

**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Complaint of DIECA Communications, Inc., d/b/a Covad Communications Company Against BellSouth Telecommunications, Inc. For Breach of the Parties' Interconnection Agreement and Unauthorized Discontinuance Of Service to Customers, Request for Maintenance of the Status Quo, and Request For Expedited Relief.

Docket No: 030945-TP

Filed: November 25, 2003

**DIECA Communications, Inc., d/b/a Covad Communications Company's Responses To Staff's Data Requests**

DIECA Communications, Inc., d/b/a Covad Communications Company, pursuant to Staff's request, filed on November 10, 2003, provides these answers to Staff's Data Request.

1. What is the Florida Public Service Commission's (FPSC) legal authority to prohibit BellSouth Telecommunications, Inc. (BellSouth) from taking any action to discontinue service to Covad or its customers during the pendency of Covad's Complaint filed September 26, 2003? Is this not a request for injunctive relief? Please explain your response.
2. What is the FPSC's legal authority to require BellSouth not to discontinue existing service to Covad or to its customers as a result of BellSouth's completion of necessary network upgrades? Is this not a request for injunctive relief? Please explain your response.

**Covad's Response<sup>1</sup>:**

Covad has requested that the Commission require BellSouth to abide by the terms of the parties' Interconnection Agreement, which this Commission has approved, and prohibit BellSouth from **discontinuing service** to Covad customers. The Commission has clear legal authority to take such action.

Chapter 364 directs the Commission to exercise its exclusive jurisdiction over telecommunications companies in the furtherance of the public interest.<sup>2</sup> Section 364.01, Florida Statutes, provides the Commission with the power to regulate telecommunication

<sup>1</sup> Request Nos. 1 and 2 ask essentially the same question and therefore are addressed together in one response.

<sup>2</sup> Section 364.01(1), (3), Florida Statutes.

companies, promote competition, and prevent anticompetitive behavior. The Legislature has recognized that the:

[c]ompetitive provision of telecommunications services . . . is in the public interest and will provide customers with freedom of choice, encourage the introduction of new telecommunications service, encourage technological innovation, and encourage investment in telecommunications infrastructure.<sup>3</sup>

The unwarranted disconnection of the service of a competitor's customers falls squarely within the type of behavior it is this Commission's duty to prohibit, not only to protect the interests of the competitive company<sup>4</sup>, but more importantly to protect the consumer. If BellSouth's conduct is not addressed by the Commission, BellSouth's actions will result in a loss of consumer choice, in unfair and anti-competitive treatment of Covad, and will deter new entry into the telecommunications market.

In general, the Commission has recognized that it has authority to prohibit regulated companies from taking certain actions which will be detrimental to customers in the exercise of its police power. For example, rule 25-22.032(6), Florida Administrative Code, (which pertains to all regulated industries) provides that a company **may not discontinue service** to a customer because of unpaid disputed bill.<sup>5</sup> If the Commission had no authority to require a company to continue service during a dispute, it would have no authority for this rule.

While from time to time, parties have argued that Commission's prohibition of a certain action is equivalent to an injunction, the Commission has rejected this argument across the regulated industries and has frequently exercised its authority to prohibit certain action on the part of regulated companies. For example, in Docket No. 030200-TP<sup>6</sup>, AT&T asked the

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<sup>3</sup> Section 364.01(3), Florida Statutes.

<sup>4</sup> Section 364.01(4)(g), Florida Statutes, gives the Commission clear authority to "[e]nsure that all providers of telecommunications services are treated fairly, by preventing anticompetitive behavior. . . ."

<sup>5</sup> The rule states: "During the complaint process, a company shall not discontinue service to a customer because of any unpaid disputed bill."

<sup>6</sup> *In Re: Petition of AT&T Communications of the Southern States, LLC d/b/a AT&T d/b/a Lucky Dog Phone Co. d/b/a ACC Business d/b/a SmarTalk d/b/a Unispeaksm Service d/b/a AT&T for cease and desist order and other sanctions against Supra Telecommunications and Information Systems, Inc.*, Order No. PSC-03-0578-FOF-TP (May 6, 2003).

