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October 21, 2003

VIA E-MAIL AND FEDERAL EXPRESS

Ms. Carole J. Washburn  
Executive Secretary  
Washington Utilities and Transportation Commission  
P.O. Box 47250  
Olympia, Washington 98504-7250

Re: In the Matter of the Implementation of the Federal Communications  
Commission's Triennial Review Order, Docket No. UT-033025

Dear Ms. Washburn:

Covad Communications Company (Covad) respectfully offers comments on the batch cut migration process in response to the Hon. Ann E. Rendahl's October 14, 2003, request for comments.

An examination of line splitting hot cut issues is essential to determine whether the incumbent local exchange carriers' (ILECs') hot cut processes are sufficient. Specifically, many mass market customers want a seamless migration of voice *and* data services, which is generally done through line splitting. Competitive local exchange carriers (CLECs) are impaired as a result of the ILECs' hot cut processes because the ILECs do not have a hot cut process in place to support: (a) migrating an end user from a line splitting arrangement (or any other arrangement, including line sharing or ILEC retail voice only) incorporating unbundled local switching (UNE-P) to a line splitting arrangement incorporating self-provisioned local switching (UNE-L), or (b) establishing line splitting arrangements incorporating self-provisioned local switching (UNE-L). Covad respectfully requests the Commission's oversight over the implementation of these hot cut processes.

Attached for the Commission's review is a recent procedural order from the California Public Utilities Commission (CPUC) establishing a procedural schedule for the various *Triennial Review*-related proceedings. Of particular note, on page 8 of the order the CPUC ruled "we agree with Covad that provisioning of line splitting arrangements should be among the migration scenarios examined in considering an acceptable batch cut process." Covad respectfully requests a similar ruling from this Commission.

Covad appreciates the Commission's consideration of these comments.

Sincerely,

Karen Shoresman Frame  
Senior Counsel  
Covad Communications Company

cc: All parties of record

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service.

Rulemaking 95-04-043  
(Filed April 26, 1995)

Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service.

Investigation 95-04-044  
(Filed April 26, 1995)

**ASSIGNED COMMISSIONER'S AND  
ADMINISTRATIVE LAW JUDGE'S RULING  
ON SCOPE AND SCHEDULE FOR NINE-MONTH  
FCC TRIENNIAL REVIEW PROCEEDING**

This ruling sets the preliminary scope and schedule for the nine-month proceeding as to impairment of competition in serving "mass market" customers<sup>1</sup> pursuant to the Federal Communications Commission (FCC) Triennial Review Order. The FCC allotted a nine-month period from the effective date of the FCC Order to conclude state-mandated proceedings relating to impairment of local exchange competition. This nine-month period concludes on July 2, 2004. The adopted scope and schedule take into account parties'

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<sup>1</sup> As defined by the FCC Order, mass market customers consist of analog voice customers that purchase only a limited number of traditional phone lines, and can only be economically served via DS0 loops.

written comments and oral argument at the prehearing conference (PHC) on September 30, 2003.

### **Service List for the Nine-Month Review Phase**

A separate service list shall be created exclusively for purposes of the FCC Triennial Review nine-month phase of this proceeding. The separate service list for this phase shall consist initially of parties that entered appearances at the PHC held on September 30, 2003, as attached to this ruling as Appendix A. The instant ruling shall be mailed to the broader service list covering all parties of record in R.95-04-043/I.95-04-044. If any of additional parties beyond those identified in Appendix A hereto wish to be on the service list for matters relating to the nine-month proceeding, they must submit a request to the Commission's Process Office to have their name added. Otherwise, subsequent service of matters relating to the nine-month proceeding shall be limited to the separate service list created only for this phase of the proceeding.

### **Scope of Proceeding: Overview**

As prescribed by the FCC, the Commission must complete a market-by-market analysis within nine months as to the extent that competitive carriers are impaired in their ability to enter the market without access to specified unbundled network elements. These elements consist of switching for mass market customers,<sup>2</sup> high capacity loops (dark fiber, DS3, and DS1); and dedicated transport in certain configurations (dark fiber, DS3, and DS1). Findings must incorporate analysis of designated triggers. The Commission will also consider operational and economic barriers on competitive entry. The Commission must also adopt a "batch cut" process for transferring large volumes of mass market

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<sup>2</sup> Switching for enterprise customers was the subject of a separate phase of this rulemaking in a 90-day proceeding. *Order* ¶ 451.

customers or issue detailed findings explaining why such a batch cut process is unnecessary in a particular market.

## **Proceedings on Mass Market Switching**

### **Scope of Inquiry**

The FCC found that “competing carriers are impaired without access to unbundled local circuit switching for mass market customers.”<sup>3</sup> The FCC, however, requires state commissions to conduct a market-by-market “granular review” of the national finding based on analysis of prescribed triggers: (a) the number of carriers self-provisioning and (b) the extent of wholesalers offering independent network element capacity.

