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COMMISSION
CLERK

-M-E-M-O-R-A-N-D-U-M-

DATE: January 6, 2005

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Office of the General Counsel (Teitzman) *AT BIC KOK*
Division of Competitive Markets & Enforcement (Dowds, Kennedy) *ES*

RE: Docket No. 040601-TP – Petition by DIECA Communications, Inc. d/b/a Covad Communications Company for arbitration of issue resulting from interconnection negotiations with BellSouth Telecommunications, Inc., and request for expedited processing. *WMB*

AGENDA: 01/18/05 – Regular Agenda – Motion and Cross-Motion for Reconsideration - Oral Argument Requested

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: Recommendation should be addressed by Commissioners Baez, Deason, Bradley, and Davidson

FILE NAME AND LOCATION: S:\PSC\GCL\WP\040601.RCM.DOC

Case Background

On August 21, 2003, the Federal Communications Commission (FCC) released its Triennial Review Order¹ (TRO) wherein the FCC determined that the high frequency portion of the loop (HFPL) was no longer required to be unbundled pursuant to section 251 of the Telecommunications Act of 1996² (the Act). However, the FCC did require a transition period in which section 251 line sharing³ will be available on a grandfathered basis for the next three

¹ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, et al., FCC 03-36 (rel. Aug. 21, 2003).

² TRO at ¶255-263

³ Line Sharing is the practice by which a CLEC and an ILEC share a local loop. The ILEC provides voice service over the low frequency portion of the loop, and a CLEC provides data services over the high frequency portion of the loop.

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years, with line sharing arrangements that existed before the effective date of the TRO remaining at the same rates until service is discontinued, while new arrangements added between October 2, 2003 and October 1, 2004 are subject to transitional rates. This determination was upheld by the D.C. Circuit Court in United States Telecommunications Association v. FCC, 359 F.3rd 554 (D.C. Cir. 2004)(USTA II).

On June 23, 2004, DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) filed its Petition for Arbitration and Request for Expedited Processing of an issue resulting from interconnection negotiations with BellSouth Telecommunications, Inc. (BellSouth). Covad is requesting we resolve the parties' dispute regarding line sharing rates, terms and conditions. On July 19, 2004, BellSouth filed its Response to Covad's Arbitration Petition in which it raised additional issues and requested this proceeding be treated as a change of law dispute rather than an arbitration.

On August 12, 2004, the parties filed a Joint Proposal letter. The parties stated that they had resolved Issue Nos. 2, 3, 6, 7, and 8 in their entirety and that discussions concerning Issue Nos. 4, 5, 9, and 10 were continuing. Additionally, the parties proposed a procedural schedule where each party would file a legal brief addressing the following issue:

- 1) Is BellSouth obligated to provide Covad access to line sharing after October 2004?⁴

The parties stated their intention in agreeing to limit the scope was to obtain a decision on the threshold legal question while still preserving all other arguments, including jurisdictional arguments, which each party expressly reserved. The joint proposed procedural schedule was approved by Order No. PSC-04-0833-PCO-TP, issued August 26, 2004.

On October 26, 2004, Order No. PSC-04-1044-FOF-TP (Line Sharing Order) was issued which required BellSouth to provide Covad access to new line sharing arrangements pursuant to the parties' interconnection agreement through its term ending December 19, 2004. On November 10, 2004, BellSouth filed its Motion for Reconsideration and Clarification of Order No. PSC-04-1044-FOF-TP. On November 12, 2004, Covad filed its Response to BellSouth's Motion for Reconsideration and Clarification and Cross-Motion for Reconsideration and Request for Oral Argument. On November 19, 2004, BellSouth filed its Response in Opposition to Covad's Cross-Motion and Request for Oral Argument. Staff notes BellSouth has stated it will continue to provide access to new line sharing arrangements pending resolution of its Motion for Reconsideration.

⁴ Pursuant to the FCC's transitional plan, Covad cannot request new line sharing arrangements after October 1, 2004. TRO at ¶265 BellSouth agreed not to take any action until October 5, 2004.

Discussion of Issues

Issue 1: Should Covad's Request for Oral Argument be granted?

