

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Applications by BellSouth Corporation *et al.*) CC Docket No. 01-277
for Authorization to Provide In-Region,)
InterLATA Services in Georgia and Louisiana)

MOTION TO STRIKE OF COVAD COMMUNICATIONS COMPANY

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Covad Communications Company (Covad), by its attorney, hereby moves to strike the December 18, 2001 *ex parte* letter submitted by BellSouth Corp. (BellSouth) in the above-referenced docket.¹ Because the *ex parte* letter proposes late, substantial changes to BellSouth's OSS in response to evidence adduced by Covad on the record in this proceeding, the letter is late-filed evidence in violation of the Commission's procedural rules and should be stricken from the record. Covad respectfully moves the Commission to strike the *ex parte* letter from the docket.

The Commission requires that "a section 271 application, as originally filed, will include all of the factual evidence on which the applicant would have the Commission rely in making its findings."² As the Commission has repeatedly stated, the submission by the applicant of a constant stream of late-filed evidence and changes to the record would be "highly disruptive to our processes to have a record that is constantly evolving."³ To the extent the Commission does accept late filed evidence from the applicant, the Commission requires that such new evidence "may cover only the period placed in dispute by commenters, and thus should not relate to performance after the filing of comments by third parties (*i.e.*, generally the 20th day of the proceeding)."⁴ On the 78th day of its application, BellSouth now proposes substantial revisions to its OSS in order to cure deficiencies in its checklist compliance. This late change in the record

¹ See Letter dated Dec. 18, 2001, from Kathleen Levitz, Vice President – Federal Regulatory, BellSouth Corp., to Magalie Roman Salas, Secretary, FCC, CC Docket No. 01-277, at 1.

² See "Updated Filing Requirements For Bell Operating Company Applications Under Section 271 Of The Communications Act," FCC Public Notice, rel. Mar. 23, 2001, at 3-4.

³ *Id.* at 4.

⁴ *Id.* at 4, citing *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3968-69, paras. 34-37 (1999) (*Bell Atlantic New York Order*); *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, Memorandum Opinion and Order, 12 FCC Rcd 20543, at para. 51 (1997) (*Ameritech Michigan Order*).

comes well beyond the period that the Commission has permitted evidence to be adduced in any prior long distance application.

On December 18, 2001, BellSouth Corp. (BellSouth) filed an *ex parte* letter in the above-referenced docket purporting to “describe its plans to introduce electronic ordering for IDSL.” Presumably to avoid (appropriate) criticism that this latest *ex parte* is a late-filed effort to alter the record (in this case, a mere 12 days before the statutory deadline for decision), BellSouth claims that its submission is “in response to the December 6, 2001 letter submitted by Covad relating to electronic ordering of IDSL loops.”⁵ It is nothing of the sort. The Commission will recall that Covad first raised the issue of BellSouth’s failure to provide *any electronic ordering capability whatsoever* for the majority of Covad’s loop volume in Covad’s initial comments in this proceeding.⁶ Indeed, as set out below, Covad has raised this issue with BellSouth and state regulators for over a year. Thus, BellSouth’s late gambit is no more than a last gasp effort to address concerns about the viability of its applications. As set out below, BellSouth’s last minute proposal to address one of Covad’s concerns is too late, too vague, too incomplete, and too uncertain to be of any use to the Commission in adjudicating BellSouth’s compliance with section 271 at the time of its September 2001 application.

Covad has requested electronic ordering of IDSL loops since BellSouth first offered the product in September 2000. Covad subsequently discovered that it would not be able to electronically order the IDSL loop when BellSouth released electronic ordering of certain xDSL UNEs (but not IDSL) in February 2001. Since that time, Covad has

⁵ *Id.*

⁶ *See, e.g.*, Covad Comments, CC Docket No. 01-277, at 10 (“BellSouth has failed to make electronic ordering available (through ANY interface) for UDC/IDSL loops, UCL-ND loops, or line sharing or ADSL loops that require conditioning.”).

