

ORIGINAL

**McWHIRTER REEVES**  
ATTORNEYS AT LAW

TAMPA OFFICE:  
400 NORTH TAMPA STREET, SUITE 2450  
TAMPA, FLORIDA 33602  
P. O. BOX 3350 TAMPA, FL 33601-3350  
(813) 224-0866 (813) 221-1854 FAX

PLEASE REPLY TO:  
  
TALLAHASSEE

TALLAHASSEE OFFICE:  
117 SOUTH GADSDEN  
TALLAHASSEE, FLORIDA 32301  
(850) 222-2525  
(850) 222-5606 FAX

January 21, 2004

**VIA HAND DELIVERY**

Blanca S. Bayo, Director  
Division of Records and Reporting  
Betty Easley Conference Center  
4075 Esplanade Way  
Tallahassee, Florida 32399-0870

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Re: Docket No.: 030852-TP

Dear Ms. Bayo:

On behalf of DIECA Communications, Inc. d/b/a Covad Communications Company (Covad), enclosed for filing and distribution are the original and 15 copies of the following:

- 00918-04 ▶ DIECA Communications, Inc. d/b/a Covad Communications Company's Motion for Summary Final Order as to Issue Nos. 7 - 12 and 14 - 18; and
- 00919-04 ▶ DIECA Communications, Inc. d/b/a Covad Communications Company's Request for Oral Argument on its Motion for Summary Final Order.

Please acknowledge receipt of the above on the extra copy of each and return the stamped copies to me. Thank you for your assistance.

Sincerely,

*Vicki Gordon Kaufman*  
Vicki Gordon Kaufman

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**BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION**

In re: Implementation of requirements arising )  
from Federal Communications Commission )  
Triennial UNE review: Location Specific-Review )  
For DS1, DS3, and Dark Fiber Loops and )  
Route-Specific Review for DS1, DS3, and Dark )  
Fiber Transport )  
\_\_\_\_\_ )

Docket No. 030852-TP

Filed: January 21, 2004

**DIECA COMMUNICATIONS INC., D/B/A COVAD COMMUNICATIONS**  
**COMPANY'S MOTION FOR SUMMARY FINAL ORDER AS TO ISSUE**  
**NOS. 7 -12 AND 14 - 18**

DIECA Communications Inc., d/b/a Covad Communications Company ("Covad") respectfully moves the Florida Public Service Commission to declare that the evidence and testimony submitted by BellSouth and Verizon regarding dedicated transport triggers fails as a matter of law to comport with the test ordered by the Federal Communications Commission (FCC) and to enter a summary final order answering Issues 7 - 12 and 14 - 18 in the negative.

**I. SUMMARY OF ARGUMENT**

During the Triennial Review, both BellSouth and Verizon proposed trigger tests to the FCC which assumed the existence of dedicated transport facilities over specific routes. The FCC expressly rejected those proposals out of a concern that such tests could result in the elimination of ILEC unbundling requirements over transport routes where there were not actual alternative transport facilities available. Instead, the FCC ordered dedicated transport trigger tests which required that ILECs present evidence of actual transport facilities deployed over specific routes. Despite this clear regulatory requirement, both BellSouth and Verizon have presented evidence in this docket which is dependant on numerous assumptions regarding the existence of transport. Although

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BellSouth and Verizon have submitted hundreds of routes they assume have dedicated transport, neither BellSouth nor Verizon have presented a single specifically identified dedicated transport facility over a specific route. BellSouth and Verizon's testimony is either 1) an improper decision by BellSouth and Verizon to ignore the trigger tests ordered by the FCC in favor of their own test (which the FCC rejected); or 2) an attempt to shift the burden of proof to the CLECs. In either case, the Commission should 1) find that the trigger evidence submitted by BellSouth and Verizon is insufficient to establish whether a route has met the trigger tests under the Triennial Review Order (TRO); 2) order BellSouth and Verizon to submit evidence of actual transport on the routes they have identified as fulfilling the FCC's trigger criteria and expand the procedural schedule to accommodate a CLEC rebuttal to such new evidence; or 3) enter a final summary order answering Issues 7 - 12 and 14 - 18 in the negative due to BellSouth's and Verizon's failure to comply with the requirements of the TRO.

## **II. LEGAL STANDARD**

Section 120.57(1)(h), Florida Statutes, provides that in any proceeding in which an agency has final order authority, a summary final order **shall** be rendered if it is determined

from the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, that no genuine issue as to any material fact exists and that the moving party is entitled as a matter of law to the entry of a final order.

