BEFORE THE MISSOURI PUBLIC SERVICE COMMISSION

In the Matter of the Determination of Prices, Terms, and Conditions of Line Splitting and Line Sharing.	)))	Case No. TO-2001-440

COVAD'S REPLY TO SBC'S RESPONSE TO COVAD'S COMMENTS ON SBC'S PROPOSED POST-TRIENNIAL REVIEW ORDER M2A APPENDIX HFPL

DIECA Communications, Inc. dba Covad Communications Company ("Covad"), pursuant to 4 CSR 240-2.080(15) files its Reply to SBC Missouri's ("SBC's") Response to Covad's Comments on SBC's Proposed Post-Triennial Review Order M2A Appendix HFPL and respectfully shows as follows:

I. Covad's Appendix HFPL has the Same Language as the M2A's Appendix HFPL

1. SBC claims that Covad operates under an agreement that is separate from the M2A.[1] In reality, the Appendix HFPL in Covad's 13-state agreement with SBC is the same Appendix HFPL that is in the M2A, with the exception of the Missouri-specific references to pricing and loop conditioning in the M2A. Therefore, Covad has a direct interest in any changes to the M2A's Appendix HFPL.

II. The Relevant Issue in this Proceeding is Whether SBC's Proposed Contract Language Conforms with State and Federal Law

2. SBC argues that "the issue is whether SBC Missouri's proposed changes to the M2A Line Sharing Appendix indeed conform to the FCC's *Triennial Review Order*."[2] SBC implies that an analysis of the impact of state law and Section 271 of the federal Telecommunications Act ("Act") is irrelevant to this proceeding. SBC's argument lacks

[1] SBC Missouri's Reply to Covad's Response to SBC Missouri's Proposed Post-Triennial Review Order M2A Line Sharing Appendix at 3 ("SBC's Reply").

[2] SBC's Reply at 3.

merit. As Covad explains in its November 13th response to SBC's proposed contract language, SBC has obligations under state law and Section 271 of the Act to provide unbundled access to the high-frequency portion of the loop ("HFPL").[3] Nothing in the *Triennial Review Order* abridges those obligations.[4] Therefore, SBC's argument that "no CLEC, including Covad, raised any claim that SBC's Missouri's proposed language does not conform to the *Triennial Review Order*" is incorrect -- SBC's proposed language does not conform to the *Triennial Review Order* because it fails to conform with state law and Section 271 of the Act.

III. SBC's Arguments About the Applicability of Section 271 Requirements Fail to Address the Specific Statements by the FCC on that Issue in the *Triennial Review Order*

3. SBC argues that "Section 271 of the Act cannot be read to independently require the unbundling of a network element that the FCC has already found need not be unbundled" and "[w]ith respect to the *Triennial Review Order*, a close reading makes plain that the FCC did not impose an obligation to unbundle the HFPL."[5] Both arguments are directly rebutted by the plain language of the FCC in the *Triennial Review Order*:

> [W]e continue to believe that the requirements of section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops,

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[3] Covad's Response to SBC's Proposed Post-Triennial Review Order M2A Appendix HFPL at 1-5 (November 13, 2003) ("Covad's Response").

[4] *See* Covad's Response at 1-3 (outlining relevant statements from the Federal Communications Commission ("FCC") in and after the *Triennial Review Order*); Covad's Comments on the Effect of the FCC's *Triennial Review Order* at 2-16 (September 10, 2003) (outlining the Commission's unbundling authority under state law and Section 271 of the Act, even after the *Triennial Review Order*.)

[5] SBC's Reply at 5.

> switching, transport, and signaling regardless of any unbundling analysis under section 251.[6]
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> Section 271 was written for the very purpose of establishing specific conditions for entry into the long distance market that are unique to the BOCs. As such, BOC obligations under section 271 are not necessarily relieved based on any determination we make under the section 251 unbundling analysis.[7]

Clearly, these passages reflect the FCC's intent to maintain preexisting unbundling obligations for Bell Operating Companies ("BOCs") under Section 271, even if the FCC no longer requires unbundling under Section 251. This applies to the HFPL, which is a preexisting unbundling obligation.[8]

4. In a similar argument, SBC argues that the FCC's recent *Illinois et al 271 Order* only requires SBC to comply with the rules prescribed in the *Triennial Review Order*.[9] Again, SBC fails to address paragraphs 653 and 655 of the *Triennial Review Order*, quoted above, which directly contradict SBC's interpretation of the FCC's orders.