Commission to order Supra Telecommunications to cease and desist from disconnecting customers from AT&T long distance service. Supra filed a motion to dismiss for, among other claims, failure to state a cause of action. In denying the motion, the Commission recognized that :

[t]he main thrust of the Telecommunications Act is the promotion of fairness and competition in the telecommunications industry. Chapter 364.01, Florida Statutes, grants broad powers to this Commission in the enforcement of the Act.

Such enforcement authority includes the ability to require a company subject to the Commission's jurisdiction to act in a certain manner prospectively and to require that company to maintain the status quo while a case is pending before the Commission.<sup>7</sup>

In Docket Nos. 920649-WS, 930642-WS,<sup>8</sup> a utility took steps to terminate service to certain customers in an RV park. The RV park filed a complaint with the Commission seeking to halt the service termination. The utility moved to dismiss the complaint on the grounds that the Commission had no power to issue an injunction. The Commission rejected the utility's argument that to grant the RV park's request would result in an injunction. The Commission found that it was granted broad police power, and that it was permitted to exercise such power in the public interest. The Commission further stated that it had the power to enforce its own statutes, rules and regulations. *See also*, Order No. PSC-99-0648-PCO-WS, where the Commission again rejected the argument that a request for emergency relief constituted an improper injunction.<sup>9</sup> Relying on the *Cynwyd* Order, the Commission said:

We agree this Commission does not have subject matter jurisdiction to issue injunctions...however, this Commission doe have the power to enforce its own

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<sup>7</sup> *In In re: Petition of ICG Telecom Group, Inc. for arbitration of unresolved issues in interconnection negotiations with BellSouth Telecommunications, Inc.*, Docket 990691-TP, Order No. PSC-00-0128-FOF-TP (Jan. 2000), the Commission ordered the parties to maintain the status quo under the parties' existing Interconnection Agreement pending a future FCC decision.

<sup>8</sup> *In Re: Complaint and Petition of Cynwyd Investments against Tamiami Village Utility, Inc., Regarding Termination of Water and Wastewater Services in Lee County. In Re: Complaint against Tamiami Village Utility, Inc. by Cynwyd Investments, and Request for Emergency Order Requiring the Utility to Reestablish Water and Wastewater Service to Cynwyd's Friendship Hall in Lee County*, Order No. PSC-94-0210-FOF-WS (Feb. 1994).

<sup>9</sup> *In re: Emergency petition by D.R. Horton Customer Homes, Inc. to eliminate authority of Southlake Utilities, Inc. to collect service availability charges and AFPI charges in Lake Count* (Apr. 1999).

statutes, rules and regulations...affecting the public health, safety and welfare.<sup>10</sup>

In Docket 020413-SU, Order No. PSC-02-1250-SC-SU<sup>11</sup>, the Commission ordered Aloha Utilities, Inc. not to collect service availability charges from its ratepayers and not to disconnect existing customers from service due to a developer's failure to pay back billed amounts. *See also*, Order No. PSC-03-1093-FOF-WS<sup>12</sup> (Florida Water Services prohibited from selling its assets prior to further proceedings before the Commission). The Commission also has prohibited an electric utility from proceeding with construction of a transmission line. Order No. PSC-94-0717-FOF-EU.<sup>13</sup>

The situations discussed above leave no doubt that the Commission has the authority to prohibit BellSouth from cutting off service to Covad customers in the exercise of its jurisdiction over telecommunications services, the parties' interconnection agreement, and its general police power. The Commission has the authority to enter an order prohibiting a company within its jurisdiction from pursuing a certain course of action.<sup>14</sup>

3. In its Complaint, Covad cites to various federal and state actions and orders and seeks relief from the FPSC for enforcement of the Parties' Interconnection Agreement. (See generally, pp. 3-9 of Complaint) Please explain why you believe the FPSC is the appropriate forum for this Complaint to be resolved. Please include in your response specific analysis regarding which authority, action, or order prevails for the purposes of resolving this case, and why.

### **Covad's Response:**

The thrust of Covad's complaint is that BellSouth has breached the parties'

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<sup>10</sup> *Id.* at 8.

