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November 25, 2003

VIA HAND DELIVERY

Blanca S. Bayo, Director
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Re: Docket No.: 030945-TP

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COMMISSION
CLERK

Dear Ms. Bayo:

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

- 12035-03 ▶ DIECA Communications, Inc., d/b/a Covad Communications Company's Motion for Summary Final Order; and
- 12036-03 ▶ DIECA Communications, Inc., d/b/a Covad Communications Company's Response to Staff Data Requests.

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

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Sincerely,

Vicki Gordon Kaufman

Vicki Gordon Kaufman

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MCWHIRTER, REEVES, MCGLOTHLIN, DAVIDSON, KAUFMAN & ARNOLD, P.A. 12035 NOV 25 8

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Complaint of DIECA Communications,
Inc., d/b/a Covad Communications Company
Against BellSouth Telecommunications, Inc.
For Breach of the Parties' Interconnection
Agreement and Unauthorized Discontinuance
Of Service to Customers, Request for
Maintenance of the Status Quo, and Request
For Expedited Relief.

Docket No: 030945-TP

Filed: November 25, 2003

**DIECA COMMUNICATIONS, INC., D/B/A COVAD COMMUNICATIONS
COMPANY'S MOTION FOR SUMMARY FINAL ORDER**

DIECA Communications, Inc., d/b/a Covad Communications Company (Covad), pursuant to section 120.57(1)(h), Florida Statutes, and rule 28-106.204(4), Florida Administrative Code, files this Motion for Summary Final Order in regard to the above Complaint. The Commission should issue a final order finding that discontinuing service to Covad and its end users under the circumstances presented here constitutes a breach of the Parties'¹ Interconnection Agreement. As grounds therefore, Covad states:

I.

SUMMARY OF ARGUMENT

1. BellSouth and Covad's business relationship principally involves BellSouth's lease of copper facilities to Covad for Covad to provide xDSL services to Florida end-users. The Parties have a 633-page Interconnection Agreement outlining all of the details of that business relationship which this Commission approved. The key question that the Commission must resolve in this docket is whether or not that Interconnection Agreement applies to the facts at hand. Covad asserts that BellSouth's discontinuance of service to Covad's end-users in connection with network modifications violates numerous portions of the Interconnection

¹ As used herein, the term "Parties" refers collectively to Covad and BellSouth.

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FPSC-COMMISSION CLERK

Agreement. BellSouth asserts two defenses to Covad's claim: 1) the portions of the Interconnection Agreement that BellSouth is purported to have breached will be made irrelevant by a BellSouth network modification that will destroy the network elements that are the subject of the Interconnection Agreement; and 2) even if the contractual provisions Covad identified are relevant, BellSouth has identified numerous alternatives to BellSouth's performance under the Commission-approved Interconnection Agreement. Notably, BellSouth *does not* assert that Covad or its customers have in any way breached the Interconnection Agreement, nor does BellSouth assert any authority under the Interconnection Agreement to discontinue service to Covad or its end-users.

2. BellSouth's first defense—which amounts to a claim that a contracting party may relieve itself of contractual obligations by intentionally destroying the object of the obligation—is not recognized under the law. BellSouth's second defense, while recognized as a defense to the award of damages (failure to mitigate), is not a defense to breach of the Interconnection Agreement. A party to an Interconnection Agreement cannot avoid performance under the specific terms of the Agreement by identifying alternatives to its own performance. Accordingly, BellSouth's "defenses" to Covad's claim for breach of the Interconnection Agreement are invalid as a matter of law and Covad is entitled to Summary Final Order.

II.

CRITERIA FOR ENTRY OF SUMMARY FINAL ORDER

3. Section 120.57(1)(h), Florida Statutes, provides that in any proceeding in which an agency has final order authority, a summary final order **shall** be rendered if it is determined from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.

4. Rule 28-106.204(4), Florida Administrative Code, provides, in part,:

Any party may move for summary final order whenever there is no genuine issue as to any material fact.

5. This Commission has recognized the propriety of using the mechanism of summary final order on numerous occasions. It has said:

The purpose of summary judgment, or in this instance, summary final order, is to avoid the expense and delay of trial when no dispute exists concerning material facts. . . . The question for determination on a motion for summary judgment is the existence or nonexistence of a material factual issue. There are two requisites for granting summary judgment: first, there must be no genuine issue of material fact, and second, one of the parties must be entitled to judgment as a matter of law on the undisputed facts.²

6. Both conditions are satisfied in this case. There are no genuine issues as to any material facts -- BellSouth does not deny that it intends to cut off service to Covad customers. Covad moves for entry of an order granting Covad's claim against BellSouth for breach of the Parties' Interconnection Agreement and asks that the Commission find that discontinuance of service to Covad and its customers in the circumstances presented here constitutes a violation of several provisions of the Parties' Interconnection Agreement.