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[6] *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Service Offering Advanced Telecommunications Capacity*, CC Docket No. 98-147 (FCC 03-06), ¶ 653, rel. August 21, 2003 ("*Triennial Review Order*").

[7] *Triennial Review Order*, ¶ 655.

[8] The FCC has consistently and repeatedly held that Checklist Item No. 4 -- which requires the BOC applicant to provide access to the "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services" -- requires BOC 271 applicants to provide non-discriminatory access to shared loops, that is, the HFPL. *See, e.g., In the Matter of Joint Application of SBC Communications Inc., Illinois Bell Telephone Company, Indiana Bell Telephone Company Inc., the Ohio Bell Telephone Company, Wisconsin Bell, Inc., and Southwestern Bell Communication Services, Inc. for Authorization to Provide In-Region, InterLATA Services in Illinois, Indiana, Ohio and Wisconsin,* WC Docket No. 03-167, FCC 03-243, Memorandum Opinion and Order, ¶ 145, rel. October 15, 2003 ("*Illinois et al 271 Order*").

[9] SBC's Reply at 5-6.

The *Triennial Review Order* is clear -- SBC must comply with pre-*Triennial Review Order* unbundling requirements under Section 271, even if the FCC no longer requires unbundling under Section 251.[10]

IV. SBC is Asking the Commission to Approve Contract Language that is Contrary to Federal Law

5. SBC argues that the Commission has no jurisdiction under Section 271 to unbundle the HFPL, since (according to SBC) only the FCC has enforcement jurisdiction under Section 271.[11] SBC's argument ignores the cooperative state-federal relationship that exists under Section 271. Furthermore, SBC is asking the Commission to approve contract language that is directly contrary to the FCC's statements in the *Triennial Review Order* that SBC still has preexisting unbundling obligations under Section 271. This is not an enforcement question. This is a question of approving contract language that appropriately captures SBC's obligations under federal law. This Commission clearly has the authority, and the duty, to approve contract language that accurately captures the federal unbundling obligations outlined by the FCC. As Covad explains above, these obligations include the obligation under Section 271 to provide unbundled access to the HFPL at just and reasonable rates.

V. SBC Does Not, and Cannot, Rebut the Fact that the Commission has Independent State Law Authority to Unbundle the HFPL

6. SBC briefly argues that there is no Missouri statute that requires unbundling of the HFPL. Notably, SBC makes no attempt to address the specific

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[10] The key potential difference is in the pricing of those network elements. Under Section 271, pricing is dictated by the "just and reasonable" standards of Sections 201 and 202. Covad respectfully urges the Commission to find that a $0 recurring rate for the HFPL is just and reasonable. *See* Covad's Response at 3.

[11] SBC's Reply at 5.

language of the numerous statutory provisions that Covad lists in its November 13th filing in support of the Commission's independent state law unbundling authority.[12] SBC does not rebut the specific provisions because it cannot -- the provisions authorize the Commission to unbundle the HFPL. SBC instead makes a general argument that these provisions cannot require unbundling if the provisions were enacted prior to 1996. This argument lacks merit because statutes are intended to be read as a whole, not as individual time capsules. When the legislature enacted SB 507 in 1996, it kept in the statute the provisions that Covad outlines in its November 13th filing. Accordingly, the preexisting statutory provisions should be read in harmony with the market-opening provisions of SB 507. Covad's interpretation does so.[13]

7. SBC also argues that the FCC's rules preempt the Commission's state law authority.[14] SBC's arguments lack merit. Section 252(e)(3) of the Act, entitled "Preservation of authority" explicitly states that:

> [N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.[15]

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[12] Covad's Response at 4-5.