Recommendation: No. The Request for Oral Argument should be denied. **(TEITZMAN)**

Staff Analysis: Covad filed its Request for Oral Argument pursuant to Rule 25-22.060(1)(F), Florida Administrative Code. Covad states that oral argument will aid the Commission in understanding the important legal and policy issues involved in this dispute and assist the Commission in reaching the appropriate decision in this matter.

BellSouth opposes Covad's Request for Oral Argument. BellSouth argues that oral argument concerning reconsideration of a matter the Commission has already discussed with the parties is not necessary. BellSouth argues that this matter can be appropriately decided as a matter of law without oral presentation.

Staff believes that the decision to either grant or deny oral argument pursuant to Rule 25-22.060(f), Florida Administrative Code, is solely within the discretion of the Commission. Moreover, staff believes that oral argument will not aid the Commission in comprehending and evaluating the issue before it, because this issue was fully addressed by both parties at the Agenda Conference held on October 5, 2004. Consequently, staff recommends that Covad's Request for Oral Argument should be denied.

Issue 2: Should BellSouth's Motion for Reconsideration be granted?

Recommendation: No. BellSouth has not demonstrated that when addressing the stipulated legal issue put forth by the parties in this docket, the Commission overlooked a point of fact or law in rendering Order No. PSC-04-1044-FOF-TP. (TEITZMAN)

Position of the Parties

BellSouth: In its Motion, BellSouth asserts the Commission should reconsider and reverse its decision that allows Covad access to new line sharing arrangements after October 1, 2004, due to the FCC's recently issued Forbearance Order.⁵ BellSouth asserts that as a result of the Forbearance Order the FCC will forbear from enforcement of any Section 271 obligation with respect to line sharing. BellSouth concedes the Forbearance Order does not explicitly mention line sharing; however, BellSouth contends that line sharing is a broadband element and the FCC did not deny any part of the forbearance petitions which asked for forbearance for all broadband elements delisted under section 251.

Additionally, BellSouth asserts that any petition for forbearance not denied within the statutory time period is deemed granted and that this assertion is supported by FCC Commissioner Martin in his concurring statement⁶ attached to the Order. BellSouth acknowledges that FCC Chairman Powell issued a separate statement which, as amended, conflicts with Commissioner Martin's statement.⁷ BellSouth contends that Chairman Powell's amended statement does not address Section 160(c) of the Act, which obligates the FCC to rule on a forbearance request within 15 months of the filing date of the petition. BellSouth argues further that while Chairman Powell indicated line sharing is excluded from the Forbearance Order, he did not explain the basis for his conclusion.

BellSouth also requests that even if the Commission decides not to address line sharing until the FCC has more clearly articulated a national telecommunications policy, the Commission should require Covad to remove line sharing from the parties' Section 251 interconnection agreement. BellSouth asserts that by not requiring 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.

Finally, BellSouth states that in the Line Sharing Order the Commission held that "a true-up may be appropriate".⁸ BellSouth requests the Commission revise the permissive language

⁵ Memorandum and Order, *Re: Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c), SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c), Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c), BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, WC Docket Nos. 01-338, 03-235, 03-260, 04-48, released October 27, 2004 (Forbearance Order)

⁶ FCC Commissioner Martin stated in his concurring statement that "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."

⁷ FCC Chairman Powell stated in his amended concurring statement that "By removing 271 unbundling obligations for fiber-based technologies – and not copper based technologies such as line sharing – today's decision holds great promise for consumers, the telecommunications sector and the American economy."

⁸ Line Sharing Order at 2

and replace it with mandatory language. BellSouth asserts the appropriate true-up would be to the full cost of the loop for any new line sharing arrangements provisioned from October 1, 2003 through October 1, 2004 as set forth in the FCC's transition plan. BellSouth contends that without a mandatory true-up, Covad benefits from lower line sharing rates than those set by the FCC.

Covad: In its response, Covad argues the Commission should deny BellSouth's Motion because it relies on an entirely baseless misconstruction of a clear order, specifically the Forbearance Order. Covad argues that rather than support BellSouth's position with regard to line sharing, the statements of Chairman Powell and Commissioner Martin clearly demonstrate that there is indeed a continuing RBOC obligation to provide CLECs with line sharing in accordance with Section 271 of the Act. Covad asserts that BellSouth is now engaging in "double-talk" in that BellSouth is relying on Commissioner Martin's statement to support its argument that the FCC granted forbearance from line sharing, while conversely arguing that line sharing is not a Section 271 obligation.

