IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA TALLAHASSEE DIVISION

DIECA Communications, Inc.
d/b/a Covad Communications
Company,

Plaintiff,

v.

FLORIDA PUBLIC SERVICE
COMMISSION et al.,

Defendants.

_____/

CASE No. 4:06cv72-RH/WCS

THE FLORIDA PUBLIC SERVICE COMMISSION'S REPONSE AND SUPPORTING MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Defendants, the Florida Public Service Commission and Lisa Polak Edgar, J. Terry Deason, and Isilio Arriaga, in their official capacities as Commissioners (collectively referred to herein as "the Commission"), respectfully request that the Court deny the relief sought by Plaintiff, DIECA Communications, Inc., d/b/a Covad Communications Company (Covad), in its Motion for Preliminary Injunction. The Commission hereby files, pursuant to the Court's February 17, 2006, Order, its Response and Supporting Memorandum in Opposition to Plaintiff's Motion for Preliminary Injunction and states:

BACKGROUND

On August 21, 2003, the Federal Communications Commission (FCC) released its Triennial Review Order (TRO),[1] revising rules and responding to the D.C. Circuit Court of Appeals' remand decision in United States Telecom Association v. FCC, 290 F.3d 415 (D.C. Cir 2002)(USTA I). On March 2, 2004, the D.C. Circuit Court of Appeals released its decision in United States Telecom Association v. FCC, 359 F.3d 554 (D.C. Cir. 2004)(USTA II), vacating and remanding certain provisions of the TRO. In particular, the D.C. Circuit held that the FCC's delegation of authority to state commissions to make impairment findings was unlawful, and that the national findings of impairment for mass market switching and high capacity transport were improper.

On February 4, 2005, the FCC released the Triennial Review Remand Order (TRRO).[2] In the TRRO, the FCC's final unbundling rules were adopted with an effective date of March 11, 2005.

In response to these court cases and FCC Orders, Defendant, BellSouth Telecommunications, Inc. (BellSouth), filed, on November 1, 2004, a petition with the Commission to establish a generic docket to consider amendments to interconnection agreements resulting from the changes of law. The administrative hearing addressing BellSouth's petition, which was assigned Commission Docket No. 041269-TP, was held before the Commission on November 2-4, 2005. On January 26, 2006,

[1] In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 01-338, CC Docket No. 96-98, CC Docket No. 98-147, 2003 FCC LEXIS 4697, rel. August 21, 2003.
[2] In the Matter of Unbundling Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313, CC Docket No. 01-338, Order on Remand, FCC 04-290, 2005 FCC LEXIS 912, rel. Feb. 4, 2005.

Commission staff filed a memorandum setting forth its recommendations to the Commission on the issues presented at the November 2-4 administrative hearing.

One of the issues that the Commission considered at the hearing pertained to line sharing. Line sharing is a practice by which a competitive local exchange carrier (CLEC) and an incumbent local exchange carrier (ILEC) share a local loop. 47 C.F.R. §51.319(a)(1)(i). The ILEC provides voice service over the low frequency portion of the loop, and the CLEC provides data service over the high frequency portion of the loop. 47 C.F.R. §51.319(a)(1)(i).

The Commission considered and voted on the issues at the Commission's February 7, 2004, agenda conference. With respect to the line sharing issue, the Commission voted that BellSouth is not obligated, pursuant to the Telecommunications Act of 1996[3] and FCC Orders, to provide line sharing to new CLEC customers after October 1, 2004. Moreover, the Commission found that it does not have authority to require BellSouth to include §271[4] elements in §252 interconnection agreements,[5] as requiring such would be contrary to both the plain language of §§271 and 252 and the regulatory regime set forth by the FCC in the TRO and the TRRO.[6] Covad Complaint, Attachment A at page 5. The Commission also instructed the parties to submit Interconnection Agreements comporting with the Commission's decision by February 27, 2006.

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[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[4] Section 271 refers to 47 U.S.C. §271. This section sets forth the requirements a Bell operating company must meet before it can provide long distance service. 47 U.S.C. §271(a). The FCC makes a determination as to whether the Bell operating company has met the requirements of the section in what has been commonly referred to as a "271 proceeding." 47 U.S.C. §271(d).

