ORIGINAL

COVAD
COMMUNICATIONS COMPANY

EX PARTE OR LATE FILED

No. of Copies rec'd 0+1
List ABCDE

December 17, 1999

Via Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RECEIVED
DEC 17 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CC Docket 99-295

Dear Ms. Salas:

On December 16, 1999, the undersigned, on behalf of Covad Communications Company, made telephone calls to the following Commission staff members to reiterate Covad's position on Bell Atlantic's section 271 application: Jordan Goldstein, Office of Commissioner Ness, Sarah Whitesell, Office of Commissioner Tristani, and Dorothy Attwood, Office of Chairman Kennard. Specifically, Covad reiterated its position that:

(1) Bell Atlantic has failed to provide nondiscriminatory access to UNEs, and access to unbundled local loops, in New York. At a debate with Bell Atlantic on December 6, 1999, before Common Carrier Bureau staff, Covad highlighted the reason why Bell Atlantic reported much better loop provisioning performance than Covad's data showed. Bell Atlantic purported to report on its performance in provisioning "digital loops" – i.e. ISDN and ADSL loops – month by month. Rather than report on the number of loops actually ordered by CLECs, Bell Atlantic reported on the number of loops it billed CLECs for each month. Obviously, loops that Bell Atlantic bills for are loops that it has already provisioned, so Bell Atlantic is only reporting to the FCC the loops that it has billed and completed, while failing to count the loops ordered by CLECs and not provisioned. As evidence that this results in a significant underreporting of loop performance, Covad pointed out that the number of loops Bell Atlantic counted each month for all CLECs in New York is actually less than the number of loops ordered by Covad alone.

(2) In the "battle of the data" over loop performance, Bell Atlantic has alleged that Covad's loop data is flawed because it counts loop provisioning problems that are not Bell Atlantic's fault. By way of background, Covad went through, order by order, every single loop order placed in New York, removing any orders that were not

Hamilton Square • 600 14th Street, NW • Suite 750 • Washington, DC 20005
Phone 202 220-0400 • Fax 202 220-0401 • http://www.covad.com

provisioned because of a Covad error. We then calculated the results – Bell Atlantic provided a functional loop, in the time period that Bell Atlantic itself committed to provide, only 29% of the time from June through August, 1999. In August alone, Bell Atlantic's performance was a staggering 13% on-time. As a result, Covad waits on average 46 days for a functional loop from Bell Atlantic. In response, Bell Atlantic makes wide-sweeping statements that Covad included some of its own errors in the data. Why couldn't Bell Atlantic counter Covad's evidence with its own analysis of loop orders? Obviously, Bell Atlantic is in possession of each and every order placed by Covad, and in fact has even more data about those loop orders than Covad does. Yet Bell Atlantic chose to make only generalizations in response to Covad's specific data. Bell Atlantic has not satisfied its evidentiary burden.

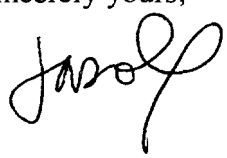
(3) Covad has presented all of these issues in the course of the New York PSC's DSL Collaborative, but that process is still underway, as Bell Atlantic awaits the outcome of its 271 application at the FCC before deciding what it is willing to agree to do in New York. As it now stands, Bell Atlantic has not committed to resolve the multitude of loop provisioning problems Covad has currently in New York, and Covad has presented its request for assistance to the New York PSC, whose decision on these issues has not yet come.

(4) Covad is a strong supporter of true structural separation as a means of preventing anticompetitive conduct by an incumbent LEC offering both retail and wholesale services, given the conflicting economic motives of such integration. Indeed, in the course of this proceeding, Covad has shared its view with the Commission that in a post-271 world, structural separation is one of the best means available to regulators of ensuring against anticompetitive conduct by Bell Operating Companies. But such separation cannot serve as a substitute for checklist compliance, no matter what form it takes. Bell Atlantic has now proposed a weak form of structural separation – a separate affiliate similar to that established by SBC/Ameritech – as a solution to its failure to comply with the checklist. Covad does not believe that such a weak affiliate is appropriate for the Commission to rely on as evidence of Bell Atlantic's compliance with the checklist. Covad would welcome the opportunity to work with the Commission to craft an appropriate structural separation regime, but this adjudication is not the proper forum for resolution of the issues involved.

(5) Finally, Covad is concerned about the implications of an approval of Bell Atlantic's section 271 application for Covad's pursuit of remedies for Bell Atlantic's unlawful practices in several venues, including state commissions, the courts, and the FCC. The Commission should ensure that Covad is not prejudiced in its ability to seek those remedies. Specifically, because the competitive checklist is an adjudication, the Commission should carefully consider the implications of Bell Atlantic's use of the Commission's order as precedent in other venues for a finding that, for example, it has opened its market fully to competition. The Commission should ensure that Bell Atlantic is not permitted to use an eventual approval of its section 271 application for purposes beyond the adjudication of its checklist compliance. The Commission should include concrete language in its order instructing Bell Atlantic

not to use the order in such a manner, and also making clear the Commission's intent that its order not be interpreted as having such precedential value in any other proceeding. Moreover, the Commission should make clear that its decision does not address whether Bell Atlantic's conduct has violated the antitrust laws, the Communications Act, or its interconnection agreements, or whether Bell Atlantic has behaved unlawfullly with respect to any particular CLEC or CLECs, or with respect to any particular circumstance. Finally, if the Commission concludes that Bell Atlantic's failure to provision unbundled loops does not outweigh factors that the Commission believes favor the application (such as Bell Atlantic's compliance in certain other areas, or any benefits from increased competition in long distance services), the Commission should make that calculus express so as not to mislead other tribunals as to Bell Atlantic's compliance with the unbundling requirements.

Sincerely yours,



Jason Oxman
Covad Communications Company

(202)-220-0409

cc:
Jordan Goldstein
Sarah Whitesell
Dorothy Attwood
Kyle Dixon
Helgi Walker
Common Carrier Bureau Staff