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June 2, 2005

VIA HAND DELIVERY

Hon Pat Miller, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*
Docket No. 04-00381

Dear Chairman Miller

Enclosed are the original and fourteen copies of BellSouth's *Response to Cinergy's Motion for Clarification* Copies of the enclosed are being provided to counsel of record

Very truly yours,

Guy M Hicks

GMH ch

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*

Docket No. 04-00381

BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSE TO CINERGY'S MOTION FOR CLARIFICATION

BellSouth Telecommunications, Inc. ("BellSouth") hereby files this *Response* in opposition to the *Motion for Clarification* ("*Motion*") filed by Cinergy Communications Company on May 23, 2005

On May 16, 2005, the Authority ruled unanimously to (1) end the alternative relief it granted on April 11, 2005 and (2) allow BellSouth to effectuate the FCC's *TRRO* for "no new adds" for unbundled local circuit switching (the UNE platform) and other delisted UNEs.

Cinergy now claims that the Authority needs to "clarify" whether the Authority also intended to permit BellSouth to refuse new orders to serve ***existing*** CLEC customers who are in the "embedded customer base" for whom the FCC provided a one-year transition period.[1] Cinergy therefore requests the Authority to "clarify" its Ruling and expressly hold that BellSouth is required to continue taking orders for new UNE-P, including UNE-P adds, moves and changes, to its embedded base customers.[2]

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[1] Cinergy *Motion* at 1

[2] BellSouth has agreed to allow CLECs to issue feature change orders for existing customers, i e , orders for new features such as call waiting, call forwarding, etc

That argument lacks merit, and Cinergy's *Motion* should be denied. Most importantly, Cinergy's *Motion* is inconsistent with the text of the *TRRO*,[3] which bars all new "UNE-P arrangements," not just those used to serve new customers. *TRRO* ¶ 227. Even beyond that, it is inconsistent with the core policy behind that decision. Instead of weaning carriers away from the UNE platform and toward alternative methods of competition, as the FCC plainly intended, it would allow CLECs in Tennessee to ***expand*** the very activities that the FCC has found to be anticompetitive.[4]

Cinergy's newfound claim of ambiguity is also inconsistent with its own prior arguments. Moreover, its claim of harm rests on a refusal to employ the many lawful means of competing that Congress and the FCC have provided.

Finally, Cinergy's *Motion* for "clarification" assumes, incorrectly, that the Authority's ruling was not clear. The Authority's "no new adds" ruling on May 16, 2005 was clear It made no exceptions for embedded base customers. The Directors agreed that there should be no new adds of delisted UNEs, period.[5] The Authority should deny the *Motion*, or, alternatively, treat Cinergy's *Motion* as a motion for reconsideration and defer ruling on it until after a written order is entered memorializing the Authority's "no new adds" decision of May 16, 2005.

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[3] *Order on Remand, Unbundled Access to Network Elements, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, 2005 WL 289015 (2005), *petitions for review pending, Covad Communications Co , et al v FCC, et al* , Nos 05-1095 et al (D C Cir) ("*TRRO*")

[4] *See Order* at 17, *BellSouth Telecomms, Inc v. Cinergy Communications Co* , No 3 05-CV-16-JMH (E D Ky Apr 22, 2005) ("*Preliminary Injunction Order*") (noting that the CLECs have no valid interest "in a practice the FCC has stated is 'anti-competitive'")

[5] *See* May 16, 2005 Tr at p 7, 14, 18

ARGUMENT

I. Cinergy's Request is Contrary to Federal Law.

Cinergy's argument is inconsistent with the text of the *TRRO*. Contrary to Cinergy's contention, the FCC repeatedly stated that, during the transition period it was creating, CLECs such as Cinergy could not add new switching UNEs and new UNE Platform arrangements, ***not*** **only** that CLECs could not add new customers using the UNE Platform.

In particular, the FCC explained that its transition plan "does not permit competitive LECs to add *new UNE-P arrangements* using unbundled access to local circuit switching pursuant to section 251(c)(3)." *TRRO* ¶ 227 (emphasis added); *see also id.* ¶ 5 ("This transition plan applies only to the embedded base, and does not permit competitive LECs to add ***new switching UNEs***") (emphasis added). The FCC's rules likewise provide that, ***without exception***, "[r]equesting carriers may not obtain new local switching as an unbundled network element." 47 C.F.R. § 51.319(d)(2)(iii).[6] When a CLEC orders a new UNE-P line to serve an existing customer, it is ordering new local switching (and a "new UNE-P arrangement"), which is prohibited under the plain language of the FCC's order and rules. *See* Kentucky *Preliminary Injunction Order* at 7 ("The strong language in the *TRRO* that ILECs no longer have an obligation to provide UNE-P switching and the corresponding effective date of March 11, 2005, will likely lead the Court to conclude that [the] *TRRO* is self-effectuating for new ***orders***.") (emphasis added);

[6] It its *Motion*, Cinergy fails to even mention, much less address, the straightforward language in the FCC's Rules

