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

In the Matter of	)	
	)	File No. EB-00-IH-0134
	)	Acct. No. X32080035
BellSouth Corporation	)	

ORDER

Adopted: October 27, 2000 **Released: November 2, 2000**

By the Commission: Commissioner Furchtgott-Roth dissenting and issuing a statement.

1. In this Order, we terminate an informal investigation into potential violations by BellSouth Corporation (BellSouth) of section 251(c)(1) of the Communications Act of 1934, as amended, and section 51.301 of the Commission's rules, in connection with BellSouth's alleged failure to negotiate in good faith the terms and conditions of an amendment to an interconnection agreement with Covad Communications Company (Covad) relating to BellSouth's provision of unbundled copper loops in nine states.

2. The Commission and BellSouth have negotiated the terms of a Consent Decree that would terminate the Commission's informal investigation. A copy of the Consent Decree is attached hereto and is incorporated by reference.

3. We have reviewed the terms of the Consent Decree and evaluated the facts before us. We believe that the public interest would be served by approving the Consent Decree and terminating the investigation.

4. Based on the record before us, and in the absence of material new evidence relating to this matter, we conclude that there are no substantial and material questions of fact as to whether BellSouth possesses the basic qualifications, including its character qualifications, to hold or obtain any FCC licenses or authorizations.

5. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 4(j), 251(c)(1), and 503(b) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), 251(c)(1), and 503(b), that the Consent Decree, incorporated by reference in and attached to this order, is hereby ADOPTED.

6. IT IS FURTHER ORDERED that the Secretary SHALL SIGN the Consent Decree

on behalf of the Commission.

7. IT IS FURTHER ORDERED that the above captioned investigation IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

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CONSENT DECREE

I. INTRODUCTION

1. The Federal Communications Commission (the "Commission") and BellSouth Corporation ("BellSouth" or the "Company") hereby enter into this Consent Decree for the purpose of terminating an informal investigation by Commission staff into whether BellSouth violated section 251(c)(1) of the Communications Act of 1934, as amended ("the Act"), and section 51.301 of the Commission's rules. The investigation focused on whether BellSouth had negotiated in good faith with Covad Communications Company ("Covad") over the terms and conditions of an amendment to an interconnection agreement relating to BellSouth's provision of unbundled copper loops.

II. BACKGROUND

2. Section 251 of the Act imposes on BellSouth, as an incumbent LEC, several obligations designed to promote competition in local telephone markets. In section 251(c)(1), the incumbent local exchange carrier and the requesting carrier have a duty to negotiate in good faith " in accordance with section 252 [of the Act] the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) of [section 251] and [section 251(c)]."[1]

3. In implementing section 251(c)(1), the Commission adopted section 51.301(c) of its rules, which sets forth a non-exclusive list of actions or practices that, if proven, would violate the duty to negotiate in good faith.[2] Under section 51.301(c)(8), "[r]efusing to provide information

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1 47 U.S.C. § 251(c)(1).

2 *See* 47 C.F.R. § 51.301(c).

necessary to reach agreement" constitutes such a violation.[3] In the Local Competition Order, the Commission stated that "an incumbent LEC may not deny a requesting carrier's reasonable request for cost data during the negotiation process, because . . . such information is necessary for the requesting carrier to determine whether the rates offered by the incumbent are reasonable."[4]

4. Under section 51.301(c)(1), a telecommunications carrier violates the duty to negotiate in good faith by "[d]emanding that another party sign a nondisclosure agreement that precludes such party from providing information requested by the Commission, or a state commission, or in support of a request for arbitration under section 252(b)(2)(B) of the Act. . . ."[5] In the *Local Competition Order*, the Commission expressed particular concern about "overly broad, restrictive, or coercive nondisclosure requirements [that] may well have anticompetitive effects."[6]

