ORIGINAL

McWHIRTER REEVES
ATTORNEYS AT LAW

TAMPA OFFICE:
400 NORTH TAMPA STREET, SUITE 2450
TAMPA, FLORIDA 33602
P. O. BOX 3350 TAMPA, FL 33601-3350
(813) 224-0866 (813) 221-1854 FAX

PLEASE REPLY TO:
TALLAHASSEE

TALLAHASSEE OFFICE:
117 SOUTH GADSDEN
TALLAHASSEE, FLORIDA 32301
(850) 222-2525
(850) 222-5606 FAX

December 11, 2003

VIA HAND DELIVERY
Blanca S. Bayo, Director
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Re: Docket No.: 981834-TP and 990321-TP

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:

- DIECA Communications, Inc. d/b/a Covad Communications Company's Motion for Reconsideration of a Portion of Order No. PSC-03-1358-FOF-TP.

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

Sincerely,

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Vicki Gordon Kaufman

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of Competitive Carriers for Commission action to support local competition in BellSouth Telecommunications, Inc.'s service territory	Docket No. 981834-TP
In re: Petition of ACI Corp. d/b/a Accelerated Connections, Inc. for generic investigation to ensure that BellSouth Telecommunications, Inc., Sprint-Florida, Incorporated, and GTE Florida Incorporated comply with obligation to provide alternative local exchange carriers with flexible, timely, and cost-efficient physical collocation.	Docket No. 990321-TP Filed: December 11, 2003

_____/

DIECA COMMUNICATIONS, INC. D/B/A COVAD COMMUNICATIONS COMPANY'S MOTION FOR RECONSIDERATION OF A PORTION OF ORDER NO. PSC-03-1358-FOF-TP

DIECA Communications, Inc. d/b/a Covad Communications Company (Covad), pursuant to rules 25-22.0367 and 28-106.204, Florida Administrative Code, files this Motion for Reconsideration of that portion of Order No. PSC-03-1358-FOF-TP, issued on November 26, 2003 (Final Order), which fails to provide CLECs with the option of either a nonrecurring charge (NRC) or a monthly recurring charge (MRC) for infrastructure power plant charges. The Commission overlooked or made a mistake of fact in failing to provide this option and it should reconsider its decision on this point. This mistake of fact leads to a mistake of law because it will certainly result in an over recovery of infrastructure costs over time in violation of 47 C.F.R. § 51.507(e). As grounds therefore, Covad states

I.

Standard for Motion for Reconsideration

The standard for a motion for reconsideration is whether the motion identifies a point of

fact or law which was overlooked or which the Commission failed to consider in rendering its order. *See, Stewart Bonded Warehouse, Inc. v. Bevis,* 294 So.2d 315 (Fla. 1974); *Diamond Cab Co. v. King*, 146 So.2d 889 (Fla. 1962); *Pingree v. Quaintance*, 394 So.2d 162 (Fla. 1st DCA 1981). In this instance, the Commission erred when it failed to provide CLECs with the option of choosing either a nonrecurring charge or a monthly recurring charge for infrastructure power plant costs. The Commission overlooked the fact that Covad requested that CLECs have the *option* of either type of charge, that the availability of two *options* eliminates any concern regarding a competitive entry barrier, and that a nonrecurring charge avoids overpayment of these power plant infrastructure costs. Thus, the standard for reconsideration has been met and this mistake should be corrected through reconsideration.

II.

The Commission Should Reconsider Its Decision Not to Provide CLECs the Option to Pay for Infrastructure Power Plant Costs through a Nonrecurring Charge

Incumbents recover infrastructure power plant costs, as well as electric usage, through a single MRC. Evidence at hearing established that this MRC could result in the ILECs being overcompensated for electrical power.[1] To remedy this situation, Covad proposed that CLECs have *two options* for paying for costs associated with power plant infrastructure. Covad suggested that such costs, at the *option* of the CLEC, be billed as *either* an NRC or an MRC.[2] Covad's position is that both *options* should be available. Each CLEC would then chose the option best suited to it, while the ILEC would recover the infrastructure power plant costs incurred to serve the CLEC.

[1] Tr. 186, 200-01, 374.
[2] Covad Post Hearing Brief at 8.

