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February 24, 2006

VIA HAND DELIVERY

Hon. Ron Jones, Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re: *Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting from Changes of Law*
Docket No. 04-00381

Dear Chairman Jones:

On February 21, CompSouth filed a letter with the TRA purporting to provide a "full picture" of what has transpired in other states on change of law issues. BellSouth agrees that the TRA should have the full picture, but CompSouth's letter does not provide that. BellSouth responds to provide the TRA with the following information regarding the status of events in other states:

In Florida, the Commission is considering whether to undertake a sua sponte reconsideration of issues on which the staffer who engaged in misconduct worked. Importantly, however, even if the commission were to alter its decision on the issues challenged by CompSouth, ***the Florida PSC has found that the commission has no authority to require the inclusion of 271 elements in 252 agreements. The validity of Florida's decision on that overarching issue is not in dispute.*** Moreover, there is no evidence to suggest that the misconduct of the staffer has had any impact on the decisions or analysis of the commissioners in Florida. Consequently, there is no basis to expect that the commission's decision will not stand.

For the TRA's information – and to ensure that the TRA actually has access to the full picture – BellSouth attaches both its response to CompSouth's motion in Florida as well as the Commission's opposition to CompSouth's request for injunctive relief.

In Louisiana, the Public Service Commission has voted on certain issues related to Section 271 and Line Sharing. Although a written order is not yet available, the following is a summary of the decision:

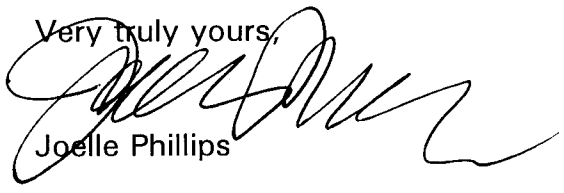
Section 271: The Louisiana Commission declined to order BellSouth to include 271 elements in 252 agreements, and it likewise declined to set rates for these elements. The Louisiana Commission explained that these 271 elements are more properly contained in arms-length, commercial agreements, subject to the FCC's enforcement authority, and it adopted BellSouth's proposed contract language with respect to these issues. The Louisiana Commission further ruled that because Section 271 contemplates an advisory role for the state commissions, any CLEC filing an enforcement action at the FCC regarding Section 271 elements shall provide a copy of the filing to the Louisiana Commission so that the Commission may intervene and advise the FCC of its recommendation, if it deems it necessary.

Line Sharing Issues: The Louisiana Commission rejected a December 2005 finding by an Administrative Law Judge that the Commission has jurisdiction to set rates for line sharing under Section 271 based on BellSouth's voluntary agreement. The Louisiana Commission ruled that BellSouth had not agreed to negotiate rates for line sharing under Section 271 for inclusion in its Section 252 interconnection agreement with Covad, but that instead, BellSouth had attempted only to negotiate transitional rates for line sharing under Section 251. The Louisiana Commission also decided that the dispute resolution and change of law provisions in the interconnection agreement cannot be used to compel arbitration of elements outside of the interconnection agreement.

BellSouth will file the order or the official minutes from the Louisiana Public Service Commission when they become available.

A copy of this letter has been provided to counsel of record.

Very truly yours,



Joelle Phillips

JP:njc

Legal Department

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February 16, 2006

VIA HAND DELIVERY AND US MAIL

Chairman Lisa Polak Edgar
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399

Re: Docket No. 041269-TP

Dear Chairman Edgar:

On February 14, 2006, counsel for Covad Communications Company ("Covad") submitted a written request that the Commission *sua sponte* withdraw portions of its staff recommendations and effectively reconsider its decision on certain issues (Issue Nos. 5, 13, 16-18, and 22) in the above-listed proceeding. Covad's request is based on the actions of Doris Moss, a former staff member, in submitting unsolicited, anonymous, and disguised emails to the Commission, and purportedly to BellSouth as well. This letter responds to Covad's letter and request.

Covad's basic premise for its request is simply wrong. Covad apparently believes that the action of a single staff member prevents the Commissioners from fulfilling their obligations under Florida law to independently evaluate and render decisions on disputed matters. Covad asks this Commission to believe that a recommendation by staff is something more than what it truly is – a recommendation. Florida Statutes, Section 350.001, clearly provides "[t]he Florida Public Service Commission shall perform its duties independently." And, as succinctly stated by the Commission in Docket No. 001305-TP regarding a similar request by another CLEC, "[a]ssuming arguendo that our staff's recommendation were flawed, we are the decision-makers in this case . . . ." not staff. *See* Order No. 02-0413-TP at 18.

