COMMONWEALTH OF KENTUCKY

BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

OPPOSITION OF COVAD COMMUNICATIONS COMPANY TO BELLSOUTH'S CROSS-MOTION FOR DECLARATORY RULING

Covad Communications Company submits this response to BellSouth's cross-motion filed May 10, 2005. For the reasons set forth herein, the Commission should deny BellSouth's cross-motion and grant Cinergy's motion seeking a determination as to whether BellSouth is required to include rates and terms for Section 271 network elements in its interconnection agreements. States can establish § 271 rates in § 252 arbitrations – and the reason is simple – because Congress said so. Meanwhile, BellSouth's attempt to cast Section 271 as an exclusively federal issue misses the point. When arbitrating and approving Section 252 interconnection agreements, the PSC is acting not only in its role as a state commission but also as *federal* arbitrator, a task directly delegated to it by Congress.

The FCC has emphasized that "BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates."[1] Therefore, there is no

[1] *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*

question that BellSouth has a statutory and regulatory duty to offer these elements; the primary question presented by Cinergy's motion is whether Section 271 network elements should be offered under the Section 252 agreement process established by Congress, or in completely unregulated "commercial agreements," as advocated by BellSouth. As demonstrated below, Cinergy's position that § 271 terms should be included in § 252 agreements is drawn straight from the Act, whereas BellSouth's notion of commercial agreements is not only absent from the Act but contrary to its design. BellSouth's cross-motion should, accordingly, be denied, and Cinergy's motion, for the same reasons, should be granted.

I. Section 271 Requires that Rates, Terms and Conditions for Section 271 Checklist Items be Included in State-Approved Section 252 Interconnection Agreements.

The Act plainly states that the § 271 competitive checklist requirements, including the loops, transport, and switching which are independent of § 251 determinations (checklist items 4, 5 and 6), *must* be implemented through interconnection agreements or SGATs approved under § 252.[2] FCC precedent on this point has been clear – in approving BOC 271 applications, the FCC has stated that a BOC "must" satisfy its checklist obligations *"pursuant to state-approved interconnection agreements* that set forth prices … for each checklist item."[3] Specifically, the Act provides in Section 271(c)(2)(A):

> (A) AGREEMENT REQUIRED – A Bell operating company meets the requirements of this paragraph if, within the State for which authorization is sought –
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> (i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A) [interconnection Agreement], or

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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, ¶ 652 (2003) ("*TRO*").

[2] 47 U.S.C. § 271(c)(1), (2).

[3] *See, e,g., Vermont 271 Order*, Appendix D, ¶ 5.

> (II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B) [an SGAT], and
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> (ii) such access and interconnection meets the requirements of subparagraph (B) [the competitive checklist items].

Section 271(c)(1) *specifically requires* that these agreements be approved under *§ 252* of the Act, so the arbitration provisions of § 252 necessarily must apply. In particular, § 271(c)(1) provides:

> (c)(1) AGREEMENT OR STATEMENT- A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.
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> (A) PRESENCE OF A FACILITIES-BASED COMPETITOR- A Bell operating company meets the requirements of this subparagraph if it has entered into one or more **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 for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in Section 3(47)(A), but excluding exchange access) to residential and business subscribers.[4]

The Senate committee that drafted the 271 competitive checklist said the checklist "set[s] forth what must, at a minimum, be provided [upon request] by a Bell operating company in *any interconnection agreement approved under section 251* to which that company is a party."[5] A BOC can thus comply with its § 271 obligations *only* by entering into interconnection agreements "under section 252" (§ 271(c)(1)(A)) that include specific terms and conditions for the § 271 checklist items. The interrelationship between Sections 252 and 271 makes clear that disputes regarding such elements are subject to a § 252 arbitration; and the Act vests primary

[4] 47 U.S.C. § 271(c)(1)(A) (emphasis added).