² *In re: Request for arbitration concerning complaint of ITC^DeltaCom Communications, Inc. against BellSouth Telecommunications, Inc. for breach of interconnection terms, and request for immediate relief*, Docket No. 991946-TP, Order No. PSC-00-1540-FOF-TP at 20 (Aug. 24, 2000) (citations omitted). See also, *In re: Application for transfer of Certificate No. 281-S in Lee County from Bonita Country Club Utilities, Inc. to Realnor Hallandale, Inc.*, Docket No. 990975-SU, Order No. PSC-00-0341-PCO-SU (Feb. 18, 2000).; *In re: Petition by Florida Power & Light Company for approval of conditional settlement agreement which terminates standard offer contracts originally entered into between FPL and Okeelanta Corporation and FPL and Osceola Farms, Co.*, Docket No. 000982-EI, Order No. PSC-00-2341-FOF-EI (Dec. 6, 2000); *In re: Complaint of Bayside Mobile Home Park*, Docket No. 010726-WS, Order No. PSC-02-0247-FOF-WS (Feb. 26, 2002).

III.

ARGUMENT

Undisputed Facts

7. On December 19, 2001, Covad and BellSouth executed a 633-page Interconnection Agreement that details the Parties' responsibilities to interconnect with each other and otherwise to comply with their obligations under the Telecommunications Act of 1996, the Federal Communications Commission's (FCC) rules, and the rules and orders of this Commission. A copy of the Parties' Interconnection Agreement, with any amendments, is on file with the Commission.

8. Section 2.11.1 of the Parties' Interconnection Agreement provides that "BellSouth shall provide Covad access to the high frequency portion of the local loop as an unbundled network element."³ Section 2.11.1.2 of the Interconnection Agreement further provides that "[t]he following loop requirements are necessary for Covad to be able to access the High Frequency Spectrum: an unconditioned, 2-wire copper loop."⁴

9. Under the terms of the Interconnection Agreement, Covad has ordered loops from BellSouth for numerous customers, including the loops serving the customers at issue in this proceeding.

10. BellSouth does not dispute that Covad has provided BellSouth with timely payment for the loops or portions of loops serving the customers at issue in this docket⁵ and has complied with all relevant portions of the Interconnection Agreement.

³See Interconnection Agreement by and Between BellSouth Telecommunications, Inc. and DIECA Communications, Inc., d/b/a Covad Communications Company at Attachment 2, Section 2.11.1, p. 89 (hereinafter Interconnection Agreement).

⁴Interconnection Agreement, Attachment 2, § 2.11.1.2.

⁵BellSouth Answer to Covad Complaint, ¶ 10.

11. The Interconnection Agreement, Attachment 2, § 1.2.1, also provides that “BellSouth shall not impose limitation restrictions or requirements or requests for the use of the network elements or combinations that would impair the ability of Covad to offer telecommunications service in the manner Covad intends.”⁶

12. The Interconnection Agreement, in Attachment 7, § 1.8, entitled “Discontinuing Service to Covad,” provides that BellSouth may discontinue service to Covad’s customers “for non-payment or in the event of prohibited, unlawful or improper use of BellSouth facilities or service. . . .”⁷

13. Network upgrades are not identified anywhere in the Interconnection Agreement as a basis to discontinue service to Covad’s customers.⁸

14. Although BellSouth has been replacing copper cable with fiber optics for years, BellSouth did not ask Covad for, or otherwise obtain from Covad, the contractual right to cut-off service to Covad’s customer during network modifications

15. BellSouth has notified Covad that BellSouth intends to remove a portion of the copper loop between Covad’s customer’s premises and the central office serving such customer’s premises.⁹

16. BellSouth’s facilities replacement will preclude Covad from continuing to serve the customers at issue in this docket via line sharing.¹⁰

17. BellSouth has not identified a provision of the Interconnection Agreement

⁶ Interconnection Agreement, Attachment 2, Network Elements and Other Services, § 1.2.1.

⁷ Interconnection Agreement, Attachment 7, Billing, § 1.8.1.

⁸ *Id.*

⁹ See 1st Revised Exhibit A to Covad Complaint, filed November 24, 2003.

