ORIGINAL

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From: Vicki Gordon Kaufman
Sent: Monday, September 27, 2004 4:31 PM
To: Filings@psc.state.fl.us
Cc: Gene Watkins; Adam Teitzman; Meredith Mays
Subject: Docket No. 040601

Pursuant to the Commission's procedures for e-filing, DIECA Communications, Inc. d/b/a Covad Communications Company provides the following information:

a. The attorney responsible for the filing is:
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b. The document is to be filed in Docket No. 040601-TP, In re: Petition of DIECA Communications, Inc., d/b/a Covad Communications Company for Arbitration of Interconnection Agreement with BellSouth Telecommunications, Inc. pursuant to Section 252(b) of the Telecommunications Act of 1996.

c. The document is filed on behalf of Covad

d. The document is a Notice of Supplemental Authority which is 2 pages long and the Final Recommendation of the La Administrative Law Judge which is 25 pages long for a total of 27 pages.

e. The document is a Notice of Supplemental Authority.

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9/28/2004

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition of DIECA Communications, Inc., d/b/a Covad Communications Company, for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc. pursuant to Section 252(b) of the Telecommunications Act of 1996.

Docket No.: 040601-TP

Filed: September 27, 2004

/

DIECA Communications, Inc. d/b/a Covad Communications Company's Notice of Supplemental Authority

DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) files this Notice of Supplemental Authority. On September 3, 2004, pursuant to Order No. PSC-04-0833-PCO-TP, Covad and BellSouth Telecommunications, Inc. (BellSouth) filed Legal Briefs.

Attached hereto is the following supplemental authority, filed after the filing of Covad's Legal Brief:

- Louisiana Public Service Commission, Administrative Hearings Division, Final Recommendation of The Administrative Law Judge (Corrected), *In re: Petition for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Docket No. U-28027, filed September 27, 2004.

S/ Vicki Gordon Kaufman
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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 Notice of Supplemental Authority has been furnished by (*) electronic mail and U.S. Mail this 27th day of September 2004 to the following:

(*) Adam Teitzman
Florida Public Service Commission
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(*)Nancy White
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c/o Nancy Sims
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S/Vicki Gordon Kaufman
Vicki Gordon Kaufman

LOUISIANA PUBLIC SERVICE COMMISSION
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DATE: September 27, 2004

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NUMBER OF PAGES INCLUDING COVER SHEET 25

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COMMENTS: U-28027 - CORRECTED Final Recommendation

LOUISIANA PUBLIC SERVICE COMMISSION
ADMINISTRATIVE HEARINGS DIVISION

DOCKET NO. U-28027

DIECA COMMUNICATIONS, INC. D/B/A COVAD COMMUNICATIONS COMPANY, EX PARTE.

In re: Petition for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996.

FINAL RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE (CORRECTED)

The findings and conclusions recommended by the administrative law judge in this proceeding are contained within the Draft Order following this cover page.

This *final* recommendation is being issued and forwarded to the Commissioners pursuant to Rule 56 of the Rules of Practice and Procedure of the Louisiana Public Service Commission. The recommendation will be considered and voted on by the Commissioners at an upcoming monthly Commission meeting.

All parties are advised to familiarize themselves with the Commission's Rules of Practice and Procedure, including provisions within Rule 56 which permit parties to request (within five working days of issuance of the *final* recommendation) the opportunity to present oral argument at the Commission meeting at which this recommendation will be considered. Copies of the Rules of Practice and Procedure of the Louisiana Public Service Commission are available from the Records and Recording Division which can be reached at (225) 342-3157.

All parties are further advised that they may ascertain whether this recommendation will be considered at the Commission's next monthly meeting by accessing the Commission's web page at **http://www.lpsc.org** and "clicking" on **Official Business** to view the Agenda for the Commission's upcoming monthly meeting. Alternatively, parties may obtain this information by calling the Commission's Administrative Hearings Division at either of the following telephone numbers:

(225) 219-9417 or **(800) 256-2397.**

Baton Rouge, Louisiana, this 27th day of September, 2004.

Carolyn L. DeVitis
Administrative Law Judge

cc: Official Service List
via: US Mail and Fax

LOUISIANA PUBLIC SERVICE COMMISSION
ADMINISTRATIVE HEARINGS DIVISION

DOCKET NO. U-28027

DIECA COMMUNICATIONS, INC. D/B/A COVAD COMMUNICATIONS COMPANY, EX PARTE.

In re: Petition for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996.

FINAL RECOMMENDATION OF THE ADMINISTRATIVE LAW JUDGE (CORRECTED)

DRAFT ORDER NO. U-28027

Nature of the Case

BellSouth and Covad are parties to a regionwide interconnection agreement. This phase of the proceeding is limited to resolving the issue of whether BellSouth Telecommunications, Inc. ("Bellsouth") is obligated to provide DIECA Communication, Inc. d/b/a Covad Communications Company ("Covad") access to line sharing after October 1, 2004. Line sharing is defined as the sharing of the High Frequency Portion of the Local Loop ("HFPL") to provide xDSL-based service by a competitive LEC and voiceband service by an incumbent LEC on the same loop.

