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

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In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95 -185

JOINT PETITION FOR RECONSIDERATION OF RHYTHMS NETCONNECTIONS INC. AND COVAD COMMUNICATIONS COMPANY

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Dated: January 21, 2000

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PETITION FOR RECONSIDERATION

Rhythms NetConnections Inc. ("Rhythms") and Covad Communications Co. (collectively "Petitioners"), by their attorneys, respectfully request that the Commission reconsider its decision on conditioning charges in the above captioned proceeding.[1]

INTRODUCTION

In order for any carrier to offer advanced services, that carrier must have access to "clean copper" or "conditioned" loops.[2] A conditioned loop is a loop in "its basic form."[3] In other words, a conditioned loop is a continuous metallic wire link unfettered by, among other things, load coils, repeaters and excessive bridge tap. While the ILECs have placed this equipment on loops to facilitate voice transmission, these devices "diminish the loop's capacity to deliver advanced services, and thus preclude the requesting carrier from gaining full use of the loop's

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[1] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238 (rel. Nov. 5, 1999) ("*UNE Remand Order*"). The Petitioners also request that any revisions made to the *UNE Remand Order* pursuant to this petition apply to any subsequent Commission decisions that affect loop conditioning charges.

[2] Indeed, the very term "conditioning" is potentially misleading. The term "conditioning" in telecommunications parlance generally refers to the process of adding equipment to a circuit to improve its functionality. In contrast, ILECs that "condition" loops for DSL service are actually removing such equipment from the loop.

[3] *Id.* ¶ 172.

capabilities."[4] Therefore, the Commission has appropriately ordered ILECs to condition loops for requesting carriers by removing these devices.[5] In fact, the Commission has now included conditioning "within the definition of the loop network element."[6] Thus, when a CLEC requests a conditioned loop, the ILEC must remove any interfering equipment that it had previously placed on the loop and make that loop available as an unbundled element. The Commission's requirement that ILECs condition loops is clearly consistent with the procompetitive principles and statutory provisions of the 1996 Act.

The *UNE Remand Order*, however, violates these same principles and provisions. The Commission's rules properly mandate that any conditioning charges be based upon its forward-looking TELRIC pricing methodology. Notwithstanding the fact that in a forward-looking environment loops would already be conditioned for the provision of data services, the *UNE Remand Order* authorizes ILECs to charge CLECs for conditioning. Moreover, authorizing ILECs to impose conditioning charges solely on the basis that they will incur costs for removing this embedded equipment is directly at odds with TELRIC. Furthermore, according to Bellcore engineering rules, loops below 18,000 feet in the embedded plant should not require conditioning.[7] Thus, even under an embedded pricing methodology, ILECs should not be permitted to impose conditioning charges on loops below 18,000 feet. The Commission should correct these contradictions between its forward-looking pricing rules and the *UNE Remand Order's* reliance on embedded pricing principles.

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[4] *Id.*

[5] *Id.* ¶173.

[6] *Id.*

[7] *Id.* ¶ 193. It is important to recognize that the Commission's loop definition is not limited, or in any way qualified, by the length of a loop. The ILECs' loop obligations, including the obligation to provide conditioned loops capable of providing advanced services, applies to loops below 18,000 feet, as well as loops beyond 18,000 feet.

Finally, if the Commission affirms its decision to permit conditioning charges, it should find that state commissions have the authority to require that any conditioning charges be recovered through the ILECs' recurring charges.

DISCUSSION

I. Conditioning Charges are Inconsistent with TELRIC

The *UNE Remand Order* creates an irreconcilable contradiction between the Commission's rules, which explicitly require a forward-looking costing approach, and the Commission's conclusion that incumbents may impose conditioning charges, which takes an embedded costing approach. The Commission's rules clearly require that any conditioning charges comply with its TELRIC pricing methodology. TELRIC costs are calculated "based on the use of the most efficient telecommunications technology currently available and the lowest cost network configuration, given the existing location of the incumbent LEC's wire centers."[8] According to 47 C.F.R. § 51.319(a)(3)(B), recovery of line conditioning costs must be "in accordance with the Commission's forward-looking pricing principles promulgated pursuant to section 252(d)(1) of the Act." In addition, according to 47 C.F.R. § 51.319(a)(3)(C) any conditioning charges must be "in compliance with rules governing nonrecurring costs in § 51.507(e)." Section 51.507(e) provides that:

> State commissions *may*, where reasonable, require incumbent LECs to recover nonrecurring costs through recurring charges over a reasonable period of time. Nonrecurring charges shall be allocated efficiently among requesting telecommunications carriers, and *shall not permit an incumbent LEC to recover more than the total forward-looking economic cost of providing the applicable element.*[9]