¹⁰ BellSouth Answer to Covad Complaint, filed October 16, 2003, p. 1.

allowing BellSouth to discontinue service to Covad and Covad's customers in connection with network modifications.¹¹

The Parties' Interconnection Agreement Precludes Discontinuance of Service to Covad's Customers in the Name of "Network Modifications"

18. The Parties' Interconnection Agreement addresses all of the key aspects of the Parties' business relationship, including how BellSouth will maintain and repair the loops (Attachment 2, § 2.1.4), what kind of demands for use of the loop that BellSouth may make (Attachment 2, § 1.2.1), and when BellSouth may discontinue service over the loops provisioned to Covad (Attachment 7, § 1.8).

19. Section 2 of the Interconnection Agreement provides that:

BellSouth will provide Covad with the functionalities of unbundled network elements so that Covad can provide any telecommunications service that can be offered by means of the unbundled elements as described in Attachment 2.

Attachment 2, § 1.2.1 of the Interconnection Agreement provides that:

Except as otherwise required by law, BellSouth shall not impose limitation restrictions or requirements or requests for the use of the network elements or combinations that would impair the ability of Covad to offer telecommunications service in the manner Covad intends.

Attachment 2, § 2.1.4 of the Interconnection Agreement provides, in relevant part, that:

BellSouth will only provision, maintain and repair loops to the standards that are consistent with the type of loop ordered.

20. All of these sections of the Interconnection Agreement between BellSouth and Covad are relevant to the treatment of copper loops before and after they are provisioned to Covad. The Interconnection Agreement defines what BellSouth will provision to Covad, how BellSouth will provision, maintain and repair loops, and the limitations on any requirements

¹¹ BellSouth's Response to Covad's First Set of Interrogatories, No. 26.

BellSouth may put on the loops provisioned to Covad. BellSouth's unequivocal intention to cut-off the copper loops provisioned to Covad would "impose limitation restrictions or requirements or requests for the use" of those loops serving the customers that would "impair the ability of Covad to offer telecommunications service in the manner Covad intends."¹² Moreover, the requirement that BellSouth only "maintain and repair loops to the standards that are consistent with the type of loop ordered" would be violated by a maintenance plan that involved conversion of the loop to a "type of loop" over which Covad cannot provide service.¹³

21. Attachment 7, §1.8, entitled "Discontinuing Service to Covad" provides that BellSouth may discontinue service to Covad's customers "for non-payment or in the event of prohibited, unlawful or improper use of BellSouth facilities or service. . . ."¹⁴ Network upgrades are *not* identified as a basis to discontinue service to Covad's customers.¹⁵ All of these provisions provide Covad the assurance that the loops it orders from BellSouth will be maintained by BellSouth until the end-user decides they no longer want Covad's service. BellSouth's stated intention to cut the wires to Covad's customers violates these provisions.

22. Most importantly, BellSouth's copper retirement policies tacitly admit their obligation to maintain service to Covad under the Interconnection Agreement. During copper retirements, BellSouth will migrate Covad's customers to alternative copper, or where feasible (IDSL or T1s) to fiber, *at no charge* to Covad or its customers. If Covad did not have a contractual right to maintenance of service for these customers, then BellSouth would charge Local Service Request (LSR) and "switch-as-is" migration fees to move these customers. It does not. It is only in the narrow circumstance presented here – where BellSouth does not plan to

¹² Interconnection Agreement, Attachment 2, § 1.2.1.

¹³ Interconnection Agreement, Attachment 2, § 2.1.4.

¹⁴ Interconnection Agreement, Attachment 7, § 1.8.1.

¹⁵ *Id.*

leave alternative facilities to serve Covad's customers – that BellSouth claims Covad has no right to service. In response to Covad's claims, BellSouth raises two heretofore unheard of defenses.

BellSouth's "Defenses" are Without Merit

23. BellSouth asserts that Covad's Complaint fails for two reasons:

First, the Agreement does not obligate BellSouth to provide network elements or services to Covad that do not exist in BellSouth's network. Second, even if the Commission were to find that the Agreement requires BellSouth to maintain service to Covad's customers, BellSouth has presented Covad with a myriad of alternatives by which Covad may serve these few customers.¹⁶

In sum, BellSouth asserts two novel defenses: 1) by destroying the object of the Interconnection Agreement, BellSouth may relive itself of its clear obligations thereunder; and 2) BellSouth may breach the undisputed terms of the Interconnection Agreement so long as it can point to alternatives to its own required performance.

