

Docket No. P-775, Sub 8

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of

Petition of DIECA Communications, Inc.,	)	
d/b/a Covad Communications Company for	)	
Arbitration of Interconnection Agreement	)	<b>PUBLIC STAFF</b>
Amendment with BellSouth	)	<b>COMMENTS ON</b>
Telecommunications, Inc., Pursuant to	)	<b>LINE SHARING</b>
Section 252(b) of the Telecommunications	)	
Act of 1996	)	

NOW COMES THE PUBLIC STAFF – North Carolina Utilities Commission, by and through its Executive Director, Robert P. Gruber, and submits these comments in response to the Commission’s Order of August 13, 2004, concerning the obligation of BellSouth Telecommunications, Inc. (BellSouth) to provide line sharing to DIECA Communications, Inc., d/b/a Covad Communications Company (Covad).

1. In an August 12, 2004, joint letter to the Commission, BellSouth and Covad informed the Commission that the parties were seeking a Commission ruling on BellSouth’s obligation to provide Covad access to line sharing after October 2004. The companies stated their intent to hold in abeyance all other issues and outstanding motions and to simultaneously file briefs supporting their respective positions on this limited matter.

2. The Commission’s Order of August 13, 2004 granted the request of BellSouth and Covad to file legal briefs no later than September 3, 2004, with all other proceedings in this docket to be held in abeyance pending further order. In addition, the Commission requested the Public Staff to file comments on the briefs no later than September 10, 2004.

3. The single issue the parties have put before the Commission is whether BellSouth is obligated to provide Covad access to line sharing after October 2004. Line sharing is the process through which a competing local provider (CLP) accesses the high frequency portion of the loop (HFPL) while the incumbent local exchange carrier (ILEC) provides voice service over the lower frequency portion of the loop.

4. Two provisions of federal law, Sections 251 and 271 of the 1996 Act<sup>1</sup> are potentially pertinent to this question. Section 251 requires all ILECs such as BellSouth to interconnect with CLPs such as Covad and provide unbundled access to network elements in accordance with rules established by the Federal Communications

<sup>1</sup> References to “the Act” or “the 1996 Act” are to the Communications Act of 1934, as amended by the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*

Commission (FCC) when the CLPs would be impaired without such access. Section 271 provides a list of the requirements (the competitive checklist) that the former Bell Operating Companies (BOCs) including BellSouth must meet in order to provide in-region, InterLATA service. Competitive checklist item 4 asks whether access or interconnection to the "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services" is generally offered and makes no reference to impairment.

5. In its *Line Sharing Order*,<sup>2</sup> the FCC found that CLPs were impaired without access to the high frequency spectrum of a local loop as a network element. As a result, the FCC required ILECs to provide CLPs with unbundled access to the HFPL.

6. In its August 21, 2003 *Triennial Review Order*<sup>3</sup>, the FCC concluded that CLPs were not impaired without access to the HFPL as a network element. Thus, the FCC found ILECs no longer had to provide line sharing to CLPs. Noting that line sharing was widespread, the FCC recognized the disruption to CLPs and end users alike that elimination of the line sharing requirement could create if the change were to take place on a flash-cut basis. Thus, the FCC's rules included provisions to gradually phase out line sharing as a Section 251 network element.

7. The FCC limited line sharing to mass market loops that are all copper or stand-alone copper. FCC Rule 51.319(a)(1)(i) includes both a grandfathering provision and a transition period. The grandfathering provision permits all line sharing arrangements existing as of the effective date of the *TRO* to remain available at the rates in effect prior to the effective date of the *TRO* so long as the CLP or its successor continues to provide xDSL service to the end user. The grandfathering provision remains in effect until the next biennial review.<sup>4</sup>

8. The transition period adopted by the FCC allows CLPs to continue to add new customers throughout the first year after the effective date of the *TRO*. The rate for accessing the HFPL during this first year will be 25% of the rate for stand-alone copper loops. The rate for the second year increases to 50% of the stand-alone copper loop while the third year rate increases to 75% of the stand-alone copper loop. After the third year, the ILEC is no longer required to provide line sharing to the CLP for end users initiating service on or after the effective date of the *TRO*.<sup>5</sup>

---

<sup>2</sup> *Deployment of Wireline Services Officering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket Nos. 98-147 and 96-98, Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, FCC 99-355 (released December 9, 1999).

<sup>3</sup> *Review of the Section 251 Unbundling Obligation 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), *vacated in part and remanded, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir 2004). (*TRO*).

<sup>4</sup> *Id.*, Paragraph 264.

<sup>5</sup> *Id.*, Paragraph 265.

9. The continuing Section 251 obligation and the related requirements for ILECs to provide unbundled access to the HFPL through line sharing have been clearly spelled out by the FCC. There appears to be no disagreement between BellSouth and Covad with respect to the line sharing requirements of Section 251. The FCC, through its *TRO*, set out the rules and obligations for grandfathered line sharing customers as well as those line sharing customers in the transition phase. While *USTA II*<sup>6</sup> has vacated certain rules in the *TRO*, the changes to line sharing were unaffected.

10. The dispute between the parties concerns Covad's contention that BellSouth is obligated to make line sharing available to new customers of Covad on or after October 2, 2004, the first anniversary of the effective date of the *TRO*. This disagreement centers on whether line sharing is included in the unbundling and access to local loops requirement set forth in Section 271(c)(2)(B)(iv) of the Act. As noted by Covad, under the requirements BellSouth agreed to when it was granted in-region interLATA long distance authority under Section 271, BellSouth is required to provide access to unbundled local loops. This obligation is in addition to and independent of any obligations or requirements BellSouth might have under Section 251.