5. In late 1999, the Enforcement Bureau ("Bureau") received information from Covad suggesting that BellSouth may have failed to negotiate in good faith in violation of section 251(c)(1) of the Act and section 51.301 of the Commission's rules. The Bureau commenced an informal investigation into these matters on February 25, 2000. The Bureau's investigation disclosed that in April 1999, Covad made a request to BellSouth for cost data to support BellSouth's proposed rates for unbundled copper loops. BellSouth did not offer access to the data until September 1999, when it offered to permit Covad access subject to Covad's execution of a non-disclosure agreement ("NDA") which the Bureau believes limited Covad's ability to disclose the cost data, as well as information concerning the course of the negotiations, to the Commission or a state commission. Covad objected to the terms of the NDA. In October 1999, BellSouth advised Covad that the proposed language did not limit Covad's ability to disclose any cost information to the Commission or a state commission. In October 1999, BellSouth offered access to the cost data without a NDA, but proposed to limit Covad's review to a period of two hours at BellSouth's offices. Covad also objected to this arrangement. The following month, BellSouth offered access to the data for 30 days without a NDA.

6. The Bureau's investigation concerned whether BellSouth's actions during the Relevant Period, as outlined above, violated the statutory good faith requirement, as implemented by the Commission. BellSouth denies that its actions constituted a failure to negotiate in good faith, and disputes that its proposed NDA would have precluded Covad from providing information to the Commission or a state commission.

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[3] 47 C.F.R. § 51.301(c)(8).

[4] *Implementation of the Local Competition Provisions of the Communications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15577-78 ¶ 155 (1996) ("*Local Competition Order*") (subsequent history omitted).

[5] 47 C.F.R. § 51.301(c)(1).

[6] *Local Competition Order* 11 FCC Rcd at 15575-76 ¶ 151.

III. DEFINITIONS

7. For purposes of this Consent Decree, the following definitions shall apply:

(a) The "Commission" or "FCC" means the Federal Communications Commission and all divisions of the Commission, including the Enforcement Bureau.

(b) "BellSouth" or "the Company" means BellSouth Corporation and any subsidiaries, including its incumbent LEC operating telephone companies in the BellSouth states, as defined in subsection (i) below, and any successors or assigns of BellSouth Corporation or its incumbent LEC operating telephone companies.

(c) "Parties" means BellSouth and the Commission.

(d) "Order" or "Adopting Order" means an order of the Commission adopting this Consent Decree.

(e) "Final Order" means an order that is no longer subject to administrative or judicial reconsideration, review, appeal or stay.

(f) "Relevant Period" means the period prior to November 16, 2000.

(g) "Inquiry" means the enforcement action initiated by the Bureau's February 25, 2000 letter of inquiry regarding allegations about BellSouth's failure to negotiate in good faith.

(h) "Effective Date" means the date on which the Commission releases the Adopting Order.

(i) The term "BellSouth States" means Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee.

IV. AGREEMENT

8. The Commission and BellSouth agree that this Consent Decree does not constitute either an adjudication of the merits or a factual or legal finding or determination regarding any compliance or noncompliance by BellSouth with the requirements of the Communications Act, including section 251 thereof, and the Commission's implementing rules, arising out of any alleged actions or failures while negotiating with Covad Communications Company the terms and conditions of an amendment to an interconnection agreement relating to BellSouth's provision of unbundled copper loops during the Relevant Period in nine states. The Parties agree that this Consent Decree is for settlement purposes only and that by agreeing to this Consent Decree, BellSouth does not admit any noncompliance, violation or liability associated with or arising from such actions or failures, including any actions or failures described in the Commission's February 25, 2000 and June 7, 2000 letters of inquiry, in any follow-up correspondence, in any meetings between BellSouth and the Commission concerning BellSouth's negotiations, or in any formal or

informal complaints, *ex parte* communications or other information received by the Commission.

9. In express reliance on the covenants and representations contained herein, the Commission agrees to terminate the Inquiry at such time as the Commission releases an Order adopting this Consent Decree.

10. The parties agree and acknowledge that this Consent Decree shall constitute a final settlement between BellSouth and the Commission of the Inquiry. In consideration of the termination of this Inquiry in accordance with the terms of this Consent Decree, BellSouth agrees to the terms, conditions and procedures contained herein.

11. BellSouth admits the jurisdiction of the Commission to adopt this Consent Decree.

12. BellSouth shall be obligated under this Consent Decree to adopt a standard NDA for requests under section 251 for access to confidential information that (1) authorizes the requesting carrier to provide confidential information requested by the FCC or a state commission, or in support of a request for arbitration or an allegation of failure to negotiate in good faith; and (2) contains no language requiring that requesting carriers treat the negotiations themselves as confidential.

