

**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.

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Docket No. 001797-TP

Filed: April 23, 2001

**DIRECT TESTIMONY OF THOMAS KOUTSKY  
ON BEHALF OF COVAD COMMUNICATIONS COMPANY**

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1 **Q. Please state your name, position and job duties.**

2 A. My name is Thomas M. Koutsky, Assistant General Counsel of Covad  
3 Communications Company. I have held this position since September 1997. In this  
4 position, I have been responsible for negotiating interconnection agreements with  
5 several incumbent local exchange carriers ("ILECs"), advocating Covad's regulatory  
6 and policy issues before the Federal Communications Commission, state PUCs, and  
7 Congress, and formulating Covad's strategy for ensuring the ILECs, such as  
8 BellSouth, provide Covad with unbundled access and interconnection arrangements  
9 in a manner that is consistent with the law and Covad's business needs.

10 **Q. Please state your qualifications and experience prior to joining Covad.**

11 A. I received my J.D. with Honors from The University of Chicago Law School in  
12 1991. From April 1994 to September 1997, I was an Attorney-Advisor in the  
13 Competition Division of the FCC. Prior to joining the FCC, I was an attorney at the  
14 Washington, DC law firm Steptoe & Johnson, where I focused on antitrust and  
15 litigation.

16  
17 The Competition Division was responsible for ensuring that the FCC's policies and  
18 rules promoted the development of competition in all areas subject to the FCC's  
19 jurisdiction and that the FCC's decisions were consistent with sound economic and  
20 legal reasoning. Prior to passage of the 1996 Act, I developed and worked on  
21 policies relating to implementation of the 1992 Cable Act, merger review.

22 Beginning in 1995, I was the Competition Division's liaison with regard to the  
23 drafting and passage of what would eventually become the Telecommunications Act

1 of 1996 ("the Act"). After the Act was passed, I worked on the FCC's rulemakings  
2 that implemented Sections 251 and 252 of the Act, including the first FCC  
3 unbundling and interconnection rules. In 1997, I worked on the FCC's decisions that  
4 rejected the first three applications filed by Bell Operating Companies for  
5 "interLATA" entry, access charge reform, the first preemption decisions made by the  
6 FCC pursuant to Section 253 of the Act, and implementation of the universal service  
7 provisions of the Act (Section 254).

8

9 My work at the FCC gave me an intimate knowledge of the workings and  
10 interrelationships of the 1996 Act – including how Sections 251 and 252 should be  
11 implemented in order to promote the development of competition in all  
12 telecommunications markets. In particular, as I will discuss further below, the  
13 fundamental and pervasive challenge in implementing Sections 251 and 252 of the  
14 Act is the need to recognize that because of disparate bargaining power between  
15 ILECs and companies like Covad, relying on "negotiations" alone to implement the  
16 substantive requirements of Section 251(c) will be insufficient to ensure the access  
17 needed for a fully-functioning and competitive market.

18 **Q. What is the purpose of your testimony?**

19 **A. My testimony will cover the following Issues set forth in Covad's Petition for**  
20 **Arbitration:**

21 **◆ Issue 1: What limitations of liability, if any, should be included in the Parties'**  
22 **Interconnection Agreement?**

- 1           ♦ Issue 2: What should BellSouth's obligations be under this Interconnection  
2           Agreement in the event that BellSouth's workforce, or the workforce of its  
3           suppliers and vendors, engage in a work stoppage?
- 4           ♦ Issue 3: Should there be a limitation of an ALEC's right to opt-in to an existing  
5           interconnection agreement that has only six months remaining before it expires?
- 6           ♦ Issue 31: Should BellSouth send Covad both a paper and a duplicate electronic  
7           bill and in either instance, when should the bill be due?
- 8           ♦ Issue 32(a): Should Covad be required to pay amounts in dispute as well as late  
9           charges on such amounts?

10          I understand that other Covad witnesses will be addressing the other Issues presented  
11          in Covad's petition.

12          **THE NATURE OF AN "INTERCONNECTION AGREEMENT"**

13          **Q.     How do the issues listed above relate to BellSouth's provision of UNEs and  
14          interconnection to Covad pursuant to Sections 251 and 252?**

15          A.     When Congress passed the 1996 Act, it deliberately chose the "interconnection  
16          agreement" as the means in which requesting carriers like Covad are to obtain  
17          enforceable rights to UNEs and interconnection from ILECs like BellSouth. Prior  
18          to passage of the 1996 Act, several state commissions, including New York and  
19          Michigan had been implementing similar unbundling provisions by requiring ILECs  
20          to file tariffs with the state commission pursuant to the authority provided by the  
21          state communications law. Rather than require all ILECs to file interconnection and  
22          unbundling tariffs, Congress took a different approach and instead devised a scheme  
23          that required that ILECs enter into binding contracts with ALECs - the

1 "interconnection agreement" – for the rates, terms and conditions of interconnection  
2 and unbundling.