Covad argues, despite BellSouth's assertions to the contrary, that in the Forbearance Order the FCC did not grant forbearance from line sharing by implication or otherwise, because forbearance from line sharing was never requested. Covad contends that the Forbearance Order repeatedly provides a list of the elements from which the FCC is forbearing and line sharing does not appear on the list. Covad asserts further that the FCC repeatedly explains that it is granting forbearance to encourage the RBOCs to build next-generation fiber facilities, and there is no mention of any consideration related to legacy copper networks carrying line sharing.

Covad contends that both BellSouth and Commissioner Martin base their assertion that the Forbearance Order implicitly granted forbearance for line sharing on the incorrect premise that there was a request for line sharing in the Forbearance Petitions. Covad asserts that Verizon's Forbearance Petition listed the elements for which forbearance was sought, and line sharing was not included. Covad argues further that the FCC granted the list in its entirety, and it is a standard canon of statutory construction that when a legislative body or agency provides a list of items to which an order or statute applies, that list is presumed to be exclusive.⁹ Covad argues that if BellSouth believes the FCC implicitly granted forbearance for line sharing, despite language to the contrary, it should file a Motion for Clarification at the FCC and not a Motion for Reconsideration before this Commission.

In response to BellSouth's requested relief that the Commission order an amendment to the parties' interconnection agreement and pay the transition rate, Covad asserts that such a request is in violation of the Procedural Order, Florida law, and would prejudice Covad. Covad contends that BellSouth is requesting the Commission reconsider its Order on a preliminary issue in the arbitration and issue an order on the ultimate issue in the arbitration. Covad asserts that the two parties agreed to submit a preliminary legal question to the Commission for resolution which was memorialized by the Procedural Order. Covad further asserts that the Commission

⁹ See, e.g., *Settlement Funding, LLC v. Jamestown Life Ins. Co.*, 78 F.Supp.2d 1349, 1358 (N.D.GA., 1999).

held “that all outstanding issues and motions shall be held in abeyance pending resolution of the legal issue set forth by the parties in their Joint Proposal.”¹⁰

Covad asserts the amendment to the parties’ interconnection agreement for which BellSouth now requests the Commission’s approval is the same amendment, including pricing, which BellSouth proposed in its original arbitration filing. Covad contends the Commission should deny BellSouth’s requested relief because if granted, this action would 1) violate the Commission’s orders and the parties’ procedural Agreement; 2) deny Covad the opportunity to provide evidence and legal briefing in support of the amendment, including pricing, proposed by Covad; and 3) fail to rule on the legal basis for the language proposed by Covad.

Staff Analysis:

Standard of Review

The standard of review for a motion for reconsideration is whether the motion identifies a point of fact or law which was overlooked or which this Commission failed to consider in rendering its Order. See Stewart Bonded Warehouse, Inc. v. Bevis, 294 So. 2d 315 (Fla. 1974); Diamond Cab Co. v. King, 146 So. 2d 889 (Fla. 1962); and Pingree v. Quaintance, 394 So. 2d 162 (Fla. 1st DCA 1981). In a motion for reconsideration, it is not appropriate to reargue matters that have already been considered. Sherwood v. State, 111 So. 2d 96 (Fla. 3rd DCA 1959), citing State ex.rel. Jaytex Realty Co. v. Green, 105 So. 2d 817 (Fla. 1st DCA 1958). Furthermore, a motion for reconsideration should not be granted “based upon an arbitrary feeling that a mistake may have been made, but should be based upon specific factual matters set forth in the record and susceptible to review.” Stewart Bonded Warehouse, Inc., 294 So. 2d at 317.