Rule 28-106.204(4) provides, in part,:

Any party may move for summary final order whenever there is no genuine issue as to any material fact.

This Commission has recognized the propriety of using the mechanism of summary final order on numerous occasions. In sum:

The purpose of summary judgment, or in this instance, summary final order, is to avoid the expense and delay of trial when no dispute exists concerning material facts. . . . The question for determination on a motion for summary judgment is the existence or nonexistence of a material factual issue. There are two requisites for granting summary judgment: first, there must be no genuine issue of material fact, and second, one of the parties must be entitled to judgment as a matter of law on the undisputed facts.<sup>1</sup>

The FCC promulgated the tests for determining whether a dedicated transport trigger is met. Those trigger tests do not allow for assumptions about the existence of transport facilities, but rather, require positive evidence of actual facilities. Neither BellSouth nor Verizon have, proffered *any* evidence of actual dedicated transport facilities over any specific route. There can be no genuine issue of material fact when the evidence required by the legal standard has not been proffered at all. Summary final order is appropriate in this instance.

### III. ARGUMENT

BellSouth and Verizon appear to be engaged in an improper effort to subvert the trigger analyses ordered by the FCC by creating an “assumption-based” test which shifts

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<sup>1</sup> *In re: Request for arbitration concerning complaint of ITC^DeltaCom Communications, Inc. against BellSouth Telecommunications, Inc. for breach of interconnection terms, and request for immediate relief*, Docket No. 991946-TP, Order No. PSC-00-1540-FOF-TP at 20 (Aug. 24, 2000) (citations omitted). *See also, In re: Application for transfer of Certificate No. 281-S in Lee County from Bonita Country Club Utilities, Inc. to Realnor Hallandale, Inc.*, Docket No. 990975-SU, Order No. PSC-00-0341-PCO-SU (Feb. 18, 2000).; *In re: Petition by Florida Power & Light Company for approval of conditional settlement agreement which terminates standard offer contracts originally entered into between FPL and Okeelanta Corporation and FPL and Osceola Farms, Co.*, Docket No. 000982-EI, Order No. PSC-00-2341-FOF-EI (Dec. 6, 2000); *In re: Complaint of Bayside Mobile Home Park*, Docket No. 010726-WS, Order No. PSC-02-0247-FOF-WS (Feb. 26, 2002).

the burden of proof to CLECs. The tests ordered by the FCC do not allow for assumptions and do not provide for any burden-shifting to CLECs to disprove assumptions about the existence of transport, spare capacity, operational readiness or a willingness to wholesale. The Commission should enter a Summary Final Order as to Issues 7 - 12 and 14 - 18 and find in the negative on those issues. Alternatively, the Commission should require BellSouth and Verizon to submit the evidence required by the FCC and provide an expansion of the current procedural schedule to allow CLECs to respond.

**A. The FCC Rejected “Assumption-Based” Trigger Tests in the TRO.**

During the triennial review proceedings, the FCC rejected several trigger tests offered by ILECs which sought to assume the existence of transport facilities because of a concern that using such “assumption-tests” could result in the removal of incumbent obligations to unbundled transport where there were, in fact, no actual alternative facilities available to CLECs. Despite having two “assumption-based tests” rejected by the FCC, Verizon and BellSouth now rely on the very same assumptions in their case before this Commission. BellSouth and Verizon offered two “assumption-based tests” to the FCC, which made assumptions about fiber-based collocations. First, the FCC rejected a collocation trigger based on the existence of pricing flexibility, which assumed transport on fiber rings, because “[t]he measure does not indicate that the competitive fiber facilities connect to collocations in any other incumbent LEC central offices. The measure may only indicate that numerous carriers have provisioned fiber from their switch to a single collocation rather than indicating that transport has been provisioned to transport traffic between incumbent LEC central offices.” TRO ¶ 397 (emphasis added).

Despite the FCC's rejection of this test, it is the very fact that "carriers have provisioned fiber from their switch to a single collocation" that forms the basis for Verizon and BellSouth's assumptions in this docket.

