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March 2, 2005

Director Deborah T. Tate
Tennessee Regulatory Authority
460 James Robertson Pkwy.
Nashville, TN 37243

Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*
Docket Number: 04-00381

Dear Director Tate :

Attached to this letter is an emergency motion filed in the above-captioned proceeding by Cinergy Communications Company ("CCC"). The motion is filed in response to BellSouth's threat to stop accepting new orders for certain UNEs effective March 11, 2005. This letter is directed to you as Hearing Officer in this docket. As you know, other competitive carriers have filed similar motions asking the Authority to direct BellSouth to continue accepting new UNE orders pending the outcome of this docket which was opened to address the impact of the FCC's new unbundling rules and other federal decisions.

The Authority's next regularly scheduled agenda conference is March 14, 2005. BellSouth has threatened to begin refusing new orders on March 11, 2005. In order for the panel assigned to this docket to address the pending petitions for emergency relief, CCC asks that you, as Hearing Officer, issue an interim order directing BellSouth to maintain the status quo pending a ruling by the panel on these petitions.[1]

Since you have already scheduled a pre-hearing conference in this docket on March 8, 2005, CCC suggests that, unless BellSouth will voluntarily agree to extend the March 11 deadline, that you hear argument on the 8th regarding this request.

Very truly yours,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: Henry Walker KG
Henry Walker

HW/djc

[1] On March 1, 2005, two other states in the BellSouth region, Georgia and Alabama, ordered that the March 11 deadline be postponed pending further state commission action. Those state actions are discussed further in this motion

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BEFORE THE
TENNESSEE REGULATORY AUTHORITY

March 2, 2005

In re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law	)))	Docket No. 04-00381

CINERGY COMMUNICATIONS COMPANY'S MOTION FOR EMERGENCY RELIEF

Cinergy Communications Company ("CCC") respectfully moves that the Tennessee Regulatory Authority ("TRA" or "Authority") grant CCC emergency relief and issue an Order preventing BellSouth Telecommunications, Inc. ("BellSouth") from rejecting UNE-P orders as of March 11, 2005, as set out in BellSouth's February 11, 2005 Carrier Notification letter. BellSouth's threat, if carried out, will cause irreparable harm to CCC and will breach BellSouth's currently effective, TRA-approved interconnection agreement ("Agreement") with CCC.[1] In order to avoid the harm to CCC and to the public interest that will result from BellSouth's threatened actions, CCC requests that the Authority issue an emergency, interim Order directing BellSouth to continue accepting and processing CCC's UNE-P orders, as well as orders for other UNEs provided by the Agreement (including moves, adds, and changes to CCC's existing embedded customer base) under the rates, terms and conditions of the Agreement, until the parties agree to amend the Agreement or until otherwise ordered by the Authority pursuant to the change-of-law provision in the Agreement.

[1] The parties are operating under an Interconnection Agreement, which expired on November 29, 2001, as well as an Interim Agreement, approved by the Authority in Docket No 02-01316, until the issues in Docket No 01-00987 are resolved and the parties enter into a new Interconnection Agreement. These two agreements will collectively constitute the "Agreement."

INTRODUCTION

This docket was opened in response to a petition filed by BellSouth on October 29, 2004, asking the Authority to establish a generic proceeding to "determine what changes recent decisions from the Federal Communications Commission ("FCC") ... require in existing approved interconnection agreements between BellSouth and competitive local exchange carriers ("CLECs") in Tennessee." BellSouth Petition at 1. In filing the petition, BellSouth acknowledged both the role of the CLECs and the Authority in determining how changes in law shall be incorporated into existing contractual relationships with CLECs. According to BellSouth, "a generic proceeding should work to the benefit of the CLECs as well as the Authority and BellSouth, since everyone will have an opportunity to be heard on the issues before these matters are initially decided." *Id.* Anticipating the issuance of the "Final FCC Unbundling Rules" (the *Triennial Review Remand Order* or *TRRO*[2]), BellSouth's petition listed as "Issue No. 1" the determination by the TRA as to whether or not the parties' interconnection agreements should be "deemed amended on the effective date" of the FCC Order.

Following the issuance of the *TRRO*, however, BellSouth unilaterally decided that it was no longer necessary to involve the CLECs or the TRA in deciding when and how to implement the FCC's new rules. Instead, BellSouth issued a Carrier Notification letter to CCC and other CLECs which states that BellSouth will reject all UNE-P orders beginning March 11, 2005, without regard to the provisions of the Agreement with CCC. The same letter states that BellSouth will stop providing high capacity UNE loops, including copper loops capable of providing High-bit Rate Digital Subscriber Line (HDSL) services, in certain central offices and

[2] In the Matter of Unbundled Access to Network Elements, WC Docket No 04-313, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No 01-338, Order on Remand, (rel. February 4, 2005)

that BellSouth will stop providing UNE transport between certain central offices. The letter does not identify those offices.[3] BellSouth appears determined to impose these determinations without consideration of the views of any other carrier or the Authority.

BellSouth's refusal to abide by the terms of the Agreement, especially the refusal to accept UNE orders, could paralyze CCC's business operations by precluding it from performing basic services for its existing, embedded customer base, such as requests to make moves, adds, or changes to the customers' existing accounts, as well as by prohibiting CCC from obtaining new customers. Additionally, BellSouth's unilateral proclamations that it will reject UNE-P orders on March 11, 2005 will breach CCC's Agreement in at least three respects: (i) by rejecting UNE-P orders that BellSouth is obligated by the Agreement to accept and process; (ii) by refusing to comply with the change of law procedure established by the Agreement; and (iii) by refusing to process new orders that CCC is entitled to place by purchasing unbundled local switching under Section 271 of the Federal Act. Nothing in the *TRRO* excuses or justifies BellSouth's stated intention of rejecting CCC's UNE-P orders beginning March 11, 2005 and ignoring the change of law process with respect to such UNE-P orders.

CCC wishes to continue placing UNE-P orders (including orders to make moves, adds, or changes to the accounts of CCC's existing, embedded customers) in Tennessee after March 11, 2005. Unless the Authority declares that BellSouth may not reject such UNE-P orders, and instead must comply with the change of law provision in its Agreement, CCC will sustain immediate and irreparable injury. Tennessee consumers currently benefiting from the local

[3] On Friday, February 18, 2005, BellSouth Telecommunications, Inc. ("BellSouth") made a filing with the Federal Communications Commission ("FCC"), which listed the BellSouth end offices affected by the FCC's recently issued unbundling rules. Whether BellSouth's list is accurate has yet to be determined Notably, in the cover letter attached to BellSouth's FCC filing, BellSouth states that state public service commissions should have no role in this determination.

service CCC offers in Tennessee also will be injured by BellSouth's planned illegal actions. CCC therefore requests that the Authority consider this matter on an emergency basis and order BellSouth to honor its agreement until the agreement has been amended or the TRA orders otherwise.

PARTIES

1. CCC has been granted a Certificate of Convenience and Necessity by the Authority, and CCC is authorized to provide local exchange service in Tennessee. CCC is a "telecommunications carrier" and "local exchange carrier" under the Telecommunications Act of 1996 ("Federal Act").

2. BellSouth has been granted a Certificate of Convenience and Necessity by the Authority, and it provides local exchange service in Tennessee as an incumbent local exchange carrier ("ILEC"), as defined in Section 251(h) of the Telecommunications Act of 1996.

JURISDICTION

3. CCC and BellSouth are subject to the jurisdiction of the Authority with respect to the matters raised in this Motion.

4. The Authority has jurisdiction with respect to the matters raised in this Motion under T.C.A. § 65-4-119 and under 47 U.S.C. § 251(d) (3) (conferring authority to State commissions to enforce any regulation, order or policy that is consistent with the requirements of Section 251).

FACTS

5. CCC has entered into an interconnection agreement with BellSouth. The Agreement was approved by the Authority. *See* footnote 1, *supra*. The Agreement generally

provides that BellSouth shall provision unbundled network elements including switching loops, transport and UNE combinations, including UNE-P.

6. The Agreement also specifies the steps to be taken if a party wishes to amend the Agreement because of a change in applicable federal or state law. Section 17.3 of the Agreement states,

> In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of Cinergy Communications Company or BellSouth to perform any material terms of this Agreement, Cinergy Communications Company or BellSouth may, on fifteen (15) days' written notice require that such terms be renegotiated, and the parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event such new terms are not renegotiated within sixty (60) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in this Agreement. [See attached **Exhibit 1**].

7. When the parties are unable to agree on how to implement a change in the law, they are directed to pursue dispute resolution. Section 11 of the Agreement, entitled "Resolution of Disputes", provides,

> Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party shall petition the Commission for a resolution of the dispute. For issues over which the Commission does not have authority, the Parties may avail themselves of any available legal remedies in the appropriate forum. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement. Furthermore, the Parties agree to carry on their respective obligations under this Agreement, while any dispute resolution is pending. [See attached **Exhibit 1**].

8. In August 2003, the FCC released its Triennial Review Order ("*TRO*"), which found impairment nationally with regard to mass market local switching, but requested a granular review by state public service commissions of the conditions for competitive local

exchange service in geographic markets in each state. These rulings were vacated and remanded by *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*") on March 2, 2004. The D.C. Circuit's mandate initially was scheduled to issue on May 1, 2004, but the court later granted an extension to June 15, 2004. During the time before the mandate issued, great uncertainty arose as to whether BellSouth would continue to process UNE-P orders.

9. The FCC issued the *TRRO* on February 4, 2005. The FCC determined, *inter alia,* that ILECs are not obligated to provide unbundled local switching pursuant to Section 251(c)(3) of the Federal Act. The *TRRO* did not address the ILECs' statutory obligation to make unbundled local switching available to CLECs pursuant to Section 271 of the Act.[4] The FCC adopted a transition plan that calls for CLECs to move to alternative service arrangements within twelve months of the effective date of the *TRRO*. *TRRO* § 227.

10. With respect to new UNE-P orders after the effective date of the *TRRO*, the FCC stated: "The transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251(c)(3) **except as otherwise specified in this Order**." *TRRO* § 227 (emphasis added).

11. The *TRRO* does not purport to abrogate the change of law provisions of carriers' interconnection agreements. To the contrary, the *TRRO* directs carriers to implement its rulings by negotiating changes to their interconnection agreements:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this

[4] The FCC had previously held that UNEs provided pursuant to § 271 must be priced at a "just and reasonable" rate consistent with §§ 201 and 202 *TRO* at ¶ 656.

> Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

TRRO § 233 (footnotes omitted.)

12. BellSouth issued Carrier Notification Letter SN91085039 on February 11, 2005. Among other things, BellSouth stated, "To be clear, in the event one of the above options [Commercial Agreement] is not selected and a CLEC submits a request for new UNE-P on March 11, 2005 or after, the order will be returned to the CLEC for clarification and resubmission under one of the available options set forth above. CLECs that have already signed a Commercial Agreement may continue to request new service pursuant to their Commercial Agreement." BellSouth made revisions to the letter on February 25, 2005 and republished the letter. A true and correct copy of the February 11, 2005 Carrier Notification SN91085039 (as republished and re-dated February 25) is attached hereto as **Exhibit 2**.

13. CCC attempted to get clarification in writing from BellSouth as to whether or not it intended to continue to accept new orders for UNE-P and other services after the effective date of the *TRRO*. CCC warned BellSouth that the Carrier Notification amounted to an anticipatory breach of the Agreement as well as a violation of the change of law and dispute resolution provisions of the Agreement. That correspondence is attached hereto as **Exhibit 3**. BellSouth did not respond to CCC's letter.

14. CCC believes that BellSouth's refusal to accept new orders will prevent CCC from obtaining new customers, and BellSouth's refusal to accept moves, adds, and changes for orders submitted on behalf of CCC's existing, embedded customer base will result in inadequate service for those existing customers. For example, if a CCC customer requests "call forwarding always" to his or her vacation home on March 1, 2005, and then asks CCC on March 12, 2005 to remove the call forwarding so that calls revert to their usual location, CCC will be unable to remove the call forwarding feature from the customer's account because of BellSouth's rejection of CCC's change request. Likewise, a growing business customer that is expanding its workforce or relocating across the street will not be able to add lines or move its service. Under all of these examples, the only solution for the customer is to terminate CCC's service and request service from BellSouth.

15. The parties' Agreement requires BellSouth to provide UNE-P to CCC at the rates specified in the Agreement. Unless and until the Agreement is amended pursuant to the change of law process specified in the Agreement, BellSouth must continue to accept and provision CCC's UNE-P orders at the specified rates. By stating that it will not accept UNE-P orders beginning March 11, 2005, BellSouth has signaled its intent to breach the Agreement.

16. The Agreement requires BellSouth to provide high capacity loops and transport as well as entrance facilities at the rates specified in the Agreement. Unless and until the Agreement is amended pursuant to the change of law process specified in the Agreement, BellSouth must continue to accept and provision CCC's orders for loops, transport and entrance facility at the specified rates. By stating that it will not accept these orders beginning March 11, 2005, BellSouth has signaled its intent to breach the Agreement.

17. The *TRRO* does not excuse or justify BellSouth's stated intention of refusing to accept CCC's UNE-P or other orders beginning March 11, 2005, because the *TRRO* explicitly requires that its rulings be implemented through changes to parties' interconnection agreements. Implementing the change of law with respect to new UNE-P orders will not be an academic exercise because the parties will need to address, among other issues, BellSouth's duty to continue to provide UNE-P to CCC under Section 271 of the Federal Act.

18. The Agreement does not permit parties to implement changes in law unilaterally. To the contrary, the Agreement requires that a party wishing to implement a change in law take specified steps, including (i) ensuring that the governmental action in question has taken effect; (ii) providing notice of the change of law to the other party; (iii) undertaking negotiations for the specified period; and (iv) if necessary, pursuing dispute resolution. By stating its intention to ignore the change of law provision in the parties' Agreement and take unilateral action to modify that Agreement, BellSouth has signaled its intent to breach the Agreement.

19. The *TRRO* does not excuse or justify BellSouth's failure to comply with the change of law provisions of the Agreement. The *TRRO* requires that parties "implement the Commission's findings" by making "changes to their interconnection agreements consistent with our conclusions in this Order." *TRRO* § 233. The *TRRO* does not exclude its provisions relating to new UNE-P orders from this requirement. Although some interconnection agreements may permit BellSouth to implement changes in law immediately, the Agreement between BellSouth and CCC does not. Under the *TRRO* and the Agreement, therefore, BellSouth must undertake the change of law process to implement the changes specified in the *TRRO* with respect to (among other issues) new UNE-P orders.

