ORIGINAL

Legal Department

Nancy B. White
General Counsel – Florida

BellSouth Telecommunications, Inc.
150 South Monroe Street
Room 400
Tallahassee, Florida 32301
(305) 347-5558

January 27, 2004

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

Re: Docket No. 030852-TP

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response in Opposition to Covad's Motion for Summary Final Order, which we ask that you file in the above captioned docket.

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,

Nancy B. White (KA)

Nancy B. White

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy White
524093

AUS
CAF
CMP
COM
CTR
ECR
GCL
OPC
MMS
SEC 1
OTH

CERTIFICATE OF SERVICE
Docket No. 030852-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail, Hand Delivery* and FedEx⊗ this 27th day of January 2004 to the following:

Adam Teitzman, Staff Counsel*
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850
Phone: (850) 413-6212
Fax: (850) 413-6250
ateitzma@psc.state.fl.us

Michael A. Gross
VP Reg. Affairs & Reg. Counsel
Florida Cable Telecomm. Assoc.
246 East 6th Avenue, Ste. 100
Tallahassee, FL 32303
Tel. No. (850) 681-1990
Fax. No. (850) 681-9676
mgross@fcta.com

Matthew Feil (+)
Scott Kassman
FDN Communications
390 North Orange Avenue
Suite 2000
Orlando, FL 32801-1640
Tel. No. 407 835-0460
Fax No. 407 835-0309
mfeil@mail.fdn.com
skassman@mail.fdn.com

Joseph A. McGlothlin+⊗
Vicki Gordon Kaufman+
McWhirter, Reeves, McGlothlin,
Davidson, Kaufman & Arnold PA
117 South Gadsden Street
Tallahassee, FL 32301
Tel. No. (850) 222-2525
Fax. No. (850) 222-5606
jmcglothlin@mac-law.com
vkaufman@mac-law.com
Represents FCCA

Mr. Charles E. Watkins+
1230 Peachtree Street, NE
19th Floor
Atlanta, GA 30309-3574
Phone: (404) 942-3492
Fax: (404) 942-3495
Represents Covad
gwatkins@covad.com
jbell@covad.com

Nanette Edwards, Esq.+
Director – Regulatory
ITC^DeltaCom
4092 S. Memorial Parkway
Huntsville, AL 35802
Tel. No. (256) 382-3856
Represent ITC^DeltaCom
nedwards@itcdeltacom.com

Ms. Donna C. McNulty+
MCI WorldCom Communications, Inc.
1203 Governors Square Blvd.,
Suite 201
Tallahassee, FL 32301-2960
Phone No. 850- 219-1008
Fax No. 850 219-1018
Represents MCI WorldCom
donna.mcnulty@mci.com

De O'Roark, Esq. (+)
MCI WorldCom Communications, Inc (GA)
Six Concourse Parkway
Suite 3200
Atlanta, GA 30328
Represents MCI WorldCom
de.oroark@mci.com

Floyd Self, Esq.+
Norman H. Horton, Esq.~
Messer Caparello & Self
215 South Monroe Street, Suite 701
Tallahassee, FL 32301
Tel. No. (850) 222-0720
Fax. No. (850) 224-4359
Represents ITC^DeltaCom
Represents MCI
Represents KMC
Represents Xspedius~
fself@lawfla.com
nhorton@lawfla.com

Tracy Hatch, Esq.
AT&T
101 North Monroe Street
Suite 700
Tallahassee, FL 32301
Tel. No. (850) 425-6364
thatch@att.com

Lisa A. Sapper+⊗
AT&T
1200 Peachtree Street, N.E.
Suite 8100
Atlanta, GA 30309
Tel. No. (404) 810-7812
lisariley@att.com

Marva Brown Johnson, Esq.
KMC Telecom III, LLC
1755 North Brown Road
Lawrenceville, GA 30043-8119
Tel. No. (678) 985-6261
Fax No.: (678) 985-6213
Represents KMC
marva.johnson@kmctelecom.com

Richard A. Chapkis (+)
Kimberly Caswell
Verizon Florida, Inc.
One Tampa City Center
201 North Franklin Street (33602)
Post Office Box 110, FLTC0007
Tampa, Florida 33601-0110
Tel. No. (813) 483-2606
Fax. No. (813) 204-8870
Represents Verizon
Richard.chapkis@verizon.com