The effect of these rules is that ILECs must base any conditioning charges on a forward-looking network design consistent with TELRIC. Clearly, a forward-looking network is one that

[8] 47 C.F.R § 51.501(b)(1).

supports both data and voice services. As the Commission recognizes, a loop can only be data ready if it is unencumbered by intervening devices such as load coils, excessive bridge tap, and repeaters.[10] In other words, a forward-looking network would not contain these devices. Indeed, to comply with TELRIC methodology, a cost study may not include costs, such as the addition of load coils and bridged tap, incurred by ILECs in the past and already included in their books. Those impedances are already paid for and booked and are not part of the forward-looking network design. Similarly, removing those impedances is a cost for which ILECs are already compensated as part of the monthly recurring loop rate – the recurring loop rate is based on the cost of an efficient loop, which does not include loop electronics such as load coils.[11]

Notwithstanding these pricing rules, the *UNE Remand Order* authorizes ILECs to recover the costs of removing load coils and other impediments that exist in the embedded plant, even though these devices would not exist in a forward-looking network. The use of a network design for pricing purposes that requires the removal of these devices in order to make functional use of the loop runs counter to TELRIC principles in that it is not forward-looking.[12] By permitting ILECs to impose a charge for a service that would not exist in a forward-looking network, the

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[9] 47 C.F.R. § 51.507(e) (*emphasis added.*)

[10] *UNE Remand Order* ¶ 172.

[11] In addition, per-unit (such as per-loop) costs must be divided "by a reasonable projection of the sum of the total number of units of the element that the incumbent LEC is likely to provide to requesting telecommunications carriers and the total number of units of the element that the incumbent LEC is likely to use in offering its own services, during a reasonable measuring period." 47 U.S.C. § 51.511. Thus, for example, when an ILEC technician removes load coils from that ILEC's loop plant, the technician does not remove one coil at a time; rather, the technician removes all of the load coils in an existing binder group of loops – any other practice would be inefficient. But if a competitive LEC requests a loop free of load coils, the ILEC will charge the competitor for each and every load coil removal, even as additional ILEC load coils are removed on that same truck roll. *See Petition of Dieca Communications d/b/a Covad Communications Company and Rhythms Links, Inc. for Arbitration to Establish an Interconnection Agreement With Southwestern Bell Telephone Company,* Arbitration Award, Texas PUC Docket No. 20272, ("*Texas Arbitration Award*") at 97-99 (Nov. 1999).

[12] Indeed, the FCC has prohibited the inclusion of loops configured with such electronic impedances in forward-looking economic cost studies, because such loops do not provide universal access to advanced telecommunications services. *Federal-State Joint Board on Universal Service, Report and Order*, CC Docket No. 96-45, 12 FCC Rcd 8776 (1997), (*Universal Service* Order) as corrected by *Federal-State Joint Board on Universal Service*, Errata, CC Docket No. 96-45, FCC 97-157 ¶ 250 (rel. June 4, 1997).

Commission threatens the integrity of its TELRIC pricing principle. Therefore, the Commission should reconsider its departure from TELRIC and prohibit ILECs from imposing conditioning charges.

II. The Commission's Justification for Permitting ILECs to Impose Conditioning Charges is Inconsistent with TELRIC

The *UNE Remand Order's* only justification for permitting conditioning charges is that under the Commission's rules because the ILEC "may incur costs in removing [these devices] . . . the incumbent should be able to charge for conditioning such loops."[13] In fact, just the opposite is true.

As explained above, the Commission's rules require that prices be based on a forward-looking, least cost, most efficient network. Permitting ILECs to impose conditioning charges simply because they will "incur costs" to make their outside plant compliant with existing Bellcore engineering guidelines is not consistent with the Commission's pricing rules. Indeed, the *UNE Remand Order's* methodology represents an embedded costing methodology, the antithesis of the Commission's TELRIC pricing rules. By relying on an embedded costing approach, the *UNE Remand Order* creates an internal contradiction with TELRIC. To correct this contradiction, the Commission should reverse its decision and affirm the integrity of its TELRIC pricing methodology by prohibiting ILECs from imposing conditioning charges.

III. Even Under an Embedded Pricing Methodology, the Commission Should Prohibit ILECs from Imposing Conditioning Charges on Loops Less than Eighteen Thousand Feet

At a minimum, the Commission should reverse its decision to allow conditioning charges on loops less than 18,000 feet. Even under an embedded costing methodology, conditioning charges are inappropriate for these shorter loops. As the Commission recognizes, "networks

[13] *Id.* ¶ 193.

built today normally should not require voice-transmission enhancing devices on loops of 18,000 feet or shorter."[14] Indeed, Bellcore resistance design standards dictate that loops under 18,000 feet should not contain such impediments. It is important to recognize that carriers requesting a conditioned loop below 18,000 feet are asking for nothing more than a loop "in its basic form"[15] that complies with accepted engineering rules.