3 **Q. Why does the difference between a tariff and a contract matter?**

4 A. The difference lies in the means and ability to enforce the substantive provisions of  
5 those legal obligations. When an ILEC like BellSouth files an intrastate tariff before  
6 a state commission, the state commission's obligations and rights to review that tariff  
7 may be (and often are) limited by state law. In addition, the right of a purchaser of  
8 services under that tariff to dispute the rates, terms and conditions of that tariff may  
9 be limited. In addition, a state commission may not have the authority or may only  
10 have limited authority to adjudicate a dispute between the ILEC and the purchaser.  
11 And since the processes and powers vary between state commissions across the  
12 nation, relying solely on these processes and powers would dramatically slow the  
13 development of competition nationwide.

14  
15 By requiring that ILECs enter into binding contracts, Congress opened the door for  
16 a panoply of standard dispute resolution procedures for enforcing these contracts,  
17 including litigation before the courts. One of Covad's most difficult challenges has  
18 been to obtain interconnection agreements with ILECs that will provide Covad  
19 sufficient and enforceable legal rights to obtain the unbundled network elements  
20 ("UNEs") and collocation that we need to execute our business. Pursuant to Sections  
21 251 and 252 of the federal Act, all of the terms of these contracts are subject to  
22 arbitration before a state public commission, such as the Florida Public Service  
23 Commission. If a state commission chooses to arbitrate those disputes pursuant to

1 Section 252 of the federal Act, a state commission has the authority and the  
2 obligation to resolve "any open issue" presented to it. *See* 47 U.S.C. 252(b)(4)(C).

3 **Q. Why can't the Commission rely on BellSouth and Covad to negotiate the**  
4 **business aspects of the interconnection agreement?**

5 A. There are two reasons why these and other issues should be arbitrated by the  
6 Commission.

7

8 *First*, oversight of *all* provisions of an interconnection agreement are necessary  
9 because the relationship between an ILEC and an ALEC is not a "normal"  
10 commercial relationship. The processes and policies put in place by Sections 251  
11 and 252 are designed to overcome the fundamental disparity in bargaining power  
12 between an ILEC and an ALEC like Covad. Under "normal" commercial situations,  
13 contracts are entered into by parties because both parties perceive a mutual,  
14 beneficial gain from entering into the transaction. For example, I only buy a car  
15 when I decide that the value I receive from the car is greater than the cost of the car.  
16 On the other hand, the dealer will only sell me a car if the price I am willing to pay  
17 for the car is sufficient to cover its overhead, costs, and expected profit. The  
18 "haggling" process between me and a car dealer (while sometimes unpleasant and  
19 unsavory) is a means in which the dealer and I determine and decide whether both  
20 parties will gain from completing the sale. Of course, this negotiation process occurs  
21 in the context of a competitive market – I am free to walk out of the dealership and  
22 buy the same or similar car from a different dealer, and the dealer may have other  
23 buyers that will pay more for the vehicle. Both the dealer and I know that the other

1 party has an alternative to a negotiated agreement, and this competitive situation by  
2 itself generally provides sufficient incentive to close the negotiations swiftly and  
3 efficiently. In the context of a car sale, the role of regulation or legal intervention is  
4 generally limited to fraud, "lemon laws", defective materials, and the like – and not  
5 the sale price of the car.

6  
7 "Negotiations" between an ALEC and an ILEC over interconnection *do not* occur in  
8 a competitive environment. ILECs like BellSouth possess a dominant market  
9 position over local facilities, and requesting carriers like Covad need to access those  
10 facilities in order to go into business in competition with BellSouth. As a result, the  
11 cooperation of an ILEC (however begrudging) is absolutely necessary for local  
12 competition to develop. The lack of local competition in local markets significantly  
13 affects both parties' approaches to the interconnection "negotiation."

14  
15 In the car sale example, I always had the option of choosing a different dealer or  
16 different car. However, if Covad wants to offer DSL services in BellSouth service  
17 territories, it has no choice but to reach an "agreement" with BellSouth. The best  
18 alternative Covad has to a negotiated agreement is not being in business in those  
19 geographic areas.

20  
21 From BellSouth's perspective, it has a dominant market position and knows that  
22 requesting carriers like Covad must reach an "agreement" with it before those  
23 providers can begin to compete with BellSouth. It is an economic fact that



1 possessing a monopoly is more profitable to a company like BellSouth than entering  
2 an agreement that will facilitate the development of a competitive market. As a  
3 result, BellSouth essentially has "nothing to gain and everything to lose" by  
4 cooperating in interconnection negotiations.

5

6 Congress recognized this disparate bargaining power and decided that there must be  
7 regulatory oversight over the rates, terms and conditions of interconnection  
8 agreements between ILECs and ALECs. Congress knew that leaving the  
9 interconnection process to private "negotiations" only would be insufficient to ensure  
10 that competition develop in local markets rapidly. As a result, Sections 251 and 252  
11 provide a framework in which the FCC establishes unbundling and interconnection  
12 rules and in which state commissions are to resolve and adjudicate "any open issue"  
13 in an interconnection agreement that is not resolved by the parties. ILECs and  
14 ALECs are required by law to negotiate all aspects of the agreement in "good faith"  
15 and failure to do so is subject to regulatory penalty. *In the matter of BellSouth*  
16 *Corporation*, File No. EB-00-IH-0134, Order and Consent Decree, FCC 00-389 (rel.  
17 Nov. 2, 2000). And recognizing the importance of swift resolution, Congress  
18 provided carriers access to a state commission interconnection agreement arbitration  
19 process that is to meet certain deadlines and procedures.

