

Matilda Sanders

ORIGINAL

From: Barclay, Lynn [Lynn.Barclay@BELLSOUTH.COM]
Sent: Wednesday, October 13, 2004 3:27 PM
To: Filings@psc.state.fl.us
Cc: Fatool, Vicki; Peters, Evelyn; Linda Hobbs; Nancy Sims; Holland, Robyn P; Bixler, Micheale; Mays, Meredith
Subject: Docket No. 040601-TP BellSouth's Letter regarding relevant excerpt from the TRA transcript

-----Original Message-----

From: Barclay, Lynn
Sent: Wednesday, September 29, 2004 2:50 PM
To: 'filings@psc.state.fl.us'
Cc: Fatool, Vicki; Peters, Evelyn; Hobbs, Linda; Sims, Nancy H; Holland, Robyn P; Bixler, Micheale; Slaughter, Brenda ; Mays, Meredith
Subject: Docket No. 040601-TP BellSouth's Letter regarding relevant excerpt from the TRA transcript

- a. Lynn Barclay
Legal Secretary to Meredith E. Mays
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b. Docket No. 040601-TP (Covad Petition)
c. BellSouth Telecommunications, Inc.
on behalf of Meredith E. Mays
d. 18 pages total (including attachment)
e. BellSouth Telecommunications, Inc.'s Letter regarding TRA's rejection of any consideration of Covad's 271 argument and ordered the FCC's transition plan.

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Legal Department

Meredith Mays
Senior Regulatory Counsel

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October 13, 2004

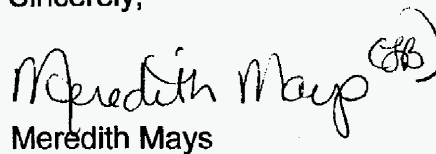
Ms. Blanca S. Bayó
Division of the Commission Clerk and
Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Docket No. 040601-TP (Covad)

Dear Ms. Bayó:

On September 29, 2004, BellSouth Telecommunications, Inc. inadvertently filed electronically a letter with attachments dated September 7, 2004, in the above referenced docket. The attached letter is what was intended to be filed. Incidentally, on September 29, 2004, the parties were served with the correct letter and attachments.

Sincerely,


Meredith Mays

Enclosure

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DOCUMENT NUMBER - DATE

11056 OCT 13 04

FPSC-COMMISSION CLERK

Meredith Mays
Senior Regulatory Counsel

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150 South Monroe Street
Room 400
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September 29, 2004

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

Re: **Docket No. 040601-TP (Covad)**

Dear Ms. Bayó:

In a letter dated September 28, 2004, BellSouth included a summary of the September 27, 2004 decision of the Tennessee Regulatory Authority ("TRA"). This letter now provides the relevant excerpt from the TRA transcript.

It is clear that the TRA rejected any consideration of Covad's 271 argument and ordered the FCC's transition plan. BellSouth requests that this excerpt be included as supplemental authority in this proceeding.

A copy of this letter is enclosed with an original and fifteen copies. 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,


Meredith Mays

Enclosure

cc: Parties of Record
Nancy White
Adam Teitzman

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CERTIFICATE OF SERVICE
Docket No. 040601-TP

I HEREBY CERTIFY that a true and correct copy of the foregoing was served via
Electronic Mail and FedEx this 29th day of September, 2004 to the following:

Adam Teltzman
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vkaufman@mac-law.com
Atty. for Covad



Meredith E. Mays

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1 BEFORE THE TENNESSEE REGULATORY AUTHORITY

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7 EXCERPT OF DIRECTORS' CONFERENCE

8 Tuesday, September 27, 2004

9 IN RE: DOCKET NO. 04-00186

10 -----

11 APPEARANCES:

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For BellSouth: Mr. Guy Hicks

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14 For Covad: Mr. Henry M. Walker
 Mr. Gene Watkins

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Reported By:
25 Teri A. Campbell, RPR, CCR

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1 (The aforementioned cause came on to
2 be heard on Tuesday, September 27, 2004, beginning at
3 approximately 1:00 p.m., before Chairman Pat Miller,
4 Director Deborah Taylor Tate, and Director Sara Kyle.
5 The following is an excerpt of the proceedings that
6 were had, to-wit:)

7

8 MS. DILLON: Section 2, Directors
9 Miller, Kyle, and Tate. Docket No. 04-00186, DIECA
10 Communications, Inc. Petition of DIECA Communications,
11 Inc., d/b/a Covad Communications Company, for
12 arbitration of interconnection agreement amendment with
13 BellSouth. Consider line sharing issue.

14 CHAIRMAN MILLER: At the request of
15 the parties on August 30, 2004, this panel unanimously
16 voted to direct the hearing officer to set
17 September 3rd as a briefing date on the question of
18 whether BellSouth was obligated to provide Covad access
19 to line sharing after October 2004.