In its *Triennial Review Order*[1], the Federal Communications Commission ("FCC") promulgated new unbundling rules. The D.C. Circuit Court reviewed the new rules and in USTA II[2] vacated a number, but not all, of the FCC pronouncements. The FCC's determination

[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978(2003) ("Triennial Review Order") vacated in part and remanded.
[2] *United States Telecommunication Ass'n v. FCC*, 359 F.3rd 554 (D.C. Cir. 2004) ("USTA, II")

that Regional Bell Operating Companies ("RBOCs") are not required to make available as an Unbundled Network Element ("UNE") the High Frequency Portion of the Loop for line sharing arrangements pursuant to Section 251 was not overturned. At the same time, the FCC stated in its *Triennial Review Order* that RBOCs have an "independent obligation, under Section 271(c)(2)(b) which sets forth the requirements the RBOCs must meet in order to obtain long distance (interLATA) authority, to provide access to certain network elements that are no longer subject to unbundling under Section 251"

Covad asserts that line sharing is a checklist item 4 loop transmission facility, which BellSouth is obligated to provide pursuant to 47 U.S.C. sec. 271(c)(2)(b)(iv) unless the FCC grants a forbearance petition under 47 U.S.C. sec. 160 *et seq*. BellSouth argues that Bellsouth does not have a continuing obligation under Section 271 to provide line sharing and that Covad is only entitled to line sharing on a limited grandfathered basis pursuant to a transitional mechanism. Pending a resolution of the line sharing issues, the Parties agree to hold in abeyance all other issues. BellSouth and Covad state in their Joint Proposal filed August 16, 2004 that the Parties do not intend to raise jurisdictional arguments in this phase of the docket.

Statement of Jurisdiction

The source of the Louisiana Public Service Commission's jurisdiction over public utilities in Louisiana is found in Article IV, Section 21(B) of the Louisiana Constitution, which provides that "The commission shall regulate all common carriers and public utilities and have such other regulatory authority as provided by law. It shall adopt and enforce reasonable rules, regulations, and procedures necessary for the discharge of its duties, and shall have other powers and perform other duties as provided by law." Pursuant to constitutional and statutory provisions, the

Commission is given broad power to regulate the service of telephone utilities and may adopt all reasonable and just rules, regulations and orders affecting or connected with the service or operation of such business. *South Central Bell Tel. Co. v. Louisiana Public Service Commission*, 352 So.2d 999 (La. 1997). 47 U.S.C. § 252(B) grants specific authority to State Commissions, including the Louisiana Public Service Commission, to resolve certain interconnection disputes arising under the Telecommunications Act of 1996. Further, this Commission has jurisdiction over Covad's Petition pursuant to sections 12 and 16 of the Parties' Agreement.

Procedural History

DIECA Communications, Inc. d/b/a Covad Communications Company, filed a Petition for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc., pursuant to Section 252(b) of the Telecommunications Act of 1996 on June 23, 2004. Notice of the filing of the Petition was published in the Commission's Official Bulletin on July 2, 2004. Notices of Intervention were received on behalf of BellSouth Telecommunications, Inc. and Advanced Tel, Inc ("EATEL") on July 16, 2004 and July 19, 2004 respectively. A Notice of Assignment to an Administrative Law Judge was issued on July 20, 2004, and a Status Conference was set for July 29, 2004. The Status Conference was rescheduled to August 11, 2004 at the request of Covad. On August 3, 2004, BellSouth filed a Motion for Summary Disposition and Expedited Relief. On the same day, Covad filed a Response to Bellsouth's Motion for Summary Disposition and Expedited Relief, Response to Motion to Convert and Response to Petition to Arbitrate. On August 10, 2004 BellSouth filed a Reply to Covad's Response to BellSouth's Motion for Summary Disposition. The Status Conference held August 11, 2004 resulted in a procedural schedule that, at the request of the Parties, bifurcated the

proceeding to allow for a decision on the line sharing issue prior to consideration of any other issues raised. The Parties requested a paper proceeding as, in their view, the line sharing question is exclusively a legal issue. Stipulated facts were to be submitted on or before the briefing date. On August 16, 2004 a letter was received from Covad and BellSouth regarding their joint proposal. Staff requested an Extension of Time to Submit its Brief on September 2, 2004 which was granted the same day. Simultaneous Briefs were filed by Covad and BellSouth on September 3, 2004. LPSC Staff filed its Brief on September 10, 2004.

