

LISA FOSHEE
Senior Regulatory Counsel

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(404) 335-0754

November 25, 2003

Mrs. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

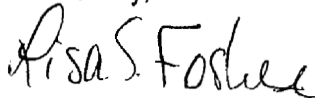
**Re: Docket No.: 030945-TP
Complaint of DIECA Communications, Inc., d/b/a Covad
Communications Company Against BellSouth Telecommunications,
Inc. for Breach of the Parties' Interconnection Agreement and
Unauthorized Discontinuance of Service to Customers, Request for
Maintenance of the Status Quo, and Request for Expedited Relief**

Dear Ms. Bayó:

Enclosed is an original and five copies of BellSouth Telecommunications, Inc.'s Responses to Florida Public Service Commission Staff's Data Requests, in the captioned matter.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,



Lisa S. Foshee (LF)

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

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FPSC-COMMISSION CLERK

CERTIFICATE OF SERVICE
Docket No. 030945-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail, Hand Delivery (*) and Federal Express this 25th day of November, 2003 to the following:

Rosanne Gervasi (*)
Staff Counsel
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Tel. No. (850) 413-6224
Fax No. (850) 413-6250
rgervasi@psc.state.fl.us

Charles Watkins
Senior Counsel
Covad Communications Co.
1230 Peachtree Street, N.E., 19th Floor
Atlanta, Georgia 30309
Tel. No. (404) 942-3494
Fax No. (404) 942-3495
gwatkins@covad.com

Vicki Gordon Kaufman
McWhirter Reeves McGlothlin Davidson
Kaufman & Arnold, P.A.
117 South Gadsden Street
Tallahassee, Florida 32301
Tel. No. (850) 222-2525
Fax No. (850) 222-5606
vkaufman@mac-law.com



Lisa Spooner Foshee

(KA)

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of DIECA Communications, Inc.,) Docket No. 030945-TP
d/b/a/ Covad Communications Company Against)
BellSouth Telecommunications, Inc. for Breach of)
the Parties' Interconnection Agreement and) Filed: November 25, 2003
Unauthorized Discontinuance of Service to)
Customers, Request for Maintenance of the Status)
Quo, and Request for Expedited Relief)
_____)

**BELLSOUTH TELECOMMUNICATIONS, INC.'S RESPONSES TO
FLORIDA PUBLIC SERVICE COMMISSION STAFF'S
REQUESTS FOR DATA RESPONSES**

BellSouth Telecommunications, Inc. ("BellSouth"), pursuant to Rule 28-106.206, Florida administrative Code, and Rules 1.340 and 1.280, Florida Rules of Civil Procedure, hereby files the following responses to the Florida Public Service Commission Staff's Request for Data Responses, dated November 7, 2003.

SPECIFIC RESPONSES

REQUEST: What is the Florida Public Service Commission's (FPSC) legal authority to prohibit BellSouth from taking any action to discontinue service to Covad Communications Company (Covad) or its customers during the pendency of Covad's Complaint filed September 26, 2003? Please explain your response.

RESPONSE: The FPSC does not have the authority in this case to prohibit BellSouth from replacing its copper cable facilities with fiber facilities during the pendency of this Complaint for several reasons, set forth briefly as follows:

- Covad has not demonstrated the elements of proof necessary to obtain a temporary restraining order: (1) a likelihood of irreparable harm; (2) unavailability of adequate remedy at law; (3) substantial likelihood of success on the merits; and (4) the balance of public interest in its favor. Thus, the FPSC has no authority to award the injunctive and extraordinary relief sought.
- Covad is asking this Commission to interfere (in 4 of the cases at issue) with a Department of Transportation road project by ordering BellSouth not to move its facilities. The Commission has no authority to essentially enjoin the DOT from completing the road move
- The *Triennial Review Order* expressly authorized ILECs to retire copper facilities, and established a procedure by which ALECs could challenge such retirements by filing objections with the FCC. In that this is an objection to a copper retirement, Covad should have pursued its complaint at the FCC.
- The *Triennial Review Order* expressly authorized ILECs to retire copper facilities, and did not authorize states to impose additional restrictions on the retirement of such facilities.
- The Commission does not have the authority to (1) order BellSouth to unbundle its packet networks, including its DSLAMs; or (2) to regulate the provision of BellSouth's DSL service, particularly its federally-tariffed wholesale DSL service.

RESPONSE (Cont'd):

BellSouth will briefly detail each argument below.