continued to insist that its ability to compete in Georgia and Louisiana was threatened by BellSouth's failure to provide electronic ordering capability for this loop type. The high percentage of customers served by fiber-fed loops in both states makes Covad's access to IDSL loops particularly critical. Covad raised these concerns in business and operations meetings with BellSouth as well as in regulatory fora, including the xDSL docket (11900-U) in Georgia. In its 271 filings before both the Georgia and Louisiana commissions, Covad discussed extensively the competitive harm it suffered as a result of BellSouth's refusal to develop electronic ordering interfaces for new products such as the IDSL and UCL-ND loop. In August 2001, Commissioner Burgess of the Georgia Commission offered to mediate a discussion between BellSouth and Covad to resolve Covad's operational issues. In the correspondence exchanged and in the meeting, much of which has been provided to the Commission in this docket, Covad reiterated its need for electronic ordering for the IDSL, UCL-ND and for conditioned loops. BellSouth stood firm in its refusal to discuss developing electronic interfaces. Likewise, Covad's Change Request for electronic ordering for these loops went unanswered and unacknowledged. In fact, BellSouth 271 witnesses have testified under oath in state proceedings that Covad had never requested electronic ordering for these loops, only to retract those statements on cross examination after a copy of the Change Request was presented.

Now, in the face of intense scrutiny by this Commission, BellSouth has finally decided to try to address the situation. But its *ex parte* submission on this matter is neither factually accurate nor sufficient to alleviate the serious competitive impact the lack of electronic ordering has on Covad. In the first instance, it is not entirely clear what BellSouth is now offering. For example, in its December 18 letter, BellSouth notes that

the electronic ordering will be “substantially identical to the manual order Covad places today” for IDSL loops.⁷ In other words, it appears that BellSouth will be creating an electronic ordering process that simply falls out for manual handling.

In addition, although BellSouth appears to be offering to change the way its ISDN loops are provisioned, BellSouth's offer fails to solve the underlying problem that led to the deployment of the IDSL loop. First, each time Covad must retrain its employees to order a different loop to serve certain customers, Covad loses the ability to serve its customers in a timely manner. As BellSouth itself admits, asking its technicians to use different procedures for ISDN loop provisioning will render the “provisioning process less efficient.”⁸ Second, BellSouth's proposal fails to address the problem of having in BellSouth’s database a group of loops identified as ISDN which are used by Covad for IDSL service.⁹ At any time, an ISDN loops may be subject to outside plant rearrangement, including rearrangement on a DLC unit. BellSouth has proposed no system for tracking Covad's loops or otherwise ensuring that the loops, once provisioned, are not rolled onto dysfunctional time slots on the Marconi DLC unit. Rather, BellSouth proposes that more Covad loops be placed into the ISDN category where service may be threatened at some point in the future.

Finally, BellSouth makes representations about when electronic ordering will be available for the IDSL loop. They should be dismissed from this docket as nothing more than speculation. For example, these representations about timeframes have not been presented to the Change Control group. Further, in independent conversations with BellSouth, Covad has been told that these dates (February 2002 and May 2002) are

⁷ *Id.*

⁸ BellSouth Dec. 18 *ex parte* at 1.

"goals" but no firm commitment has been made to reaching them. In the final analysis, these promises of future performance cannot substitute for present failure to comply with the competitive checklist. Although Covad welcomes BellSouth's suggestion that it is willing to implement electronic ordering capability for Covad's loops, that suggestion is hardly sufficient to cure the clear statutory defects in BellSouth's Georgia and Louisiana applications. If BellSouth in fact implements electronic ordering capability for Covad, that implementation should be core of BellSouth's refiled long distance applications in the future.

For the reasons set forth herein, Covad's MOTION TO STRIKE should be GRANTED. BellSouth December 18, 2001, *ex parte* letter in CC Docket No. 01-277 regarding IDSL loops should be stricken from the record of that docket.

Respectfully submitted,

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⁹ See Covad Dec. 6 *ex parte*, CC Docket No. 01-277, for a detailed explanation of this issue.