BEFORE THE WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION

In the Matter of the Implementation of the Federal Communication Commission's Triennial Review Order	Docket No. UT-033025 COMMENTS OF COVAD COMMUNICATIONS COMPANY RE IMPLEMENTATION OF FCC's TRIENNIAL REVIEW ORDER

Pursuant to the Notice Inviting Comments Concerning Process for Implementing FCC Triennial Review Order, dated August 22, 2003, Covad Communications Company ("Covad") submits the following Comments.

COMMENTS

Covad provides DSL and data services to residential customers and large and small businesses across the country. Although Covad partners with voice providers over UNE-P, Covad does not provide any voice services over UNE-P. Accordingly, Covad's Comments address xDSL and data-specific issues which may arise after the effective date of the Triennial Review Order ("TRO").

At the outset, Covad notes for the next month or two, the states' abilities and responsibilities to implement the line-sharing portions of the TRO is likely to be very much in a state of flux. Covad has already filed a motion for a stay with the FCC. If the FCC does not issue a stay of the line sharing provisions, it is likely that the U.S. Court of Appeals will do so. Because of the uncertainty surrounding the line sharing issues, it is important for the Commission to adopt and follow procedures that are flexible enough to accommodate a range

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of issues that could shrink or grow as the state proceeding progresses. Covad notes that many of the Commission's procedural questions are addressed by the TRIP Task Force "Decision Point List" ("DPL") outlining and Procedural Issues raised by the TRO. Eschelon has submitted copies of the TRIP DPL with Comptel's responses on behalf of the CLEC industry. By this reference, Covad adopts the TRIP DPL responses as submitted by Eschelon.

Covad also believes that the procedural questions can best be answered with some understanding of the nature and scope of the substantive points that must be addressed. Accordingly, the balance of Covad's comments are aimed at providing background on the issues of particular importance to DLECs (data LECs). Specifically, Covad's Comments address 1) Line Splitting, 2) Line Sharing Transition and 271 Access, 3) Line Sharing Pricing, and 4) Copper Retirement. While many of the post-TRO issues and concerns raised by Covad may not become issues for the Commission, Covad's Comments are intended to inform the Commission of the xDSL and data issues raised by the TRO that have the potential to become the subject of requests for Commission action.

I. LINE SPLITTING

The FCC's phase-out of Line Sharing was largely premised on the availability of Line Splitting. However, ILEC processes, rates and OSS for Line Splitting are currently inadequate to allow CLECs to scale their businesses by offering customers a package of both voice and data services. Accordingly, before Line Sharing can be transitioned out, state commissions must determine that the processes, rates and OSS for Line Splitting provide competitors with a meaningful opportunity to compete. Indeed, the Coalition for High-Speed Online Internet Competition and Enterprise ("CHOICE Coalition"), including Covad, recently filed a Motion for Stay with the FCC on this basis. A copy of the CHOICE Coalition Motion for Stay is attached.

Line Splitting is a simple arrangement that provides two services, voice and data, on a single customer loop, similar to when the ILECs add data services to an existing

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voice customer. Until the processes and systems that enable Line Splitting are as seamless and customer friendly as when an ILEC adds data services, CLECs' ability to compete in offering packages of voice and data services will be severely restricted. Significant obstacles stand in the way of scalable Line Splitting at this time. First, each ILEC has a morass of system and process limitations that make Line Splitting migrations difficult, expensive and, in some cases, service interrupting. For example, the systems and processes for adding UNE -P to a data line or adding data to a UNE-P line often require multiple orders, manual orders, or a combination of both and some threaten service interruption or unreasonably high nonrecurring charges for such migrations. Second, systems and processes that maximize the customer's ability to choose from a wide variety of service providers are simply nonexistent. Customers may wish to change voice providers, change data providers, and drop voice or data service at some time. These consumer choices are not supported by the existing ILEC Line Splitting systems and processes. Commissions must evaluate ILEC systems and processes to insure that these migrations are timely, seamless to the customer, result in minimal (if any) service interruption, and occur without any negative effects on 911 databases, telephone number retention and other customer impacting aspects of service. Additionally, there are virtually no systems or processes in place to enable Line Splitting in a UNE-L environment. These examples illustrate some, but not all, of the issues that must be addressed by state commissions to facilitate Line Splitting as a truly available competitive alternative.