13. In addition, BellSouth shall be obligated to revise, within 30 calendar days of the execution of this consent decree, its existing negotiation manual to include (1) a copy of the statutory and regulatory obligations regarding BellSouth's duty to negotiate in good faith; (2) a copy of the standard NDA described above; and (3) procedures for expedited access to confidential information, including a timeline for proposing the standard NDA and for prompt release of confidential information to the CLEC, and escalation procedures for issues regarding disclosure of confidential information.

14. BellSouth shall also be obligated to conduct, within 30 calendar days of the execution of this consent decree, a training session for all of its negotiators that focuses on the statutory and regulatory obligations regarding BellSouth's duty to negotiate in good faith; and to revise its current training schedule to include a session every six months that focuses on BellSouth's statutory and regulatory duty to negotiate in good faith. BellSouth shall be further obligated to provide new employees who have negotiation duties a copy of the revised negotiation manual prior to their assumption of such duties, and to ensure that supervisors will review the negotiation manual with such employees, highlighting BellSouth's statutory and regulatory duty to negotiate in good faith.

15. BellSouth agrees to make a voluntary contribution to the United States Treasury in the amount of seven hundred fifty thousand dollars ($750,000) within 10 calendar days after the time that the Order adopting this Consent Decree becomes a Final Order. Payment should be made by check or money order drawn to the order of the Federal Communications Commission. Reference should be made on the check or money order to ~~[~~"Acct No. X32080035"~~]~~. Such remittances must be mailed to: Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, IL 60673-7482.

16. The Commission agrees that, based on the facts developed in the Inquiry and in the absence of material new evidence related to this matter, it will not use the facts developed in this Inquiry through the date of the Consent Decree or the existence of this Consent Decree to institute, on its own motion, any new proceeding, formal or informal, or take any action on its own motion against BellSouth concerning the matters that were the subject of the Inquiry. The Commission also agrees that, based on the facts developed in the Inquiry, and in the absence of material new evidence related to this matter, it will not use the facts developed in this Inquiry through the date of this Consent Decree or the existence of this Consent Decree to institute on its own motion any proceeding, formal or informal, or take any action on its own motion against BellSouth with respect to its basic qualifications, including its character qualifications, to be a Commission licensee or with respect to compliance with the Commission's rules and policies. Consistent with the foregoing, nothing in this Consent Decree limits the Commission's authority to adjudicate any complaint that may be filed pursuant to section 208 or 251 of the Communications Act, as amended, 47 U.S.C. §§ 208, 251, and to take any action in response to such complaint. If any such complaint is made by a third party, the Commission's adjudication of such complaint shall be based solely on the record developed in that proceeding.

17. BellSouth waives any and all rights it may have to seek administrative or judicial reconsideration, review, appeal or stay, or to otherwise challenge or contest the validity of this Consent Decree and the Order adopting this Consent Decree, provided the Order adopts the Consent Decree without change, addition, or modification.

18. BellSouth and the Commission agree that the effectiveness of this Consent Decree is expressly contingent upon issuance of an Order that is consistent with the Consent Decree and which adopts the Consent Decree without change, addition, or modification.

19. In the event that this Consent Decree is rendered invalid by any court of competent jurisdiction, this Consent Decree shall become null and void and may not be used in any manner in any legal proceeding.

20. If either Party (or the United States on behalf of the Commission) brings a judicial action to enforce the terms of the Order adopting this Consent Decree, neither BellSouth nor the Commission shall contest the validity of the Consent Decree or Order, and BellSouth and the Commission will waive any statutory right to a trial *de novo* with respect to any matter upon which the Order is based, and shall consent to a judgment incorporating the terms of this Consent Decree.

21. BellSouth waives any claims it may otherwise have under the Equal Access to Justice Act, Title 5 U.S.C. § 504 and 47 C.F.R. § 1.1501, *et seq.*

22. Any violation of the Consent Decree or the Order adopting this Consent Decree will constitute a separate violation of a Commission order, entitling the Commission to exercise any rights and remedies attendant to the enforcement of a Commission order.