24. As to BellSouth's first "defense", essentially BellSouth has announced its intention to snip the wires to Covad's customers in violation of numerous provisions of the Interconnection Agreement described above. BellSouth says the Interconnection Agreement does not obligate it to provide network elements or services to Covad that do not exist in BellSouth's network.¹⁷ Of course, in addition to the *legal* failings of BellSouth's defense is the *factual* failing that the copper loops at issue *do exist*.

25. BellSouth seems to have a very unique understanding of the law. Section 1.2.1 of Attachment 2 "provides that for those network elements or services Covad purchases from BellSouth, BellSouth may not impose restrictions that would impair Covad's ability to offer telecommunications services using those elements." However, BellSouth then asserts that this

¹⁶ BellSouth Answer to Covad Complaint at 2.

¹⁷ BellSouth Answer to Covad Complaint at 2.

obligation will no longer apply once it removes the loops Covad has purchased.”¹⁸ Not only is this a ridiculous assertion, it is not a defense recognized under law. A performing party under an Interconnection Agreement cannot escape its obligations by destroying the object of its performance. A car leasing company cannot terminate leases in the middle of their term by destroying peoples’ cars. If this were the case, interconnection agreements, which are contracts, would become meaningless. BellSouth’s assertion that it is not breaching the Interconnection Agreement because the loops it is contractually obligated to maintain will be rendered non-existent after BellSouth breaches the Interconnection Agreement is facially without merit.

26. BellSouth’s alternative "defense" is equally nonsensical. BellSouth asserts that it has not breached the Interconnection Agreement, even if the Interconnection Agreement requires that service be maintained to Covad’s end users, because “BellSouth has provided Covad with a myriad of alternatives by which Covad may serve these few customers.”¹⁹ This is yet another novel theory from BellSouth, one that has not been adopted by any court in history. Alternatives to performance *are* a defense to the award of damages for breach of contract, usually called “failure to mitigate.” They do *not* excuse a party from performance under the Interconnection Agreement. BellSouth argues, in essence, that a breach of the Interconnection Agreement is cured if the wronged party can obtain the object of the Agreement elsewhere. However, BellSouth fails to address two key elements of § 1.2.1 of Attachment 2: The “impairment” that such requests for use may not have is on the “the ability of Covad to offer telecommunications service *in the manner Covad intends.*” See section 1.2.1, Attachment 2. Here, BellSouth wants to impose a restriction on Covad’s use of the network elements provided to Covad that would impair Covad’s ability to provide ADSL service to its customers in the manner Covad intends –

¹⁸ *Id.*

¹⁹ BellSouth Answer to Covad Complaint at 2.

via the manner the customer is currently receiving service. The purpose of § 1.2.1 is to provide Covad with the assurance that there will be a continuity of service from BellSouth over the loops Covad uses to provide service to its customers. Covad intends on providing ADSL service to its customers using the network Covad spent billions of dollars to construct – not a network that BellSouth thinks Covad should have to build with still more billions of dollars in capital that Covad does not have.

27. More importantly, Attachment 7, §§ 1.8 and 1.8.1, provide the specific and limited circumstances upon which BellSouth may discontinue service to Covad:

Discontinuing Service to Covad. The procedures for discontinuing service to Covad are as follows: 1.8.1 BellSouth reserves the right to suspend or terminate service for nonpayment of services or in the event of prohibited, unlawful or improper use of BellSouth facilities or service or any other violation or noncompliance by Covad of the rules and regulations contained in BellSouth's tariffs.

There is no dispute that at all relevant times, Covad has provided BellSouth with timely payment for the loops or portions of loops serving these customers, and has complied with all relevant portions of the Interconnection Agreement. BellSouth has not made any allegations to the contrary in this proceeding. Modifications to BellSouth's network, such as replacing copper with fiber, are not identified in the Interconnection Agreement as a basis for BellSouth to discontinue service to Covad or its Florida customers.

28. BellSouth has negotiated literally hundreds of interconnection agreements with competitive carriers and has been replacing copper cable with fiber cable for years. In the specific circumstances presented here, the Parties negotiated a clause in their Interconnection Agreement dealing quite specifically with the limited circumstances under which BellSouth's service to Covad could be cut off, but—despite an on-going and aggressive fiber-deployment program—BellSouth chose not to ask for a term in the Interconnection Agreement which would

give it the right to cut-off service to Covad's customers during conversion to an all-fiber network. In short, given the clear language on this issue in the Interconnection Agreement, BellSouth is prohibited from discontinuing service to Covad at its whim in the name of "network changes."

