BELLSOUTH

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December 4, 2001

VIA HAND DELIVERY

David Waddell, Executive Secretary
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996*

Docket No. 01-00987

Dear Mr. Waddell:

Enclosed are the original and thirteen copies of BellSouth's Response to Cinergy Communications Company's Petition for Arbitration. Copies of the enclosed are being provided to counsel for Cinergy.

Very truly yours,

Guy Hicks w/permission ch

Guy M. Hicks

GMH:ch
Enclosure

423124

BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE

In Re: *Petition of Cinergy Communications Company for Arbitration of an Interconnection Agreement with BellSouth Telecommunications, Inc. pursuant to the Telecommunications Act of 1996*

Docket No. 01-00987

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO CINERGY COMMUNICATIONS COMPANY'S PETITION FOR ARBITRATION

Pursuant to 47 U.S.C. § 252(b)(3), BellSouth Telecommunications, Inc. ("BellSouth") hereby responds to Cinergy Communications Company's ("Cinergy") Petition for Arbitration ("Petition") and states that:

INTRODUCTION

Sections 251 and 252 of the Telecommunications Act of 1996 ("1996 Act") encourage negotiations between parties to reach voluntary local interconnection agreements. Section 251(c)(1) requires incumbent local exchange companies to negotiate the particular terms and conditions of agreements to fulfill the duties described in Sections 251(b) and 251(c)(2-6).

Since passage of the 1996 Act on February 8, 1996, BellSouth has successfully conducted negotiations with numerous competitive local exchange carriers ("CLECs") in Tennessee. The Tennessee Regulatory Authority ("TRA") has approved numerous agreements between BellSouth and CLECs. The nature and extent of these agreements vary depending on the individual needs of the companies, but the conclusion is inescapable — BellSouth has a record of

embracing competition and displaying a willingness to compromise to interconnect on fair and reasonable terms.

As part of the negotiation process, the 1996 Act allows a party to petition a State commission, such as the TRA, for arbitration of unresolved issues.[1] The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved.[2] The petitioning party must submit along with its petition "all relevant documentation concerning — (i) the unresolved issues; (ii) the position of each of the parties with respect to those issues; and (iii) any other issue discussed and resolved by the parties."[3] A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.[4] The 1996 Act limits the State commission's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and in the response.[5]

BellSouth and Cinergy's current Interconnection Agreement ("Agreement") expired on November 29, 2001. On May 30, 2001, Cinergy and BellSouth began negotiations for a new agreement. Unfortunately, the parties were unable to reach

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[1] 47 U.S.C. § 252(b)(2).

[2] *See generally,* 47 U.S.C. §§ 252 (b)(2)(A) and 252 (b)(4).

[3] 47 U.S.C. § 252(b)(2).

[4] 47 U.S.C. § 252(b)(3).

[5] 47 U.S.C. § 252(b)(4).

agreement on some issues. As a result, Cinergy filed its Petition for Arbitration. When parties cannot successfully negotiate an interconnection agreement, either may petition a State commission for arbitration of unresolved issues between the 135th and 160th day from the date a request for negotiation was received.[6]

Through the arbitration process, the State commission must resolve the unresolved issues ensuring that the requirements of Sections 251 and 252 of the 1996 Act are met. The obligations contained in those sections of the 1996 Act are the obligations that form the basis for negotiation, and if negotiations are unsuccessful, then form the basis for arbitration. Issues or topics not specifically related to these areas are outside the scope of an arbitration proceeding. Once the State commission has provided guidance on the unresolved issues, the parties must incorporate those resolutions into a final agreement to be submitted to the State commission for approval.[7]

SPECIFIC RESPONSE

In accordance with Section 252(b)(3) of the 1996 Act, BellSouth responds to each specifically numbered allegation in Cinergy's Petition and says that:

1. BellSouth denies that it and Cinergy are parties to an interconnection agreement dated May 30, 2001. BellSouth admits that Cinergy and BellSouth are parties to an interconnection agreement dated November 30, 1999. BellSouth admits the remaining allegations in Paragraph 1 on information and belief.

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[6] 47 U.S.C. § 252(b)(1).

[7] 47 U.S.C. § 252(a).

2. BellSouth admits the allegations in Paragraph 2.

3. The allegations in Paragraph 3 do not require a response.

JURISDICTION

BellSouth admits that the TRA has jurisdiction over the unresolved issues that have been properly raised in Cinergy's Petition. BellSouth also admits that the parties began negotiations on May 30, 2001, and that pursuant to 47 U.S.C. § 252(b)(1), an arbitration petition could have been filed anytime between the 135th and 160th day after the date Cinergy requested negotiations under § 252 of the Act. Except as specifically admitted, BellSouth denies the allegations in the paragraph of the Petition entitled "Jurisdiction."