Parties disagree as to whether the market definition for the mass market switching impairment analysis should be decided in one phase or two. The ILECs believe that market definition should be addressed in an initial phase based only on analysis of the triggers, with operational and economic barriers treated in a second phase. Other parties believe that operational and economic barriers should concurrently be considered in one consolidated phase before the Commission defines the markets.

The determination of whether to schedule one or two procedural phases for mass market switching issues shall be made in a subsequent ruling. The schedule for mass market switching will be set based on disposition of that issue. In any event, parties shall proceed without delay in propounding necessary discovery on all relevant mass market switching issues, including operational and economic barriers.

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<sup>3</sup> FCC Order ¶ 473.

## Proceedings on Loops and Transport

### Scope of Inquiry

The FCC found that carriers are impaired at most customer locations on a nationwide basis without access to dark fiber,<sup>4</sup> are impaired on a customer-location-specific basis without access to unbundled DS3 loops,<sup>5</sup> and are generally impaired without access to unbundled DS1 loops.<sup>6</sup> The FCC also found that requesting carriers are impaired on a nationwide basis without access to unbundled dark fiber, DS3, and DS1 transport facilities.<sup>7</sup> The FCC requires state commissions to conduct a granular analysis of high capacity loop and transport impairment only for specific customer locations or routes for which sufficient relevant evidence has been presented.<sup>8</sup>

The Commission shall consider factual claims that competing carriers are not impaired without access to enterprise market loops only with respect to specifically identified customer locations.<sup>9</sup> The FCC criteria to be used in assessing impairment are: (1) a “Self-Provisioning Trigger,” i.e., “where a specific customer location is identified as being currently served by two or more unaffiliated [CLECs] with their own loop transmission facilities at the relevant loop capacity level,” and (2) a “Competitive Wholesale Facilities Trigger,” i.e.,

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<sup>4</sup> *FCC Order*, ¶ 311.

<sup>5</sup> *FCC Order*, ¶ 320.

<sup>6</sup> *FCC Order*, ¶ 325.

<sup>7</sup> *FCC Order*, ¶ 359.

<sup>8</sup> TRO at ¶ 417, and note 1289.

<sup>9</sup> *FCC Order*, ¶ 328.

where two or more unaffiliated competitive providers have deployed transmission facilities to the location and are offering alternative loop facilities to [CLECs] on a wholesale basis at the same capacity level.”<sup>10</sup>

This Commission must likewise undertake a granular impairment examination regarding dedicated transport,<sup>11</sup> and make findings on a route-specific basis taking into account the Self-Provisioning and Wholesale Facilities Triggers. A party seeking to overcome the national finding of impairment shall therefore be required to present *prima facie* evidence showing non-impairment based on triggers or, failing that, based on the potential deployment test on a customer-by-customer (for loops) or route-by-route (for transport) basis.

### **Schedule for Loops and Transport Issues**

CLEC parties generally believe the loop and transport phase of the proceeding can be resolved through collaborative workshops without evidentiary hearings. The ILECs assume that evidentiary hearings will be required, but also propose treating transport and loop impairment issues in a separate procedural track from mass market switching.

SBC and Verizon shall serve opening testimony on loop and transport issues on November 20, 2003. Opening testimony shall identify the loops (by customer location) and transport (by route) where the ILECs seek to challenge the national findings of impairment. In the interests of facilitating consensus on loops and transport issues, a collaborative workshop, to be moderated by TD staff, shall be scheduled for December 4, 2003. A workshop report shall be

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<sup>10</sup> *FCC Order*, ¶ 329.

<sup>11</sup> *FCC Order*, ¶ 360.

jointly filed and served by TD staff in cooperation with workshop participants within 5 business days indicating agreements reached and remaining issues in dispute. Any disputes that remain in this phase after the collaborative workshop shall be addressed in reply testimony due on December 30, 2004. Reply testimony will be presented by loop or transport element under the trigger(s) or potential deployment test for which a *prima facie* case has been made of no impairment. Only where a *prima facie* case is presented for a particular customer-by-customer location by loop type or transport route for any applicable trigger or potential deployment test will further proceedings be necessary.

To the extent evidentiary hearings are deemed needed, they shall be scheduled for the week beginning January 12, 2004. A further scheduling for briefing shall be set at a later time.