The FCC also rejected a BellSouth fiber ring "A or Z" trigger test which assumed transport facilities based on fiber collocation, as follows: "BellSouth's and other BOC's fiber-based collocation proposals are based solely on the presence of alternative transport at one end of a route such that when one end of a route is competitive (a central office with fiber-based collocation), no unbundled transport will be available in or out of that competitive central office. These proposals would effectively leverage the existence of competition in one location to remove the unbundling obligation to perhaps several other locations without any proof that a requesting carrier could self-provide or utilize alternative transport to reach those other locations." TRO ¶ 401 (emphasis added).

The FCC rejected these proposed "assumption-based tests" because the assumptions upon which the tests were based might not be true in every instance. If the assumption failed to be accurate in even a single instance, then the finding of no impairment would be legally incorrect because the CLEC would remain impaired without alternative transport. To avoid this pitfall of "assumption-tests", the FCC adopted a set of tests which required evidence of actual deployment of dedicated transport between specific routes before any finding of no impairment.

In sum, the FCC rejected proposals by Verizon and BellSouth which sought to assume the existence of dedicated transport based on fiber-based collocations -- the very same criteria Verizon and BellSouth now seek to use in this docket. At the time the FCC rejected the tests now proffered by BellSouth and Verizon to this Commission, the FCC

was well-aware of the fiber ring network design used by BellSouth and Verizon in this docket as the basis for their assumptions regarding the existence of transport facilities. TRO ¶¶ 378-79; 399; see also, TRO ¶¶ 370-77. Yet the FCC rejected these proposed tests on the basis that they were NOT reliable indicators of actual available dedicated transport between two wire centers. TRO ¶¶ 397, 401. The FCC's trigger tests oblige ILECs to demonstrate that "true alternatives to the incumbent LEC's network have been deployed". TRO ¶ 408. This Commission may not ignore the trigger tests ordered by the FCC in favor of the BellSouth and Verizon's "assumption-based" tests considered and rejected by the FCC, but offered here nevertheless.

**B. The Two FCC Trigger Tests Do Not Permit Assumptions.**

In the TRO, the FCC identified two trigger tests which the states must use to determine whether there are alternatives to ILEC transport between two ILEC wire centers: the "self-provisioning" and "wholesale alternatives" tests. To meet the self-provisioning trigger for DS3 or dark-fiber transport, there must be "three or more competing providers not affiliated with each other or with the incumbent LEC, including intermodal providers of service comparable in quality" that have self-deployed fiber transport facilities along a particular route and that are operationally ready to use those facilities to provide transport along that route. 47 C.F.R. §§ 51.319(e)(2)(i)(A) and (e)(3)(i)(A). The "self-provisioning" test does not ask whether competitors can be assumed to have self-deployed. "[T]his trigger identifies only the existence of *actual* competitive facilities". TRO ¶ 410 (emphasis in original).

Similarly, to meet the competitive "wholesale alternatives" trigger for DS1, DS3, or dark-fiber transport, there must be "two or more competing providers not affiliated

with each other or with the incumbent LEC, including intermodal providers of service comparable in quality” that are operationally ready and willing to offer wholesale transport of a given capacity along a particular route. 47 C.F.R. §§51.319(e)(1)(ii), (e)(2)(i)(B) and (e)(3)(i)(B). Again, the “wholesale alternatives” test does not provide for assumptions about 1) available facilities; 2) their spare capacity; 3) operational readiness to provide transport; or 4) the willingness to wholesale transport. Both of the FCC’s trigger tests safeguard *against* “counting alternative fiber providers that may offer service, but ... are otherwise unable immediately to provision service along the route” and *avoids* “counting alternative transport facilities owned by competing carriers not willing to offer capacity to their network on a wholesale basis.” TRO ¶ 414. In short, the FCC tests “ensure that transport can readily be obtained from a firm using facilities that are not provided by the incumbent LEC.” TRO ¶ 412.

For competitive carriers, like Covad, who do not self-provision their own transport, it is vitally important that the Commission not accept any assumptions about the existence of alternative dedicated transport facilities. If such assumptions are not accurate – even in limited circumstances – the competitive carrier will be left with no alternative facilities – the very basis of the FCC’s national finding of impairment. Accepting “assumed evidence” is equally dangerous if it is applied to spare capacity, operational readiness or a willingness to wholesale. An erroneous reliance on “assumed evidence” on any of these issues will leave CLECs without alternatives for dedicated transport. Of course, this may be the outcome BellSouth and Verizon want. Without alternative transport, CLECs like Covad will be obliged to pay BellSouth and Verizon the significantly inflated tariff price for DS3 and DS1 transport. The only other explanation



for BellSouth and Verizon's failure to provide the information required by the FCC trigger tests is that BellSouth and Verizon desire to transfer millions of dollars of transport business to their CLEC-competitors. Irrespective of BellSouth and Verizon's reasons for wishing to employ tests rejected by the FCC, they should not be allowed to ignore the tests ordered by the FCC in favor of their own test.

