

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. P-55, SUB 1549

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Proceeding to Consider Amendments)	
to Interconnection Agreements Between)	ORDER DENYING MOTION
BellSouth Telecommunications, Inc.)	FOR STAY
and Competing Local Providers Due to)	
Changes of Law)	

BEFORE: Commissioner James Y. Kerr, II, Presiding, and Commissioners Sam J. Ervin, IV, Lorinzo L. Joyner, and Howard N. Lee

BY THE COMMISSION: On March 1, 2006, the Commission issued an Order in this docket requiring BellSouth Telecommunications, Inc. (BellSouth) and all competing local providers (CLPs) in North Carolina to execute and file amendments to their interconnection agreements (ICAs) on or before March 10, 2006 based on changes of law. The amendments were to incorporate language that was either approved in the Order or consistent with its conclusions, provided that the parties may agree to language that departs from the Order. In that Order, however, the Commission concluded that it would not rule on Issue No. 16 as to whether BellSouth is obligated pursuant to Section 271 of Telecommunications Act of 1996 (the Act) and the Federal Communications Commission (FCC) Orders to provide line sharing to new customers after October 1, 2004. BellSouth had argued that Section 271 did not obligate it to provide line sharing. Specifically, the Commission concluded:

The Commission concludes that, since it has decided in Finding of Fact No. 8 that it does not have the authority to require BellSouth to include Section 271 elements in ICAs entered into pursuant to Section 252, nor have the authority to set rates for such elements, it will not rule on whether BellSouth is obligated pursuant to the Act and FCC Orders to provide line sharing to new customers after October 1, 2004, under its Section 271 obligations.

COVAD MOTION FOR STAY

On March 10, 2006 DIECA Communications, Inc. d/b/a Covad Communications Company (Covad) filed a Motion for Partial Stay of Order Concerning Changes of Law with respect to line sharing while Covad petitions the FCC regarding this issue. Covad stated that it is preparing an informal complaint, which will be converted into a Section 271(d)(6) complaint shortly thereafter, to be filed with the FCC to resolve the

merits of this matter. Under Section 271(d)(6)(B), the FCC must act with 90 days of the filing.

Covad stated that the Commission has the authority to grant motions to stay and, generally speaking, the Commission has stayed prior orders of the Commission upon the showing of good cause. Here Covad asks for a stay to preserve the status quo pending resolution of this issue for approximately 90 days while the issue is pending before the FCC.

Covad noted that BellSouth has made clear that it will cease taking line sharing orders from Covad. Absent a stay, Covad argued that it would suffer irreparable harm, since it will be unable to provision new digital subscriber line (DSL) orders in North Carolina. Covad processed in 2005 an average of 163 line sharing orders per month in North Carolina. Prospective customers will seek other providers, and Covad's relationships with wholesale partners will be terminated or impaired. An imminent threat of lost customers, lost goodwill, and lost business reputation constitute irreparable harm.

Covad further argued that it is also likely to succeed on the merits of its petition to the FCC. It argued that it is clear that BellSouth is obligated to provide line sharing under the Checklist Item No. 4 of Section 271 of the Act. Other state commissions, including Georgia, have reviewed this issue and have declared line sharing to be a Section 271 element.

PUBLIC STAFF COMMENTS

On March 10, 2006, the Public Staff also filed Comments in support of Covad's Motion for Partial Stay. The Public Staff agreed with Covad's arguments noted above and emphasized that Covad's request for a temporary and partial stay would not be unduly harmful to either BellSouth or the Commission.

BELLSOUTH RESPONSE

On March 14, 2006, BellSouth filed its Response in Opposition to Covad's Motion for Partial Stay. Should the Commission elect to grant a partial stay—which it should not—it should require Covad as a condition of obtaining that stay to submit to BellSouth a payment of \$76,914.41 as security for its Motion.

BellSouth represented that Covad has asked the Commission to preserve the status quo, which would require BellSouth to provide Covad with line sharing as a Section 251 unbundled network element (UNE). Regardless of whether Covad actually files a petition at the FCC, the Commission has properly decided that delisted Section 251 UNEs must be removed from ICAs and that it has no authority to require BellSouth to include Section 271 elements in ICAs. Essentially, Covad is asking the Commission to permit it to continue to disregard the specific transition plan that the FCC adopted years ago to transition CLPs such as Covad away from line sharing. Under the

FCC transition plan, Covad should not have been able to obtain new line sharing arrangements as of October 2004—18 months ago. Moreover, Covad is wrong that, absent a stay, it cannot provision new DSL orders. It can do so, but not at the currently very low rate.

