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Kathleen B. Levitz
Vice President-Federal Regulatory

EX PARTE OR LATE FILED

Suite 900
1133-21st Street, N.W.
Washington, D.C. 20036-3351
202 463-4113
Fax: 202 463-4198
Internet: levitz.kathleen@bsc.bls.com

October 15, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Written Ex Parte in CC Docket No. 98-147

Dear Ms. Salas:

This is to inform you that BellSouth Corporation has made the attached written ex parte to Lawrence E. Strickling. I have also sent copies Carol Matthey, Margaret Egler, Jane Jackson, Staci Pies, Christopher Libertelli, and Vincent Palladini.

Pursuant to the Commission's rules, we are filing two copies of this notice and that written ex parte presentation and ask you to include both in the record in CC Docket No. 98-147.

Sincerely,



Kathleen B. Levitz

Attachment

cc: Lawrence E. Strickling (w/o attachment)
Carol Matthey (w/o attachment)
Margaret Egler (w/o attachment)
Jane Jackson (w/o attachment)
Staci Pies (w/o attachment)
Christopher Libertelli (w/o attachment)
Vincent Palladini (w/o attachment)

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October 15, 1999

Mr. Lawrence Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
The Portals
445 12 Street, S.W.
Washington, D.C. 20554

Re: Ex Parte – CC Docket No. 98-147

Dear Mr. Strickling:

On September 30, 1999 Covad Communications, Inc. ("Covad") submitted a letter to you making certain observations regarding line sharing. Even though the Commission has not issued an order on line sharing, these observations assume that the Commission will require incumbent local exchange carriers ("ILEC") to provide line sharing to competitive local exchange carriers ("CLEC"). Confident of such an order, Covad goes on to suggest language to be included in the order that would prescribe interim line sharing while the details of permanent line sharing are finalized. The letter suggests that the Commission require permanent line sharing as a service to be tariffed, apparently pursuant to the Commission's authority under Section 201(b) of the Telecommunications Act (the "Act"), and that interim line sharing be required as a network element that must be unbundled ("UNE") pursuant to the Commission's authority under Sections 251 and 252 of the Act. Leaving nothing to chance, the letter even suggests that if authority under Sections 201, 251 and 252 is inadequate, the Commission has authority under Section 4(i) of the Act to implement the above plan.

Without belaboring the point, the Commission has not required, nor should it require, line sharing. BellSouth set out in ample detail within its comments and reply comments in the rulemaking proceeding why line sharing is not a service -- access or exchange. Moreover, BellSouth explained that line sharing is the further unbundling of the ILEC's network; and if the Commission is to prescribe the ILECs to perform line sharing it can do so only after a proper statutory analysis, pursuant to the "necessary and impairment" requirement of Section 251(d), has been performed. Accordingly, until it applies the necessary and impairment standard, which has yet to be released, to line sharing as a network element, the Commission cannot require line sharing to be a UNE. Indeed, BellSouth contends that such analysis will show that refusal to require the unbundling of line sharing as a network element will not impair CLECs' ability to offer the type of services they want to offer.

Moreover, the notion of line sharing represents dissimilar regulatory positions for two providers of services in the same broadband market. The Commission released a recent report

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Chief, Common Carrier Bureau
Federal Communications Commission
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concluding that regulation or even the threat of regulation will slow the deployment of broadband services.¹ The Commission applies this seemingly palpable principle to cable companies, however, ignores it when addressing advanced services provided over the local loop.² Line sharing has great potential for discouraging ILEC deployment of digital subscriber line services. It will not only add additional costs, but penalizes ILECs for attempting to gain economies of scope, by using their loops to provide multiple services, in favor of CLECs who want a free ride on the ILECs' economies of scope. Clearly the CLECs could take advantage of the economies obtained by offering multiple services over the loop, but have voluntarily decided to forgo these economies in their business plan.