**C. BellSouth and Verizon Assume Their Entire Case.**

In the testimony and exhibits submitted in this docket to date, BellSouth and Verizon assume there are transport facilities between all collocation arrangements in a LATA where fiber carriers have deployed back haul facilities.<sup>2</sup> They then assume that the assumed-to-exist-facilities have spare capacity,<sup>3</sup> and finally, they assume that the

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<sup>2</sup> BellSouth's evidence is summarized in Shelley Padgett's Direct Testimony as follows: "Using discovery and these internal data, a list of fiber-based collocations for each competitive carrier was created and used to generate all the potential transport routes for a given carrier using the assumption that competitive carriers can route traffic between any pair of fiber-based collocation arrangements in a LATA. Furthermore, if a carrier has a collocation arrangement in a BellSouth wire center and it has pulled its own fiber to the collocation, it is reasonable to assume that it should qualify for the self-provisioning trigger for both dark fiber and DS3 dedicated transport (due to the channelization I described above)." BellSouth Telecommunications, Inc., Direct Testimony of Shelley W. Padgett, Docket No. 030852-TP (Dec. 22, 2003) ("Padgett Direct") at 18 (emphasis added); see also, BellSouth Telecommunications, Inc., Direct Testimony of A. Wayne Gray, Docket No. 030852-TP (Dec. 22, 2003) ("Gray Direct") at 8; Verizon also makes the same assumptions: "[I]f the same carrier has fiber-based facilities in two Verizon wire centers in a LATA, it is very reasonable to assume that those fiber facilities are part of a CLEC-operated ring and that traffic can be directly or indirectly routed from one Verizon wire center to the other. It is also reasonable to assume that these CLEC-operated fiber rings connect to the CLEC's POP, and that traffic can flow to and from all parts of the carrier's network through the POP." Verizon Florida Inc., Joint Direct Testimony of Orville D. Fulp and John White, Docket No. 030852-TP (Dec. 22, 2003) ("Fulp/White Direct") at 17 (emphasis added).

<sup>3</sup> BellSouth further assumes the existence of spare capacity: "[C]arriers almost always choose to deploy a considerable larger number of strands than what they need for their immediate transmission needs." Gray at 9 (emphasis added); "For the reasons explained by Mr. Gray, it is logical to assume that interoffice facilities have spare fiber strands."

carriers with assumed-to-exist-with-assumed-spare-capacity facilities are willing and able to provide them for transport.<sup>4</sup> Relying solely on this assumed evidence, BellSouth and Verizon assert that they have fulfilled both the FCC's self-provisioning and wholesale facilities trigger tests along hundreds of routes. Amazingly, they both accomplish this feat without identifying a single actual deployed dedicated transport facility linking two wire centers. In short, they have impermissibly assumed their entire case.

In addition to the fact that the FCC already considered and rejected this kind of "assumption trigger test", BellSouth and Verizon's decision to ignore the trigger tests ordered by the FCC is particularly egregious because it also ignores the FCC's definition of dedicated transport. BellSouth and Verizon's tests use the existence of optical back haul facilities used to connect competitive carriers' networks to the incumbent network to create "dedicated transport" between every such carrier's collocation. However, the FCC expressly stated that "we find that transmission links that simply connect a competing carrier's network to the incumbent LEC's network are not inherently part of the incumbent LEC's local network. Rather, they are transmission facilities that exist *outside*

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Padgett Direct at 19 (emphasis added); Verizon, also assumes spare capacity: "Additionally, as a matter of basic network engineering and sound economics; the vast majority of self-provisioned fiber transport facilities will have spare fibers." Fulp/White Direct at 22 (emphasis added).