## **Proceedings on Batch Hot Cut Process**

### **Scope of Inquiry**

The FCC has found that operational and economic factors associated with the current hot cut process used to transfer a loop from one carrier's switch to another's serve as barriers to competitive entry in the absence of unbundled switching. As directed by the FCC, in each of "the markets in which it will evaluate impairment," this Commission must either "approve and implement" a "batch cut" process to make the hot cut process more efficient and reduce per-line costs for transferring large volumes of mass market customers or else, issue detailed findings that the current hot cut processes do not give rise to impairment in a market and that a batch cut process is therefore unnecessary.<sup>12</sup>

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<sup>12</sup> FCC Order ¶ 460.



The nine-month proceeding shall thus address the “batch cut” process concurrently with the review of impairment relating to loop, transport, and switching access.

Issues to be addressed with a “batch cut” process include deciding the appropriate number of loops to include in each batch and specific processes in performing a batch cut including a timetable for implementation and performance metrics for evaluation. The FCC’s national finding of impairment is based on the combined effect of all aspects of the hot cut process on competitors’ ability to serve mass market voice customers.<sup>13</sup> The hot cut impairment analysis must therefore include consideration of all relevant sources of revenues derived from the loop, including both voice and data sources. Accordingly, we agree with Covad that provisioning of line splitting arrangements should be among the migration scenarios examined in considering an acceptable batch cut process.

The batch cut process must be undertaken for separately each ILEC that asserts that there is no impairment in its particular geographic market or markets in order to “tak[e] into account the incumbent LEC’s particular network design and cut over practices.” 47 C.F.R. § 51.319(d)(2)(ii)(A)(2).

### **Procedural Schedule for Batch Hot Cuts**

As an initial procedural step, the ILECs shall present their proposals concerning the specific processes to be used when performing a batch cut. The FCC states that the batch cut process is expected to produce efficiencies related to performing tasks once for multiple lines that would otherwise have been

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<sup>13</sup> FCC Order ¶ 473.

performed on a line-by-line basis.<sup>14</sup> SBC and Verizon shall present opening testimony on November 7, 2003, concerning their proposed batch cut processes.

Several parties agree that issues relating to the batch cut process lend themselves to at least partial resolution through a separate collaborative workshop that will hopefully obviate the need for evidentiary hearings. SBC reports that it is currently enhancing the batch cut process to “scale up” the existing hot cut process to meet required mass market volumes for implementation in the areas the Commission deems necessary.

A collaborative batch hot cut workshop shall be set for November 17, 2003 for parties to seek consensus and narrow areas of dispute as to appropriate batch hot cut processes. The workshop will also provide a forum to discuss the means by which appropriate “Total Element Long-run Incremental Cost” (TELRIC) rates can be identified for those batch cut processes on which parties may reach consensus, or those requiring further litigation. The FCC requires that state commissions adopt TELRIC rates for the batch cut activities that are approved to the extent such rates are not already adopted. A workshop report shall be jointly filed and served by TD staff in cooperation with workshop participants on November 24, 2003, indicating any agreements reached and remaining issues in dispute as to the batch cut process and related TELRIC pricing thereof.

To the extent unresolved issues remain concerning batch cut issues, a further schedule shall be set following receipt of the workshop report. Findings must also be made concerning in which markets, if any, the absence of a batch cut migration process is not causing impairment. Any further procedural

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<sup>14</sup> FCC Order ¶ 489.

schedule to address this issue shall be integrated with the schedule for market determination in connection with the mass market switching analysis. To the extent evidentiary hearings are deemed needed on batch cut processing issues, they shall be scheduled following receipt of the workshop report in coordination with any evidentiary hearings on switching, loops and transport issues.

## **Discovery Issues**

### **Role of The Commission in Discovery Process**

In view of the broad scope of entities from whom data must be collected in connection with the analysis of triggers, the Commission staff will facilitate discovery workshops to reach consensus on a standardized template of data requests. Coordination issues include reaching consensus on the categories of data that need to be collected, and identifying the entities from whom specific data must be collected. Coordination and consolidation will avoid duplication of requests and responses, and will promote uniformity.

The Commission shall prepare a transmittal letter under the signature of Commissioner Kennedy to be sent to all carriers from whom trigger data must be collected, and directing the prompt production of the requested data. Individual parties may also issue their own discovery where interests and questions diverge from the standardized data request template. Even if a party has asked questions that are not part of the global data request, other parties may be interested in the questions or responses, and should have access to such information, to the extent desired. The Commission staff shall also facilitate procedures for the prompt transmittal of data responses to designated active parties in the proceeding.

To the extent parties can't reach their own resolution, the Commission will adjudicate discovery disputes through its law and motion process. The

burden of proof remains on each party to make its case, conduct discovery, and produce evidence.