<sup>11</sup> *In re: Initiation of show cause proceedings against Aloha Utilities, Inc. in Pasco County for failure to charge approved service availability charges, in violation of Order No. PSC-01-0326-FOF-SU and Section 367.091, Florida Statutes* (Sept. 2002).

<sup>12</sup> *In re: Investigation into proposed sale of Florida Water Services Corporation*, Docket No. 02106612 (February 7, 2003).

<sup>13</sup> *In re: Petition of Florida Power Corporation to Open Investigation into Tampa Electric Company's Proposed Construction of a 69 KV Transmission Line to Serve Cities of Wauchula and Fort Meade*, Docket No. 930676-EU (June 1994).

<sup>14</sup> While Covad does not agree that the standard for the issuance of an injunction is appropriate here, such standard would clearly be met in this case. First, irreparable harm will occur if Covad's customer are put out of service; second, there will be no adequate remedy once service has been discontinued; and third, Covad has a high likelihood of success on the merits as this is a clear breach of the parties' Interconnection Agreement.

Interconnection Agreement by terminating service for reasons that are not only not permitted by the Agreement but are not even mentioned in the Interconnection Agreement. The Telecommunications Act of 1996 (Act) confers jurisdiction on the Commission to adjudicate disputes arising out of interconnection agreements. *See*, 47 U.S.C. §§ 252(e)(3), 253(b). Further, the parties designated the Commission as the appropriate forum for resolution of disputes arising from the Interconnection Agreement. (Interconnection Agreement at § 12).

In addition, the *Triennial Review Order (TRO)* provides that incumbent LECs must notify competitors of replacement dates to "ensure that incumbent and competitive carriers can work together to ensure the competitive LECs maintain access to loop facilities."<sup>15</sup> It does not state that incumbents may unilaterally disconnect service. Further, the *TRO* at ¶ 284 stresses that the FCC has not preempted the states' jurisdiction over copper replacements. State commissions must evaluate an incumbent LEC's retirement of copper loops to ensure such retirement complies with applicable state legal or regulatory requirements. The situation at issue in Covad's Complaint does not comply with such requirements and it is the state commission who must review the circumstances of Covad's complaint.

Finally and most importantly, ¶¶ 700 and 701 of the *TRO* state that the *TRO* is not self-executing. It is not intended to override the terms of the parties' Interconnection Agreement. Any such changes must be accomplished through negotiations. Thus, the terms of the parties' Interconnection Agreement take precedence over the *TRO's* provisions. Despite what BellSouth may argue, federal preemption as to the matters raised in Covad's complaint is not an issue.

4. Are there any disputed issues of material fact involved in the resolution of this Complaint, or is Covad amenable to having the Complaint addressed in an informal hearing pursuant to Sections 120.569 and 120.57(2), Florida Statutes, after the filing of briefs by the parties?

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<sup>15</sup> *TRO* at ¶ 281.

**Covad's Response:**

No, there are no material facts in dispute. This case is a straight forward Interconnection Agreement interpretation matter in which the Commission is called upon to enforce the parties' Interconnection Agreement. The Interconnection Agreement between BellSouth and Covad imposes certain obligations on both parties. BellSouth is obligated to provide copper loops to Covad pursuant to the terms and conditions of the Agreement. BellSouth has indicated its intent not to do so, thus resulting in a breach of certain material terms of the Interconnection Agreement. Based on this posture of the case, Covad has no objection to an informal hearing based on briefs of the parties. In fact, Covad has simultaneously filed a Motion for Summary Final Order.

However, to the extent BellSouth claims, and would attempt to rely on facts outside the four corners of the Interconnection Agreement, there will no doubt be disputed issues of material fact which will need to be resolved through an evidentiary hearing.

5. Page 1, paragraph 1, of Covad's Complaint states that BellSouth's network modifications will result in "... customers' permanent loss of service from Covad."
  - a. Are there other means by which these customers could be served by Covad if the network modifications are completed? Please explain your response.

**Covad's Response:**

BellSouth readily admits that the network modifications will permanently terminate line sharing service to the customers at issue. BellSouth Answer at p. 1. BellSouth is choosing to cut the copper provisioned to Covad's customers in violation of numerous provisions of the Parties' Interconnection Agreement. BellSouth could replace the copper with copper, but has made a determination not to do so. While there are several technically feasible alternatives to serve these customers, none are economically viable for Covad, nor are they contractually warranted.