As background, BellSouth reviewed the regulatory history of line sharing. It noted, first, that the FCC created line sharing in 1999, three years after the Act, when the FCC authorized unbundled access to the “high frequency portion of the loop” (HFPL), the portion of the loop spectrum used to provide high-speed or broadband DSL services, on the theory that this would permit competing carriers to provide DSL-based services. The FCC’s original order on line sharing was appealed to the D.C. Circuit, where it was vacated and remanded. In 2003, the FCC addressed line sharing on remand and refused to impose line sharing under Section 251(c)(3), stating that competitors were not impaired without it, that its marginal benefits were outweighed by its costs, and that it actually discouraged competition and innovation. The FCC then adopted a transitional plan to enable competitors to modify their business practices and operations on a going-forward basis, though it preserved existing line sharing arrangements entered into before October 2, 2003 (the effective date of the *Triennial Review Order*) at existing rates “until the next biennial review” (which has yet to occur). The FCC also allowed for new line sharing arrangements for one additional year—until October 2, 2004—at 25% of the cost of purchasing stand-alone copper loops. Thus, after October 2, 2004, ILECs could deny competitors access to new line-sharing arrangements. Moreover, after October 2, 2006, the FCC ordered that the rate for line sharing arrangements entered into between October 2, 2003, and October 2, 2004, would rise incrementally until October 2006 to the full cost of the loop. Covad unsuccessfully sought to stay the FCC ruling, but the D.C. Circuit affirmed the FCC’s decision not to re-impose line sharing.

With respect to Section 271, BellSouth noted that the FCC alone has approval and enforcement authority under Section 271. To show compliance, the Bell Operating Company (BOC) must satisfy the “competitive checklist” set out in Section 271. This list includes “local loop transmission from the central office to the customer’s premises, unbundled from switching and other services.” The Section 271 checklist existed before the FCC created the now vacated line sharing UNE. It requires BOCs to provide local loops—not line sharing.

In North Carolina, Covad filed a Petition with the Commission in Docket No. P-775, Sub 8, seeking action to preserve line sharing, but by order dated October 29, 2004, the Commission declined to answer the question and left unchanged the terms of the parties’ 2001 interconnection agreement. In its March 1, 2006, Order in Docket No. P-55, Sub 1549, the Commission held, among other things, that the Commission has no authority to require BellSouth to include Section 271 elements in Section 251/252 ICAs, that Covad and other CLPs must delete the delisted Section 251 UNEs from interconnection agreements, and that ICAs should only contain language for line sharing transitioning.

BellSouth argued that Covad's Motion for Stay suffers from the fatal flaw that line sharing provided as a UNE under the terms of Section 251/252 is contrary to federal law. In addition, the Commission has properly recognized the limitations on its Section 271 authority, and has no role in implementing or enforcing that obligation.

Additionally, Covad's contentions that it is likely to succeed on the merits in a yet-to-be-filed FCC petition and that it will suffer irreparable harm if a stay is not granted are in error. Covad's argument that line sharing is a Section 271 requirement is without merit. Even if Covad were correct that line sharing were required under Section 271, the FCC would have imposed line sharing requirements in Section 271 orders before it required line sharing as a Section 271 UNE, but it did not do so. Indeed, in the 1999 *New York 271 Order*, the FCC specifically refused to require the BOC applicant to establish that it provided access to line sharing, the *Line Sharing Order* not yet being in effect at that time. As for state law decisions, BellSouth observed that Covad had selectively cited decision from some states (e.g., Georgia) favorable to it, while omitting other states that have rejected its claims (e.g., South Carolina). The result that Covad seeks is nothing less than the subversion of the FCC's transition mechanism.

Lastly, BellSouth noted that it is the entity that will suffer if a partial stay is granted. It will continue to be forced to provide access to line sharing at "nearly confiscatory" total-element, long-run incremental cost (TELRIC) rates. It will lose customers and be irreparably harmed as a result.