BELLSOUTH'S INDEPENDENT DUTY TO PROVIDE UNE-P UNDER SECTION 271 OF THE FEDERAL ACT

20. Even if BellSouth were empowered by the *TRRO* unilaterally to change CCC's rights that arise out of section 251(c)(3) (which it is not), BellSouth would not be entitled to refuse to accept new UNE orders because Section 271 of the Act independently supports CCC's right to obtain UNEs and UNE combinations from BellSouth at just and reasonable rates.

21. As the FCC affirmed in the *TRO,* so long as BellSouth wishes to continue to provide in-region interLATA services under section 271 of the 1996 Act, it "must continue to comply with any conditions required for [§271] approval" (*TRO* § 665), and that is so whether or not a particular network element must be made available under Section 251. One of the central requirements of Section 271 is that a Bell Operating Company enter into "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", including loops, transport, and switching. § 271(c)(1)(A) and (c)(2)(A)(ii). To satisfy the requirements of Section 271, the interconnection agreement must provide these network elements at a rate deemed just and reasonable. *TRO,* ¶¶ 662-664.

22. There is thus a tangible basis for negotiation and dispute resolution regarding BellSouth's continuing obligation to provide Section 271 local switching as part of the UNE-P combination. Although the FCC in the *TRO* declined to require BellSouth to combine Section 271 local switching with other UNEs pursuant to section 251(c)(3) (*see TRO* ¶ 655 & n. 1989), and that decision was upheld in *USTA II*, the D.C. Circuit noted that the general nondiscrimination requirement of section 202 could provide an independent basis for requiring the combination of Section 271 switching with other UNEs. *USTA II*, 359 F.3d at 590. This is but one issue for negotiation and dispute resolution.

23. Providing unbundled mass market switching in isolation provides nothing of value to CLECs because BellSouth owns the loop plant that serves consumers in its service territory. If BellSouth were to provide unbundled switching to CLECs in isolation, while providing switching to its retail business combined with all the other elements needed to provide service, BellSouth would discriminate against CLECs in violation of Section 202 of the Federal Act. Thus, there is plainly a dispute between BellSouth and the CLECs regarding BellSouth's obligation to provide Section 271 switching in combination with the other elements that make up UNE-P. As noted above, the Authority has necessarily determined that the UNE rates in the Agreements are "just and reasonable" under Tennessee law. CCC submits, therefore, that until the Authority or the FCC reaches some other conclusion, the rates in the Agreement should be determined to be "just and reasonable" under section 271. If BellSouth disagrees, its remedy is not to unilaterally cease provisioning UNE-P effective March 11, 2005, but rather to initiate proper change of law and dispute resolution processes with CCC to address its concerns.

DECISIONS IN OTHER JURISDICTIONS

24. *Georgia.* On March 1, 2005, the Georgia Public Service Commission ("GPSC") adopted the GPSC Staff Recommendation in GPSC Docket No. 19341-U, *Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements* ("*GA Order*").[5] The *GA Order* finds that the parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *TRRO* and that BellSouth could not unilaterally modify those interconnection agreements via the Carrier Notification Letters it transmitted to CLECs. *See GA Order* at 1, 3-4. The GPSC noted the language of

[5] In the case of the *GA Order*, a copy of the actual order will not be available for approximately a month, so CCC has attached, as **Exhibit 4**, a copy of the Staff Recommendation approved by a 5-0 vote. CCC will supplement this filing with the formal order when it becomes available.

Paragraph 233 of the *TRRO* in finding that "the *TRRO* could not be read to abrogate the rights of the parties related to the change in law provisions of their agreements. To the contrary, parties are directed to implement the rulings of the *TRRO* into their agreements through negotiation." *Id.* at 4.

25. The GPSC further disputed BellSouth's assertion that the *TRRO* permitted (or required) the unilateral action taken by BellSouth regarding new UNE-P orders after March 11, 2005, finding that "[n]othing about the transition period has any bearing on the application of the change of law provision to the question of 'new adds' after March 11." *Id.* at 4-5. Instead, the GPSC stated that "[i]t is not reasonable to construe this language [of Paragraph 235 of the *TRRO*] as indicative of intent to abrogate the parties' interconnection agreements." *Id.* at 4. The GPSC also adopted the following recommendation from Staff:

> BellSouth also relies upon the use of the term "self-effectuating" in paragraph 3 of the TRRO. However, BellSouth does not characterize this paragraph accurately. BellSouth states that the use of the term "self-effectuating" refers only to "new adds." (Response, p. 2). That is not a distinction the FCC makes. The FCC simply states that the impairment framework is, *inter alia*, "self-effectuating." (TRRO, 3). BellSouth must acknowledge that for the embedded customer base subject to the transition period the order recognizes the need for negotiations to implement the provisions into interconnection agreements. Therefore, unless it can link the FCC's use of the term "self-effectuating" solely to the "new adds," its argument cannot prevail. It cannot do so convincingly; however, and its argument on this issue must fail.

Id. at 5.

26. *Michigan.* The Michigan Public Service Commission's ("MPSC") February 28, 2005 "Order Commencing a Collaborative Proceeding" in MSPC Case Nos. U-12320 and U-14447, *In the matter, on the Commission's own motion, to consider Ameritech Michigan's compliance with the competitive checklist in Section 271 of the federal Telecommunications Act of 1996* and *In the matter, on the Commission's own motion, to commence a collaborative*

proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC Michigan and Verizon ("*MI Order*") found [6] that the Michigan CLECs' objections to SBC's February 10th and 11th Accessible Letters "have merit," and noted that Paragraph 233 of the FCC's *TRRO:*

> ... indicates that *the FCC did not contemplate that ILECs may unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings* in the February 4 order. It also indicates that this Commission has an important role in the process by which ILECs and CLECs resolve their differences through good faith negotiations. Indeed, the Commission was specifically encouraged by the FCC to monitor implementation of the Accessible Letters issued by SBC and Verizon to ensure that parties do not engage in unnecessary delay.[7]

Thus, the MPSC found that SBC's unilateral actions in the February 10th and 11th Accessible Letters were improper, and that as part of the collaborative process established to implement those letters, "the Commission observes that the change of law provisions contained in the parties' interconnection agreements must be followed." *MI Order* at 6.

27. *Texas.* The Public Utility Commission of Texas' ("PUCT") February 25, 2005 "Order No. 39 Issuing Interim Agreement Amendment" in PUCT Docket No. 28821, *Arbitration of Non-Costing Issues for Successor Interconnection Agreements to the Texas 271 Agreement* ("*TX Order*")[8] reflects the PUCT's finding that SBC Texas must continue to perform moves, changes and new adds for Texas CLECs' existing embedded customers throughout the duration of the FCC-prescribed 12-month transition period, which Joint CLECs have asked this Commission to order. *See TX Order* and § 1.3.2 of attached "Interim Agreement Amendment with UNE Conforming Language to Interconnection Agreement – Texas". The *TX Order* also

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[6] Although the findings of the *MI Order* on tariffing are based, in part, on Michigan-specific authority, its recognition of the FCC's pronouncements on the necessity of following change-of-law processes are not. A copy of the *MI Order* is attached as **Exhibit 5**.

[7] *See MI Order* at 5-6 (emphasis added).

[8] A copy of the *TX Order* is attached as **Exhibit 6**.

specifically refrains from making any findings contrary to the Texas CLECs as to SBC Texas' obligations to provide certain network elements pursuant to Section 271 of the Federal Telecommunications Act of 1996, instead deferring those issues to be addressed pursuant to an existing docket schedule. *Id.* at § 5.[9]

28. *Alabama.* On March 1, 2005, the Alabama Public Service Commission voted 3-0 to require BellSouth to continue accepting CLEC UNE-P orders until a future monthly commission meeting, the next of which is scheduled for early April.

CONCLUSION

WHEREFORE, for the foregoing reasons, CCC respectfully requests that the Authority:

(1) Order BellSouth to continue accepting and processing CCC's UNE-P orders, including new orders, moves, adds, and changes to CCC's existing embedded customer base, under the rates, terms and conditions of the Agreement;

(2) Order BellSouth to continue accepting and processing CCC's loops, transport, and EEL orders under the rates, terms and conditions of the Agreement;

(3) Order BellSouth to comply with the change of law provisions of the Agreement with regard to the implementation of the *TRRO*;

(4) Order such further relief as the Authority deems just and appropriate.

[9] While the *TX Order* did not require SBC Texas to continue providing the UNE-Platform to Texas CLECs for new customers after March 11, 2005, the Texas situation is distinct in that the generic Texas interconnection agreement applicable to the Texas CLECs (known as the T2A) has expired.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

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Cinergy Communications Company

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing is being forwarded via U.S. mail, to:

Guy Hicks
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Charles B. Welch, Jr.
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618 Church Street, Ste. 300
Nashville, TN 37219

on this the 2nd day of March 2005.

Henry Walker

EXHIBIT 1

10.6 The disclosure of Information neither grants nor implies any license to the Recipient under any trademark, patent, copyright, or application which is now or may hereafter be owned by the Discloser.

10.7 Survival of Confidentiality Obligations. The Parties' rights and obligations under this Section 10 shall survive and continue in effect until two (2) years after the expiration or termination date of this Agreement with regard to all Information exchanged during the term of this Agreement. Thereafter, the Parties' rights and obligations hereunder survive and continue in effect with respect to any Information that is a trade secret under applicable law.

10.8 Assignments

10.9 Any assignment by either Party to any non-affiliated entity of any right, obligation or duty, or of any other interest hereunder, in whole or in part, without the prior written consent of the other Party shall be void. A Party may assign this Agreement or any right, obligation, duty or other interest hereunder to an Affiliate of the Party without the consent of the other Party; provided, however, that the assigning Party shall notify the other Party in writing of such assignment thirty (30) days prior to the Effective Date thereof and, provided further, if the assignee is an assignee of Cinergy Communications Company, the assignee must provide evidence of Commission CLEC certification. The Parties shall amend this Agreement to reflect such assignments and shall work cooperatively to implement any changes required due to such assignment. All obligations and duties of any Party under this Agreement shall be binding on all successors in interest and assigns of such Party. No assignment or delegation hereof shall relieve the assignor of its obligations under this Agreement in the event that the assignee fails to perform such obligations.

11. Resolution of Disputes

11.1 Except as otherwise stated in this Agreement, if any dispute arises as to the interpretation of any provision of this Agreement or as to the proper implementation of this Agreement, the aggrieved Party shall petition the Commission for a resolution of the dispute. For issues over which the Commission does not have authority, the Parties may avail themselves of any available legal remedies in the appropriate forum. However, each Party reserves any rights it may have to seek judicial review of any ruling made by the Commission concerning this Agreement. Furthermore, the Parties agree to carry on their respective obligations under this Agreement, while any dispute resolution is pending.

12. Taxes

12.1 Definition. For purposes of this Section, the terms "taxes" and "fees" shall include but not limited to federal, state or local sales, use, excise, gross receipts or other

16. Adoption of Agreements

16.1 BellSouth shall make available, pursuant to 47 USC § 252 and the FCC rules and regulations regarding such availability, to Cinergy Communications Company any interconnection agreement filed and approved pursuant to 47 USC § 252, during the original term of such Agreement. BellSouth shall also make available, pursuant to 47 USC § 252 and the FCC rules and regulations regarding such availability, to Cinergy Communications Company any interconnection service, network element, or combination of network elements provided under any other agreement filed and approved pursuant to 47 USC § 252 during the original term of such agreement. The Parties shall adopt all rates, terms and conditions concerning such other interconnection, service or network element and any other rates, terms and conditions that are legitimately related to or were negotiated in exchange for or in conjunction with the interconnection, service or network element being adopted. The adopted interconnection, service, network element, or combination of network elements and agreement shall apply to the same states as such other agreement. The term of the adopted agreement or provisions shall expire on the same date as set forth in the agreement which was adopted.

17. Modification of Agreement

17.1 If Cinergy Communications Company changes its name or makes changes to its company structure or identity due to a merger, acquisition, transfer or any other reason, it is the responsibility of Cinergy Communications Company to notify BellSouth of said change and request that an amendment to this Agreement, if necessary, be executed to reflect said change

17.2 No modification, amendment, supplement to, or waiver of the Agreement or any of its provisions shall be effective and binding upon the Parties unless it is made in writing and duly signed by the Parties.

17.3 In the event that any effective legislative, regulatory, judicial or other legal action materially affects any material terms of this Agreement, or the ability of Cinergy Communications Company or BellSouth to perform any material terms of this Agreement, Cinergy Communications Company or BellSouth may, on fifteen (15) days' written notice require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required. In the event that such new terms are not renegotiated within sixty (60) days after such notice, the Dispute shall be referred to the Dispute Resolution procedure set forth in this Agreement.

17.4 Notwithstanding anything to the contrary in this Agreement, this Agreement shall not be amended or modified after the expiration date hereof as set forth in Section 2 above.