- b. If the network modifications proceed as currently scheduled, will

Covad abandon these customers or will it find alternative means to provision service? Please explain your response.

**Covad's Response:**

Covad will pursue all remedies available to it to ensure that BellSouth does not disconnect its customers. If the customers are disconnected, Covad will continue to provide them with the service they currently enjoy via BellSouth's wholesale ADSL product in order to mitigate the damages to Covad, its customers and its business relationships with Internet Service Providers serving these customers. Covad will then pursue all available remedies at law and equity, in contract and tort, for BellSouth's intentional and unjustified discontinuance of service to Covad and its customers.

6. Please explain how BellSouth's replacement of copper facilities would impair Covad in its offering of telecommunications service.

**Covad's Response:**

Covad requires a copper facility in order to provide its broadband telecommunications service to its customers. BellSouth's replacement of the essential copper facilities that Covad leases from BellSouth would impair Covad by ending its ability to offer its broadband telecommunications service to its customers.

7. During the November 4, 2003, conference call between Covad, BellSouth and staff members, BellSouth's counsel noted that if BellSouth were to go forward with its network modifications, it would be amenable to a "true-up" provision after the Commission reaches a decision on the merits of the Complaint.
  - a. Has a "true up" proposal been presented to Covad? If so, did Covad accept or reject the proposal? Please explain your response.

**Covad's Response:**

BellSouth has made informal confidential proposals to Covad and Covad has provided confidential responses.

- b. If a "true-up" proposal were presented, would Covad consider such a proposal? If not, why not?

**Covad's Response:**

It is Covad's understanding that BellSouth proposes to allow Covad to continue service but to charge Covad more than Covad is currently obligated to pay under the parties' Interconnection Agreement. If Covad prevails, BellSouth would then "true up" or repay Covad the inappropriately collected amounts. Covad is opposed to such an arrangement because it would require Covad to pay more than is called for in its Interconnection Agreement with BellSouth.

Covad would be amenable to a true-up approach where Covad would continue to receive service under the rates provided for in the Interconnection Agreement, subject to a final Commission decision in this docket.

8. If network upgrades or modifications are necessary due to storm damage or cable deterioration, should BellSouth be prohibited from making such upgrades? Please explain your response.

**Covad's Response:**

Covad has no objection to BellSouth "upgrading" its network. BellSouth has "upgraded" thousands of facilities like the ones at issue here. Covad has never objected to those upgrades. Covad has no objection to the majority of the upgrades to the facilities at issue here. This case is about terminating service to BellSouth's competitor's customers in violation of an Interconnection Agreement between BellSouth and that competitor. In addition to the anti-competitive ramifications of allowing BellSouth to cut-off service to its competitors at its whim with six months notice (which this Commission must consider), BellSouth is not permitted to breach its Interconnection Agreement and disconnect customers receiving service from Covad.

9. Do you believe network upgrades are in the public interest? Please explain your response.

**Covad's Response:**

Yes. However, this case presents several competing issues, all of which implicate the



public interest. The enforcement of contract law is in the highest public interest. Business contracts provide parties to a business relationship with the assurance that each will perform their respective tasks in a predictable manner. The Interconnection Agreement between a CLEC and an ILEC is designed to perform that function. The dispute between BellSouth and Covad is about the maintenance of service over copper facilities, which is the primary business relationship between Covad and BellSouth. The 633-page Interconnection Agreement between them, predictably, addresses that topic. Under the terms of the Interconnection Agreement, BellSouth may not do what it has expressed an intention to do. It is in the public interest to enforce the terms of the Interconnection Agreement.

Competition is also in the public interest. Without competition created by the Telecommunications Act of 1996, it is probable that there would not be DSL in Florida. Covad was the first company to commercially deploy DSL. Before Covad and the Act, DSL sat on a shelf because the RBOCs enjoyed the revenue from second line dial-up service that would be lost to line sharing over a single line. The competition represented by Covad brings lower prices and better and more innovative services. While BellSouth would like carte blanche from the Commission to cut-off its competitors whenever it so chooses (in the name of “network upgrades”), such authority has never been, and never will be, in the public interest. Monopolies are bad for the public, innovation and the economy.