[5] Section 252 refers to 47 U.S.C. §252. State commissions arbitrate and approve interconnection agreements. 47 U.S.C. §252(e). When a state commission makes a determination under this section, an aggrieved party may bring an action in Federal district court to determine whether the agreement meets the requirements of the section. 47 U.S.C. §252(e)(6).

[6] This was identified as Issue 7(a) in the proceeding before the Commission.

Subsequent to the Commission's vote at the agenda conference, the Commission's Inspector General issued a report on February 9, 2006, addressing allegations of misconduct by a Commission staff member assigned to Docket No. 041269-TP. The Inspector General concluded that the staff member sent, under fictitious names, unauthorized e-mails to Commissioners and BellSouth. The report found that the staff member's conduct constituted violations of Commission policy and State and Commission rules. The staff member subsequently resigned.

On February 14, 2007, Covad submitted a letter to the Chairman of the Commission. In the letter, Covad requested that the Commission take immediate action, *sua sponte*, to assign new and independent staff to re-evaluate the issues that the former staff member had responsibility for and those in which she provided her unsolicited opinion and "bring forth a truly independent recommendation for [the Commission's] consideration." One of the issues that Covad requested the Commission re-evaluate is the line sharing issue.

On February 15, 2006, Covad filed its Complaint for Declaratory Relief (Complaint) with this Court, along with its Motion for Preliminary Injunction (Motion) and Request for Expedited Hearing on the Motion for Preliminary Injunction. The line sharing issue is the subject of the Complaint and Motion.

BellSouth submitted to the Commission its response to Covad's letter on February 16, 2006. BellSouth stated that, while it believed reconsideration was unnecessary, it did not object to the Commission reconsidering the issues identified by Covad.

In response to Covad's letter, Commission staff filed a memorandum on February 17, 2006. (Attachment A) The memorandum recommends that the Commission vacate its decision on all the issues identified in Covad's letter to the Chairman; reassign new staff members to review the existing record; and have the newly assigned staff members prepare an independent recommendation for the Commission's de novo consideration. The line sharing issue is subject to re-evaluation by the Commission. The Commission's vote on the issue of its authority to require BellSouth to include §271 elements in §252 interconnection agreements is not included in the February 17, 2006, Commission staff recommendation and is not subject to re-evaluation by the Commission.

BellSouth subsequently filed with the Commission on February 17, 2006, its Motion to Amend Filing Date for Interconnection Agreement, requesting the Commission revise the date for filing the interconnection agreement from February 27, 2006, to March 2, 2006. Covad filed its response on February 20, 2006. The parties subsequently agreed to submit interconnection agreements by March 10, 2006, on issues not vacated by the Commission at the February 28, 2006, agenda conference.

Also on February 17, 2006, this Court issued its Order Setting Procedures on Motion for Preliminary Injunction. By its February 17, 2006, Order, the Court required Defendants to respond to Plaintiff's Motion for Preliminary Injunction by February 21, 2006.

ARGUMENT

The Court's February 17, 2006, Order specifically states that "Defendant's response memorandum shall address the issue of the plaintiff's likelihood of success on the merits of plaintiff's claim that the Florida Public Service Commission's decision at issue violates the Telecommunications Act and regulations and orders issued pursuant thereto." This issue is addressed in Point II.A. The Commission asserts, however, that there is a threshold issue that this Court should consider, whether this matter is ripe for the Court's review, that would make the necessity for the preliminary injunction moot.

I. This Matter is Not Ripe for the Court's Review.

For the purposes of judicial review, the administrative process is complete upon the rendition of the final order. Diamond Cab Co. of Miami v. King, 146 So. 2d 889, 892 (Fla. 1962). The order is deemed rendered when it is been reduced to writing, signed, and made a matter of record or filed, if recording is not required. Id. at 891. The Commission's Final Order in this matter has not yet been rendered.[7] A memorandum to the Commission wherein Commission staff addresses Covad's request to vacate the Commission's vote taken on February 7, 2006, including the line sharing issue that is the subject of this appeal, is currently pending before the Commission. The Commission is scheduled to consider the staff recommendation at its February 28, 2006, agenda conference. There are no plans to issue the Final Order before the Commission addresses the staff's recommendations.

