



BellSouth Telecommunications, Inc.
601 W. Chestnut Street
Room 407
Louisville, KY 40203

Dorothy.Chambers@BellSouth.com

Dorothy J. Chambers
General Counsel/Kentucky

502 582 8219
Fax 502 582 1573

September 28, 2004

RECEIVED

SEP 30 2004

PUBLIC SERVICE
COMMISSION

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

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:

BellSouth wishes to update this Commission with regard to the recent activities of other state public service commissions in BellSouth's territory.

On September 27, 2004, the Tennessee Regulatory Authority ("TRA") voted to adopt BellSouth's position that BellSouth's only obligation with respect to line sharing is to comply with the FCC's 251(c)(3) transition plan rejecting Covad's §271 argument. See, TRA Transcript, pp. 12-14. BellSouth will provide this Commission a copy of the TRA's written Order as soon as the TRA issues it. It is undersigned counsel's understanding that the Georgia Commission also recently voted to accept the Georgia Commission staff recommendation finding a continuing obligation to provide line sharing, but has not yet issued a written Order. BellSouth will provide a copy of the Georgia Commission Order to this Commission as soon as it is issued.

Thus, at present, in BellSouth's nine state territory, one state Commission, the Tennessee Regulatory Authority, has accepted BellSouth's position that BellSouth has no line sharing obligation beyond the FCC's §251 transition plan and one other PSC, the Georgia Commission, has deferred consideration of Covad's 271 argument. The other seven commissions have not yet decided the line sharing issues; however, as this Commission is aware, some commission staff have written recommendations on the issue.

BellSouth believes, now that Covad has filed two letter briefs of September 23, 2004 and September 24, 2004, that substantively re-argue Covad's position and dispute at length the recent and persuasive analysis of the Florida PSC Staff that it is appropriate to file a reply.¹ The Florida Staff concluded that line sharing is not a loop and it is not required to be unbundled under Section 271. Covad's recent letter briefs raise the same arguments made to and rejected by the Florida Staff in the September 23, 2004 Recommendation. Covad, however, is correct when it states that the Florida Staff concluded that line sharing "***never was***" a checklist item 4 element. In so doing, Staff correctly interpreted the plain language of a federal statute, without resorting to FCC orders.

The Florida Staff directly addressed the questions posed in Covad's letter as to why, if line sharing is not a Section 271 element, the FCC consistently addressed line sharing under the heading of checklist item 4 element in its 271 orders. Staff reviewed those orders and concluded that they reflected at best an "inconsistent regulatory treatment of section 271 line sharing by the FCC," with "certain orders ... seem[ing] to indicate that line sharing does fall under checklist item 4" and "[o]ther orders indicat[ing] that line sharing is not required under checklist item 4". Because of the inconsistency in the orders, the Florida Staff chose to decide the issue based on an interpretation of the plain language of the statute. Checklist item 4 requires "(iv) Local loop transmission from the central office to the customer's premises unbundled from local switching." The Florida Staff interpreted this provision as follows:

Staff agrees with the parties that line sharing is the practice by which a CLEC and an ILEC share a local loop. The ILEC provides voice service over the low frequency portion of the loop, and a CLEC provides data services over the high frequency portion of the loop. However, based on this understanding of line sharing, staff does not believe line sharing meets the requirements of the item 4 checklist. Staff recommends that

¹The Commission's September 3, 2004 Order in this proceeding, pursuant to the request of the parties, provided for simultaneous briefs of the single legal question in order to facilitate an expedited decision in this matter. See, BellSouth's letter of August 12, 2004. At the September 14, 2004 oral argument on the single legal issue addressed in the simultaneous briefs, both parties received requests for information which they agreed to provide by letter. BellSouth provided its response, by letter dated September 16, 2004, in a one-page letter addressing BellSouth's Petition for Forbearance filed at the Federal Communications Commission. BellSouth provided a copy of this Petition and its status, but included no argument in its correspondence. Covad, on the other hand, by letter dated September 23, 2004, not only answered questions, but also re-argued its position, stated what it believes BellSouth's likely response would be, and then provided Covad's rebuttal to Covad's version of BellSouth's anticipated reply. By letter dated September 23, 2004, BellSouth provided the September 23, 2004 Florida Staff Recommendation to this Commission. BellSouth made no arguments in its letter regarding the Florida Staff Recommendation and said it would not further respond to Covad's September 23 "letter brief." However, by letter dated September 24, 2004, Covad filed a second letter brief, this time extensively addressing and disagreeing with the Florida Staff Recommendation.

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".... Consequently, in the absence of a definitive determination regarding line sharing by the FCC and based on a plain reading of the checklist item 4 requirement, staff recommends the Commission find that BellSouth is not obligated to provide access to line sharing arrangements after October 2004.