BellSouth Telecomms., Inc v. Mississippi Pub. Serv. Comm'n, 3:05CV173LN, 2005 WL 1076643, at *3, *6 (S.D. Miss. Apr. 13, 2005) (stating that "the FCC's intent in the TRRO is an unqualified elimination of new UNE-P orders as of March 11, 2005, irrespective of change of law provisions in the parties' interconnection agreements" and precluding, without reservation, the Mississippi PSC from "enforcing that part of its order requiring BellSouth to continue to process new orders for UNE-P switching"); *BellSouth Telecomms., Inc. v MCImetro Access Transmission Servs., LLC*, 1:05-CV-0674-CC, 2005 WL 807062, at *2 (N.D. Ga. Apr 5, 2005) ("The FCC's decision to create a limited transition that applied only to the ***embedded base*** and required higher payments ***even for those existing facilities*** cannot be squared with the PSC's conclusion that the FCC permitted an indefinite transition during which competitive LECS could order new facilities and did not specify a rate that competitors would pay to serve them.") (emphasis added). Cinergy's *Motion for Clarification* ignores the FCC Rules and these federal district court decisions.

In urging a different conclusion, Cinergy cites two paragraphs in which the FCC counsels that CLECs must shift their "customers" away from the UNE-Platform within one year of March 11, 2005.[7] But those statements do not contradict or undermine the language in the FCC's decisions proscribing ***all*** new UNE Platform arrangements. The FCC's decision establishes that (1) existing customers must be transitioned away within one year and (2) during that year, no new UNE Platform arrangements can be obtained. Those two conclusions are fully

[7] Cinergy *Motion* at 2 (citing *TRRO* ¶¶ 199, 216)

consistent with each other. In contrast to Cinergy's position, moreover, reading the FCC's decision to adopt those two conclusions is consistent with the FCC's clear statement that no new "UNE-P arrangements" are permitted and with the FCC rule stating that "[r]equesting carriers may not obtain new local switching as an unbundled network element."

Although the text of the FCC's decision provides ample basis to deny this *Motion*, Cinergy's position is also inconsistent with the over-arching federal policy here. As the FCC stressed, the purpose of its transition plan is to encourage the CLECs to move away from unlawful unbundling rules. *Id.* ¶ 227; Kentucky *Preliminary Injunction Order* at 17 (noting that the FCC has deemed its previous policy to be "anti-competitive").

Under Cinergy's position, CLECs would be free to add new UNE-Platform arrangements for existing customers right up until 11 months and 29 days after the *TRRO* went into effect, even though Cinergy and all other CLECs are supposed to be using the 12-month transition period to "perform the tasks necessary to an orderly transition, which could include deploying competitive infrastructure, negotiating alternative access arrangements, and performing loop cutovers or other conversions "[8] Cinergy's request would therefore frustrate the FCC's goal of moving away from the UNE Platform and encouraging carriers to negotiate alternative, commercially reasonable substitutes for that anticompetitive practice. As the Authority is well aware, BellSouth and numerous CLECs in Tennessee have successfully negotiated commercial agreements.

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[8] *TRRO* ¶ 227

Cinergy also cites the decisions of a few state commissions that have required ILECs to provide new UNE arrangements for existing customers.[9] But other state commissions have ***not*** required ILECs to keep providing new UNE arrangements for existing customers. For instance, the California Commission decision is especially well-reasoned and persuasive. As that Commission said,[10] "we note that the FCC has clearly stated that 'Incumbent LECs have ***no*** obligation to provide competitive LECs with unbundled access to mass market local circuit switching.'"[11] Moreover,

> it is clear that the FCC desires an end to the UNE-P, for it states '... we exercise our "at a minimum" authority and conclude 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. (quoting *TRRO* ¶ 2004) (emphasis added by California commission)).

As well,

> [o]ther parts of the [*TRRO*] also support this interpretation. In particular, the FCC also states: '... we establish a transition plan to migrate ***the embedded base of unbundled local circuit switching used to serve mass market customers to an alternative service arrangement***.' ... Note that this last statement refers to 'the embedded base of unbundled local circuit switching;' it does ***not*** refer to an '***embedded base of customers***.'

Id. (emphasis in original).

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[9] Cinergy *Motion* at 3-4

[10] Assigned Commissioner's Ruling Granting in Part Motion for Emergency Order Granting Status Quo for UNE-P Orders, *Petition of Verizon California Inc* , App No 04-03-014 (Cal PUC Mar 11, 2005), available at http //www cpuc ca gov/word_pdf/RULINGS/44496 pdf On March 17, 2005, the California Public Utility Commission voted to adopt the Assigned Commissioner's ruling in its entirety

[11] *Id* at 7 (quoting *TRRO* ¶ 5) (emphasis added by California commission)

Thus, the California Commission held that

> since there is no obligation and a national bar on the provision of UNE-P, we conclude that 'new arrangements' refers to any new UNE-P arrangement, whether to provide service for new customers or to provide a new arrangement to existing services The [*TRRO*] clearly bars both.