Susan S. Masterton, Esq. +
Sprint-Florida, Inc.
Sprint Communications Co. L.P.
1313 Blair Stone Road
P.O. Box 2214
Tallahassee, FL 32316-2214
Tel. No. (850) 599-1560
Fax. No. (850) 878-0777
susan.masterton@mail.sprint.com

Jean Houck
Business Telecom, Inc.
4300 Six Forks Road
Raleigh, NC 27609
Tel. No. (919) 863-7325
jean.houck@btitelecom.net

Jake E. Jennings +
NewSouth Communications Corp
Two North Main Center
Greenville, SC 29601-2719
Tel. No.: 864 672-5877
Fax No.: 864 672-5313
jejennings@newsouth.com

Jon Moyle, Jr.
Moyle Law Firm (Tall)
The Perkins House
118 North Gadsden Street
Tallahassee, FL 32301
Phone: (850) 681-3828
Fax: 681-8788
Represents NuVox Communications Inc.
Email: *jmoylejr@/moylelaw.com*

Charles V. Gerkin, Jr. **(+)**
Regulatory Counsel
Allegiance Telecom, Inc.
9201 North Central Expressway
Dallas, TX 75231
Phone: 469-259-4051
Fax: 770 234-5945
Cell: 770 855-0466
charles.gerkin@algx.com

Terry Larkin
Allegiance Telecom, Inc.
700 East Butterfield Road
Lombard, IL 60148
Phone: (630) 522-6453
terry.larkin@algx.com

Jorge Cruz-Bustillo +
Assistant General Counsel
Supra Telecommunications
2620 S.W. 27th Avenue
Miami, Florida 33133
Tel. No. (305) 476-4252
Fax. No. (305) 443-1078
jorge.cruz-busitillo@stis.com

Jonathan Audu
Manager, Regulatory Affairs
Supra Telecommunications
1311 Executive Center Drive
Suite 220
Tallahassee, FL 32301-5027
Tel. No. (850) 402-0510
Fax. No. (850) 402-0522
Email: jonathan.audu@stis.com

AT&T by E-Mail only:
soniadaniels@att.com

Bo Russell
Nuvox Communications Inc.
301 North Main Street
Greenville, SC 29601-2171
Phone: (864) 331-7323
Email: brussell@nuvox.com

Nancy B. White (LA)

(+) signed protective agreement
(*) via Hand Delivery
(⊗) via FedEx

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Implementation of requirements arising from Federal Communications Commission triennial UNE review: Location-Specific Review for DS1, DS3 and Dark Fiber Loops, and Route-Specific Review for DS1, DS3 and Dark Fiber Transport	)	Docket No. 030852-TP Filed: January 27, 2004

BELLSOUTH TELECOMMUNICATION, INC.'S RESPONSE IN OPPOSITION TO COVAD'S MOTION FOR SUMMARY FINAL ORDER

I. INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth") files this response in opposition to the Motion for Summary Final Order as to Issue Nos. 7-12 and 14-18 ("Motion") filed by DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"). Covad's Motion asserts incorrectly that because BellSouth has failed to produce evidence satisfying the FCC's triggers criteria that a summary final order is appropriate. At the same time, Covad requests the Commission order BellSouth to submit different evidence, which evidence would presumably be more to Covad's liking, and to expand the schedule in this proceeding. The Commission should deny Covad's motion in its entirety.

As a preliminary matter, as BellSouth recently explained in its Response in Opposition to the FCCA's Motion to Strike filed January 21, 2004, Covad's disagreement with the type of evidence BellSouth submitted does not lead to a conclusion that the evidence is not relevant. Arguments about the weight of the evidence are appropriately raised in post-hearing briefs. BellSouth submitted evidence and Covad evidently disagrees with the evidence, but evidentiary disagreements by nature suggest the existence of material issues of fact in dispute, which is the situation here.