18. Non-waiver of Legal Rights

EXHIBIT 2

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085039

Date. February 25, 2005

To Competitive Local Exchange Carriers (CLEC)

Subject CLECs – (Product/Service) – **REVISED** - Triennial Review Remand Order (TRRO) - Unbundling Rules (Originally posted on February 11, 2005)

On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO)

The TRRO has identified a number of former Unbundled Network Elements ("UNE") that will no longer be available as of March 11, 2005, except as provided in the TRRO These former UNEs include all switching[1], as well as certain high capacity loops in specified central offices[2], and dedicated transport between a number of central offices having certain characteristics,[3] as well as dark fiber[4] and entrance facilities[5]

The FCC, recognizing that it removed significant unbundling obligations formerly placed on Incumbent Local Exchange Carriers (ILEC), adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements [6] The FCC provided that the transition period for each of these former UNEs (loops, transport and switching), would commence on March 11, 2005 [7] The FCC made provisions to include these transition plans in existing Interconnection Agreements through the appropriate change of law provisions It also provided that rates for these former UNEs during the transition period would be trued up back to the effective date of the TRRO to reflect the increases in the prices of those former UNEs that were approved by the FCC in the TRRO

The FCC took a different direction with regard to the issue of "new adds" involving these former UNEs With regard to each of the former UNEs the FCC identified, the FCC provided that no "new adds" would be allowed as of March 11, 2005, the effective date of the TRRO For instance, with regard to switching, the FCC said, "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[8] The FCC also said "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order." (footnote omitted)[9]

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[1] TRRO, ¶199
[2] TRRO, ¶¶174 (DS3 loops), 178 (DS1 loops)
[3] TRRO, ¶¶126 (DS1 transport), 129 (DS3 transport),
[4] TRRO, ¶¶133 (dark fiber transport), 182 (dark fiber loops)
[5] TRRO, ¶141
[6] TRRO, ¶¶142 (transport), 195 (loops), 226 (switching)
[7] TRRO, ¶¶143 (transport), 196 (loops) 227 (switching)
[8] TRRO, ¶199
[9] TRRO, ¶227

The FCC clearly intended the provisions of the TRRO related to "new adds" to be self-effectuating First, the FCC specifically stated that "Given the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005 "[10] Further, the FCC specifically stated that its order would not " supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis ,"[11] but made no such finding regarding existing Interconnection Agreements Consequently, in order to have any meaning, the TRRO's provisions regarding "new adds" must be effective March 11, 2005, without the necessity of formal amendment to any existing Interconnection Agreements. Therefore, while BellSouth will not breach its Interconnection Agreements, nor act unilaterally to modify its agreements, the FCC's actions clearly constitute a generic self-effectuating change for all Interconnection Agreements with regard to "new adds" for these former UNEs

Thus, pursuant to the express terms of the TRRO, effective March 11, 2005, for "new adds," BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates or Unbundled Network Element-Platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs.

Further, effective March 11, 2005, BellSouth is no longer required to provide high capacity UNE loops, **including copper loops capable of providing High-bit Rate Digital Subscriber Line (HDSL) services**, in certain central offices or to provide UNE transport between certain central offices As of that date, BellSouth will no longer accept orders that treat these items as UNEs, except where such orders are certified pursuant to paragraph 234 of the TRRO In addition, as of March 11, 2005, BellSouth is no longer required to provide new UNE dark fiber loops or UNE entrance facilities under any circumstances and we will not accept orders for these former UNEs

Prior to the effective date of the TRRO, BellSouth will provide comprehensive information to CLECs regarding those central offices where UNE DS1, **HDSL** and DS3 loops are no longer available, and the routes between central offices where UNE DS1, DS3 and dark fiber transport are no longer available

CLECs will continue to have several options involving switching, loops and transport available to serve their new customers To this end, with regard to the combinations of switching and loops that constituted UNE-P, BellSouth is offering CLECs these options

- Short Term (3-6 month) Commercial Agreement to provide a bridge between the effective date of the Order and the negotiation of a longer term commercial agreement,
- Long Term Commercial Agreement (3 years, effective January 1, 2005, with transitional discounts available under those agreements executed by March 10, 2005)

In addition, most CLECs, if not all, already have the option of ordering these former UNEs, and particularly the combination of loops and switching, as resale, pursuant to existing Interconnection Agreements

To be clear, in the event one of the above options is not selected and a CLEC submits a request for new UNE-P on March 11, 2005 or after, the order will be returned to the CLEC for clarification and resubmission under one of the available options set forth above CLECs that have already signed a Commercial Agreement may continue to request new service pursuant to their Commercial Agreement

With regard to the former high capacity loop and transport UNEs, including dark fiber and entrance facilities, that BellSouth is no longer obligated to offer, BellSouth has two options for CLECs to consider Specifically, CLECs may either elect to order resale of BellSouth's Private Line Services or alternatively, may request Special Access service in lieu of the former TELRIC-priced UNEs Any

[10] TRRO ¶235
[11] TRRO ¶199 Also see ¶¶ 198

orders submitted for new unbundled high capacity loops and unbundled dedicated interoffice transport in those non-impaired areas after March 11, 2005, without the required certifications, will be returned to the CLEC for clarification and resubmission under one of the above options

To obtain more information about this notification, please contact your BellSouth contract negotiator

Sincerely,

ORIGNAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

EXHIBIT 3

Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214
phone 913.492.1230
fax 913.492.1684

March 2, 2005

CINERGY. COMMUNICATIONS

VIA EMAIL AND FEDERAL EXPRESS

Mr. Jerry Hendrix
Assistant Vice President
BellSouth Interconnection Services
675 West Peachtree St., N.E.
Atlanta, GA 30375

Re: Change of Law

Dear Jerry:

This responds to Amy Hindman's letter of February 23, 2005. The parties are currently involved in dispute resolution with regard to DSL over UNE-P and commingling in Kentucky in Docket 2004-00501. The commingling issue is also being resolved in Tennessee in the Section 252 arbitration that is set for hearing on Cinergy Communications' Motion For Summary Judgment.

To date, BellSouth has refused to comply with the Dispute Resolution process with regard to the Triennial Review Remand Order ("TRRO"). BellSouth's Carrier Notification of February 11, 2005 concluded that the transition plan should be self-effectuating. This unilateral action is inconsistent with the Dispute Resolution procedures contained in our Tennessee, Kentucky and region-wide interconnection agreements. Pursuant to Sections 11 and 17 of the interconnection agreements, BellSouth must give 15 day written notice of a change of law materially affecting the interconnection agreement; however, such notice cannot be given prior to March 11, 2005, the Effective Date of the TRRO. After 15 days, the parties have 60 days to negotiate an amendment. To the extent the parties cannot agree within 60 days, the aggrieved party may petition the appropriate state commission for resolution of the dispute. The commission's order is then subject to appeal to federal district court. Upon ruling by the court, the interconnection agreement will be amended.

Because BellSouth refuses to abide by the Dispute Resolution process, Cinergy Communications has been forced to seek emergency relief from the Kentucky PSC and the TRA. Despite this fact, we look forward to resolving this dispute. We remain open to negotiations and are willing to travel to Atlanta to resolve all outstanding issues. To the extent we cannot resolve these issues prior to March 10, 2005, this is to demand that,

in anticipation of litigation, BellSouth preserve all records associated with orders placed by Cinergy Communications with BellSouth on and after March 11, 2005 which are held, placed in jeopardy, held for clarification, or rejected as a consequence of the TRRO. Additionally, Cinergy Communications requests that all documents, including but not limited to, meeting minutes, emails, letters, memoranda and correspondence, in electronic format or on paper, associated with its intention to hold, place in jeopardy, hold for clarification, or reject CLEC orders as a consequence of the TRRO be preserved in anticipation of litigation. Cinergy Communications also specifically requests that BellSouth preserve any such evidence reflecting communications with other Regional Bell Operating Companies. BellSouth's stated intention to cease taking orders for certain network elements is unlawful. In order to determine damages and penalties associated with BellSouth's failure to properly accept and provision orders, as well as to determine any monopolistic intent underlying this conduct, Cinergy Communications requests that BellSouth preserve all the above-described evidence.

Very truly yours,

Robert A. Bye

Vice President and
General Counsel

cc: Amy Hindman
John Cinelli

BellSouth Interconnection Services
675 West Peachtree St., NE
Room 34S91
Atlanta, Georgia 30375

Amy Hindman
(404) 927-8998
FAX: 404 529-7839

Sent Via Certified Mail and Electronic Mail

February 23, 2005

Mr. Robert A. Bye
Vice President and General Counsel
Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214

Dear Bob:

This is in response to your letter dated February 21, 2005 to Jerry Hendrix, which is responding to my letter of February 18, 2005. As your contract negotiator, I am responding to your letter.

BellSouth appreciates the lively dialog with Cinergy in setting out the positions of both parties relating to issues, including but not limited to Digital Subscriber Lines (DSL) over Unbundled Network Element-Platform (UNE-P) in Kentucky, commingling and the Triennial Review Remand Order (TRRO). Regretfully, it is apparent each party disagrees with the other party's positions, and will be unable to reach agreement outside of the Dispute Resolution process.

BellSouth will continue to work with Cinergy to move forward in negotiations. Should you have questions, do not hesitate to contact me.

Sincerely,

Amy Hindman
Manager - Interconnection Services

cc. John Cinelli—Cinergy (via electronic mail)
Jerry Hendrix—BellSouth (via electronic mail)

Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214
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February 21, 2005

CINERGY. COMMUNICATIONS

Mr. Jerry Hendrix
Assistant Vice President
BellSouth Interconnection Services
675 West Peachtree St., N.E.
Atlanta, GA 30375

Re: Change of Law

Dear Jerry:

This is in response to Amy Hindman's letter of February 18, 2005. It is now clear from this response that BellSouth has no intention of complying with the terms of the Interconnection Agreement.[1] This is despite the fact that the Interconnection Agreement specifies the procedure that the parties are to take in the event of change of law. This response amounts to an anticipatory breach of our Interconnection Agreement.

I am compelled to respond to some of the assertions made by Ms. Hindman in her letter. Cinergy Communications attempted to verify in several letters that BellSouth would continue to comply with the terms of its Interconnection Agreement. Ms. Hindman attempts to dispute this fact by mischaracterizing the intent of Cinergy Communications' letters. The letters speak for themselves. It is clear that Cinergy Communications is and has been concerned about the ability to place new orders for UNE-P, including DSL over UNE-P. BellSouth conveniently ignores the fact that without UNE-P there can be no DSL over UNE-P.

The District Court upheld the Kentucky Public Service Commission's approval of our Interconnection Agreement. The Interconnection Agreement was sanctioned by an Order from an Article III court and cannot be collaterally attacked. We agree with Ms. Hindman's point that "rulings by the District Court have been based on the state of the law at the time and may change as the state of law changes." However, the Interconnection Agreement provides for an orderly transition process which includes notice, good faith negotiation, and arbitration if necessary. The TRRO cannot usurp the

[1] "In your February 15, 2005 letter, you disagree with BellSouth's position that per the TRRO, carriers are no longer entitled to place new orders for network elements that are no longer required to be provided pursuant to Section 251 of the Act. BellSouth fully explained its position on this issue in the Carrier Notification posted on February 11, 2005, and stands by that position."

dispute resolution provisions of the Interconnection Agreement. Therefore, we expect BellSouth to comply with the terms of the contract.

BellSouth denies that it is dragging its feet on commingling, and then proceeds to dig its heels in further. It is true that Cinergy Communications refused to accept BellSouth's "take it or leave it" offer to amend our interconnection agreement. However, that agreement was insufficient to incorporate the commingling of DSL with UNE-P or UNE-L. Since that time, Cinergy Communications has offered to negotiate this issue many times without success.

BellSouth is misinterpreting the TRO and must even rely upon misleading quotes to do so. The first two sentences of Paragraph 581 of the TRO provide as follows:

> We conclude that the Act does not prohibit commingling of UNEs and wholesale services and that section 251(c)(3) of the Act grants authority for the Commission to adopt rules to permit the commingling of UNEs and combinations of UNEs with wholesale services, including interstate access services. An incumbent LECs wholesale services constitute one technically feasible method to provide nondiscriminatory access to UNEs and UNE combinations.

Paragraph 581 then goes on to provide further justification for commingling based upon the discriminatory practices of BellSouth and other LECs:

> Thus, we find that a restriction on commingling would constitute an "unjust and unreasonable practice" under 201 of the Act, as well as an "undue and unreasonable prejudice or advantage" under section 202 of the Act. Furthermore, we agree that restricting commingling would be inconsistent with the nondiscrimination requirement in section 251(c)(3). **Incumbent LECs place no such restrictions upon themselves for providing service to any customers by requiring, for example, two circuits to accommodate telecommunications traffic from a single customer. . .**

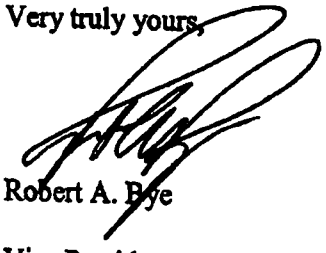
BellSouth's refusal to provide commingling results in precisely the discriminatory conduct this rule sought to prevent. BellSouth requires that DSL must be provisioned on resale lines despite the fact that BellSouth does not require this of itself. Clearly, this is just the type of abuse that this new rule sought to prevent.

BellSouth understands the plain meaning of the new commingling rule found at 47 CFR § 51.309(e) and (f). This is why BellSouth placed commingling language in its access tariff. To the extent BellSouth truly believed that commingling did not apply to DSL, it could have provided such a limitation in its tariff.

Finally, let me again state that Cinergy Communications is prepared to negotiate in good faith to bring resolution to this issue. We look forward to reviewing your proposed amendment. I would request that this time around you please forward your proposed amendment in Word version instead of an Acrobat .pdf file. Thereafter, I will

make redline changes with the "Track Changes" function of the Word software. To the extent BellSouth provides yet another "take it or leave it" amendment, we shall have no choice but reject your offer as unacceptable.

Very truly yours,



Robert A. Bye

Vice President and
General Counsel

Cc: Amy Hindman
John Cinelli

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Sent Via Certified Mail and Electronic Mail

February 18, 2005

Mr Robert A. Bye
Vice President and General Counsel
Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214

Dear Bob:

This is in response to your letter dated February 11, 2005, regarding Carrier Notification SN91085032, which sets forth BellSouth's plans to offer commercial agreements for DS0 Wholesale Local Voice Platform services, and to your letter dated February 15, 2005, regarding Carrier Notification SN91085039, which provides information relating to the Triennial Review Remand Order ("TRRO").

You state in your letter dated February 11, 2005, "We have attempted to verify on numerous occasions that BellSouth will continue to accept new Unbundled Network Element-Platform (UNE-P) orders after the effective date of the Federal Communication Commission's ("FCC") Triennial Review Remand Order ("TRRO")." This statement is inaccurate. Neither Cinergy's attempts to verify BellSouth's intentions nor BellSouth's responses thereto have related to the TRRO or BellSouth's obligation under federal law to provide UNE-P. The BellSouth letters you reference, dated December 29, 2004 and January 17, 2005, are both in response to Cinergy's correspondence regarding the change of law proceeding in Kentucky relating to Digital Subscriber Line ("DSL") over UNE-P. BellSouth continues to maintain its position that it will provide DSL over Cinergy's UNE-P circuits, pursuant to the terms of Cinergy's Kentucky Interconnection Agreement, until the earlier of execution of an amendment to comply with the change of law or a decision of the Kentucky Public Service Commission (PSC) in docket 2004-00501. The Carrier Notifications referenced in your correspondence of February 11 and February 15, 2005, do not relate to the provisions of the Interconnection Agreement regarding DSL over UNE-P or to the change of law proceeding pending in the above referenced docket.