Summary of the Parties' Positions

Covad's Position

Covad argues that BellSouth's obligation to provide line sharing is derived from the fact that line sharing is a Checklist Item 4 loop transmission facility and, Bell Operating Companies, of which BellSouth is one, offering long distance services pursuant to section 271 have a corresponding obligation to provide Checklist Item 4 loop transmission facilities, irrespective of any unbundling determinations under Section 251. Covad acknowledges that the determination *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, it al.*, CC Docket No. 01-338, et al., Federal Communications Commission ("FCC") 03-36 (rel. August 21, 2003) 654 (" Triennial Review Order") resulted in the removal of line sharing as a Checklist Item 2, section 251(c)(3) UNE. But, Covad asserts, it did not remove line sharing from Checklist Item 4. In its *Triennial Review Order* at 652, for example, the FCC stated ""[W]e reaffirm that BOCs have an independent obligation, under section 271(c)(2)(B), to provide access to certain[checklist 4,5,6 and 10]network elements that are no longer subject to unbundling under section 251…"

Covad points out that in every Regional Bell Operating Company's ("RBOC") application for Section 271 authority and every FCC Section 271 Order granting any RBOC, including BellSouth such authority, the FCC placed line sharing in Checklist Item 4. So long, Covad asserts, that BellSouth continues to sell long distance service under Section 271 authority, it must continue to provide non-discriminatory access to all network elements under checklist items 4, 5, 6 and 10, including line sharing, irrespective, of whether they are "delisted" under 252.

In reply to arguments raised by BellSouth in other jurisdictions, Covad anticipates the following arguments being raised by BellSouth: 1) Because of section 251 unbundling determinations, line sharing is no longer a Checklist Item 4 element. 2) The HFPL used to provide line sharing is not a loop transmission facility under the definition of Checklist Item 4, and thus, line sharing was never a Checklist Item 4 element. 3) In the Triennial Review, or in prior orders granting Section 271 authority, the FCC somehow indicated that line sharing is not really a Checklist Item 4 facility. Covad assures that all of these arguments that may be put forth by BellSouth are baseless. Contrary to BellSouth's assertion, Covad argues, the FCC's Section 251 unbundling determination in the Triennial Review did not remove line sharing from Checklist Item 4. In fact, the FCC made it clear in the Triennial Review at 654 that:

> Checklist items 4,5,6 and 10 separately impose access requirements regarding loop, transport, switching, and signaling without mentioning section 251. Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so as it did in checklist item 2. Moreover, were we to conclude otherwise, we would necessarily render checklist items 4,5, 6, and 10 entirely redundant and duplicative of checklist item 2 and thus violate one of the enduring tenets of statutory construction: to give effect, if possible, to every clause and word of a statute.

Covad provides a comparison of what it states are some of the differences of BellSouth's obligation under Section 251 and its Section 271 obligations, concluding for example, that the

TELRIC price under Section 251 is not retained, but the Section 271 obligation to provided nondiscriminatory access remains. Covad also suggests that the commingling and combination rules applicable to Section 251 UNEs may not apply to Section 271 UNEs, and that the FCC may forebear enforcing 271 obligations pursuant to 47 U.S.C. section 160. Covad makes short shrift of a possible assertion by BellSouth that a comment at paragraph 665 of the Triennial Review that, "we do not believe that Congress intended that the conditions required for approval would not change over time" is sufficient to conclude that section 251 unbundling determinations can remove line sharing from Checklist Item 4, particularly in view of the FCC other more definite statements that RBOCs have continuing distinct obligations under Section 271.

Further, Covad points out that Congress has provided a procedure for RBOCs to seek removal of their Section 271 obligations by filing a Petition for Forbearance pursuant to 47 U.S.C. § 160 and, in fact BellSouth has availed itself of this opportunity by filing a forbearance petition with the FCC.[3] There would be no need for such a filing, or the opportunity for such a filing, if Section 271 Checklist Item 4 obligations extended no further than certain Checklist Item 2 Section 251 obligations that have been terminated.

In sum, two irrefutable legal facts, according to Covad, should govern the decision in this matter: 1) Line sharing is a Checklist Item 4 loop transmission facility and 2) RBOCs, including BellSouth, offering long distance services pursuant to Section 271 authority have an obligation to provide Checklist Item 4 elements irrespective of any unbundling determinations under section 251.

[3] Petition for Forbearance, *In the Matter of BellSouth Telecommunications, Inc.'s Petition for Forbearance* Under 47 U.S.C. sec 160(c),WC Docket No. 04-48, filed March 1, 2004

BellSouth's Position

BellSouth proposes to amend its Interconnection Agreement with Covad which, BellSouth states, would then incorporate recent changes of law with respect to Covad's access to the unbundled high frequency portion of the loop ("HFPL"). BellSouth maintains that rules recently issued by the FCC, and upheld by the United States Court of Appeals for the D.C. Circuit, have already answered the question at issue in the present docket. In BellSouth's view, since issuance of the Triennial Review Order, Covad is only entitled to line sharing on a grandfathered basis pursuant to a transitional mechanism. BellSouth asserts that after October 1, 2004, Covad cannot request new line sharing arrangements, and even if it could, such requests would not be at TLERIC prices. BellSouth suggests that Covad's assertion that line sharing continues to be available is based upon an argument that would have the Louisiana Public Service Commission ("LPSC") interpret Section 271 of the Telecommunications Act of 1996[4] in a manner that would effectively destroy the carefully balanced transitional plan established by the FCC under Section 251.