- a. Covad is not entitled to a temporary restraining order during the pendency of this Complaint.

The injunctive relief Covad seeks is extraordinary relief that should be granted sparingly. *Tom v. Russ*, 752f So.2d 1250, 1251 (D. Ct. App. Fla. 2000). To assert a claim for a temporary restraining order, the plaintiff must prove the following: (1) a likelihood of irreparable harm; (2) the unavailability of an adequate remedy at law; (3) a substantial likelihood of success on the merits; and (4) considerations of public interest in its favor. *Id.* Covad has not demonstrated any of these criteria. Thus, it is not entitled to the injunctive relief it is seeking.

First, Covad has not demonstrated that it will suffer irreparable harm without this extraordinary relief. In fact, Covad need not suffer any harm at all. On the contrary, Covad could maintain service to its customers in an efficient and non-capital intensive manner by purchasing service out of BellSouth's wholesale DSL tariff. This would be transparent to Covad's end-users and would require no facility placement by Covad. In fact, the only conceivable harm to Covad from this option is the difference between the wholesale tariff rate (around 30 dollars) and the line sharing rate (61 cents) – a monetary difference that certainly will not cause Covad irreparable financial harm and could be recouped as damages should Covad ultimately prevail.

Second, Covad has an adequate remedy at law. As BellSouth has demonstrated, Covad has a myriad of ways by which it can provide service to its end users after BellSouth replaces its copper cable facilities. If Covad incurs costs in implementing those methods that this Commission later determines Covad should not have incurred, Covad can seek damages. The pursuit of a damages claim, however, is an adequate remedy at law that bars entitlement to injunctive relief.

Third, Covad has not demonstrated a substantial likelihood of success on the merits. Covad's sole basis for its complaint is that by retiring copper cable facilities due to an impending DOT road move and a deteriorating copper cable, BellSouth is breaching the interconnection agreement. Covad has failed to point to any provision of the interconnection agreement, however, that entitles Covad to purchase unbundled network elements (in this case specifically the High Frequency Portion of the Loop)

RESPONSE (Cont'd):

when facilities for such UNEs do not exist in the network. On the contrary, the Agreement explicitly provides that Covad's entitlement to the HFPL is based on the availability of a copper facility. Attachment 2, § 2.11.1.1 (“[t]he following loop requirements are necessary for Covad to be able to access the High Frequency Spectrum: *an unconditioned, 2-wire copper loop*”)(emphasis added). It stands to reason that when this facility no longer exists in BellSouth's network because, for example, the DOT has ordered BellSouth to pull the facilities out of the ground, the UNE is no longer available. There is nothing in the Agreement that requires BellSouth to provide network elements that do not exist; conversely, there is no obligation for BellSouth to maintain facilities solely to provision network elements.

Covad argues that BellSouth is “disconnecting service” and has not met the criteria in Attachment 7 for effectuating such a disconnect. Covad's reliance on this section, however, is inapposite. Section 1.8 applies to situations in which Covad fails to pay BellSouth or misuses BellSouth's facilities. It does not speak to the situation in which the facilities necessary to provide a specific UNE to Covad no longer exist in BellSouth's network. The availability of UNEs, such as the HFPL that Covad wants, is addressed in Attachment 2. Section 1.8 applies to disconnecting “service;” BellSouth is replacing facilities. Section 1.8 does not apply to the latter scenario.

Finally, Covad has not demonstrated that considerations of public interest are in its favor. The easiest way for Covad to provide service to its customers during the pendency of this complaint is to purchase BellSouth's wholesale DSL service from BellSouth's federal tariff. Rather than purchase this service, however, Covad wants to put all of the cost and burden on BellSouth to maintain these customers, including, it seems, laying duplicative facilities, or interfering with a DOT road project. BellSouth should not be forced to incur this substantial risk and/or expense when Covad has a simple, straight-forward method pursuant to which it can continue to provide service to its end-users pending resolution of this claim. Moreover, the citizens of Florida should not be burdened with delayed road construction or additional, unnecessary plant deployment when Covad has a non-intrusive method immediately available to it by which it can provide service to its end-users.