The Commission should consider the answers to the following questions in order to determine whether Line Splitting is a viable option for data competition in Washington:

1. Are the ILEC's pre-order, order, provisioning, billing processes, and OSS needed to provide Line Splitting electronic or manual?

2. Regardless of whether electronic or manual, do these processes and OSS enable customers to switch easily and quickly between carriers, both voice and data, without undue service disruption on the scale required for mass market services?

3. If manual, are those processes and OSS adequate, or should electronic processes and OSS be developed?

4. Have all migration scenarios for Line Splitting customers been identified? Do the answers to any of the questions in this section vary based upon the specific customer migration scenarios involved?

5. Are the customer migration processes, hardware, software, and interfaces in place for both ILECs and CLECs? Are they functional? Are they scalable? How should the migration functionality, capacity and scalability be measured? How can/ should the ILEC demonstrate or "prove" that there is sufficient and/or adequate functionality, capacity, and scalability?

6. How should the timeliness of the migration process(es) be measured? How can can/should the ILEC demonstrate or "prove" that it can perform migrations on a timely basis? What standards should be used?

7. Does the RBOC have FCC or state-approved performance measures for customer Line Splitting migrations that could be used – at least on an interim basis? What do those migration metrics and business rules measure? Functionality? Timeliness? Other? Are those performance measures and business rules sufficient and appropriate on a long-term basis?

8. What process, hardware, software, or interface upgrades or modifications need to be made to better enable seamless, timely, accurate customer migrations between carriers, without undue service disruption on the scale required for mass market services? What are the testing and implementation schedules for those upgrades or modifications?

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9. Are there 911 implications for the migration processes to residential mass market customers?

II. LINE SHARING TRANSITION TIMING AND 271 ACCESS

Again, elimination of Line Sharing is purportedly being justified by the existence of Line Splitting as a competitive alternative. On that basis, states must insure that adequate processes exist to support Line Splitting arrangements before implementing any transition out of Line Sharing. However, a transition is not required if a state enforces access to Line Sharing under Section 271 or state law, for example under RCW 80.36.140.

In the TRO, the FCC stated that "The requirements of Section 271(c)(2)(B) establish an independent obligation for BOCs to provide access to loops, switching, transport, and signaling under checklist items 4-6, and 10, regardless of any unbundling analysis under section 251." Checklist item 4 of Section 271 clearly states that BOCs must provide "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services." The HFPL is a "local loop transmission from the central office to the customer's premises, unbundled from local switching or other services," and accordingly, states and the FCC have universally recognized that the non-discriminatory provision of the HFPL at TELRIC rates is a requirement of checklist item 4. Indeed, the FCC recently reaffirmed that the RBOCs must provide access to Line Sharing pursuant to Section 271. In the Minnesota 271 Order, released on June 26, 2003 (more than four months after the announcement of the Triennial Review decision), the FCC—in granting Qwest's petition—states that: "Our conclusion is based on our review of Qwest's performance for all loop types—which include, as in past section 271 orders, voice grade loops, xDSL capable loops, and high capacity loops—as well as hot cut provisioning ***and our review of Qwest's processes for line sharing*** and line splitting." (Minnesota 271 Order, § 53). The FCC reaffirms this position in its discussion of the specific requirements of Checklist Item 4: "Competing carriers ***should have access to the HFPL*** at either a central office or at a remote

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terminal." (Minnesota 271 Order, App. C, § 50). Accordingly, it is clear that BOCs are required to provide access to the HFPL pursuant to their Section 271 obligations.

With regard to unbundling under Section 251, the FCC has stated that it intends to find that competitors are not impaired without access to Line Sharing because of the availability of Line Splitting. States retain the authority under the Act to determine whether circumstances in their state warrant such a finding. Transition from Line Sharing to Line Splitting is not ripe unless the ILEC currently provisions and prices Line Splitting at parity with Line Sharing. Accordingly, competitors must retain access, under Section 251, to the HFPL until such time as Line Splitting is provisioned and priced at parity with Line Sharing.