<sup>4</sup> BellSouth also assumes a carrier's willingness to wholesale transport: "In other words, if a carrier is willing to wholesale high-capacity loops at a given customer location, it is also likely to be willing to wholesale high-capacity loops at all other customer locations where it has deployed its own loop facilities." Padgett Direct at 10 (emphasis added). Similarly, Verizon assumes a willingness to provide dedicated transport: "Verizon assumes that a carrier that has deployed fiber transport facilities and is willing to provide transport over those facilities to other carriers is providing (or is willing to provide) various levels of capacity at wholesale, including dark fiber, DS1, and DS3." Fulp/White Direct at 25 (emphasis added).

the incumbent LEC's local network. Accordingly, such transmission facilities are not appropriately included in the definition of dedicated transport." TRO ¶ 366 (emphasis in original), see also TRO ¶ 367 (discussing the differences between back haul facilities and dedicated transport). Despite the FCC's express exclusion of back haul facilities from the definition of dedicated transport, BellSouth and Verizon rely solely on these facilities to assume the entirety of their case.

**D. BellSouth and Verizon's New Tests Improperly Seek to Shift the Burden of Proof to CLECs.**

BellSouth and Verizon also attempt to use their new "assumption-tests" to shift the burden to CLECs to disprove the FCC finding that they are impaired without access to dedicated transport. Verizon states:

Given that it is widely recognized that CLECs that deploy their own fiber tend to build fiber rings, the burden is now properly put on competing carriers if they wish to attempt to show that a specific route cannot in fact be connected within their network. Absent such particularized, route-specific evidence, however, the Commission should rely on Verizon's evidence that these carriers' networks connect together the transport facilities we have shown exist at each end of each identified route.<sup>5</sup>

Verizon expressly states that it is the CLECs who must present "particularized, route-specific evidence" disproving Verizon's multiple assumptions about the existence of dedicated transport, spare capacity, operational readiness and a willingness to provide transport.<sup>6</sup> Verizon and BellSouth are overtly attempting to turn the FCC's trigger analyses and national finding of generalized impairment on its head by creating a NEW test: "All fiber based collocations in a LATA will be assumed to be attached via dedicated transport, have spare capacity, and be operationally ready to provide dedicated

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<sup>5</sup> Fulp/White Direct at 17-18.

<sup>6</sup> *Id.*

transport. CLECs must present ‘particularized, route-specific evidence’ to disprove the assumption.” Of course, there is no citation available for this test *because this is not the test*. The FCC identified the trigger tests this Commission must use and they do not look remotely like the tests BellSouth and Verizon appear to be employing. The Commission must reject BellSouth and Verizon’s efforts to subvert the analysis ordered by the FCC and order BellSouth and Verizon to submit the evidence required by the trigger tests or face an order answering the trigger issues in the negative.

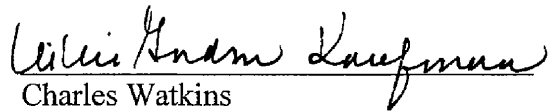
#### IV. CONCLUSION

It is axiomatic that there can be no question of material fact precluding a summary final order when there is no relevant evidence submitted on the question. Here BellSouth and Verizon were tasked with identifying dedicated transport between their wire centers actually deployed by CLECs or offered by CLECs at wholesale. Verizon and BellSouth were both provided discovery responses identifying route specific CLEC transport by numerous companies, including Covad.<sup>7</sup> However, BellSouth and Verizon both chose to ignore that evidence, and submit only a list of collocated CLECs with fiber entrance facilities. Based on these back haul facilities alone, BellSouth and Verizon assert that it can be assumed that all central offices with fiber-based collocations have dedicated transport running between them. BellSouth and Verizon further assert that spare capacity, operational readiness and a willingness to wholesale can all also be assumed. BellSouth and Verizon have failed to submit evidence identifying a single actual facility meeting the FCC’s definition of dedicated transport between two wire centers.

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<sup>7</sup> Covad provided both BellSouth and Verizon discovery responses in this docket. The massive volume of discovery provided in this docket appears to have only demonstrated to Verizon and BellSouth that they could not prevail over a sufficient number of routes if they relied on *actual* evidence.

The Commission should, therefore: 1) declare that the evidence submitted by BellSouth and Verizon to date fails as a matter of law to fulfill the FCC trigger tests; 2) order BellSouth and Verizon to submit competent relevant evidence, and provide for an expansion of the procedural schedule to accommodate CLEC rebuttal of any such evidence; or 3) in the alternative, enter a final summary order answering Issues 7 - 12 and 14 - 18 in the negative.