Moreover, while Covad certainly does not mention this, the fact of the matter is that Covad is not impaired without line sharing and thus requiring BellSouth to

RESPONSE (Cont'd):

go to extraordinary and costly lengths to maintain line sharing would be detrimental to the development of competition and consequently to the public interest. *Triennial Review Order*, ¶ 255 (“we decline [to make available the high frequency portion of the loop (“HFPL”)] except as specified on a grandfathered basis”). In other words, Covad does not need access to the ILECs’ facilities to compete in the broadband market. This fact is relevant because it means that Covad is as able as BellSouth to deploy the facilities necessary to serve its end users, and is not barred from competing without line sharing. There is no reason, therefore, that BellSouth should incur the cost to maintain service to Covad’s end-users when Covad can do so as economically as can BellSouth.

b. The Commission has no authority to enjoin a DOT road project.

For four of the five customers at issue in this proceeding, BellSouth is replacing its copper cable facilities as a result of a DOT road move. By asking this Commission to stay BellSouth’s removal of those facilities, Covad essentially is asking the Commission to interfere in a DOT road move by ordering BellSouth not to remove facilities whose removal is essential to the completion of the project. Covad can purchase BellSouth’s wholesale DSL service out of its federal tariff to ensure its end users do not lose service pending the resolution of this claim without the Commission impeding a state road project.

c. In that this is a network replacement, Covad should pursue its claim at the FCC.

Section 251(c)(5) of the Act requires ILECs to provide “reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier’s facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.” The network modification disclosure rules require ILECs to provide public notice to interconnecting carriers when implementing changes to the network that “(1) affects competing service providers’ performance or ability to provide service; or (2) otherwise affects the ability of the incumbent LEC’s and a competing service provider’s facilities or network to connect, to exchange information, or to use the information exchanged.” In the *Triennial Review Order*, the FCC confirmed the adequacy of its network disclosure rules. *Triennial Review Order*, ¶ 281. The FCC further held that “when a copper loop is retired and replaced with a FTTH loop,

RESPONSE (Cont'd):

we allow parties to file objections to the incumbent LEC's notice of such retirement." *Id.* at ¶ 282. In the event an opposition is filed, the FCC "will deem all such oppositions denied unless the [FCC] rules otherwise upon the specific facts and circumstances of the case at issue within 90 days of the [FCC's] public notice of the intended retirement." *Id.* BellSouth filed network disclosures announcing the retirement of the copper cables at issue in this case in compliance with the FCC's rules. Covad does not dispute that BellSouth complied with the network disclosure rules. While Covad couches its complaint as a claim for breach of the interconnection agreement, it is more accurately characterized as an opposition to BellSouth's copper cable replacement and thus should be handled by the FCC.

- d. The FCC specifically has authorized copper cable replacements.

In the *Triennial Review Order*, the FCC held that it "decline[s] to prohibit incumbent LECs from retiring copper loops or copper subloops that they have replaced with fiber. Instead, we reiterate that our Section 251(c)(3) network modification disclosure requirements...apply to the retirement of copper loops and copper subloops." *Triennial Review Order*, ¶ 271. Thus, so long as it complies with the network disclosure rules, which it has, BellSouth is entitled to retire its copper cable facilities.

In addition, while the FCC preserved the states' authority to enforce "applicable state legal or regulatory requirements" with respect to copper retirements, the FCC explicitly held that it was not "establishing independent authority based on federal law for states to review incumbent LEC copper loop retirement policies." *Triennial Review Order*, at ¶ 284. Thus, while the Commission has the authority to enforce existing ("applicable") regulations regarding copper retirement, it does not have independent authority to review BellSouth's retirement policies.

- e. The Commission does not have the authority to award Covad the relief it seeks.

Although it is intentionally vague about the relief it seeks in this matter, one can assume that Covad wants the Commission to either (1) order BellSouth to unbundle its DSLAM; or (2) order BellSouth to provide its federally-tariffed wholesale DSL service at the line-sharing rate. The Commission does not have the jurisdiction to do either.

RESPONSE (Cont'd):

With respect to the DSLAM, the FCC confirmed in the *Triennial Review Order* that ILECs are not obligated to unbundle their packet networks, including their DSLAMs. The FCC held that “[w]e find, on a national basis, that competitors are not impaired without access to packet switching, including routers and DSLAMs.” *Triennial Review Order*, at ¶ 537. The basis for the FCC’s decision was that there did “not appear to be any barriers to deployment of packet switches that would cause [the FCC] to conclude that requesting carriers are impaired with respect to packet switching” and that “competitors continue to actively deploy their own packet switches, including routers and DSLAMs, and are not impaired without unbundled access to these facilities from incumbents.” *Id.* at ¶ 539.

