

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition by DIECA
Communications, Inc. d/b/a Covad
Communications Company for
arbitration of unresolved issues
in interconnection agreement
with BellSouth
Telecommunications, Inc.

DOCKET NO. 001797-TP
ORDER NO. PSC-01-0967-PCO-TP
ISSUED: April 20, 2001

ORDER DENYING MOTION TO LIMIT ISSUES

Pursuant to Section 252 of the Telecommunications Act of 1996 (Act), DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) petitioned for arbitration with BellSouth Telecommunications, Inc. (BellSouth) on December 15, 2000. On January 9, 2001, BellSouth filed its Response to Covad's petition for arbitration. On April 2, 2001, BellSouth Telecommunications, Inc. (BellSouth) filed a Motion to Limit Issues (Motion). On April 9, 2001, Covad filed its Response to the Motion. This matter is currently set for an administrative hearing.

MOTION

In its Motion to Limit Issues, BellSouth asserts that several of the issues which Covad has included in its Petition for Arbitration are already included in other pending dockets before the Commission. BellSouth states that it is a waste of time and resources to consider precisely the same issues in multiple dockets when a generic docket has been established to consider those issues. Specifically, BellSouth alleges that Issues 10(a) and 10(b) are within the scope of Issue 11 from Docket No. 990649-TP, Investigation into Pricing of Unbundled Network Elements (UNE Docket), and Issue 24, in this Docket, to the extent it concerns TELRIC rates for unbundled loops, is within the scope of Issue 9(a) from UNE Docket. BellSouth explains that Covad raised the substance of Issue 14 in the UNE Docket in its testimony and briefs relating to Issue 3 in that docket. BellSouth believes that Covad is not entitled to re-litigate that issue again in this docket.

BellSouth also states that Issues 5(a), 5(b), 5(c), 12, 15, and 30 in this Docket are within the scope of, and should be considered in, Docket No. 000121-TP, Investigation into the Establishment of Operations Support Systems Permanent Performance

DOCUMENT NUMBER-DATE

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FPCSO-RECORDS/REPORTING

Measures for Incumbent Local Exchange Telecommunications Companies (Performance Measures Docket). BellSouth asserts that Issues 5(a), 5(b), and 5(c) ask how long it should take BellSouth to provision voice grade loop, ADSL, HDSL, or UCL, compatible loop and deconditioning of loops. While Issues 15 and 18 relate to the interval for installation of splitters in the central office and the interval for provisioning line sharing, Issue 30 concerns BellSouth's obligation to resolve all "loop facility issues" within 30 days of receiving a complete and correct local service request for that facility from Covad. BellSouth contends that the issues regarding proposed intervals, Issues 15, 18, and 30 are within the scope of the Performance Measures Docket, and would be more appropriately addressed in that docket. Issue 12 raises the issue of whether Covad should be relieved of its obligation to pay for a local service request it has submitted, but later cancelled, if the cancellation was purportedly based on BellSouth's failure to deliver a requested loop within five business days. BellSouth states that this issue is also within the scope of the Performance Measures Docket because it is a proposed enforcement mechanism.

BellSouth states that Issue 29 relates to collocation rates and that this issue is appropriate for consideration when the Commission addresses generic collocation rates, as the Commission has indicated it will do. Accordingly, BellSouth requests that Issue 29 be deferred to the generic investigation of collocation rates.

RESPONSE

In its Response, Covad asserts that it has an unfettered right to negotiate for terms and conditions necessary to operate in business, and in the event that those negotiations are not successful, to "petition a State commission to arbitrate any open issues" 47 U.S.C. § 252(b)(1) (emphasis added). Covad states that Florida courts have ruled that the Florida Commission is required to resolve in an arbitration any open issue presented to it pursuant to Section 252 (b) (4) (C). See also, MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc. et al., Case No. 4:97cv141-RH (N.D. Fla. June 6, 2001) at 31-37 [hereinafter MCI]. Covad states that BellSouth's suggestion that some of the issues be deferred to other dockets is an attempt by BellSouth to deprive Covad of a resolution of the issues by Covad in its arbitration. Moreover, the issues as framed address specific interconnection

agreement language appropriate to be incorporated in the Covad/BellSouth contract. Even if some issues are addressed in the UNE Docket, Covad states it is not clear that the Commission will ultimately make a finding on each issue raised in testimony or brief by Covad. Therefore, Covad retains the right to arbitrate the issues it has identified. Covad explains that the testimony for the Performance Measures docket has already been filed and the hearing is scheduled. Covad believes that it will be denied any right to raise additional issues and have those issues resolved in that docket if issues from this docket are deferred to the Performance Measures docket. Although the generic collocation investigation would be a viable avenue to address collocation rates, Covad asserts that BellSouth refuses to consider any interim rate other than the one it proposes. Covad acknowledges the limited resources of the Commission, but can not agree to waive its right to arbitrate in a Covad-specific docket the issues it considers are critical to its ability to operate competitively in the marketplace.

