STOLL·KEENON·OGDEN
PLLC

2000 PNC Plaza
500 West Jefferson
Louisville, KY 40202
(502) 333-6000
Fax: (502) 333-6099
www.skofirm.com

DOUGLAS F. BRENT
(502) 568-5734
douglas.brent@skofirm.com

September 21, 2006

ELECTRONIC FILING

Ms. Elizabeth O'Donnell
Executive Director
Kentucky Public Service Commission
P.O. Box 615
Frankfort, KY 40602

Re: Case No. 2004-00427 –BellSouth's Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law

Dear Ms. O'Donnell,

On behalf of Covad, I am writing to briefly respond to BellSouth's recent filing of a district court decision arising out of an appeal in Florida by Covad. The Commission is free to review both the Maine decision and the Florida decision for whatever value the Commission wishes to assign them. However, it is important that the Commission note one important fact about the Florida district court's ruling: the Florida district court actually disagreed with the Florida Public Service Commission's reasoning. Had the district court applied the correct standard of review, it would have reversed the Florida Public Service Commission. The district court also erred by going outside the Florida PSC's reasoning to affirm.

Specifically, the Florida PSC's decision was that line sharing was a checklist item 4 element, but ceased to be -- or "fell-out" of checklist item 4 -- as a result of its being vacated by the D.C. Circuit and not reinstated by the FCC as a section 251 element in the *TRO*.[1] Covad argued to the district court that the FCC made it very plain that if line sharing was a checklist item 4 element, then it remained one despite the FCC's 251 analysis in the *TRO*. The Florida district court agreed that this analysis was correct, but affirmed on the basis of the court's

[1] *FL PSC Order* at pp. 24 ("line sharing was considered a § 271 checklist item 4 element by the FCC at the time it issued the BellSouth Long Distance Order."). Relevant portions of the Florida PSC Order are attached hereto.

opinion -- at odds with the Florida PSC's opinion -- that line sharing never was a checklist item 4 element.[2]

There are two fundamental problems with the court's decision: 1) a Florida district court is not free to overrule the orders of the FCC with its own opinions; and 2) the district court is not free to affirm the Florida PSC for reasons other than those provided by the Florida PSC.

The Florida district court concluded that line sharing never was a checklist item 4 element. However, the FCC had clearly treated line sharing as a checklist item 4 element – and did so repeatedly. Specifically, in granting BellSouth §271 authority to sell long distance services in Florida, the FCC determined that "BellSouth's provisioning of the line shared loops satisfies checklist item 4."[3] It is impossible to explain how a Bell Operating Company can "satisfy" a checklist item by providing elements that never were in the checklist item. Indeed, as explained by Covad in the cases here in Kentucky (and in briefing to the Florida district court), the FCC repeatedly placed line sharing in checklist item 4 and the FCC expressly explains that the provision of line sharing is a checklist item 4 obligation in appendices to its §271 orders.[4] The Maine district court relied on these express statements by the FCC in ruling that line sharing is a checklist item 4 element and the Commission should do so as well.[5]

A federal district court lacks the subject matter jurisdiction to overrule section 271 obligations expressly set-forth in numerous FCC orders years after the fact -- whether the district court thinks the FCC's orders are consistent with the Act or the district court thinks the Act should be implemented differently.[6] The district court's decision is, accordingly, incorrect both as a matter of law and as a matter of procedure.

---

[2] *DIECA Communications, Inc. v. Florida Public Service Commission*, et al., Case No. 4:06cv72RH/WCS, at page 18, fn 14. (The Florida PSC did state that line sharing was a checklist item 4 element, so this agreement resolves the case in Covad's favor).

[3] *BellSouth FL/TN 271 Order* ¶144 (attached as Exhibit 7 to Covad's Brief filed September 3, 2004 in Kentucky PSC Case No. 2004-00259).