23. The Parties also agree that any provision of the Consent Decree that would require the Company to act in violation of a rule or order adopted by the Commission will be superseded by such Commission rule or order.

24. This Consent Decree may be signed in counterparts.

FEDERAL COMMUNICATIONS COMMISSION

By: _____

Magalie Roman Salas, Secretary

BELLSOUTH CORPORATION

By: _____

Margaret Greene, Executive Vice President – Regulatory and External Affairs

DISSENTING STATEMENT OF
COMMISSIONER HAROLD FURCHTGOTT-ROTH

Re: BellSouth Corporation, Order, EB Docket No. EB-00-IH-0134, Acct. No. X32080035.

I cannot approve of the consent decree that the Commission adopts today. The Commission's assertion of jurisdiction over this matter sets this agency on a course that is completely at odds with the framework that Congress intended for local exchange carriers to use to reach agreements regarding the terms on which competing carriers will use incumbents' networks. Moreover, the agency has predicated its investigation of this matter on a one-sided set of facts, where the complaining party did not bother to file any sort of formal complaint, either here or at a state commission. As far as I can tell, the Commission has browbeaten BellSouth into paying a $750,000 fine and agreeing to a number of conditions simply for proposing to include two terms that the agency thinks questionable in a non-disclosure agreement. I therefore dissent from this decision, and I regret that BellSouth found it necessary to negotiate this decree with the Enforcement Bureau.

Background. Nearly two years ago, Covad and BellSouth voluntarily negotiated a third amendment to their existing interconnection agreement, which applied to several states in BellSouth's territory. The effective date of that amendment was December 1, 1998, and the term was for two years.[7] In this contract, the parties agreed to temporary prices for certain network elements that BellSouth would provide. At Covad's request, the parties agreed that prices for BellSouth's network elements would be "'trued-up (up or down) based on final prices either determined by further agreement or by final order, including any appeals, in a proceeding involving BellSouth before the regulatory authority for the state in which the services are being performed or any other body having jurisdiction over this agreement, including the Federal Communications Commission."[8]

The December 1998 agreement did not cover the terms under which BellSouth would provide unbundled copper loops to Covad. In the spring of 1999, the parties embarked on negotiating an amendment to their agreement regarding this network element, and this consent decree is the result of a dispute that arose during those negotiations.

BellSouth proposed an amendment that, among many other things, set the rates at which it would provide its unbundled loops to Covad. Covad objected to these rates and asked BellSouth for cost studies to show that the rates conformed with the Commission's pricing rules.[9] BellSouth contended that these data were confidential and asked Covad to sign a nondisclosure agreement before BellSouth disclosed the information to Covad.[10]

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[7] *See* Affidavit of Brian T. Campbell, BellSouth Manager-Interconnection Service/Pricing (Mar. 9, 2000).

[8] *See* Third Amendment to Interconnection Agreement between Covad and BellSouth, ¶ 6.0 (Dec. 1, 1998).

[9] *Id.*

[10] *See* Letter from Brian T. Campbell to Christopher Goodpastor (Sept. 2, 1999).

The draft nondisclosure agreement proposed by BellSouth provided that BellSouth's "Confidential Information" would not be "revealed or distributed" to anyone other than Covad's "Authorized Representatives." Paragraph 7 of the draft agreement provided that "[i]n the event [Covad] is required by law, regulation, or court order to disclose any of [BellSouth's] Confidential Information, [Covad] will promptly notify [BellSouth] in writing prior to making any such disclosure in order to facilitate [BellSouth] seeking a protective order or other appropriate remedy from the proper authority." In addition, Paragraph 5 provided that both parties were to treat the negotiations regarding Covad's purchase of unbundled network elements as confidential and specified that "the discussions and conversations within the context of Negotiations are inadmissible in any proceeding conducted before a state or federal regulatory, judicial or administrative agency."

