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November 22, 2004

Ms. Beth O'Donnell
Executive Director
Public Service Commission
211 Sower Boulevard
P. O. Box 615
Frankfort, KY 40602

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PUBLIC SERVICE
COMMISSION

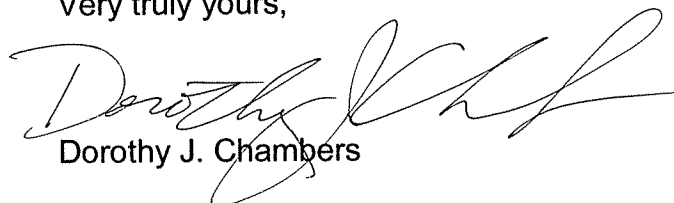
Re: Petition of DIECA Communications, Inc. d/b/a Covad Communications Company for Arbitration of Interconnection Agreement Amendment with BellSouth Telecommunications, Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996
PSC 2004-00259

Dear Ms. O'Donnell:

Enclosed for filing in the above-captioned case are the original and ten (10) copies of BellSouth's Response to Covad's Motion for Rehearing.

Per the Commission's October 18, 2004 Order, BellSouth also advises that the other outstanding issues are still being negotiated by the parties.

Very truly yours,


Dorothy J. Chambers

Enclosures

cc: Parties of Record

560132

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF DIECA COMMUNICATIONS, INC.,)	
D/B/A COVAD COMMUNICATIONS COMPANY)	
FOR ARBITRATION OF INTERCONNECTION)	CASE NO.
AGREEMENT AMENDMENT WITH BELLSOUTH)	2004-00259
TELECOMMUNICATIONS, INC. PURSUANT TO)	
SECTION 252(B) OF THE TELECOMMUNICATIONS)	
ACT OF 1996)	

**RESPONSE OF BELLSOUTH TELECOMMUNICATIONS, INC.
TO COVAD'S MOTION FOR REHEARING**

INTRODUCTION

BellSouth Telecommunications, Inc. ("BellSouth"), by counsel, hereby responds to DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad") motion for rehearing of the Commission's October 18, 2004, decision. This Commission correctly decided that BellSouth has no continuing obligation to provide line sharing arrangements. Accordingly, Covad's Motion for Rehearing should be denied.

The Commission correctly analyzed the FCC's *Triennial Review Order* and also the decision by the appellate court in *United States Telecommunications Association v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("USTA II"). This Commission concluded: "[t]he [D.C. Circuit] upheld the FCC's determination that no impairment would be suffered by competitive carriers from the lack of separate access to the high-frequency portion of the loop." October 18, 2004 Order at 4. It is now beyond dispute that there is not any Section 251(c) obligation to provide line sharing. This Commission recognized that fact and further correctly determined BellSouth

is not obligated to provide line sharing under Section 271 and is “not obligated to provide any portion of [the local loop] on a separate and unbundled basis. Local loop transmission, according to our determination, must necessarily include the entire loop.” Order at 5. Thus, this Commission correctly held that BellSouth’s obligations “pursuant to competitive checklist Item 4 do not include line sharing arrangements as line sharing is not a separate loop type.” *Id.*¹

Contrary to Covad’s efforts to cast doubt on this Commission’s correct determination that line sharing is not a Section 271 element, the FCC’s recent decision on Verizon’s forbearance petition reinforces that this Commission’s determination is correct.² Moreover, the rationale set forth in the *Verizon Order* regarding the benefits to broadband competition fully applies to line sharing. For example, the FCC held that with respect to broadband facilities:

The [FCC] intended that its determinations in the *Triennial Review* proceeding would relieve incumbent LECs of such substantial costs and obligations, and encourage them to invest in next-generation technologies and provide broadband services to consumers. We see no reason why our analysis should be different when the unbundling obligation is imposed on the BOCs under section 271 rather than section 251(c) of the Act.

Verizon Order, at ¶ 34. This holding mirrors the FCC’s conclusion about the effect of removing line sharing from the UNE list in the *Triennial Review Order*. *Triennial Review Order*, at ¶ 263 (“we anticipate that the [FCC’s] decisions in this Order and other proceedings will encourage the deployment of new technologies providing the mass market with even more broadband options”). Further, in *Verizon* the FCC reiterated its finding in the *Triennial Review* that “[t]here appear to be a number of promising access technologies on the horizon and we expect

¹ The Tennessee Regulatory Authority also has reached the same conclusion that in accordance with the transition plan set forth in the *Triennial Review Order* is not obligated to provide line sharing past October 1, 2004, except in accordance with that Plan. See, BellSouth’s letter, filed September 30, 2004, attaching September 27, 2004 TRA Transcript, pp. 12-14.

² Petition for Forbearance of the Verizon Telephone Companies pursuant to 47 U.S.C. 160(c) et al., W.C. Docket No. 01-338, October 27, 2004.

intermodal platforms to become increasingly a substitute for ... wireline broadband service.”

