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August 7, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

96-98

Re: CC Docket Nos. 99-68 and 96-98

Dear Ms. Salas:

On August 4, 2000, Covad Communications electronically filed reply comments in the above-referenced dockets. Attached are hard copies to be placed in the dockets on the chance that electronic filings were not made in both dockets.

Very truly yours,

Florence Grasso

Florence M. Grasso

cc: Jane Jackson
Rich Lerner
Tamara Preiss
Jared Carlson
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	

REPLY COMMENTS OF COVAD COMMUNICATIONS COMPANY

Jason D. Oxman
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Covad Communications Company (Covad), by its attorney, hereby respectfully submits these comments in the above-captioned proceeding. Covad is the nation's largest competitive broadband service provider using digital subscriber line (DSL) technology, and has the largest nationwide DSL network of any carrier – incumbent or competitive LEC. In order to provide consumers with innovative broadband services that were unavailable in the monopoly era, Covad relies on the core market-opening provisions of the 1996 Act – section 251 – to purchase unbundled network elements from incumbent LECs. In a four year pattern of pursuing litigation and delay instead of embracing competition, incumbent LECs have adopted numerous tactics to avoid their obligations to unbundle their networks. Many of those tactics have involved jurisdictional arguments raised by the incumbents, and Covad is concerned that the Commission may inadvertently provide support to those arguments in this proceeding. Therefore, Covad respectfully requests that the Commission remain mindful of the importance of the jurisdictional questions raised in this proceeding to the broadband competitive LECs who rely on the core competitive provisions of the Act.

At the outset, Covad supports the statutory right of all telecommunications carriers to receive fair compensation for the transport and termination of telecommunications traffic. As the Commission considers the arguments of the parties in this proceeding, it must be mindful of the implications of any jurisdictional analysis it may undertake in this proceeding. Because the Commission has treated advanced telecommunications services, such as DSL services, as interstate services, incumbent LECs refusing to provide UNEs, collocation space, and interconnection to DSL providers have eventually been ordered to do so by the Commission. For example, in filings

responding to the D. C. Circuit remand of the *First Advanced Services Order*,[1] U S WEST argued that incumbent local exchange carriers are not "acting in the capacity of an ILEC" when they provide advanced telecommunications services and, therefore, are not subject to the market-opening provisions contained in Section 251 of the Communications Act. U S WEST further claimed that, because competitive local exchange carriers that offer such advanced telecommunications services are not providing telephone exchange or access service, they have no right to interconnect with an incumbent LEC's network, collocate equipment on an incumbent LEC's premises, or obtain unbundled network elements ("UNEs") from an incumbent LEC.

The Commission wisely rejected that argument, preserving the right of broadband CLECs to access the UNEs, collocation space, and interconnection capabilities necessary to provide consumers an innovative array of procompetitive services. The Commission based its determination in part on its prior ruling that advanced services using DSL technology were interstate servivces. In the *GTE DSL Order*, the Commission considered whether GTE could tariff its proposed ADSL service in the Federal jurisdiction. In resolving this issue, the Commission ruled squarely that "GTE's ADSL offering is a special access service" that is subject to federal regulation.[2] The Commission must ensure that in the instant proceeding it protects data CLECs seeking to benefit from the core market-opening provisions of the Act.

In remanding the instant matter to the Commission for resolution of issues related to reciprocal compensation, the D.C. Circuit did not see the relevance of the

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[1] *See* FCC Public Notice, "*Comments Requested in Connection with Court Remand of August 1998 Advanced Services Order*," DA 99-1853, CC Docket Nos. 98-11, 98-26, 98-32, 98-78, 98-91, 98-147 (rel. Sep. 9, 1999) ("*Notice*").

Commission's jurisdictional analysis to the resolution of whether dial up calls to ISPs were compensable pursuant to section 251(b)(5) of the Act.[3] Covad agrees with the *CLEC Coalition* that the issue now before the Commission is not the jurisdictional nature of such calls; rather, the question remanded to the Commission is whether the reciprocal compensation provisions of the Act have any different application depending on the nature of the end user.[4] To the extent the Commission does engage in any jurisdictional analysis, it must ensure that it distinguishes between "dial-up" – i.e. circuit switched – calls to particular end users, and broadband services, like DSL, that are not the subject of the Commission's inquiry. In so doing, the Commission will adequately protect the interests of such companies that have suffered under incumbent LEC "misinterpretation" of the Commission's jurisdictional analyses in the past.

Finally, in the wake of the remand of the Commission's pricing methodology by the Eighth Circuit Court of Appeals, the Commission should consider the cost-causation and cost-avoidance arguments raised by incumbent LECs as the Commission reexamines its UNE pricing scheme. In the record of this proceeding, incumbent LECs uniformly complain of the hundreds of millions of dollars in costs they suffer as a result of consumer usage of the circuit-switched network to access dial-up ISPs. In determining the methodology that state commissions must apply in setting UNE prices, the Commission must consider – as instructed by the Eighth Circuit – the actual incremental costs imposed on the incumbent LEC required to provision the UNE. Such an analysis must, of course, include the incremental cost savings enjoyed by the incumbent as a result

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[2] *GTE DSL Order*, 13 FCC Rcd 22466, 22480 (1998).

[3] *Bell Atlantic v. FCC*, 206 F.3d 1, 2, 3-5 (D.C. Cir. 2000).

[4] *CLEC Coalition Comments* at 2-3.

of the UNE provisioning. In the case of DSL services, by the incumbent LECs' own admission, such cost savings can be monumental. DSL services, which offer an always-on, packet-switched connection to ISPs and other services, take end-users who would traditionally have accessed ISPs through dial-up connections off of the circuit-switched network. As a result, the costs imposed on incumbent LECs – as detailed in this proceeding – are eliminated upon the migration of those users off of the circuit-switched network. Such cost savings should not be a windfall for the incumbents if there is a corresponding cost imposed on CLECs who provide those savings that can be reduced accordingly. In this case, the data CLEC, ordering an unbundled loop from the incumbent, provides that cost savings by taking the dial-up ISP customer off of the circuit-switched network. The Commission must ensure that in setting UNE pricing methodology it takes account such cost savings, and that prices of unbundled loops be reduced accordingly.

Respectfully submitted,

/s/

dated: August 4, 2000

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