[7] While Covad's Motion might lead this Court to believe that the Commission issued its final determination in this matter verbally with no plans to reduce it to writing, this is simply not the case. The Commission was scheduled to render it final written order on or before February 27, 2006. The issues raised in Covad's February 14, 2006, letter to the Chairman led to the filing of the staff memorandum on February 17, 2006, recommending the Commission re-evaluate its vote taken on February 7, 2006. Consequently, any written order memorializing the Commission's February 7, 2006, vote will not be issued until after the Commission determines, at its February 28, 2006, agenda conference, whether to re-evaluate its vote on the issues set forth in Covad's letter.

As the Commission is on course to consider the relief requested in Covad's letter to the Chairman, Covad has not exhausted its administrative remedies. Until Covad's administrative remedies are exhausted, this issue is not ripe for review. See United States v. Williams, 425 F.3d 987, 990 (11th Cir. 2005). Ripeness for review determines whether the district court has subject matter jurisdiction. Reahard v. Lee County, 30 F.3d 1412, 1414 (11th Cir. 1994). Accordingly, this matter is not ripe for review, and, thus, this Court lacks subject matter jurisdiction.

II. Standard for Injunctive Relief

The requirements for preliminary injunctive relief impose a heavy burden on the plaintiff. The standard applicable to Covad's request was articulated in Siegel v. Lepore, 234 F. 3d 1163, 1176 (11th Cir. 2000):

> A district court may grant injunctive relief only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. See McDonald's Corp. v. Robertson, 147 F. 3d 1301, 1306 (11th Cir. 1998)(citing All Care Nursing Serv., Inc. v. Bethesda Mem'l Hosp., Inc., 887 F. 2d 1535, 1537 (11th Cir. 1989)). In this Circuit, "[a] preliminary injunction is an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion'" as to each of the four prerequisites. Id. (internal citation omitted); see also, Texas v. Seatrain Int'l, S.A., 518 F. 2d 175, 179 (5th Cir. 1975)(grant of preliminary injunction "is the exception rather than the rule," and plaintiff must clearly carry the burden of persuasion).

The Court states in its February 17, 2006, Order that Defendant's response memorandum "shall address the issue of plaintiff's likelihood of success on the merits of plaintiff's claim that the Florida Public Service Commission's decision at issue

violates the Telecommunications Act and regulations and orders issued pursuant thereto." This issue is addressed in Point A.

A. Covad has failed to show a substantial likelihood of success on the merits.

First, Covad incorrectly states the standard that must be met to obtain a preliminary injunction, stating it as a "probable" success on the merits. Covad Motion at 6. The correct standard, however, places a much heavier burden on Covad and has been defined by the Eleventh Circuit as a "substantial" likelihood of success on the merits. Siegel, 234 F. 3d at 1176.

Covad makes a blanket assertion in its Motion that the "merits of the case strongly favor Covad" and that the Commission's decision is contrary to "clear federal law and pronouncements of the FCC on the issue of line sharing." Covad Motion at 6. Covad's position is fatally flawed for two primary reasons: 1) "line sharing" is not "a loop transmission facility" under §271; and 2) the Commission does not have the authority to require BellSouth to include §271 elements in §251 interconnection agreements. Moreover, Covad's position is in direct conflict with the clear statement of the FCC that line sharing is anti-competitive and contrary to the goals of the Act. TRO at ¶248, 260, 261.

1. "Line sharing" is not a "loop transmission facility" under §271.

The "Competitive Checklist" referred to in Covad's Complaint is set forth in 47 U.S.C. §271(c)(2)(B). The term "line sharing" is not found anywhere in 47 U.S.C. §271(c)(2)(B).

Although the plain language of §271 does not contain the term "line sharing," Covad claims that it is a requirement of §271(c)(2)(B)(iv)("Checklist Item 4"),

asserting that the high frequency portion of the loop constitutes a "local loop transmission facility" for the purposes of §271. This interpretation, however, does not comport with the plain language of §271(c)(2)(B)(iv).

Line sharing is a practice by which a CLEC and an ILEC share a local loop. 47 C.F.R. §51.319(a)(1)(i). The ILEC provides voice service over the low frequency portion of the loop, and the CLEC provides data service over the high frequency portion of the loop. 47 C.F.R. §51.319(a)(1)(i).