See *Staff Recommendation*, FPSC Docket no. 040601-TP, filed September 23, 2004 ("Florida Staff Recommendation").

Further, Covad is simply wrong when it states that every FCC 271 Order that has granted an Regional Bell Operating Company ("RBOC") long distance authority has required line sharing under checklist item 4. The first two FCC decisions granted long distance authority to an RBOC based on records that predated the FCC's creation of this new unbundled element in the *Line Sharing Order*. In the *Bell Atlantic New York Order*² and the *SWBT Texas Order*,³ the FCC concluded that **the RBOC was not required to comply with the FCC's new line sharing rule in order to obtain long distance relief**. If line sharing were a checklist item 4 statutory requirement, then the FCC could not as a matter of law have granted these RBOCs long distance applications. These decisions alone refute Covad's checklist item 4 argument. Indeed, if line sharing had been a checklist 4 item requirement under Section 271, there would have been no need for the FCC to create this new element in the 1999 *Line Sharing Order*⁴ because it would have existed independently by statute. The fact of the matter is line sharing is not an element required to be unbundled by statute under checklist item 4 of Section 271; it is an element created by rule by the FCC under the authority delegated to it pursuant to section 251.

FCC 271 Orders post-dating the 1999 *Line Sharing Order* do include a discussion of the RBOC's compliance with that order under checklist item 4 of Section 271. In the Georgia/Louisiana 271 Order (as well as others), the FCC made clear that its discussion in this section included a review of compliance, not only with the checklist item 4 loop requirements, but also all FCC-created requirements related to the loop,

² *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).

³ *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 Recd 18354 (June 30, 2000).

⁴ 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 Rcd 20912 ("*Line Sharing Order*"), *vacated and remanded*, *USTA v. FCC*, 290 F.3d 415 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003).

including the line sharing requirement. Indeed, the Florida Staff cited to the Georgia/Louisiana 271 order as one of the FCC 271 Orders that supported the conclusion that the line sharing is not required by statute under Section 271. Several FCC 271 Orders were issued after the *Triennial Review Order*, in which the FCC eliminated the line sharing requirement it had created in the *Line Sharing Order*. In these Orders, the FCC acknowledged that it had adopted new rules in the *Triennial Review Order* since the date the record had been compiled, but explained that it would nevertheless evaluate the application in these cases based on the *former unbundling rules*. If line sharing had always been a checklist item 4 statutory requirement under Section 271, there would have been no need to make this statement because line sharing would have remained a requirement under checklist item 4.

It also is important to consider what the FCC has said directly on this issue. In the FCC brief filed with the District of Columbia Circuit Court of Appeals in connection with the USTA II decision, the FCC stated that "the Commission [FCC] also removed all existing unbundling obligations with respect to packet switching, and, subject to grandfather provisions and a transition, *eliminated ILEC line sharing duties*." (emphasis added.)⁵

This, of course, is contrary to the position Covad is asking this Commission to take. The FCC's brief demonstrates clearly that the FCC purposefully referred to the elimination of line sharing duties, as opposed to just removing line sharing unbundling under Section 251. If, as Covad suggests, the FCC had intended to preserve line sharing under Section 271, it would not have told the DC Circuit Court otherwise. This Commission should rely on the FCC's interpretation of its Triennial Review Order, and not accept Covad's arguments.

The clear course is to give credence to what the FCC unequivocally stated, that is, subject to grandfather and transition provisions, ILEC line sharing duties have been eliminated. See footnote 5. This Commission should adopt the FCC's unambiguous transition mechanism, as it has been upheld by the DC Circuit Court. This transition mechanism has not been amended by the FCC since its release and affirmation by the Appellate Court. Those decisions are dispositive of this issue.

Very truly yours,



Dorothy J. Chambers

Enclosure

cc: Parties of Record

551832

⁵ See FCC's Brief of December 31, 2003, at p. 15-16, in Docket No. 00-1012, copy attached.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

BEFORE THE TENNESSEE REGULATORY AUTHORITY

EXCERPT OF DIRECTORS' CONFERENCE

Tuesday, September 27, 2004

IN RE: DOCKET NO. 04-00186

APPEARANCES:

For BellSouth: Mr. Guy Hicks

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

Reported By:
Teri A. Campbell, RPR, CCR

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.

00003

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,

00004

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

00005

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.

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

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

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

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

00010

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,

00011

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

00012

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?

00013

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.

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.