20 Are there any comments by my fellow
21 directors? I have prepared a motion.

22 DIRECTOR TATE: If we could, could we
23 take just about two minutes? I have a question that I
24 need to discuss.

25 CHAIRMAN MILLER: Certainly.

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1 (Pause.)

2 CHAIRMAN MILLER: Are there any
3 comments from my fellow directors?

4 DIRECTOR KYLE: Can the parties come
5 up just in case there's questions? Are we still on
6 00186?

7 CHAIRMAN MILLER: Yes, ma'am. As a
8 preliminary matter, there is Mr. Charles Watkins who
9 has applied for appearance pro hac vice. I want to go
10 ahead and grant that motion in order that if there are
11 any questions of the panel that he be allowed to
12 participate.

13 DIRECTOR KYLE: Do you want to go
14 through your motion first, Chairman?

15 CHAIRMAN MILLER: I'm going to try a
16 short motion first. Based upon the FCC's finding in
17 the Triennial Review Order pursuant to 47 USC
18 251(c)(3), I move we find BellSouth is required to
19 provide line sharing to Covad after October 2004.

20 DIRECTOR KYLE: Let me take a stab at
21 this for discussion just a minute since we have counsel
22 here. I want to be corrected. There may be a lot of
23 that. So feel free.

24 Now, as I understand it --

25 CHAIRMAN MILLER: If we could,

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1 Director Kyle, have the parties identify themselves for
2 the record.

3 DIRECTOR KYLE: Thank you.

4 MR. WALKER: Henry Walker here on
5 behalf of Covad. I would like to introduce Mr. Gene
6 Watkins.

7 MR. WATKINS: Good afternoon, Chairman
8 and Directors.

9 MR. HICKS: Guy Hicks on behalf of
10 BellSouth Telecommunications.

11 DIRECTOR KYLE: I'm not as articulate
12 as you attorneys, but let me try this. Let me see if I
13 understand the Triennial Review Order. The FCC says as
14 to line sharing we're in a three-year transition
15 period. I understand it to mean this: That existing
16 customers are grandfathered in. Then year one, which
17 was from October 2003 to October 2004, new customers
18 come in.

19 Now, that's different from existing
20 customers. New customers come in. They're to pay
21 25 percent of the reoccurring rate. Now, year two and
22 year three, the rate goes up for those new customers.
23 Then at the end of year three, CLECs basically go and
24 get their own loop. Then looking back at the existing
25 customers, I think you have to wait on the biannual

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1 review.

2 So we had one year from October 2003
3 to October 2004 where new customers could be gained.
4 Am I right, Mr. Watkins? I see you ready to correct
5 me. I stand ready to be corrected.

6 MR. WATKINS: Generally, Director
7 Kyle, you're correct. What the FCC did was they looked
8 at line sharing under 251(c)(3) and said are CLECs
9 impaired with it or without it. They ruled that they
10 were not impaired without access and set up a
11 transitional period for moving from line sharing to a
12 standalone loop. That's what you see these percentages
13 of. The percentages that our existing customers would
14 be paying would be stepped up until we reach the
15 standalone loop rate. That's for customers picked up
16 in the last year.

17 New orders would be cut off as of
18 October 2004, coming up in about a week.

19 DIRECTOR KYLE: I'm with you.

20 MR. WATKINS: That entire transitional
21 mechanism was designed to address those CLECs who are
22 obtaining line sharing from ILECs. In fact, the rule
23 repeatedly identifies the character that is being
24 addressed here is 251(c)(3) and ILECs. That's on one
25 side.

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1 Now, the Act independently -- and the
2 FCC also said this in the Triennial Review Order --
3 independently imposes access requirements under 271 for
4 regional Bell operating companies.

5 DIRECTOR KYLE: All right. Let's
6 don't talk about 271 because that's not why we're here
7 today. All we did was give our recommendation of 271
8 to the FCC. As we know, we did a voluminous amount of
9 work. It went up to the FCC. They take jurisdiction.

10 I'm not here on 271 today. I'm here
11 only on 251. So, in order not to complicate this
12 argument, let's just stay back with 251(c)(3). Okay?

13 MR. HICKS: Director Kyle, I think
14 that is correct what you just said, your description of
15 the transition plan. I would like to note that the FCC
16 in its briefs to the Court of Appeals in Washington,
17 D.C. in connection with USTA II, the big case we've all
18 been following, I think made very clear what it did
19 with line sharing. If I might just read a couple of
20 brief excerpts. Again, these are the lawyers for the
21 federal government arguing to the Court of Appeals in
22 Washington, D.C.