[5] S. Rep. 104-23, 104th Cong, 1st Sess., p. 43 (March 30, 1995) (emphasis added).

jurisdiction with the states – not the FCC – to arbitrate disputes involving interconnection agreements.[6]

The FCC has confirmed the role that states play in this process. In the *TRO*, it emphasized that "BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates."[7] The FCC recognized that its order will need to be implemented through interconnection agreements between carriers.[8] The FCC held that where a negotiated agreement cannot be reached, parties should submit their requests to state arbitration and that state commissions would implement the *TRO* under the § 252 process.[9] At the same time, the FCC stated that "parties may not refuse to negotiate any subset of the rules we adopt herein" – which includes the FCC's 271 rules.[10]

BellSouth never disagreed with this point when it sought approval of its Section 271 applications at the FCC; on the contrary, the 271 rates on which BellSouth relied in its § 271 application for Kentucky were the rates established by this Commission *in the § 252 process*. The Kentucky Commission has therefore established § 271 rates before, and can do so again.[11] Indeed, were the FCC to be presented with a new § 271 application, it would require BellSouth to have its § 271 rates approved by a state commission *under § 252* – including those loops,

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[6] *See* 47 U.S.C. §§ 252(d)(4), 252(e), 252 (e)(5).

[7] *TRO*, ¶ 652; *see also TRO*, ¶¶ 653 & 656.

[8] *TRO*, ¶ 701.

[9] *TRO*, ¶¶ 703-704.

[10] *TRO*, ¶ 706.

[11] The FCC's approval of BellSouth's Kentucky § 271 application in no way erased the authority exercised by this Commission under § 252 prior to approval, any more than it eliminated the Commission's same jurisdiction over the terms of access to UNEs under section 251. Rather, continuing compliance with the requirements of either section 271 or section 251 requires the continuing availability of access and interconnection pursuant to agreements approved by state commissions under section 252. All that changes upon the grant of a section 271 application is that the applicant Bell company becomes subject to this Commission's enforcement authority under section 271(d)(6) in the event it fails to continue complying.

transport and switching required under 271 independently of section 251 (checklist items 4, 5 and 6).[12] The FCC found that a BOC can satisfy the § 271 checklist only if it has a "concrete and specific legal obligation to furnish the item upon request *pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions*."[13] The Act and FCC precedent therefore are clear that § 271 rates and terms should be included in § 252 interconnection agreements, and that these agreements are, in the first instance, approved by state commissions. Accordingly, by the clear terms of the Act, BellSouth's cross-motion should be denied, and Cinergy's motion should be granted.

II. Neither the Act nor the FCC Have Preempted States from Establishing 271 Rates in Section 252 Agreements.

BellSouth's cross-motion dances around the clear instructions of the Act and FCC precedent described above and instead tries to distract the Commission with a barrage of out-of-context irrelevant case law and a minority of incorrect state decisions to argue that states are preempted from undertaking the task that Congress explicitly delegated to them. BellSouth's argument for preemption does not withstand scrutiny and must be rejected.

If Congress had intended § 271 to preempt the states, it would have "unambiguously and straightforwardly" granted the FCC the exclusive authority to establish rates, terms and conditions for § 271 network elements.[14] As Covad demonstrates above, Congress instead

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[12] The FCC has dismissed § 271 applications and determined that a BOC failed to comply with the checklist if the BOC relied on an agreement that was not binding or had not been approved by the state commission. *See, e.g., Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-1, Order, 12 FCC Rcd 3309, ¶ 22 (1997); *see also Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20700, ¶¶ 25 & 71 (1997) (subsequent history omitted).

[13] *Vermont 271 Order*, Appendix D ¶ 5 (emphasis added).

[14] Since Section 271 elements are generally intrastate in nature, they are subject to state regulation unless Congress established exclusive federal jurisdiction with language "so unambiguous or straightforward so as to override the command of § 152(b)." See *Illinois Pub. Telecomms. Assoc'n v. FCC*, 117 F.3d 555, 561 (D.C. Cir. 1997); *New England Public Comm. Council v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003); *New York & Public Service*

expressly provided state approval of § 252 agreements that are to include § 271 rates. But even if the Commission found the statutes and FCC precedent cited by Covad above to be unclear, it certainly cannot conclude that Congress so clearly established the opposite conclusion with sufficient clarity to meet the high threshold required to establish preemption.