10. Do you believe line sharing is currently a UNE? Please explain your response.

**Covad's Response:**

Yes, line sharing is a UNE pursuant to § 271. In the *TRO*, the FCC determined, incorrectly and over the admitted opinion of four out of five Commissioners to the contrary, that competitive LECs are not impaired without access to line sharing as a 251 UNE. However, RBOCs offering long distance, like BellSouth, remain obligated to provide access to line sharing pursuant to § 271. BellSouth has expressed its disagreement with this statement in briefing to

remove line sharing from the SEEM plan in state throughout its region.

BellSouth will base its argument that BellSouth has no obligation to offer line sharing pursuant to § 271 on two assertions: 1) line sharing (the HFPL) is not a § 271 check list #4 item (271(c)(2)(B)(iv)); and 2) that it would be “illogical” for the FCC to lift the obligation for an ILEC to provide access to line sharing as a UNE only to reinstate that obligation under § 271. Both of BellSouth’s assertions are incorrect.

BellSouth will argue that that line sharing is not a “loop transmission” under checklist item #4 despite the fact that the FCC and BellSouth itself have repeatedly categorized line sharing under checklist #4. In every FCC 271 Order granting BellSouth long distance authority, the FCC placed line sharing and line splitting in the section of the Order considering checklist item #4.<sup>16</sup> More importantly, BellSouth placed line sharing and line splitting in every one of its own briefs to the states and to the FCC under checklist item #4.<sup>17</sup> Having briefed line sharing as a checklist number 4 item, it is a bit disingenuous for BellSouth to now assert that line sharing is not a check list #4 item. BellSouth cannot admit this, of course, because to do so would admit that BellSouth’s continues to have an obligation to provide access to line sharing under § 271. TRO ¶¶ 653-55. Instead, BellSouth argues that loops and line sharing are separate UNEs under 251, therefore they cannot both fall under “local loop transmission facilities” in checklist item

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16 See, e.g., Memorandum Opinion and Order, *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, WC Docket No. 02-150, FCC Order 02-260, released September 18, 2002, pp. 142-45 (finding that under checklist item #4, “BellSouth offers nondiscriminatory access to the high frequency portion of the loop in each applicable state.”)

17 Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Florida and Tennessee, *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee*, WC 02-307, filed September 20, 2002 at pp. 96-99; Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina, *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, WC 02-150, filed June 20, 2002 at pp. 114-116; Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Georgia and Louisiana, *In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC 01-277, filed October 2, 2001 at pp. 112-114.

#4. The HFPL is, however, clearly a form of loop transmission – a loop transmission that the Bells themselves routinely use to provide xDSL services separately from narrowband voice services.<sup>18</sup> Indeed, in describing the high frequency portion of the loop in the *Line Sharing Order*, the FCC stated that “requesting carriers may access unbundled loop functionalities, such as *non-voiceband transmission frequencies, separate from other loop functions*” – distinguishing the high frequency loop transmission path from the narrowband frequencies used for circuit switched voice services.<sup>19</sup> The HFPL (line sharing) is repeatedly categorized under checklist item #4 by both BellSouth and the FCC *because* the HFPL is a “local loop transmission facility” under 271(c)(2)(B)(iv). Accordingly, as long as BellSouth continues to offer long distance, it must provide access to line sharing.

In lieu of actual legal argument to the contrary, BellSouth asserts that it is “illogical” for the FCC to lift the obligation of ILECs to provide access to line sharing as a UNE only to maintain an RBOC’s obligation to maintain access under section 271. Despite BellSouth’s reasoning, however, the FCC expressly held that “BOC obligations under section 271 are not necessarily relieved based on any determination we make under section 251 unbundling analysis.” *TRO* ¶ 655. Moreover, the FCC addressed the question of the apparent illogic of a statutory scheme in which the FCC could cease the requirement of an RBOC to provide access to a UNE under 251, and yet continue the identical requirement under § 271:

659. In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. So if, for example, pursuant to section 251, competitive entrants are found not to be “impaired” without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271 (c)(2)(B)(vi). In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements

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<sup>18</sup> In other words, BellSouth customers typically purchase narrowband voice services without also purchasing xDSL, and pay a separate monthly fee in order to add xDSL services to their local loop.

