



600 14th Street, N.W., Suite 750 > Washington, D.C. 20005 > 202-220-0400

Jason D. Oxman
Vice President and Assistant General Counsel

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Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: CC Dockets No. 01-338 and 96-98

Dear Ms. Dortch:

On October 10, 2002, Covad met with several Commission staff members to discuss the Triennial Review and Broadband proceedings. In the course of that meeting, a question was asked concerning the FCC's legal authority to readopt the current line-sharing obligations in light of the decision of the D.C. Circuit remanding the Commission's line sharing orders in *United States Telecom Ass'n v. FCC*, 290 F.3d 415 (D.C. Cir. 2002) ("*USTA*"). As set out in greater detail below, the *Line Sharing Order*¹ was remanded because the Commission failed to consider the existence of cable modem service in concluding that wireline competitors were impaired in providing the services they seek to offer without access to the high-frequency portion of the ILECs' loop plant. On remand, the FCC therefore is required to analyze the extent to which cable modem service effects impairment. But nothing in the D.C. Circuit's decision speaks to the outcome of that analysis, and based on the record before it here, the FCC should conclude that competitors and competition remain impaired without access to the high frequency portion of the ILECs' loops.

¹ *In re Deployment of Wireline Services Offering Advanced Telecomms. Capability*, 14 F.C.C.R. 20912 (1999) ("*Line Sharing Order*"), *order on recons.*, 16 F.C.C.R. 2101 (2001).

The D.C. Circuit “remand[ed] both the *Line Sharing Order* and the *Local Competition Order*[²] to the Commission for further consideration in accordance with the principles outlined” in its decision.³ In its decision the court affirmed the FCC’s judgment that the high frequency portion of the loop properly qualified as a discrete “network element,” a critical cornerstone of the Commission’s *Line Sharing Order* that has now withstood judicial review.⁴ In other words, the Court held that the upper frequencies of a loop fit the Act’s legal definition of a network element, and thus could properly be unbundled by the Commission. The Court nevertheless remanded the *Line Sharing Order* on the ground that the FCC did not consider whether ordering the incumbent carriers to share the high frequency portion of the lines connecting their central offices to their customers would benefit or harm competition in general.⁵ In particular, the FCC “failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite).”⁶

In so ruling, the court remained appropriately agnostic on whether, after considering evidence of competition from cable and satellite, the FCC could re-impose its line sharing rules on remand. That evidence was not before the court. Indeed, if the Court had concluded that line sharing was unlawful no matter what the evidence showed on remand, it would not have remanded the matter to the FCC at all. *See Chemical Mfrs. Ass’n v. EPA*, 28 F.3d 1259, 1268 (D.C. Cir. 1994) (holding that remand for further proceedings was not warranted where there did not appear to be *any* basis to support the agency’s rule).⁷ *See also WorldCom, Inc. v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002) (rule remanded where there exists a “non-trivial likelihood” that the agency could reinstate the rule on remand after proper consideration of the relevant factors). In sum, agencies routinely reinstate orders after they have been remanded because the reviewing court has concluded that the agency had failed to consider relevant evidence based on a misunderstanding of the law. *See, e.g., III Pierce, Jr. Administrative Law Treatise* at § 18.1, p. 1325 (4th Ed.) (“if the judicial decision was based on the court’s conclusion that the agency action was predicated on a misunderstanding of applicable law, the agency often can support the same action on remand with a set of reasons or findings that is consistent with the applicable law announced by the reviewing court”).

² *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 F.C.C.R. 3696 (1999) (“*Local Competition Order*”), *modified*, 15 F.C.C.R. 1760 (1999).

³ *USTA*, 290 F.3d at 430.

⁴ *USTA*, 290 F.3d at 429.

⁵ *USTA*, 290 F.3d at 428-29.

⁶ *Id.* at 428. In addition, the Court ordered that any order unbundling the high frequency portion of the loop be consistent with the Court’s broader impairment analysis set out in the *Local Competition Order*. *Id.* at 428-29.

⁷ At least one state commission already has recognized that the *USTA* decision did not hold that ordering line sharing was impermissible as a matter of law under the 1996 Act. *In re Complaint of the Competitive Local Exchange Carriers Association of Michigan, et al., Against SBC Ameritech Michigan for Anti-Competitive Acts and Acts Violating the Michigan Telecommunications Act*, No. U-13193, at 15 n.7 (Mich. Pub. Serv. Comm’n June 6, 2002).

Moreover, subsequent to its decision, the Court granted a petition to stay the mandate relating to the *Line Sharing Order* filed by WorldCom, Inc., and supported by Covad, leaving the line sharing rules in place until January 2, 2003. In its motion, WorldCom had argued that the FCC could well re-adopt line sharing rules consistent with the Court's decision, and it would be deeply disruptive to the status quo and to the thousands of customers benefiting from competitive services offered over line-shared loops if the line sharing rules were vacated pursuant to the Court's mandate, only to those rules reinstated by the Commission in the Triennial Review. The Court agreed with these arguments, staying the mandate only until January 2003 based on the FCC's representations that by that time it will have adopted new line sharing rules as part of its Triennial Review Process.⁸ Obviously, the Court would not have granted WorldCom's motion if it believed that the line-sharing rules could not be reinstated consistent with its decision; to the contrary, the prospect that those rules would be reinstated was the very predicate of the relief requested in the petition to stay the mandate.