BellSouth states that in the *Triennial Review Order*[5], the FCC decided that the HFPL is no longer a UNE. The FCC explained that, "rules requiring line sharing may skew competitive CLECs' incentives toward providing a broadband-only service to mass market consumers, rather than a voice-only service or, perhaps more importantly, a bundled voice and xDSL service

[4] References to "the Act" or "the 1996 Act" mean the Communications Act of 1934, as amended by the Telecommunications Act of 1996, which can be found at 47 U.S.C. § 151 et seq.

[5] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 FCC Rcd 16978 (2003) ("Triennial Review Order"), vacated in part and remanded, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II").

offering."[6] Covad contends that the HFPL is an element identified in Section 271 as one that must be unbundled, even if it is not required to be unbundled under the FCC's Section 251 rules. BellSouth argues that Covad's reliance upon Checklist Item 4 in Section 271 is without reasonable basis, and that Covad's reasoning is contradicted by the plain language of Checklist Item 4, which requires only access to the loop unbundled from switching. BellSouth argues that the key point is that Checklist Item 4 explicitly requires the provision of the whole loop unbundled from the local switching, not pieces or parts of the loop.

Additionally, BellSouth argues that Covad's claims are also inconsistent with the FCC's analytical framework in its *Line Sharing Order*[7], *Triennial Review Order* and FCC adjudications. The FCC decided in the *Line Sharing Order*, and continued in the *Triennial Review Order*, BellSouth asserts, to designate the high frequency portion of the loop an unbundled network element, separate and apart from the loop itself. BellSouth states that Covad's argument ignores two FCC decisions, *Bell Atlantic New York Order*[8] and *SWBT Texas Order*[9], granting long distance authority to a BOC, in which the FCC explained that the BOC was not required to comply with the FCC's unbundling rules established in the UNE Remand proceedings and was not required to demonstrate that it complied with line sharing. BellSouth contends that the *SBC*

[6] Triennial Review Order ¶ 261.
[7] Third Report and Order in CC Docket No. 98-147 and Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 14 FCC 20912 ("Line Sharing Order"), vacated and remanded, USTA v. FCC, 290 F.3d 415 (D.C. Cir. 2002) ("USTA I"), cert. Denied, 538 U.S. 940 (2003).
[8] *In the Matter of Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act To Provide In-Region InterLATA Service in the State of New York*, CC Docket No., 99-295, 15 FCC Rcd 3953 (Dec. 22, 1999).
[9] *In the Matter of Application by SBC Communications, Inc., et al.; Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, 15 FCC Rcd 18354 (June 30, 2000).

Illinois/Indiana/Ohio Order[10] and the *Qwest Arizona Order*[11] demonstrate that, even under the FCC's old unbundling rules, the loop and the HFPL were treated as separate elements. BellSouth asserts that the FCC's orders make two points clear. First, the FCC distinguished the loop UNE from the HFPL UNE in its *SBC Illinois/Indiana/Ohio Order*[12] in discussing unbundling required under Checklist Item 2. Second, by referring to its rules in its Checklist Item 4 discussions, BellSouth argues, the FCC has demonstrated it would analyze both the actual checklist item 4 loop provisioning requirement and related requirements (such as line sharing) that arise from the unbundling rules. While Checklist Item 4 of Section 271 may obligate BellSouth to provide access to loops, BellSouth argues that this obligation does not extend to an obligation to further unbundle the HFPL from the loop. BellSouth claims that consequently Covad cannot reasonably rely on the FCC's Section 271 decisions to demonstrate that line sharing is a Checklist Item 4 requirement.

BellSouth points out that in the *Triennial Review Order*, the FCC observed that Section 251 and Section 271 operate independently. BellSouth contends that in relevant part, at paragraph 654 of the *Triennial Review Order*, the FCC made clear that checklist items 4, 5, 6, and 10 only "impose access requirements regarding loop, transport, switching, and signaling"; line sharing, BellSouth interjects, is never mentioned by the FCC as a requirement of any checklist item. Additionally BellSouth points out that there is not any mention of a continuing Section 271 obligation in the lengthy analysis of the elimination of the HFPL under Section 251

[10] *Joint Application by SBC Communications, Inc. et al., for Authorization to provide In-Region InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, WC Docket No. 03-167, *Memorandum Opinion and Order*, FCC 03-243 (Oct. 15, 2003).
[11] *Application by Qwest Comm. International, Inc., for Authorization to Provide In-Region, InterLATA Services in Arizona*, WC Docket No. 03-194, *Memorandum Opinion and Order* (Dec. 3, 2003).
[12] *Joint Application by SBC Communications, Inc. et al., for Authorization to provide In-Region InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, WC Docket No. 03-167, *Memorandum Opinion and Order*, FCC 03-243 (Oct. 15, 2003).

and the transitional plan to end access to that UNE.[13] BellSouth contends that because none of the state commissions in BellSouth's region, including the Georgia and North Carolina Commissions, recognized any Section 271 obligation to provide access to the HFPL after October 1, 2004, Covad cannot justifiably cite to these decisions as support for its position.