In considering whether material facts exist, this Commission has explained that Motions for Summary Final Order are analyzed using the legal principles applicable to motions for summary judgment. These principles require Covad to demonstrate the nonexistence of an issue of material fact, and every inference must be drawn in BellSouth's favor. Order No. PSC-03-1469-FOF-TL. It is difficult to fathom how Covad can, on the one hand insist that there are no material facts in dispute, and then suggest on the other hand that BellSouth must submit evidence in a different format. The reality is that Covad's motion is little more than a bullying tactic designed to make BellSouth compile and present discovery responses in a format pleasing to Covad, rather than a motion founded on legal principles and a lack of material facts. Because Covad's Motion is defective as a matter of law, it must be rejected.

II. BACKGROUND

This docket concerns, in part, consideration of the triggers applicable to dedicated transport established by the FCC in its *Triennial Review Order* ("TRO"). Based upon both discovery responses and prefiled testimony, it is clear that there is a disagreement between the parties concerning interpretation of the triggers rules. In particular, the rules applicable to transport provide that "[a] route between two points . . . may pass through one or more intermediate wire centers or *switches* . . . . [t]ransmission paths between identical end points . . . are the same 'route,' irrespective of whether they pass through the same intermediate wire centers or switches . . . ." 47 C.F.R. § 51.319(e). Nothing could be clearer, although Covad and others seem to ignore this, then that the triggers test the FCC has created is based on routes, which include transmission paths that pass through switches, and is not based on direct physical links between one central office and a second central office. The TRO explains in language that

is not susceptible to manipulation or misinterpretation that a direct connection is not required. (¶ 402, n. 1246).

Covad and others take issue with BellSouth's application of these clear rules. To illustrate the disagreement, suppose that there are two BellSouth wire centers, wire center A and wire center B. BellSouth's transport facilities directly connect the two wire centers. In this illustration, there are also CLEC facilities. This hypothetical CLEC has transport facilities that take traffic from BellSouth wire center A, to the CLEC's fiber ring, and then to the CLEC's switch. The CLEC also has transport facilities that take traffic from BellSouth wire center B to the CLEC's fiber ring, and then to that same switch. In this example, the CLEC does not have transport facilities that route directly between wire center A to wire center B; instead, transport occurs indirectly between the two BellSouth wire centers, via the CLEC switch. Under the FCC's rules, the two routes, BellSouth's route, which is direct, and the CLEC's route, which goes through a switch, both count as routes from A to B. In responding to discovery, however, many CLECs have failed to identify indirect connections between wire centers A and B, because, in the CLECs' interpretation, indirect transport routes are not relevant.[1] The CLECs interpretation of the rule (where, in fact, no interpretation is required or allowed) is simply wrong, and would turn the goal of encouraging facilities-based transport and encouraging CLECs to build out their transport networks on its head. BellSouth's prefiled testimony and exhibits include reasonable inferences made relating to certain CLECs; such inferences – which are in line with the direction given in the TRO -- include that transport routes are indirectly

[1] E.g., AT&T's response to Verizon Interrogatory 1 "AT&T is not a self-provider of transport *as defined by the TRO* .... AT&T self-provides facilities that connect, for example, our switch to ILEC office A and facilities that connect our switch to ILEC office B using portions of a fiber that passes near/through both A and B, but does not either (1) connect A to B or (2) take on a dedicated basis any 'traffic' that originates at either one to the other and therefore AT&T's facilities are not dedicated transport as defined by the TRO and new FCC rule." (emphasis added).

possible between certain wire centers. This Commission will have to resolve this, and other, disagreements in this proceeding.

DISCUSSION

A. Covad's Motion Fails to Meet the Legal Standard

In considering motions for summary final order, the procedural posture is telling. In the case *Re: Application for increase in water rates in Orange County by Wedgefield Utilities, Inc.*; Docket No. 991437-WU ("*Wedgefield Order*") (July 27, 2001), this Commission explained that it was premature to consider a motion for summary final order before the parties had the opportunity to "complete discovery and file testimony." Here, while preliminary rounds of discovery have been conducted, additional discovery requests are pending. Moreover, BellSouth anticipates serving discovery relating to the rebuttal testimony that was recently filed, and may also need to depose witnesses and non-parties to fully complete the evidentiary record.[2] In addition, there remains a round of surrebuttal testimony, which testimony is not due to be filed until February 4, 2004. Because the procedural posture here demonstrates that discovery has not been completed and all testimony has not been filed, it is obvious that the drastic remedy of a final summary order is not appropriate.