The FCC has defined the "local loop" as a specific "transmission facility between a distribution frame (or its equivalent) in an incumbent LEC central office and the loop demarcation point at an end-user customer premises." 47 C.F.R. §51.319(a). The high frequency portion of the loop is only a part of the facility, not the entire "transmission path" required by §271. Line sharing, thus, does not constitute a loop itself, as purported by Covad, but is a process that utilizes a loop.

Covad points to statements in the Massachusetts 271 Order and Florida and Tennessee 271 Order where line sharing was mentioned in the §271 proceedings in reference to Checklist Item 4. Covad Complaint at 8. To characterize these statements as the FCC making a definitive statement that line sharing is a Checklist Item 4 requirement is simply inaccurate. As stated above, the plain language of Checklist Item 4 does not contain the term "line sharing."

Covad also states that other state commissions have considered this issue and declared that line sharing is a §271 element. Covad Motion at 6. Covad fails to

mention, however, that the Michigan,[8] Rhode Island,[9] and Illinois[10] commissions have ruled in a manner consistent with the Commission, finding that line sharing is not a §271 element.

Contrary to Covad's assertions (Covad Motion at 6), the FCC has not clearly defined a Bell operating company's obligation to provide line sharing pursuant to §271. The FCC has, however, specifically and clearly stated in the TRO that line sharing is anti-competitive and contrary to the goals of the Act. TRO at ¶¶248, 260, 261. Allowing Covad to circumvent the TRO and obtain unbundled access to the high frequency portion of the loop by way of §271 would directly contradict the FCC's stated goals in regard to line sharing. Thus, Covad has failed to show a substantial likelihood of success on the merits.

2. The Commission does not have the authority to require BellSouth to include §271 elements in §252 interconnection agreements.

While Covad's Complaint and Motion focus on the Commission's vote on the line sharing issue, it loses sight of the Commission's overarching decision affecting Covad's line sharing arguments: that the Commission does not have the authority to include §271 elements in §252 interconnection agreements.[11]

Even if, for the sake of argument, line sharing is a §271 element, there is no directive in the Act requiring §271 elements be included in §252 interconnection

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[8] In re: Application of ACD Telecom, Inc. against SBC Michigan for its Unilateral Revocation of Line Sharing Service in Violation of the Parties' Interconnection Agreement and Tariff Obligations and For Emergency Relief, 2005 Mich. PSC LEXIS 109, Order Dismissing Complaint (March 29, 2005)

[9] In re: Verizon-Rhode Island's Filing of October 2, 2003 to Amend Tariff No. 18, Rhode Island Public Utilities Commission Report and Order, Docket No. 35556, 2004 R.I. PUC LEXIS 31 (October 12, 2004).

[10] In re: XO Illinois, 2004 WL 3050537(Ill. C.C. October 28, 2004).

[11] This was Issue 7(a) in the proceeding before the Commission. Unlike the line sharing issue (Issue 16), the Commission's vote on Issue 7(a) was not identified in Covad's letter to the Chairman and the validity of the Commission's vote on the issue is not in dispute. This issue will not be re-evaluated by the Commission at its February 28, 2006, agenda conference.

agreements. Section 271(c)(1) only provides that, to comply with the section, a Bell operating company must meet the requirements of either subparagraph (A) or (B), which require the company to have entered into one or more §252 agreements or provide a Statement of Generally Available Terms. Moreover, §252(c), which sets forth the standard for arbitration, makes no reference at all to §271. Rather, the section only requires state commissions to ensure that "resolution and conditions meet the requirements of Section 251, including the regulations prescribed by the [FCC] pursuant to Section 251." 47 U.S.C. §252(c)(1).

In the TRO, the FCC concluded that the state authority preserved by §251(d)(3) is limited to state unbundling actions that are consistent with the requirements of §251 and do not "substantially prevent" the implementation of the federal regulatory regime. TRO at ¶731. Moreover, the FCC specifically stated in the TRO that whether a particular §271 element's rate satisfies the just and reasonable pricing standards of §201 and §202 is a fact-specific inquiry that the FCC will undertake in either an application for 271 authority proceeding or an enforcement proceeding brought pursuant to §271(d)(6). TRO at ¶664. This strongly indicates that the FCC did not envision state regulation of §271 elements or their inclusion in §252 interconnection agreements.