BellSouth states that the FCC created a grandfathering and transitional mechanism and declined to require access to line sharing for new customers under Section 251 after October 1, 2004. BellSouth contends that rather than accepting the FCC's decision and incorporating the terms of the federal rules into the parties' agreement, Covad seeks to wish it away through a Section 271 Checklist Item 4 argument that is contradicted by what BellSouth sees as the plain language of that item, the FCC's initial and subsequent orders granting ILEC's long distance authority, the analysis in the *Line Sharing Order*, and the analysis and conclusions reached in the *Triennial Review Order*.

Staff's Position

Staff begins its discussion with two statements; 1) It is unmistakable that the FCC has determined that Incumbent Local Exchange Carriers ("ILECS") no longer have a Section 251 requirement to provide line sharing, and 2) It is also unmistakable that the FCC recognized Regional Bell Operating Companies ("RBOCs") as having a continuing obligation to provide nondiscriminatory access to network elements pursuant to Section 271. In support of the second assertion, Staff quotes the *Triennial Review* at 650, "BOCs have an independent obligation, under Section 271(c)(2)(b) to provide access to certain network elements that are no longer subject to unbundling under Section 251, and to do so at just and reasonable rates."

[13] Triennial Review Order, ¶¶ 255-265.

Section 271 states that access provided by a RBOC meets the requirements if such access includes "Local loop transmission from the central office to the customer's premises unbundled from local switching or other services." Therefore, Staff concludes, the determination as to whether an obligation to provide line sharing under 271 exists rests on whether the definition of "Local loop transmission" includes line sharing.

Staff states that Section 271 provides conditions that must be met in order to be eligible to for Section 271 authority, among which in Checklist Item 4, is the requirement that BellSouth provide nondiscriminatory access to line sharing. Staff points out that BellSouth submitted, and Staff considered for its Recommendation that was adopted by the Commission in LPSC Order No. U-22252-E, data relative to BellSouth's provision of line sharing in Louisiana as part of its Louisiana Section 271 application. The FCC's decision on BellSouth's Section 271 application includes the statement that "Our conclusion is based on our review of BellSouth's performance for all loop types, which include...voice grade loops, hot cut provisioning, xDSL capable loops, high capacity loop and digital loops, and our review of BellSouth's process for line sharing and line splitting." (*Joint application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Georgia and Louisiana*, CC Docket No. 02-35, Released May 15, 2002, FCC 02-147). Staff asserts that it is clear that the FCC found that BellSouth had an obligation to provide line sharing in Checklist item 4, and that the FCC has made no pronouncement since absolving BellSouth of this obligation.[14] Staff concludes that, "absent a definitive pronouncement from the FCC, BellSouth

[14] Staff informs that BellSouth has filed an application for forbearance from its Section 271 obligations with the FCC pursuant to 47 U.S.C. 160(c). However, in view of the impending change in the Section 251 line sharing, Staff states that the LPSC cannot wait for an FCC determination.

has a continuing obligation to provide line sharing, in accordance with its grant of Section 271 authority."

Background

In its Third Report and Order issued December 9, 1999 the FCC found that the high frequency portion of the loop meets the statutory definition of a network element and must be unbundled pursuant to sections 251 (d)(2) and (c)(3), thereby instituting line sharing obligations for incumbent LECs. In May of 2002 the D.C. Circuit Court in USTA I vacated and remanded the FCC's *Line Sharing Order*. The FCC considered the matter in its August 21, 2003 *Triennial Review Order*, finding that, "Subject to a grandfather provision and a transition period, incumbent LECs do not have to provide unbundled access to the high frequency portion of their loops under a sec. 251 impairment analysis." In the same *Triennial Review Order*, the FCC determined that "The requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling, under checklist items 4-6 and 10, regardless of any unbundling analysis under section 251. Where a checklist item is no longer subject to 251 unbundling, section 252(d)(1) does not operate as the pricing standard. Rather, the pricing of such items is governed by the 'just and reasonable' standard established under sections 201 and 202."

Analysis

BellSouth Telecommunications, Inc and DIECA Communications, Inc. d/b/a Covad Communications Company, waiving any jurisdictional challenges, have approached the Louisiana Public Service Commission, asking for a decision as to whether under its existing

interconnection agreement, or as the agreement may be amended, BellSouth has any continuing obligation to provide line sharing of the High Frequency Portion of the Line ("HFPL") to Covad after October 1, 2004. All Parties are fully aware of, and do not dispute, that subsequent to the issuance of the *Triennial Review Order* and the failure of the D.C. Circuit Court to overturn certain relevant portions of that Order, the Regional Bell Operating Companies are not required to make available as a Unbundled Network Element, the High Frequency Portion of the Loop for line sharing arrangements pursuant to Section 251. That is not to say that the Parties, at least in BellSouth's view, are prohibited from entering commercial arms length negotiations for the provision of HFPL.

