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Sent: Wednesday, November 10, 2004 1:08 PM
To: Filings@psc.state.fl.us
Cc: Fatool, Vicki; Peters, Evelyn; Linda Hobbs; Nancy Sims; Holland, Robyn P; Bixler, Micheale; Slaughter, Brenda ; Mays, Meredith
Subject: Docket No. 040601-TP BellSouth's Motion for Reconsideration and Clarification

- a. Lynn Barclay
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- b. Docket No. 040601-TP (Covad Petition)
- c. BellSouth Telecommunications, Inc.
 on behalf of Meredith E. Mays
- d. 8 pages total (including attachment)
- e. BellSouth Telecommunications, Inc.'s Motion for Reconsideration and Clarification.

<<040601 motion for recon.pdf>>

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November 10, 2004

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


Re: Docket No. 040601-TP (Covad)

Dear Ms. Bayó:

Enclosed is BellSouth Telecommunications, Inc.'s Motion for Reconsideration and Clarification, which we ask that you file in the 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,


Meredith E. Mays

Enclosures

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

549356

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CERTIFICATE OF SERVICE
Docket No. 040601-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
Electronic Mail and FedEx this 10th day of November, 2004 to the following:

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Meredith E. Mays

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of DIECA Communications, Inc.,)
d/b/a Covad Communications Company,) Docket No.: 040601-TP
for Arbitration of Interconnection Agreement)
Amendment with BellSouth Telecommunications,) Filed: November 10, 2004
Inc. pursuant to Section 252(b) of the)
Telecommunications Act of 1996)
_____)

**BELLSOUTH TELECOMMUNICATIONS, INC.'S
MOTION FOR RECONSIDERATION AND CLARIFICATION**

BellSouth Telecommunications, Inc. ("BellSouth") requests that the Commission reconsider and clarify its Order¹ issued October 26, 2004. Specifically, BellSouth requests that the Commission: (1) conclude that Covad Communications Company ("Covad") is not entitled to new line sharing arrangements after October 1, 2004; (2) order Covad to conform its current interconnection agreement with BellSouth to the transition plan in the *Triennial Review Order*; (3) order the true-up of rates referenced in the Order; (4) clarify its Order to make clear that it resulted from Commission action not from an agreement between the parties and clarify that the use of the language "section 271 line sharing obligation" was not intended to address material issues in dispute. These actions will ensure that the Commission's Order both complies with existing law and is accurate.

DISCUSSION

I. The Verizon Order Justifies Reconsideration.

The Commission should reconsider and reverse its decision that allows Covad access to new line sharing arrangements after October 1, 2004, due to the *Verizon Order*² recently issued by the Federal Communications Commission ("FCC"). As a result of the *Verizon Order*, the

¹ Order No. PSC-04-1044-FOF-TP ("Order").

² *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. 160(c), et al.*, WC Docket No. 01-338, October 27, 2004 ("*Verizon Order*").

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FLORIDA COMMISSION OF PUBLIC UTILITIES

FCC will forbear from enforcement of any 271 obligation with respect to line sharing (if such an obligation ever existed at all). The *Verizon Order* does not explicitly mention line sharing, however, the FCC did not deny any part of the BellSouth petition which asked for forbearance for all broadband elements delisted under section 251. Line sharing is a broadband element.³ Under Section 160(a), any petition for forbearance not denied within the statutory time period is deemed granted.⁴ Thus, as explained by Commissioner Martin in his concurring statement, “regardless of whether it was affirmatively granted, because the [FCC’s] decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute.”

BellSouth acknowledges that the separate statement of Chairman Powell – which statement was amended *after* the FCC issued a press release concerning the adoption of the *Verizon Order* and, as amended -- conflicts with Commissioner Martin’s statement. Chairman Powell’s amended statement, however, does not address section 160(c) of the Act which obligates the FCC to rule on forbearance petitions within fifteen months of the filing date of the petition. Again, while the *Verizon Order* does not explicitly mention line sharing, the FCC did not deny any part of the BellSouth petition that asked for forbearance for all broadband elements delisted under section 251. Consequently, the FCC’s failure to deny BellSouth’s petition with respect to line sharing means that the FCC must forbear from enforcing any 271 obligations that may exist with respect to line sharing, as recognized by Commissioner Martin. Moreover, while Chairman Powell indicated line sharing is excluded from the *Verizon Order*, he did not explain

³ *Triennial Review Order*, at ¶ 255 (“we use the term ‘line sharing’ to describe when a competing carrier provides *xDSL service* over the same line that the incumbent LEC uses to provide voice service...”) (emphasis added).

⁴ 47 U.S.C. § 160(c) (“[a]ny such petition shall be deemed granted if the Commission does not deny the petition...”).

the basis for his conclusion nor did he address the legal argument that the FCC's failure to deny the petitions results in granting forbearance for line sharing as well as the other cited elements.

