

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

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

O R D E R

On June 23, 2004, DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad") filed a petition for arbitration of issues between itself and BellSouth Telecommunications, Inc. ("BellSouth") pursuant to 47 U.S.C. § 252. On August 13, 2004, Covad and BellSouth filed a letter containing a joint proposal. Therein, the parties requested that this Commission address a legal issue of whether BellSouth is obligated to provide Covad access to line sharing after October 2004. As part of this request, the parties indicated that they would hold the remaining issues for arbitration in abeyance, along with any outstanding motions. On September 3, 2004, the Commission ordered BellSouth and Covad to file written briefs on their agreed issue. The Commission also scheduled an oral argument for September 14, 2004 in the Commission's offices. By this Order the Commission addresses the issue presented.

Covad asserts that BellSouth is obligated to provide it access to line sharing after October 2004. According to Covad, BellSouth's obligations arise pursuant to 47 U.S.C. § 271(c)(2)(B)(iv), the fourth item of the Telecom Act's 14-point competitive checklist.

Line sharing is a checklist item 4 transmission facility, according to Covad, and, as such, BellSouth has a duty to provide line sharing pursuant to Section 271, irrespective of unbundling determinations under 47 U.S.C. § 251.

Checklist item 4 requires Bell operating companies to offer access or interconnection of 14 specific items to other telecommunications carriers in return for the Bell operating companies' authorization to enter the in-region interLATA long-distance market. Specifically, checklist item 4 requires local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

In opposition to Covad, BellSouth argues that its only obligation regarding line sharing arises under Federal Communications Commission ("FCC") rules promulgated pursuant to 47 U.S.C. § 251. These rules were altered by the FCC in its Triennial Review Order released August 21, 2004.¹ In the Triennial Review Order, the FCC determined that the high-frequency portion of the loop utilized to provide line sharing arrangements was no longer required to be unbundled, pursuant to Section 251 of the 1996 Telecom Act.² The FCC did establish a transition period during which line sharing was to be made available on a "grandfathered basis" for the next 3 years. Under this arrangement, line sharing that existed before the effective date of the Triennial Review Order remained at the same rates until it is discontinued, and new line sharing added

¹ 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., FCC 03-36. (Rel. Aug. 21, 2003.)

² Triennial Review Order at ¶ 255-263.

between October 2, 2003 and October 1, 2004 was subject to transitional rates.³ These determinations made by the FCC were upheld in United States Telecommunications Association v. FCC, 359 F.3d 554 (D.C. Cir. 2004) (“USTA II”). Since the FCC has eliminated line sharing as an unbundled network element after October 2004, BellSouth asserts that its only obligation regarding line sharing is to comply with this transitional mechanism established by the FCC.

Covad contends that the Triennial Review Order itself finds an independent obligation for BellSouth, a Bell operating company, to provide certain network elements, even if they are no longer subject to unbundling under Section 251. The Triennial Review Order states that the FCC “reaffirm[s] that Bell operating companies 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.”⁴ Covad asserts that the FCC order granting approval for BellSouth to provide in-region interLATA services in Kentucky specifically placed line sharing as a checklist item 4 obligation. According to Covad, BellSouth has never been relieved of this obligation and, thus, should not be relieved after October 2004.

BellSouth counters with an argument that its obligation to provide the high-frequency portion of the loop was an obligation that existed solely pursuant to a federal rule that has now changed. According to BellSouth, it has never had a statutory obligation to provide the high-frequency portion of the local loop, pursuant to either Section 251 or Section 271.

³ Triennial Review Order at ¶ 264-269.

⁴ Triennial Review Order at ¶ 652, 659.

BellSouth further argues that Section 271 requires the provision of a loop but does not require the provision of subloops or portions of the loop, such as the high-frequency portion or other isolated functionalities of the loop. The high-frequency portion of the loop, according to BellSouth, was a separate UNE, and is now no longer required to be provided and was never required to be provided pursuant to checklist item 4.

The Commission has carefully considered the arguments of both parties and finds that BellSouth has no continuing obligation to provide line sharing arrangements. The USTA II decision upheld the FCC's directional change regarding the provision 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." 359 F.3d at 584. 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 local telecommunications markets." Id. at 584, 585. Finally, the Court noted that, even if there is some impairment for CLECs with respect to the elimination of mandatory line sharing, the FCC reasonably found that other considerations outweighed any impairment. Id. at 585. The Court upheld the FCC's rule regarding line sharing on the grounds that "the decision not to unbundle that

element was reasonable, even in the face of some CLEC impairment, in light of evidence that unbundling would skew investment incentives in undesirable ways and that intermodal competition from cable ensures the persistence of substantial competition in broadband.” Id.

Regarding Section 271, USTA II found that the FCC reasonably concluded that checklist item 4 imposed unbundling requirements for elements independent of the unbundling requirements imposed by Section 251. Id. at 588. Thus, even in the absence of impairment, BellSouth must unbundle local loops in order to enter the in-region interLATA market; but, as the Court upheld, the FCC determined that TELRIC pricing was not appropriate in the absence of impairment. Id. at 589.

This Commission finds that, pursuant to Section 271(c)(2)(B)(iv), BellSouth has an obligation to unbundle local loop transmission from the central office to the customer’s premises. However, we disagree with Covad’s definition of loop transmission. BellSouth is obligated to provide the whole loop, but not obligated to provide any portion of it on a separate and unbundled basis. Local loop transmission, according to our determination, must necessarily include the entire loop. We specifically find 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. Thus, BellSouth is no longer obligated to provide Covad access to new line sharing arrangements after October 2004. The determinations of this Commission do not, however, prohibit BellSouth from voluntarily agreeing to line sharing arrangements with Covad or any other local exchange carrier through the negotiation and execution of interconnection agreements.

IT IS THEREFORE ORDERED that:

1. BellSouth is no longer obligated to provide Covad line sharing arrangements after October 2004.

2. Within 30 days of the date of this Order, Covad and BellSouth shall submit, in writing, a status of all issues pending in this arbitration proceeding.

Done at Frankfort, Kentucky, this 18th day of October, 2004.

By the Commission

Commissioner W. Gregory Coker did not participate in the deliberations or decision concerning this case.

ATTEST:

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke at the end, positioned above the text 'Executive Director'.

Executive Director