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February 25, 2005

Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

Re: *Petition for Interconnection by Cinergy Communications Company Against BellSouth Telecommunications, Inc.*
Docket No. 01-00987

Dear Chairman Miller:

This letter addresses the pending Motion for Summary Judgment filed by Cinergy Communications Company in the above-captioned arbitration proceeding. The TRA is scheduled to hear oral argument on the motion on February 28, 2005.

On February 18, 2005, BellSouth Telecommunications, Inc. ("BellSouth") filed with the TRA (a) a Wisconsin court decision issued last summer involving the appeal of a Wisconsin Public Service Commission decision, and (b) copies of letters to the FCC signed by members of Congress, including members from Tennessee, urging the FCC to adopt policies that spur development of broadband services. BellSouth argues in an accompanying letter that these documents support BellSouth's position in the pending Motion for Summary Judgment. Cinergy disagrees.

The Wisconsin court decision does not apply to Cinergy's Summary Judgment Motion.

(1) Neither party in the Wisconsin case raised, and the court did not address, Cinergy's principal argument that the FCC's commingling rules now require BellSouth to allow Cinergy to "combine" a UNE loop with a wholesale, special access service. That is precisely what Cinergy proposes to do here ie., to combine a UNE loop with DSL (a special access service) so that Cinergy can offer customers both voice service and high-speed data service over the same UNE loop.

(2) In the Wisconsin case, the court was reviewing a decision of the Wisconsin Public Service Commission in which Wisconsin Bell (an SBC affiliate) was ordered to provide retail internet access service to certain end users. As Cinergy has repeatedly pointed out, this case does not involve BellSouth's retail ISP service ("FastAccess"), which is not regulated, but BellSouth's wholesale DSL service, which is a regulated service.

(3) Contrary to the Wisconsin ruling, a United States District Court in Kentucky has held, in a case involving Cinergy, that the Kentucky Public Service Commission was correct in ordering BellSouth to provide

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Cinergy with DSL service over a UNE loop. That case, like this one, addressed BellSouth's wholesale DSL service, not BellSouth's retail FastAccess service. Kentucky, of course, is in the Sixth Judicial Circuit, which includes Tennessee. Wisconsin is not.

(4) The Wisconsin decision holds that, when a Bell carrier is ordered to provide broadband internet access over a UNE loop, that is no different than ordering the Bell carrier to split the loop with a CLEC, a remedy which the FCC has expressly rejected. As Cinergy has previously noted, however, the FCC's rules on commingling specifically allow Cinergy to combine BellSouth's DSL service with a UNE loop. Moreover, as the California Public Utilities Commission ruled last summer, the relief requested by Cinergy is not equivalent to an order directing the incumbent to split the loop with a CLEC. When the CLEC leases a UNE loop, the CLEC controls the entire loop. It is the CLEC, not the incumbent, that is electing to split the loop and to provide both voice and broadband data service over the same loop. The incumbent is not being asked to split the loop, only to continue selling its wholesale DSL transmission service to the CLEC and to allow the CLEC to commingle the DSL service on the UNE loop. A copy of the California decision has previously been filed with the TRA.

BellSouth also filed with the TRA copies of letters from Congress to the FCC which discuss generally the deployment of broadband capabilities but do not address the issue before the Authority. This filing is clearly improper and should be struck from the record. Rule 27(d) of the Tennessee Rules of Appellate Procedure provides for the "citation of supplemental authorities" which are those "pertinent and significant authorities" which "come to the attention of a party" after briefs have been filed. While court decisions, such as the Wisconsin case, qualify as "authorities," letters from Congress to the FCC are not, even arguably, included under this rule. BellSouth must know that such filings, which are evidently intended to lobby the Authority, are inappropriate in a contested case proceeding. The TRA should disregard them. Finally, one cannot help but note the irony of BellSouth's argument: the letters from Congress encourage the wide development of broadband services yet BellSouth, in this case, refuses to make broadband service available to a customer simply because the customer has chosen to receive voice service from a CLEC over a UNE loop.

For these reasons, BellSouth's February 18 filings should carry no weight in this proceeding.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

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2/25/2005