COVAD'S REPLY

On March 20, 2006, Covad filed a Reply to BellSouth's Response. Covad restated its view that without a partial stay to maintain the status quo, it would suffer irreparable harm. Covad also pointed out that, in the event that the FCC resolves this matter in BellSouth's favor, BellSouth can recover fees that it asserts are owned as a result of its continuing provision of line sharing and thus will suffer no harm if the Commission grants the partial stay. BellSouth's request for security as a condition for Covad obtaining the stay should also be denied where, as here, the Public Staff has intervened on behalf of the using and consuming public to maintain the status quo pending a hearing on the merits. See, e.g., *In the Matter of US LEC of North Carolina, Inc. v. BellSouth Telecommunications, Inc.*, Docket No. P-55, Sub 1480, at p. 9 (December 23, 2003).

WHEREUPON, the Commission reaches the following

CONCLUSIONS

After careful consideration, the Commission concludes that good cause exists to deny Covad's Motion for Stay.

Even a cursory examination of the rather convoluted history of the line sharing issue discloses that line sharing is no longer a Section 251 UNE, except insofar as the

provisions of the FCC's transitional plan apply to existing customers. Line sharing's dawn as a Section 251 UNE was belated, its day in the sun short, but its twilight has been long. Covad is hoping for its revival as a Section 271 UNE. Some state commissions have agreed with Covad on this; others have not. This Commission, when first presented with the issue in 2004, demurred and hoped for FCC resolution, which has unfortunately not yet occurred. The Commission has most lately said in its March 1, 2006, Order Concerning Changes of Law in this docket that Section 271 elements do not belong in ICAs, that the Commission will not set the rates for such elements, that the primary responsibility for enforcement of Section 271 obligations rests with the FCC, and that the Commission will decline to rule on whether BellSouth is required to provide line sharing to new customers after October 1, 2004. The Commission is pleased that Covad has now indicated it will take the matter up with the FCC under a ninety-day process. Perhaps with the matter squarely before it, the FCC will make a definitive ruling.¹

The question at hand, of course, is whether this Commission should issue a stay. Covad makes two main arguments. First, it says a stay is necessary to "preserve the status quo" for it would otherwise suffer irreparable harm; and, second, it says that it is likely to prevail at the FCC. These propositions are open to doubt.

As noted above, the applicable status quo is one in which line sharing is no longer a Section 251 UNE, its interim availability is tightly constrained under the transitional plan, and neither this Commission nor the FCC has pronounced it to be a Section 271 UNE. As such, Covad cannot be said to be suffering irreparable harm in not receiving something that it is legally no longer entitled to receive. As to the likelihood of prevailing at the FCC, the Commission is skeptical. While understandably convinced of the merits of its case, Covad has not shown a probability of prevailing on the merits before the FCC.

Finally, the Commission is disturbed both by the lateness of Covad's apparent intent to file under Section 271(d)(6)(B) with the FCC and Covad's filing for a stay here. The Commission issued its Order Concerning Line Sharing, where it declined to rule whether BellSouth was obligated to provide line sharing under Section 271, on October 24, 2004—*well over a year ago*. If Covad were confident in its belief that line sharing was a Section 271 element and that BellSouth's failure to provide line sharing constituted one of the "failures of Bell operating companies to meet conditions required for approval" of Section 271 authority, then presumably it could have petitioned the FCC much earlier. In any event, the March 10, 2006, deadline for wrapping up the change of law amendments has been well-advertised. The Commission issued its Order Concerning Changes of Law on March 1, 2006, yet Covad waited until *March 10, 2006*, the date when conforming amendments were originally due, to file its Motion for Stay.

¹ Or perhaps not. Section 271(d)(6)(B) states only that the FCC, unless the parties otherwise agree, "shall *act on* such complaint within 90 days." (emphasis added) This is no guarantee of a definitive ruling.

For all the above reasons, the Commission declines to issue a stay in this Order, but applauds Covad's apparent intent even at this late date to seek a definitive ruling from the FCC.

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 23rd day of March, 2006.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in cursive script that reads "Patricia Swenson".

Patricia Swenson, Deputy Clerk

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