8

9 (Conclusion of Excerpt.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATE

STATE OF TENNESSEE)
COUNTY OF DAVIDSON)

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

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

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

TERI A. CAMPBELL,
REGISTERED PROFESSIONAL
REPORTER, CERTIFIED COURT
REPORTER, AND NOTARY PUBLIC
FOR THE STATE OF TENNESSEE AT
LARGE

My Commission Expires:
July 19, 2008



BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—————
No. 00-1012 (AND CONSOLIDATED CASES)
—————

UNITED STATES TELECOM ASSOCIATION, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

—————
ON PETITIONS FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION
—————

R. HEWITT PATE
ASSISTANT ATTORNEY GENERAL

MAKAN DELRAHIM
DEPUTY ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

JOHN A. ROGOVIN
GENERAL COUNSEL

JOHN E. INGLE
JOHN P. STANLEY
LAURENCE N. BOURNE
JAMES M. CARR
JOEL MARCUS
CHRISTOPHER L. KILLION
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

similar to standards that the ILECs had advocated. *See id.* n.275 (JA -). The Commission's analysis also takes into account countervailing cost advantages that new entrants may possess. *Id.* ¶89 (JA -). And the Commission's revised rules give greatest weight to evidence of actual deployment by facilities-based competitors in determining whether any relevant cost disparities that exist actually constitute impairment-causing barriers to entry. *Order* ¶¶93-95 (JA -).⁷

Third, the Commission phased out line sharing. *Order* ¶¶255-269 (JA -). In reaching this decision, the Commission considered all the revenues that a new entrant could expect to receive from use of the whole loop (*id.* ¶258 (JA -)); the development of "line splitting" as a viable way for two CLECs to share a loop, one using the low frequency portion of the loop, the other using the high frequency portion (*id.* ¶259 (JA -)); and the relevance of other broadband platforms (such as cable) to the costs and benefits of mandatory line sharing (*id.* ¶¶262-263 (JA -)).

The revised impairment framework results in a significantly shorter list of UNEs. The Commission removed unbundling obligations with respect to the highest capacity enterprise loops, as well as lower capacity enterprise loops at locations where state commissions find that deployment-based triggers are met. The Commission curtailed unbundling obligations with respect to mass market loops that have fiber components used in the provision of broadband services. The Commission removed unbundling obligations with respect to the highest capacity transport facilities, as well as lower capacity transport facilities along routes where state commissions determine that deployment-based triggers are met. The Commission removed

⁷ *See also Order* ¶¶329-331, 359, 394-404, 498-500 (JA - , - , -) (adopting deployment-based "triggers" for geographic market-specific impairment fact-finding by state commissions).

unbundling obligations with respect to switching for the enterprise market, as well as mass market switching at locations where state commissions find that deployment-based triggers are met. The Commission also removed all existing unbundling obligations with respect to packet switching, and, subject to grandfather provisions and a transition, eliminated ILEC line sharing duties. *See generally Order* ¶¶4, 7 (JA ,).

The FCC determined that CLECs remained impaired in serving mass market customers without access to unbundled switching. *Order* ¶¶7, 459-461 (JA , -). This determination stemmed in large part from the fact that the ILEC networks – developed in a monopoly environment – are designed to permit easy electronic connection and disconnection of customers served by ILEC switches, but require expensive and operationally difficult manual “hot cuts” to rewire connections between a customer’s loop and a CLEC switch. *Order* ¶465 & n.1409 (JA).

The hot cut process “create[d] an insurmountable disadvantage to carriers seeking to serve the mass market” with their own switches (*id.* ¶475 (JA)), as demonstrated not only by commenters’ submissions regarding costs and operational difficulties (*id.* ¶¶464-474 (JA -)) but also by the “extremely limited deployment of [CLEC] circuit switches to serve the mass market” (*id.* ¶435 (JA)). Indeed, because there currently was no economically efficient way of connecting CLEC switches to mass market loops, the Commission found that ILEC switches shared many of the essential characteristics of voice grade loops, which all parties agree should be made available as UNEs. *See id.* ¶¶226, 429 & n.1316, 439 (JA , ,).

Although the record supported a national impairment finding with respect to mass market switching, certain high-capacity loops, and some types of transport, the Commission recognized

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES Telecom Association, et al.,)	
)	
PETITIONERS,)	
)	
V.)	
)	No. 00-1012 (AND
FEDERAL COMMUNICATIONS COMMISSION AND UNITED)	CONSOLIDATED CASES)
STATES OF AMERICA,)	
)	
RESPONDENTS.)	

CERTIFICATE OF COMPLIANCE

Pursuant to the requirements of Fed. R. App. P. 32(a)(7), I hereby certify that the accompanying "Brief for Respondents" in the captioned case contains 27844 words.

Laurence N. Bourne
James M. Carr
Joel Marcus
Christopher L. Killion
Counsel
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740 (TELEPHONE)
(202) 418-2819 (FAX)

December 31, 2003