

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

INVESTIGATION CONCERNING THE)
PROPRIETARY OF INTERLATA SERVICES)
BY BELL SOUTH TELECOMMUNICATIONS,) **CASE NO. 2001-105**
INC., PURSUANT TO THE)
TELECOMMUNICATIONS ACT OF 1996)

SURREPLY OF COVAD, AT&T AND MCI

DIECA Communications, Inc. d/b/a Covad Communications Company (“Covad”), AT&T Communications of the South Central States (“AT&T”), and MCI metro Access Transmission Services, LLC (“MCI”) (collectively, the “Competitive Carriers”) are obliged to file this response¹ to BellSouth’s November 19 Reply Brief, which misstates both BellSouth’s legal obligations and its prior advocacy to reach the conclusion that “BellSouth has no obligation to offer line sharing pursuant to Section 271.” BellSouth Reply Brief at p. 6. BellSouth’s attempt to weaken the SEEM plan by ignoring line sharing obligations under Section 271 must be rejected.

BellSouth bases its argument that BellSouth has no obligation to offer line sharing pursuant to Section 271 on two assertions: 1) line sharing (the HFPL) is not a section 271 check list number 4 item (271(c)(2)(B)(iv)); and 2) that it would be “illogical” for the FCC to lift the obligation for an ILEC to provide access to line sharing as a UNE only to reinstate that obligation under section 271. Both of BellSouth’s assertions are incorrect.

¹ On December 5 BellSouth filed a motion to place SEEM payments in escrow, to which the Competitive Carriers will file a separate reply.

I. Line Sharing is a Checklist Number Four Item.

BellSouth argues that that line sharing is not a “loop transmission” under checklist item number 4. Reply Brief at p. 7. However, the FCC and BellSouth itself have repeatedly categorized line sharing under checklist number 4. In every FCC 271 Order granting BellSouth long distance authority, the FCC placed line sharing and line splitting in the section of the Order considering checklist item number 4.² The FCC’s treatment of BellSouth is hardly unique. Numerous 271 Orders granting long distance authority to other Bell companies are consistent with the checklist item four discussion in the BellSouth 271 Orders.³ More importantly, BellSouth placed line sharing and line splitting in every one of its own briefs to the states and to the FCC under checklist item number 4.⁴ Having briefed line sharing as a checklist number 4 item, it is a bit

² See e.g., Memorandum Opinion and Order, In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina, WC Docket No. 02-150, FCC Order 02-260, released September 18, 2002, pp. 142-45 (finding that under checklist item #4, “BellSouth offers nondiscriminatory access to the high frequency portion of the loop in each applicable state.”)

³ See Exhibit A to this surreply, which is a comprehensive list of specific page references to FCC 271 Orders discussing line sharing and checklist item 4.

⁴ *Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Florida and Tennessee*, In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Florida and Tennessee, WC 02-307, filed September 20, 2002 at pp. 96-99; *Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina*, In the Matter of: Joint Application by BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc. for Provision of In-Region, InterLATA Services in Alabama, Kentucky, Mississippi, North Carolina and South Carolina, WC 02-150, filed June 20, 2002 at pp. 114-116; *Brief in Support of Application by Bellsouth for Provision of In-Region, Interlata Services in Georgia and Louisiana*, In the Matter of: 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 01-277,

disingenuous for BellSouth to now assert that line sharing is *not* a checklist number 4 item. BellSouth cannot admit this, of course, because to do so would admit that BellSouth continues to have an obligation to provide access to line sharing under section 271. *TRO ¶¶ 653-55*. Instead, BellSouth spends several paragraphs arguing that loops and line sharing are separate UNEs under 251, therefore they cannot both fall under “local loop transmission facilities” in checklist item number 4. Reply Brief at pp. 7-8. As previously stated in the Competitive Carrier’s response to BellSouth’s Motion to Modify the SEEM Plan, the HFPL is clearly a form of loop transmission – a loop transmission that the Bells themselves routinely use to provide xDSL services separately from narrowband voice services.⁵ Indeed, in describing the high frequency portion of the loop in the *Line Sharing Order*, the FCC stated that “requesting carriers may access unbundled loop functionalities, such as *non-voiceband transmission frequencies, separate from other loop functions*” – distinguishing the high frequency loop transmission path from the narrowband frequencies used for circuit switched voice services.⁶ The HFPL (line sharing) is repeatedly categorized under checklist item number 4 by both BellSouth and the FCC *because* the HFPL is a “local loop transmission” facility under 271(c)(2)(B)(iv). Accordingly, as long as BellSouth continues to offer long distance, it must provide access to line sharing. Because, in BellSouth’s own words, “the purpose of the enforcement provisions of the [SEEM] plan is to prevent ‘backsliding’ after