BELLSOUTH'S POSITION ON UNRESOLVED ISSUES

Cinergy raised 18 issues in its Petition that it failed to raise during the parties' negotiations, and Cinergy raised 11 additional issues that it agreed previously were resolved. Notwithstanding Cinergy's inclusion in its Petition of several new issues and issues BellSouth understood were resolved during prior negotiations, BellSouth has continued to negotiate with Cinergy in good faith and the parties have resolved several issues since Cinergy filed its Petition. BellSouth sets forth below its position with respect to each of the unresolved issues between BellSouth and Cinergy. Those issues that have been resolved by the parties are not addressed herein. To avoid confusion, BellSouth will maintain the "Issue No." from Cinergy's Petition rather than renumbering the remaining unresolved issues.

Consequently, certain numbers will be omitted. To the extent Cinergy again attempts to seek to have the TRA arbitrate issues that BellSouth understands have been resolved by the parties, BellSouth reserves the right to amend this Response to address such issues.

Issue 1: Should Cinergy Communications be obligated to indemnify, hold harmless or defend BellSouth in the event of a third party claim regarding the accuracy of Subscriber Line Information ("SLI")? (Section 5.3.3)

Yes. Cinergy agrees that it is responsible for subscriber listing information ("SLI") provided by Cinergy under the Agreement, and it further agrees that BellSouth shall not be liable for the content or accuracy of any SLI provided by Cinergy. Cinergy likewise agrees that it should be required to indemnify, hold harmless or defend BellSouth with respect to the provision of inaccurate SLI, but improperly seeks to limit the extent of its indemnification obligations. First, Cinergy's requirement to indemnify BellSouth for claims that arise from SLI provided by Cinergy should not be limited in scope. Since it is Cinergy that is responsible for providing SLI for its customers to BellSouth, Cinergy should be responsible for all claims related to SLI for its customers. Second, Cinergy's obligation to indemnify BellSouth for claims relating to SLI should not exclude reasonable attorneys' fees and expenses. It makes no sense for Cinergy to be required to indemnify BellSouth for damages arising from Cinergy's provision of SLI under the Agreement, but to not permit BellSouth to recover its *reasonable* attorneys' fees and costs in defending such claims.

Issue 3: Should Cinergy Communications be liable for taxes and fees which are not billed by BellSouth at the time of service, or for taxes and fees which are disputed by Cinergy Communications at the time of billing?

Yes. Cinergy agrees that it is responsible for paying taxes and fees imposed upon it where BellSouth has the obligation to collect and/or remit such taxes or fees to the appropriate governmental agencies. Cinergy seeks, however, to eliminate its obligation to pay such taxes or fees if BellSouth does not bill Cinergy for such taxes or fees at the time it bills Cinergy for the underlying services giving rise to the tax or fee, or if it disagrees with BellSouth's determination as to the application or basis for a tax or fee billed by BellSouth. Cinergy's position is premised on its argument that BellSouth could "conceivably" bill Cinergy for any amount and call it a tax or fee in order to lower Cinergy's profit margin. Cinergy's allegation that BellSouth would engage in such illegal conduct is wholly without merit. Moreover, its argument does not address Cinergy's undisputed liability for taxes or fees regardless of whether they are billed by BellSouth at the time the respective service is billed, and Cinergy offers no argument to support its position that it should be relieved of its liability for taxes or fees under those circumstances. BellSouth may determine initially that a tax is not applicable although the tax is ultimately determined to be applicable. BellSouth should be able to recover the tax from the responsible party. To rule otherwise would provide a disincentive for BellSouth to challenge the applicability of taxes. The Agreement provides a reasonable mechanism for Cinergy to dispute BellSouth's determination as to the application or basis for any tax or fee billed to Cinergy. Cinergy should not be

permitted unilaterally to withhold a tax or fee, as those payments are remitted to third party governmental agencies and are not retained by BellSouth.

Issue 5: Should any negotiated amendment to this agreement based upon a change in legislative, regulatory, judicial or other legal action be applied retroactively to the date of such change? (Section 17.3)

No. It is neither appropriate nor necessary for amendments to interconnection agreements that are negotiated due to legislative, regulatory, judicial or other legal action to be retroactive to the date of such action. The relationship between BellSouth and Cinergy (like all CLECs) is, pursuant to the 1996 Act, governed by an interconnection agreement. The parties may agree to apply an amendment to their agreement made due to legislative, regulatory, judicial or other legal action retroactively. Cinergy's argument that, unless changes are applied retroactive to the effective date of the legislative, regulatory or judicial action, BellSouth will have incentive to drag its feet in executing an amendment to the parties' interconnection agreement, is misplaced. First and foremost, BellSouth is required to abide by the law, and it is committed to doing so. Moreover, the Agreement requires BellSouth to negotiate in good faith concerning changes Cinergy believes are necessitated by any legislative, regulatory, judicial, or other legal action. If Cinergy believes BellSouth is delaying in bad faith, it has a remedy. The Agreement provides that any dispute concerning such a request shall be referred to the dispute resolution procedure set forth in the Agreement.