At issue then is the question of whether BellSouth is obligated under any other provision, to provided line sharing, and if so, at what price. As seen in the summary of the Parties' Positions, BellSouth argues that any provision that would serve to require a BOC to offer anything that is no longer required under Section 251, must be in error. Staff and Covad assert that Section 271 Checklist Item 4 obligations are separate and apart from Section 251 obligations and remain in force. In this rare instance, the FCC has considered the matter and provided an analysis of the relationship of the two sections. In the *Triennial Review Order*, the FCC plainly states,

> The requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling, under checklist items 4-6 and 10, regardless of any unbundling analysis under section 251. Where a checklist item is no longer subject to 251 unbundling, section 252(d)(1) does not operate as the pricing standard. Rather, the pricing of such items is governed by the 'just and reasonable' standard established under sections 201 and 202. ."

The FCC then engages in a lengthy analysis of its basic position that Section 271 establishes an independent obligation for BOCs to provide access to loops, switching, transport, and signaling

under Checklist Items 4-6 and 10, regardless any unbundling analysis under Section 251 as follows:

> For the reasons outlined below, we reaffirm that BOCs have an independent obligation, under section 271 (c)(2)(B), to provide access to certain network elements that are no longer subject to unbundling under section 251, and to do so at just and reasonable rates." *Triennial Review Order*, ¶652
>
> - First, the plain language and the structure of section 271 (c)(2)(B) establish that BOCs have an independent and ongoing access obligation under section 271. Checklist item 2 requires compliance with the general unbundling obligations of section 251(c)(3) and of section 251(d)(2) which cross-references section 251(c)(3).[15] Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling,[16] without mentioning section 251. Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so as it did in checklist item 2. *Triennial Review Order*, ¶ 654
>
> - ...while checklist item 2 provides that a BOC must provide access to UNEs in accordance with the requirements of sections 251(c)(3) and 252(d)(1), the checklist items establishing the specific, separate network element obligations do not contain this language. ... we find Congress' decision to omit cross-references particularly meaningful in this instance: half of the checklist items contain explicit cross-references to other statutory provisions, and it is reasonable to conclude that Congress would have inserted a cross-reference into items 4-6 and 10 had that been its intention. *Triennial Review Order*, ¶ 657

Numerous cases on statutory interpretation have held that, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." Gozlon-Peretz v. United States, 498 U.S. 395 (1991) citing Russello v. United States, 464 U.S. 16 (1983) and General Motors Corp. v. United States, 496 U.S. 530 (1990). ." United States v. Wong Kim Bo, 472 F.2d 720, 722 (CA5 1972). See United States v. Wooten, 688 F.2d 941, 950 (CA4 1982), See North Haven Board of Education v. Bell, 456 U.S. 512, 521, 102 S.Ct. 1912,

15 *See* 47 U.S.C. § 271(c)(2)(B)(ii).
16 *See* 47 U.S.C. § 271(c)(2)(B)(iv), (v), (vi), (x).

1917, 72 L.Ed.2d 299 (1982); United States v. Naftalin, 441 U.S. 768, 773-774, 99 S.Ct. 2077, 2081-2082, 60 L.Ed.2d 624 (1979).

Because of the BOC's unique market position, in order to encourage competition in the marketplace, conditions were imposed that BOC's were required to meet prior to and during their entry into the long distance market. Section 251 obligations are shared by all LECs, Section 271 obligations are distinct from 251 obligations.

- Second, it is reasonable to interpret section 251 and 271 as operating independently. Section 251, by its own terms, applies to *all* incumbent LECs, and section 271 applies only to BOCs, a subset of incumbent LECs.[17] In fact, section 271 places specific requirements on BOCs that were not listed in section 251. These additional requirements reflect Congress' concern, repeatedly recognized by the Commission and courts, with balancing the BOCs' entry into the long distance market with increased presence of competitors in the local market. ... recognizing an independent obligation on BOCs under section 271 would by no means be inconsistent with the structure of the statute. Section 271 was written for the very purpose of establishing specific conditions of entry into the long distance that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251unbundling analysis. *Triennial Review Order*, ¶ 655.

- In interpreting section 271(c)(2)(B), we are guided by the familiar rule of statutory construction that, where possible, provisions of a statute should be read so as not to create a conflict. ... In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TELRIC pricing. This interpretation allows us to reconcile the interrelated terms of the Act so that one provision (section 271) does not gratuitously reimpose the very same requirements that another provision (section 251) has eliminated. *Triennial Review Order*, ¶ 659.

The courts have not ignored FCC pronouncements on line sharing among other issues. While choosing to over turn a number of FCC pronouncements, the D.C. Circuit court in its

[17] This fact alone demonstrates that section 271 is not dependent on section 251 because a more limited set of carriers was made subject to the demands of section 271. It is consistent with norms of statutory construction that section 251 as a general statutory provision does not control the more specific section 271. *See Gozlon-Peretz v. United States*, 498 U.S. 395 (1991) (a specific provision controls over one of a more general application).