<sup>19</sup> *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order in CC Docket No. 98-147 Fourth Report and Order in CC Docket No. 96-98, FCC 99-355, 14 FCC Rcd. 20912, 20923 at para. 18 (1999).

not required to be unbundled under section 251, but does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated.

TRO ¶ 659.

In short, although the *price* for a “de-listed” UNE may change, if that UNE falls under §271 (c)(2)(B)(iii)-(vi), the obligation to provide non-discriminatory *access* remains. BOCs who continue to sell long distance must continue to provide non-discriminatory access to all checklist items “de-listed under 251”<sup>20</sup>, including line sharing under checklist item #4. Whether BellSouth thinks that statutory scheme is illogical or not, it is the law.

11. Please refer to page 1, footnote 1, of BellSouth’s October 16, 2003, Answer to Covad’s Complaint. In footnote 1, it is stated that “The two circuits BellSouth could research are being migrated from copper to fiber due to a DOT road move, but neither appears to be a circuit whose performance capabilities will be affected by the change from copper to fiber.”

a. Is BellSouth’s statement from the footnote correct regarding the performance capabilities of two of the circuits identified in Covad’s complaint will not be affected by a change from copper to fiber?

**Covad's Response:**

Although one loop identified by BellSouth is a T1 loop that will not be affected by the change, the other loop identified by BellSouth is being used to provide SDSL service, which will be affected. Part of the circuit ID for that loop (containing the letters “LXFU”) typically identifies an ISDN (IDSL) capable loop, which is why BellSouth may be under the impression that this loop will not be affected. ISDN (IDSL) service is not affected by conversion to fiber. Covad has elected, however, to provide SDSL service over the ISDN-capable loop at issue, which will be affected by the network change.

b. Other than the circuits specifically referenced in the footnote, are

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<sup>20</sup> With the exception of checklist item numbers 1 and 2, as these items are directly tied to § 251 UNEs. Additionally, non-RBOC ILECs do not have § 271 obligations and so do not have an obligation to provide access to UNEs “de-listed” under § 251.

there any others identified in Covad's complaint that would be affected by a change from copper to fiber?

**Covad's Response:**

One additional Florida customer has been noticed for termination by BellSouth. Covad has provided a 1<sup>st</sup> Revised Exhibit A to its Complaint in order to identify that customer.

12. Please refer to page 3 of BellSouth's Answer to Covad's Complaint. On page 3, BellSouth identifies nine methods which may be used by Covad to provision service to its customers. Of the nine methods identified, do you believe any are viable provisioning options for Covad? Please address each of the nine methods in explaining your response.

**Covad's Response:**

BellSouth may not escape specific performance under the Interconnection Agreement by pointing to alternatives to its own specific performance. The options identified by BellSouth are, therefore, irrelevant.

While BellSouth and Covad agree that some of the options are technically feasible options (though some would constitute a significant degradation of service to the customer, *e.g.*, IDSL is 10 times slower and than their current ADSL service), with the possible exception of various "partnerings" offered by BellSouth, which do not yet exist, none of the service-equivalent options are economically viable for Covad. The "options" are discussed below.

- (1) Place its own DSLAM at the DLC remote terminal as does BellSouth in such a situation.

In considering this "option", the Commission and Staff should note that it is so obviously impossible for CLECs to profitably collocate at the remote terminal that *no* CLEC in the State of Florida has ever even asked an ILEC to allow it to collocate at the remote terminal, much less tried to collocate. Sprint's experience in Kansas cost over \$150,000 and took one and one-half years to get to market (per remote terminal!).