When considering whether it is appropriate to enter final summary orders, Florida administrative decisions show that such motions are rarely granted. *Wedgefield Order and* Consolidated dockets 030867, 030868, 030869, and 030961 ("Rate rebalancing docket"), Order No. 03-1469-FOF-TL. This is because all inferences are drawn in favor of the non-moving

[2] At the outset of this proceeding, on September 21, 2004, BellSouth and the FCCA filed a Joint Emergency Motion which sought to change the procedural dates so that direct testimony was filed on January 23, 2004, with rebuttal testimony due on February 13, 2004. As set forth in that motion, the parties anticipated that this docket would be particularly fact-intensive. Covad did not object to the motion. The Commission denied the motion and in light of the controlling dates in this case, it is particularly important to permit the completion of the full discovery period.

party, and because the moving party must demonstrate that there are no material facts are in dispute – legal requirements that Covad has not met. Recently, in rejecting the Attorney General's Motion for Summary Final Order in the Rate rebalancing docket, Commissioner Jaber explained:

> I have, for the last four years now, expressed concerns about motions for summary final orders . . . . the standard is a tough one. And when motions for summary final orders are filed, they are filed, it's my understanding, with the . . . . benefit of the doubt, the possible inference in favor of the party who the motion for summary final order is brought against. And that's tough, that's a very tough standard to meet.
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> * * * *
>
> The very fact that we've got conflicting testimony and an opportunity to cross-examine, I think, leaves the notion that there's a genuine issue of material fact.
>
> (Rate rebalancing docket, Hearing Tr., Vol. 2, pp. 102-103).

Commissioner Jaber's explanation of how the Commission views summary final orders in the Rate rebalancing docket is consistent with the analysis in the *Wedgefield Order,* where the Commission recognized that:

> the granting of a summary judgment, in most instances, brings a sudden and drastic conclusion to a lawsuit, thus foreclosing the litigant from the benefit of and right to a trial on the merits of his or her claim. *Coastal Caribbean Corp. v. Rawlings,* 361 So.2d 719, 721 (Fla. 4th DCA 1978). It is for this very reason that caution must be exercised in the granting of summary judgment, and the procedural strictures inherent in the Florida Rules of Civil Procedure governing summary judgment must be observed. *Page v. Staley,* 226 So.2d 129, 132 (Fla. 4th DCA 1969); *McCraney v. Barberi,* 677 So.2d 355 (Fla. 1st DCA 1996) (finding that summary judgment should be cautiously granted). The procedural strictures are designed to protect the constitutional right of the litigant to a trial on the merits of his or her claim. They are not merely procedural niceties nor technicalities.

The Commission denied granting summary final order in the *Wedgefield Order,* explaining "[w]eighing the severity of the remedy sought in the summary final order against

the diminutive avoided costs and delay available, we find that the better and more cautious course is to deny the summary final order." This Commission should likewise deny Covad's Motion – discovery and testimony are ongoing, summary final orders are rarely granted, and granting Covad's order even if it met the legal standard (which it does not) would fail to meet the policy objectives of avoiding costs and delay.

B. Covad's Motion Confuses "Assumptions" with Evidentiary Inferences

Covad tries to show that there are no material facts in dispute by devoting the bulk of its motion to an explanation of how evidentiary inferences that BellSouth draws are alleged assumptions. BellSouth will not reiterate its explanation of how the evidence it has submitted is relevant; BellSouth incorporates by reference as if fully stated herein its Response in Opposition to the FCCA's Motion to Strike filed on January 21, 2004. BellSouth's argument here shows that Covad's motion fails because it has made no showing that demonstrates its entitlement to a summary final order.

The real dispute between the parties is that Covad has confused inference and assumption. In fairness to Covad, BellSouth's witnesses (which witnesses are not lawyers) use the words "assume" and "assumption" rather than the legal terminology for the conclusions they reached. Had BellSouth's witnesses used legal terminology, the language used would have been that the witnesses *inferred* and drew *inferences* from facts. BellSouth's witnesses have explained the basis for their inferences. Florida law permits inferences, which are simply conclusions drawn from facts. *American Heritage Dictionary,* 1982. For example, § 90.701, Florida Statutes, permits a witness to testify in the form of inference and opinion. Likewise, § 90.301 Florida Statutes, allows "the drawing of an inference that is appropriate." Finally, § 90.703, allows testimony in the form of an opinion or inference even when it includes an ultimate issue