The Final Order states that the "appropriate remedy for this issue [regarding power charges] is one that provides a means for ILECs to recoup their investment while not overbilling CLECs for DC power."[3] Covad concurs. The Final Order goes on to find that an MRC for power plant infrastructure costs is appropriate. However, while the Final Order endorses a separate power infrastructure charge as "conceptually sound," it then inexplicably rejects such a mechanism on the erroneous basis that it "might" pose a barrier to entry:

> While the proposal to separate infrastructure from power consumption that was discussed at the hearing is conceptually sound, paying for power plant infrastructure costs up-front might pose a barrier to entry for most CLECs.[4]

The Commission then selected Sprint's modified proposal as the "most reasonable option" and as "a step in the right direction in mitigating this issue."[5]

However, the option of an NRC or MRC for power plant infrastructure that Covad proposed *and* the option of the Sprint proposal is the most appropriate choice based on the record in this proceeding. The NRC would be one of two *options;* thus, it could not possibly pose a barrier to entry, as any CLEC who so desired could select the MRC. In fact, the availability of options would provide CLECs with alternatives. For those CLECs who would prefer to pay for power plant infrastructure through an MRC, that option would be available. For those, such as Covad, who prefer an NRC, that option would also be available. Rather than creating a barrier to entry, the availability of either an NRC *or* an MRC would allow each CLEC to select the payment methodology most suited to it and its entry strategy and would not create an entry barrier. Based on the Commission's stated basis for rejecting the "conceptually sound" proposal

[3] Final Order at 38.
[4] Final Order at 39.
[5] Final Order at 40.

of an NRC for power infrastructure, the Commission apparently overlooked the fact that the NRC for power plant infrastructure would be an *option.*

In addition, the Federal Communications Commission's (FCC) pricing rules, which implement §§ 251 and 252 of the Telecommunications Act, state that commissions may permit ILECs to recover nonrecurring costs (which the costs of power plant infrastructure are) through recurring charges over a reasonable period of time, but may not permit an incumbent LEC to over recover for a particular element.[6] The evidence in this case established that ILECs are over recovering for power plant infrastructure costs, and will continue to do so, under the MRC approach. During cross-examination, BellSouth witness Milner admitted that over payment was occurring:

> MR. WATKINS: . . .If we were actually using 24.3 amps, ... that is fused, so we actually requested 40 amps. The difference between that 40 and 24 is not electricity that BellSouth -- apart from the infrastructure to cover the batteries and the rectifiers, it is not electricity that BellSouth is paying anybody for.
>
> MR. MILNER: That is correct. We are not paying Florida Power and Light for that difference, yes.
>
> . . .
>
> COMMISSIONER DAVIDSON: Is BellSouth incurring a cost for the 40 amps?
>
> MR. MILNER: For all of the infrastructure the answer is yes.
>
> COMMISSIONER DAVIDSON: For the power, though?
>
> MR. MILNER: For the amount of power that we would buy from Florida Power and Light at that moment, perhaps not.[7]

Every dollar of overpayment for the power portion of the total MRC results in a more rapid reimbursement to the ILEC for the infrastructure portion of the MRC, with the result that for CLECs who have been collocated for a number of years and have been paying this MRC, the

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[6] 47 CFR § 51.507(e).

[7] Tr. 186-187. *See also*, cross examination of Sprint witness, Davis. Tr. 373.

ILECs may already be overcompensated for their infrastructure costs:

> CHAIRMAN JABER: Here is what I'm getting at, I think I would like to hear some feedback from the ALECs with regard to whether that is a proposal that is acceptable. And I know Mr. King is testifying later, so if you all want him to address that, that's fine.
>
> MR. WATKINS: Q. Well, I can ask one question here that might clarify what my beliefs are about some of that stuff, and that is Covad did most of its collocations in about 1999, so to the degree that you are recovering some of the in-plant factors, or in-plant costs by charging us this $7.80 per fused amp, you have been recovering those costs for a long period of time, and to the degree that there is now a new charge that is higher than the incremental charge or a nonrecurring charge, you would almost double-recover from a company that has had a collocation space for a long period of time, isn't that right?
>
> MR. MILNER: A. Well, not necessarily. I mean, if we are going to go to a new method of doing this, there does not necessarily have to follow that there is going to be some double recovery. You know, we could account for what number of years Covad has been in business and had collocation, and not -- I don't mean in any way this would be, you know, a negative statement about Covad, but four years is not very long in the life of a power plant. I mean, those things are built for the long-term.[8]

There can be no doubt that at some point, the ILEC will be over compensated for its infrastructure costs if those costs are wrapped into an MRC with the power costs ***in perpetuity***. Such overcompensation violates 47 C.F.R. § 51.507(e). That FCC rule allows recovery of NRC costs via an MRC, but prohibits over recovery of costs through the MRC by limiting the period of time the MRC may be charged to a "reasonable time." However, this is exactly the situation which will continue to exist if the option of an NRC for power plant infrastructure costs is not made available to CLECs.