As further grounds for reconsideration, the *Verizon Order* touted the benefits to broadband competition, which benefits apply equally to excluding access to new line sharing arrangements. For example, the FCC held that:

The [FCC] intended that its determinations in the *Triennial Review* proceeding would relieve incumbent LECs of such substantial costs and obligations, and encourage them to invest in next-generation technologies and provide broadband services to consumers. We see no reason why our analysis should be different when the unbundling obligation is imposed on the BOCs under section 271 rather than section 251(c) of the Act.⁵

This holding mirrors the FCC's conclusion about the effect of removing line sharing from the UNE list in the *Triennial Review Order*.⁶ The FCC also explained "[t]here appear to be a number of promising access technologies on the horizon and we expect intermodal platforms to become increasingly a substitute for ... wireline broadband service."⁷ Finally, the FCC concluded:

broadband technologies are developing and we expect intermodal competition to become increasingly robust, including providers using platforms such as satellite, power lines and fixed and mobile wireless in addition to the cable providers and BOCs. We expect forbearance from section 271 unbundling will encourage the BOCs to become full competitors in this emerging industry and at the same time substantially enhance the competitive forces that will prevent the BOCs from engaging in unjust and unreasonable practices at any level of the broadband market.⁸

⁵ *Verizon Order* ¶ 34.

⁶ *Triennial Review Order*, at ¶ 263 ("we anticipate that the [FCC's] decisions in this Order and other proceedings will encourage the deployment of new technologies providing the mass market with even more broadband options").

⁷ *Verizon Order* ¶ 22.

⁸ *Verizon Order* ¶ 29.

Just as forbearance from 271 obligations for fiber to the home and fiber to the curb loops is good for broadband competition, so is forbearance from any line sharing obligations. This Commission should reconsider its decision so that it is consistent with the *Verizon Order*.

II. The Commission Should Order Covad To Amend Its Section 251 Interconnection Agreement.

Even if the Commission decides not to address line sharing until the FCC has more clearly articulated national telecommunications policy, the Commission cannot blind itself to current law, which clearly provides that line sharing is no longer a Section 251 UNE. The parties' agreement obligates BellSouth to provide Covad with access to line sharing as though it is an existing Section 251 obligation. At a minimum, the Commission must require Covad to remove line sharing from the parties' Section 251 interconnection agreement. This amendment of the interconnection agreement must occur because by declining to require Covad to amend the Section 251 interconnection agreement, the Commission is allowing the continued existence of an interconnection agreement that does not comply with the law.

III. The Commission Should Order The Rate True-Up Referenced In The Order.

In the Order, the Commission stated that "a true-up *may* be appropriate."⁹ BellSouth requests that the Commission remove the permissive language from the Order and replace it with mandatory language; namely "a true-up *shall* be appropriate." The appropriate true-up would be the full cost of the loop for any new line sharing arrangements provisioned after October 1, 2004 as well as increased recurring rates for line sharing arrangements ordered between October 1, 2003 through October 1, 2004 as set forth in the FCC's transition plan. Without such a true-up, Covad benefits from lower line sharing recurring rates than those set by the FCC.

⁹ *Order*, at 2 (emphasis supplied).

IV. The Commission Should Clarify its Order

The Order notes that “each side indicated they would continue to honor existing interconnection agreement obligations . . . through the term of the parties interconnection agreement ending December 19, 2004.” While that language is technically correct – BellSouth has stated that it will not unilaterally modify the terms of an interconnection agreement, which means that until an amendment or an order BellSouth must continue to abide by such terms – it has caused confusion. A recent order from the North Carolina Commission in a similar dispute between the parties referred to this Commission’s agenda session and stated “BellSouth and Covad agreed at a meeting held on October 5, 2004, that BellSouth will continue to provide Covad access to new line sharing arrangements until December 19, 2004.” While BellSouth will respond in due course to the North Carolina Commission, to accurately reflect the October 5, 2004 agenda session, the Order should be modified. This modification should make it clear that Covad’s access to new line sharing arrangements in Florida after October 1, 2004 results due to Commission action and not because of an agreement between the parties.¹⁰

Finally, in an abundance of caution, BellSouth requests the Commission clarify that the reference to “section 271 line sharing obligation” in the Order was not intended to reflect a Commission decision on disputed issues. This modification can occur through the insertion of a single word, underlined and italicized in the following sentence: “if the FCC affirmatively removes any section 271 line sharing obligation.”

CONCLUSION

¹⁰ See October 5, 2004 Tr. at 53, 55 (following discussion concerning whether an agreement could be reached, counsel for BellSouth stated “[w]ith all due respect, I think we would prefer the order” and “I’m not sure I’m agreeing to anything”).

The Commission should reconsider its Order so that it is consistent with the *Verizon Order* and should also require Covad to amend the parties' Agreement to include the FCC's transitional plan. The Commission should also clarify its Order so that a true-up is mandatory rather than permissive and so that it is accurate.

Respectfully submitted, this 10th day of November 2004.

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