20

21 It is important to note that the disparity in bargaining power permeates *every clause*  
22 of the interconnection agreement – not simply the clauses related to UNE rates or  
23 OSS methods and procedures. Because interconnection agreements are enforceable

1 contracts, certain clauses, including a broad limitation of liability clause, can  
2 significantly undermine legal rights that may be present in another section of the  
3 contract. Also, BellSouth's refusal to even consider or discuss Covad's suggestion  
4 about how to manage a potential strike means that absent regulatory intervention,  
5 Covad has no adequate assurance that it will be treated in a nondiscriminatory  
6 manner, as required by law. Finally, the failure of the contract to ensure that timely  
7 and accurate bills are presented to Covad just as much impairs Covad's ability to do  
8 business in Florida as does failure to provide a loop on a timely basis.

9 **Q. What is the other reason these issues should be arbitrated?**

10 A. If the Commission chooses to arbitrate pursuant to Sections 251 and 252, it must  
11 "resolve" "any open issue" presented to it. Sections 252(b)(1), 252(b)(4)(C); *see*  
12 *MCITelecommunications Corp. v. BellSouth Telecommunications, Inc.*, 112 F. Supp.  
13 2d 1286 (N.D. Fla. 2000). A recent decision by the Northern District of Florida  
14 noted that "[the statutory term 'any open issues' makes clear that the right to arbitrate  
15 is as broad as the freedom to agree; any issue on which a party unsuccessfully seeks  
16 agreement may be submitted to arbitration." *Id.* at 1297.

17  
18 A refusal to resolve an open issue by the statutory deadline provided for in Section  
19 252 could be interpreted as a "failure to act" and could lead to the submission of the  
20 entire arbitration to the FCC pursuant to Section 252.

21 **ISSUE 1: SHOULD BELLSOUTH BE PERMITTED TO REQUIRE COVAD TO**  
22 **WAIVE LIABILITY FOR BREACHES OF THE AGREEMENT?**

1 **Q. What is the current limitation of liability clause in the existing Covad-BellSouth**  
2 **contract?**

3 A. Because Covad seeks to enforce its interconnection contracts with ILECs in a variety  
4 of settings, including breach of contract litigation before the courts, limitation of  
5 liability clauses are a focus of our negotiation strategy. In 1998, Covad and BellSouth  
6 specifically negotiated the limitation of liability clause to provide that BellSouth  
7 would not be protected by a limitation of liability clause if Covad were damaged  
8 "from the gross negligence or willful misconduct of BellSouth." In addition, the  
9 clause provided that if BellSouth failed to "honor in one or more material respects any  
10 one or more of the material provisions" of the contract, no limitation of liability would  
11 apply at all. Covad has proposed that the next interconnection agreement between  
12 Covad and BellSouth contain the same clause.

13 **Q. What has BellSouth proposed instead?**

14 A. BellSouth has put forward a proposal that would shield it from any substantial liability  
15 from *any* breach of the interconnection agreement. In particular, BellSouth has  
16 proposed that it would *only* be liable to Covad for the "actual costs of the services or  
17 functions not performed or improperly performed." That is an entirely unacceptable  
18 limitation and would gut the other substantive provisions of the Agreement.

19 **Q. How so?**

20 A. As discussed above, Congress wrote Sections 251 and 252 around the principle that  
21 interconnection agreements are enforceable legal contracts. In standard commercial  
22 settings, contracts are enforced through dispute resolution or litigation settings, and  
23 in the event a contract is breached, the damaged party can recover the damages

1 provided for in the agreement. A clause that substantially wipes out any responsibility  
2 or damages for a breach provides little, if any, incentive for a party to comply with  
3 the contract. If liability is severely limited (as in BellSouth's proposed change), the  
4 obligation to provide the contracted-for goods and services is watered down to the  
5 point that the obligation has little meaning.

6 **Q. How would BellSouth's proposal harm the Commission's pro-competitive**  
7 **initiatives?**

8 A. If BellSouth is successful in putting this clause in the Covad Agreement, even if the  
9 Commission implemented pro-competitive rules related to loop installation intervals,  
10 OSS, etc., BellSouth would not be liable to Covad for its failure to implement those  
11 policies. For example, under BellSouth's proposal, if BellSouth failed to provide a  
12 loop to Covad, Covad's "damages" would be limited to the "actual cost" of the loop  
13 it did not provide. In other words, BellSouth states that it will not bill Covad for a  
14 loop that it does not provide, and that Covad is precluded from recovering any other  
15 damages for that breach of contract.