To the extent that ILECs have placed interfering devices on loops less than 18,000 feet in length, they have violated widely accepted engineering rules and the ILECs, not the CLECs, should pay to remove this equipment. Just because the ILECs will incur costs for making their outside plant compliant with proper engineering rules is not sufficient justification for permitting them to pass those costs on to the CLECs. Even using an embedded, historical cost recovery methodology, charging CLECs for the removal of equipment that should not be present is inappropriate. Therefore, the Commission should reverse its decision and prohibit ILECs from imposing conditioning charges on loops less than 18,000 feet.

IV. The Commission Should Find that State Commissions May Require that Conditioning Charges be Recovered Through Recurring Charges

Furthermore, the Commission should revise its decision to find that under its rules line conditioning need not be recovered through a nonrecurring charge. In the *UNE Remand Order*, the Commission concluded that incumbent LECs "may have an incentive to inflate the charge for line conditioning by including additional common and overhead costs, as well as profits."[16] The Commission concluded, however, that state commissions should "ensure that the costs

[14] *Id.*
[15] *Id.* ¶ 172.
[16] *Id.* ¶ 194.

incumbents impose on competitors for line conditioning are in compliance with our pricing rules for nonrecurring costs."[17]

While Petitioners agree with the Commission's conclusion that state commissions have an important role to play in ensuring ILEC compliance with TELRIC pricing principles, we do not agree with the Commission's conclusion that state commissions *must* permit ILECs to recover conditioning costs as nonrecurring charges. Indeed, by dictating that conditioning charges are to be recovered as nonrecurring charges, the Commission belies its own conclusion that state commissions, not the FCC, shall determine the appropriateness of such charges. The Commission's rules clearly state that "[s]tate commissions *may*, where reasonable, require incumbent LECs to recover nonrecurring costs through recurring charges over a reasonable period of time."[18] While loop conditioning can be construed as a nonrecurring activity (that is, it is only performed once on a loop), it does not necessarily follow that the costs of loop conditioning must be imposed on competitive LECs as a nonrecurring charge. Therefore, Petitioners request that the Commission revise its decision and permit state commissions to order ILECs to recover their conditioning costs through their recurring charges.

Petitioners and other competitive LECs have argued in numerous state proceedings that loop conditioning charges proposed by ILECs are discriminatory, do not comport with TELRIC pricing methodology, and represent double recovery for conditioning costs. Yet competitive LECs will now be handicapped in making this argument before state commissions by the FCC's statement that incumbent LECs must be permitted to recover conditioning costs as nonrecurring charges. Thus, the FCC has foreclosed state commissions from concluding that the TELRIC

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[17] *Id.*

[18] 47 C.F.R. § 51.507(e) (*emphasis added*).

recurring monthly loop rate, which is based on the forward-looking network design that has no electronic impedances, already compensates incumbent LECs fully for removal of such devices.

This is not a mere hypothetical outcome: this very perverse result has actually occurred. In a recent arbitration award, the Texas Public Utility Commission arbitrators concluded, "consistent with FCC precedent, including the *Local Competition Order*," that SBC's loop rates in Texas must be TELRIC-based.[19] The arbitrators further found that "conditioning charges for the removal of repeaters and load coils should only apply to xDSL loops at or beyond 18,000 feet in length."[20] Yet the Texas arbitrators "recognize[d] that the FCC recently found that the incumbent, in this instance SWBT, should be able to charge for conditioning on loops at or less than 18,000 feet in length."[21] Thus, while the Texas arbitrators found in favor of Covad and Rhythms by specifically accepting their argument that conditioning charges should never apply to loops less than 18,000 feet in length, the arbitrators felt compelled by the FCC's *UNE Remand Order* to permit SBC to charge CLECs for the "costs" it incurs for loop conditioning on <u>any</u> loop. This perverse result could not have been the intention of the FCC: to support its conclusion that state commissions should make the final determination as to loop costs, the FCC should revise its conclusion that incumbent LECs are always entitled to recover loop conditioning charges as nonrecurring costs.

CONCLUSION

Petitioners urge the Commission to reconsider its decision to allow ILECs to impose conditioning charges. Since a forward-looking network design would not require conditioning, such charges are incompatible with the Commission's pricing rules. At a minimum, the Commission should prohibit ILECs from forcing carriers to pay conditioning charges on loops

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[19] *Texas Arbitration Award* 84.
[20] *See id.* 95.

below 18,000 feet. In addition, the Commission should permit state commissions, in determining the level of conditioning charges, to order the ILECs to recover these costs through recurring charges where reasonable.

Respectfully submitted,

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[21] *See id.*

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