[4] Among the dozens of examples cited in Covad's brief: *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*, Brief in Support of Application by Bellsouth for Provision of In-Region, InterLATA Services in Florida and Tennessee, WC 02-307, filed September 20, 2002 at pp. 96-99; *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*, Brief in Support of Application by Bellsouth 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; *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*, Brief in Support of Application by Bellsouth for Provision of In-Region, InterLATA Services in Georgia and Louisiana, CC 01-277, filed October 2, 2001 at pp. 112-114.

[5] *Verizon New England, Inc. v. Maine PUC*, No. 05-53-B-C, -- F.3d --, 2006 WL 2007655 (D. Me. Jul. 18, 2006) (*see* letter from Douglas F. Brent to Elizabeth O'Donnell filed July 25, 2006 in Case No. 2004-00259)

[6] *See* 47 U.S.C. §402(a) (providing for judicial review of FCC orders by a court of appeals rather than a district court); 28 U.S.C. § 2342 et seq. (the Hobbs Act).

Additionally, the Florida district court agreed with Covad that if line sharing is a checklist item 4 element, then it remains one today.[7] The district court characterized this as a "straw man", but it is actually the central question in the appeal. The Florida PSC concluded that line sharing was a checklist item 4 element.[8] The Florida PSC then went on to incorrectly reason that the section 251 analysis by the FCC in the *TRO* caused line sharing to "fall-out" of checklist item 4. That theory is directly contrary to the *TRO*, and the district court agreed.[9]

The Florida district court affirmed the Florida PSC on a different basis – that line sharing never was a checklist item 4 element. However, "a reviewing court may not affirm an agency decision on grounds not addressed by the agency . . ." *Florida Department of Labor and Employment Security v. United States Department of Labor*, 893 F.2d 1319 (11th Cir. 1990)(emphasis added). Indeed, an "order of an agency can only be defended on the grounds cited by the agency . . ." *BellSouth Telecommunications, Inc. v. MCIMetro Access Transmission Services, LLC*, 425 F.3d 964, 970 (11th Cir. 2005). Accordingly, the Florida district court's decision exceeded the scope of its available review. Covad will be appealing these manifest errors, among others, to the 11th Circuit Court of Appeals.

In sum, the Florida district court's decision is dead wrong. Line sharing clearly is a checklist item 4 element and BellSouth remains obligated to provide access to it at just and reasonable prices.

I certify that this filing was uploaded electronically today to the Commission's web filing portal, and that the electronic version is a true copy of the document filed in paper form. Please indicate receipt of this filing by returning an electronic receipt.

Sincerely yours,

STOLL KEENON OGDEN, PLLC

Douglas F. Brent

attachment

LOU 105114/116480/448411.1

---

[7] *DIECA Communications, Inc. v. Florida Public Service Commission*, et al., Case No. 4:06cv72RH/WCS, at page 18, fn 14.

[8] *FL PSC Order* at pp. 24 ("line sharing was considered a § 271 checklist item 4 element by the FCC at the time it issues the BellSouth Long Distance Order.").

[9] *DIECA Communications, Inc. v. Florida Public Service Commission*, et al., Case No. 4:06cv72RH/WCS, at page 18, fn 14.

BEFORE THE PUBLIC SERVICE COMMISSION

In re: Petition to establish generic docket to consider amendments to interconnection agreements resulting from changes in law, by BellSouth Telecommunications, Inc.	DOCKET NO. 041269-TP ORDER NO. PSC-06-0299-FOF-TP ISSUED: April 17, 2006

The following Commissioners participated in the disposition of this matter:

LISA POLAK EDGAR, Chairman
J. TERRY DEASON
ISILIO ARRIAGA

SECOND ORDER ON GENERIC PROCEEDING

BY THE COMMISSION:

Table of Contents

Multiplexing

BellSouth witness Tipton asserts that the multiplexing equipment rate is associated with the higher bandwidth service. Although CompSouth proposed language indicating the multiplexing rate should be cost-based, no CLEC witness refuted BellSouth either through filed testimony or briefs. For this reason, the multiplexing rate should be determined as BellSouth proposes.

