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December 3, 2003

Mrs. Blanca S. Bayó
Director
Division of the Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No.: 030945-TP
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

Dear Ms. Bayó:

Enclosed are an original and fifteen copies of BellSouth Telecommunications, Inc.'s Response to Covad's Motion for Summary Judgment, which we ask that you file in the captioned docket.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

Lisa Spooner Foshee

Lisa Spooner Foshee (LKA)

cc: All Parties of Record
Marshall M. Criser III
R. Douglas Lackey
Nancy B. White

CERTIFICATE OF SERVICE
Docket No. 030945-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via Electronic Mail and First Class U. S. Mail this 3rd day of December 2003 to the following:

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Lisa S. Foshee

Lisa S. Foshee (LSF)

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BEFORE THE

FLORIDA PUBLIC SERVICE COMMISSION

In the Matter of:	)	
	)	
Petition for Emergency Relief	)	
Regarding Unilateral Customer	)	Docket No. 030945-TP
Termination by BellSouth	)	
Telecommunications, Inc.	)	Filed: December 3, 2003

BELLSOUTH'S RESPONSE TO COVAD'S MOTION FOR SUMMARY FINAL ORDER

BellSouth Telecommunications, Inc. ("BellSouth") hereby responds to DICEA Communications, Inc. d/b/a Covad Communications Company's ("Covad") Motion for Summary Final Order and objects as follows:

Statement of Material Fact

Covad sets forth in Section III of its Motion for Summary Final Order a list of so-called Undisputed Facts. Following is BellSouth's response to that list:

1. BellSouth agrees with the statements made in Paragraph 7 of the Motion.

2. BellSouth agrees with the statements made in Paragraph 8 of the Motion.

3. BellSouth disagrees with the statements made in Paragraph 9 of the Motion. Covad is not ordering loops from BellSouth. Rather, Covad is ordering the high frequency portion of the loop, or line sharing. Covad is not providing voice service to these end-users, only data services.

4. BellSouth agrees with the statements made in Paragraph 10 of the Motion.

5. BellSouth agrees with the statements made in Paragraph 11 of the Motion.

6. BellSouth agrees with the statements made in Paragraph 12 of the Motion.

7. BellSouth disagrees with the statements made in Paragraph 13 of the Motion.

8. BellSouth disagrees with the statements made in Paragraph 14 of the Motion. BellSouth is entitled to remove its copper cable facilities. Covad does not dispute BellSouth's right. Once the facilities are removed, BellSouth is not obligated to provide line sharing because the prerequisite component, namely the copper loop, no longer exists in BellSouth's network.

9. BellSouth agrees with the statements made in Paragraph 15 of the Motion and further states that such notification was made pursuant to, and in compliance with, all applicable rules.

10. BellSouth agrees with the statements made in Paragraph 16 of the Motion.

11. BellSouth disagrees with the statements made in Paragraph 17 of the Motion for all the reasons set forth herein and in its prefiled testimony in this docket.

Argument

I. BellSouth's Removal of Copper Cable Facilities Does Not Breach The Interconnection Agreement.

a. According to the Agreement, BellSouth only is obligated to provide UNEs that exist in its network.

To assert a claim for summary judgment, the movant must prove that there is no issue of material fact and that the movant is entitled to judgment as a matter of law. Covad has not met this burden and therefore its motion should be denied.

Covad's single claim to relief in this case is that by removing copper cable facilities as a result of a DOT road move or non-negligent deterioration of cable, BellSouth will breach the parties' interconnection agreement. As BellSouth has explained, and as Covad does not dispute, BellSouth is entitled to remove its copper cable facilities. Moreover, BellSouth is not obligated under the Interconnection Agreement between Covad and BellSouth ("Agreement") to provide Covad UNEs that do not exist. Thus, BellSouth will not breach the Agreement by removing such facilities.

Covad asserts that it is entitled to judgment as a matter of law because "destroying the object of a contract [to] relieve itself of its contractual obligations" is not a defense to breach of contract. Mischaracterization of BellSouth's position, however, does not entitle Covad to summary judgment.