Issue 8: Should interpretation of this agreement be construed against BellSouth? (Section 24)

The answer to this legal question is no. Cinergy contends that interpretation of the interconnection agreement should be construed against BellSouth because "it is BellSouth's Agreement." It is not; It is a negotiated Agreement. The 1996 Act requires BellSouth to negotiate the terms of interconnection agreements. Cinergy in fact received the benefit of its extensive negotiations with BellSouth over the terms of the current agreement and, moreover, is availing itself of its right under the 1996 Act to arbitrate issues about which the parties cannot agree. It would be unreasonable to construe language against BellSouth that Cinergy proposed or even chose not to negotiate, or that results from an arbitration decision by the TRA. This is not a case of a contract of adhesion or a form contract that Cinergy had no choice to accept. Consequently, the rules of contract construction do not require that the agreement be interpreted against BellSouth.

Issue 9: Should payment terms be net 30 day for all resale services? (Section 7.6)

No. Payment should be due by the next bill date. BellSouth invoices Cinergy every 30 days. To the extent Cinergy has questions about its bills, BellSouth cooperates with Cinergy to provide responses in a prompt manner and resolve any issues. It is reasonable for payment to be due before the next bill date.

Issue 10: Should BellSouth be required to provide Cinergy Communications nondiscriminatory access to unbundled packet switching in areas where BellSouth has deployed remote terminals in its network?

No. See BellSouth's response to Issue 11.

Issue 11: Should BellSouth be required to offer unbundled packet switching as a UNE?

No. The FCC declined to require ILECs to offer unbundled packet switching as a UNE, except in limited circumstances. FCC Rule 51.319(c)(5) requires ILECs to provide packet switching as a UNE only if the following four conditions are met: (i) the ILEC has deployed digital loop carrier systems or any other system in which fiber facilities replace copper in the distribution section of the network; (ii) there are no spare copper loops capable of supporting xDSL services the requesting carrier seeks to offer; (iii) the ILEC has not permitted a requesting carrier to collocate a DSLAM in the remote terminal; and (iv) the ILEC has deployed packet switching capability for its own use. Those requirements are not satisfied in this case, and Cinergy does not contend otherwise. The fact is that where BellSouth has deployed digital loop carrier and placed a DSLAM in its remote terminal in order to provide xDSL service, it will allow a requesting CLEC to collocate a DSLAM at the remote terminal so that it may provide xDSL service as well. The TRA has ruled recently in addressing this same issue that BellSouth is not required to offer unbundled packet switching as a UNE except when the limited circumstances identified in FCC Rule 51.319 and cited above exist. *See* Interim Order of Arbitration Award, BellSouth-Intermedia Arbitration, Docket No. 99-00948 (June 25, 2001), at 33-36.

Issue 12: Should BellSouth be required to offer Line Splitting – access to the High Frequency Portion of the Loop (HFPL) – when Cinergy Communications purchases UNE-P loops from BellSouth to provide local service?

No. UNE-P represents the direct connection of a loop and a port such that a CLEC can provide voice service to an end-user customer without collocating facilities in a central office or purchasing additional UNEs. The central office architecture of a UNE-P arrangement is identical to that of BellSouth's own retail voice service. The issue of line splitting arises where a CLEC providing voice service over a UNE-P arrangement wants to permit another CLEC to utilize the high frequency portion of the loop to provide data service. To allow line splitting, the loop and the port must be disconnected so that the loop can be terminated to a collocated splitter owned and maintained by one of the CLECs serving the customer. When a splitter is inserted, the UNE-P no longer exists. The line splitting arrangement requires more central office cabling and cross connections than does the UNE-P arrangement. The FCC has expressly recognized that UNE-P cannot be provisioned in a line splitting arrangement. It stated in its Texas 271 Order that "if a competing carrier is providing voice service using the UNE-P, it can order an unbundled xDSL-capable loop terminated to a collocated splitter and DSLAM equipment and unbundled switching combined with shared transport, *to replace its existing UNE-platform arrangement* with a configuration that allows provisioning of both voice and data services." Memorandum Opinion and Order, CC Docket No. 00-65 (June 30, 2000), at ¶ 325 (emphasis added).