Simply put, contrary to Covad's allegations, it is the job of the Commissioners to independently consider and evaluate all of staff's recommendations. BellSouth is unaware and Covad has not alleged any facts that prevented the ***Commissioners*** from exercising their statutorily-mandated independent judgment in this case. Notably, the investigation conducted by the Commission's Office of the General Counsel into the emails at issue belies Covad's insinuations. Specifically, the Office of the General

Counsel found that (1) no party was adversely impacted by the events giving rise to Covad's request and (2) no Commissioner even read the emails in question.

Further, any suggestion of nefarious activity by BellSouth is incorrect and devoid of any evidence in support. BellSouth did not ask to receive random, anonymous emails from an unidentified individual; BellSouth has disclosed to the Commission all of the emails it received from Ms. Moss or individuals using various pseudonyms; BellSouth has not received any other communications from Ms. Moss (appropriate or otherwise) or from individuals using her alleged pseudonyms in this or any other proceeding; and, assuming that Ms. Moss did in fact send all of the emails in question, BellSouth has no knowledge about the reasons why she sent the unsolicited emails in the first place. Given these facts, the Commission has ample reason to reject Covad's request.

Covad also takes exception to the portions of the staff recommendation that Ms. Moss prepared; namely Issues 16 and 17, which concern line sharing. Covad suggests that the Commission reached its decision on this issue only because Ms. Moss was biased. This erroneous implication is contradicted by a prior Commission staff recommendation. Specifically, in Docket No. 040601-TP, the Commission staff recommended that "line sharing is not a 'local loop transmission from the central office to the customer's premises' as required by checklist item 4. If line sharing does not come under checklist item 4 and therefore is not required to be provided pursuant to section 271, staff believes BellSouth is no longer obligated to provide Covad access to new line sharing arrangements after October 2004." (Sept. 24, 20044, Staff Recommendation, p. 11). Ms. Moss is not listed as a participating staff member in Docket No. 040610-TP and to BellSouth's knowledge did not participate in that proceeding. Thus, the remedy that Covad seeks – that staff other than Ms. Moss prepare a recommendation on the line sharing issues -- already took place and staff other than Ms. Moss reached the same conclusion as she and the Commission here.

Moreover, as a practical matter, Covad's requested relief makes little sense given that the Commission properly determined that it has no authority over Section 271 checklist items. Consequently, even if the Commission adopted Covad's flawed legal reasoning in the context of a Commission-initiated reconsideration motion, it has already found that it would have no enforcement authority over line sharing.

Additionally, Covad, in its attempt to persuade this Commission to grant the relief it requests, misstates state commission precedent on this issue. As BellSouth made clear in its post-hearing brief, state commissions in Illinois, Massachusetts, Michigan, and Rhode Island have ruled in a manner consistent with this Commission. Thus, Covad is incorrect in stating this Commission "is the only commission in the nation" to rule adversely to its position on the line sharing issue.

Finally, BellSouth does agree that all parties appearing before the Commission are entitled to fairness and impartiality but disputes that the Commission did not provide such treatment to Covad or any other CLEC in this proceeding. And no matter how hard Covad tries, an adverse ruling by the Commission does not equate into bias by the Commissioners. Accordingly, while BellSouth does not believe that reconsideration of the issues that Ms. Moss prepared, or reconsideration of the issues that were the subject of the emails in question is necessary to ensure fairness and impartiality to the parties, BellSouth has no objection to *sua sponte* reconsideration of Issues 5, 13, 16-18, and 22 by the panel of Commissioners that heard this case if that panel deems such action appropriate. BellSouth would respectfully request that, should the panel take such action, reconsideration occur as expeditiously as possible, preferably by the next regularly scheduled agenda session.

In no event, however, should the Commission withdraw or suspend its current rulings on these issues while additional review is being conducted. It is essential to the orderly process of business that CLECs and BellSouth implement contract amendments consistent with the Commission's decision by March 11, 2006. If the Commission reaches a different conclusion after further examination, the parties can handle it via an additional amendment. The Commission should not allow Covad's request to circumvent the Commission's directive to execute amendments compliant with its decision by February 27, 2006, unless otherwise mutually agreed to.

Sincerely,

Meredith E. Mays

cc: Governor Bush
Senator Lee Constantine
Commissioner Isilio Arriaga
Commissioner J. Terry Deason
Commissioner Matthew M. Carter II
Commissioner Katrina J. Tew
Richard D. Melson
Blanco Bayo
Patrick Wiggins
Adam Teitzman
Kira Scott
Beth Salak
Nancy White
Gene Watkins
Parties of Record

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
Samantha M. Cibula
Florida Bar No. 0116599
David E. Smith
Florida Bar No. 309011

Florida Public Service Commission
1540 Shumard Oak Blvd.
Tallahassee, FL 32399-0850
(850)413-6199

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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