First, the parties agree that BellSouth is entitled to remove its copper cable facilities so long as BellSouth complies with the network disclosure rules. The parties also agree that BellSouth fully has complied with those rules. It is from this point, however, that the parties' views diverge. Despite agreeing that BellSouth is entitled to retire copper cable facilities, Covad contends that the right it agrees BellSouth has to upgrade its network is somehow constrained by the Agreement. Such is not the case. The Agreement supports BellSouth's unfettered right to upgrade its network; the result of the exercise of that right, per the Agreement, is that the line sharing UNE, which by definition requires a copper loop, no longer exists.

Notably, Covad has not pointed to one provision in the Agreement, nor can it, that bars or restricts BellSouth's right to upgrade its network. In fact, the contract is silent on the issue of nondiscretionary copper cable replacements. Because the contract is silent on that specific issue, the Commission needs to look to other parts of the contract to determine the intent of the parties. Attachment 2 clearly sets for the circumstances in which BellSouth will provide line sharing. Section 2.11.1.1 of Attachment 2 specifically provides that the High Frequency Spectrum (or line sharing) requires a copper loop. Thus, to the extent that a copper loop no longer exists in BellSouth's network, BellSouth is no longer obligated to provide the line sharing UNE. By definition, without the copper loop, there is no line sharing UNE. And, as the Act and FCC rules make clear, where the UNE does not exist in BellSouth's network, BellSouth is not obligated to provide it to a CLEC.

The Agreement only obligates BellSouth to provide UNEs that exist in its network. A comparable example is a wholesale provider of widgets. If the provider decides to discontinue the sale of widgets, the provider's customers cannot force the wholesaler to continue to sell widgets – rather, the customer needs to find an alternative to widgets. Similarly, in this situation,

if BellSouth decides to build a fiber network instead of a copper network, its wholesale customers cannot force it to provide copper simply for their purchase.

The proposition that BellSouth is entitled to modify its network is hardly earth-shattering, although Covad's inflated rhetoric would have the Commission believe otherwise. In fact, the FCC has encouraged BellSouth (and other ILECs) to deploy fiber networks to increase the reach of broadband to all consumers. Obviously, for ILECs to deploy broadband, ILECs need to replace copper - it is nonsensical to assume that an ILEC would maintain dual facilities. To interpret the Agreement in such a way as to prevent BellSouth from upgrading its network would be contrary to the intent of the parties and contrary to public policy. What Covad is asking is for this Commission to read the Agreement to mean that BellSouth is barred from bringing the benefits of fiber and broadband to any number of customers if Covad happens to have one line sharing customer on the copper cable facility. Such an interpretation is not a logical reading of the Agreement and could constitute a serious impediment to the ubiquitous deployment of broadband services.

b. <u>The Force Majeure clause in the Agreement excuses BellSouth's performance</u>.

Throughout its Motion, Covad characterizes BellSouth's replacement of copper cable facilities as "intentional" destruction of the facilities. As the facts make clear, however, BellSouth is not intentionally destroying anything. Rather, in all but one case the DOT has mandated that BellSouth must remove its facilities. In the last case, the copper cable has deteriorated, through no fault of BellSouth's, past the point of repair. While Covad may not like or understand the concept of placing facilities on public right-of-ways, or the fact that copper cable eventually wears out, the fact is that BellSouth has no choice in this matter.

Even if this removal of facilities somehow constituted a breach standing alone, which it does not, the force majeure clause in the Agreement excuses BellSouth's performance. Section 14.1 of the General Terms and Conditions of the Agreement addresses nondiscretionary situations such as the mandated removal of BellSouth's copper cable facilities. Section 14.1 specifically provides that:

> In the event performance of this Agreement, or any obligation hereunder, is either directly or indirectly prevented, restricted, or interfered with by reason of *acts of the government in its sovereign capacity* or *any other circumstances beyond the reasonable control and without the fault or negligence of the Party affected,* the Party affected...shall be excused from such performance on a day-to-day basis....

Section 14.1, Attachment 2. The DOT's requirement that BellSouth remove its copper cable facilities due to a road move is both an "act of the government in its sovereign capacity" and a "circumstance[] beyond the reasonable control and without the fault or negligence" of BellSouth. Moreover, the deterioration of the copper cable is "beyond the reasonable control and without the fault or negligence of the Party affected." Consequently, even if BellSouth were obligated to provide line sharing after the removal of the copper cable facilities, it is excused from performance by Section 14.1 of the Agreement.

c. <u>The provisions upon which Covad relies are not germane to this dispute</u>.