16 **Q. Why is Covad's proposal better for competition and consumers?**

17 A. As stated above, Covad has only proposed to carry-forward the same clause that has  
18 governed the Agreement since 1998. Covad's proposal would provide that if  
19 BellSouth willfully breached the contract or engaged in gross negligence in  
20 implementing the contract, no limitation would apply. In addition, material  
21 breaches of the contract would not be subject to limited liability. The public interest  
22 is served by the development of competition in local markets – a development that  
23 requires the cooperation of the dominant carrier like BellSouth. Congress has chosen

1 that this cooperation be implemented and enforced through enforceable  
2 interconnection agreements. It is axiomatic that if a legal right cannot be enforced,  
3 it is as if the legal right does not exist in the first place. BellSouth's proposal would  
4 severely restrict Covad's ability to sue for and recover its actual, compensatory,  
5 consequential and punitive damages from breaches of the Agreement before a federal  
6 court, state court, the Commission, the FCC, or other appropriate authority. As a  
7 result, if BellSouth habitually fails to provide loops to Covad, under BellSouth's  
8 proposal, Covad would only be able to receive a credit for the charges for those non-  
9 delivered loops—even if those failures put Covad out of business. BellSouth seeks  
10 to eschew itself of responsibility for this behavior—even if the behavior were  
11 intentional.

12 **Q. Can the Commission determine that Covad's clause should be in the**  
13 **Agreement?**

14 **A.** Yes. As discussed above, the Commission has the legal authority and obligation  
15 under Sections 251 and 252 to arbitrate this clause. The importance of the limitation  
16 of liability clause is similar to the compensation provision MCI sought to arbitrate  
17 in the *MCI* decision. By asking the Commission to arbitrate the limitation of liability  
18 clause, Covad is not requesting that the Commission award Covad damages. In fact,  
19 Covad's proposal enables Covad to recover damages in direct litigation against  
20 BellSouth. Indeed, last December, Covad did initiate such an action in federal court  
21 against BellSouth. *See MCI* at 1298. ("there is assuredly nothing in that decision  
22 that precludes the Florida Commission from arbitrating a request for a compensation

1 provision as part of an arbitration proceeding otherwise properly undertaken by the  
2 Florida Commission").

3  
4 In addition, Covad believes that BellSouth has waived any argument it may have  
5 about the arbitrability of this clause. The record reflects that *BellSouth*, not Covad,  
6 is the party that wants to change this provision in the Agreement. As a result, it is  
7 *BellSouth*, not Covad that has sought that Covad agree to this clause – not the other  
8 way around.

9 **ISSUE 2: SHOULD BELLSOUTH BE EXEMPTED FROM ITS OBLIGATIONS**  
10 **UNDER THIS AGREEMENT IN THE EVENT IT FAILS TO MANAGE ITS**  
11 **WORKFORCE SUFFICIENTLY TO AVOID A STRIKE?**

12 **Q. Why has Covad proposed a strike contingency planning process?**

13 A. In August 2000, Verizon suffered a strike of several of its trade unions in the former  
14 Bell Atlantic region. This strike significantly impacted Covad's operations in those  
15 states and significantly impacted Covad's ability to provide DSL service to end users.  
16 This strike put at risk sales to Covad customers, posed potential damage to good will,  
17 and required Covad to spend significant resources resolving issues caused by  
18 Verizon's failure to manage its labor relations.

19  
20 The Verizon strike revealed that it is important to think about contingency and  
21 recovery plans, methods to track orders, notifications of stoppages, and escalation  
22 procedures. In the Verizon strike, such contingency planning was late in coming and  
23 a host of "emergency" calls and conferences, including near-daily oversight by FCC

1 staff were needed to remedy a situation that could have been disastrous for new  
2 entrants.

3 **Q. What has been BellSouth's response?**

4 A. Despite the fact that BellSouth's CWA contract is set to expire in the Summer of  
5 2002, BellSouth has rejected Covad's proposal to begin contingency planning for a  
6 strike. In fact, BellSouth has stated that it will not negotiate this point because it  
7 does not have sufficient personnel trained to make any decisions on this point.

8 **Q. Is BellSouth's position unlawful?**

9 A. Yes. In fact, BellSouth's refusal to make available or even train an individual with  
10 sufficient authority to make decisions on Covad's eminently reasonable request is in  
11 and of itself a violation of BellSouth's obligation to negotiate in good faith. FCC  
12 Rule 51.303(c)(7) specifically states that failure to "designate a representative with  
13 authority to make binding representations, if such refusal significantly delays  
14 resolution of issues" violates the good faith obligation. 47 C.F.R. 51.303(c)(7). In  
15 this case, BellSouth's apparent refusal to provide a person educated on these issues  
16 has delayed resolution until this date. See also 47 C.F.R. 51.303(c)(6) ("intentionally  
17 obstructing or delaying negotiations or resolutions of disputes" also violates good  
18 faith obligation).

19 **Q. How could strike procedures potentially harm new entrants?**

20 A. Without proper planning and assessment, a work stoppage policy could have a  
21 discriminatory impact on Covad and other ALECs, even more so than it would on  
22 BellSouth. For example, because Covad and other ALECs are new entrants, most  
23 ALEC orders are for "new" service installations (e.g., new loops or new line-sharing

1 orders). On the other hand, because BellSouth currently has a dominant market  
2 share, BellSouth is more likely to process more maintenance/repair orders than "new"  
3 service orders. As a result, a work stoppage policy that freezes all "new" installations  
4 while giving maintenance and repair orders priority in the queue would have a severe  
5 discriminatory impact upon Covad and other ALECs.