[13] SBC claims that "Covad does not argue that the provisions of Missouri law grant the Commission any greater authority than that conferred on the FCC by Sections 251/252 of the federal Act." SBC's Reply at 7, n.11. SBC's claim is incorrect. Missouri law does grant the Commission independent, and potentially greater, unbundling authority than that conferred on the FCC by Sections 251/252 of the Act, for all of the reasons that Covad outlines on pages 4-5 of its November 13th filing.

[14] SBC's Reply at 7-9.

[15] 47 U.S.C. § 252(e)(3).

Likewise, Section 251(d)(3) of the Act, entitled "Preservation of State access regulations" states:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that - (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[16]

The Commission can also rely on Section 261(b) and (c) of the Act, which expressly allow state commissions to impose requirements necessary to further competition in the provision of telephone exchange service or exchange access so long as the requirements are not inconsistent with the Act. Further, Section 601(c)(1) of the Act specifically rejects implied preemption under the Act, stating: "No implied effect- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments." When read in conjunction, these sections clearly envision preservation of state authority to promote the competitive goals of the Act and establish a dual partnership between the state and federal government. Accordingly, the Act preserves this Commission's independent unbundling authority.

8. Moreover, the FCC lacks authority to preempt the Commission's independent unbundling authority. While the FCC has the authority to interpret the Act, it does not have the authority to re-write it. Indeed, any deference previously accorded to the FCC's interpretation of the Act under the *Chevron* doctrine has long since been forfeited because the FCC's interpretation of the Act has been repeatedly reversed by the

[16] 47 U.S.C. § 251(d)(3).

D.C. Circuit. Thus, notwithstanding any statements in the *Triennial Review Order*, the Act defines this Commission's authority, and, as set forth above, the Act does not evince any general Congressional intent to preempt state law unbundling orders. Rather, the Act expressly preserves such state law authority. Indeed, the Supreme Court has interpreted these provisions of the Act to grant states the authority to unbundle elements in addition to those unbundled by the FCC, stating, "[i]f a requesting carrier wants access to additional elements, it may petition the state commission, which can make other elements available on a case-by-case basis."[17] Accordingly, nothing the FCC asserts in its *Triennial Review Order* regarding a state's ability to unbundle elements in addition to those unbundled by the FCC can trump an Opinion of the United States Supreme Court interpreting the Act.

9. Should this Commission place stock in the FCC's interpretation of the Act in its *Triennial Review Order*, it is worth noting that even the FCC recognized that the aforementioned provisions of the Act expressly indicate Congress' intent not to preempt state regulation, and forbid the FCC from engaging in such preemption:

> Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. ***Many states have exercised their authority under state law to add network elements to the national list***.[18]

The FCC further acknowledges in the *Triennial Review Order* that Congress expressly declined to preempt states in the field of telecommunications regulation:

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[17] *AT&T v. Iowa Utilities Bd.*, 525 U.S. 366, 388 (1999).

[18] *See Triennial Review Order*, at ¶ 191 (emphasis added).

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.[19]

Accordingly, the FCC has explicitly acknowledged that this Commission retains its independent state law unbundling authority.

10. In the *Triennial Review* Order, the FCC claimed to identify a narrow set of circumstances under which federal law would act to preempt state laws unbundling orders:

> Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 and do not "substantially prevent" the implementation of the federal regulatory regime…
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> [W]e find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation.[20]

Based upon the Eight Circuit's *Iowa Utilities Board I* decision the FCC specifically recognized that state law unbundling orders that are inconsistent with the FCC's unbundling orders are <u>not</u> *ipso facto* preempted:

> That portion of the Eighth Circuit's opinion reinforces the language of [section 251(d)(3)], i.e., that state interconnection and access regulations must "substantially prevent" the implementation of the federal regime to be precluded and that "merely an inconsistency" between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3).[21]

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[19] *See Triennial Review Order*, at ¶ 192.

[20] *See Triennial Review Order*, at ¶¶ 192, 194.

[21] *See Triennial Review Orde*r, ¶ 192 n. 611 (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 806).

In sum, the FCC's *Triennial Review Order* confirms that "merely an inconsistency" between state rules providing for competitor access and federal unbundling rules is insufficient to create such a conflict. Rather, the FCC recognized that the state laws would not be subject to preemption unless they "substantially prevent implementation" of Section 251.