Id.[12] Moreover, regardless of what various state commissions have ordered, the federal court decisions in Georgia, Kentucky, and Mississippi support BellSouth's position on this issue

II. Cinergy's Motion is Contrary to the CLECs' Prior Understanding in this Case and Cinergy's Claims of Harm Remain Unpersuasive.

Cinergy now claims that the Authority must "clarify" its May 16, 2005 decision regarding UNE-P.[13] But Cinergy previously evinced no such confusion when Cinergy when it stated in its *Motion for Emergency Relief* that

> 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, add, or changes to the customers' existing accounts, as well as by prohibiting CCC from obtaining new customers.[14]

Similarly, Cinergy evinced no such confusion as to the effect of a similar order from the federal court in Kentucky granting BellSouth's motion for a preliminary injunction on "no new adds". When it opposed BellSouth's motion, Cinergy claimed that, if the motion was granted, there would be "harm to CLEC

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[12] On the theory that the parties needed "additional time to negotiate the applicable ICA amendments necessary to transition and to continue to serve the CLECS embedded customer base," the California commission did ask SBC to "continue processing CLEC orders involving additional UNE-Ps for the embedded base of customers who already have UNE-Ps, until no later than May 1, 2005 " *Id* at 9

[13] Cinergy *Motion* at 1

[14] Cinergy *Motion for Emergency Relief* at 3

customers who would be forced to deal with two providers or to switch providers if they moved to a new address or wanted an additional phone or fax line."[15] Contrary to its current position, therefore, Cinergy has previously understood that granting BellSouth relief, and thus giving effect to the conclusions in the *TRRO*, would prevent Cinergy from adding new "phone or fax line[s]" for existing customers using the UNE Platform.

Nor was Cinergy alone in this regard. MCI likewise argued in Kentucky that, if a preliminary injunction was granted for BellSouth, "when existing UNE-P customers contact MCI seeking to add new telephone lines to their accounts, or seek to transfer service when they move, the competitor will have to deny those requests."[16] MCI thus understood as well that, if the rules in the *TRRO* became effective, that would bar new UNE Platform orders for existing customers.

Beyond that, the claims of harm associated with these assertions are no more persuasive now than they were when made in opposing BellSouth's motion. The core fact remains that, separate and apart from the UNE Platform, Congress and the FCC have given Cinergy many ***lawful*** ways to accommodate this customer demand in both the short- and long-term. Cinergy claims in its *Motion* that, without clarification from the Authority, it would have to "refuse to provide the [additional] line to a customer."[17] The Authority should not be misled. Cinergy could enter into a commercial agreement with BellSouth. More than 120 BellSouth competitors in BellSouth's nine-state region have now signed commercial

[15] Cinergy *Response* at 29
[16] MCI *Response* at 21
[17] Cinergy *Motion* at p 5

agreements for access to BellSouth's facilities. The federal act also requires that BellSouth resell its local voice service to Cinergy, and to do so at a statutory discount rate established by the Authority (and designed to remove all costs related to offering services at retail from the rate paid by a CLEC).[18] With either a commercial agreement or resale, additional lines could be provided to an end user by Cinergy, and there would be no disruption to the end user.

Thus, as Cinergy acknowledges, even in instances where its customer desires to have "hunting" between different lines, it can do so by ordering all the relevant lines under the statutory resale rules.[19] Cinergy's only response to that acknowledged fact is the unsupported assertion that it "loses money" using resale.[20] Even assuming that bald assertion is correct, that must mean either that Cinergy is inefficient (and has greater wholesale costs than BellSouth) or that Cinergy's complaint is with Congress, which established the methodology for determining resale rates. In either event, Cinergy's argument identifies no harm that could justify ignoring the plain language of the FCC's *TRRO* prohibiting all new UNE Platform arrangements [21]

CONCLUSION

The Authority should deny Cinergy's motion for clarification. Alternatively, because the Authority's May 16, 2005 ruling was clear, the Authority should treat

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[18] *See* 47 U S C §§ 251(c)(4), 252(d)(3)

[19] *See* Cinergy *Motion* at 5

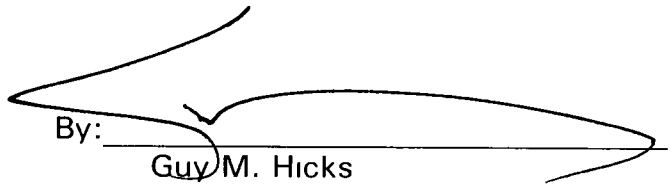
[20] *Id*

[21] Moreover, contrary to Cinergy's claim (*Motion* at 5), BellSouth also loses a potential customer when Cinergy exploits artificially low UNE Platform wholesale rates to add lines to serve existing customers If Cinergy must rely upon lawful means of competing, BellSouth could well win the right to serve those additional lines or perhaps to win all the customer's business

Cinergy's *Motion for Clarification* as a motion for reconsideration and defer ruling on it until after a written order is entered memorializing the May 16, 2005 ruling.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.



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