In your February 15, 2005 letter, you disagree with BellSouth's position that per the TRRO, carriers are no longer entitled to place new orders for network elements that are no longer required to be provided pursuant to Section 251 of the Act. BellSouth fully explained its position on this issue in the Carrier Notification posted on February 11, 2005, and stands by that position.

Further, your argument that "the FCC doesn't have the power to set aside an order of an Article III court" is nonsensical. First, the District Court for the Eastern District of Kentucky (District Court) has never issued an order relating to BellSouth's obligation to provide UNE-P. Its order related only to whether the PSC's order requiring BellSouth to provide DSL services over Cinergy's UNE-P lines was entitled to deference. Second, the District Court's jurisdiction over Interconnection Agreements relates solely to the right to review whether the PSC has correctly implemented the law as it exists at the time of the review. Previous rulings by the District Court have been based on the state of the law at that time and may change as the state of law changes. In any event, the FCC's ruling in the TRRO has not set aside an order of any court.

In addition, BellSouth is not "dragging its feet on commingling" as your February 15, 2005 letter states. BellSouth requested that Cinergy execute an amendment to its Interconnection Agreement to incorporate the FCC's Triennial Review Order (TRO). In fact, it is Cinergy that has not negotiated nor executed a TRO amendment that would add to Cinergy's Interconnection Agreement, among other things, language consistent with the FCC's ruling on commingling. However, execution of a TRO amendment would not allow Cinergy to commingle wholesale DSL over UNE-loops, as you are requesting. The FCC explains in the TRO that a tariffed wholesale service is a "technically feasible method to provide nondiscriminatory access to UNEs and UNE combinations".[1] Cinergy is not seeking a method of access to UNEs, but rather is leasing a facility as a UNE, and then asking BellSouth to provide a tariffed service over the facility that it has leased This is not consistent with commingling as described in the TRO. Further, Cinergy is attempting to use the commingling provisions of the TRO to demonstrate that it is entitled to services that the FCC, in other portions of the TRO have clearly stated are not required to be provided.

Finally, you claim in your February 15, 2005 letter that Cinergy is willing to negotiate in good faith to implement a transition plan in accordance with the TRRO. BellSouth will send Cinergy an amendment in the next few weeks to incorporate this transition to other arrangements, and looks forward to executing such an amendment with Cinergy. In connection with that Interconnection Agreement amendment, BellSouth continues to offer its DS0 Wholesale Local Voice Platform Services Commercial Agreement with transitional discounts through March 10, 2005.

Please feel free to contact me with any questions.

Sincerely,

Amy Hindman
Manager - Interconnection Services

cc: John Cinelli—Cinergy (via electronic mail)
Jerry Hendrix—BellSouth (via electronic mail)

[1] TRO, ¶ 581

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February 15, 2005

CINERGY. COMMUNICATIONS

Mr. Jerry Hendrix
Assistant Vice President
BellSouth Interconnection Services
675 West Peachtree St., N.E.
Atlanta, GA 30375

Re: Carrier Notification SN91085039

Dear Jerry:

This follows our conversation of this date in which you asked me to respond in writing to the above-reference Carrier Notification issued February 11, 2005. Our objections to this Carrier Notification are set forth below. You agreed that BellSouth will provide a written response on February 22, 2005, and Cinergy Communications agrees not to pursue any legal action until after it reviews this response.

We strenuously disagree with your assertion that the TRRO "constitutes a generic self-effectuating change for all interconnection agreements." The TRRO says no such thing, and in fact says just the opposite. The TRRO transition provides that "carriers have twelve months from the effective date of this Order to modify their interconnection agreements, including any change of law process."[1] However, the FCC also provided: "Of course, the transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period."[2]

Nothing in this language remotely suggests that the TRRO was intended to supersede the dispute resolution provisions of existing interconnection agreements. To the contrary, this is a "default process" that applies to those interconnection agreements where the language is silent. In the case of Cinergy Communications, our interconnection agreement was arbitrated and upheld by a federal court. Even to the extent the TRRO required what you assert, such requirement would be illegal since the FCC doesn't have the power to set aside an order of an Article III court:

> Since neither the legislative branch nor the executive branch has the power to review judgments of an Article III court [e.g. Eastern District of

[1] TRRO ¶ 227
[2] TRRO ¶ 228

Kentucky], an administrative agency such as the FCC, which is a creature of the legislative and executive branches, similarly has no power.

Deerfield v. FCC, 992 F.2d 420 (1993). This case stands for the proposition that the FCC cannot collaterally attack an Order of a federal court. Therefore, there cannot be a unilateral or "self-effectuating" amendment, modification or reformation.

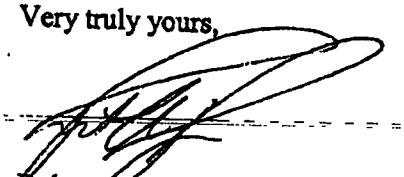
The only way that our interconnection agreement may be modified is pursuant to the terms of that agreement. As we have outlined on numerous occasions, BellSouth must provide notice and negotiate in good faith. To the extent the parties cannot agree, the commission will arbitrate the dispute and, provided that decision is upheld on appeal by the district court, the contract will be amended. The Order isn't even effective until March 11, 2005, so BellSouth intends to deny new orders before it even sends its first notice of change of law.

Cinergy Communications stands ready to negotiate in good faith to develop a transition plan. We have no desire to remain on UNE-P. We have spent the past two years investing in switching technology and building out our network, and have every intention of converting our customer base. However, BellSouth cannot simply demand this transition and then withhold our ability to commingle wholesale DSL on those UNE-L loops. BellSouth itself is causing the delay. To the extent BellSouth stops dragging its feet on commingling, I have no doubt that we can agree to transition plan.

The interconnection agreement contemplated a change of law, and it provides for an orderly transition process. Cinergy Communications negotiated for and received contract language that insures the status quo during the change of law process specifically to avoid business interruptions. BellSouth should honor its contract.

I look forward to your written response on or before February 22, 2005. As I have stated on numerous occasions, Cinergy Communications would prefer to resolve this matter through amicable negotiation. However, if that is not possible, we have no choice but to seek relief from the federal court.

Very truly yours,



Robert A. Bye

Vice President and
General Counsel

Cc: Amy Hindman
John Cinelli

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February 11, 2005

CINERGY. COMMUNICATIONS

Mr. Jerry Hendrix
Assistant Vice President
BellSouth Interconnection Services
675 West Peachtree St., N.E.
Atlanta, GA 30375

Re: Carrier Notification SN91085032

Dear Jerry:

I am in receipt of the above-referenced Carrier Notification. I understand that BellSouth will not voluntarily offer its DS0 Wholesale Local Voice Platform Services Commercial Agreement ("DS0 Agreement") at the same price which it is available today. However, this Carrier Notification also seems to suggest that BellSouth will not accept new UNE-P orders after March 11, 2005.

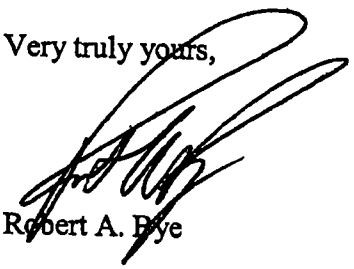
We have attempted to verify on numerous occasions that BellSouth will continue to accept new UNE-P orders after the effective date of the Triennial Review Remand Order ("TRRO"). In her letter of December 29, 2004, Amy Hindman confirmed that "BellSouth has no intentions of breaching the Interconnection Agreement, as you imply, by 'prevent[ing] new orders or otherwise interrupt[ing] Cinergy Communications' service.'" Ms. Hindman reiterated this position on January 17, 2005 by stating, "BellSouth has no intentions of breaching the Interconnection Agreement."

Despite the above reassurances, BellSouth has persisted in asserting a reservation of rights to pursue modification, reformation, or amendment of the existing Interconnection Agreement. It is our understanding that modification and/or amendment require the parties to follow sections 11 and 17 of the Interconnection Agreement. Taken together as a whole, these provisions require a written notice, good faith negotiation, commission arbitration, and judicial review before any amendment can be incorporated. Reformation is an equitable remedy based upon mutual mistake of fact which requires court intervention. None of these reserved rights entitle BellSouth to unilaterally suspend service or prevent new orders.

This is to request that BellSouth provide assurances in plain language, and without legal reservations, that it will continue to abide by the terms of the Interconnection Agreement and accept new orders after March 11, 2005. To the extent

BellSouth cannot provide this assurance without qualification or reservation within five (5) business days, Cinergy Communications will consider such action an anticipatory breach of the Interconnection Agreement. Thereafter, Cinergy Communications will take all necessary legal action to enforce its rights under the Interconnection Agreement and seek damages for BellSouth's breach.

Very truly yours,



Robert A. Bye

Vice President and
General Counsel

Cc: Amy Hindman
John Cinelli

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085032

Date: February 8, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – Commercial Agreement for BellSouth DS0 Wholesale Local Voice Platform Services

On February 4, 2005, the Federal Communications Commission (FCC) released its Order on Remand ("Order"), which, among other things, relieved Incumbent Local Exchange Carriers ("ILEC") of their obligation to provide unbundled access to mass market switching and Unbundled Network Element-Platform ("UNE-P") services, on a nationwide basis, pursuant to Section 251 of the Act. The Order establishes a twelve-month transition period commencing March 11, 2005, during which CLECs must transition their embedded base of mass market switching and UNE-P lines to alternative arrangements. The Order further precludes CLECs from adding new UNE-P lines starting March 11, 2005.

As a result of these ordered changes, BellSouth would like to inform CLEC customers that through March 10, 2005, the day before the Order becomes effective, BellSouth will continue to offer its current DS0 Wholesale Local Voice Platform Services Commercial Agreement ("DS0 Agreement") with transitional discounts off of BellSouth's current market rate for mass market platform services. As of March 11, 2005, although BellSouth will continue to offer commercial agreements for DS0 switching and platform services, the pricing set forth in the current DS0 Agreement will no longer be available.

BellSouth encourages CLECs to contact their negotiator to find out more about its DS0 Agreement while the transitional discounts remain available.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

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Sent Via Certified Mail and Electronic Mail

January 17, 2005

Mr. Robert A. Bye
Vice President and General Counsel
Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214

Dear Bob:

This is in response to your letter of January 7, 2005, and is a follow-up to our telephone conversation of January 13, 2005, regarding the Kentucky Broadband Act.

Although BellSouth has attempted to negotiate an amendment with Cinergy pursuant to change of law as a result of the Kentucky Statute KRS 278.546; Chapter 167 of the ACTS (Kentucky Broadband Act), Cinergy persists with its argument that an amendment is not needed because Digital Subscriber Line (DSL) over Unbundled Network Element (UNE-P) is commingling. BellSouth disagrees with this position, and has previously provided to Cinergy its position with regard to commingling.

In accordance with previous state Commission rulings, BellSouth has incorporated DSL over UNE-P language into Cinergy's Interconnection Agreement, regardless of appeals sought to overturn this ruling. By doing so, BellSouth fulfilled the "duty of each party to continue their respective obligations under the agreement" as you mention in your letter. Therefore, BellSouth would expect Cinergy to similarly comply with any and all rulings from the Kentucky Public Service Commission (KPSC) as a result of the decision in KPSC Docket 2004-501.

As stated to you in my letter of December 29, 2004, BellSouth has no intentions of breaching the Interconnection Agreement. However, BellSouth does intend to exercise its legal, equitable and/or regulatory rights and pursue modification, reformation or amendment of the existing Interconnection Agreement to properly reflect the Kentucky Broadband Act and current law.

As always, BellSouth stands ready to negotiate an amendment with Cinergy to comply with the ~~Kentucky Broadband~~ Act. ~~Should you wish to reconsider BellSouth's amendment, please contact~~ me at 404.927.8998. Otherwise, we will resolve the dispute at the KPSC.

Sincerely,

Amy Hindman
Manager - Interconnection Services

cc: John Cinelli—Cinergy (via electronic mail)
Jerry Hendrix—BellSouth (via electronic mail)

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phone 913.492.1230
fax 913.492.1684

CINERGY. COMMUNICATIONS

January 7, 2005

Ms. Amy Hindman
BellSouth Interconnection Services
675 West PeachTree Street, NE
Room 34S91
Atlanta, GA 30375

Re: Kentucky Broadband Act

Dear Amy:

This responds to your letter of December 29, 2004. We disagree that an amendment to our Interconnection Agreement is required. It is our position that the Kentucky Broadband Act has no material affect on the Interconnection Agreement. BellSouth has raised this issue in KPSC Docket 2004-501. Comments in that docket are due January 20, 2005, and Cinergy Communications will timely file comments therein.

Cinergy Communications has consistent stated since the release of the TRO that DSL over UNE-P is commingling. BellSouth has incorporated the commingling language of 47 CFR § 51.309 into its tariff from which Cinergy Communications purchases its DSL, but has refused to provide DSL under the tariff despite repeated attempts to negotiate this into our agreements. It is our position that a change of law based upon commingling has been properly noticed pursuant to the Interconnection Agreement and, therefore, this issue must be part of any dispute resolution process. Even if the Kentucky Broadband Act requires a change of law, it is immaterial because BellSouth's tariff would require substantially the same language.

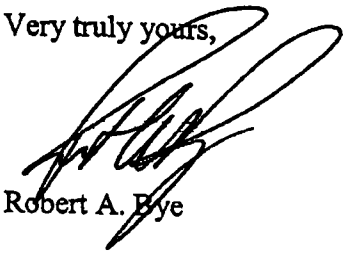
The only amendment that is necessary in Kentucky, as well as the other BellSouth states, is to add DSL over UNE-L as a service to which Cinergy Communications is entitled under the commingling language contained in BellSouth's Access Tariff. Cinergy Communications intends to seek this relief in the change of law proceedings associated with the FCC's forthcoming USTA II Order. The exception is Tennessee where a hearing on this issue scheduled in the pending Section 252 arbitration on February 28, 2005.

Your assertion regarding appeals is misguided. Section 17 references the dispute resolution procedures of Section 11 to the extent the parties cannot voluntarily agree on

an amendment. Section 11 anticipates that either party would seek judicial review of any ruling made by the Commission. The duty of each party to continue their respective obligations under the agreement while dispute resolution is pending also includes any and all appeals. Therefore, even if Cinergy Communications loses in KPSC Docket 2004-501, BellSouth will be required to provide DSL over UNE-P until all appeals are exhausted.