Verizon Order, at ¶ 22. Finally, the FCC concluded:

broadband technologies are developing and we expect intermodal competition to become increasingly robust, including providers using platforms such as satellite, power lines and fixed and mobile wireless in addition to the cable providers and BOCs. We expect forbearance from section 271 unbundling will encourage the BOCs to become full competitors in this emerging industry and at the same time substantially enhance the competitive forces that will prevent the BOCs from engaging in unjust and unreasonable practices at any level of the broadband market.

Verizon Order, at ¶ 29. These competitive, market place forces and technological developments compelled the FCC to conclude forbearance was appropriate for any 271 obligations which might be thought to apply to line sharing.

The FCC’s most recent order establishes that it has chosen to forbear from applying any independent Section 271 unbundling obligations to broadband elements, including line sharing. In that Order, the FCC explained, “[a]lthough Verizon’s petition was ambiguous with regard to the exact scope of the relief requested, later submissions by Verizon clarified that Verizon is requesting forbearance relief only with respect to those broadband elements for which the Commission made a national finding relieving incumbent LECs from unbundling under Section 251(c).”³ The FCC cited to the *ex parte* letter filed March 26, 2004, by Verizon. *See* Verizon’s March 26, 2004, *ex parte* letter and relevant attachment as Exhibit 1 to this response. Covad’s argument that line sharing was not specifically addressed in the petitions for forbearance filed by Verizon and BellSouth ignores this clear reference to those broadband elements where the FCC had made a national finding relieving incumbent LECs from Section 251(c) obligations. As noted earlier, there is no dispute that the FCC has relieved incumbent LECs from 251(c) line sharing obligations.

³ *See* footnote 6 of Verizon order.

Verizon's March 26, 2004 letter included a white paper specifically referring to line sharing. Indeed, referring to *USTA II*, Verizon stated:

[t]he court reached similar conclusions with respect to *other broadband elements*. . . . *with respect to line sharing*, the court again concluded that, even if CLECs were impaired to some degree without mandatory line sharing, the Commission had properly concluded given the 'substantial intermodal competition from cable companies' that, 'at least in the future, line sharing is not essential to maintain robust competition in this market.'

[Emphasis supplied].

The FCC noted that the broadband relief requested under Verizon's petition was ambiguous, and then made clear that it was relying upon Verizon's March 26, 2004, filing for the specific details. That March 26, 2004 filing, which as quoted above, specifically included a discussion of line sharing, demonstrates that any line sharing obligation that may have still existed under Section 271 was included in the request for forbearance relief as a broadband element.⁴ The FCC's order establishes that it has chosen to forbear from applying any independent Section 271 unbundling obligations to broadband elements including line sharing, if there ever were any Section 271 unbundling obligations for line sharing.

Covad's motion for rehearing is based essentially on a reference in the statement of Michael Powell, Chairman of the FCC, amended after the FCC issued a press release concerning the adoption of the *Verizon Order*. Powell's statement failed to state any basis for the reference to line sharing. Powell's statement also does not address the impact of the FCC's failure to deny the forbearance petition. In addition, as noted above, Powell's statement also conflicts with Commissioner Martin's statement that the FCC's decision to forbear from enforcing the requirements of Section 271 is applicable to line sharing. Although the FCC's order, and not Chairman Powell nor Commissioner Martin's statements, is determinative, Commissioner

⁴ Of course, line sharing was included in the forbearance petition simply as a precaution because, as BellSouth has made clear, its position has consistently been that line sharing never was a checklist item 4 requirement.

Martin's statement correctly recognized that there was a need to clarify the relationship of Section 271 rules to recent broadband decisions.⁵ Commissioner Martin's statement also correctly states the law with respect to the effect of the FCC's order as to line sharing. Line sharing clearly was included in the request for broadband relief. The FCC's affirmative grant of the forbearance request provided the requested relief to the extent there were any continuing Section 271 obligations with respect to line sharing.⁶

The FCC held in the *Verizon Order* that it will forbear from enforcement of any Section 271 obligations with respect to line sharing. Furthermore, because the *Verizon Order* does not deny any part of Verizon's or BellSouth's petition, which asked for forbearance for all broadband elements listed under Section 251, even if there had not been an affirmative grant of forbearance as to line sharing, the FCC's Order resulted, by operation of statute, in the grant of the entire petition. It is undisputed that line sharing is a broadband element. *Triennial Review Order*, at ¶ 255 ("we use the term 'line sharing' to describe when a competing carrier provides *xDSL service* over the same line that the incumbent LEC uses to provide voice service...")(emphasis added). Because the Verizon/BellSouth Petition for forbearance was not denied within the statutory time period, by statute it is deemed granted. 47 U.S.C. § 160(c)

⁵ "Today's action continues the commitment not to saddle next generation broadband networks and facilities with unbundling obligations established for legacy networks. This decision should encourage the rapid deployment of new investment in the high-speed broadband networks and facilities that will provide American consumers with more 21st century advanced services."