6  
7 In addition, the fact that BellSouth only provides ADSL over line-shared lines while  
8 ALECs provide a variety of DSL services over both line-shared and stand-alone  
9 loops may also turn a facially inoffensive policy into a discriminatory one. For  
10 instance, during the Verizon strike, for a period of time Verizon only processed  
11 orders that did not require a "field dispatch." This policy meant that line-sharing  
12 orders that required only CO work could be installed but that stand-alone loops  
13 would be less likely to be installed. ALECs would see perhaps half of their retail  
14 DSL orders delayed while BellSouth would be able to process most of its DSL retail  
15 orders.

16 **Q. What would Covad's proposal require BellSouth to do?**

17 **A.** Covad's proposal would only require that BellSouth engage in active consultations,  
18 meetings and communications with Covad if a work stoppage is imminent. In every  
19 area we enter, Covad is among the largest consumer of unbundled loops and transport  
20 provided by the ILEC. As a result, Covad believes that it should be afforded  
21 contingency planning that other large commercial customers may obtain.

22 **ISSUE 3: SHOULD BELLSOUTH BE PERMITTED TO RESTRICT COVAD'S**  
23 **RIGHTS UNDER SECTION 252(D) OF THE TELECOM ACT BY IMPOSING AN**



1 ARTIFICIAL LIMITATION ON COVAD'S ABILITY TO OPT-IN TO THE  
2 INTERCONNECTION AGREEMENTS REACHED BETWEEN BELL SOUTH AND  
3 OTHER COMPETITIVE CARRIERS?

4 Q. Does the "opt-in" clause in the Covad-BellSouth Agreement place a time limit  
5 on Covad's rights to particular agreements?

6 A. No. The current Agreement states that BellSouth "shall make available" to Covad  
7 "any interconnection, service or network element provided under any other  
8 agreement filed and approved pursuant to 47 USC 252 as controlled by the  
9 appropriate court of judicial review." This clause essentially states that Covad is  
10 entitled to the full legal rights it may have under Section 252(I) of the Act to opt-in  
11 to rates, terms and conditions BellSouth offers to other ALECs in Florida.

12 Q. What limits does the law place on Covad's Section 252(I) rights?

13 A. In 1996, the FCC implemented Section 252(I) with 47 CFR 51.809. That FCC rule  
14 was affirmed by the United States Supreme Court in January 1999. Rule 51.809  
15 specifically states:

16 An incumbent LEC shall make available without unreasonable delay  
17 to any requesting telecommunications carrier any individual  
18 interconnection, service, or network element arrangement contained  
19 in *any agreement* to which it is a party that is approved by a state  
20 commission pursuant to section 252 of the Act, upon the same rates,  
21 terms and conditions as those provided in the agreement.

22  
23 Under Rule 51.809, the *only* restrictions upon this option are those set forth in  
24 51.809(b). That rule restricts Covad's 252(I) rights only for cases in which the ILEC  
25 can demonstrate that its costs have changed or that such an arrangement is  
26 technically infeasible to provide to Covad.

1 **Q. What restrictions has BellSouth proposed to place on Covad's legal rights?**

2 A. BellSouth has proposed two significant substantive restrictions. The first would  
3 prevent Covad from exercising Section 252(I) rights for any interconnection, service  
4 or network element arrangement that is provided for in a contract that is due to expire  
5 within six months of Covad's decision to opt-in to that arrangement. The second  
6 would require Covad to agree to all "legitimately related" clauses that relate to any  
7 particular arrangement.

8 **Q. Is either restriction contemplated for or provided for by the FCC Rule 51.  
9 809(b)?**

10 A. No. In fact, Rule 51.809(a), quoted above, explicitly states that an ILEC must  
11 provide "any individual . . . arrangement contained in any agreement."

12 **Q. Why would an ALEC seek to opt-into an arrangement that may expire within  
13 a few months?**

14 A. There are several legitimate reasons. Remember the discussion above with regard  
15 to the disparate bargaining power between an ILEC and an ALEC in an  
16 interconnection "negotiation." Until an ALEC closes an interconnection agreement,  
17 it cannot provide service – it cannot raise financing, it cannot begin marketing, etc.  
18 In the event an ILEC and an ALEC cannot agree on interconnection terms and an  
19 arbitration is begun, the ALEC also must await resolution of that arbitration before  
20 the arbitrated contract can be finished (a process that, pursuant to Section 252, can  
21 take up to 9 months).

22

23 Because of this situation, it is common business practice for an ALEC to use its

1 Section 252(I) rights to "opt-in" to an existing interconnection arrangement that it  
2 needs to do business while it begins or continues the process of negotiation or  
3 arbitration with the ILEC. ALECs routinely use these legal rights to get their  
4 business up and running in a state immediately.

5 **Q. But why would an ALEC opt-in to an arrangement that is about to expire?**

6 A. The fact that an arrangement may only have limited duration may actually be a  
7 reason for the ALEC to opt-in to that provision. In this manner, an ALEC will not  
8 be "locked-in" to a suboptimal arrangement for very long.

9  
10 For example, in this arbitration, Covad is seeking a firm, 3-day loop installation  
11 interval from BellSouth. Covad expects that this arbitration will be completed in the  
12 next six months. Suppose that BellSouth enters into an agreement with one of  
13 Covad's competitors that would provide for a firm, 5-day loop installation interval  
14 for the next six months. Although Covad believes it will ultimately prevail on its  
15 request for a firm 3-day interval, it will still be able to use Section 252(I) to opt-in  
16 to the firm 5-day interval while its 3-day arbitration is pending. BellSouth's proposal  
17 would prevent Covad from exercising this right.