With respect to its wholesale DSL service, BellSouth provides that service through a federal tariff. This Commission, therefore, does not have jurisdiction over that tariff or the terms and conditions under which the service is provided. As Judge Posner has explained, “A tariff filed with a federal agency is the equivalent of federal regulation. . . . And since the federal regulation defines the entire contractual relation between the parties, there is no contractual undertaking left over that state law might enforce *Federal law does not merely create a right; it occupies the whole field, displacing state law.*” *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488-89 (7th Cir. 1998) (emphasis added); see *Evans v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000) (filed tariff “conclusively and exclusively enumerate[s] the rights and liabilities as between the tariff and the customer”). In short, a state commission cannot regulate federally tariffed services. *Qwest Corp. v. Scott*, No. 02-3563, 2003 WL 79054 (D. Minn. Jan. 8, 2003).

REQUEST: 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? Please explain your response.

RESPONSE: BellSouth disagrees that it is “discontinuing existing service” to Covad or its customers by retiring its copper cable plant. Rather, BellSouth is replacing facilities, a result of which will be that the facility necessary to provide the line-sharing UNE will no longer exist. With that clarification, BellSouth refers the Commission to its response to Data Request No. 1.

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

RESPONSE: BellSouth does not dispute that the Commission generally has jurisdiction over disputes arising out of interconnection agreements. In specific response to Data Request No. 3, however, BellSouth refers the Commission to its response to Data Request No. 1.

REQUEST: Are there any disputed issues of material fact involved in the resolution of this Complaint, or is BellSouth 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?

RESPONSE: BellSouth contends that there are no disputed issues of material fact in this case in that BellSouth did not breach the parties' interconnection agreement and that Covad has a number of economically feasible alternatives to line-sharing pursuant to which it could provide service to the customers at issue. If Covad disputes either of those propositions, however, BellSouth respectfully requests a hearing on this matter.

REQUEST: Please specifically identify when Covad will no longer be able to provision service via copper loops to each of the Covad customers identified in confidential Exhibit A (attached to Covad's September 26, 2003 Complaint).

RESPONSE: Please see the attachment provided for a list of the circuits that will be affected by road moves and one that is in a deteriorating cable. BellSouth does not get a vote in any of these moves, they are all non-discretionary.

REQUEST: 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" process after the Commission reaches a decision on the merits of the Complaint.

a. Please provide details of your "true-up" proposal.

b. Has the "true-up" proposal been presented to Covad? If so, did Covad accept this proposal? If not, does BellSouth intend to present such a proposal?

RESPONSE: On the conference call, BellSouth stated that the issue of the temporary restraining order should be resolved by Covad purchasing BellSouth's wholesale DSL service from its federal tariff. Should Covad ultimately win the relief it wants, it can seek the difference in the rates as damages and the parties can true-up the payments.

BellSouth provided this option to Covad and Covad rejected it.

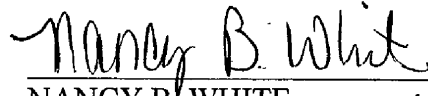
REQUEST: During the November 4, 2003, conference call between Covad, BellSouth and staff members, BellSouth's counsel stated that one project was for replacing a "deteriorated cable," and not a road construction or public works project.

Do you believe network upgrades or modifications which are undertaken for different reasons (i.e., cable deterioration versus road construction/public works projects) should be evaluated differently by the FPSC in its consideration of this Complaint? Please explain your answer.

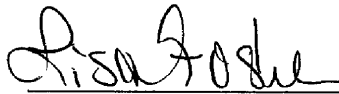
RESPONSE: BellSouth does not believe there is any difference in copper cable replacement for road moves or copper cable replacement for deteriorating cable. In each instance, BellSouth must remove the copper cable facility, and in each instance BellSouth's network deployment directives indicate that the copper should be replaced with fiber. The support for BellSouth's position that it has the right to replace its copper cable facilities with fiber facilities set forth in response to Data Request No. 1 are as applicable to road moves as they are to deteriorating cable.

Respectfully submitted, this 25th day of November, 2003.

BELLSOUTH TELECOMMUNICATIONS, INC.



NANCY B. WHITE (KA)
JAMES MEZA III
c/o Nancy H. Sims
150 South Monroe Street, Suite 400
Tallahassee, FL 32301
(305) 347-5558



LISA FOSHEE (KA)
R. DOUGLAS LACKEY
Suite 4300, BellSouth Center
675 West Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0754

#514504