11. Recognizing its ability to preempt state unbundling orders was limited (if existent at all), the FCC declined to issue a blanket determination that all state orders unbundling the HFPL were preempted. Rather, the FCC invited parties to seek declaratory rulings from the FCC regarding whether individual state unbundling orders "substantially prevent implementation" of Section 251. Contrary to this standard, however, the FCC stated that it was "*unlikely*" that it would refrain from preempting a state law or Order that required the "unbundling of network elements for which the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis."[22] While the FCC's preemption analysis (or more accurately, its unsupported supposition) is flawed, it is important to note that even pursuant to this faulty analysis the FCC expressly refused to conclude that an order unbundling the HFPL would be preempted as a matter of law, thereby signaling to state commissions that the HFPL, high capacity fiber loops, and hybrid copper-fiber loops could be unbundled under particular circumstances.

12. Contrary to the conclusion postulated by the FCC, the proper analysis to determine whether state access laws impermissibly conflict with the federal regulatory

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[22] *See Triennial Review Order*, ¶ 195 (emphasis added).

regime is set forth in *Michigan Bell v. MCIMetro*, 323 F.3d 348 (6th Cir. 2003). In *Michigan Bell*, the Sixth Circuit Court of Appeals refused to preempt an Order of the Michigan Public Service Commission ("MPSC") (allowing MCI to transmit resale orders by fax pursuant to SBC's Michigan tariff offering) which SBC argued "conflicted" with MCI's tariff, and hence, the Act. Conducting its preemption analysis the Sixth Circuit first noted that the MPSC's authority was expressly preserved by the Act:

> When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. ***In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition***, stating that the Act does not prohibit state commission regulations 'if such regulations are not inconsistent with the provisions of [the Act].'[23]

The Court then explained that "as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted.[24] The Court later reiterated that an order of the state commission would be affirmed provided that it "does not frustrate the purposes of the Act."[25] An order requiring access to the HFPL under Missouri law would not prevent a carrier from taking advantage of the network opening provisions of the Act, nor would such unbundling frustrate the purposes of the Act. The Court unequivocally stated:

> The Commission can enforce state law regulations, ***even where those regulations differ from the terms of the Act*** or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services.[26]

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[23] *Michigan Bell*, 323 F3d at 358 (emphasis added).

[24] *Michigan Bell*, 323 F3d at 359.

[25] *Michigan Bell*, 323 F3d at 361.

[26] *Michigan Bell*, 323 F3d at 361 (emphasis added).

Accordingly, contrary to the FCC's statement that it is "unlikely" that state laws requiring access to the HFPL would escape preemption, it is clear that this Commission has the authority to require access to the HFPL, including line sharing over high capacity fiber and hybrid copper-fiber loops, under Missouri law because such orders would not interfere with the ability of new entrants to obtain services.

13. Although the FCC stated that it was "unlikely" to refrain from preempting a state law unbundling access to the HFPL, the *Triennial Review Order* broadly identifies the circumstances that would lead the FCC to decline to preempt a state commission order unbundling a network element that the FCC has declined to unbundle nationally. Specifically, in its discussion of state law authority to unbundle network elements, the FCC states that "the availability of certain network elements may vary between geographic regions."[27] Indeed, according to the FCC, such a granular "approach is required under *USTA*."[28] Thus, if the requisite state-specific circumstances exist in a particular state, state rules unbundling network elements not required to be unbundled nationally are permissible in that state, and would not substantially prevent the implementation of Section 251.

VI. Missouri Consumers Will Lose Competitive Choices if Line Sharing is Eliminated or if SBC's Other Changes to the M2A are Adopted

14. SBC outlines its policy arguments for eliminating line sharing on pages 9-11 of its reply.[29] SBC does not, and cannot, rebut the key policy concern with its

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[27] *See Triennial Review Order*, ¶ 196.

[28] *See Triennial Review Order*, ¶ 196 (citing *USTA*, 290 F.3d at 427).