Covad is not entitled to summary judgment because the provisions relied upon by Covad to make its case are not applicable to the scenario at hand. Heading III.A in Covad's Motion demonstrates the fundamental flaw in Covad's case – this is not "discontinuance of service" in the "name of 'network modifications'" as Covad contends. On the contrary, this is a network modification authorized by the Federal Communications Commission that results in the unavailability of the line sharing UNE as defined in the Agreement. The distinction between "discontinuance of service" and "removal of facilities" is crucial, and renders the sections of the

Agreement cited by Covad irrelevant to this dispute. For example, Attachment 7, Section 1.8.1, upon which Covad relies so heavily, applies to service over UNEs available for purchase. In this case, the line sharing UNE is no longer available at all, and thus the provisions regarding discontinuance of service do not apply. Similarly, Sections 1.2.1 and 2.1.4 apply to UNEs that are being purchased from BellSouth – if the UNE is not available, those obligations are not relevant. The stretch Covad is making is obvious when one studies Covad's claim that removing copper cable facilities would "impair the ability of Covad to offer telecommunications service in the manner Covad intends." (Brief, at 7). What Covad is really saying is that anywhere BellSouth fails to have a copper loop, BellSouth has breched the Agreements because it has impaired Covad's ability to provide service in the way it intends. Such a position is nonsensical.

II. The Alternatives Available to Covad Demonstrate that the Equities Favor BellSouth In This Case.

Again, Covad has mischaracterized BellSouth's position in this case. BellSouth is not arguing that the alternatives available to Covad cure a breach. As BellSouth demonstrated above, BellSouth did not breach the Agreement. The alternatives are for the Commission's benefit to understand that BellSouth is not terminating service to Covad's customers. On the contrary, Covad has a myriad of economic alternatives by which it can provide service to its customers. Moreover, unlike Covad, BellSouth is presenting the Commission with ways this dispute can be resolved. Covad, on the other hand, has been decidedly circumspect about what it actually wants the Commission to do, no doubt recognizing that the relief it really wants is outside the Commissions jurisdiction to award.

Moreover, Covad's position is based on a fundamental misunderstanding of the Triennial Review Order. On Page 13 of its Brief, Covad argues that the FCC guaranteed it access to loops. Covad, of course, fails to mention two crucial points: first, Covad is <u>not</u> ordering "loops" – it is

ordering line sharing; and second, the loop access the FCC was protecting was access to the voice capabilities. In fact, the FCC expressly declined to require further unbundling of the high frequency portion of the loop because it found the broadband market to be competitive and found that CLECs (Covad in particular) do not need access to ILEC facilities to compete in the broadband market. *Triennial Review Order*, at ¶ 255 ("we decline [to make line sharing available] except as specified on the grandfathered basis"). Covad is well-aware that the FCC is moving towards appropriate market-based competition for broadband services; it is disingenuous for Covad to seek protection in rules applicable only to voice-grade services.

III. The Commission Does Not Have The Jurisdiction To Award The Relief Covad Seeks.

The Commission must deny Covad's Motion for Summary Final Order because Covad has not presented to the Commission any remedy that the Commission has the jurisdiction to award. Thus, even were the Commission to find a breach of the Agreement, the Commission still needs to tell the parties what to do given that BellSouth has no choice but to remove the copper cable facilities. There appear to be only four options Covad has mentioned: (1) keep the copper in the ground; (2) lay dual facilities; (3) unbundle BellSouth's DSLAM; or (4) provide BellSouth's federally-tariffed wholesale DSL service at the line-sharing rate. The Commission does not have the authority to award any of this relief. First, the Commission cannot interfere with a DOT road move. Second, the Commission cannot order BellSouth to engage in wasteful and expensive deployment of duplicative plant. Third, the FCC was explicit that BellSouth does not need to unbundle its DSLAMs. *Triennial Review Order*, at ¶ 537. Last, this Commission cannot regulate BellSouth's federally-tariffed Wholesale DSL service by dictating the rates, terms, or conditions pursuant to which it will be provided. See *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488-89 (7th Circ. 1998); *Evans v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000)

(filed tariff "conclusively and exclusively enumerate[s] the rights and liabilities as between the tariff and the customers").

CONCLUSION

In conclusion, BellSouth respectfully requests that the Commission deny Covad's Motion for Summary Final Order of this case.

This 3rd day of December, 2003.

BELLSOUTH TELECOMMUNICATIONS, INC.

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