Cinergy argues that it should not be denied the data capability of a loop when Cinergy provides local service using UNE-P. If Cinergy purchases a UNE-P, it has access to the entire loop, including the high frequency portion of the loop, and may provide data services to the customer. Line splitting refers to the situation where one CLEC provides data service over the same loop that a second CLEC is using to provide voice service.

Issue 13: Should BellSouth be required to include packet switching functionality as part of the UNE platform, (referred to as UNE-D)?

See BellSouth's response to Issue 11.

Issue 14: Should BellSouth be prohibited from requiring credit card billing of its Advanced Service customers when Cinergy Communications provides the underlying voice service to the same end user?

No. First, the only situation in which a CLEC's voice customer might also receive BellSouth's retail xDSL service is where the CLEC is reselling BellSouth's voice service to the customer. BellSouth's billing system for its retail xDSL service allows it to bill the customer on either the customer's telephone bill or via credit card. BellSouth does not have in place a system to allow it to send separate bills for retail xDSL service when the customer is not also a voice customer of BellSouth. It is common practice in the industry for internet service providers to use credit card billing. There is no reason to require BellSouth to incur the costs of modifying its billing system to do what other providers of enhanced services are not required to do.

Issue 15: Should BellSouth be required to provide access to stutter dialtone as part of the UNE-P offering?

Yes. Stutter dialtone is a vertical feature of the switch and, accordingly, Cinergy has access to it. BellSouth does not believe that there is a disputed issue regarding the availability of stutter dialtone.

Issue 16: When existing BellSouth service(s) (including resale and other UNEs) are replaced with UNE combination(s) or UNE-P, may BellSouth physically disconnect or separate equipment and facilities employed to provide the service(s).

At the present time, when BellSouth converts resale or UNEs to a UNE-P arrangement, it must issue and work both a "D" order to disconnect the existing service and an "N" order to provision the new UNE-P arrangement. BellSouth is, however, developing a single "C" order process to effectuate such conversions. BellSouth plans to make this single C process available on a region-wide basis in April, 2002.

Issue 17: Should Cinergy be entitled to obtain, without restriction, combinations of unbundled network elements that are ordinarily combined in BellSouth's network.

Yes. BellSouth will provide combinations of UNEs that are ordinarily combined in BellSouth's network. BellSouth does not believe that this is a disputed issue.

Issue 18: Should BellSouth be required to implement Operational Support Systems which support all transaction types, including adding, deleting, moving or changing of service, when Cinergy Communications purchases a UNE-P loop?

The TRA is currently conducting a generic OSS proceeding, Docket No. 01-00362, and this issue should be deferred to the generic OSS docket. To the extent

the TRA declines to defer this issue involving OSS to its generic OSS docket, BellSouth's response is that BellSouth's OSS support all transaction types, and BellSouth provides documentation regarding its OSS to CLECs, including Cinergy, to enable CLECs to understand and utilize BellSouth's OSS.

Issue 27: Should payments terms be net 30 days for all services? (Section 1.3)

See BellSouth's response to Issue 9.

Issue 28: Should BellSouth be allowed to charge Cinergy Communications a deposit? (Section 1.8)

Yes. It is quite reasonable and commercially prudent for BellSouth to be permitted to require a deposit to secure a CLEC's receivables. This is especially true where a CLEC poses a credit risk by virtue of its payment history or its financial condition. BellSouth's proposed language states that any deposit request must be based on a credit analysis, and it limits deposits to two months billings. Also, it does not require a cash deposit, but gives the CLEC several options with respect to a deposit. A deposit provision is necessary to protect BellSouth and is a common industry practice.

Issue 29: Should BellSouth be required to deposit all disputed amounts into an interest bearing, third-party escrow account until such dispute is resolved? (Section 2)

No. There is no need for BellSouth to pay disputed charges from Cinergy into an interest bearing escrow account pending resolution of the dispute. Section 2.2 of Attachment 7 to the Agreement provides that if BellSouth does not pay a

disputed charge and is ultimately deemed liable for such charge, then BellSouth must pay late payment charges. The imposition of late payment fees under these circumstances obviates the need for an interest bearing escrow account. BellSouth is financially capable of paying any amount Cinergy might rightfully charge it under the Agreement, and Cinergy does not contend otherwise. Consequently, an escrow account is not necessary.

WHEREFORE, BellSouth requests that the TRA arbitrate the issues properly raised in Cinergy's Petition and this Response and adopt BellSouth's position on each of the issues.

Respectfully submitted,

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Very truly yours,

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CERTIFICATE OF SERVICE

I hereby certify that on December 4, 2001, a copy of the foregoing document was served on the parties of record, via the method indicated:

[ ] Hand
[X] Mail
[ ] Facsimile
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