BellSouth's preemption argument rests primarily on its confusion between the FCC's role in *approving* § 271 applications and *enforcing* the requirements of § 271 with the role of the states in approving and/or arbitrating § 252 agreements. While the Act vests the FCC with authority to enforce Section 271, as recognized by the recent Kentucky and Mississippi federal district court decisions relied on so heavily by BellSouth's cross-motion, the FCC's enforcement authority in no way precludes or preempts state commissions from establishing § 271 rates in terms when acting as *federal* arbitrator under § 252. An ALJ in Illinois recently rejected an argument by SBC, identical to BellSouth's argument here, that the FCC's enforcement authority over § 271 extended to preempt state consideration of rates in the § 252 process. The ALJ explained that, "SBC is right that the FCC has exclusive authority to enforce its order approving the ILEC's application. Only the FCC can impose the remedies set forth in subsection 271(d)(6) – i.e., a corrective order, a penalty or suspension or revocation of interLATA toll authority."[15] However, the ALJ concluded that the issue of who has authority to establish § 271 rates is a <u>*separate*</u> matter, and that notwithstanding the FCC's enforcement authority, "CLECs can request negotiations to incorporate 271 rights in their ICAs."[16] In other words, while § 271(d)(6) confers federal jurisdiction to address a Bell operating company's failure to allow such interconnection

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Comm'n of New York v. FCC, 267 F.3d 91, 102 (2nd Cir. 2001). Therefore, states may exercise their section 152(b) authority and regulate § 271 network elements because nothing in § 271 unambiguously and straightforwardly prohibits states from doing so.

[15] *Cbeyond Communications et al. v. Illinois Bell Telephone Company*, Case No. 05-0154, ALJ Decision (Ill. Commerce Comm., May 9, 2005), at 23.

[16] *Id*. at 26.

by revoking interLATA approval, that jurisdiction is limited to addressing the non-compliance by enforcement action, not the implementation of the terms of such access and interconnection in the first place.

In any event, while the FCC does have jurisdiction to enforce Section 271, such jurisdiction is not exclusive. On the contary, the FCC has repeatedly concluded that state commissions are fully empowered to ensure BOC compliance with the competitive checklist after section 271 application approval. In its final § 271 order, the FCC explained:

> We note that in all of the previous applications that the Commission has granted to date, the applicant was subject to an enforcement plan administered by the relevant state commission to protect against backsliding after BOC entry into the long distance market. These mechanisms are administered by the state commissions and derive from authority the states have under state law or under the federal Act. As such, these mechanisms can serve as critical complements to the Commission's authority to preserve checklist compliance pursuant to section 271(d)(6).[17]

Since the FCC itself has found that the states have a role in enforcing § 271, BellSouth is wrong in asserting that state enforcement actions would be preempted by exclusive FCC enforcement authority. But this fact is irrelevant here, since Cinergy's motion does not call upon this Commission to enforce § 271, it only asks the Commission to perform its duties under § 252.

To be sure, the FCC has exercised authority over § 271 rates, by prescribing a "just and reasonable" standard that states are required to apply when establishing § 271 rates. The resulting paradigm is similar to that established by Congress and the FCC for Section 251 UNE rates, in which the FCC established the TELRIC methodology and left implementation of that methodology to the state commissions in § 252 proceedings.[18] The Commission therefore has

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[17] *Qwest Communications for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of Arizona,* WC Docket No. 03-194, Memorandum Opinion and Order, FCC 03-309, at n. 196.

[18] See *Iowa II*, 525 U.S. at 385 n.10.

the same authority to establish "just and reasonable" rates for "federal" § 271 elements in a § 252 arbitration proceeding as it does to establish TELRIC rates for "federal" § 251 UNEs in such proceedings.