11. BellSouth argues that the local loop unbundling requirement addressed in Checklist Item 4 requires the provision of the whole loop, nothing more or nothing less. BellSouth argues that it is only required to provide line sharing under Section 251. And since the FCC has provided for a transition period to eliminate line sharing as a UNE, then the only obligation BellSouth has to provide line sharing arises from the requirements of the FCC's transition plan. Once the transition period ends, BellSouth maintains that it will no longer be required to provide line sharing to CLPs.

12. In the Kansas/Oklahoma Order<sup>7</sup> granting interLATA in-region authority for SBC Communications, Inc. (SBC) in Kansas and Oklahoma, the FCC concluded in Paragraph 178 that:

In order to establish that it is "providing" unbundled local loops in compliance with checklist item 4, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors demand and at an acceptable level of quality. A BOC must also demonstrate that it provides nondiscriminatory access to unbundled loops. **Specifically, the BOC must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested.** In order to provide the requested loop functionality, such as the ability to deliver xDSL services, the BOC may be required to take affirmative steps to

<sup>6</sup> *U.S. Telecomm. Ass'n v. FCC*, 359 F. 3d 554 (D.C. Cir. 2004) (*USTA II*)

<sup>7</sup> *Joint Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-217, Memorandum Opinion and Order, FCC 01-29 (released January 22, 2001).

condition existing loop facilities to enable competing carriers to provide services not currently provided over the facilities. The BOC must provide competitors with access to unbundled loops regardless of whether the BOC uses digital loop carrier (DLC) technology or similar remote concentration devices for the particular loops sought by the competitor. (Footnotes deleted, Emphasis added)

13. The Kansas/Oklahoma Order clearly indicates that compliance with Checklist Item 4 requires BellSouth to do more than simply provide a whole loop to a CLP. This Order goes so far as to require the BOC to perform line conditioning if necessary. Indeed, this Commission noted the FCC's requirements as spelled out in the Kansas/Oklahoma Order in its Advisory Opinion with regard to BellSouth's request for 271 authority in North Carolina.<sup>8</sup>

14. BellSouth's contention that line sharing is not part of the Checklist Item 4 is inconsistent with its filings before this Commission and the FCC. Even though BellSouth now claims line sharing is not a requirement of Checklist Item 4, its brief and proposed order filed in Docket No. P-55, Sub 1022 addressed line sharing in connection with its compliance obligations of Checklist Item 4. In addition, BellSouth also addressed line sharing in its brief filed with the FCC in support of its Five-State Application for 271 authority.<sup>9</sup>

15. If providing line sharing was not required for ascertaining compliance with Checklist Item 4, BellSouth presumably would not have included an analysis of its line sharing capability. Further, the Public Staff submits the FCC would not have included sections dealing with line sharing when discussing Checklist Item 4 compliance in its numerous 271 Orders, including the Order that authorized BellSouth to provide in-region, InterLATA long distance service in North Carolina.<sup>10</sup>

16. The Public Staff urges the Commission to find that line sharing is a part of the Checklist Item 4 obligations of BellSouth. The Commission's determination of this issue should reflect that BellSouth has a Section 251 obligation to provide line sharing to existing customers on a grandfathered and transitional basis as well as an on-going Section 271 obligation to make line sharing available to new customers of CLPs on and after October 2, 2004.

---

<sup>8</sup> Application of BellSouth Telecommunications, Inc., to Provide In-Region, InterLATA Service Pursuant to Section 271 of the Telecommunications Act of 1996, Docket No. P-55, Sub 1022, Order and Advisory Opinion Regarding Section 271 Requirements, Page 168 (Issued July 9, 2002).

<sup>9</sup> Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina, WC Docket No. 02-150, Brief in Support of Application by BellSouth for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina, and South Carolina (filed June 20, 2002).

<sup>10</sup> Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina, WC Docket No. 02-150, Memorandum Opinion and Order, FCC 02-260, Paragraphs 249-50 (Released September 18, 2002).

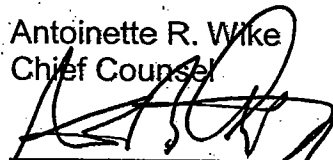
17. The issue put forth by BellSouth and Covad does not require a Commission determination of the appropriate rates for line sharing. The Public Staff notes that the FCC has set forth specific rates for line sharing provided under the provisions of Section 251. With respect to the appropriate rates for line sharing provided under the auspices of Section 271, the Public Staff believes the FCC's Section 201 and 202 standards for just and reasonable rates would apply.

18. The Public Staff notes that several proceedings are ongoing at the federal level concerning line sharing which may ultimately have an impact on this matter.

Respectfully submitted this the 10th day of September 2004.

PUBLIC STAFF  
Robert P. Gruber  
Executive Director

Antoinette R. Wike  
Chief Counsel



---

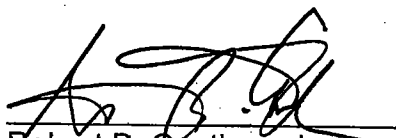
Robert B. Cauthen, Jr.  
Lucy E. Edmondson  
Staff Attorneys

4326 Mail Service Center  
Raleigh, North Carolina 27699-4326  
Telephone: (919) 733-6110

**CERTIFICATE OF SERVICE**

I certify that a copy of these Comments has been served on all parties of record or their attorneys, or both, by depositing a copy in the United States Mail, first class postage prepaid, properly addressed.

This the 10th day of September 2004.

  
\_\_\_\_\_  
Robert B. Cauthen, Jr.