[29] SBC's analysis is factually incorrect or irrelevant in certain key respects. For example, on page 10 of its response, SBC claims that Covad can provide line

requested relief -- Missouri consumers will lose competitive choices if line sharing is eliminated. Consumers in Missouri that purchase voice services from SBC will lose a key competitive choice in high-speed data if line sharing disappears. Line splitting is not a solution for those customers, as line splitting is only available if the consumer purchases voice services from a competitive carrier. Cable modems are not an option in the areas of Missouri not served by cable modems. Therefore, consumers in those areas will go from having two broadband alternatives -- digital subscriber line ("DSL") services from SBC and line shared DSL services from a competitive carrier -- to being a captive customer of SBC. This result is contrary to sound public policy and will result in significant customer disruption.

15. Moreover, SBC's proposal to strike existing rights for competitive carriers to access SBC-owned splitters, even during SBC's so called "transition period," exacerbates these public policy concerns. Covad currently provides line shared DSL services to Missouri customers over SBC-owned splitters. If SBC is allowed to discontinue the current requirement in the M2A to lease SBC-owned splitters, those customers will suffer significant disruption and a potential loss in competitive alternatives. Similarly, SBC's proposed changes to the M2A arguably impact the pricing

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splitting to 50 million of AT&T's local customers. AT&T has far fewer than 50 million local customers, with a nationwide number that is likely closer to a couple million customers and a Missouri-specific number that is likely a fraction of that. Since line splitting is only available where the competitive voice carriers provide local services, Covad's potential market in Missouri for line splitting is far smaller than the potential market for line sharing.

Similarly, SBC's claim on page 9 of its response that Covad has failed to establish the technical infeasibility of line splitting is irrelevant. Line splitting is only available to customers who subscribe to the local voice services of competitive carriers. Therefore, widespread line splitting is economically and practically infeasible.

of line sharing. If SBC is allowed to charge rates that exceed TELRIC for key components such as the HFPL, cross-connects, OSS, splitters, and maintenance services, then Missouri customers will lose competitive alternatives as competitors will be unable to provide competitively priced DSL services in Missouri.

VII. SBC's Procedural Proposals for Line Splitting are Merely Delaying Tactics Designed to Avoid the Implementation of Workable Line Splitting Arrangements

16. SBC argues that Covad should address line splitting issues with its account team or in SBC's 13-state "collaborative" process. Covad has tried both approaches, to no avail. In those forums, SBC simply refuses to implement workable line splitting arrangements, which is not surprising since SBC controls the agenda and has no incentive, absent regulatory oversight, to make any meaningful concessions.

17. Instead, Covad respectfully urges the Commission to address line splitting issues in a Commission-sponsored proceeding. SBC itself recognizes that the *Triennial Review Order* directs SBC and competitive carriers "to use existing state commission collaboratives and change management processes to address OSS modifications that are necessary to support line splitting."[30] SBC's so-called "collaborative" is not a "state commission collaborative." Indeed, so far it appears to be mainly an attempt by SBC to avoid state oversight over line splitting issues.

18. SBC also argues that Covad has not requested arbitration of line splitting issues.[31] The *Triennial Review Order* does not require arbitration of these issues. Instead, as SBC itself admits, the *Triennial Review Order* requires SBC to implement

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[30] SBC's Reply at 12, *quoting Triennial Review Order*, ¶ 252.

[31] SBC's Reply at 12.

OSS modifications in state commission collaboratives and change management processes. Covad respectfully requests such modifications, with state commission oversight.

19. Finally, SBC argues that Covad is somehow contractually precluded from raising line splitting issues with state commissions.[32] SBC's argument has no foundation in the parties' contract.

VIII. Conclusion

20. SBC's reply fails to rebut Covad's analysis and requested relief in Covad's November 13th filing. Covad supports Staff's September 10th recommendation for the Commission to review contract proposals from the parties to update the line sharing and line splitting provisions of the M2A. As part of that review process, Covad respectfully urges the Commission to exercise its independent state and federal authority to unbundle line sharing and hybrid copper-fiber loops.

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[32] SBC's Reply at 12, n.25.

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Certificate of Service

A true and correct copy of the foregoing was served upon the parties identified on the attached service list on this 4th day of December, 2003, by placing same in the U.S. Mail, postage paid.

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