Staff believes that BellSouth has not demonstrated that in addressing the stipulated legal issue¹¹ put forth by the parties in this docket, the Commission overlooked a point of fact or law in rendering its Order. In the Line Sharing Order, the Commission found that BellSouth had a continuing obligation, pursuant to the terms of its interconnection agreement with Covad, to provide access to new line sharing arrangements through the term of the agreement. This decision was reached after the parties indicated at the October 5th Agenda Conference that they had an existing interconnection agreement that addressed line sharing obligations. At no point in its Motion for Reconsideration does BellSouth call into question the Commission’s justification or rationale for reaching its decision. Rather, BellSouth relies heavily on the Forbearance Order, issued subsequent to the Commission’s Line Sharing Order, as the justification for its Motion. However, staff does not believe the Forbearance Order sheds additional light on the question put before this Commission, nor does it hinder or pre-empt the Commission’s decision. Accordingly, staff recommends the Commission deny BellSouth’s Motion for Reconsideration.

¹⁰ *Procedural Order at 2.*

¹¹ Is BellSouth obligated to provide Covad access to line sharing after October 2004?

Issue 3: Should BellSouth's Motion for Clarification be granted?

Recommendation: Yes. The Commission should clarify that the decision reached in Order No. PSC-04-1044-FOF-TP did not result from an agreement by the parties. Additionally, the Commission should clarify that it did not make an affirmative finding that there is an existing Section 271 line sharing obligation. (TEITZMAN)

Position of the Parties:

BellSouth's Motion for Clarification

In its Motion, BellSouth asserts that the Line Sharing Order notes that "each side indicated they would continue to honor existing interconnection agreement obligations through the terms of the parties' interconnection agreement ending December 19, 2004." BellSouth contends that while that language is technically correct - it has stated it will not unilaterally modify the terms of an interconnection agreement - it has caused confusion in other jurisdictions. BellSouth cites a North Carolina Commission Order which referred to this Commission's agenda session and stated that the parties had reached an agreement. As a result, BellSouth now requests this Commission clarify that BellSouth is required to provide access to new line sharing arrangements, not as a result of an agreement between the parties, but rather to comply with a Commission Order.

Additionally, BellSouth requests the Commission clarify that the reference in the Line Sharing Order to a "section 271 line sharing obligation" was not intended to reflect a decision on disputed issues.

Covad did not address BellSouth's Motion for Clarification in its response.

Staff Analysis:

Staff does not believe the Commission indicated in the Line Sharing Order that an agreement had been reached by the parties. To the contrary, staff believes the Line Sharing Order explicitly requires BellSouth to continue providing access to new line sharing arrangements. Nonetheless, it appears that some confusion may have occurred in other jurisdictions. Therefore, staff recommends the Commission clarify that BellSouth is required to provide access to new line sharing arrangements, not as a result of an agreement between the parties, but rather to comply with a Commission Order.

Additionally, the last line on page 2 of the Line Sharing Order states:

Additionally, we recognize that a true-up may be appropriate if the FCC affirmatively removes the section 271 line sharing obligation and shall revisit this matter if necessary.

Staff has reviewed the Agenda transcript and does not believe the Commission intended to make an affirmative finding that there is an existing Section 271 line sharing obligation. Accordingly, staff recommends the following clarification be made:

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Additionally, we recognize that a true-up may be appropriate if the FCC affirmatively removes *any* Section 271 line sharing obligation and shall revisit this matter if necessary.

Issue 4: Should Covad's Cross-Motion for Reconsideration be granted?

Recommendation: No. Covad has not demonstrated that when addressing the stipulated legal issue put forth by the parties in this docket, the Commission overlooked a point of fact or law in rendering Order No. PSC-04-1044-FOF-TP. (TEITZMAN)

Position of the Parties:

Covad's Cross-Motion

In its Cross-Motion, Covad asserts it is now abundantly clear that line sharing is a Section 271 obligation based on the statements of Chairman Powell and Commissioner Martin. Covad asserts that a not-so-subtle shift has occurred in BellSouth's advocacy from arguing that line sharing never was a Section 271 obligation to arguing the FCC will forbear from enforcing the obligation, because it is now clear that at least two Commissioners consider line sharing a Section 271 obligation. Covad asserts there can be no debate whether the FCC has granted forbearance for line sharing unless line sharing is a Section 271 obligation from which forbearance is necessary. Consequently, regardless of whether forbearance for line sharing has been granted, Covad requests this Commission find that line sharing is a Section 271 obligation unless and until the FCC forbears from enforcing it.