The issue of whether BellSouth must continue to provide UNE-P under §271, regardless of the elimination of UNE-P under §251, was addressed during an analysis of BellSouth's motion for preliminary injunction before the United States District Court for the Southern District of Mississippi. BellSouth Telecommunications, Inc. v. Mississippi Public Service Commission, 368 F. Supp. 2d 557, 565-566 (Dist. Ct. So.

Miss. 2005). The court agreed with the state commission's finding that BellSouth did not have to continue to provide UNE-P under §271, concluding that any enforcement authority for any alleged failure by BellSouth's to comply with §271 obligations rests with the FCC not the court. Id.

The regulatory framework set forth by the FCC in both the TRO and TRRO indicate that jurisdiction over §271 matters rests with the FCC, rather than state commissions. The Commission, thus, correctly found that it does not have the authority to require BellSouth to include §271 elements in §252 interconnection agreements. Covad is not contesting this Commission finding in its Complaint. Therefore, even if this Court ultimately finds that line sharing is a §271 element and reverses the Commission's decision as Covad requests in its Complaint, the Commission has no authority to require BellSouth to include line sharing in the §252 interconnection agreement. Covad has, thus, failed to show a substantial likelihood of success on the merits.

B. Covad cannot show irreparable injury from the Commission's decision.

The loss of line sharing is a consequence of the stated policy of the FCC in the TRO and TRRO. Covad has the option to pursue other available alternative arrangements, such as line splitting or establishing its own facilities. TRO at ¶¶258, 259, 260. Not only are other options available, these options must be phased in under the TRRO.

Damage to customer base and goodwill can be irreparable injury under Eleventh Circuit precedent as Covad argues. However, putting aside the valid legal basis giving rise to the loss of customers and goodwill, Covad could implement

damage control to prevent the consequences it projects by, for example, entering into alternative arrangements to obtain line sharing.

C. The potential harm to Covad does not outweigh the potential harm to other parties.

It may be true that Covad might lose customers if the Commission's decision stands. On the other hand, BellSouth might lose potential customers to Covad if it has to continue to provide line sharing to its competitor if the Commission's decision is enjoined.

The Commission has an interest in promoting effective competition in Florida. Its interest, as well as the interests of the Florida customers the Commission represents, will be harmed.

The FCC has found that CLECs are not impaired without the unbundling of the high frequency portion of the loop and that continued availability undermines genuine, facilities-based competition. TRO at ¶¶260, 261. Covad will be able to continue to compete for new customers using other arrangements, and genuine competition will serve the customers' interests. TRO at ¶¶260, 261.

Delaying the immediate transition away from line sharing will harm the public interest with respect to competition in the telecommunications market more than it will harm Covad's ability to stay in the market. Thus, on balance, the harm to BellSouth and the consuming public represented by the Commission outweighs any harm to Covad caused by the unavailability of line sharing.

D. Granting Covad's Motion would be adverse to the public interest.

As argued above, it is clear that the national policy, as articulated by the FCC in the TRO and TRRO, and the state policy, as articulated by the Florida Commission,

favors promoting competition. Competition will be advanced by the prompt elimination of line sharing. Granting Covad's Motion would run counter to the public interest and should be denied.

For the foregoing reasons, Defendants, the Commission, request that Covad's Motion for Preliminary Injunction be denied.

Respectfully submitted,

s\Samantha M. Cibula
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been mailed this 21th day of February 2006, to the following:

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State of Florida

Public Service Commission

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-M-E-M-O-R-A-N-D-U-M-

DATE: February 17, 2006

TO: Director, Division of the Commission Clerk & Administrative Services (Bayó)

FROM: Division of Competitive Markets & Enforcement (Salak)
Office of the General Counsel (Teitzman, Wiggins)

RE: Docket No. 041269-TP – Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.

AGENDA: 02/28/06 – Regular Agenda – Posthearing Procedural Decision – Parties May Participate

COMMISSIONERS ASSIGNED: Edgar, Deason, Arriaga

PREHEARING OFFICER: Edgar

CRITICAL DATES: None

SPECIAL INSTRUCTIONS: None

FILE NAME AND LOCATION: S:\PSC\CMP\WP\041269.RCM.DOC

Case Background

On August 21, 2003, the FCC released its Triennial Review Order (TRO), which contained revised unbundling rules and responded to the D.C. Circuit Court of Appeals' remand decision in USTA I.