29. BellSouth cannot escape its obligations to continue service to Covad by identifying alternative methods Covad could employ in place of BellSouth's specific obligations pursuant to the Interconnection Agreement. BellSouth cannot escape its clear and specific obligation to perform by pointing to ways Covad could obtain the contracted-for service, particularly when those alternatives are significantly more expensive than the price for the services for which Covad contracted. The point of an Interconnection Agreement is to define each party's obligations and to assure performance by each party. Again, if parties to an Interconnection Agreement could avoid their own specific obligations under the Agreement simply by pointing to alternatives, then the whole point of negotiations, arbitrations and interconnection agreements would disappear. Yet this is BellSouth's only other defense: if we cannot escape our obligations by cutting the wire, we still do not have to perform because Covad can go elsewhere to obtain functionally similar service at many multiples of the cost of our agreement. A water company cannot escape a contract to provide drinking water by telling you to dig a well. Yet this is precisely what BellSouth is trying to do. BellSouth's two defenses are without merit as a matter of law and the Commission should find that BellSouth's actions will breach the Parties' Interconnection Agreement.

30. Finally, BellSouth repeatedly relies on citations to the FCC's *Triennial Order* to assert a "right" or "entitlement" to retire copper.²⁰ Covad does not dispute BellSouth's general "right" to upgrade portions of its network, nor BellSouth's specific adherence to the FCC notice

²⁰ See BellSouth Answer to Covad Complaint at 2.

rules in this case. However, no FCC rule provides BellSouth a “right” to cut-off service to Covad’s customers or a “right” to ignore the provisions of the Interconnection Agreement with Covad, during network modifications or otherwise.²¹ The FCC expressly provided that “such [copper retirement] notifications will ensure that incumbent and competitive carriers can work together to ensure the competitive LECs maintain access to loop facilities”; and that objections will be denied unless “the copper retirement scenario suggests that competitors will be denied access to the loop facilities required under our rules.”²² Covad is entitled to access to the loop serving the customers at issue here under FCC rules.²³ BellSouth’s retirement will deny that access.²⁴ While BellSouth has the “right” to do many things under FCC rules, like sell loops, those rights do *not* carry with them the right to cut-off service to a competitor’s customers. For instance, BellSouth cannot sell a loop being used by a CLEC. Moreover, the FCC does not even imply that its network modification notice rules allow an ILEC to ignore its obligations to a CLEC pursuant to a Commission-approved Interconnection Agreement.²⁵ Indeed, with regard to *Triennial Order* changes in existing rules, the FCC expressly rejected the ILECs’ request that provisions of the *Triennial Order* trump interconnection agreements.²⁶ Accordingly, BellSouth may not ignore its obligations to Covad merely by providing notice of its intention to do so, nor does the FCC confer on BellSouth the “right” to cut-off its competitor’s customers in connection with network changes.

²¹ See In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, released August 21, 2003 (*Triennial Order*), ¶¶ 271, 281-84 (regarding notice requirements associated with copper retirements).

²² *Id.* ¶¶ 281 and 282 (emphasis added).

²³ *Id.* ¶¶ 264-71.

²⁴ BellSouth Answer to Covad’s Complaint at 1.

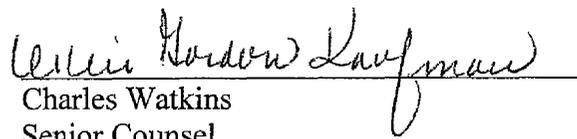
²⁵ See *Triennial Order* ¶¶ 271, 281-84; 700-706.

²⁶ *Triennial Order*, ¶¶ 700-706.

IV.

CONCLUSION

BellSouth has neither a contractual right to cut-off Covad's customers nor a legal defense to Covad's claims. Covad is, therefore, entitled to a Summary Final Order determining that discontinuance of service to Covad under the circumstances presented here would be a breach of the Parties' Interconnection Agreement.



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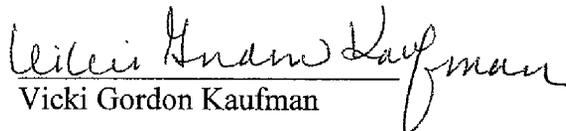
Attorneys for Covad Communications, Inc.

CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing DIECA Communications, Inc. d/b/a Covad Communications Company Motion for Summary Final Order has been provided by (*) hand delivery or U.S. Mail this 25th day of November 2003, to the following:

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