In early September 1999, Covad asked BellSouth to delete Paragraph 5 of the non-disclosure agreement. It did not say anything about Paragraph 7. On September 14, 1999, BellSouth responded that it was unwilling entirely to delete Paragraph 5. BellSouth's representative told Covad that if it "would like to propose different language, I would be happy to present it to our legal folks for reconsideration."[11]

On September 30, 1999, Covad signed the amendment to the December 1998 interconnection agreement, but declared it did so "under protest." It asserted that it believed the "prices imposed by BellSouth are both unreasonable and contrary to federal pricing rules."[12] BellSouth responded on October 1, 1999, in a letter stating that BellSouth thought the issue regarding the rates for the unbundled copper loop had been resolved through previous discussions. BellSouth pointed out that the rates would be subject to "true-up" based on final prices determined by further agreement or by a regulator's order. BellSouth also stated that it had offered to allow Covad to review the underlying cost studies, but that Covad had not yet signed a nondisclosure agreement.[13]

In a letter dated October 4, 1999, Covad again took issue with BellSouth's proposed nondisclosure agreement. Paragraph 5, wrote Covad's representative, "precludes Covad from disclosing *any* information regarding the entire negotiation to 'a state or federal regulatory, judicial or administrative agency.'"[14] Covad asserted that BellSouth had violated its duty to negotiate in good faith, both by initially refusing to disclose cost information and by subsequently conditioning disclosure of its cost information upon the execution of a nondisclosure agreement that covered the entire negotiation. Covad asked BellSouth to reconsider the terms under which it would provide cost information regarding the unbundled copper loop.

On October 13, 1999, BellSouth acknowledged that it had asked Covad to execute a nondisclosure agreement before reviewing the studies. But it disagreed with Covad's reading of

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[11] *See* Email from Brian T. Campbell to Christopher Goodpastor (Sept. 14, 1999).
[12] *See* Letter from Dhruv Khanna, Covad Executive Vice-President/General Counsel, to Harris Anthony, General Counsel, BellSouth Interconnection Services (Sept. 30, 1999).
[13] *Id.*
[14] *See* Letter from Christopher Goodpastor to Brian Campbell (Oct. 4, 1999).

the proposed agreement. "The non-disclosure agreement (NDA) proposed by BellSouth would not have precluded Covad from providing the information contained therein in the event that it were required to do so by an order of the FCC or state commission. Paragraph seven (7) of the proposed agreement simply required Covad to notify BellSouth so that BellSouth could seek a protective order or obtain an order that ensured that the confidential information was accorded proprietary treatment."[15] In addition, BellSouth contended that, in Paragraph 5 of the agreement, it merely sought to keep confidential the discussions and conversations held during the negotiations, in the same way that the rules of evidence make settlement discussions inadmissible in litigation. "If Covad wishes to introduce cost studies into arbitration, it can certainly seek to do so, subject to appropriate objections and requests for proprietary treatment."[16]

According to an *ex parte* pleading that BellSouth has submitted, representatives of BellSouth and Covad met on October 14, 1999.[17] According to BellSouth, Covad's representatives indicated that they were unwilling to execute a nondisclosure agreement, and BellSouth proposed to permit Covad to review the cost studies for two hours on October 20, 1999. BellSouth's pleading states that Covad's representative agreed to this proposal.

Covad again expressed its unhappiness with the nondisclosure agreement proposed by BellSouth, stating in an October 16, 1999 email that it was "troubled by BellSouth's insistence upon keeping ALL negotiations regarding the [unbundled copper loop] Amendment confidential . . . when BellSouth only contends that the cost studies alone are confidential. . . . [W]e cannot agree to keep other aspects of these negotiations (*i.e.*, our recent letters) confidential, when neither party contends these portions of the negotiations contain confidential information." Covad's representative went on to say that he had already disclosed portions of the negotiations to entities outside of Covad, and that it was therefore impossible for Covad to comply with Paragraph 5 of the proposed NDA. Covad proposed to substitute Rule 408 of the Federal Rules of Evidence for Paragraph 5.[18] In an October 22, 1999 letter Covad insisted that it needed "unfettered access to all cost information" on which BellSouth's rates were based,[19] and on November 4, 1999, Covad declared that BellSouth's proposal to disclose the cost information in a two-hour meeting at BellSouth's offices was "entirely unacceptable."[20]

On November 16, 1999, BellSouth responded to these complaints. Its letter states that Tom Allen of Covad had "previously agreed to come to BellSouth to examine the cost data" in question, but that "[a]pparently Covad has now changed its position."[21] It went on to offer to provide the cost study to Covad to review pursuant to section 9 of the companies' existing