Nevertheless, BellSouth will purport to have a business plan that is viable for remote

terminal collocation. However, in order for the business model presented by BellSouth to work, BellSouth must assume an average monthly revenue of \$87 – more than double the average revenue BellSouth itself or Covad could expect. BellSouth’s model also ignores the single most important statistic, after revenue, in a telecommunications model – churn. BellSouth’s model has 0% churn, when DSL customers typically churn off at a rate exceeding 40% annually. When actual revenue and churn are input into BellSouth’s model, it does not return a positive cash flow for over 10 years.

Even if remote terminal collocation was a viable business option, BellSouth does not even begin to address the capital required to implement the model – over \$10,000 per collocation, with over 35,000 remote terminals in the BellSouth region alone. Finally, even if remote terminal collocation were economically viable and possible from a capital standpoint, Covad would not adopt a network design plan based on BellSouth’s copper retirement notices that happen to impact Covad’s customers. BellSouth’s copper retirement decisions are so random and entirely in BellSouth’s control that a CLEC would be grossly breaching its duty to its shareholders if it relied on BellSouth’s copper retirements to deploy a network. In short, remote terminal collocation is not economically viable; it is not possible from an available capital standpoint for Covad; and cannot be implemented in response to copper retirements.

(3) Provision the end-user customer with Intergrated Service Digital Network (“ISDN”) Digital Subscriber Line (“IDSL”) service.

While ISDN is a technically feasible way to serve customers over fiber, the customers at issue here would see a significant slowing of their service over ISDN. Covad wants to ensure that whatever the outcome in this docket, these customers continue to receive the service they ordered at the price they were promised. The majority of the customers at issue here currently enjoy a maximum downstream speed of 1.5 mega bytes per second. With ISDN, they would only have a maximum speed of 144 kilobytes per second. To offer them ISDN as a replacement

for their current ADSL service is like offering a customer a replacement car with a maximum speed of 14 miles per hour for their 150 mile per hour sports car. BellSouth does not include T1 service in this “option”, which would also allow service over fiber at the same downstream speed, possibly because T1 service is prohibitively expensive for residential customers.

(5) Purchase BellSouth’s tariffed wholesale DSL offering.

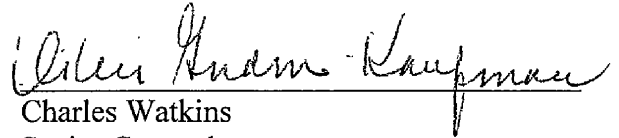
BellSouth’s wholesale ADSL offering is not economically viable to serve these customers. The tariff price is so close to the average revenue per customer that the cost to back haul the data to Covad renders the model forever unprofitable.

- (2) build its own loop facilities or lease loop facilities from a third party.
- (6) purchase and maintain BellSouth’s copper facility prior to its removal.
- (7) lease BellSouth’s copper facility on a time and materials basis.

These three “options” are various versions of building the “last mile” of copper facilities. As the FCC recently determined, “no party seriously asserts that stand-alone copper loops should not be unbundled . . .” *TRO* ¶ 249. Copper loops and sub loops are unbundled precisely because CLECs are economically and operationally impaired in their ability to recreate the loops.

- (8) deploy a fixed wireless broadband technology.
- (4) partner with a cable broadband provider to provide cable modem broadband service.
- (9) partner with a satellite broadband provider.

The moment Covad can economically and operationally use any of the “options” to spare it the necessity of relying on BellSouth for access to the “last mile” facility (and the “partner” will do business with Covad), Covad will take advantage of that opportunity.



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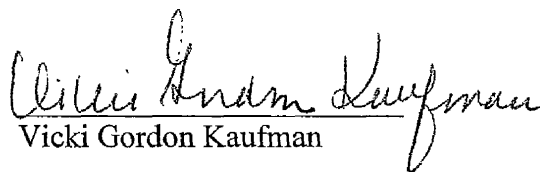


**CERTIFICATE OF SERVICE**

I **HEREBY CERTIFY** that a true and correct copy of the foregoing DIECA Communications, Inc., d/b/a Covad Communications Company's Responses to Staff's Data Requests has been provided by (\*) hand delivery or U.S. Mail this 25<sup>th</sup> day of November 2003, to the following:

(\*) Roseanne Gervasi  
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Florida Public Service Commission  
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Tallahassee, Florida 32399-0850

(\*) Nancy White  
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