Even if the Commission found line sharing to be a UNE, there are legal and operational reasons why the interim proposal set forth in Covad's letter is not workable. To begin, the proposal does not legally comply with Section 252 of the Act. Covad's interim proposal assumes line sharing to be a UNE. Under this assumption, Covad requests the Commission to require ILECs to provide a "blanket amendment" to their interconnection agreements with CLECs. This blanket amendment would set forth the terms and conditions that ILECs must abide by in provisioning line sharing to all CLECs. The blanket amendment must be presented to the Chief of the Bureau within 30 days of the release of the order and any CLEC can presumably sign it immediately thereafter. The proposal would then require the ILEC to begin provisioning line sharing within ten days of the CLEC signing the amendment.

For the sake of responding to Covad's proposal, BellSouth will assume that the Commission will find line sharing to be a UNE. If it does, the procedure for providing that UNE to a CLEC is governed by negotiated agreement between the ILEC and CLEC pursuant to Section 252 of the Act. Section 252 is very specific about the negotiation process – a request for the network element must be made by the CLEC;³ the ILEC must enter into a good faith negotiation with the CLEC to determine the particular terms and conditions to provide the element;⁴ mediation can be requested by either party during the negotiation;⁵ if open items remain after 135 days either party can petition the state commission to arbitrate these items.⁶ Covad's proposal asks the Commission to circumvent this statutory obligation and simply mandate an amendment to an agreement with terms and conditions that assume one size fits all.

¹ "Broadband Today: A Staff Report to William K. Kennard, Chairman, Federal Communications Commission, on Industry Monitoring Sessions Convened by Cable Services Bureau," Deborah A. Lathen, Bureau Chief, Cable Services Bureau, October 1999, <http://www.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf>

² Such disparity is particularly egregious considering that ILEC competitors already have access to unbundled loops, but no such access is afforded to cable competitors.

³ 47 U.S.C. § 252(a)(1).

⁴ 47 U.S.C. § 251(c).

⁵ 47 U.S.C. § 252(a)(2).

⁶ 47 U.S.C. § 252(b)(2).

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Aside from the fact that the Commission cannot ignore the Act's negotiation obligations, Covad is well aware that the terms and conditions for the provisioning of a network element are not homogeneous in nature. Each CLEC will want different features and capabilities to meet its individual needs. It is completely unreasonable to suggest that the Commission could adopt an order that would incorporate universal terms and conditions necessary to implement a UNE such as line sharing for all CLECs.⁷

Before an ILEC can provide a UNE to a CLEC, it must know what the CLEC wants. Simply making a generic request for line sharing is woefully inadequate even to begin the negotiation process, much less to enable the parties to negotiate an agreement provisioning such an element. For example, the ILEC would need specific information about the geographic areas in which the CLEC wants the element, the type of service the CLEC plans to offer, and any technical constraints surrounding the service. The ILEC would also need to complete or establish implementation procedures (*e.g.*, installation of splitters, access to the central office, collocation agreements), maintenance procedures, ordering procedures, billing procedures, and pricing.⁸ This is by no means an exhaustive list of the information needed to be negotiated between the parties. And, while some of the points for negotiation among carriers would overlap, many issues will be unique to the individual CLEC. Accordingly, the Commission should not consider establishing terms and conditions, on either an interim or permanent basis, for implementing line sharing as a UNE.⁹ Any attempt to do so will only frustrate the Commission's ultimate goal of prompt implementation by requiring the ILECs to implement processes to be order compliant that may not help meet the needs of specific CLECs requesting line sharing.

Covad's request that line sharing be priced at 10% of unbundled analog two wire loops further limits the viability of its proposal. The proposed price for allocation of loop cost is, of course, an arbitrary figure pulled from thin air. It is unsupported by any economic method for

⁷ The only term and condition that Covad requests in its letter is a price which equals 10% of the cost of an unbundled loop. This highly suggests that Covad is more concerned with obtaining a reduced cost loop than actually implementing line sharing.

⁸ BellSouth will discuss Covad's suggested price for line sharing below. Although it is not entirely clear from the proposed language, BellSouth assumes that Covad's proposed price of 10% of the loop relates only to an allocation of loop cost to line sharing and not the entire price for the line sharing element. Clearly, the rate for line sharing will also recover incremental costs and fixed costs that do not relate to the loop. BellSouth, as well as any ILEC, has the right to recover these costs plus a reasonable profit. 47 U.S.C § 252(d)(1). This price will have to be determined through the negotiation, and possibly arbitration, process.