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[15] *See* Letter from Brian T. Campbell to Christopher Goodpastor (Oct. 13, 1999).
[16] *Id.*
[17] *See* Response of BellSouth to Enforcement Bureau Possible Notice of Apparent Liability.
[18] *See* Email from Christopher Goodpastor to Brian T. Campbell (Oct. 16, 1999).
[19] *See* Letter from Christopher Goodpastor to Michelle Culver, Negotiator, Interconnection Services, BellSouth Interconnection Services (Oct. 22, 1999).
[20] *See* Letter from Christopher Goodpastor to Brian T. Campbell (Nov. 4, 1999).
[21] *See* Letter from Brian T. Campbell to Christopher Goodpastor (Nov. 16, 1999).

interconnection agreement.[22] BellSouth asked Covad to return the cost data to it within 30 days.

Covad rejected this offer on December 2, 1999. It argued that although this offer was better than what had been previously proposed, "it still prevents Covad from effectively using the information in negotiations with BellSouth." "To arbitrarily limit Covad's access to the cost information for thirty days when the negotiations will likely last beyond that period creates an improper disparity in bargaining power that favors BellSouth."[23] Covad demanded that BellSouth deliver the cost information to it no later than December 8, 1999, asserting that any failure to do so would violate BellSouth's duty to negotiate in good faith. And on January 28, 2000, Covad sent a follow-up letter that it said served as "another formal request from Covad for unfettered access to the . . . cost studies."[24] To date, Covad has declined to sign a non-disclosure agreement, and BellSouth has not provided Covad with the disputed cost information.

Sometime last spring, Covad apparently informally contacted the Enforcement Bureau and alleged that BellSouth had violated its duty of good faith negotiation in the course of these negotiations. Covad did not file any formal complaint with this Commission, nor did it ever formally raise this issue before a state commission. An investigation ensued, and this consent decree is the result.

The Commission Lacks Jurisdiction to Enter Into this Consent Decree. Section 251(c)(1) requires both incumbent and competing local exchange carriers to negotiate in good faith the terms of interconnection agreements. Section 252 sets out a detailed framework that carriers are to use to reach such agreements. Carriers may first attempt voluntarily to reach agreement, without regard to the standards set out in section 251(b) and (c). 47 U.S.C. § 252(a)(1). If a party is dissatisfied with any aspect of these voluntary negotiations, it may petition a state commission to resolve outstanding issues. *Id.* § 252(b)(2). Parties may ask a federal district court to determine whether a state commission's decision meets the requirements of sections 251 and 252.

The Commission here assumes, without discussion, that it has independent jurisdiction to enforce BellSouth's section 251 obligations. In other words, it thinks that it may review BellSouth's conduct in voluntary negotiations to determine whether there has been a violation of BellSouth's section 251 duties, including its duty to negotiate in good faith. I disagree. The statutory framework that Congress devised contemplates that parties will resolve whatever differences they may have through the section 252 process. Thus, if either Covad or BellSouth were displeased with the course that their voluntary negotiations had taken, the statute directs them to take the dispute to a state commission and from there to a federal district court.

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[22] Section 9 of the parties' existing agreement provides for the use of confidential information exchanged by the companies. *See* Third Amendment to Interconnection Agreement between Covad and BellSouth, § 9.0 (Dec. 1, 1998).

[23] *See* Letter from Christopher Goodpastor to Brian T. Campbell (Dec. 2, 1999).

[24] *See* Letter from Tom Allen, Covad Vice President, ILEC Relations to Jerry Hendrix, Senior Director, BellSouth Interconnection Services (Jan. 28, 2000).

The Commission here effectively bypasses this process. In my view, its assertion of jurisdiction is not supported by the statute, and the practical effect of its action will be to undermine the section 252 negotiation process. Significantly, the only court that has thus far considered the issue on the merits has determined the Commission's view of its authority independently to enforce section 251 is "contradicted by the language, structure, and design of the Act." *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 804 (8th Cir. 1997). Although the Supreme Court reversed this determination on ripeness grounds, *see AT&T v. Iowa Utils. Bd.*, 119 S. Ct. 721, 733 (1999), I believe that the Eighth Circuit's understanding of the Commission's role in the section 251 and 252 process is the correct one, and I regret that no party has brought this issue before a court. If a party may sidestep the section 252 arbitration process simply by notifying the Commission that it believes another party has violated section 251, the process through which parties are intended to reach agreement will be gravely disrupted.