to be decided by the trier of fact. That BellSouth's witnesses have made certain inferences is entirely permissible and appropriate. The *TRO* does not trump nor suggest that inferences permissible in any state evidentiary proceeding are not permitted. In delegating authority to the states, the FCC recognized that "the states are better positioned than we are to gather and assess the necessary information." *TRO*, ¶ 188. Covad cites to no legal authority, nor can it, that would prohibit BellSouth from making reasonable inferences in light of disagreements over legal interpretations, and its suggestion to the contrary is simply wrong.[3]

As a matter of law, the dispute between BellSouth and Covad can be distilled to one of interpretation. The evidence relating to transport is susceptible of different interpretations. Certainly this Commission can apply its expertise in evaluating questions relating to transport. In conducting this evaluation, it is telling that AT&T denied the existence of a single facilities based transport route when: (1) AT&T includes predecessor companies that were at the forefront of the competitive access provider markets and led the dedicated access and private line markets; (2) AT&T leads the enterprise market; and (3) AT&T is one of the largest nationwide CLECs. In light of such facts and the evidence submitted in this proceeding, the existence of material facts that are in dispute is obvious.

C. Covad's Request for Additional Evidence Is Nonsensical

Covad concludes its Motion with a request that the Commission require BellSouth to submit evidence, which presumably would limit the transport routes at issue to those relating only to CLEC admissions. This conclusion is nonsensical and it shows the fallacy

[3] Covad claims, without citing to any legal authority, that "[t]he tests ordered by the FCC do not allow for assumptions and do not provide for any burden-shifting to CLECs to disprove assumptions . . ." Motion, p. 4. Covad's lack of authority to support this point is telling – it is up to this Commission to make findings of fact and conclusions of law, and in doing so, the Commission relies on and follows the Florida Evidence Code, which allows inferences. *See* Order No. PSC-92-0326-PCO-WS. In addition, the FCC itself addressed the burden of proof, when it found that "[w]e do not adopt a 'burden of proof' approach that places the onus on either incumbent LECs or competitors to prove or disprove the need for unbundling." *TRO*, ¶ 92.

of Covad's Motion. Covad's request shows that it recognizes that there are transport routes that, by carrier admissions, meet the triggers test. This necessarily means that material facts are at issue in this proceeding, and nullifies Covad's attempt to obtain a summary final order. In reality, Covad's request is a transparent attempt to dictate the means by which BellSouth presents its case, which Covad has no authority to do. BellSouth's witnesses are not precluded from applying common sense to carrier discovery responses to present the most relevant evidence to this Commission.

For example, AT&T and others claim that, based on their *interpretations* of the *TRO,* they do not offer wholesale transport. Yet, in analogous circumstances, the Commission denied motions for summary final order when the parties disagreed about what statutory language meant. Specifically, in the Rate rebalancing docket, this Commission found that "[t]he parties disagree on the proper interpretation of Section 364.164, Florida Statutes. We find, based on the pleadings, the arguments, and the prefiled testimony, there are genuine issues of material fact in dispute regardless of whose statutory interpretation is ultimately determined to be correct." Order No. PSC-03-1469-FOF-TL, p 15. This Commission should follow the rationale it articulated in the Rate rebalancing docket and reject Covad's motion in this case.

Moreover, if Covad believes that it needs additional evidence relating to how BellSouth selected certain routes in seeking a finding of non-impairment, then Covad can certainly propound additional discovery with questions of its choosing. Covad cannot, however, preclude BellSouth's ability to proffer evidence and evidentiary inferences into the record, simply because Covad disagrees with BellSouth's conclusions.

III. CONCLUSION

As set forth above, BellSouth respectfully requests that the Commission deny Covad's Motion for Summary Final Order.

Respectfully submitted this 27th day of January 2004.

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

R. DOUGLAS LACKEY (RA)
ANDREW D. SHORE
MEREDITH E. MAYS
Suite 4300, BellSouth Center
675 W. Peachtree Street, N.E.
Atlanta, GA 30375
(404) 335-0750

COUNSEL FOR BELLSOUTH
TELECOMMUNICATIONS, INC.

523737