March 2, 2004, *USTA II* (United States Telecom Association v. FCC, 359 F.3d 554 (D.C. Cir. 2004)) stated at page 52 that "The FCC reasonably concluded that checklist items four, six and ten imposed unbundling requirements for those elements independent of the unbundling requirements imposed by §§251-52. In other words, even in the absence of impairment, BOCs must unbundled local loops, local transport, local switching, and call-related databases in order to enter the interLATA market. Order ¶¶ 653-55."

The FCC's lengthy interpretation of the independence of Section 271 obligations from the alterations effected in Section 251 obligations in the *Triennial Review Order*, and the Court's upholding of the FCC interpretation in *USTA II* leaves little doubt that BOCs in general, and BellSouth in particular, must continue to supply Checklist item 4 elements post October 1, 2004. The decisive question remains as to whether line sharing of the high frequency portion of the loop is included in Checklist Item 4 of Section 271. Section 271 Checklist Item 4 requires BOCs to grant to CLECs "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services." What is required of Checklist Item 4 relies on the definition of "local loop transmission" and "unbundled from ... other services." Covad claims that "local loop transmission ... unbundled from ... other services" includes line sharing, more specifically, the availability of the high frequency portion of the loop by itself. Covad states that the FCC has defined the "loop" in section 271(c)(2)(B)(iv), competitive checklist item 4 as a "transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer's premises".[18] And the High Frequency Portion of the Loop as, "a complete transmission path on the frequency range above the one used

[18] *In the Matter of Joint application by SBC Communications, Inc et. al for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio, and Wisconsin*, FCC 03-243, Released October 15, 2003.

to carry analog circuit-switched voice transmission between the incumbent LEC's distribution frame (or its equivalent) in its central office and the demarcation point at the customer's premises."(*Triennial Review Order* at 268). As HFPL is a complete transmission path, it therefore is a form of loop transmission facility under the FCC's definition for Checklist Item 4 element.

BellSouth argues that "local loop transmission" refers to the whole loop and not just portions of the loop. There is no specific statement from the FCC or the Courts as to whether "local loop transmission ... unbundled from ... other services" includes line sharing or the provision of the high frequency portion of the loop by itself. While this is a relatively recent issue, a number of state public service commissions are in the process of addressing the issue. For example, the Florida Public Service Commission in its Memorandum for Docket No. 040601-TP dated September 23, 2004 stated that "line sharing is properly identified as a process that utilizes a loop, rather than constituting a loop by itself. ... Staff believes it is improper to identify a line-shared loop as a separate 'loop type.' Thus, staff recommends that line sharing is not a 'local loop transmission from the central office to the customer's premises' as required by checklist item 4."

On the other hand, the North Carolina Utilities Commission ("NCUC") in its Public Staff Comments on Line Sharing for Docket No. P-775, Sub 8 dated September 10, 2004, for example, finds that line sharing is a part of the Checklist Item 4 obligations of BellSouth. The NCUC relies on the FCC Kansas/Oklahoma Order[19] and previous Section 271 filings made by BOCs in other matters to reach its conclusion, finding that line sharing has previously been included by

[19] 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. 00-271, Memorandum Opinion and Order, **FCC 01-29 (released** January 22, 2001).

BOCs in their Section 271 Applications and relied upon by commission granting the applications. The reasoning provided by the NCUC is also applicable to an examination of BellSouth's InterLATA application for Louisiana. In BellSouth's Comments in Support of its Application for InterLATA Relief Pursuant to Section 271 of the Telecommunications Act of 1996 filed on April 20, 2004, BellSouth addressed its compliance with Checklist Item 4. In BellSouth's discussion of Checklist Item 4 it stated, "BellSouth provides access to the high frequency portion of the loop as an unbundled network element." In Staff's Final Recommendation of BellSouth's Section 271 Application, which was adopted by the LPSC in Order No. U-22252-E, Staff addresses line sharing and HFPL in the Checklist Item 4 discussion. In the FCC's determination of BellSouth's Application for InterLATA Services in Georgia and Louisiana, the FCC addresses line sharing and HFPL in its discussion of Checklist Item 4. The pattern of addressing line sharing and the high frequency portion of the loop is repeated in other InterLATA decisions rendered by the FCC. The question arises as to why would the LPSC, the FCC and other state commissions address line sharing and the high frequency part of the loop when evaluating Checklist Item 4, if it were not part of Checklist Item 4. The LPSC, the FCC and other state commissions have included line sharing and the high frequency part of the loop when evaluating Checklist Item 4, absent further direction from the FCC or from the Court, it is reasonable to conclude that line sharing is a Checklist Item 4.