BellSouth proudly notes that the Washington and Utah commission recently decided not to arbitrate § 271 rates. However, a greater number of states have established rates for Section 271 elements or otherwise determined that such rates should be included in interconnection agreements, including Tennessee,[19] Illinois,[20] Maine,[21] and New Hampshire.[22] An ALJ arbitrator in Oklahoma also recently held that § 271 rates and terms should be included in § 252 interconnection agreements.[23] In any event, this Commission should grant Cinergy's motion and deny BellSouth's not because of what any other state has done or not done, but because it is the correct interpretation of the Act.

The case law cited by BellSouth is all inapposite. First, BellSouth argues that *MCI* and *Coserv* limit section 252 arbitrations only to Section 251 issues and non-251 issues that both parties voluntarily agree to negotiate. While these cases may support an argument that BellSouth can refuse to negotiate terms wholly unrelated to its obligations under the Act, they also make clear that BellSouth cannot refuse to negotiate terms related to § 251. Covad submits

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[19] The Tennessee Regulatory Authority so voted on June 21, 2004 in *Petition for Arbitration of ITC Deltacom Communications Inc. with BellSouth Communications, Inc.*, Docket 03-00119. In response, BellSouth filed a preemption petition with the FCC before the TRA issued an order.

[20] *See XO Illinois Petition for Arbitration of an Amendment to an Interconnection agreement with Illinois Bell Telephone Company Pursuant to Section 252(b) of the Communications Act of 1934, as Amended,* Docket No. 04-0471, Amendatory Arbitration Decision, at 66-67 (Ill. Commerce Comm. Oct. 28, 2004).

[21] *Verizon Maine Proposed Schedules, Terms, Conditions and Rates for Unbundled Network Elements and Interconnection (PUC 20) and Resold Services (PUC 21)*, Docket No. 2002-682, Order Part II, at 19-20 (Me. PUC Sept. 3, 2004) (attached hereto as Exhibit N).

[22] *Proposed Revisions to Tariff NHPUC No. 84 (statement of Generally Available Terms and Conditions); Petition for Declaratory Order re Line Sharing*, DT 03-201, 04-176, Order Following Briefing, Order No. 24,442, at 50 (N.H. P.U.C. Mar. 11, 2005).

[23] *Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Oklahoma under Section 252(B)(1) of The Telecommunications Act of 1996*, Cause No. PUD 200400497, Written Report of the Arbitrator at 199 (Okla. Corp. Comm. May 2005).

that this rule is equally applicable to § 271, which the Act specifically connected to the § 252 process (as demonstrated in Section I above). Neither *MCI* nor *Coserv* considered this issue, and these cases are, at best for BellSouth, inconclusive as to whether ILECs are required to negotiate § 271 terms in their interconnection agreements.

BellSouth contends, incorrectly, that *Indiana Bell Tel. Co. v. Indiana Util. Regulatory Comm'n* preempts the Commission granting Cinergy's requested relief.[24] *Indiana Bell* found only that a state commission could not impose conditions on a § 271 application that were in fact an indirect means of regulating § 251 UNEs *outside the interconnection agreement process*.[25] The Court emphasized that,

> What the IURC has done is to make an end run around the Act. By issuing a freestanding order, the IURC set up baselines for interconnection agreements. The order interferes with the procedures set out in the Act, which require that agreements be negotiated between private parties and only when that fails are they subject to mediation by state agencies.[26]

Cinergy has not proposed an "end run" around the Section 252 process; instead, it has proposed to use that process in exactly the manner prescribed by Congress, while BellSouth attempts to evade it. Therefore, *Indiana Bell* offers no support to BellSouth's position.

BellSouth claims incorrectly that the FCC's *InterLATA Boundary Order* established exclusive FCC jurisdiction over § 271. This is a grossly erroneous interpretation of this order. Instead, the FCC only held that it had sole authority over LATA boundaries. Nothing in this order, or any other FCC decision, altered or diminished the role Congress delegated to states to oversee the implementation of § 271 rates and terms in § 252 agreements.

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[24] *Indiana Bell*, 359 F.3d 493, 497 (7th Cir. 2004)).

[25] *Id.* at 497.

[26] *Id.* at 498.

