the absence of the showing of "impairment" that is necessary to trigger UNE provisioning obligations for non-BOC ILECs.

The UNE obligations under Section 271 do not mirror those of Section 251, as the FCC has explained. The pricing standards are the "just and reasonable" and "nondiscriminatory" standards found in Sections 201 and 202 of the Communications Act. TRO at ¶ 656. As the FCC explained, "[a]pplication of the just and reasonable and nondiscriminatory pricing standard of sections 201 and 202 advances Congress's intent that Bell companies provide meaningful access to network elements." TRO at ¶ 663.

The FCC's findings with regard to the ongoing obligations of BOCs such as BellSouth to provide UNEs under Section 271 were explicitly upheld in *United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), the same decision that rejected the FCC's impairment findings under 251 and directly led to the TRRO that has ended CLEC access to Section 251 unbundled switching:

> The FCC reasonably concluded that checklist items four, five, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§ 251-252. In other words, ***even in the absence of impairment, BOCs must unbundle local loops, local transport, local switching, and call-related databases*** in order to enter the interLATA market.

USTA II at 588 (emphasis added).

BellSouth's obligation to provide these elements – and to provide for commingling of these elements with other elements and services pursuant to the TRO at ¶579 -- is obvious. As is shown below, BellSouth's obligation to negotiate the terms and conditions upon which these elements will be provided, pursuant to Section 252 and under this Commission's auspices, is equally obvious.

II. THIS COMMISSION HAS AUTHORITY CONFERRED BY BOTH FEDERAL AND STATE LAW TO DETERMINE, PURSUANT TO STANDARDS SET BY THE FCC, BELLSOUTH'S ONGOING SECTION 271 OBLIGATIONS IN KENTUCKY.

A. Section 271 of the Act Explicitly Requires the UNEs Specified on the Competitive Checklist To Be Provided Pursuant to an Agreement That Has Been Approved by a State Commission.

Any attempt to argue that the state commission negotiation, mediation, arbitration, and approval process does not apply to Section 271 obligations must be rejected out of hand based on the dispositive language of the statute itself. Pursuant to Section 271, a BOC must provide Competitive Checklist UNEs *pursuant to an agreement that has been approved by a state commission.* In short, the obligation to provide Section 271 UNEs, like all other ILEC obligations under the Act, is implemented by and through interconnection agreements that are subject to state commission jurisdiction.

Here is what Section 271, in pertinent part, says:

> SPECIFIC INTERCONNECTION REQUIREMENTS.—
> (A) AGREEMENT REQUIRED. – A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought –
>
> (i)(I) such company is providing access and interconnection ***pursuant to one or more agreements described in paragraph (1)(A),***
>
> …
> and
>
> (ii)such access and interconnection meets the requirements of subparagraph (B) of this paragraph [the Competitive Checklist].

47 U.S.C. §271(c)(2).

The "agreements described in paragraph (1)(A)" that, pursuant to statutory directive, must contain the Section 271 UNEs are "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…" 47 U.S.C. § 271(c)(1)(A) (emphasis added). Section 252, in turn, specifies that interconnection agreements must be submitted to state commissions – and *only* to state commissions – for approval or rejection. The Federal Communications Commission has no role whatever under Section 252 unless a state commission "fails to act to carry out its responsibility under this section," in which case the FCC "shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5).

In short, without an interconnection agreement ***"approved under section 252"*** to provide Section 271 UNEs, BellSouth is out of compliance with its Section 271 obligations that the FCC itself requires – and it is the state commission's "responsibility" under section 252 to approve an agreement. *See AT&T Corp. v. Iowa Utilities Bd.,* 525 U.S. 366, 384 (1999) (explaining that the FCC sets pricing standards, but "[i]t is the States that will apply those standards … determining the concrete result in particular circumstances"); *Qwest Communications International Inc. Petition for Declaratory Ruling on the Scope of the Duty to File and Obtain Prior Approval of Negotiated Contractual Arrangements Under Section 252(a)(1),* WC Docket No. 02-89, Memorandum Opinion and Order, 17 FCC Rcd 19337 (2002) (rejecting a BOC's attempt to read Section 252 narrowly and holding that Section 252 creates a broad obligation to file interconnection agreements with state commissions).

Thus, it is true – but wholly irrelevant – that the FCC has authority to enforce Section 271. The FCC indicated in the TRO that it *will,* in fact, enforce Section 271. However, without a 252 agreement implementing the FCC's Section 271 requirements, BellSouth is already out of compliance with FCC standards. The end game is that a 252 agreement is the sole means by

which FCC standards can be met – and the only way to a 252 agreement is through the state commission.

The FCC, furthermore, has recognized the states' role in policing Section 271 compliance, explaining that state commission assistance is necessary to prevent BOC "backsliding" in its Section 271 obligations after the BOC has obtained in-region, interLATA authority.[2] This Commission has explicitly recognized its responsibility to prevent such backsliding. *See Investigation Concerning the Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc., Pursuant to the Telecommunications Act of 1996* , at 7 (Ky. PSC No. 2001-00105, April 26, 2002) (declaring that it would monitor BellSouth's performance "to ensure that it maintains compliance with Section 271"). BellSouth did not appeal the PSC's declaration of its authority.

But even if the PSC had not explicitly stated that it would act to ensure continuing Section 271 compliance, BellSouth's arguments that the FCC, and only the FCC, has authority to enforce Section 271 obligations is wholly beside the point. The FCC has already issued its orders requiring Section 271 UNEs. It is now up to BellSouth to provide them – and for this Commission, as with other interconnection agreement issues – to ensure that the FCC's standards are in fact met.