BellSouth states that Covad's petition proposes a contract amendment that would require BellSouth to, 'in accordance with its obligations under Section 271' continue after October 1, 2004 to offer unbundled access to the HFPL to new customers at rates that are inconsistent with the transitional rates established by the FCC."(BST Brief at 5). Apparently BellSouth is of the opinion that Covad is asserting that, "Covad apparently believes that it can continue ordering

new line sharing arrangements at UNE prices after October 1, 2004." (BST Brief at 5). Covad makes no such assertion, in fact Covad quotes the FCC statement that, "In order to read the provisions so as not to create a conflict, we conclude that section 271 requires BOCs to provide unbundled access to elements not required to be unbundled under section 251, but does not require TERLIC pricing." "[T]he appropriate inquiry for network elements required only under section 271 is to assess whether they are priced on a just, reasonable and not unreasonably discriminatory basis – the standards set forth in sections 201 and 202."[20] Elsewhere BellSouth asserts that if, which it denies, BellSouth is required to provide line sharing to new customers after October 1, 2004, then such provision should not be at TELERIC rates. Checklist items 4-6 and 10, unlike Checklist item 2, are not cross referenced under sections 251(c)(3) and 252(d)(1). These items therefore need not be offered under Section 271 at Total Element Long Run Incremental Cost ("TERLIC") prices, but rather must be offered at just and reasonable prices required under 47 U.S.C. § 201-202 (*Triennial Review Order* at 656). To the extent that BellSouth is required to offer line sharing under Section 271, those offerings would be not be required to be offered at TELERIC prices.

BellSouth has several avenues available to seek removal of a Section 271 obligation to provide line sharing. Indeed, BellSouth has availed itself of alternative methods of coping with 271 obligations and has filed both for clarification or reconsideration of the *Triennial Review Order* and filed an Application for Forbearance. In its Petition for Reconsideration[21] BellSouth urges that the FCC should not impose unbundling obligation, if any, that an ILEC has under Section 271, where such facilities have been delisted under Section 251. BellSouth filed a

[20] Triennial Review Order, ¶ 656.
[21] *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, et al.*, CC Docket No. 01-338, *et al.*, BellSouth Petition for Clarification and/or Partial Reconsideration (filed Oct. 2, 2003)

Petition for Forbearance on March 1, 2004, *In the Matter of BellSouth Telecommunication, Inc., Petition for Forbearance under 47 U.S.C. Section 160(c).* The Petition asks that the FCC forbear from applying any stand-alone unbundling obligation on broadband elements. In its Petition, BellSouth admits that the FCC states that, "Section 271 of the Act establishes an independent unbundling obligation on ILECs to provide unbundled access to network elements, even where the Commission has found that access to such elements is no longer necessary under the statutory impairment standard." **In BellSouth's view, however, this position cannot be** reconciled with the other portions of the *Triennial Review Order*, the FCC's decisions under Section 271, or the D.C. Circuit's decision in *USTA II.* Therefore, BellSouth concludes that, "any language in the Triennial Review Order that could be conceived as establishing an independent Section 251-type unbundling obligation under Section 271 is incorrect...." While BellSouth chooses to argue that the FCC's conclusion that separate Section 271 obligations to continue to provide line sharing are in error, nonetheless, BellSouth in the process has acknowledged that the FCC, the agency charged with oversight, has made the analysis and has **concluded that the Section 271 obligation to provide line sharing has not terminated. On page 7** of BellSouth's brief in the current docket is found the following statement:

> Other checklist items in Section 271 (checklist items 4-6 and 10) require access to certain network elements that are identified in the Act itself. *The FCC has concluded that Section 271 requires RBOCs to continue to require unbundling of these specifically identified elements, even if they do not meet the impairment test under Section 251* and thus are not required to be unbundled under the FCC's rules.

Conclusion

Despite BellSouth's assertions to the contrary, the FCC's lengthy interpretation of the independence of Section 271 obligations from the alterations effected in Section 251 obligations in its *Triennial Review Order*, and the Court's upholding of the FCC interpretation in *USTA II* leaves little doubt that BOCs in general, and BellSouth in particular, must continue to supply Checklist item 4 elements post October 1, 2004.

The more difficult question however, is whether line sharing of the high frequency portion of the loop is included in Checklist Item 4 of Section 271. Section 271 Checklist Item 4 requires BOCs to grant to CLECs "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services." What is required of Checklist Item 4 relies on the definition of "local loop transmission". The issue is of recent development; a number of state commissions are in the process of considering the matter and appear to be reaching differing conclusions. BellSouth's Section 271 Application, the LPSC's decision on that Application, the FCC's decision and a number of other state commissions all have included line sharing and the high frequency part of the loop when evaluating Checklist Item 4. Absent further direction from the FCC or from the Court, it is reasonable to conclude that line sharing is a Checklist Item 4, and therefore continues to be available after October 1, 2004 unless BellSouth's Petition for Forbearance is granted. Line sharing does not however continue to be available at TELERIC prices, but rather at "just and reasonable" prices.

IT IS THEREFORE ORDERED:

That line sharing remains an available feature in Louisiana under BellSouth's Section 271 obligations subsequent to October 1, 2004 at just and reasonable prices unless BellSouth's Petition for Forbearance is granted by the FCC.

BY ORDER OF THE COMMISSION
BATON ROUGE, LOUISIANA

DISTRICT III
CHAIRMAN IRMA MUSE DIXON

DISTRICT IV
VICE CHAIRMAN C. DALE SITTIG

DISTRICT II
COMMISSIONER JAMES M. FIELD

DISTRICT I
COMMISSIONER JACK "JAY" A. BLOSSMAN

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