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April 9, 2001

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Blanca S. Bayo, Director
Division of Records and Reporting
Betty Easley Conference Center
4075 Esplanade Way
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Re: Docket No.: 001797-TP

Dear Ms. Bayo:

On behalf of DIECA Communications, Inc. d/b/a Covad Communications Company, enclosed for filing and distribution are the original and 15 copies of the following:

- Covad Communications Company's Response to BellSouth's Motion to Limit Issues.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me in the envelope provided. Thank you for your assistance.

Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

VGK/bae
Enclosure

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

Petition for Interconnection Arbitration
By DIECA Communications, Inc. d/b/a
Covad Communications Company Against
BellSouth Telecommunications, Inc.

Docket No. 001797-TP
Filed: April 9, 2001

**COVAD COMMUNICATIONS COMPANY'S RESPONSE TO
BELLSOUTH'S MOTION TO LIMIT ISSUES**

COME NOW, DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad") and hereby responds to BellSouth Telecommunications, Inc.'s ("BellSouth") Motion to Limit Issues in the arbitration between Covad and BellSouth.

While arguing that a host of Covad arbitration issues should be pushed out of Covad's arbitration into other dockets, BellSouth is hoping that many of the issues raised by Covad will never be resolved by the Commission. In essence, BellSouth argues that any docket other than Covad's Arbitration is the appropriate place to set terms and conditions for BellSouth's performance for and contract with Covad. Section 252(b)(1) of the 1996 Telecommunications Act (the "Act") entitles Covad to petition a state commission to arbitrate any open issues remaining between BellSouth and Covad with respect to their Interconnection Agreement. Likewise, the Act specifically requires the state commission to resolve each issue set forth in the petition by imposing the appropriate conditions as required upon the parties to the Agreement. *Id.* at § 252(b)(4)(C).

The law contemplates Covad's unfettered right to negotiate for terms and conditions necessary to operate its 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).

Section 252(c) provides the rule of decision for this proceeding:

STANDARDS FOR ARBITRATION.—In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall—

- (1) ensure that such resolution and conditions meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251;
- (2) establish any rates for interconnection, services, or network elements according to subsection (d); and
- (3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

Moreover, Florida courts have ruled that the Florida PSC 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, 2000) at 31-37. By suggesting that the vast majority of Covad's issues should be pushed into other dockets, BellSouth is attempting to deprive Covad of a resolution of the issues by Covad in its arbitration where (1) Covad can frame the issues it believes need to be addressed by the Commission; and (2) the result will provide specific Interconnection Agreement language appropriate to be incorporated in its contract.

BellSouth seeks to delay, defer and possibly deny resolution of Covad's arbitration issues by convincing this Commission that the issues either (1) have already been adjudicated in the UNE cost case, Docket No. 990649-TP; (2) should be adjudicated in the Performance Measures proceeding, Docket No. 000121-TP; or (3) should be postponed indefinitely and considered in the yet unscheduled collocation docket. First, even if some issues were raised during the UNE cost case,

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. Second, the testimony for the Performance Measures docket has already been filed and the hearing is scheduled. If issues are pushed from Covad's arbitration to that docket, Covad will be effectively denied any right to raise additional issues and have those issues resolved in that docket. Third, although a generic collocation cost docket does make some sense, BellSouth refuses to consider any interim rate other than the one it proposes. Thus, Covad is forced to litigate these rates now or accept, for an unspecified amount of time¹, the BellSouth unilaterally developed and imposed collocation rates. With BellSouth showing no flexibility on setting interim rates, Covad is entitled to litigate collocation rates in its arbitration.

Covad recognizes the limited resources of the Commission, but cannot agree to waive its right to arbitrate in a Covad-specific docket the issues it believes are critical to functioning successfully in the marketplace monopolized by BellSouth. Covad will address below each of the issues BellSouth seeks to banish from this arbitration.

