COMMONWEALTH OF KENTUCKY

BEFORE THE KENTUCKY PUBLIC SERVICE COMMISSION

In the Matter of:

PETITION OF BELLSOUTH	**)**	
TELECOMMUNICATIONS, INC. TO ESTABLISH	**)**	
GENERIC DOCKET TO CONSIDER AMENDMENTS	**)**	**Case No. 2004-00427**
TO INTERCONNECTION AGREEMENTS	**)**	
RESULTING FROM CHANGES OF LAW	**)**	

COVAD'S REPLY TO BELLSOUTH

DIECA Communications, Inc. d/b/a Covad Communications Company ("Covad"), hereby replies to BellSouth's August 10, 2005 Response in Opposition to the Joint CLECs' Cross-Motion for Summary Judgment. Covad specifically replies herein to that portion of BellSouth's Response regarding Issue 17 (line sharing).[1]

As the Joint CLECs made clear in responding to BellSouth's Motion for Summary Judgment, the Commission already has the line sharing issue before it in Case No. 2004-00259, concerning an arbitration of an amendment to a specific interconnection agreement between Covad and BellSouth. The issue has been fully briefed by the parties and is now held in abeyance by the Commission pending "appropriate clarification and guidance from the FCC." Order on Reconsideration at 2 (November 30, 2004). In light of that proceeding, Covad believes no binding decision on this issue should be rendered in *this* case. Nevertheless, since BellSouth insists on arguing about line sharing in this generic docket, Covad replies as follows.

[1] Covad will participate in a separate reply to BellSouth's Response regarding Issue 8.

This issue, as the briefs make clear, is one which hinges on Section 271. As a consequence, the only question before the Commission is a ***historical*** one: Was line sharing in checklist item 4 when BellSouth obtained 271 authority or not? The answer is clear. ***Every*** FCC order which addresses the issue states that line sharing is required under Item 4. It is equally clear that the FCC's decisions regarding what is, or is not, a UNE under Section 251(c)(3) does not affect BellSouth's UNE obligations established in Section 271. In its Triennial Review Order[2] and before the *USTA II*[3] court, the Federal Communications Commission ("FCC") made it clear that its *TRO* UNE determinations under 251(c)(3) elements did not change RBOC Section 271 access obligations with regard to checklist items 4, 5, 6, and 10. So, if line sharing was a checklist item 4 element, it remains one today despite the Section 251 determinations in the *TRO*, and consequently, remains a 271 obligation for BellSouth.

In the *TRO*, the FCC explained:

> Checklist item 2 requires compliance with the general unbundling obligations of section 251(c)(3) and of section 251(d)(2) which cross-references section 251(c)(3). Checklist items 4, 5, 6, and 10 separately impose access requirements regarding loop, transport, switching, and signaling without mentioning section 251. **Had Congress intended to have these later checklist items subject to section 251, it would have explicitly done so as it did in checklist item 2. Moreover, were we to conclude otherwise, we would necessarily render checklist items 4, 5, 6, and 10 entirely redundant and duplicative of checklist item 2 and thus violate one of the enduring tenets of statutory construction: to give effect, if possible, to every clause and work of a statute.** [4]

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[2] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking (FCC-03-36). 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., Federal Communications Commission ("FCC") 03-36 (rel. Aug. 21, 2003), ("Triennial Review Order" or "TRO").

[3] United States Telecom Association v. FCC, 359 F.3d 554 (D.C.Cir. 2004) ("USTA II").

[4] *Id.* at ¶ 654 (emphasis added) (internal footnotes omitted).

It was to explain the redundancy of the overlapping network access requirements in checklist item 2 and checklist items 4-6 and 10 that the FCC engaged in the *TRO* analysis at paragraphs 649-667.[5] The FCC's interpretation of Section 271(c)(2)(B) *reconciles* the overlapping access requirement contained in checklist item 2 with the same access requirements contained in checklist items 4-6 and 10:

> 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**.[6]

In short, although the *price* for a "de-listed" UNE may change, if that UNE falls under Section 271(c)(2)(B)(iv)-(vi) or (x) (checklist items 4-6 or 10), the obligation to provide non-discriminatory *access* remains.[7]

In *USTA II*, the D.C. Circuit Court of Appeals affirmed the FCC's holding:

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[5] *Id.* at ¶ 651 ("In the *Triennial Review NPRM*, the Commission sought comment on how the access requirements specified in the section 271 competitive checklist relate to the unbundling requirements derived from sections 251(c)(3) and 251(d)(2).").

[6] *Id.* at ¶ 659 (emphasis added).

[7] *Id.* at ¶ 658 ("Checklist items 4 through 6 and 10 do not require us to impose unbundling pursuant to section 251(d)(2). Rather, the checklist *independently imposes unbundling obligations*, but simply does so with less rigid accompanying conditions.") (emphasis added); *see also, TRO* ¶ 653 ("the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling *regardless of any unbundling analysis under section 251*") (emphasis added); *see also, TRO* ¶ 654.