Decision

BellSouth is required to commingle or to allow commingling of a UNE or UNE combination with one or more facilities or services that a CLEC has obtained at wholesale from an ILEC pursuant to any method other than unbundling under §251(c)(3). However, this does not include offerings made available under §271. Also, BellSouth is not required to effectuate commingling with a third party's service or a CLEC-provided service. Finally, the multiplexing rate in a commingled circuit shall be based on the higher bandwidth circuit.

The language proposed by BellSouth best implements this decision and shall be adopted, as set forth in Appendix A.

ISSUE 16: PROVISION OF LINE SHARING TO NEW CLEC CUSTOMERS AFTER OCTOBER 1, 2004

Parties' Arguments

BellSouth argues that, ". . . the FCC has made clear in paragraphs 199, 260, 261, 262, 264, and 265 of the TRO that BellSouth is not obligated to provide new line sharing arrangements after October 1, 2004. . . ." In addition, BellSouth believes that, per the FCC's transition rules, all line sharing arrangements should terminate on October 2, 2006.

In addressing the Joint CLECs' position that line sharing is a §271(c)(2)(B)(iv) element, BellSouth argues that the particular requirement for checklist item 4 is that BOCs must offer ". . . local loop transmission, unbundled from local switching, and other services being provided over a single line." (47 U.S.C. §271(d)(2)(B)(iv)) The FCC has defined a local loop as "a 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 CFR 51.319(a)) However, in its Line Sharing Order, the FCC defined the HFPL "as the frequency range above the voiceband on a copper loop facility that is being used to carry analog circuit-switched voiceband transmissions." (Line Sharing Order Appendix B B-1) Thus, BellSouth argues in its brief, the HFPL is only part of the facility, not the entire "transmission path" required by checklist item 4.

In addition, BellSouth notes in its post hearing brief, "Even if line sharing could be construed to be a §271 network element, state commissions have no authority to require an ILEC to include §271 elements in a §252 interconnection agreement." [T]he CLECs' theory that line

sharing is still available as a §271 element would render irrelevant the FCC's carefully-calibrated transition plan to wean CLECs away from line sharing and to other means of accessing facilities ". . . that do not have the same anti-competitive effects that the FCC concluded are created by line sharing." BellSouth also claims, " [T]here is not a single mention of line sharing in Section 271." BellSouth also argues that, even if §271 did require line sharing, the FCC's Broadband 271 Forbearance Order would have removed any such obligation. Additionally, claims BellSouth, [C]ommission decisions in Tennessee, Massachusetts, Michigan, Rhode Island and Illinois support BellSouth's position.

The Joint CLECs contend that "line sharing was (and remains) a checklist item 4 element and BellSouth remains obligated to provide access to it at just and reasonable rates until the FCC grants forbearance from that obligation pursuant to 47 U.S.C. § 160. (EXH 3, p. 36) The Joint CLECs cite as evidence language from the FCC's Order granting BellSouth authority under 47 U.S.C. §271 to sell interLATA long distance telephone service in the State of Florida. (BellSouth Long Distance Order ¶144) The language cited appears in paragraph 144 of the Order and states, "BellSouth's provisioning of the line shared loops satisfies checklist item 4."

As noted previously, it is BellSouth's position that even if line sharing is a checklist item 4 component, the FCC's Broadband 271 Forbearance Order relieves it from an obligation to provide line sharing. In response to BellSouth's position, the Joint CLECs note that the Separate Statements of Commissioners Martin and Powell attached to that Order, while differing in perspective and intent, each indicate their belief that line sharing is a §271 unbundling obligation. Furthermore, the Joint CLECs note that the FCC did not grant forbearance for line sharing because the Broadband 271 Forbearance Order repeatedly lists the elements from which the FCC is forbearing and line sharing is not on the list.