If Covad (and other CLECs) are forced to continue to pay an MRC for power plant infrastructure, they will continue to pay for the same power plant many times over. This will result in overcompensation to the ILECs for these costs in contravention of the FCC rule. Thus,

[8] Tr. 200-01.

not only should an NRC be made available as an option in this case, but the Commission should require BellSouth to credit CLECs for any overpayments they have made to date, if any, under the MRC element.

III.

Conclusion

The Commission made an error of fact and overlooked that the NRC for power plant infrastructure would be an *option* and thus would not create a barrier to entry. The continued combination of the infrastructure NRC, paid as an MRC, with the power MRC creates a mistake of law -- the violation of 47 C.F.R. §51.507(e). As a consequence, the Commission should reconsider this portion of the Final Order. In order to correct any past violations of 47 C.F.R. § 51.507(e), the Commission should require ILECs to credit CLECs with any overcharges made under the MRC for power infrastructure based on the cost evidence to be presented in Phase II.

WHEREFORE, Covad requests that the Commission reconsider that portion of its Final Order relating to the NRC for power plant infrastructure and:

1. Require the ILECs to offer an NRC for power plant infrastructure charges as an option for CLECs;

2. Require ILECs to credit CLECs with all amounts CLECs overpaid, or will overpay, through the MRC for power infrastructure based on the cost evidence to be presented in Phase II.

Charles Watkins
Covad Communications Co.
1230 Peachtree Street, N.E., 19th Floor
Atlanta, GA 30309
(404) 942-3494
(404) 942-3495 (fax)
gwatkins@covad.com

Vicki Gordon-Kaufman
McWhirter, Reeves, McGlothlin, Davidson,
Kaufman & Arnold, P.A.
117 South Gadsden Street
Tallahassee, FL 32301
(850) 222-2525
(850) 222-5606 (fax)
vkaufman@mac-law.com

Attorneys for DIECA Communications, Inc.
d/b/a Covad Communications Company

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Reconsideration has been furnished by (*) hand delivery, (**) electronic mail and U.S. Mail this 11th day of December 2003, to the following:

(*) (**) Adam Teitzman
Florida Public Service Commission
Division of Legal Services
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399-0850

(**) Jeff Wahlen
Ausley Law Firm
Post Office Box 391
Tallahassee, Florida 32302

(**) Nancy B. White
c/o Nancy H. Sims
BellSouth Telecommunications, Inc.
150 South Monroe Street, Suite 400
Tallahassee, Florida 32301-1556

(**) Michael A. Gross
Florida Cable Telecommunications
Association, Inc.
246 East 6th Avenue, Suite 100
Tallahassee, Florida 32303

(**) Laura L. Gallagher
MediaOne
101 E. College Avenue, Suite 302
Tallahassee, Florida 32301

(**) Don Sussman
Network Access Solutions Corporation
Three Dulles Tech Center
13650 Dulles Technology Drive
Herndon, VA 20171-4602

(**) Susan Masterton
Charles Rehwinkel
Sprint Communications Company
Post Office Box 2214
MC: FLTLHO0107
Tallahassee, Florida 32316-2214

(**) Ann Shelfer
Supra Telecommunications
1311 Executive Center Drive, Suite 200
Tallahassee, Florida 32301

(**) Matthew Feil
Florida Digital Network, Inc.
390 North Orange Avenue, Suite 2000
Orlando, Florida 32801

(**) Robert Waldschmidt
Howell & Fisher
Court Square Building
300 James Robertson Parkway
Nashville, TN 37201

(**) Richard Heatter
Mpower Communications Corp.
175 Sully's Trail, Suite 300
Pittsford, NY 14534

(**) Rodney Joyce
Shook, Hardy & Bacon LLP
600 14th Street, NW
Suite 800
Washington, DC 20005

(**) Richard A. Chapkis
Verizon Select Services, Inc.
Post Office Box 110
FLTC0007
Tampa, Florida 33601-0110

(**) C. Ronis/D. McCuaig/J. Frankel
Wilmer Law Firm
2445 M. Street, NW
Washington, DC 20037

(**) Tracy Hatch
AT&T Communications of the
Southern States, Inc.
101 North Monroe Street, Suite 700
Tallahassee, Florida 32301-1549

Vicki Gordon Kaufman