> The FCC reasonably concluded that checklist items ***four***, five, six and ten imposed unbundling requirements for those elements ***independent*** of the unbundling requirements imposed by §§ **251**-52. In other words, even in the absence of impairment, BOCs must unbundled local loops, local transport, local switching, and call-related databases in order to enter the interLATA market. Order ¶¶ 653-55. [8]

It is important to note that because checklist items 4, 5, 6, and 10 are *independent of Section 251* determinations, those 251 determinations may *not* remove elements from checklist items 4, 5, 6 or 10. So the simple historical question is: ***Was*** line sharing in checklist item 4? If it was, then it remains in checklist item 4.[9]

The answer to that question is equally simple: In numerous FCC Orders, the FCC expressly stated that line sharing is a checklist item 4 element. A few examples include:

The *Massachusetts 271 Order*:

> On December 9, 1999 the Commission released the *Line Sharing Order* that, among other things, defined the high-frequency portion of local loops as a UNE that must be provided to requesting carriers on a nondiscriminatory basis pursuant to section 251c(3) of the Act and, thus, checklist items 2 **and 4** of section 271. [10]

The *Florida and **Tennessee** 271 Order*:

> BellSouth's provisioning of the **line shared loops** satisfies **checklist item 4**.[11]

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[8] *USTA II* at 588 (emphasis added).

[9] *Id.*; *TRO* ¶¶ 658-59.

[10] *In the Matter of Application of Verizon New England, Inc. et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, Memorandum Opinion and Order (April 16, 2001) at ¶ 164 (emphasis added). In reply to BellSouth's point that the FCC did not require RBOCs to provide line sharing in a December 1999 and June 2000 set of 271 grants, it should be noted that line sharing was not ordered until after those applications were pending and that the FCC specifically addressed the provision of line sharing in those orders.

[11] *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, Memorandum Opinion and Order, WC Docket No. 02-307, FCC 02-331, Released December 19, 2002 at ¶ 144 (emphasis added).

The *Georgia 271 Order*:

> We find that, given BellSouth's generally acceptable performance for all other categories of **line-shared loops**, BellSouth's performance is in compliance with **checklist item 4**. [12]

If BellSouth had a **single quotation** from the FCC saying that line sharing was not a checklist item 4 element or that line sharing was not a Section 271 obligation, BellSouth would have provided such a quote to the Commission. Yet they have not. Like the debate between Chairman Powell and Commissioner Martin over whether the FCC granted forbearance as to line sharing under 271, the above quotations make no sense unless line sharing fell under section 271 checklist item 4.[13]

In the world BellSouth attempts to construct in its Response, line sharing **never was** a checklist item 4 element. However, that position renders numerous quotations from the FCC nonsensical. If the FCC did not mean what it said in the above quotations, what did it mean? How does an RBOC "satisfy" or "comply" with a checklist item, by providing an element which **never was** under that checklist number? BellSouth's position just does not match-up with numerous statements from the FCC. BellSouth's effort to remove line sharing from the checklist by arguing that it never really had to offer line sharing because offering the whole loop was sufficient to fulfill its obligations under the checklist is laughable to any party to the 271 proceedings. BellSouth had to offer both line sharing and whole loops in order to fulfill its

[12] *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, Memorandum Opinion and Order, WC Docket No. 02-35, FCC 02-147, Released May 15, 2002, ¶ 239 (emphasis added).

[13] As discussed in detail in Covad's November 10, 2004 Petition for Reconsideration filed in Case No. 2004-00259, the FCC's "Forbearance Order" and separate statements released by Chairman Powell and Commissioner Martin make clear that both these FCC Commissioners believe that line sharing is a Section 271 obligation. These statements persuaded the Commission to grant reconsideration to Covad.

obligations under checklist item 4 and those obligations did not change with the 251(c)(3) determinations contained in the *TRO*.

Most importantly, the outcome of this question is key to a long-term commercial agreement between BellSouth and Covad for the provision of line sharing, which is the way Covad has addressed this question with every other Regional Bell Operating Company in the nation. In refusing reasonable commercial terms, BellSouth holds the dubious distinction of remaining the lone holdout in the nation. If Covad could come to reasonable long-term commercial agreements with SBC, Qwest and Verizon, there is no reason BellSouth cannot do the same. Yet this issue – will this Commission and others in the South hold BellSouth to its 271 line sharing obligation – remains the primary impediment to obtaining reasonable terms from BellSouth.

If BellSouth can sit on its hands and put Covad is an untenable position at the negotiating table, or avoid its obligations altogether, then BellSouth will have abused its monopoly control over copper loops to the determent of competition in Kentucky, and in violation of the promises it made to Congress and this Commission during the 271 process. As Covad reminded the Commission nearly two years ago in Case No. 2003-00373, a formal complaint against BellSouth related to line sharing, it was the Kentucky Commission which had noted in its own 271 review that BellSouth's line sharing policy might raise issues of competitive discrimination in the future.[14] BellSouth's recalcitrance today is but an example of what the Commission feared might have "the effect of chilling local competition for advanced services."[15] It is, therefore, imperative that the Commission grant the CLECs' Cross-motion for Summary Judgment as to

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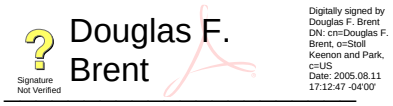
[14] *Investigation Concerning the Propriety of Provision of InterLATA Services by BellSouth Telecommunications, Inc. Pursuant to the Telecommunications Act of 1996,* Case No. 2001-00105, slip op. at 25 (April 26, 2002).

[15] *Id*., p. 13.

this issue and expressly declare that BellSouth has a Section 271 obligation to provide line sharing.

Respectfully submitted,



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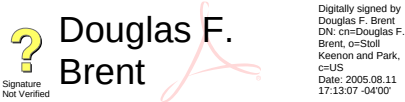
August 11, 2005

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Response to Bellsouth's Motion For Summary Judgment has been filed electronically as permitted by the procedural order governing Case No. 2004-00427 this 11th day of August, 2005.



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