23 They said the commission phased out
24 line sharing, which is consistent with your description
25 of the transition plan. In reaching its decision, the

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1 FCC considered all the revenue that a new entrant could
2 expect to receive from the use of a whole loop. That's
3 consistent with your point about after October they can
4 buy a loop. This is not a question of Covad not being
5 able to do line sharing. It's a question of whether
6 they buy the loop and get all the revenues of the loop
7 and the cost of the loop or whether they can just buy
8 the line sharing portion for new customers.

9 So the lawyers for the federal
10 government told the court, they said, the commission
11 just phased out line sharing. It considered the
12 development of line splitting. It considered
13 intermodal competition, which is critical. That's why
14 the court in the first place reversed the FCC's initial
15 line sharing rules because they said the FCC ignored
16 intermodal competition like wireless and cable modem.

17 The lawyers go on to say -- and the
18 others -- using the high frequency portion and the
19 relevance of other broadband platforms such as cable
20 modem to the cost and benefits of mandatory line
21 sharing.

22 Also in that same brief, the FCC
23 lawyers say the commission also removed all existing
24 unbundling obligations with respect to packet
25 switching; and subject to the grandfather provisions

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1 and the transition plan, the one you just described,
2 eliminated ILEC line sharing duties. I think if the
3 FCC, as Covad claims, had meant to give with the left
4 hand but take away with the right hand -- that is, take
5 away line sharing out of 251 but keep it under 271 -- I
6 really believe the FCC lawyers would have told the
7 court that. Instead they said what we've done, judge,
8 is eliminated line sharing duties.

9 I think duties is broader than the
10 question of unbundling. They could have said we've
11 eliminated 251 unbundling; we've eliminated TELRIC.
12 No. They said we've eliminated line sharing duties.
13 This rule -- this transition plan that you described is
14 now a federal rule. It's been upheld by the USTA II
15 court, by the D.C. Circuit Court of Appeals. It's the
16 law of the land. It is the right rule.

17 I think if the FCC had intended to
18 eliminate line sharing for some companies but not for
19 BellSouth and regional Bell operating companies, it
20 would have said so explicitly and could have done that.

21 MR. WATKINS: Director Kyle, I've got
22 to mention this. BellSouth does not challenge and
23 their briefing did not challenge the fact that the
24 FCC -- this is a quotation from the brief filed in this
25 matter before the Authority. (Reading) The FCC has

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1 concluded that Section 271 requires RBOCs -- like
2 BellSouth -- to continue to require unbundling of the
3 specifically identified elements even if they do not
4 meet the impairment test under Section 251.

5 The impairment test is what the FCC
6 was analyzing in advance of the transition mechanism
7 that you've been talking about. Covad has not and does
8 not now take issue with that impairment analysis or the
9 determination made under it.

10 The issue today is, does BellSouth
11 have an independent obligation of that 251 analysis
12 that BellSouth themselves recognize exists. The issue
13 is does it exist for line sharing. They also don't
14 take issue with the fact that if line sharing is in
15 checklist item 2, which is a part of 271, they have the
16 obligation. They don't dispute that. What they
17 dispute is that line sharing is a checklist item 4
18 element.

19 DIRECTOR KYLE: Mr. Watkins, we've got
20 so many 271 petitions in front of the FCC. We did our
21 part on 271. It is now on to our father court here to
22 make all those determinations. And with all the
23 petitions going on up there right now, I feel like
24 you're trying to make -- persuade me to make a decision
25 under 271. I've got to make this under 251(c)(3) and

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1 follow what the FCC has left us with. It was what I
2 described. **Any new customers can come in for that**
3 year, October 2003 to October 2004.

4 Now, the terms and conditions are --
5 in the second year, you pay a higher percentage, third
6 year higher percentage. **Then the transition ends.**
7 Then you get out there and compete, work together and
8 negotiate all of those things you seem to do better
9 sometimes than coming in to court. We can't focus on
10 271 in here, but you're saying we can.

11 MR. WATKINS: Well, the parties
12 themselves have procedurally agreed to ask the
13 Authority this very question.

14 CHAIRMAN MILLER: Well, I think you
15 recharacterized the question. **I think the question**
16 before us is, is BellSouth obligated to provide Covad
17 line sharing after October 2004. **And I renew my motion**
18 that says, based on the FCC findings in the Triennial
19 Review Order, pursuant to 47 USC 251(c)(3), I move we
20 find BellSouth is required to provide line sharing to
21 Covad after October 2004. That's as far as I'm willing
22 to go. **I think to go further would be speculative.**

23 DIRECTOR KYLE: Do you have a comment,
24 Mr. Hicks, for Bell?

25 MR. HICKS: Yes, I do. Thank you,

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1 Director Kyle. I think that another telling fact here
2 is that the original -- the first 271 cases that were
3 approved, New York and Texas, were approved by the FCC
4 based on the RBOCs' agreement to provide loops. There
5 was no line sharing at that time at all. So if, as
6 Covad argues, line sharing is part of the 271
7 checklist, which we don't think you need to decide
8 today, it wouldn't make sense for Texas and New York to
9 have gotten 271 relief and the FCC to have said you met
10 checklist item 4, because there was no line sharing
11 requirement at that point.