⁶ As noted by Commissioner Martin, "I join my colleagues in support of today's decision to forbear from enforcing the requirements of section 271, with regard to **all** the broadband elements that the Commission, on a national basis, relieved from unbundling in the *Triennial Review Order* and subsequent broadband decisions. The elements are fiber-to-the-home loops, fiber-to-the-curb loops, the packetized functionality of hybrid loops, packet switching, and **line-sharing**."

While the Commission did not specifically address line sharing in today's decision, the Bell Operating Companies had included a request in their petitions that we forbear from enforcing the requirements of Section 271 with respect to line sharing. (See, e.g., *Verizon Petition for Forbearance*, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Dkt No. 01-338.) Since line-sharing was included in their request for broadband relief and we affirmatively grant their request, I believe today's order also forbears from any section 271 obligation with respect to line-sharing. Regardless of whether it was affirmatively granted, because the Commission's decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute." [Emphasis added.]

("[a]ny such petition shall be deemed granted if the Commission does not deny the petition..."). Thus, as explained by Commissioner Martin in his concurring statement, "regardless of whether it was affirmatively granted, because the [FCC's] decision fails to deny the requested forbearance relief with respect to line sharing, it is therefore deemed granted by default under the statute."⁷

Covad's request for rehearing should be denied for the same sound reasoning this Commission noted in its October 18, 2004, Order which recognized the USTA II decision upholding the FCC's directional change as to the provisioning of unbundled access to the high frequency portion of copper loops:

The Court upheld the FCC's determination that no impairment would be suffered by competitive carriers from the lack of separate access to the high frequency portion of the loop. The FCC determined that it would focus on all potential revenues from the full functionality of the loop, including voice, data, video, and other services, and that these revenues would offset the costs associated with purchasing the entire loop. Thus, the court upheld the FCC decision that 'eliminating mandatory line sharing would not impair CLECS' ability to provide broadband services.' [Citation omitted]. The Court also upheld the FCC's finding that 'the results of mandatory line sharing [are] contrary to the Act's goal of encouraging vigorous competition in all telecommunications markets.'

Order at 4. Not surprisingly, the FCC order in the Verizon forbearance petition also emphasized these same benefits to broadband competition:

The [FCC] intended that its determinations in the *Triennial Review* proceeding would relieve incumbent LECs of such substantial costs and obligations, and encourage them to invest in next-generation technologies and provide broadband services to consumers. We see no reason why our analysis should be different when the unbundling obligation is imposed on the BOCs under section 271 rather than section 251(c) of the Act.⁸

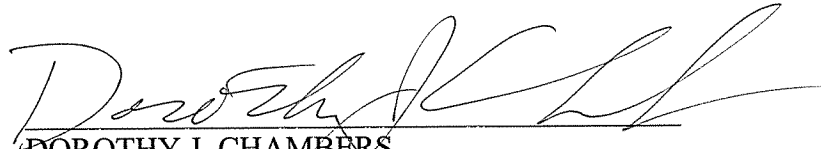
⁷ Covad's argument attempting to twist Commissioner Martin's statement so as to find some support for Covad's position is untenable. Commissioner Martin unambiguously states the FCC granted forbearance for "any section 271 obligations." This statement would clearly include any 271 line sharing obligations, if there were any. Commissioner Martin's statement also is consistent with BellSouth's position that such forbearance was not needed as line sharing never was an independent section 271 obligation. In any event, if there was a section 271 obligation, the FCC's Verizon Order forbears from its enforcement.

⁸ *Verizon Order* ¶ 34.

This rationale is applicable to excluding access to new line sharing arrangements and also mirrors the FCC's conclusion about the effect of removing line sharing from the UNE list in the *Triennial Review Order*.⁹

This Commission correctly determined BellSouth has no continuing obligation to provide line sharing arrangements. Accordingly, this Commission should deny Covad's Motion for Rehearing.

Respectfully submitted,



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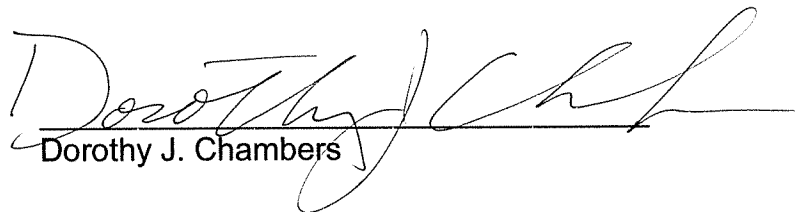
⁹ *Triennial Review Order* at paragraph 263 (“we anticipate that the [FCC’s] decisions in this order and other proceedings will encourage the deployment of new technologies providing the mass market with even more broadband options”).

CERTIFICATE OF SERVICE

It is hereby certified that a true and correct copy of the foregoing was served on the following individuals by mailing a copy thereof, this 22nd day of November , 2004.

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