### **Treatment of Confidential Data**

Parties agree on the need to protect confidential data to be collected during the course of this proceeding. Some parties, however, offer a nondisclosure agreement template as previously used in the OANAD proceeding while other parties proposed a Protective Order be used, as authorized by the Commission. The Commission shall adopt a Protective Order applicable to discovery in this phase, rather than simply having parties execute their own nondisclosure agreement. Particularly because discovery may involve entities that are not active participants in the proceeding, a Protective Order is preferable to enforce compliance. At the PHC, parties were directed to meet and confer to resolve differences over language in the draft Protective Order submitted. We shall direct that the draft Protective Order be amended accordingly, and resubmitted for approval to the assigned ALJ no later than close of business on October 9, 2003.

#### **IT IS RULED that:**

1. A separate service list is established for the nine-month phase of the FCC Triennial Review, as attached hereto as Appendix A. Any party that is not on the attached service list but that seeks to be added to the service list, either as an active party or on an "information only" basis must file a request with the Commission's Process Office to be so added. Subsequent filings relating to the nine-month proceeding shall only be served using this separate service list.
2. The preliminary schedule for the nine-month phase is adopted, as discussed above.

3. The schedule to address mass market switching impairment issues shall be set in a subsequent ruling pending determination as to whether to use a single-phased or two-phased proceeding for making findings on this issue.

4. SBC and Verizon shall present opening testimony on November 7, 2003, concerning their proposed batch cut processes.

5. A collaborative batch hot cut workshop is set for November 17, 2003, starting at 10:00 a.m. in the Commission's Courtroom , 505 Van Ness Avenue San Francisco for parties to seek consensus as to appropriate batch hot cut processes

6. SBC and Verizon shall serve opening testimony on loop and transport issues on November 20, 2003.

7. A collaborative workshop to seek consensus on loop and transport issues, to be moderated by TD staff, shall be scheduled for December 4, 2003, starting at 10:00 a.m. in the Commission's Courtroom , 505 Van Ness Avenue San Francisco.

8. A workshop report shall be jointly filed and served by TD staff in cooperation with workshop participants within 5 business days after each of the workshops indicating agreements reached and remaining issues in dispute.

9. Any loop/transport issues in dispute after the collaborative workshop shall be addressed in reply testimony due on December 30, 2004.

10. To the extent evidentiary hearings are needed for loop/transport issues, they shall be scheduled for the week beginning January 12, 2004.

11. To the extent unresolved issues remain concerning batch cut issues, a further schedule to address these issues shall be set following receipt of the workshop report.

12. A transmittal letter under the signature of Commissioner Kennedy shall be sent to all carriers from whom trigger data must be collected, directing the prompt production of the requested data.

13. The draft Protective Order previously submitted by parties shall be amended to reflect joint consensus of participating parties, and resubmitted for approval to the assigned ALJ no later than close of business on October 9, 2003.

14. The scope, schedule and procedures set forth above are hereby adopted.

Dated October 8, 2003, at San Francisco, California.

/s/ SUSAN P. KENNEDY

Susan P. Kennedy  
Assigned Commissioner

/s/ THOMAS R. PULSIFER

Thomas R. Pulsifer  
Administrative Law Judge

**APPENDIX A**

**SERVICE LIST FOR THE NINE-MONTH PHASE  
OF THE FCC TRIENNIAL REVIEW**

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**CERTIFICATE OF SERVICE**

I certify that I have by mail, and by electronic mail, to the parties to which an electronic mail address has been provided, this day served a true copy of the original attached Assigned Commissioner's and Administrative Law Judge's Ruling on Scope and Schedule for Nine-Month FCC Triennial Review Proceeding on all parties of record in this proceeding or their attorneys of record.

Dated October 8, 2003, at San Francisco, California.

/s/ TERESITA C. GALLARDO

Teresita C. Gallardo

**N O T I C E**

Parties should notify the Process Office, Public Utilities Commission, 505 Van Ness Avenue, Room 2000, San Francisco, CA 94102, of any change of address to insure that they continue to receive documents. You must indicate the proceeding number on the service list on which your name appears.

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The Commission's policy is to schedule hearings (meetings, workshops, etc.) in locations that are accessible to people with disabilities. To verify that a particular location is accessible, call: Calendar Clerk (415) 703-1203.

If specialized accommodations for the disabled are needed, e.g., sign language interpreters, those making the arrangements must call the Public Advisor at (415) 703-2074, TTY 1-866-836-7825 or (415) 703-5282 at least three working days in advance of the event.

CERTIFICATE OF SERVICE  
Docket No. UT-033025

I hereby certify that a true and correct copy of the Comments of Covad Communications Company has been sent by first-class U.S. Mail with postage fully prepaid to the following:

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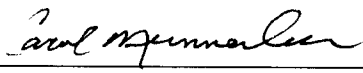
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DATED this 21<sup>st</sup> day of October, 2003, at Seattle, Washington.

  
\_\_\_\_\_  
Carol Munnerlyn, Secretary