

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)

**DIALOG’S COMMENTS IN SUPPORT OF CINERGY COMMUNICATIONS’
MOTION FOR DECLARATORY RULING**

Dialog Telecommunications, Inc. (“Dialog”), pursuant to the Commission’s May 5, 2005 Order, hereby files its comments in support of the Emergency Motion for Declaratory Ruling filed April 26, 2005 by Cinergy Communications Company (“Cinergy”). Dialog fully supports Cinergy’s Motion and concurs in the legal analysis therein. As discussed below, the Commission has the authority to determine just and reasonable rates for local network elements BellSouth is required to provide under § 271 of the Communications Act, and, at least on an interim basis, the rates for elements combined to provide a service equivalent to UNE-P should equal the rates determined by the FCC in the TRRO, *i.e.*, TELRIC plus one dollar.

I. INTRODUCTION

Dialog serves residential voice customers, primarily in less-densely populated areas of Western Kentucky. Dialog relies on unbundled elements purchased from BellSouth to serve all of its customers. BellSouth, relying on the recent injunction issued by the U.S. District Court for the Eastern District of Kentucky (which pertains to the Commission’s March 10, 2005 Order in this case), is currently refusing to accept new orders for unbundled switching. However, the Court’s order enjoining the Commission has no bearing whatsoever on BellSouth’s

obligations to provide UNEs, including switching, under § 271, for those obligations were not at even at issue in the Commission's order which BellSouth sought to have enjoined. Thus, the injunction presents no barrier to the relief requested by Cinergy, nor is it an excuse for BellSouth to disregard its continuing obligations to provide UNEs as required to maintain compliance with § 271.

Dialog urges the Commission to grant the Emergency Motion. BellSouth is not likely to meet its obligations unless the Commission acts. As Cinergy explains in the Motion, for every day that BellSouth is permitted to reject UNE orders for lack of a § 251 obligation, and is not being required to accept UNE orders based on its continuing § 271 obligation, Cinergy, Dialog, and other carriers suffer serious harm in violation of their rights under the 1996 Act and FCC orders.

II. SECTION 271 OF THE COMMUNICATIONS ACT REQUIRES BELLSOUTH TO PROVIDE UNES, INCLUDING SWITCHING.

As an interexchange carrier providing interLATA service in Kentucky, BellSouth is uniquely subject to numerous interconnection-related requirements contained in § 271 of the Telecommunications Act. Under the "Competitive Checklist" of 47 U.S.C. § 271(c)(2), BellSouth must provide local loop transmission, local transport, unbundled switching, and nondiscriminatory access to databases and associated signaling necessary for call routing and completion. 47 U.S.C. §271(c)(2)(B). As Cinergy explains in its Emergency Motion, BellSouth has a continuing obligation to meet the requirements under § 271 as long as it intends to remain in the long distance business, and the FCC has made clear that the obligation to provide those § 271 UNEs is completely independent of any unbundling analysis under section 251. Cinergy Motion at 3-4. Thus, while the TRRO may have ended the obligations of some ILECs (e.g., KY

ALLTEL, Cincinnati Bell) to provide unbundled switching, BellSouth's obligations remain, because of the overlapping requirements arising under § 271. (Those obligations do not apply to the other large ILECs in Kentucky, because those ILECs are not BOCs, they were never restricted from entering the interLATA market, and they are not subject to § 271.) And Cinergy describes how the D.C. Circuit, while rejecting the FCC's impairment findings under § 251 and thereby precipitating the end of unbundled switching under § 251, upheld the FCC's findings with regard to the ongoing obligations of BOCs such as BellSouth to provide UNEs under § 271. *Id.* (citing *United States Telecom Ass'n v. FCC*, 359 F.3d 554, 588 (D.C. Cir. 2004) ("*USTA II*"). Without question, BellSouth has an obligation to provide access to the piece parts of its network under § 271.