filed October 2, 2001 at pp. 112-114.

⁵ In other words, Bell customers typically purchase narrowband voice services without also purchasing xDSL, and pay a separate monthly fee in order to add xDSL services to their local loop.

⁶ See *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Third Report and Order in CC Docket No. 98-147 Fourth Report and Order in CC Docket No. 96-98, FCC 99-355, 14 FCC Rcd. 20912, 20923 at para. 18 (1999).

BellSouth obtains authority to provide interLATA service”,⁷ BellSouth’s Motion to Modify the SEEM Plan to remove line sharing should be denied.

II. BellSouth’s Obligation to Provide Non-Discriminatory Access to Line Sharing Under Section 271 is Independent of its Obligation to Provide Access Under Section 251.

In lieu of actual legal argument, BellSouth asserts that it is “illogical” for the FCC to lift the obligation of ILECs to provide access to line sharing as a UNE only to maintain an RBOC’s obligation to maintain access under section 271. Despite BellSouth’s reasoning, however, the FCC expressly held that “BOC obligations under section 271 are not necessarily relieved based on any determination we make under section 251 unbundling analysis.” *TRO* ¶ 655. Moreover, the FCC expressly addressed the question of the apparent illogic of a statutory scheme in which the FCC could cease the requirement of an RBOC to provide access to a UNE under 251, and yet continue the identical requirement under section 271:

659. 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. So if, for example, pursuant to section 251, competitive entrants are found not to be “impaired” without access to unbundled switching at TELRIC rates, the question becomes whether BOCs are required to provide unbundled switching at TELRIC rates pursuant to section 271 (c)(2)(B)(vi). 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.

TRO ¶ 659.

⁷ BellSouth Telecommunications, Inc. Brief of the Evidence, FPSC Docket 000121-TP, filed May 31, 2001, p. 1.

In short, although the *price* for a “de-listed” UNE may change, if that UNE falls under 271 (c)(2)(B)(iii)-(vi), the obligation to provide non-discriminatory *access* remains. BOCs who continue to sell long distance must continue to provide non-discriminatory access to all checklist items “de-listed under 251”⁸, including line sharing under checklist item #4. Whether BellSouth thinks that statutory scheme is illogical or not, it is the law.

III. BellSouth’s Motion to Modify the SEEM Plan Must be Denied.

As a consequence of the foregoing, there is no legitimate debate about whether line sharing should be categorized under checklist number 4 – the FCC and BellSouth have categorized line sharing as such in every pleading on the subject. There is also no legitimate debate about whether RBOCs, including BellSouth, must continue to provide non-discriminatory access to checklist #4 items, including the HFPL (line sharing). *TRO* ¶¶ 653-667. Manifestly then, BellSouth remains obligated to provide non-discriminatory access to line sharing under both the TRO and section 271. *Id.*; *TRO* ¶¶ 264-71. That obligation should be enforced, as it always was intended to be, by the SEEM plan. The Commission should, therefore, reject BellSouth’s obfuscatory tactics and deny its Motion to Modify the SEEM plan.

⁸ With the exception of checklist item numbers 1 and 2, as these items are directly tied to section 251 UNEs.

Respectfully submitted,

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CERTIFICATE OF SERVICES

A copy of the foregoing was served this 8th day of December, 2003, first class, United States mail, postage prepaid, upon all parties of record.

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