The arguments in support of line sharing on remand are substantial, and they are unaffected by the court's decision. In brief, Covad and other carriers have submitted undisputed evidence on the record that linesharing has been directly responsible for an explosion in DSL deployment by both ILECs and CLECs, and that the policy goals of the Act (promoting competition and broadband deployment) are advanced only by maintaining the availability of lineshared loops. Even before the *USTA* decision, the FCC stated that it would consider the impact of competition from cable and elsewhere on the FCC's line sharing analysis both as part of its "Triennial Review Proceeding" in which it is revisiting all of its unbundling rules, and as part of its "Broadband Framework Proceeding" in which it is considering the appropriate regulatory classification of broadband facilities.⁹ The Commission need only examine the record of the state of broadband deployment to conclude that linesharing will continue to benefit competition in general.¹⁰

Covad and other competing carriers submitted extensive comments explaining why, even considering competition from the cable companies and others, the FCC should re-adopt the same line sharing rules it adopted in the *Line Sharing Order*.¹¹ These carriers demonstrated that satellite and wireless technologies do not presently offer competitive broadband services, and are not likely to do so in the foreseeable future. They also showed that cable provides no competition in the small office/home office (SOHO) segments. Rather, the cable companies

⁸ See *Order* dated September 4, 2002, citing *Triennial Review NPRM* ¶ 81 (FCC is currently reviewing rules for triennial review that is to be completed in 2002).

⁹ See *In re Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers* ("Triennial Review Proceeding"), 16 F.C.C.R. 22781, ¶ 53 (2001); *id.* ¶ 27; *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Notice of Proposed Rulemaking* ("Broadband Framework Proceeding"), 17 F.C.C.R. 3019, ¶ 44 (2002).

¹⁰ *USTA*, 290 F.3d at 428-29.

¹¹ See Comments of Covad Communications Company, *Triennial Review Proceeding*, at 38-47, 93-104 (filed Apr. 4, 2002).

compete only in residential broadband, and even there, most households still do not have a choice between cable and wireline broadband services.¹²

Covad and others have demonstrated that because cable competition offers at most a limited duopoly in one market segment, the combination of incumbent wireline service and cable modem service does not alone create a competitive market for broadband services. The FCC should therefore find, as it found with respect to cable telephony in the voice market, that a choice between two carriers would not “drive down prices to competitive levels,” but “would more likely create stagnant duopolies.”¹³ Thus, competitors have made a record which demonstrates that, even considering the existence of cable modem service and other sources of intermodal competition, competition in broadband markets will be advanced best by allowing wireline competitors to enter the broadband market by leasing the high frequency portion of the incumbents’ local loops.

This is hardly a speculative argument. Indeed, the Commission just recently affirmed the critical value of intramodal competition when in its absence consumers would be left with a duopoly in which each market participant would act on its incentives to raise prices and deter innovation. In comments explaining why the Commission rejected the proposed EchoStar/DirecTV merger, the Chairman offered reasons that apply directly to the line sharing decision now facing the Commission:

The record before us irrefutably demonstrates that the [elimination of line sharing] would eliminate an ***existing viable competitor in every market in the country***. The case against [eliminating line sharing] is particularly compelling with respect to residents of rural America who are not served by any cable operator. Those Americans would be left with only one choice for their [broadband Internet access] service, now and in the foreseeable future. But that alone is not the cornerstone of our decision. At best, this merger would create a duopoly in areas served by cable; at worst it would create a [] monopoly in unserved areas. Either result would decrease incentives to reduce prices, increase the risk of collusion, and inevitably result in less innovation and fewer benefits to consumers. That is the antithesis of what the public interest demands.¹⁴

These are powerful arguments, fully as persuasive in the context of line sharing as they are in the context of a merger of intramodal competitors. These are also arguments fully consistent with the D.C. Circuit’s *USTA* decision, which expressed no opinion about the Commission’s long-

¹² For example, in California, where competitive broadband deployment far outpaces any other state in the country, only 13% of consumers have a choice between cable modem and DSL services. Testimony of Loretta M. Lynch, President, California Public Utilities Commission, Before the U.S. Senate Committee on Commerce, Science, and Transportation, at 2 (May 22, 2002).

¹³ *Local Competition First Report and Order* at ¶ 55.

¹⁴ Statement of Chairman Powell, October 10, 2002.

standing understanding of the dangers of duopoly service and the Commission's interest in preserving and promoting more competitive marketplaces.

I hope this answers your questions. If you have additional questions, please do not hesitate to contact me.

Respectfully submitted,

/x/ Jason Oxman

Jason Oxman
Covad Communications Company

cc:
William Maher
Jeff Carlisle
Scott Bergman
Michelle Carey
Tom Navin
Brent Olson
Robert Tanner
Christopher Libertelli
Matthew Brill
Jordan Goldstein
Dan Gonzalez