Charles Watkins  
Senior Counsel  
Covad Communications Co.  
1230 Peachtree Street, N.E., 19<sup>th</sup> Floor  
Atlanta, Georgia 30309  
(404) 942-3494  
(404) 942-3495 (fax)  
[gwatkins@covad.com](mailto:gwatkins@covad.com)

Vicki Gordon Kaufman  
McWhirter, Reeves, McGlothlin, Davidson,  
Kaufman & Arnold, P.A.  
117 South Gadsden Street  
Tallahassee, Florida 32301  
(850) 222-2525  
(850) 222-5606 (fax)  
[vkaufman@mac-law.com](mailto:vkaufman@mac-law.com)

Attorneys for DIECA Communications, Inc.  
d/b/a Covad Communications, Company

## CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true and correct copy of the foregoing DIECA Communications, Inc. d/b/a Covad Communications Company's Motion for Summary Final Order as to Issues 7-12 and 14-18 has been provided by (\*) hand delivery, (+) Federal Express, (\*\*) email and U.S. Mail this 21<sup>st</sup> day of January 2004, to the following:

(\*)(\*\*) Adam Teitzman, Staff Counsel  
Division of Legal Services  
Florida Public Service Commission  
2540 Shumard Oak Boulevard  
Tallahassee, Florida 32399-0850

(\*\*) Tracy Hatch  
AT&T Communications of the  
Southern States, LLC  
101 North Monroe Street  
Suite 700  
Tallahassee, Florida 32301

(\*)(\*\*) Nancy White  
c/o Nancy Sims  
BellSouth Telecommunications, Inc.  
150 South Monroe Street, Suite 400  
Tallahassee, Florida 32301-1556

(\*\*) Michael Gross  
Florida Cable Telecommunications  
246 East 6<sup>th</sup> Avenue  
Tallahassee, Florida 32302

(+) (\*\*) Richard Chapkis  
Verizon Florida, Inc.  
201 North Franklin Street  
MC: FLTC0717  
Tampa, Florida 33602

(\*\*) Matthew Feil  
Florida Digital Network, Inc.  
390 North Orange Avenue, Suite 2000  
Orlando, Florida 32801

(\*\*) Susan Masterton  
Sprint Communications Company  
1313 Blairstone Road  
Post Office Box 2214  
MC: FLTLHO0107  
Tallahassee, Florida 32301

(\*\*) Jeffrey J. Binder  
Allegiance Telecom, Inc.  
1919 M Street, NW  
Washington, DC 20037

(\*\*) Floyd R. Self  
Messer, Caparello & Self  
215 South Monroe Street, Suite 701  
Tallahassee, FL 32301

(\*\*) Donna Canzano McNulty  
MCI WorldCom  
1203 Governors Square Boulevard  
Suite 201  
Tallahassee, Florida 32301

(\*\*) Nanette Edwards  
ITC^DeltaCom  
4092 S. Memorial Parkway  
Huntsville, Alabama 35802

(\*\*) Norman H. Horton, Jr.  
215 South Monroe Street  
Tallahassee, Florida 32302-1876

(\*\*) Jake E. Jennings  
Senior Vice-President  
Regulatory Affairs & Carrier Relations  
NewSouth Communications Corp.  
NewSouth Center  
Two N. Main Center  
Greenville, SC 29601

(\*\*) Jon C. Moyle, Jr.  
Moyle, Flanigan, Katz, Raymond  
& Sheehan, P.A.  
The Perkins House  
118 North Gadsden Street  
Tallahassee, FL 32301

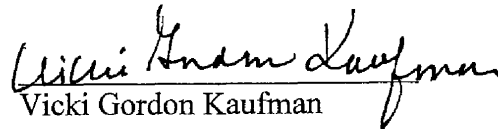
(\*\*) Rand Carrier  
Geoff Cookman  
Granite Telecommunications, LLC  
234 Copeland Street  
Quincy, MA

(\*\*) Andrew O. Isar  
Miller Isar, Inc.  
2901 Skansie Avenue, Suite 240  
Gig Harbor, WA 98335

(\*\*) Scott A. Kassman  
FDN Communications  
390 North Orange Avenue  
Suite 2000  
Orlando, FL 32801

(\*\*) Thomas M. Koutsky  
Vice President, Law and Policy  
Z-Tel Communications, Inc.  
1200 19<sup>th</sup> Street, NW Suite 500  
Washington, DC 20036

(\*\*) Michael B. Twomey  
Post Office Box 5256  
Tallahassee, Florida 32314-5256

  
Vicki Gordon Kaufman