Covad asserts it would not object to the inclusion in a Commission Order of the following language adopted by the Louisiana Commission:

On October 27, 2004, the Federal Communications Commission issued an order granting BellSouth's Petition for Forbearance in WC Docket 04-48. Based upon conflicting statements issued by FCC Chairman Michael Powell and FCC Commissioner Kevin Martin regarding the intent and scope of that order, there is disagreement as to whether BellSouth is relieved from the obligation to provide line sharing under Section 271. Because of this issue, the Commission will hold this proceeding in abeyance until the FCC provides clarification as to BellSouth's continuing obligation to provide line-sharing. Upon clarification by the FCC, the Parties will true-up the rates for line sharing, if necessary, retroactive to the effective date of the Triennial Review Order. If the FCC does not clarify this issue within three months from the issuance of this Commission's order, the Commission will review this matter again at the request of either party.

BellSouth's Response

Staff notes that a portion of BellSouth's Response addressed whether forbearance was specifically requested for line sharing in the Verizon petition and therefore serves as a response to Covad's response to BellSouth's Motion for Reconsideration, which is not permitted under the Florida Administrative Code. Those specific portions of BellSouth's response not addressing Covad's Cross-Motion have been omitted from staff's recommendation.

BellSouth argues that Covad's contention that Commissioner Martin acknowledged the existence of a Section 271 line sharing obligation is misplaced. BellSouth asserts that Commissioner Martin's use of the word "any" when he stated in his concurring statement to the Forbearance Order that ". . . I believe today's order also forbears from *any* section 271 obligation with respect to line sharing." (emphasis added), belies Covad's contention that line sharing is clearly a section 271 obligation.

In response to the language proposed by Covad, BellSouth proposes the Commission include the following language in a subsequent order:

On October 27, 2004, the Federal Communications Commission issued an order granting BellSouth's Petition for Forbearance in WC Docket 04-48. Based upon conflicting statements issued by FCC Chairman Michael Powell and FCC Commissioner Kevin Martin, this Commission desires a more clearly articulated statement of national policy before requiring the parties to amend their current interconnection agreement. The parties have extended the arbitration window relating to the current agreement through January 12, 2005. The Commission will hold this proceeding in abeyance until either: (1) January 12, 2005; or (2) the FCC articulates more clearly its national policy concerning line-sharing, whichever occurs first. In either instance, the Parties shall true-up the rates for line sharing retroactive to the effective date of the Triennial Review Order.

Staff Analysis:

Staff believes that Covad has not demonstrated that when addressing the stipulated legal issue put forth by the parties in this docket, the Commission overlooked a point of fact or law in rendering its Order. In the Line Sharing Order, the Commission found that BellSouth had a continuing obligation, pursuant to the terms of its interconnection agreement with Covad, to provide access to new line sharing arrangements through the term of the agreement. Similar to BellSouth, Covad relies heavily on the Forbearance Order, issued subsequent to the Commission's Line Sharing Order, as the justification for its Cross-Motion. However, staff does not believe the Forbearance Order sheds additional light on the specific question put before this Commission, nor does it hinder or pre-empt the Commission's decision.

Furthermore, staff does not believe Covad's requested relief is appropriate for a Cross-Motion for Reconsideration. Essentially, rather than reconsider its previous decision, Covad requests the Commission issue a declaratory statement that line sharing is a Section 271 obligation. Such a request is more appropriately addressed in another venue and does not identify a mistake of fact or law in the Commission's prior Order. Accordingly, staff recommends the Commission deny Covad's Cross-Motion for Reconsideration.

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Issue 5: Should this docket be closed?

Recommendation: No. This docket should remain open to address the remaining open issues, currently held in abeyance pursuant to Order No. PSC-04-0833-PCO-TP . Staff will work with the parties to discuss how the docket should proceed and bring a recommendation to the Prehearing Officer. (TEITZMAN)

Staff Analysis: This docket should remain open to address the remaining open issues, currently held in abeyance pursuant to Order No. PSC-04-0833-PCO-TP . Staff will work with the parties to discuss how the docket should proceed and bring a recommendation to the Prehearing Officer.

Furthermore, staff notes that in the Line Sharing Order the Commission found that a true-up of the rates for line sharing may be necessary at some later date. In the parties' filings, neither party indicates any objection to a mandatory true-up of the rates for line sharing. Consequently, staff will work with the parties to discuss a possible settlement of this issue.