BellSouth's reliance on *Boomer v. AT&T* is similarly misplaced. *Boomer* involved a *state law* claim by a retail customer against AT&T for an *interstate* service. *Boomer* is completely irrelevant to the consideration of the Commission's authority under *federal* law to regulate BellSouth's largely intrastate § 271 elements.

The closest BellSouth comes to presenting arguments that may ultimately confine this Commission's authority is its contention that states are preempted from imposing TELRIC rates for 271 elements, or from imposing terms on 271 that would essentially restore the entirety of the Section 251 obligations that the FCC has eliminated.[27] But these are arguments about *what* rates and terms should or should not be included in interconnection agreements; not arguments as to *whether* the Commission remains entrusted with the authority to consider what rates and terms should apply when approving or arbitrating an interconnection agreement. If BellSouth disagrees with the interim rates proposed by Cinergy, it should put forth a counterproposal. Instead, BellSouth has simply refused to negotiate any terms as part of the § 252 process, a refusal that violates the terms of the Act.

III. BellSouth's Preemption Argument May be a Disguise for a Plan to Avoid All § 271 Obligations.

BellSouth's argument that the Commission should not establish § 271 rates appears to be part of the RBOCs' overall strategy not for FCC regulation of § 271, but for the complete absence of regulation that would ensure that BellSouth's § 271 rates are just and reasonable. The RBOCs have previously insisted that interconnection agreements need to reflect the entire rights and obligations of the parties under the Act and applicable law, or else such rights may be forfeited. SBC, for example, recently argued to the D.C. Circuit that:

[27] Covad in no way concedes that the Commission is so preempted.

> Under the language and structure of the 1996 Act, the obligations between ILECs and CLECs and governed in the first instance by their interconnection agreements. Indeed, absent such an agreement an ILEC has no obligation to make *any* facilities available to the CLEC, much less on the terms and conditions [required by the FCC's Section 251 regulations].[28]

The context of SBC's argument was that two CLECs had argued that SBC violated certain obligations to them that arose under the conditions that the FCC had imposed on the merger of SBC and Ameritech, which the D.C. Circuit had previously concluded were independent of Section 251.[29] SBC concluded that a CLEC that executed an interconnection agreement after the adoption of the merger conditions that did not include the substantive obligations imposed by the merger conditions "disavowed" its right to such access. Under this theory, *any* unbundling or interconnection obligation could only be implemented through a § 252 agreement "regardless of the source of the Commission's authority to impose the merger conditions," *i.e.*, even if the merger conditions were not derived from § 251.[30] And in particular, SBC argued that a CLEC could only secure its rights arising from the 1996 Act – which would include § 271 – in an interconnection agreement, and that any CLEC that did not secure such rights in its interconnection agreement had "expressly" waived them.[31]

The Commission should not effectively force CLECs to waive their right to obtain Section 271 UNEs. Instead, CLECs should be permitted to negotiate for access to § 271 checklist items in the manner prescribed by Congress – through § 252 interconnection

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[28] *SBC v. FCC*, D.C. Cir. Docket No. 03-1147, Brief of SBC Communications, Inc. at 15 (September 28, 2004) (emphasis original).

[29] *SBC v. FCC*, 373 F.3d 140 (D.C. Cir. July 6, 2004).

[30] *Id*. at 17. SBC made this argument knowing that the D.C. Circuit had previously concluded that its merger obligations were in fact independent of Section 251.

[31] *Id*. at 22.

agreements. Therefore, BellSouth's cross-motion must be denied and Cinergy's motion should be granted.

IV. Conclusion

For the foregoing reasons, the Commission should reject BellSouth's cross-motion; and should require BellSouth to negotiate and, if necessary, arbitrate, rates and terms for Section 271 checklist items in its Section 252 agreements; and should set interim rates for Section 271 elements to stymie BellSouth's attempt to cease providing Section 251 UNEs before it has replaced its Section 251 pricing with Section 271 pricing.

Respectfully submitted this 23rd day of May, 2005

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Opposition of Covad Communications Company to Bellsouth's Cross-Motion For Declaratory Ruling has been filed electronically as permitted by the procedural order governing Case No. 2004-00427 this 23rd day of May, 2005.

Douglas F. Brent

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