The Evidence on Which this Action Is Predicated Is Exceedingly Slim. Even if the Commission had jurisdiction over this matter, however, I could not join in this decision. The Commission here apparently has taken action based on BellSouth's proposal to include two paragraphs regarding confidentiality in a draft of a nondisclosure agreement.[25] I would be very reluctant to conclude that this conduct, without more, constituted a failure to act in good faith under section 251.

In its *Local Competition Order*, the Commission considered section 251's good faith requirements. It ruled that whether a party has acted in good faith will typically require a case-by-case determination, in light of all the facts and circumstances underlying the negotiations.[26] The Commission specifically considered the matter of non-disclosure agreements. It noted that there are "pro-competitive reasons for parties to enter into a nondisclosure agreements," although it also concluded that agreements should not preclude a party from providing information requested by the Commission, a state commission, or in support of a request for arbitration under section 252(b)(2)(B).[27] The Commission also observed that a party might voluntarily agree to limit its legal rights or remedies as part of a negotiated agreement.[28]

The Commission here appears to have lost sight of the fact that section 252(a)(1) authorizes parties to negotiate binding agreements "without regard to the standards" set forth in section 251(b) and (c).[29] Surely this language means that parties should be free at least to *propose* virtually any language they choose regarding interconnection agreements, including the

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[25] Consistent with an agreement between the Enforcement Bureau and BellSouth, the Commission was barred by the statute of limitations from taking any enforcement action based on conduct that occurred prior to August 25, 1999. *See* 47 U.S.C. § 503(b)(6).

[26] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 15575 [¶ 150] (1997).

[27] *Id.* [¶ 151].

[28] *Id.* [¶ 152].

[29] Since parties may voluntarily negotiate agreements that depart from section 251's requirements, I do not understand why, at this stage of negotiations, Covad asserted that BellSouth was required to base rates for its unbundled loops on TELRIC.

extent to which shared information will be kept confidential. BellSouth did no more than that here. It merely proposed boilerplate language regarding confidentiality of cost data, and its subsequent correspondence with Covad indicates that it was open to modifying the language of these paragraphs. To be sure, the *Local Competition Order* ruled that agreements should not prevent the disclosure of information to regulatory authorities, but I do not understand BellSouth's proposed language to run afoul of this requirement. To the extent there was any ambiguity on this point, BellSouth's October 13 letter made utterly clear that it did not intend either Paragraph 5 or Paragraph 7 to preclude Covad from introducing cost information in an arbitration proceeding.

In addition, the record indicates that Covad's conduct was not entirely irreproachable. It appears to have declined to negotiate regarding alternative language, despite BellSouth's request that it propose modifications. Indeed, Covad insisted several times on "unfettered access" to the cost information – a demand that is clearly inconsistent with the *Local Competition Order*'s recognition that an incumbent carrier may have legitimate reasons for keeping cost information confidential.

Moreover, it is very troubling that the Commission here has not acted on a formal complaint, but instead undertook this investigation on its own motion. And it is telling that – even after November 16, 1999, when BellSouth agreed to make the information available to Covad on terms that even the Enforcement Bureau evidently thinks were acceptable – Covad continued to decline to review the data. Nor do I understand why, if Covad was so unhappy with the course that voluntary negotiations had taken, it failed to ask a state commission to resolve the matter. If Covad did not think itself sufficiently harmed by BellSouth's conduct to warrant filing a formal pleading, ask for state commission arbitration, or even to review the data at issue when it was made available, I cannot comprehend why the Enforcement Bureau thought it appropriate to initiate this proceeding.

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The Commission had no jurisdiction to undertake this enforcement proceeding. And even assuming it had some authority to adopt this consent decree, the set of facts on which it chose to base this enforcement action is exceedingly troubling. If a company can be exposed to this level of liability simply by proposing terms to be included in an interconnection or confidentiality agreement, I see no reason why it should risk voluntarily negotiating at all. I therefore dissent from the Commission's adoption of this decree.