Covad proclaims that Issues 5(a), 5(b), 5(c) and 18, which address the provisioning of loops, are a critical component of Covad's interconnection with BellSouth. Covad asserts that BellSouth refuses to commit to anything other than "target" delivery intervals and using its "best efforts" to achieve them. In essence, Covad alleges that BellSouth's proposal would bar Covad from having enforceable contractual rights addressing the provisioning of delivery intervals. Covad contends that Issue 12, regarding charges imposed for local service requests, arises from BellSouth's attempt to impose these charges, despite the fact that many times Covad's modification or alteration of its order is a result of BellSouth's failure to provision that order in a timely manner. Covad asserts that Issue 14 concerns specific restrictions BellSouth has placed on Covad's ability to qualify and reserve a plain voice grade. Further, Covad states that Issue 15 addresses installation times for splitters, which is included in the proposed interconnection agreement between Covad and BellSouth. Although BellSouth indicates that Issue 29, regarding collocation rates, should be addressed in the upcoming generic investigation of collocation rates, Covad states that it needs reasonable interim rates in place until that time. Covad asserts that BellSouth has steadfastly refused to consider compromise offered by Covad for those interim rates. Issue 30, regarding resolution of "loop facilities" is yet another open issue that parties have not been

able to negotiate certain terms. Although Covad believes that Issues 10(a), 10(b) and 24 are within the scope of the UNE Docket and could be addressed in that docket, out of an abundance of caution, and pursuant to Section 252 of the Telecommunications Act of 1996 (Act), Covad included these issues as open issues which it is entitled to arbitrate. Accordingly, Covad requests that issues 5(a), 5(b), 5(c), 12, 14, 15, 18, 29 and 30 remain in the Covad/BellSouth arbitration.

DECISION

Section 252 (b)(1) and (b)(4)(A) of the Act provides that a State commission must arbitrate any open issues between parties presented in a petition for arbitration and the response. Accordingly, federal law does not appear to give state commissions any discretion in this regard. Although BellSouth argues that there are issues that should be deferred from this docket to the UNE, Performance Measures, and collocation rates generic dockets, BellSouth has not presented a compelling argument that federal law allows that these issues be deferred to other dockets. In its Response, Covad explains that the issues BellSouth requests be deferred to other dockets cannot be deferred because they are open issues that Covad has petitioned to be arbitrated. Further, as asserted by Covad, the law makes clear that the right to arbitrate is as broad as the freedom to agree; any issue on which a party unsuccessfully seeks agreement may be submitted for arbitration. *MCI* at 33. When parties are not able to reach an agreement on the issues in dispute, they become open issues parties may submit for arbitration.

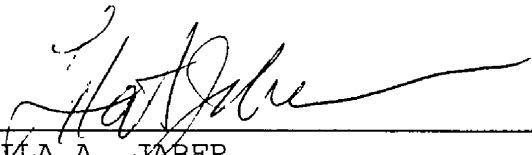
In consideration of the foregoing, BellSouth's Motion to Limit Issues is denied. However, I fully expect that the parties will continue to negotiate and that resolutions of some of these issues will be reached prior to hearing.

Based on the foregoing,

ORDERED by Commissioner Lila A. Jaber, as Prehearing Officer, that BellSouth Telecommunications, Inc.'s Motion to Limit Issues is hereby denied.

ORDER NO. PSC-01-0967-PCO-TP
DOCKET NO. 001797-TP
PAGE 5

By ORDER of Commissioner Lila A. Jaber, as Prehearing Officer,
this 20th day of April, 2001.



LILA A. JABER
Commissioner and Prehearing Officer

(S E A L)

FRB

NOTICE OF FURTHER PROCEEDINGS OR JUDICIAL REVIEW

The Florida Public Service Commission is required by Section 120.569(1), Florida Statutes, to notify parties of any administrative hearing or judicial review of Commission orders that is available under Sections 120.57 or 120.68, Florida Statutes, as well as the procedures and time limits that apply. This notice should not be construed to mean all requests for an administrative hearing or judicial review will be granted or result in the relief sought.

Mediation may be available on a case-by-case basis. If mediation is conducted, it does not affect a substantially interested person's right to a hearing.

Any party adversely affected by this order, which is preliminary, procedural or intermediate in nature, may request: (1) reconsideration within 10 days pursuant to Rule 25-22.0376, Florida Administrative Code, if issued by a Prehearing Officer; (2) reconsideration within 15 days pursuant to Rule 25-22.060, Florida Administrative Code, if issued by the Commission; or (3) judicial review by the Florida Supreme Court, in the case of an electric, gas or telephone utility, or the First District Court of Appeal, in the case of a water or wastewater utility. A motion for reconsideration shall be filed with the Director, Division of Records and Reporting, in the form prescribed by Rule 25-22.060, Florida Administrative Code. Judicial review of a preliminary,

ORDER NO. PSC-01-0967-PCO-TP

DOCKET NO. 001797-TP

PAGE 6

procedural or intermediate ruling or order is available if review of the final action will not provide an adequate remedy. Such review may be requested from the appropriate court, as described above, pursuant to Rule 9.100, Florida Rules of Appellate Procedure.