A. ISSUES THAT MUST REMAIN IN THE ARBITRATION DOCKET

Issues 5(a), 5(b), 5(c), and 18

As a DSL provider in Florida, Covad purchases from BellSouth a variety of loops to provide DSL service: ADSL, HDSL, UCL, UDC/IDSL, and Line Shared loops. The timely provisioning of these loops is a critical component of Covad's interconnection with BellSouth. For a DSL provider like Covad, an Interconnection Agreement that fails to specify the number of days BellSouth has to

¹ At this point in time, the Commission has not even scheduled Phase II of the collocation proceeding.

deliver the principle product Covad buys has little value. Nonetheless, BellSouth suggests that loop delivery intervals are better established in a generic performance measures docket, which imposes penalties for poor performance on the literally thousands of UNEs which BellSouth provides. While certainly penalties and performance measures are important, and those should be based on firm loop delivery intervals, Covad needs a contract provision that specifies the intervals in which BellSouth must deliver elements to Covad. Covad has proposed that BellSouth be allowed three (3) business days to deliver loops and five (5) business days when those loops require conditioning. This is a reasonable period of time. In contrast, BellSouth refuses to commit to anything other than "target" delivery intervals and using its "best efforts" to achieve them. Obviously, BellSouth's proposal gives Covad no enforceable contractual rights. Moreover, BellSouth believes it should be allowed to unilaterally alter the delivery intervals by refusing to put them in contracts.

Interestingly, BellSouth suggests that loop delivery intervals are best set in a performance measures docket. In a similar docket in Georgia, BellSouth took the position that no firm loop delivery interval for xDSL loops was appropriate. Rather, BellSouth argued that xDSL loops should be delivered in the same timeframe as "DS1" loops. Covad needs a set loop delivery interval contract provision so that both Covad and BellSouth will know what is expected of BellSouth. BellSouth consistently refuses to provide any service that is not specifically set forth in Covad's contract. To avoid this problem in the future, Covad asked for a firm loop delivery interval in its contract. Issues 5(a), 5(b), 5(c), and 18 should not be deferred to the performance measures docket. Covad is prepared to present evidence that establishes a reasonable loop delivery interval for xDSL loops to Covad in Florida.

Moreover, testimony in the Florida performance measures docket has already been filed and

there is no opportunity for Covad to add additional information to the record. Although Covad did propose that the Commission use a firm loop delivery interval to measure BellSouth performance, Covad believes there is additional information and testimony it could provide in the arbitration. Furthermore, irrespective of what is decided about how penalties should be assessed regarding poor loop delivery intervals in the performance measures docket, Covad is entitled to have a contract provision in its Interconnection Agreement specifying the interval in which it can expect to receive the single most important product it buys from its sole supplier. Under the Act, Covad is entitled to have that issue adjudicated in its Arbitration and incorporated into its contract with BellSouth.

Issue 12

This issue addresses whether BellSouth should be able to unilaterally impose a charge for a submitted local service request ("LSR"), which is later modified or cancelled by Covad. This issue 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 failing to provision that order in a timely manner. As a result, Covad is entitled to offer evidence to establish whether BellSouth's attempt to impose such charges in these conditions is reasonable.

BellSouth contends that this issue should be addressed in the performance measures docket because it is a proposed enforcement mechanism. Actually, this issue results from BellSouth's unwarranted attempt to impose charges on Covad as a result of BellSouth's own failed performance. BellSouth's contract proposal suggests that in every instance that Covad modifies or cancels an LSR, a charge should be imposed. Covad disagreed with that proposal and has properly raised the issue here for adjudication. Now, BellSouth seeks to bury this issue in the massive performance measures docket, after all testimony has already been filed. Such a deferral deprives Covad of its right to offer

written testimony and live witnesses in support of the issues it has chosen to arbitrate.

Nonetheless, if BellSouth is willing to withdraw its proposed charge for any modified or cancelled LSR, Covad would be willing to forgo arbitrating this issue at this time. Otherwise, it is rightfully part of the Arbitration between Covad and BellSouth.

Issue 14

This issue addresses a specific restriction BellSouth has placed on Covad's ability to qualify and reserve a plain voice grade SL1 loop for its DSL service. Although Covad discussed this issue briefly in the UNE docket (Docket No. 990649-TP), it is not clear this issue will ultimately be resolved by the Commission there. It is not on the issue list and does not necessarily need to be resolved in order for the Commission to reach conclusions on proposed rates in that docket. Thus, it is appropriate that Covad include it on its list of unresolved, open issues. By refusing to allow Covad to qualify, reserve, and order a voice grade loop for DSL service, BellSouth is essentially depriving Covad of its right to utilize loop makeup information to the fullest extent to qualify and order whichever loop it chooses. Covad is entitled to contract terms and conditions that govern its right to select, reserve, and order any loop it chooses. Thus, this issue should not be removed from the Arbitration.