Based upon the above-referenced language in our Interconnection Agreement, any adverse action by BellSouth which has the effect of denying service or preventing new orders of DSL over UNE-P during the dispute resolution process, including appeals, is a knowing and intentional breach of the agreement. In the event of such a breach, Cinergy Communications shall have no choice but to seek injunctive relief as well as a claim for money damages based upon tortiuous interference with our customer contracts. Conduct yourself accordingly.

Very truly yours,



Robert A. Bye

Vice President and
General Counsel

Cc: Jerry Hendrix
John Cinelli

Cinergy Communications Company
8829 Bond Street
Overland Park, KS 66214
phone 913.492.1230
fax 913.492.1684

December 14, 2004

Mr. Jerry Hendrix
Assistant Vice President
BellSouth Interconnection Services
675 West Peachtree St., NE
Atlanta, GA 30375

CINERGY. COMMUNICATIONS

Re: Kentucky DSL over UNE-P

Dear Jerry:

Thank for taking time out to meet with me yesterday in Atlanta. We appreciate the opportunity to negotiate directly with BellSouth. It was obvious from our meeting that the parties are too far apart to reach a compromise. I look forward to resolving these issues in the Kentucky docket recently established by BellSouth, and welcome continued negotiations at any point during the dispute resolution process.

I was pleased by your reassurance that BellSouth would continue to carry on its obligations under the interconnection agreement while any dispute is pending pursuant to Section 11.1. You emphasized this point by exclaiming, "we're not lawbreakers here."

Section 11.1 of our agreement provides: "**the Parties agree to carry on their respective obligations under this Agreement, while any dispute resolution is pending.**" Please be advised that any attempt to prevent new orders or otherwise interrupt Cinergy Communications' service during the dispute resolution process (including appeals) shall constitute a material breach of the contract. Additionally, Cinergy Communications will also seek money damages for BellSouth's tortious interference with its customers.

Very truly yours,

Robert A. Bye

Vice President and
General Counsel

EXHIBIT 4

R-1. DOCKET NO. 19341-U: **Generic Proceeding to Examine Issues Related to BellSouth's Obligations to Provide Unbundled Network Elements**: Consideration of Staff's Recommendation regarding MCI's Motion for Emergency Relief Concerning UNE-P Orders. (Leon Bowles)

Summary of Staff Recommendation

1. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

2. Issues related to a possible true-up mechanism should be decided at a later time.

3. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

Background

On February 21, 2005, MCI MetroAccess Transmission Services, LLC ("MCI") filed with the Georgia Public Service Commission ("Commission") a Motion for Emergency Relief Concerning UNE-P Orders ("Motion"). The Motion asked for the following relief:

(1) Order BellSouth to continue accepting and processing MCI's unbundled network platform ("UNE-P") orders under the rates, terms and conditions of the Agreement;

(2) Order BellSouth to comply with the change of law provisions of the Agreement with regard to the implementation of the TRRO;

(3) Order such further relief as the Commission deems just and appropriate.

BellSouth Telecommunications, Inc. filed its Response in Opposition ("Response") on February 23, 2005.

MCI's Motion was in response to Carrier Notification Letters received from BellSouth Telecommunications, Inc. ("BellSouth"). The Carrier Notification Letters, in turn, were in response to the February 4, 2005, Triennial Review Remand Order issued by the Federal Communications Commission ("FCC"). The FCC determined on a nationwide basis that incumbent local exchange carriers ("ILECs") are not obligated to provide unbundled local switching pursuant to section 251(c)(3) of the Federal Telecommunications Act ("Federal Act"). (TRRO ¶ 199). For the embedded customer base, the FCC adopted a twelve-month transition period, but specified that this transition period would not permit competitive LECs ("CLECs") to add new customers using unbundled access to local circuit switching. *Id.*

MCI Motion

MCI asserted that its interconnection agreement with BellSouth includes a provision that specifies the necessary steps to be taken in the event of a change in law. (Motion, p. 4). MCI

states that on February 8, 2005, and then on February 11, 2005, it received from BellSouth Carrier Notification Letters stating that as a result of the Triennial Review Remand Order ("TRRO") it was no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost rates or unbundled network platform and as of that date, BellSouth will no longer accept orders that treat those items as unbundled network elements. *Id* at 7-8.

On February 18, 2005, MCI sent a letter to BellSouth asserting that the actions referenced in its Carrier Notification Letters would constitute breach of the parties' agreement. *Id* at 8. Specifically, MCI claims that the actions would breach the agreement (i) by rejecting UNE-P orders that BellSouth is obligated by the Agreement to accept and process; and (ii) by refusing to comply with the change of law procedure established by the Agreement. *Id.* at 1. MCI argues that the TRRO does not purport to abrogate the parties' rights under their interconnection agreement. *Id.* at 6. Therefore, MCI contends that BellSouth is required to follow the steps set forth in the parties' interconnection agreement. *Id.* at 9. The change of law provision states that in the event that "any effective and applicable . . . regulatory . . . or other legal action materially affects any material terms of this Agreement . . . or imposes new or modified rights or obligations on the Parties . . . MCIm or BellSouth may, on thirty (30) days written notice . . . require that such terms be renegotiated, and the Parties shall renegotiate in good faith such mutually acceptable new terms as may be required." (Agreement, Part A, § 2.3.)

MCI also argues that BellSouth is obligated to provide UNE-P under state law. *Id.* at 10. Finally, MCI states that section 271 of the Federal Act independently supports MCI's right to obtain UNE-P from BellSouth at the just and reasonable rates set forth in the Agreement. *Id* at 14.

BellSouth Response

BellSouth argues that the TRRO is self-effectuating, and that as of March 11, 2005 (effective date of TRRO), it does not have any obligation to provide unbundled mass market local switching. (Response, p. 3). BellSouth construes the TRRO to abrogate the change of law provisions of the parties' agreements. BellSouth argues that under the *Mobile-Sierra* doctrine the FCC has the authority to negate any contract terms of regulated carriers, under the condition that it makes adequate public findings of interest. *Id.* at 5.

BellSouth argues that MCI is not entitled to UNE-P under state law. First, BellSouth argues that the Commission has not held the necessary impairment proceedings. *Id.* at 8-9. Second, BellSouth argues the Commission is preempted from granting the relief sought by MCI on this issue. *Id. at* 9-11. Third, BellSouth states that state law does not provide for the combination of unbundled network elements. *Id* at 11.

Finally, BellSouth rebuts MCI's section 271 arguments. BellSouth claims that although it is obligated to provide unbundled local switching under section 271, switching under this code section is not combined with a loop, is subject to exclusive FCC jurisdiction and is not provided via interconnection agreements. *Id*

Staff Recommendation

1. Parties must abide by the change of law provisions in their interconnection agreements to implement the terms of the *Triennial Review Remand Order* ("TRRO").

At this time, there is no dispute between the parties as to the meaning or purpose of the change of law provision. The difference between the parties is over whether the TRRO alters the parties' rights under their interconnection agreement. That is, whether the TRRO should be construed to negate the change of law provision so that as of the effective date of the TRRO the parties rights under their agreement change. The first step in this analysis is to determine whether the FCC has the authority to issue an order that would alter the parties' rights under the interconnection agreements. If this question is answered in the affirmative, then the next question is whether the FCC exercised that authority in the TRRO with regard to the change of law provision.

BellSouth cites to the *Mobile-Sierra* doctrine in its Response. This doctrine allows for the modification to the terms of a contract upon a finding that such modification will serve the public need, and it has been held that the FCC has the authority to employ the doctrine. Cable & Wireless, P.L.C. v. FCC, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999). Therefore, it appears that the answer to the first question is that the FCC does have the authority under the proper circumstances to amend agreements between private parties.

In order to determine whether the FCC intended to employ the doctrine in this instance it is necessary to examine more closely what is required for its application. In a case involving the Federal Energy Regulatory Commission, the D.C. Circuit Court of Appeals held that it is a violation of the *Mobile-Sierra* doctrine for an agency to modify a contract without "making a particularized finding that the public interest requires modification . . ." Atlantic City Electric Company, et al. v. FERC, et al., 295 F.3d 1, 40-41 (2002). In Texaco Inc. and Texaco Gas Marketing Inc. v. FERC et al., 148 F.3d 1091 (1998), the Court of Appeals for the D.C. Circuit expanded on the high public interest standard necessary to invoke the *Mobile-Sierra* doctrine. The Court explained that the finding of public interest necessary to override the terms of a contract is "more exacting" than the public interest that FERC served when it promulgated its rules. 148 F.3d at 1097. The Court held that the public interest necessary to alter the terms of a private contract "is significantly more particularized and requires analysis of the manner in which the contract harms the public interest and of the extent to which abrogation or reformation mitigates the contract's deleterious effect." *Id.* Therefore, in order to determine whether the FCC intended to invoke the *Mobile-Sierra* doctrine, it is necessary to examine the analysis, if any, that the FCC conducted to decide whether modification of the agreements satisfied the public interest.

BellSouth's Response does not include a single reference to a statement in the TRRO that modification of the agreements was in the public interest, much less a citation to analysis of why such reformation would be in the public interest. In fact, BellSouth does not cite to any express language in the TRRO at all that says that the FCC intends to reform the contracts. Instead, BellSouth quotes the FCC's statement that the transition period "shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using

unbundled access to local circuit switching." (BellSouth Response, p. 4, quoting TRRO ¶ 199). BellSouth follows this quotation with the question, "How much clearer could the FCC be?" (Response, p. 4). The answer to this question is provided in the very order cited by BellSouth later in its brief for support that the FCC has the authority to invoke the *Mobile-Sierra* doctrine. In its *First Report and Order,* prior to addressing contracts between ILECs and commercial mobile radio service providers, the FCC explained the basis for its authority to modify contracts when such modifications served the public interest. BellSouth cites to no language in the TRRO even approaching that level of clarity.

Even if the strict standard did not apply, the TRRO could not be read to abrogate the rights of the parties related to the change in law provisions of their agreements. To the contrary, parties are directed to implement the rulings of the TRRO into their agreements through negotiation.

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order. We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

(*TRRO* § 233, footnotes omitted).

If the FCC had not intended for parties to negotiate amendments related to their interconnection agreements related to new customers, then it seems likely that it would have made that exception clear in the above paragraph.

To support its position, BellSouth first cites to a portion of the order that states the requirements of the TRRO shall take effect March 11, 2005. (BellSouth Response, p. 2, citing TRRO, ¶ 235). However, examination of that paragraph makes it clear that all the FCC is addressing is that the TRRO would be effective March 11, 2005, "rather than 30 days after publication in the Federal Register." (TRRO, ¶ 235). It is not reasonable to construe this language as indicative of intent to abrogate the parties' interconnection agreements. Next, BellSouth claims that the FCC expressly stated that the TRRO would not supersede "any alternative arrangements that carriers voluntarily have negotiated on a commercial basis . . ." (BellSouth Response, pp. 2-3, quoting TRRO ¶199). BellSouth reasons that the express exemption for commercial agreements must mean that the lack of exemption for conflicting provisions in interconnection agreements means they are superseded. (Response, p.3). The flaw in BellSouth's analysis is that it fails to characterize the TRRO correctly. The FCC did not state that the TRRO would not supersede the commercial agreements; it stated that the *transition period* would not supersede the commercial agreements. (TRRO, ¶ 199). Nothing about the

transition period has any bearing on the application of the change of law provision to the question of "new adds" after March 11. Consequently, supersession is not an issue between the transition period and this application of the change of law provision.

BellSouth also relies upon the use of the term "self-effectuating" in paragraph 3 of the TRRO. However, BellSouth does not characterize this paragraph accurately. BellSouth states that the use of the term "self-effectuating" refers only to "new adds." (Response, p. 2). That is not a distinction the FCC makes. The FCC simply states that the impairment framework is, *inter alia,* "self-effectuating." (TRRO, ¶3). BellSouth must acknowledge that for the embedded customer base subject to the transition period the order recognizes the need for negotiations to implement the provisions into interconnection agreements. Therefore, unless it can link the FCC's use of the term "self-effectuating" solely to the "new adds," its argument cannot prevail. It cannot do so convincingly; however, and its argument on this issue must fail.

Finally, the Staff's recommendation is consistent with the Commission's decision in Docket No. 14361-U related to the effective date of the rates in that proceeding. In its September 2, 2003 Order on Reconsideration, the Commission held that "the rates ordered in the Commission's June 24, 2003 Order are available to CLECs on June 24, 2003, *unless the interconnection agreement indicates that the parties intended otherwise.*" (Order on Reconsideration, p. 4) (emphasis added). That this ordering paragraph contemplated consideration of change of law provisions was demonstrated in Docket No. 17650-U, *Complaint of AT&T Communications of the Southern States, LLC of the Southern States, LLC Against BellSouth Telecommunications, Inc.* In its Order Adopting Hearing Officer's Initial Decision, the Commission concluded that the change of law provision in the parties' interconnection agreement applied, and justified an effective date other than June 24, 2003. In its brief in that docket, BellSouth, then in a position to benefit from the application of the change of law provision, stated that, "The change-in-law provision contains specific steps which the parties must follow to change the terms, when a regulatory action materially affects any material terms of the Agreement." (BellSouth Brief in Support of its Motion to Dismiss and Response to Complaint and Request for Expedited Review, p. 3). The Commission agreed with this argument raised by BellSouth in that docket. The Staff believes that it would be consistent to apply that reasoning in this instance as well.

2. Issues related to a possible true-up mechanism should be decided at a later time.

Staff recommends that the Commission defer ruling on the question of a true-up mechanism until after it has had the opportunity to consider the issues more closely. This matter is being brought before the Commission on an expedited basis. While it is necessary for the Commission to resolve the issue related to the change of law provisions prior to March 11, 2005, the same urgency does not apply to the issue of a true-up mechanism. Prior to voting on this issue, it may be of assistance for the Commission to confirm that it has the benefit of all the arguments related to the appropriateness and operation of a true-up mechanism as well as any other potential issues involved. Staff intends to bring this issue back before the Commission in a timely manner.

3. Issues related to BellSouth's obligations to continue to provide mass market unbundled local switching under either Georgia law or section 271 should be resolved by the Commission in the regular course of this docket.