On March 2, 2004, the D.C. Circuit Court of Appeals released its decision in USTA II, which vacated and remanded certain provisions of the TRO. In particular, the D.C. Circuit held that the FCC's delegation of authority to state commissions to make impairment findings was unlawful, and further found that the national findings of impairment for mass market switching and high-capacity transport were improper.

The FCC released an Order and Notice (Interim Order) on August 20, 2004, requiring ILECs to continue providing unbundled access to mass market local circuit switching, high capacity loops, and dedicated transport until the earlier of the effective date of final FCC unbundling rules or six months after publication of the Interim Order in the Federal Register. On February 4, 2005, the FCC released the Triennial Review Remand Order (TRRO), wherein the FCC's final unbundling rules were adopted with an effective date of March 11, 2005.

In response to the decisions handed down in USTA II and the FCC's Orders, BellSouth Telecommunications, Inc. (BellSouth) filed on November 1, 2004, its Petition to establish a generic docket to consider amendments to interconnection agreements resulting from changes of law. Specifically, BellSouth asked that the Commission determine what changes are required in existing, approved interconnection agreements between BellSouth and CLECs in Florida as a result of changes in law. Pursuant to Order No. PSC-05-0736-PCO-TP, Order Establishing Procedure, issued on July 11, 2005, 31 issues were identified.

On May 5, 2005, the Commission issued the No-New-Adds Order, finding that the TRRO is specific, as is the revised FCC rule, that CLECs are prohibited from adding new local switching as a UNE, effective March 11, 2005.

On July 15, 2005, BellSouth filed a Motion for Summary Final Order or, in the alternative, Motion for Declaratory Ruling. On July 22, 2005, CompSouth responded to the Motion and filed a Cross Motion for Summary Final Order or Declaratory Ruling.

On August 22, 2005, Supra Telecommunications and Information Systems, Inc. filed its Emergency Motion to Require BellSouth to Effectuate Orders for Supra's Embedded Customer Base. On November 8, 2005, the Commission issued its Embedded Base Order, which denied Supra's motion and found that the TRO prohibits CLECs from adding any new local switching UNE arrangements.

On September 29, 2005, parties filed prehearing statements. The administrative hearing was conducted on November 2-4, 2005. At the commencement of the administrative hearing, the Commission denied BellSouth's Motion for Summary Final Order or, in the alternative, Motion for Declaratory Ruling and CompSouth's Cross-Motion or Declaratory Ruling. Post-hearing briefs were filed on November 30, 2005.

On January 26, 2006, staff filed its recommendation addressing the remaining unresolved issues. At the February 7, 2006 Agenda Conference, the Commission considered and approved staff's recommendations on all remaining issues with exception of issue 13 upon which staff was denied. Parties are currently scheduled to file their signed interconnection agreements and amendments on February 27, 2006, for Commission approval.

Subsequent to the Commission's consideration of staff's recommendation at the February 7, 2006 Agenda Conference, the Inspector General completed an investigation into alleged misconduct by a staff member, Ms. Doris Moss, who was assigned to this docket. The Inspector General concluded that Ms. Moss had sent, under fictitious names, unauthorized e-mail communications to Commissioners and BellSouth which constituted violations of Commission

policy and State and Commission rules including conduct unbecoming a state employee (under Rule 60L-36.005(3)(f), F.A.C.) and improper communication between a Commission employee and a party (under Rule 25-22.033, F.A.C.) Ms. Moss' employment was promptly terminated following conclusion of the investigation.

On February 14, 2006, the Chairman's office received a letter from Covad Communications Company (Covad) requesting that the Commission, *sua sponte*, withdraw all portions of the staff recommendation in this docket that were the responsibility of Doris Moss, as well as those she discussed in her e-mails, assign new staff to those issues, and direct such staff to prepare an independent recommendation for the Commission's de novo consideration to ensure fair and impartial consideration of the affected issues. The affected issues are 5, 13, 16-18, and 22(b).