⁹ Indeed, any attempt to establish terms and conditions in the order will only prejudice the negotiation process. Negotiations are a give and take process. One party may be willing to give up one bargaining chip to gain another. If pre-determined conditions are set, CLECs will likely view them as position from which they do not have to yield, even to gain something else.

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cost allocation, but is Covad's assumption of a "fair" amount. While the Commission may have authority to set national pricing standards, as Covad contends in its letter, the Commission does not have authority to set standards that ignore the statutory right of ILECs to a price based on the cost of the requested network element.¹⁰ With line sharing the loop becomes a shared facility, thus use of the loop requires that the CLEC bear some of the cost of the loop. Conversely, if one carrier uses the entire loop, then it should bear the entire cost of the loop. Accordingly, the price of the line sharing UNE must include a reasonable portion of the cost of the loop plus a reasonable profit. Presumably any analysis of how to allocate such costs would start with existing cost methodologies, not with a number pulled out of the air by a potential buyer. In any event, it is ludicrous to suggest that requiring an ILEC to sell over 99 % of the capacity of a shared facility to a competing carrier at ten percent of the cost satisfies the statutory standard for cost-based pricing of network elements or that such a price would constitute just compensation for excluding the ILEC from the use of that bandwidth.¹¹

A price that appropriately reflects the fair market value of line sharing would, however, not only provide just compensation but would also give ILECs an economic incentive to offer line sharing. If CLECs are interested in profiting by participation in a competitive market, let them make an offer to buy line sharing at a price that covers the ILECs' cost of implementing and administering line sharing and that provides a market-based contribution to the cost of the loop and a reasonable profit, rather than manipulating the regulatory process to coerce an unreasonably low price.

Covad's reliance on the cost support provided with ILECs' asymmetric digital subscriber line ("ADSL") tariffs to justify pricing for line sharing at 10% of an unbundled analog two wire loop is misplaced. The fact that ILECs allocate a small, or no, cost to their ADSL service is inapposite. ILECs use the entire loop. Accordingly the loop cost is their "input" cost for the services they provides over the loop. The ILECs recover that cost in the most efficient manner as determined by the economics of their operations and the market. CLECs, on the other hand, choose to constrain their business to ADSL and only use a shared loop. The CLECs' "input" cost is the cost of sharing rather than the full loop. Thus, they choose to forgo the kind of scale and scope economies that the ILECs make the most of.

This letter has demonstrated that Covad's proposal is not legally or operationally valid. The concept of a fixed set of terms and conditions governing the offering of a UNE dictated by Commission order would never withstand legal scrutiny nor further the CLECs' stated goal of implementing line sharing on an expedited basis. For a specific CLEC, line sharing can only be implemented by determining what that CLEC wants and negotiating with it an agreement to provision such a UNE. Contrary to Covad's statements, negotiation is not a stall tactic devised

¹⁰ 47 U.S.C § 252(d)(1).

¹¹ BellSouth is not suggesting cost allocation based on relative bandwidth, but is merely illustrating the unreasonableness of Covad's approach to pricing of line sharing.

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by the ILECs to lengthen the implementation of line sharing. It is the method mandated by Congress in the Act. Neither Covad nor the Commission can do an end-run around the statutory requirement. Neither should the Commission ignore the practical reality that negotiating effective agreements for a new kind of relationship between ILECs and CLECs will require a significant amount of time, as Congress recognized. BellSouth would voluntarily begin entertaining negotiations immediately after the order's release and not wait until the order becomes effective. While BellSouth is skeptical that line sharing priced to cover all relevant costs and to provide a reasonable profit will be more advantageous to CLECs than simply purchasing an unshared loop, in the event that the Commission mandates line sharing BellSouth is willing to begin such negotiations in order to expedite, not stall, the development of line sharing arrangements.

Sincerely,



Kathleen Levitz
Vice President – Federal Regulatory

cc: Carol Matthey
Margaret Egler
Jane Jackson
Staci Pies
Christopher Libertelli
Vincent Paladini