The Order Initiating Docket set forth among the issues to be addressed: "whether BellSouth is obligated to provide Unbundled Network Elements ("UNEs") under section 271 of the Telecommunications Act of 1996," and "whether BellSouth is obligated to provide UNEs under Georgia State Law." Because those issues as well do not need to be decided prior to March 11, the Staff recommends that the Commission decide those issues in the regular course of this docket.

EXHIBIT 5

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to consider Ameritech Michigan's compliance with the competitive checklist in Section 271 of the federal Telecommunications Act of 1996.	Case No. U-12320
In the matter, on the Commission's own motion, to commence a collaborative proceeding to monitor and facilitate implementation of Accessible Letters issued by SBC Michigan and Verizon.	Case No. U-14447

At the February 28, 2005 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. J. Peter Lark, Chair
Hon. Robert B. Nelson, Commissioner
Hon. Laura Chappelle, Commissioner

ORDER COMMENCING A COLLABORATIVE PROCEEDING

On February 16, 2005, MCImetro Access Transmission Services LLC (MCImetro), which is a competitive local exchange carrier (CLEC) pursuant to the federal Telecommunications Act of 1996, 47 USC 251 et seq. (FTA), filed objections to certain proposals and pronouncements made in five "Accessible Letters" dated February 10 and 11, 2005 by SBC Michigan (SBC), which is an incumbent local exchange carrier (ILEC) under the FTA. Other CLECs quickly followed suit.

On February 18, 2005, LDMI Telecommunications, Inc. (LDMI), also filed objections to the five Accessible Letters.

On February 23, 2005, Talk America Inc., filed objections to one of the five Accessible Letters.

On February 23, 2005, TelNet Worldwide, Inc., Quick Communications, Inc. d/b/a Quick Connect USA, Superior Technologies, Inc. d/b/a/ Superior Spectrum, Inc., CMC Telecom, Inc., Grid4 Communications, Inc., and Zenk Group Ltd. d/b/a Planet Access filed comments in support of the objections raised by MCImetro and LDMI.

On February 23, 2005, XO Communications, Inc. (XO), filed objections to one of the five Accessible Letters.

On February 23, 2005, SBC filed its response to the objections filed by MCImetro and LDMI.

Accessible Letter No. CLECAM05-037 (AL-37), which is dated February 10, 2005, states that SBC will be withdrawing its wholesale unbundled network element (UNE) tariffs "beginning as early as March 10, 2005." AL-37, p.1. Accessible Letter No. CLECALL05-017 (AL-17) and Accessible Letter No. CLECALL05-018 (AL-18), which are each dated February 11, 2005, state that SBC will not accept new, migration, or move local service requests (LSRs) for mass market unbundled local switching (ULS) and unbundled network element-platform (UNE-P) on or after March 11, 2005, notwithstanding the terms of any interconnection agreements or applicable tariffs. In AL-18, SBC additionally states that effective March 11, 2005, it will begin charging CLECs a $1 surcharge for mass market ULS and UNE-P. Accessible Letter No. CLECALL05-019 (AL-19) and Accessible Letter No. CLECALL05-020 (AL-20), which are each dated February 11, 2005, state that as of March 11, 2005 SBC will no longer accept new, migration, or move LSRs for certain DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops. Also, in AL-20, SBC states that beginning March 11, 2005, it will be

charging increased rates for the embedded base of DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops.[1]

The CLECs maintain that SBC has no unilateral right to change its wholesale tariffs. According to them, the Commission established a procedure in Case No. U-12320 whereby SBC must provide the CLECs with a 30-day notice of its intent to change any of its tariff provisions. The CLECs also point out that the Commission allowed a CLEC to object to SBC's proposed actions within two weeks of SBC's notice. In short, the CLECs insist that SBC may not unilaterally revise the rates, terms, and conditions under which SBC provisions wholesale telephone services. The CLECs seek a Commission order (1) establishing a proceeding to address the changes proposed by SBC, (2) prohibiting SBC from withdrawing its wholesale tariff until completion of this proceeding, (3) compelling SBC to honor its tariffs and interconnection agreements as they presently exist, (4) barring SBC from enforcing or implementing the Accessibility Letters until issuance of a final order in this proceeding, (5) directing SBC to continue to accept and provision new, migration, or move LSRs for mass market unbundled local switching (ULS) and unbundled network element-platform (UNE-P) until further order of the Commission, (6) directing SBC to continue to accept and provision new, migration, or move LSRs for certain DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops until further order of the Commission, and directing SBC not to increase the rates it charges for UNE-P, DS1 and DS3 high capacity loops, DS1 and DS3 dedicated transport, dark fiber transport, and dark fiber loops until further order of the Commission.

[1]Although not contained in the record of the Case No. U-12320 docket, which is limited to consideration of issues related to Ameritech Michigan's compliance with the competitive checklist in Section 271 of the FTA, the Commission is also aware that Verizon has issued at least two similar Accessible Letters. The arguments raised by the CLECs with regard to SBC's proposed actions apply with equal force to the actions proposed by Verizon.

SBC responds by arguing that the modifications set forth in its Accessibility Letters are fully consistent with the Federal Communications Commission's (FCC) recent February 4, 2005 order regarding unbundling obligations of ILECs[2] and must therefore be honored by the CLECs and the Commission. According to SBC, the CLECs' objections are directly contrary to the recent rulings of the FCC. SBC states that the FCC has established a nationwide bar on unbundling as follows:

1. An ILEC is not required to provide access to local circuit switching on an unbundled basis to requesting telecommunications carriers for the purpose of serving end-user customers using DS0 capacity loops. 47 C.F.R. § 51.319(d)(2)(i).

2. Requesting carriers may not obtain new local switching as an UNE. *Id.* § 51.319(d)(2)(iii).

3. ILECs have no obligation to provide CLECs with unbundled access to mass market local circuit switching. *TRO Remand Order* ¶ 5.

4. The FCC's transition plan does not permit CLECs to add new switching UNEs. *Id.*

5. The FCC did not impose a Section 251 unbundling requirement for mass market local circuit switching nationwide. *Id.* ¶ 199.

6. The FCC found that the disincentives to investment posed by the availability of unbundled switching, in combination with unbundled loops and shared transport, justify a nationwide bar on such unbundling. *Id.* ¶ 204.

7. The FCC found that continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and therefore determined not to unbundle that network element. *Id.* ¶ 210.

8. The FCC found that unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition. *Id.* ¶ 218.

According to SBC, the FCC's unbundling bar applies with equal force to network elements, such as shared transport, which can only be provided in conjunction with switching. SBC also

[2]In the Matter of Unbundled Access to Network Elements, WC Docket No. 04-313 and Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338. *(TRO Remand Order).*

asserts that the FCC reached a similar result with regard to signaling (¶ 544) and for certain databases used in routing calls (¶ 551). Therefore, SBC maintains that, given the FCC's bar on unbundled switching, it cannot be forced to provide unbundled access to any switch-related UNEs.

SBC next argues that the Commission should reject the CLECs' efforts to link their objections to Case No. U-12320 and Section 271 of the FTA. According to SBC, the Commission has no decision making authority under Section 271. Further, SBC maintains that Section 271 focuses on "just, reasonable, and non-discriminatory" pricing rather than on total element long run incremental cost (TELRIC) pricing, which it claims will be perpetuated by adoption of the CLECs' objections. Further, SBC insists that Section 271 provides no support for continuing its required provision of UNE combinations. Finally, SBC argues that the Commission and the CLECs are powerless to ignore the FCC's holdings or otherwise delay SBC's implementation of the FCC's pricing determinations.

The Commission finds that the objections filed by the CLECs have merit. In Paragraph No. 233 of the FCC's February 4 order, the FCC stated:

> We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act. *Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.* We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes. We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. *We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.* Paragraph No. 233 (Emphasis added).

The emphasized portion of Paragraph No. 233 indicates that the FCC did not contemplate that ILECs may unilaterally dictate to CLECs the changes to their interconnection agreements necessary to implement the FCC's findings in the February 4 order. It also clearly indicates that

this Commission has an important role in the process by which ILECs and CLECs resolve their differences through good faith negotiations. Indeed, the Commission was specifically encouraged by the FCC to monitor implementation of the Accessible Letters issued by SBC and Verizon to ensure that parties do not engage in unnecessary delay. In addition, Paragraph No. 234 of the FCC's order indicates that SBC must immediately process a request for access to a dedicated transport or high capacity loop UNE and it can challenge the provision of such UNEs "through the dispute resolution procedures provided for in its interconnection agreements."

Given the urgency of the circumstances, the Commission finds that it should immediately commence a collaborative process for implementation of Accessible Letters issued by SBC Michigan and Verizon. In so doing, the Commission observes that the change of law provisions contained in the parties' interconnection agreements must be followed.

To avoid confusion, the Commission finds that a new proceeding that is devoted specifically to its monitoring and facilitating of the implementation of the Accessible Letters issued by SBC and Verizon should be commenced. Docket items 6, 7, 8, 9, 10, 11, 12, and 13 that currently appear in Case No. U-12320 should be placed into the docket file for Case No. U-14447. All additional pleadings related to implementation of Accessible Letters issued by SBC and Verizon should also be placed solely in the docket for Case No. U-14447.

The Commission intends that the collaborative proceeding should be limited in scope and duration. The Commission has selected the Director of its Telecommunications Division, Orjiakor Isiogu, to oversee all collaborative efforts. The Commission also directs that the collaborative process be conducted in a manner that will bring it to a successful end in no more than 45 days.

During the time that the collaborative process is ongoing, the Commission directs that SBC and Verizon may bill the CLECs at the rate effective March 11, 2005, however, the ILECs may

not take any collection actions against the CLECs for the portion of the bill caused by the increase on March 11, 2005. To ensure that there will be no undue benefit to the CLECs or harm to the ILECs due to the delay associated with the collaborative process, the Commission will also direct that there will be a true-up proceeding at the end of the collaborative process that will determine how rates and charges will be adjusted retroactively to March 11, 2005.[3]

The Commission has selected Case No. U-14447 for participation in its Electronic Filings Program. The Commission recognizes that all filers may not have the computer equipment or access to the Internet necessary to submit documents electronically. Therefore, filers may submit documents in the traditional paper format and mail them to the: Executive Secretary, Michigan Public Service Commission, 6545 Mercantile Way, P.O. Box 30221, Lansing, Michigan 48909. Otherwise, all documents filed in this case must be submitted in both paper and electronic versions. An original and four paper copies and an electronic copy in the portable document format (PDF) should be filed with the Commission. Requirements and instructions for filing electronic documents can be found in the Electronic Filings Users Manual at: http://efile.mpsc.cis.state.mi.us/efile/usersmanual.pdf. The application for account and letter of assurance are located at http://efile.mpsc.cis.state.mi.us/efile/help. You may contact the Commission Staff at (517) 241-6170 or by e-mail at mpscefilecases@michigan.gov with questions and to obtain access privileges prior to filing.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1991 PA 179, as amended, MCL 484.2101 et seq.; the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 USC 151

[3] See, Paragraph 228 and footnote 630 of the FCC's February 4, 2005 order.

et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.

b. A collaborative process should be commenced in Case No. U-14447 for monitoring and facilitating the implementation of the Accessible Letters issued by SBC and Verizon.

c. Pending completion of the collaborative process, SBC and Verizon may bill the CLECs a the rate effective March 11, 2005, however, SBC and Verizon may not take any collection actions against the CLECs for the portion of the bill caused by the increase on March 11, 2005.

d. Following completion of the collaborative process, a true-up proceeding should be conducted to adjust rates and charges retroactively to March 11, 2005.

THEREFORE, IT IS ORDERED that:

A. A collaborative process is commenced in Case No. U-14447 for monitoring and facilitating the implementation of the Accessible Letters issued by SBC Michigan and Verizon.

B. Pending completion of the collaborative process and further order of the Commission, SBC Michigan and Verizon shall refraining from collecting any billed rate arising from implementation of any of the changes described in their Accessible Letters.

The Commission reserves jurisdiction and may issue further orders as necessary.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ J. Peter Lark
Chair

(SEAL)

/s/ Robert B. Nelson
Commissioner

/s/ Laura Chappelle
Commissioner

By its action of February 28, 2005.

/s/ Mary Jo Kunkle
Its Executive Secretary

EXHIBIT 6

DOCKET NO. 28821

ARBITRATION OF NON-COSTING ISSUES FOR SUCCESSOR INTERCONNECTION AGREEMENTS TO THE TEXAS 271 AGREEMENT	**§ § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER NO. 39
ISSUING INTERIM AGREEMENT AMENDMENT

Upon consideration of the parties' filings and discussion at the February 24, 2005, Open Meeting, and the expiration of the Texas 271 Agreement (T2A) and T2A-based interconnection agreements between Southwestern Bell Telephone, L.P. d/b/a SBC Texas (SBC Texas) and competitive local exchange carriers (CLECs), the Public Utility Commission of Texas (Commission or PUC) issues the attached interim agreement amendment to govern parties' contractual relationships for the period of March 1 through July 31, 2005.[1] In issuing this interim agreement amendment, the Commission finds it necessary to act to prevent a lapse in the parties' contracts that could affect telecommunications services to end-user customers pending the completion of this docket.

The PUC seeks to ensure that the aforementioned expired agreements are made current to reflect recent changes in law under the Federal Communications Commission's (FCC) *Triennial Review Order* (TRO)[2] and *Triennial Review Remand Order* (TRRO).[3] The attached interim agreement amendment represents the Commission's preliminary determinations of the impacts of the TRO and TRRO. Parties are not precluded from arguing the merits of these issues in Track II of this proceeding and as appropriate, requesting relief, including, but not limited to, seeking true-up.

SBC Texas is directed to issue the attached interim agreement amendment through an Accessible Letter to all CLECs operating under the T2A, T2A-based interconnection agreements, or the contract developed in Docket No. 24542 no later than March 4, 2005. SBC Texas is further ordered to post this interim agreement amendment in a conspicuous location on its CLEC website, with appropriate links.

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[1] The deadline of July 31, 2005 is the date under the current proposed procedural schedule by which parties expect to have completed this docket and have replacement contracts in place.

[2] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competitive Provisions of the Telecommunications Act of 1996,* and *Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket Nos. 01-388, 96-98, 98-147, Order, FCC 03-36 (Aug. 21, 2003) (*Triennial Review Order*).