18  
19 Covad has explored and undertaken such a strategy with other incumbent LECs. The  
20 fact that an agreement may be due to expire within a short period of time provides  
21 the ALEC the comfort in knowing that it need not be "stuck with" a suboptimal  
22 arrangement for any longer than necessary.

23

1           Because it is ALECs that need agreements to do business, ALECs should be  
2           expected to exercise their 252(I) appropriately. An ALEC is not likely to opt-in and  
3           build a business around an agreement that is due to expire unless the ALEC has a  
4           strong, legitimate reason to do so. Nothing in federal law gives BellSouth the  
5           authority to act as arbiter of an ALEC's business judgment.

6   **Q.    Would BellSouth's 6-month proposal significantly limit ALEC 252(I) options?**

7   A.    Yes. Most of BellSouth's interconnection agreements have a duration of two years.  
8           If you consider all of BellSouth's interconnection agreements as the pool of potential  
9           Section 252(I) candidates, at any particular point in time, BellSouth would exclude  
10          approximately 25% of all of BellSouth's interconnections, services, or UNE  
11          arrangements from the 252(I) process. That is a significant and arbitrary exclusion that  
12          has no basis in federal law.

13 **Q.    How would BellSouth's "legitimately related or negotiated in exchange for"  
14          proposal limit Covad's legal rights?**

15 A.    BellSouth's proposal that Covad accept all clauses that are "legitimately related to or  
16          were negotiated in exchange for or in connection with" the particular interconnection,  
17          service or network element arrangement Covad seeks to adopt is vague and subject  
18          to acrimonious interpretative battles. In its Petition, Covad stated that if the four  
19          corners of the agreement clearly indicate a legitimate relationship between an  
20          arrangement and other clauses, Covad would accept those clauses as well. But Covad  
21          does not believe that parole evidence should be used to determine whether "legitimate  
22          relationships" or "exchanges" exist between an arrangement and another clause that  
23          is not readily apparent from the four corners of the agreement. FCC Rule 51.809(a)

1 states that an ALEC is entitled to exercise its 252(I) rights "without unreasonable  
2 delay." Covad is concerned that if BellSouth is permitted to delay an opt-in by  
3 injecting the review of parole evidence, Covad's 252(I) rights would be substantially  
4 impaired.

5 **Q. What type of parole evidence would conceivably be needed in order to  
6 implement BellSouth's proposal?**

7 A. BellSouth's proposal opens the door for discovery of the correspondence and  
8 testimonial evidence of negotiations between BellSouth and the ALEC whose  
9 arrangement Covad seeks to implement. This process would conceivably involve  
10 subpoenas, document discovery, and depositions of negotiators for the other ALEC.  
11 In addition, discovery of BellSouth's interconnection agreement negotiation strategy  
12 and tactics would also be necessary. Covad sees no reason why initiating this *Bleak*  
13 *House*-type litigation would be in the public interest. Such a process would only  
14 inject delay, uncertainty and cost for all providers.

15 **ISSUE 31: SHOULD BELLSOUTH SEND A COMPLETE ELECTRONIC AND**  
16 **PAPER BILL WITHIN TEN BUSINESS DAYS OF THE BILL DATE, AND WHAT**  
17 **WILL BE THE BILLING DATE OF THAT BILL?**

18 **Q. What language has Covad proposed for Attachment 7, Sections 1.4-1.5?**

19 A. BellSouth has agreed to prepare bills for Covad in both electronic and paper form but  
20 takes the position that when it sends *either* billing format, the bill is due. Covad has  
21 proposed that it have thirty days to process the bills when received. In particular,  
22 Covad has proposed the following sections:

1                   1.4    BellSouth shall send to DIECA within ten (10) business days  
2                   of the bill date the entire bill in electronic and paper form, unless  
3                   otherwise agreed to by the parties. If both the electronic and  
4                   paper form of the bill are not sent to DIECA within ten (10)  
5                   business days of the bill date, DIECA shall only be obligated to  
6                   pay that bill within thirty (30) days of receipt of the bill. The bill  
7                   will be due thirty days after the receipt of whichever copy of the  
8                   bill arrives later.

9  
10                  1.5    Payment Due. The payment will be due on or before the next  
11                  bill date (i.e., same date in the following month as the bill date)  
12                  and is payable in immediately available funds, except as set forth  
13                  in section 1.4. [last three sentences of 1.5 are not in dispute]  
14

15                  This proposal ensures that Covad will have thirty days to process and pay a bill once  
16                  it has received it in the agreed-to format.

17   **Q.    What has BellSouth proposed?**

18   A.    BellSouth's proposal for Section 1.4 would delete the last sentence of Covad's  
19           proposed Section 1.4. In addition, BellSouth would delete the final clause ("except  
20           as set forth in section 1.4.") of the first sentence of Section 1.5. With these changes,  
21           BellSouth would give Covad less than twenty days to process and pay a bill.