12 Line sharing is separate. It was a
13 provisioning. It's a practice of sharing the loop.
14 The FCC looked hard and long at this. You know, the
15 FCC originally in 1999 required line sharing as a UNE.
16 Then the D.C. Court of Appeals said, no, you can't do
17 that. You ignored intermodal competition. You've got
18 to go back to the drawing board and look at this again.

19 The FCC came back and said the court
20 is right; we're going to adopt the transition plan. We
21 recognize that Covad and others have customers. So
22 we're going to adopt this transition plan, but line
23 sharing for new customers is going to end October 2004.
24 That was upheld by the court. The plan has been upheld
25 by the court and there is no need really for you to

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1 look beyond that. I think there are petitions dealing
2 with this at the federal level that we'll all have to
3 wait on.

4 And one additional point, I think, to
5 bring some clarity to this is that I know you-all had
6 mentioned a few agenda conferences ago that there was
7 some reporting in the trade press that Chairman Powell
8 talked about reinstating line sharing. But the trade
9 press proved to be wrong because when the interim rules
10 came out recently, there was nothing about line
11 sharing. Nothing changed the transition plan, the one
12 that's been upheld by the courts.

13 I think it's telling that if there was
14 discussion in Washington about reinstating line
15 sharing, you wouldn't have to reinstate it if it was
16 still here. Do you see what I'm saying? There
17 wouldn't be discussion about reinstating line sharing
18 and whether that's a good idea if, as Covad is telling
19 you, it is still here under Section 271.

20 DIRECTOR KYLE: I want to make sure
21 that Chairman Miller and I are saying the same thing.
22 Bell, you will continue to offer this line sharing
23 under Section 251(c)(3) in accordance with that
24 transition period as outlined by the Federal
25 Communications Commission?

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1 MR. HICKS: We'll do everything that's
2 outlined in the transition plan.

3 DIRECTOR KYLE: And that's what I have
4 just stated that I gave you-all an opportunity to
5 correct.

6 MR. HICKS: Yes. That's really all
7 we're asking for is that the transition plan be put in
8 the interconnection agreement. Nothing more. Nothing
9 less.

10 DIRECTOR KYLE: Chairman Miller, am I
11 saying the same thing you are, that we're asking Bell
12 to continue offering line sharing in accordance with
13 the transition period as outlined by the FCC? I think
14 we're on the same track.

15 CHAIRMAN MILLER: Yes.

16 DIRECTOR TATE: I have a question for
17 Mr. Watkins, if I could. I'm certainly not asking for
18 any confidential information, but have you-all
19 negotiated some agreements with some other ILECs around
20 the country that may be different from this transition
21 plan?

22 MR. WATKINS: Director Tate, we have
23 entered into agreements with every regional Bell
24 operating company to preserve line sharing except
25 BellSouth.

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1 DIRECTOR TATE: Well, I'm just once
2 again wishing, hoping, and reiterating that
3 negotiations and commercial agreements do a much better
4 job probably for all of you than we do up here. I
5 would agree with the Chairman's motion with that said.

6 DIRECTOR KYLE: I do too.

7 CHAIRMAN MILLER: Madam Clerk.

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9 (Conclusion of Excerpt.)

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1 REPORTER'S CERTIFICATE

2 STATE OF TENNESSEE)

3 COUNTY OF DAVIDSON)

4 I, Teri A. Campbell, Registered
5 Professional Reporter, Certified Court Reporter, and
6 Notary Public for the State of Tennessee at Large,
7 hereby certify that I reported the foregoing
8 proceedings at the time and place set forth in the
9 caption thereof; that the proceedings were
10 stenographically reported by me; and that the foregoing
11 proceedings constitute a true and correct transcript of
12 said proceedings to the best of my ability.

13 I FURTHER CERTIFY that I am not related to
14 any of the parties named herein, nor their counsel, and
15 have no interest, financial or otherwise, in the
16 outcome or events of this action.

17 IN WITNESS WHEREOF, I have hereunto
18 affixed my official signature and seal of office this
19 28th day of September, 2004.

20

21 _____
22 TERI A. CAMPBELL,
23 REGISTERED PROFESSIONAL
24 REPORTER, CERTIFIED COURT
25 REPORTER, AND NOTARY PUBLIC
FOR THE STATE OF TENNESSEE AT
LARGE

24 My Commission Expires:
25 July 19, 2008