Issue 15

Issue 15 addresses installation times for splitters used to provide line sharing loops for Covad. BellSouth suggests, again, that these issues are better determined in a generic performance measures docket. This is incorrect for two reasons. First, BellSouth's proposed Interconnection Agreement to Covad included delivery intervals for splitters used for line sharing. Therefore, BellSouth has already waived its right to adjudicate this in another docket. This is not a performance

issue, but rather a clear contract provision upon which the parties cannot agree. Second, delivery intervals for line shared splitters are critical to Covad's service offering using line sharing. The longer Covad has to wait for splitter installations, the longer Covad may be delayed in providing DSL service over line shared loops. Since Covad and BellSouth could not reach agreement on the intervals during negotiations, these issues must be adjudicated in the Arbitration between Covad and BellSouth. Furthermore, none of the testimony filed in the performance measures docket recommends the establishment of an interval for splitter installation. Thus, there is no way the Commission could resolve this issue in the performance measures docket.

Issue 29

Issue 29 seeks resolution of collocation rates in Florida. BellSouth has developed an entirely new method to charge Covad for space preparation. The rates for this new methodology have not been approved by the Commission. Although Covad recognizes that the Commission has indicated its intention to initiate a collocation cost docket at some point in the future, Covad needs at least reasonable interim rates in place until that time. BellSouth refuses to offer any interim rate other than its proposed rates. In negotiations, BellSouth's steadfastly refused to consider any compromise offered by Covad for those interim rates. Essentially, Covad either must litigate now permanent collocation rates or accept BellSouth's unilaterally imposed collocation rates in its Interconnection Agreement until some undetermined time in the future when permanent rates are set in the generic docket. Covad prefers to seek rates in its arbitration. Therefore, this issue should not be deferred to the undocketed, unscheduled collocation rate docket.

Issue 30

Issue 30 involves Covad's proposal that BellSouth resolve all facility issues related to xDSL

loops within thirty (30) days. Service continues to be delayed by the number and duration of Covad orders that are "held" pending facilities issues. BellSouth refuses to commit to any interval for resolving these issues. Covad has been able to obtain no relief from BellSouth with respect to increasing efficiency and resolving these facility issues in a timely manner. Moreover, no testimony filed in the performance measures docket specifically addresses this issue. Therefore, the Commission is unlikely to establish an interval for resolution of facilities issues in that docket. This remains an open issue relating to the Interconnection Agreement between Covad and BellSouth and Covad is entitled to have it resolved in its Arbitration with BellSouth.


B. ISSUES THAT WILL BE ADDRESSED IN OTHER DOCKETS

Issues 10(a), 10(b), and 24 (with the exception of Line Sharing rates)

Covad agrees that Issues 10(a), 10(b), and 24 (with the exception of line sharing) have been explicitly raised and will be resolved in Docket No. 990649-TP. Nonetheless, since no final order has yet issued in that docket, these remain open issues between Covad and BellSouth. Thus, out of an abundance of caution, and pursuant to § 252 of the Act, Covad included these issues as open issues which it is entitled to arbitrate. Covad agrees that the rates set in Docket No. 990649-TP must be incorporated into its Interconnection Agreement with BellSouth.

CONCLUSION

As addressed above, issues 5(a), 5(b), 5(c), 12, 14, 15, 18, 29, and 30 must remain in the Arbitration between Covad and BellSouth. Issues 10(a), 10(b), and 24 (with the exception of line sharing) are cost issues which Covad agrees will be explicitly resolved in the UNE cost docket.



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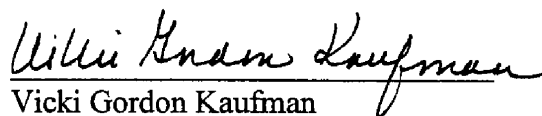
Attorneys for Covad Communications
Company

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the Covad Communications Company's Response to BellSouth's Motion to Limit Issues has been furnished by (*) hand delivery this 9th day of April, 2001, to the following:

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