22   **Q.    How so?**

23   A.    BellSouth ties payment of a bill to the "bill date" and not the actual date in which  
24           Covad receives the bill. Section 1.4 states that BellSouth will send a bill within ten  
25           business days (which can be up to fourteen calendar days) of the bill date. Section  
26           1.5 states that Covad's payment is due "on or before the next bill date." For example:

27           April 16:     Bill date for March services  
28           April 30:     BellSouth sends bill with April 16 bill date to Covad (10<sup>th</sup> business  
29           day after April 16)

1 May 16: Covad payment due.

2 In this example, Covad has only thirteen business days (seventeen calendar days) to  
3 process and pay the bill.

4 **Q. But doesn't BellSouth's proposal give Covad additional time if BellSouth does  
5 not provide a bill on time?**

6 A. No. BellSouth only gives Covad extra time to process a bill if *both* the electronic and  
7 paper copies are late. For example:

8 April 16: Bill date for March services

9 April 30: BellSouth sends paper bill to Covad (10<sup>th</sup> business day)

10 May 1: BellSouth sends electronic bill to Covad (11<sup>th</sup> business day; late)

11 May 3: Covad receives paper copy

12 May 4: Covad receives electronic copy

13 May 16 Next "bill date"; payment due.

14 Using BellSouth's proposed language, the payment is due on May 16 – only eight  
15 business days after Covad received the electronic bill. This is because BellSouth's  
16 proposed Section 1.5 clearly states that "the payment will be due on or before the  
17 next bill date" – in this case, May 16. Because BellSouth was able to get a paper  
18 copy of the bill out the door on the tenth business day, BellSouth's proposed Section  
19 1.4 states only that if both forms of the bill are not sent to Covad within ten business  
20 days is Covad given thirty days to process and pay the bill.

21 **Q. How would Covad's proposal handle the second example above?**

22 A. Covad's proposal would ensure that Covad has adequate time to review and process  
23 the bills:

- 1        April 16:        Bill date for March services
- 2        April 30:        BellSouth sends paper bill to Covad (10<sup>th</sup> business day)
- 3        May 1:            BellSouth sends electronic bill to Covad (11<sup>th</sup> business day; late)
- 4        May 3:            Covad receives paper copy
- 5        May 4:            Covad receives electronic copy
- 6        May 16            Next "bill date"
- 7        June 3:            Covad payment due (30 days after receipt of electronic copy)

8    **Q.    Why is this process important to Covad?**

9    A.    As discussed above, Covad is one of the largest purchasers of loops, collocation, and  
10    transport services in the state of Florida and indeed the entire BellSouth region. The  
11    paper bills Covad has received from BellSouth and other ILECs often fill many  
12    boxes. It is a significant expense, and sometimes an impossibility, to review a paper  
13    bill in any timely fashion. As proposed by BellSouth, it could generate a paper bill  
14    on the tenth business day, delay sending an electronic copy of the bill for several  
15    days or weeks, and Covad would be obligated to review and pay that paper bill in  
16    only eight to ten business days. That is not a commercially reasonable request for  
17    a high-volume customer like Covad.

18   **Q.    Why does reviewing the bills take so long?**

19   A.    As discussed above, paper bills for loops, transport and collocation can fill boxes.  
20    Aside from the sheer administrative expense and impossibility of processing a paper  
21    record like this in only eight business days, in the past, Covad has encountered  
22    significant problems with BellSouth's bills.



1 Indeed, since September 1999, Covad has encountered several significant problems  
2 with the bills proffered by BellSouth. For example, for loop and transport circuits,  
3 through March 2001, Covad has identified over \$1.6 million worth of BellSouth  
4 overcharges. These instances of over billing include mistakes or errors for circuit  
5 charges, canceled circuits, disconnected circuits, mileage errors, service data errors,  
6 improper application of tax exemption, and USOC logic set errors. Detecting these  
7 problems and raising the dispute with BellSouth to hopefully resolve that problem  
8 takes time and effort. In addition, Covad believes that BellSouth's current billing  
9 dispute proposal (Issue 32) would essentially put the onus on Covad to pay the entire  
10 amount of a bill while such an issue is in dispute. Covad strongly believes that  
11 BellSouth's proposals would have a significant anticompetitive impact: indeed,  
12 BellSouth would have a tremendous incentive to produce incorrect paper bills,  
13 demand immediate payment from the ALEC, and delay resolution of that dispute.

14 **Q. In your opinion, can Covad adequately process a paper bill within eight to ten**  
15 **business days?**

16 A. I have been involved in an on-going ILEC billing verification and reconciliation  
17 process at Covad. Covad has a dedicated team of professionals whose sole job is to  
18 review and reconcile ILEC bills. Even when we get electronic copies of such bills,  
19 the verification process takes a significant amount of time. In my opinion, Covad is  
20 not able to process boxes of a paper bill in eight to ten business days. Indeed, no  
21 high-volume consumer of UNEs and collocation can be expected to engage in a  
22 complete and thorough review of voluminous bills.

23 **Q. But doesn't BellSouth promise to provide electronic copies? Won't that help?**

1 A. While BellSouth has agreed to provide an electronic copy, the due date of a bill is not  
2 dependent upon preparation of that bill. As shown above, as proposed by BellSouth,  
3 it can insist on payment within eight to ten business days even if it has only prepared  
4 a paper bill. Under Covad's proposal, Covad will not be obligated to pay a bill until  
5 thirty days after it has received both the electronic and paper copies of the bill.  
6 Covad's proposal is a commercially reasonable term that any high-volume purchaser  
7 should be able to receive.