III. THE COMMISSION HAS AUTHORITY TO DETERMINE BELLSOUTH'S ONGOING SECTION 271 OBLIGATIONS IN KENTUCKY.

Cinergy's Motion makes clear that the Commission's duty to approve § 252 agreements for § 271 elements is compelled by the "dispositive language" of the statute itself. Cinergy Motion at p. 6. Dialog agrees. The plain language of the Act makes clear that Bell company compliance with § 271 depends upon continuing § 252 jurisdiction by state commissions over the terms of access to network elements set forth in the § 271 checklist. § 271(d)(6) makes clear that a Bell operating company has the obligation to continue to meet the conditions required for approval – which include providing interconnection to 271-specific competitive checklist items via "binding agreements that have been approved under section 252." The language could not be clearer. And since only state commissions have the authority to arbitrate § 252 agreements (except in narrow circumstances involving a state's refusal to act, not at issue here), it is clear that the

Commission has authority to determine the rates BellSouth may collect for § 271 UNEs. The fact that the FCC makes the ultimate determination of BellSouth's compliance with § 271 does not mean that a state commission is ousted from setting the rates for § 271 UNEs in the first instance.

IV. TELRIC PLUS ONE DOLLAR IS A REASONABLE INTERIM PRICING STANDARD.

More than six years ago, BellSouth defended the Commission's determination of TELRIC-based interconnection rates based on a cost model presented by BellSouth, convincing the U.S. District Court for the Eastern District of Kentucky that those TELRIC rates were "just and reasonable" and therefore lawful under the 1996 Act.¹ More recently, the FCC, as part of its *TRRO* order removing certain network elements from § 251 obligations, found that a "just and reasonable" transition rate for the UNE-P would equal TELRIC plus one dollar. Thus, recognizing the urgent need for a § 271 rate, occasioned by the abrupt end to § 251 switching for new customers, Cinergy has made a wholly logical reading of the *TRRO* to conclude that the transition rate set therein by the FCC implicitly satisfies the "nondiscriminatory," "just and reasonable" pricing standard of 47 U.S.C. §§ 201 and 202 and therefore may be applied immediately to § 271 UNEs.

Moreover, Cinergy's comments explain that while the pricing standards for UNE obligations under Section 271 are not identical to those of Section 251, there need not be a wide gulf between cost-based TELRIC prices, on the one hand, and rates that, while not cost-based, are just and reasonable under §§ 201 - 202. Rates for UNEs provided under § 271, including a UNE-P equivalent, will be just and reasonable, and therefore lawful, only if they preserve a

¹ See *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 40 F. Supp. 2d 416, 420-421 (E.D. Ky. 1999)

meaningful opportunity for CLECs to compete: “[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.” Cinergy Motion at p. 5, (quoting *TRO* at ¶ 663). The FCC’s pricing decision in the *TRRO* was surely informed by its prior determination in the *TRO*. Therefore, TELRIC plus one dollar for a UNE-P equivalent is an appropriate interim rate for § 271 UNEs.

V. CONCLUSION

The FCC has ordered BellSouth to provide § 271 UNEs at just and reasonable prices. BellSouth has failed to set prices for those UNEs, but that cannot excuse a refusal to provide Section 271 UNEs at all. Setting the interim price for these UNEs using the TELRIC rates for BellSouth determined in Administrative Case No. 382 would be lawful, because TELRIC rates *are* just and reasonable. However, recognizing that the TRRO allows a price *above* TELRIC for imbedded customers served via UNE-P, Cinergy has proposed that the Commission prescribe an interim § 271 rate of TELRIC plus one dollar, even for new customers, since that price is also within the bounds of “just and reasonable.” Cinergy’s proposal is a sensible one and fully in accordance with the law.

Dialog respectfully urges the Commission to grant Cinergy’s Motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Comments of Dialog Telecommunications, Inc. have been filed electronically as permitted by the procedural order governing Case No. 2004-00427 this 11th day of May, 2005.

Douglas F. Brent