III. LINE SHARING TRANSITION PRICING

The FCC noted that where a Section 271 checklist element is no longer subject to unbundling pursuant to Section 251 then Section 252(d)(1) no longer operates as the pricing standard for that element. The FCC stated that the pricing standard for de-listed checklist elements is the "just and reasonable" standard set forth in Section 201 and 202 of the Act. Loop facilities, however, are intrastate facilities and subject to pricing by state commissions. Accordingly, the FCC's pricing direction doesn't control this Commission with regard to pricing loops, including the HFPL, to which competitors are provided access pursuant to an incumbents Section 271 obligations.

Even if the FCC's pricing directions applied to the states, however, the "just and reasonable" standard is the TELRIC standard as set forth in Section 251(d)(1). Section 251(d)(1) states:

> Determinations by a State commission of the ***just and reasonable rate*** for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the ***just and reasonable rate*** for network elements for purposes of subsection (c)(3) of such section –

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(A) shall be -

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

Similarly, Section 201(b) states: "***All charges***, practices, classifications, and regulations for and in connection with such communication service, ***shall be just and reasonable***, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful." Likewise, Section 202(a) states: "It shall be unlawful for any common carrier to make any ***unjust or unreasonable discrimination in charges***, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."

Accordingly, when setting rates for elements to which the ILEC must provide access pursuant to Section 271, as opposed to Section 251, the Commission should employ the same "just and reasonable" rate standard that it employed for setting the rate for that element pursuant to Section 252(d)(1). That is, this Commission must set TELRIC rates for all network elements, whether an ILEC is required to provide access to that element pursuant to Section 251 or 271. In the interim, states are permitted to leave in place the existing TELRIC rates for the element, because what is "just and reasonable" under one part of the statute (Section 252) is, as a matter of law, "just and reasonable" under another part of the same statute (Sections 201 and 202).

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IV. RETIREMENT OF COPPER LOOPS

Given the new FCC rules regarding the unbundling of fiber loops, States should not permit ILECs to retire copper in the absence of a state commission review to address the end user and competitive impacts of such retirement. Retirement of copper provides the ILECs with a simple way to eliminate competition now and to insure their monopolies over customers and services are not threatened in the future. States must be vigilant in monitoring this inherently anti-competitive activity by evaluating the customer impacts as well as the impact on CLECs resulting from such activities. Obviously, states also must address the prices, terms and conditions under which competing firms will continue to enjoy access to the features and functionalities provided by the retiring plant. Until such terms and conditions are in place, copper plant should not be permitted to be retired.

Therefore, ILECs should only be allowed to retire copper loops and subloops after the ILEC demonstrates that it has already made equivalent access available through alternative loop facilities that permit all carriers to obtain the same features and functionality (including, but not limited to line splitting) and provide the same types of services that are possible through access to the copper loop or subloop.

The States must adopt procedures to require the filing by the ILECs of any plans they have to retire any copper loops or subloops. Under such procedures, the ILEC would first file a petition with the State Commission containing appropriate supporting information, setting forth the factual basis for its request and proof that it has satisfied each of the Commissions set substantive standards. Interested parties would then join the Commission in evaluating the ILEC submission in an evidentiary proceeding.

Before states allow ILECs to retire copper loops being used by CLECs to serve customers, states must consider the following: (1) the type of service being provided over the facility; (2) the availability of replacement facilities to provide identical service the customer; (3) the price of the alternative facilities in comparison to the price of the current facilities;

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(4) the charges by the ILEC for migration to new facilities including all service order, migration, provisioning or related charges; (5) the impact on the CLEC of paying the charges associated with moving the customer to another facility and that CLECs ability to make a profit on the line subsequent to incurring such expenses; and (6) the impact on competition that results from retirement of copper, including an assessment of what competitive alternatives exist for the customer once the copper is retired.

Before states allow ILECs to retire copper not currently being used by CLECs to provide service to customers, states should consider: (1) the impact on competition that results from retirement of copper, including an assessment of what competitive alternatives exist for customer once the copper is retired; and (2) the amount of CLEC investment in a particular CO that may be stranded based on the retirement of copper loops from that CO.

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