[2] *See, e.g., Joint Application by SBC Communications, Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma,* CC Docket No. 00-217, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001), *aff'd in part, remanded in part sub nom Sprint Communications Co. v. FCC,* 274 F.3d 549 (D.C. 2001) ("… we are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to SWBT's entry into the Kansas and Oklahoma long distance markets").

III. SECTION 271 UNES MUST BE PROVIDED AT "JUST AND REASONABLE" PRICES AND, BECAUSE INTERIM PRICING IS NECESSARY, THE INTERIM PRICING STANDARD SHOULD BE TELRIC PLUS ONE DOLLAR.

BellSouth clearly must provide Section 271 UNEs. TRO, ¶ 653; *USTA II*. BellSouth also must provide these UNEs at "just" and "reasonable" prices. 47 U.S.C. ¶¶ 201-202; TRO ¶ 656, 663; *USTA II*. But BellSouth's recalcitrance has created a situation in which there has been no price set for Section 271 UNEs, even as Section 251 UNEs have abruptly become unavailable. Accordingly, pending the outcome of the parties' negotiations, 271 UNEs should be priced according to the only standard that has been found to be "just and reasonable:" TELRIC plus one dollar. Even without the one dollar, TELRIC has already been upheld by the United States Supreme Court in *Verizon Communications, Inc. v. Federal Communications Comm'n,* 435 U.S. 467 (2002). No such finding would have been possible had TELRIC not been "just and reasonable." Section 252(d)(1) of the Act, under which the Supreme Court scrutinized TELRIC, requires Section 251 UNEs to be offered at "just and reasonable rates."

BellSouth itself has defended the PSC's TELRIC methodology in court. In *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.,* 40 F.Supp.2d 416, 421 (E.D. Ky. 1999), MCI brought suit claiming that the PSC's UNE prices had "figured into the rate BellSouth's bloated, inefficient infrastructure." The PSC, however, argued that its prices reflected "the concrete reality" of BellSouth network operation. *Id.* The court agreed with the PSC, and with BellSouth, that the prices had been properly set based on BellSouth's own cost studies. *Id.* At 422.

In providing Section 271-based relief to Cinergy, this Commission would be doing precisely what the Maine Public Utilities Commission has done. In its Order of March 17, 2005

[attached hereto as Exhibit 1], the Maine Commission held, pursuant to the FCC's TRRO, that Section 251 UNEs would no longer be available for new CLEC customers. However, the Commission ordered Verizon-Maine, the local BOC, to continue provisioning UNEs under Section 271 at TELRIC rates pending approval of Section 271-specific "just and reasonable" rates.

The Maine Commission's resolution of the interim pricing issue makes perfect sense. BellSouth, like Verizon-Maine, has failed to set prices for Section 271 UNEs; but failure to set prices does not excuse failure to comply with an FCC directive by refusing to provide Section 271 UNEs at all. Setting the interim price at TELRIC is the obvious – perhaps the only -- solution. Here, Cinergy requests TELRIC plus one dollar to comply with the pricing required under the TRRO for "imbedded" customers served by Section 251 UNEs, to avoid exceeding the price that the FCC has implicitly found "just and reasonable."

CONCLUSION

The FCC has ordered BellSouth to provide Section 271 UNEs at just and reasonable prices. Taking the issue presented in this motion to the FCC would be redundant. The FCC can do no more than tell BellSouth the same thing all over again. Though the FCC "enforces" Section 271 obligations, it does not arbitrate, mediate, or approve individual interconnection agreements through which BellSouth's Section 271 obligations must be honored. Even if the FCC's statutory role included arbitration of interconnection agreements – and it certainly does not – it would lack the resources to review, mediate, arbitrate, and enforce every BOC interconnection agreement in the country. That is why Congress gave this role to state commissions in Section 252 of the Act.

It is time – it is well past time -- for BellSouth to fulfill its Section 271 obligations through agreements approved under Section 252 of the Act. For every day that BellSouth is permitted to reject UNE orders for lack of a Section 251 obligation, and is not required to accept UNE orders based on its continuing Section 271 obligation, Cinergy suffers serious harm in violation of its rights under the 1996 Act and FCC orders.

For the foregoing reasons, Cinergy respectfully requests that the Commission declare, as expeditiously as possible, that BellSouth is obligated by Section 271 of the Act to provide the UNEs specified in the Competitive Checklist to CLECs in Kentucky; that this Commission has authority to ensure that these FCC-mandated UNEs are provided pursuant to an interconnection agreement approved under Section 252 of the Act; that BellSouth must negotiate in good faith with regard to the prices it will charge CLECs for Section 271 UNEs; and that, as Cinergy's access to Section 251 UNEs under its interconnection agreement has been ended prior to final execution of amendments providing access to Section 271 UNEs, BellSouth must provide those UNEs at TELRIC plus one dollar pending final PSC approval of Section 271 UNE rates.

Respectfully submitted,

Signature Not Verified

Douglas F. Brent

Digitally signed by Douglas F. Brent
DN: cn=Douglas F. Brent, o=Stoll Keenon and Park, c=US
Date: 2005.04.26 12:31:42 -04'00'

C. Kent Hatfield
Deborah T. Eversole
Douglas F. Brent
Stoll, Keenon & Park, LLP
2650 AEGON Center
400 West Market Street
Louisville, KY 40202
Telephone: (502) 568-9100
Facsimile: (502) 568-5700

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Emergency Motion Of Cinergy Communications For Declaratory Ruling 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 26th day of April, 2005.

Douglas F. Brent

Signature Not Verified

Digitally signed by Douglas F. Brent
DN: cn=Douglas F. Brent, o=Stoll Keenon and Park, c=US
Date: 2005.04.26 12:32:03 -04'00'

Douglas F. Brent