On February 16, 2006, the Chairman's office received a letter from BellSouth in response to Covad's letter and request. BellSouth states in its letter that although it does not believe reconsideration of the affected issues is necessary to ensure fairness and impartiality to the parties, BellSouth has no objection to *sua sponte* reconsideration of the affected issues. BellSouth further requests that the Commission neither withdraw or suspend its rulings on the issues while additional review is being conducted.

This recommendation addresses the appropriate action for the Commission to take in light of the identified employee misconduct.

Discussion of Issues

Issue 1: Should the Commission, on its own motion, vacate its decision on Issues 5, 13, 16-18, and 22(b), and direct staff to assign new staff members to review the existing record and prepare a new recommendation on those issues for the Commission's de novo consideration?

Recommendation: Yes. Staff recommends, in an abundance of caution and to promote public confidence in the impartiality of its consideration of issues 5, 13, 16-18, and 22(b), that the Commission should vacate its decision on Issues 5, 13, 16-18, and 22(b), and direct that new staff members be assigned to review the existing record and prepare a new recommendation on these issues for the Commission's de novo consideration. **(TEITZMAN)**

Staff Analysis:

The Commission Code of Ethics requires that, consistent with their role as public servants of the State of Florida, Commissioners and Staff of the Commission shall aspire to "provide fair and impartial analyses, recommendations, and decisions regarding all Commission matters." The Code of Ethics also clearly identifies that its purpose is "to communicate to the public that the Commissioners and Staff of the Florida Public Service Commission are dedicated to the highest standards of professional integrity and conduct and that, individually and collectively, we are fair and honest with all parties in all Commission-related business and professional activities."

Staff believes that the conduct of Ms. Moss has created a perception of bias and raises reasonable concerns regarding the impartiality of her analyses and recommendations addressing Issues 5 and 16-18. Additionally, her actions raise concern regarding the handling of Issues 13 and 22(b) on which she improperly communicated with a party. Staff believes the perception of bias in this case contravenes the purpose of the Commission Code of Ethics and that the Commission should take aggressive action to ameliorate these concerns.

Accordingly, staff recommends, in an abundance of caution and to promote public confidence in the impartiality of its consideration of issues 5, 13, 16-18, and 22(b), that the Commission should vacate its decision on Issues 5, 13, 16-18, and 22(b), and direct that new staff members be assigned to review the record and prepare a new recommendation on these issues for the Commission's de novo consideration.

Issue 2: Should the Commission issue a Final Order on the non-vacated issues?

Recommendation: Yes. If the Commission approves staff's recommendation in Issue 1, the Commission should direct that a Final Order on the non-vacated issues be issued immediately. In light of the March 11, 2006 deadline, staff recommends further that the Commission require the filing of interconnection agreements and amendments compliant with the Commission's decisions on the non-vacated issues or the result of negotiation by March 2, 2006, for approval by the Commission.

If the Commission denies staff's recommendation on Issue 1, the Commission should direct that a Final Order on all issues be issued immediately and should require the filing of interconnection agreements and amendments compliant with the Commission's decisions or the result of negotiation by March 2, 2006, for approval by the Commission. **(TEITZMAN)**

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, the Commission should direct that a Final Order on the non-vacated issues be issued immediately. In light of the March 11, 2006 deadline, staff recommends further that the Commission require the filing of interconnection agreements and amendments compliant with the Commission's decisions on the non-vacated issues or the result of negotiation by March 2, 2006, for approval by the Commission.

If the Commission denies staff's recommendation on Issue 1, the Commission should direct that a Final Order on all issues be issued immediately and should require the filing of interconnection agreements and amendments compliant with the Commission's decisions or the result of negotiation by March 2, 2006, for approval by the Commission.

Issue 3: Should this docket be closed?

Recommendation: No. If the Commission approves staff's recommendation in Issue 1, this docket should remain open pending the Commission's consideration of Issues 5, 13, 16-18, and 22(b). Upon resolution of these issues, the Commission should set forth a time frame for the submission of signed amendments addressing these issues for approval by the Commission. **(TEITZMAN)**

Staff Analysis: If the Commission approves staff's recommendation in Issue 1, this docket should remain open pending the Commission's consideration of Issues 5, 13, 16-18, and 22(b). Upon resolution of these issues, the Commission should set forth a time frame for the submission of signed amendments addressing these issues for approval by the Commission.