[3] *Unbundled Access to Network Elements* and *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers,* WC Docket No. 01-388 and CC Docket No. 01-388, Order on Remand, FCC 04-290 (Feb. 4, 2005) (*Triennial Review Remand Order*)

SIGNED AT AUSTIN, TEXAS the 25th day of February 2005.

PUBLIC UTILITY COMMISSION OF TEXAS

JULIE PARSLEY, COMMISSIONER

PAUL HUDSON, CHAIRMAN

BARRY T. SMITHERMAN, COMMISSIONER

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INTERIM AGREEMENT AMENDMENT WITH UNE CONFORMING LANGUAGE TO INTERCONNECTION AGREEMENT - TEXAS

This Interim Agreement Amendment with UNE Conforming Language is to the approved Interconnection Agreement entered into by and between Southwestern Bell Telephone, L.P. d/b/a SBC Texas ("SBC Texas") and CLEC NAME ("CLEC").

WHEREAS, the original Agreement modified by way of this Amendment is the result of CLEC's decision to opt into the Texas 271 Agreement ("T2A") or parts thereof pursuant to Order 55 in Project 16251 dated October 13, 1999, or as a result of the Final Order issued in Docket No. 24542, as such Agreement may have been modified from time to time, and to the extent the original Agreement was only a partial election by CLEC to opt into the T2A, such Agreement may also include certain voluntarily negotiated or arbitrated appendices/provisions (hereinafter collectively "the T2A Agreement"); and

WHEREAS, the T2A Agreement expired October 13, 2003; and

WHEREAS, on April 11, 2003, SBC Texas delivered to CLEC a timely request to negotiate a successor agreement to CLEC's T2A Agreement ("Notice to Negotiate"); and

WHEREAS, Section 4.2 of CLEC's T2A Agreement provides that if either party has served a Notice to Negotiate then, notwithstanding the expiration of the T2A Agreement on October 13, 2003, the terms, conditions and prices of the T2A Agreement will remain in effect for a maximum period of 135 days after such expiration for completion of negotiations and any necessary arbitration; and

WHEREAS, a series of extensions of the T2A have occurred, and the termination of the T2A occurred as of February 17, 2005; and

WHEREAS, on January 23, 2004, SBC Texas filed its Omnibus Petition for Arbitration in Docket No. 28821 against all Texas CLECs with interconnection agreements originally expiring on October 13, 2003. Additionally, also on January 23, 2004, separate petitions of arbitration were filed against SBC Texas by the following CLECs: Stratos Telecom, Inc., Comcast Phone of Texas, LLC, Heritage Technologies, Ltd., FamilyTel of Texas, LLC and Navigator Telecommunications, LLC; Birch Telecom of Texas Ltd. L.L.P. and Ionex Communications South, Inc; CLEC Joint Petitioners; MCImetro Access Transmission Services, LLC, MCI Worldcom Communications and Brooks Fiber Communications of Texas, Inc.; Sage Telecom of Texas, L.P.; AT&T Communications of Texas, L.P., TCG Dallas and Teleport Communications Houston, Inc.; and CLEC Coalition.

WHEREAS, it appears that a successor interconnection agreement will not be approved in the Arbitration until after February 17, 2005, the termination date of CLEC's T2A Agreement; and

WHEREAS, pursuant to Order No. 34 in Docket No. 28821 and the Texas Public Utility Commission's 2/10/05 ruling extending the effective date of the T2A from 2/17/05 to 2/28/05, the Texas PUC has ordered extension of the term of CLEC's T2A agreement beyond the termination date of February 17, 2005 to February 28, 2005, and has instructed the parties to create an amendment to incorporate its decision on TRO elements Order Addressing Threshold Issues dated April 19, 2004 and Order Addressing Motion for Reconsideration of Threshold Issues dated August 18, 2004 in Docket No. 28821, along with the transition periods/pricing from the FCC's TRO Remand Order, released February 4, 2005, and scheduled to become effective March 11, 2005. The Texas PUC has stated that the amendment will, along with the CLEC's T2A agreement, Attachments 6-10, and the Arbitration Award on Track One Issues in Docket No. 28821, and the Texas UNE Rate Amendment resulting from the September 9, 2004 Revised

Arbitration Award in Docket No. 28600, govern as an interim interconnection agreement approved by the Texas PUC during the period between the TPUC-established termination of the T2A Agreement (i.e., February 28, 2005) and the earlier of: (i) the date a successor agreement between SBC Texas and CLEC is approved or is deemed to have been approved by the Texas PUC; or (ii) July 31, 2005; and

WHEREAS, the interim agreement will automatically terminate the earlier of: (i) the date a successor agreement between SBC Texas and CLEC is approved or is deemed to have been approved by the TPUC; or (ii) July 31, 2005; and full intervening law rights are available to both parties under the interim agreement notwithstanding any language in CLEC's T2A Agreement, Attachments 6-10 to the contrary;

NOW, THEREFORE, in consideration of the foregoing, and the promises and mutual agreements set forth herein, and to facilitate the orderly progress of the Arbitration to conclusion, the T2A Agreement is hereby amended, as follows, to be effective only on an interim basis, for the purposes herein expressed, and for a finite, interim term to expire the earlier of (i) the date a successor agreement between SBC and CLEC is approved or is deemed to have been approved by the TPUC; or (ii) July 31, 2005; and to make full intervening law rights available to both parties:

1. The Whereas clauses contained herein are incorporated into this Agreement.

2. The title of the T2A Agreement is hereby changed to "Interim Interconnection Agreement – Texas." All internal references to the "Agreement" are hereby changed to "Interim Agreement."

3. Sections 4 1, including Sections 4.1.1 and 4.1.2, Sections 4.2, 4.2.1 and 4.3 of the General Terms and Conditions of the Agreement are hereby deleted in their entirety and replaced with the following:

   4.1 **Effective Date and Expiration/Termination**. The Interim Agreement shall be deemed effective following approval by the TPUC and commencing on the TPUC-established termination of the T2A Agreement February 28, 2005, and shall terminate, without any further action on the part of either Party, the earlier of:

   4.1.1 The effective date of approval by the TPUC of a successor agreement to the T2A or partial-T2A Agreement(s) in the above referenced Arbitration; or
   4.1.2 The date a successor agreement between SBC and CLEC is approved or is deemed to have been approved by the TPUC; or
   4.1.3 The effective date of a written and signed agreement between the parties that the Interim Agreement is terminated; or
   4.1.4 A proper request by CLEC that the Interim Agreement be terminated (subject to CLEC's post-termination obligations, such as CLEC's payment obligation(s) and the other obligations set forth in Section 44.0 "Survival of Obligations" of the General Terms and Conditions); or
   4.1.5 Termination for any other reason, such as non-payment (as set forth in Section 10 of the General Terms and Conditions), subject to CLEC's post-termination obligations, such as CLEC's payment obligation(s) and the other obligations set forth in Section 44.0 "Survival of Obligations" of the General Terms and Conditions; or
   4.1.6 July 31, 2005.

4. Sections 2.0 and 2.1 ("Effective Date") of the General Terms and Conditions of the Agreement are deleted in their entirety.

5. Nothing in this Agreement is to be interpreted as an agreement by SBC Texas to an extension of the T2A or any Section 271 obligations. The Interim Agreement, notwithstanding any provision to the contrary, is not based upon the same consideration or conditions as the T2A Agreement, and, regardless of when this Amendment is executed or effective, it shall not have the effect of extending the T2A Agreement, even if the

Agreement contained or contains, in whole or in part, provisions identical or substantially similar to provisions contained in the T2A Agreement. Any issues relating to Section 271 and any disputed issues with respect to language in the preamble to the underlying Agreement will be addressed in the proceedings related to the Parties' successor Interconnection Agreement, and the parties reserve their rights to all arguments related to the disposition of such issues.

6. Sections 1 3, 18.2, 18.3, and 30.2 of the General Terms and Conditions of the Agreement are hereby deleted in their entirety, and replaced with the following:

2.0 Intervening Law

2.1 In entering into this Amendment and Interim Agreement, neither Party is waiving, and each Party hereby expressly reserves, any of the rights, remedies or arguments it may have at law or under the intervening law or regulatory change provisions in the underlying Agreement (including intervening law rights asserted by either Party via written notice predating this Amendment) with respect to any orders, decisions, legislation or proceedings and any remands thereof, including, without limitation, the following actions, which the Parties have not yet fully incorporated into this Agreement or which may be the subject of further review: *Verizon v. FCC, et. al*, 535 U.S. 467 (2002); *USTA, et. al* v. FCC, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA I*") and following remand and appeal, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"); the FCC's 2003 Triennial Review Order and 2005 Triennial Review Remand Order; and the FCC's Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, 16 FCC Rcd 9151 (2001), (rel. April 27, 2001), which was remanded in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

7. Sections 14.1, 14.5, and 14.8 of Attachment 6: Unbundled Network Elements are hereby deleted and Section 1.0 ("Introduction") of Attachment 6: Unbundled Network Elements of the Agreement is hereby deleted and replaced with the following:

1.0 Declassified Network Elements No Longer Required

1.1 TRO-Declassified Elements. Notwithstanding anything in this Interim Agreement, pursuant to the *TRO* and to the decision in *USTA II*, except as provided in Paragraph 3.0 below, nothing in this Interim Agreement requires SBC Texas to provide to CLEC any of the following items as an unbundled network element, either alone or in combination (whether new, existing, or pre-existing) with any other element, service or functionality: (i) entrance facilities; (ii) OCn dedicated transport; (iii) "enterprise market" local circuit switching for DS1 and higher capacity switching; (iv) OCn loops; (v) the feeder portion of the loop; (vi) any call-related database (other than the 911 and E911 databases), that is not provisioned in connection with CLEC's use of embedded base SBC Texas unbundled local circuit switching (as provided in Section 1.3, below); (vii) Operator Services and Directory Assistance that is not provisioned in connection with CLEC's use of embedded base SBC Texas unbundled local circuit switching (as provided in Section 1.3 below); (viii) Shared Transport and SS7 signaling that is not provisioned in connection with CLEC's use of embedded base SBC Texas unbundled local circuit switching (as provided in Section 1.3 below); (ix) packet switching, including routers and DSLAMs; (x) the packetized bandwidth, features, functions, capabilities, electronics and other equipment used to transmit packetized information over hybrid loops (as defined in 47 C.F.R. § 51.319(a)(2)), including without limitation, xDSL-capable line cards installed in digital loop carrier ("DLC") systems or equipment used to provide passive optical networking ("PON") capabilities; (xi) fiber-to-the-home Loops and fiber-to-the-curb Loops (as defined in 47 C.F.R. § 51.319(a)(3)) ("FTTH Loops" and "FTTC Loops"), except to the extent that SBC Texas has deployed such fiber in parallel to, or in replacement of, an existing copper loop facility and elects to retire the copper loop, in which case SBC Texas will provide nondiscriminatory access to a 64 kilobits per second transmission path capable of voice grade service over the FTTH Loop or

FTTC Loop on an unbundled basis to the extent required by terms and conditions in the Agreement.

1.1.1 SBC Texas will provide written notice to CLEC of its intention to discontinue the provision of one or more of the TRO-Declassified Elements identified in Section 1.1, above under the Agreement. During a transitional period of thirty (30) days from the date of such notice, SBC Texas agrees to continue providing such TRO-Declassified Elements under the terms of the Agreement, to the extent required by the Agreement.

1.1.1.1 Upon receipt of such written notice, CLEC will cease new orders for such network element(s) that are identified in the SBC Texas notice letter. SBC Texas reserves the right to monitor, review, and/or reject CLEC orders transmitted to SBC Texas and, to the extent that the CLEC has submitted orders and such orders are provisioned after this 30-day transitional period, such network elements are still subject to this Paragraph Section 1, including the CLEC options set forth in subparagraph 1.1.1.1.1 below, and SBC Texas's right of conversion in the event the CLEC options are not accomplished by the end of the 30-day transitional period.

1.1.1.1.1 During such 30-day transitional period, the following options are available to CLEC with regard to the network element(s) identified in the SBC Texas notice, including the combination or other arrangement in which the network element(s) were previously provided:

(i) CLEC may issue an LSR or ASR, as applicable, to seek disconnection or other discontinuance of the network element(s) and/or the combination or other arrangement in which the element(s) were previously provided; or

(ii) SBC Texas and CLEC may agree upon another service arrangement (e.g. via a separate agreement at market-based rates or resale), or may agree that an analogous resale service or access product or service may be substituted, if available.

Notwithstanding anything to the contrary in the Agreement, including any amendments to the Agreement, at the end of the thirty (30) day transitional period, unless CLEC has submitted a disconnect/discontinuance LSR or ASR, as applicable, under subparagraph (i), above, and if CLEC and SBC Texas have failed to reach agreement, under subparagraph (ii), above, as to a substitute service arrangement or element, then SBC Texas will convert the subject element(s), whether alone or in combination with or as part of any other arrangement to an analogous resale or access service or arrangement, if available, at rates applicable to such analogous service or arrangement.

1.2 TRO Remand Order – Declassified High-Capacity Loop and Dedicated Transport Elements No Longer Required. Notwithstanding anything in the Agreement, effective March 11, 2005, pursuant to Rule 51.319(a) and Rule 51.319(e) as set forth in the TRO Remand Order, the following high-capacity loop and dedicated transport elements are no longer required to be provided by SBC Texas on an unbundled basis under the Agreement, whether alone, in combination, or otherwise:

- Dark Fiber Loops;
- DS1 Loops or DS3 Loops in excess of the caps or to any building served by a wire center described in Rule 51.319(a)(4) or 51.319(a)(5), as set forth in the TRO Remand Order, as applicable;

- DS1 Dedicated Transport or DS3 Dedicated Transport in excess of the caps or between any pair of wire centers as described in Rule 51.319(e)(2)(ii) or 51.319(e)(2)(iii), as set forth in the TRO Remand Order, as applicable; and/or
- Dark Fiber Dedicated Transport, between any pair of wire centers as described in Rule 51.319(e)(2)(iv), as set forth in the TRO Remand Order.

The above-listed element(s) are referred to herein as the "Affected Loop-Transport Element(s)."