Analysis

FCC Ends New Line Sharing Arrangements

In its TRO the FCC refused to reinstate the vacated line sharing rules. (TRO ¶199) However, because of its initial decision to unbundle the HFPL, the FCC determined that line sharing as an unbundled network element is to be grandfathered for those CLECs providing line sharing to customers as of October 1, 2003, (the effective date of the Order) until such time as the FCC concludes its next biennial review, which commenced in 2004. (TRO ¶264) In addition, the TRO also adopted a three-year transition plan for new line sharing arrangements of requesting carriers which provides that, during the first year of transition, CLECs may add new line sharing customers using the HFPL at 25 percent of the state-approved rates or the agreed upon rates in existing interconnection agreements. (TRO ¶264) In years two and three of the transition, the rate for the HFPL increases to 50 then 75 percent of the state-approved rates or the agreed upon rates in existing interconnection agreements and that no new HFPL arrangements may be added in. (TRO ¶265) Thus, as put forth by BellSouth's witness Fogle, as an unbundled network element, new line sharing arrangements ended as of October 2, 2004, the first day of the second year of the transition plan enumerated in the TRO. The Joint CLECs also acknowledge this circumstance.

Line Sharing As a "Checklist Item 4" Element

The Joint CLECs note that the FCC considered line sharing as a checklist item 4 element in its BellSouth Long Distance Order. The FCC has also included line sharing as a checklist item 4 component in its Orders approving BOC long distance entry for Verizon in Massachusetts and BellSouth in Georgia. The Joint CLECs allege that ". . . indeed, in every FCC order granting any BOC such authority – the FCC placed line sharing in checklist item 4."

The FCC's BellSouth Long Distance Order further supports the Joint CLECs' contention that line sharing was considered a checklist item 4 element. The Order contains an Appendix D, titled Statutory Requirements. Appendix D is an annotated history of the statutory requirements necessary for approval of a BOC petition to provide in region, interLATA long distance services. Here, under the heading "D. Checklist Item 4 – Unbundled Loops" of Appendix D, the FCC indicates that in order to comply with checklist item 4, "[a] BOC must also demonstrate that it provides nondiscriminatory access to unbundled loops. Specifically, the BOC must provide access to any functionality requested by a competing carrier unless it not technically feasible. . . ." (BellSouth Long Distance Order, Appendix D ¶49) In the following paragraph of the same section of Appendix D, the FCC notes that its Line Sharing Order "introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high frequency portion of the loop (HFPL)." (BellSouth Long Distance Order, Appendix D ¶50)

The FCC's inclusion of the line sharing discussion under the Section D. Checklist Item 4 – Unbundled Loops heading, as well as, the use of the term 'BOCs' in reference to line sharing obligations, offers further support that line sharing was considered a §271 checklist item 4 element by the FCC at the time it issued the BellSouth Long Distance Order. BellSouth has not provided evidence that refutes this conclusion.

Line Sharing a Current "Check List Item 4" Element

Thus, the critical issue is whether the decision by the D.C. Circuit in USTA I to vacate and remand the FCC's initial decision requiring line sharing, and the subsequent FCC conclusion in the TRO not to reinstate line sharing as a UNE, effectively eliminates line sharing as a checklist item 4 element. In other words, stated hypothetically, if BellSouth were required today to apply for 271 relief, would line sharing be included as a required element under checklist item 4?

Why Line Sharing Is Not a Current "Checklist Item 4" Element

Webster's Ninth New Collegiate Dictionary defines vacate as "to make legally void: annul." The Joint CLECs argue that line sharing remains a checklist item 4 element beyond the FCC's decision in the TRO not to reinstate the vacated line sharing unbundled element. However, if the FCC's determination to include line sharing as a component of checklist item 4 hinges on the vacated Line Sharing Order and that decision is annulled, it would seem that the Joint CLECs argument would be nullified as well.