8 **ISSUE 32(A): SHOULD COVAD BE OBLIGATED TO PAY AN AMOUNT IN**  
9 **DISPUTE, AND IF COVAD DOES NOT PAY, SHOULD BELL SOUTH BE**  
10 **PERMITTED TO ASSESS LATE PAYMENT CHARGES FOR THAT AMOUNT?**

11 **Q. Has Covad encountered billing problems with BellSouth in the past?**

12 A. Yes, very significant ones. As discussed above, Covad has encountered several  
13 significant billing problems with BellSouth. Through March 2001, Covad has  
14 identified over \$1.6 million worth of overcharges. BellSouth mistakes include errors  
15 for circuit charges, canceled circuits, disconnected circuits, mileage errors, service  
16 data errors, improper application of tax exemption, and USOC logic set errors. In  
17 fact, the size, extent and pervasive nature of these billing discrepancies reveal  
18 significant problems with BellSouth's billing systems for UNEs and collocation.  
19 While Covad cannot speak for other carriers, I anticipate that other ALECs are facing  
20 similar substantial billing disputes.

21 **Q. If Covad believes a bill is incorrect, what should the process be?**

22 A. If BellSouth has overcharged Covad, Covad should not have to pay the amount of the  
23 overcharges while the dispute is resolved. In addition, late payment charges should

1 not be assessed on an amount withheld in dispute. Covad should also not be subject  
2 to suspension or termination of service for "nonpayment" if the nonpayment is due  
3 to a legitimate billing dispute (Section 3.2). Only if it turns out that Covad has  
4 incorrectly withheld an amount should late payment fees be considered. As  
5 discussed above, billing discrepancies can run into the hundreds of thousands and  
6 even millions of dollars. Covad has proposed language in Attachment 7, Sections  
7 1.7 and 3.2 to reflect that process.

8 **Q. How would BellSouth's proposal adversely impact competition in Florida?**

9 A. Again, it is important to understand the fundamental disparity in bargaining power  
10 between an ILEC like BellSouth and an ALEC like Covad. For Covad to keep its  
11 business up and running in Florida, BellSouth must continue to provide loops,  
12 collocation, transport, and OSS to Covad. While BellSouth is certainly entitled to  
13 payment for the elements and services it actually provides, it is only entitled to  
14 payment of the actual, approved or agreed-to rate for those elements and services.  
15 An BellSouth should not be permitted to threaten to cut off Covad's access to loops  
16 and elements because Covad refuses to pay an incorrect bill.

17  
18 By requiring ALECs to pay all billed amounts prior to resolution, BellSouth bears  
19 absolutely no risk or burden in the event it renders an incorrect bill. As a result,  
20 BellSouth's proposal actually creates a perverse incentive for BellSouth to render  
21 incorrect bills. A certain percentage of billing mistakes may never be detected by the  
22 ALEC -- for example, a mileage charge for a high-cap, DS3 circuit may not be readily  
23 determinable by an ALEC, as calculation of the mileage may be dependent upon

1 BellSouth network information that the ALEC may not have ready access to  
2 (especially within the 8-10 business-day window proposed by BellSouth). In  
3 addition, under BellSouth's proposal, BellSouth would be able to collect interest on  
4 the disputed amount pending resolution. As a result, even if the dispute is resolved  
5 in the ALEC's favor eventually, BellSouth is no worse off than if it had rendered a  
6 correct bill in the first place.

7  
8 It is important once again for the Commission to understand the relative position of  
9 the ILEC and the ALEC. I do not need to remind the Commission of the realities of  
10 the ALEC industry today--the willingness of financiers to fund ALEC ventures is  
11 significantly diminished from the 1996-99 period. In contrast, BellSouth enjoys a  
12 stable cash flow and profit and dominant market position. By establishing a system  
13 that encourages BellSouth to render incorrect bills and that requires ALECs to pay  
14 these inflated amounts to BellSouth while the dispute is resolved, the Commission  
15 will establish a system that causes ALECs to run out of cash faster if they operate in  
16 Florida. In both the short and long runs, placing this additional cost and risk on  
17 ALEC entry into Florida will harm Florida consumers.

18 **Q. Are BellSouth's billing proposals discriminatory?**

19 **A.** Access to billing systems are explicitly part of the OSS unbundled network element  
20 mandated by the FCC. As a result, BellSouth must provide "nondiscriminatory"  
21 access to billing. If BellSouth believes that its billing practices are  
22 nondiscriminatory, it must stand ready to prove that it treats its retail customers  
23 (either residential or high-volume businesses, or both) in the same manner – that is,

1           allowing only eight to ten business days to review a voluminous paper bill and  
2           assessment of late payment charges even on matters in dispute.

3   **Q.    Does that conclude your direct testimony?**

4   **A.    Yes.**

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Direct Testimony of Thomas Koutsky on Behalf of Covad Communications Company has been furnished by (\*) hand delivery this 23rd day of April, 2001, to the following:

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