1.2.1 After March 11, 2005, pursuant to Rules 51.319(a) and (e), as set forth in the TRO Remand Order, SBC Texas shall continue to provide unbundled access to the Affected Loop-Transport Element(s) to CLEC, if and as provided by Attachment 6: UNE, only for CLEC to serve its embedded base. "Embedded base" shall refer only to Affected Loop-Transport Element(s) ordered by CLEC prior to March 11, 2005. The price for the embedded base Affected Loop-Transport Element(s) shall be the higher of (A) the rate CLEC paid for the embedded base Affected Loop-Transport Element(s) as of June 15, 2004 plus 15% or (B) the rate the state commission has established or establishes, if any, between June 16, 2004 and March 11, 2005 for the Affected Loop-Transport Element(s), plus 15%. CLEC shall be fully liable to SBC to pay such pricing under the Agreement, including applicable terms and conditions setting forth damages, interest, and/or late payment charges for failure to comply with payment terms, notwithstanding anything to the contrary in the underlying Agreement.

1.3 TRO Remand Order – Mass Market ULS/UNE-P – Notwithstanding anything in the underlying Agreement, effective March 11, 2005, pursuant to Rule 51.319(d) as set forth in the TRO Remand Order, Mass Market Local Circuit Switching, whether alone, in combination (as with UNE-P), or otherwise, is no longer required to be provided by SBC on an unbundled basis under the Agreement. Pursuant to the TRO Remand Order, "Mass Market" Local Circuit Switching means unbundled local circuit switching arrangements used to serve a customer at less than the DS1 capacity level (e.g. , 23 or fewer Local Circuit Switching DS0 ports or the equivalent switching capacity).

1.3.1 After March 11, 2005, pursuant to Rule 51.319(d)(2)(iii), as set forth in the TRO Remand Order, SBC shall continue to provide unbundled access to Mass Market Local Circuit Switching/UNE-P to CLEC, if and as provided by Attachment 6: UNE, only for CLEC to serve its embedded base. "Embedded base" shall refer only to Mass Market Local Circuit Switching/UNE-P ordered by CLEC prior to March 11, 2005. The price for the embedded base Mass Market Local Circuit Switching/UNE-P shall be the higher of (A) the rate CLEC paid for the embedded base Mass Market Local Circuit Switching/UNE-P as of June 15, 2004 *plus one dollar* or (B) the rate the state commission has established or establishes, if any, between June 16, 2004 and March 11, 2005 for the Mass Market Local Circuit Switching/UNE-P, *plus one dollar*. CLEC shall be fully liable to SBC to pay such pricing under the Agreement, including applicable terms and conditions setting forth damages, interest, and/or late payment charges for failure to comply with payment terms, notwithstanding anything to the contrary in the underlying Agreement.

1.3.2 Consistent with Paragraphs 199 and 216 of the TRO Remand Order, which recognize that CLECs must have time to transition their embedded customer-base that is served using Mass-Market Local Circuit Switching and UNE-P combinations to other facilities, including self-deployed switching and UNE loops, CLEC shall not be prohibited from ordering and SBC shall provision (i) additional UNE-P access lines to serve CLEC's embedded

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customer-base and (ii) moves and changes in UNE-P access lines to serve CLEC's embedded customer-base during the time that this Amendment is in effect.

1.4 Consistent with Paragraph 100 of the TRO Remand Order, CLEC shall have the right to verify and challenge SBC's identification of fiber-based collocation arrangements in the listed Tier 1 and Tier 2 wire centers as part of Track 2 of the Arbitration.

1.4.1 If the PUC determines that SBC's identification of fiber-based collocation arrangements is in error and if the correction of such error results in change to one or more wire center's classification as a Tier 1 or Tier 2 wire center, the rates paid by CLEC for High-Capacity Loops and Transport shall be subject to true-up.

1.5 Consistent with Paragraph 234 of the TRO Remand Order, and recognizing that the designation of wire centers as Tier 1 and Tier 2 is dependent on facts not within CLEC's knowledge or control, CLEC shall undertake a reasonably diligent inquiry and shall self-certify, based on that inquiry, that its request for a High-Capacity Loop and/or Transport is consistent with the requirements of the TRO Remand Order. SBC shall provision the requested High-Capacity Loop and/or Transport according to standard provisioning intervals and only after provisioning may it challenge CLEC's ability to obtain the High-Capacity Loop and/or Transport.

1.5.1 If it is subsequently determined that the CLEC's request for a High-Capacity Loop and/or Transport is inconsistent with the requirements of the TRO Remand Order, the rates paid by CLEC for High-Capacity Loops and Transport shall be subject to true-up.

1.5.2 Consistent with footnote 524 of the TRO Remand Order, High-Capacity Loops no longer subject to unbundling under Section 251, shall be subject to true-up to the applicable transition rate.

1.6 Consistent with Paragraph 133 of the TRO Remand Order, CLEC shall have the right to retain and obtain dark fiber transport as an unbundled network element under Section 251 only on routes for which the wire center on one end is neither Tier 1 nor Tier 2.

1.7 CONVERSIONS: CLEC shall have the right to order and SBC shall provision conversions of special access services to UNEs and UNE Combinations during the time this Amendment is in effect; provided however, that CLEC (1) satisfies the tests set out in Paragraphs 591 through 599 of the TRO and (2) the UNE or the UNE Combination requested is not subject to any of the transition plans identified in the TRO Remand Order. That is, CLEC may not seek to request the conversion of a special access circuit to a UNE or UNE combination unless the UNE itself or each of the UNEs sought to be combined is ordered to be provided on an unbundled basis in the TRO Remand Order.

1.8 COMMINGLED ARRANGEMENTS: CLEC shall have the right to order and SBC shall provision the following commingled arrangements consisting of the following High-Capacity Loops and Transport required to be unbundled under Section 251 or subject to the transition plan set out in the TRRO:

(a) UNE DS1 loop connected to:

(1) a commingled wholesale/special access 3/1 mux and DS3 or higher capacity interoffice transport;[1]
(2) a UNE DS1 transport which is then connected to a commingled wholesale/special access 3/1 mux and DS3 or higher capacity interoffice transport;
(3) a commingled wholesale/special access DS1 transport.

(b) UNE DS1 transport connected to:
(1) a commingled wholesale/special access 3/1 mux and DS3 or higher capacity interoffice transport.

(c) UNE DS3 transport connect to:
(1) a commingled wholesale/special access higher capacity interoffice transport.

1.8.1 SBC and CLEC shall establish and agree to a manual ordering process for the commingled arrangements identified in 1.6 above no later than 10 business days following the effective date of this Amendment. Commingled arrangements ordered by CLEC using the agreed-upon manual ordering process shall be provisioned within the provisioning intervals already established by SBC for the wholesale service(s) with which CLEC requests a UNE be commingled.

1.8.2 SBC shall charge the rates for UNEs (or UNE combinations) that are commingled with facilities or service obtained at wholesale (including, for example, special access services) on an element-by-element basis, and such wholesale facilities and services on a facility-by-facility, service-by-service basis.

1.8.3 The Parties agree that the list of commingled arrangements identified in 1.6 above is not a complete list of all commingled arrangements that ultimately may be made available to CLEC following the conclusion of Track 2 of the Arbitration. The Parties' disputes regarding the availability of other commingled arrangements as well as the process and procedures for ordering commingled arrangements are part of Track 2 of the Arbitration.

8 TO THE EXTENT THE UNDERLYING AGREEMENT INCLUDES LINE SHARING PROVISIONS INCLUDE THE FOLLOWING: The following provisions are hereby added to the Agreement specific to the High Frequency Portion of the Loop" ("HFPL"):

Grandfathered and New End-Users: SBC Texas will continue to provide access to the HFPL, where: (i) prior to October 2, 2003, CLEC began providing DSL service to a particular end-user customer and has not ceased providing DSL service to that customer ("Grandfathered End-Users"); and/or (ii) CLEC begins/began providing xDSL service to a particular end-user customer on or after October 2, 2003, and on or before the close of business December 3, 2004 ("New End-Users"). Such access to the HFPL shall be provided at the same monthly recurring rate that SBC Texas charged prior to October 2, 2003 and shall continue for Grandfathered End-Users until the earlier of: (1) CLEC's xDSL-base service to the end-user customer is disconnected for whatever reason, or (2) the FCC issues its Order in its Biennial Review Proceeding or any other relevant government action which modifies the FCC's HFPL grandfather clause established in its Triennial Review Order and as to New End-Users, the earlier of: (1) and (2) immediately above; or (3) October 2, 2006.

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[1] "Higher capacity interoffice transport" must include any technology that is offered or made available with that transport on a regular or routine basis, e.g., SONET. This requirement applies to all references to "higher capacity interoffice transport" in this Section 1.6

Beginning October 2, 2006, SBC Texas shall have no obligation to continue to provide the HFPL for CLEC to provide xDSL-based service to any New End-Users that CLEC began providing xDSL-based service to over the HFPL on or after October 2, 2003 and before December 3, 2004. Rather, effective October 2, 2006, CLEC must provide xDSL-based service to any such new end-user customer(s) via a line splitting arrangement, over a stand-alone xDSL Loop purchased from SBC Texas, or through an alternate arrangement, if any, that the Parties may negotiate. Any references to the HFPL being made available as an unbundled network element or "UNE" are hereby deleted from the underlying Agreement.

9. Except as prohibited or otherwise affected by the *Interim Order*, nothing in this Amendment shall affect the general application and effectiveness of the Interim Agreement's "change of law," "intervening law", "successor rates" and/or any other similar provisions and/or rights under the Interim Agreement. The rights and obligations set forth in this Amendment apply in addition to any other rights and obligations that may be created by such intervening law, change in law or other substantively similar provision.

10. This Amendment shall be deemed to revise the rates, terms and provisions of the Agreement, including without limitation all associated prices in the Agreement to the extent necessary to give effect to the terms and conditions of this Amendment. In the event of a conflict between the terms and conditions of this Amendment and the rates, terms and conditions of the Agreement, this Amendment shall govern. By way of example only, if the Agreement provides that a combination of UNEs must be provided by SBC Texas, CLEC may not obtain a combination including one or more elements affected by Section 1.0 "Declassified Elements No Longer Required," above. By way of additional example only, if the Agreement provides (or assumes) that a UNE must be provided by SBC Texas, elements affected by Section 1.0 "Declassified Elements No Longer Required" are, nonetheless, not required to be provided, except to the limited extent set forth in Section 1.0 "Elements No Longer Required" and in such case, any rates for Elements No Longer Required under the Agreement shall be deemed removed from the Pricing Schedule to the Agreement.

11. This Amendment may require that certain sections of the Agreement shall be replaced and/or modified by the provisions set forth in this Amendment including without limitation certain sections not explicitly identified in this Amendment. The Parties agree that such replacement and/or modification shall be accomplished without the necessity of physically removing and replacing or modifying such language throughout the Agreement. Rather, the Agreement shall automatically be deemed to be modified by way of this Amendment to the extent necessary to implement the provisions of this Amendment.

12. Nothing in this Amendment shall be deemed to affect the right of a Party to exercise any rights it may have under the Interim Agreement including, without limitation, its intervening law rights, any rights of termination, and/or any other rights available to either Party under the Interim Agreement.

13. Although it is not necessary to give effect to the terms and conditions of this Amendment, including pricing provisions, upon written request of either Party, the Parties may amend any and all Interim Agreement rates and/or pricing schedules to formally conform the Interim Agreement to reflect the terms and conditions of this Amendment.

14. Notwithstanding any contrary provision in the Interim Agreement, this Amendment, or any applicable SBC tariff, nothing contained in the Interim Agreement, this Amendment, or any applicable SBC tariff shall limit SBC Texas's right to appeal, seek reconsideration of or otherwise seek to have stayed, modified, reversed or invalidated any order, rule, regulation, decision, ordinance or statute issued by the Texas PUC, the FCC, any court or any other governmental authority related to, concerning, or that may affect SBC Texas's obligations under the Interim Agreement, this Amendment, any applicable SBC tariff, or applicable law.

15. PERFORMANCE MEASURES and REMEDY PLAN: The performance measures and the existing remedy plan contained in the T2A for ordering, provisioning and maintenance shall apply to all High-Capacity Loops and Transport, and all Mass-Market Switching/UNE-P access lines during the period in which this Amendment is effective.

16. In entering into this Amendment, neither Party is waiving, and each Party hereby expressly reserves, any of the rights, remedies or arguments it may have at law or under the intervening law or regulatory change provisions in the underlying Agreement (including intervening law rights asserted by either Party via written notice predating this Amendment) with respect to any orders, decisions, legislation or proceedings and any remands thereof, including, without limitation, the following actions, to the extent the Parties have not yet fully incorporated them into this Agreement or which may be the subject of further government review: *Verizon v. FCC, et. al*, 535 U.S. 467 (2002); *USTA, et. al* v. *FCC*, 290 F.3d 415 (D.C. Cir. 2002) and following remand and appeal, *USTA v. FCC*, 359 F.3d 554 (D.C. Cir. 2004); the FCC's Triennial Review Order (rel. Aug. 21, 2003) including, without limitation, the FCC's MDU Reconsideration Order (FCC 04-191) (rel. Aug. 9, 2004) and the FCC's Order on Reconsideration (FCC 04-248) (rel. Oct. 18, 2004); the FCC's Triennial Review Remand Order (rel. Feb. 4, 2005), WC Docket No. 04-313; CC Docket No. 01-338; and the FCC's Order on Remand and Report and Order in CC Dockets No. 96-98 and 99-68, 16 FCC Rcd 9151 (2001), (rel. April 27, 2001), which was remanded in *WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002). The Parties further acknowledge and agree that this Amendment is to effectuate an Interim Agreement for a finite period of time to afford the Texas PUC and the Parties additional time to finalize a successor interconnection agreement based upon the provisions set forth herein. Therefore, the Parties acknowledge and agree that: (i) because this Amendment is to effectuate an Interim Agreement and not a final 251/252 Interconnection Agreement between the Parties; and (ii) effectively incorporates pricing changes into the Interim Agreement; and (iii) the Interim Agreement contains certain arbitrated provisions; and (iii) portions of the Interim Agreement are the result of CLEC's prior decision to opt into the T2A Agreement or parts thereof; that no aspect/provisions of this Interim Agreement qualify for portability into Illinois or any other state under 220 ILCS 5/13-801(b) ("Illinois Law"), Condition 27 of the Merger Order issued by the Illinois Commerce Commission in Docket No 98-0555 ("Condition 27") or any other state or federal statute, regulation, order or legal obligation (collectively "Law"), if any.

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