The TRO offers additional insight in this matter. In ¶665, the FCC addresses its ongoing responsibility to enforce the conditions of §271 approval. It states:

> While we believe that section 271(d)6 establishes an ongoing duty for BOCs to remain in compliance, we do not believe that Congress intended that the "conditions required for such approval" would not change with time. Absent such a reading, the Commission would be in a condition where it would be imposing backsliding requirements on BOCs solely based on date of section 271 entry, rather than on the law as it currently exists. We reject this approach as antithetical to public policy because it would require the enforcement of out-of-date or even *vacated* (emphasis added) rules. (TRO ¶665)

In the FCC's own words, on remand "We do not reinstate the Commission's vacated line sharing rules . . ." (TRO ¶199). It would appear that the FCC anticipated a situation directly analogous to that of line sharing and put forth its position that enforcement of vacated rules in the context of §271(d)6 would not be appropriate. Put another way, it appears that if BellSouth were to apply for 271 approval today it would not be required to offer line sharing as a checklist item 4 compliance element.

271 Elements

Moreover, as reflected in its BellSouth Change-of-Law Order, this Commission determined that it does not have the authority to require BellSouth to include §271 elements in §252 interconnection agreements. We further found that to do so would be contrary to both the plain language of §251 and §252 and the regulatory regime set forth in the TRO and the TRRO. Thus, even if we were to conclude that BellSouth must continue to offer line sharing as a §271 checklist item 4 element, do not have the authority to require inclusion of line sharing (or any §271 element) as part of a §252 interconnection agreement.

Decision

In light of (1) the action of the D.C. Circuit in USTA I to vacate and remand the FCC's decision on line sharing, (2) the FCC's subsequent decision on remand not to reinstate line sharing as an unbundled network element, and (3) the FCC's own words regarding ongoing enforcement of §271 approvals contained in the TRO, we conclude that BellSouth is not obligated pursuant to the Telecommunications Act of 1996 and FCC Orders to provide line sharing to new CLEC customers after October 1, 2004.

ISSUE 17: APPROPRIATE LANGUAGE FOR TRANSITIONING OFF A CLEC'S EXISTING LINE SHARING ARRANGEMENTS

Parties' Arguments

BellSouth witness Fogle indicates that BellSouth's proposed language includes both the FCC's line sharing transition plan and a requirement that CLECs that have ordered line sharing arrangements after October 1, 2004, pay the full stand-alone loop rate for those arrangements and add no new line sharing arrangements going forward. In addition, witness Fogle also indicates that the Joint CLEC proposed language, as reflected in Exhibit 23, would continue to obligate

BellSouth to provide access to line sharing as an UNE. Witness Fogle suggests this language should be rejected in its entirety.

The Joint CLECs proposed contract language, as reflected in Exhibit 23, does not reflect the FCC's line sharing transition plan contained in the TRO at ¶¶264-265. However, the Joint CLECs suggest that, if we find in Issue 16, "that BellSouth does not have an obligation under Section 271 to provide continued access to line sharing, then the language offered by either CompSouth or BellSouth appropriately reflects the remaining legal obligations of BellSouth."

Analysis

In Issue 16, we have found that BellSouth is not obligated to continue to provide access to line sharing arrangements to CLECs after October 1, 2004. Therefore, we agree with BellSouth that the transition plan for line sharing arrangements adopted by the FCC should be reflected in the language of the agreement. The transition plan states:

> The three-year transition period for new line sharing arrangements will work as follows. During the first year, which begins on the effective date of this Order, competitive LECs may continue to obtain new line sharing customers through the use of the HFPL at 25 percent of the state-approved recurring rates or the agreed-upon recurring rates in existing interconnection agreements for stand-alone copper loops for that particular location. During the second year, the recurring charge for such access for those customers will increase to 50 percent of the state-approved recurring rate or the agreed-upon recurring rate in existing interconnection agreements for a stand-alone copper loop for that particular location. Finally, in the last year of the transition period, the competitive LECs' recurring charge for access to the HFPL for those customers obtained during the first year after release of this Order will increase to 75 percent of the state-approved recurring rate or the agreed-upon recurring rate for a stand-alone loop for that location. After the transition period, any new customer must be served through a line splitting arrangement, through use of the stand-alone copper loop, or through an arrangement that a competitive LEC has negotiated with the incumbent LEC to replace line sharing. We strongly encourage the parties to commence negotiations as soon as possible so that a long-term arrangement is reached and reliance on the shorter-term default mechanism that we describe above is unnecessary. (TRO ¶265)

As noted by BellSouth witness Fogle, BellSouth has no ongoing obligation to provide access to line sharing to requesting CLECs after October 1, 2004. Having reviewed the language proposed by BellSouth in Exhibit 12, we make the following modifications: In light of the line sharing transition plan enumerated previously, it is appropriate, in order to reduce confusion, to separately delineate each of the line sharing scenarios created by the TRO, i.e., those line sharing arrangements in service prior to October 1, 2003, and grandfathered, those line sharing arrangements established between October 2, 2003 and October 1, 2004, and those line sharing arrangements placed in service on or after October 2, 2004.

The paragraph addressing the conversion of line sharing arrangements to line splitting arrangements shall be modified to reflect that line splitting is an arrangement offered by

BellSouth to the CLEC purchasing the entire loop. In addition, the CLEC shall purchase any needed equipment.

Decision

Neither the language proposed by BellSouth nor the Joint CLECs is totally appropriate to implement this recommended decision. Instead, the language proposed by BellSouth, with the modifications discussed in our analysis, shall be adopted. The approved language is set forth in Appendix A.

ISSUE 18: APPROPRIATE ICA LANGUAGE TO IMPLEMENT BELLSOUTH'S OBLIGATIONS WITH REGARD TO LINE SPLITTING

Parties' Arguments

BellSouth

BellSouth's existing ICA language provides for line splitting over a UNE-Loop, and through March 10, 2006, with UNE-P arrangements. In this docket, BellSouth proposes to remove the specific language in the ICA that discusses line splitting over an embedded base of UNE-P lines.

For CLECs that enter into an agreement with BellSouth after the end of the 12-month transition plan specified by the FCC in the TRRO (March 10, 2006), BellSouth's proposed ICA does not include the provisioning of Line Splitting pursuant to an UNE-P arrangement. Since new CLECs would not have an embedded base of UNE-P lines, they are not permitted to order UNE-P from BellSouth and may also not order line splitting over UNE-P.

BellSouth witness Fogle contends that BellSouth's line splitting obligations are limited to a CLEC's purchase of the stand-alone loop. In other words, witness Fogle is asserting that BellSouth has no obligation to provide line splitting under a commingled arrangement that consists of a loop and unbundled switching provided by BellSouth pursuant to §271. It is BellSouth's position that UNE-P should not be reincarnated and, moreover, §271 obligations should not be included in §§251 and 252 interconnection agreements.

BellSouth witness Fogle also argues that BellSouth is not obligated to provide the splitter for the CLEC in a line splitting arrangement. According to witness Fogle, "A CLEC can provide the splitter in its leased collocation space in BellSouth's central office. Using its own splitter, the CLEC is free to offer voice service on the low frequency portion of the loop, and have another CLEC provide broadband service, such as DSL, over the high frequency portion of the loop (or vice-versa)."

Joint CLECs

The Joint CLECs and CompSouth did not offer direct or rebuttal testimony addressing the line splitting issue; however, CompSouth witness Gillan proposed ICA language regarding line splitting in exhibits to his testimony. Further discussions of the ICA revisions were raised in CompSouth's response to our staff's interrogatories and in the Joint CLECs' brief. The areas of concern can be summarized as follows: