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January 23, 2003

ERRATUM

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*; WC Docket No. 01-338 (*Triennial Review); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* WC Docket No. 02-33 *(Broadband NPRM)*.

Dear Ms. Dortch:

On January 10, 2003, the undersigned, on behalf of Covad Communications (Covad), filed a letter addressed to you in the above-referenced dockets. That letter was mistakenly dated "January 10, 2002." The date should be corrected to read "January 10, 2003." A copy of the corrected letter is attached.

Respectfully submitted,

___/s/ Praveen Goyal_____

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CORRECTED VERSION January 10, 2003

Marlene H. Dortch
Secretary
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Washington, D.C. 20554

Re: *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*; WC Docket No. 01-338 (*Triennial Review); Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* WC Docket No. 02-33 *(Broadband NPRM)*.

Dear Ms. Dortch:

During the course of the above-referenced proceedings, a number of questions have been raised implicating the ability of competitive telecommunications carriers, such as Covad Communications (Covad), to access unbundled network elements (UNEs) and to use those elements to provide broadband telecommunications services. Specifically, the Commission has asked whether its classification of ILEC retail services integrating broadband transmission technologies with Internet access as "information services" might somehow also relieve ILECs of their statutory obligation to provide competitors with UNEs used in the provision of competitive broadband services, such as the line shared loop UNE.[1] In fact, such an outcome could not be further from both the statutory text of and the policies underlying the unbundling provisions in the 1996 Act.

As we describe in what follows, Covad provides wholesale telecommunications services to ISPs. Covad's legal right to lease UNEs under section 251(c)(3) to provide these telecommunications services remains independent of how the Commission ultimately decides to characterize the retail services that ISPs (such as Covad's *customers*) provide over those facilities. Similarly, Covad's right to access UNEs to provide wholesale telecommunications services to an affiliated ISP also remains unaffected by the Commission's classification of the ISP's integrated Internet access retail service offering. In all of these scenarios, Covad acts as a telecommunications

[1] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities,* WC Docket Nos. 02-33, 95-20, 98-10, Notice of Proposed Rulemaking, FCC 02-42, 17 FCC Rcd 3019, 3047, para. 61 (2002) (*Broadband NPRM*).

carrier providing wholesale telecommunications services – the only factor determinative of whether Covad has a right to access UNEs.

In the *Broadband NPRM* proceeding, the FCC considers the possibility of overruling the *Computer Inquiry* rules, thereby allowing the ILECs to withdraw their DSL tariffs and to refuse to provide these DSL-based telecommunications services to ISPs.[2] If that were to happen, the Commission suggests that the ILECs might continue to deal with select ISPs on an individualized private carriage basis.[3] But whatever the Commission concludes in this regard, and however the ILECs may respond to any Commission rulings, it would not change the fact that CLECs such as Covad continue to use UNE loop facilities to provide telecommunications services to ISPs. Undoubtedly, the ILECs' obligations to lease network elements to CLECs "for the provision of a telecommunications service" requires merely that the *CLECs* be using the facilities in question to provide telecommunications service, regardless of how the ILEC is making use of them.

As even the ILEC Qwest acknowledges,[4] it must be the CLEC's, not the ILEC's, use of the network element that is determinative of the right to unbundled access. "Network element" is defined by the Act to be a facility "used in the provision of a telecommunications service."[5] Although the text of the definition is ambiguous on the matter of <u>whose</u> use of the facility matters, the Commission has previously made clear that a network facility meets the definition of a "network element" so long as it is "capable of being used" to provide a telecommunications service, rather than a facility currently being used to provide a telecommunications service.[6] Any other construction of the "network element" definition that hinged on the element being used <u>currently</u> to provide a telecommunications service – by the incumbent, of course, since absent unbundling no other party could access the facility – would be inconsistent with the network element unbundling provisions in section 251(c)(3). Section 251(c)(3) of the statute is explicit that it is the *requesting carrier's* intended use of the facility that triggers the unbundling obligation. Specifically, section 251(c)(3) provides that it is the ILEC's "duty to provide, to any requesting telecommunications carrier for the provision of a

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[2] *Broadband NPRM* at paras. 43-53.

[3] *Id.* at para. 26.

[4] Qwest Comments at 21, 72-78.

[5] 47 U.S.C. § 153(29).

[6] *See UNE Remand Order* ¶ 329 ("[W]e interpret the term "used" in the definition of a network element to mean "capable of being used" in the provision of a telecommunications service.") As explained further below, a definition of "network element" that hinged on the facility's actually being used by the incumbent to provide telecommunications services would preclude competitors from ever accessing spare facilities, and provide the incumbents with a perpetual first-mover advantage. *See infra* at p. 3.

telecommunications service" network elements.[7] The manner in which the elements are provided must allow "requesting carriers . . . to provide *such* telecommunications service."[8] Plainly, the "telecommunications service" twice referenced in section 251(c)(3) is the *CLEC's* telecommunications service. Nowhere in the text of section 251(c)(3) is the ILEC's use of the facility to provide a telecommunications service even mentioned. Accordingly, the ILEC's use of the facility is simply irrelevant to the inquiry of whether or not the facility must be unbundled. Since section 251(c)(3) is *unambiguous* in this regard, a plausible reading of the "network element" definition in section 153(29) is that it too, must be concerned with facilities that a *CLEC* could use to provide a telecommunications service.

On the contrary, any construction of the "network element" definition that required that a facility had to be used by the *incumbent* to provide a telecommunications service would run contrary to the Commission's understanding of the purpose of the Act's unbundling requirements: that competitors be allowed to fashion *their own* unique telecommunications services and information services using in part facilities leased by the incumbent, without regard to the uses the incumbent makes of those same facilities. The Commission found such differentiation of services provided over leased facilities to be one of the principal advantages to the Act's unbundling requirements.[9] Indeed, the Commission's construction of the network element definition based on the ILEC's use of the network facility in question would lead to several absurd outcomes. Competitors would never be able to access unused facilities in the ILEC network plant because they were not being "used" by the incumbent. Moreover, competitors would only be able to provide service to customers where the ILEC first used the same facility to provide service, giving the ILECs a perpetual first-mover advantage. Thus, Covad would never be able to obtain a spare loop to provide its stand-alone loop SDSL service, nor would Covad be able to provision line shared xDSL service for a customer without existing line shared xDSL service. It is precisely to avoid such absurd outcomes that the Commission rejected ILEC arguments that "because dark fiber is transport that is not currently 'used' in the provision of a telecommunications service, . . . it does not meet the statutory definition of a network element."[10]

Accordingly, there is little question that it is the CLEC's use of the network facility in question, and not that of the ILEC, that determines whether the CLEC has the right to access the facility as a UNE. The only question remaining is whether the use to which the CLEC puts the facility is indeed for the provision of a telecommunications

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[7] 47 U.S.C. § 251(c)(3).

[8] *Id.*

[9] *See, e.g. Local Competition Order* ¶ 333.

[10] *UNE Remand Order* ¶326. *See also id.* at ¶¶ 327, 330.

service. But this inquiry is hardly a new one. Indeed, for all the reasons Covad was a telecommunications carrier with the right to access UNEs prior to the inception of the *Broadband NPRM*, Covad remains the selfsame telecommunications carrier.[11] That Covad's services are telecommunications services, *i.e.* common carrier services, is amply demonstrated by an examination of the law governing common carrier communications. In its *NARUC I* and *II* decisions, the D.C. Circuit Court of Appeals identified the series of characteristics associated with common carriage:

> [T]he primary sine qua non of common carrier status is a quasi-public character, which arises out of the undertaking "to carry for all people indifferently. . . ." This does not mean that the particular services offered must practically be available to the entire public; a specialized carrier whose service is of possible use to only a fraction of the population may nonetheless be a common carrier if he holds himself out to serve indifferently all potential users. Nor is it essential that there be a statutory or other legal commandment to serve indiscriminately; it is the practice of such indifferent service that confers common carrier status. That is to say, a carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve.[12]
>
> A second prerequisite to common carrier status … is the requirement formulated by the FCC and with peculiar applicability to the communications field, that the system be such that customers "transmit intelligence of their own design and choosing."[13]

Covad's service offerings easily satisfy these criteria. More than 90% of Covad's business involves selling DSL-based transmission services to hundreds of ISPs and resellers. Specifically, Covad leases both standalone ILEC loops and the high-frequency portion of ILEC loops, combines them with its own DSL and related transmission equipment, and sells the resultant DSL-based transmission services to ISPs. In addition, Covad sells bare transmission capacity, rather than content – that is to say, Covad does not supply or alter the nature of the content transmitted over its wholesale DSL lines. Indisputably, the service Covad is selling is a telecommunications service. Indeed, the one tentative conclusion offered in the Broadband Framework Proceeding that was uniformly embraced by every commenter was that the Commission should reaffirm its

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[11] The D.C. Circuit has held that it is nature of the communications involved rather than regulatory fiat that determines whether a service provider is engaged in providing common carrier services. *See NARUC v. FCC I,* 525 F.2d 630, 644 (D.C. Cir. 1976) ("A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so."); *NARUC v. FCC II*, 533 F.2d 601, 608 and n. 27 (D.C. Cir. 1976) ("'a common carrier is such by virtue of his occupation,' that is by the actual activities he carries on…").

[12] *NARUC II*, 533 F.2d at 608-09 (citing *NARUC I*, 525 F.2d at 642 (D.C. Cir. 1976)).

[13] *NARUC II*, 533 F.2d at 609.

consistently-held conclusion that these DSL-based transmission services are "telecommunications services."[14]

To the extent the Commission has any remaining doubts about the common carrier nature of Covad's service offerings, it has only to look to its own precedent to resolve these doubts. The Commission has already determined that a hallmark of private carriage is that the provider does not offer service indiscriminately, but only offers transmission on a case-by-case basis. For example, the Commission has found a service provider to act as a private carrier where (i) the provider would "negotiate with and select customers on an individualized basis," (ii) "there would be no set prices or terms of service" and service would be "tailored to the specific operational requirements of each user," (iii) contracts would be long-term of "five or ten years long" with "limited and stable" customer base, and (iv) the provider's "primary objective is to meet the internal needs of the parent" owners.[15] Covad's services stand in stark contrast to such private carriage. Covad holds its services out generally to ISP customers, rather than pre-selecting customers on an individualized basis. Rather than tailoring transmission services to the operational requirements of every individual user, Covad makes standardized service tiers available to its ISP partners. In addition, rather than being limited and stable, Covad's customer base is characterized by dynamism and growth. Finally, rather than constructing its network to meet its internal communications needs, Covad's network and services are structured to meet the needs of its hundreds of ISP customers.

It is true that Covad makes its telecommunications services available by negotiated contract, rather than by tariff. This is exactly the mechanism, however, that the Commission contemplated for Covad's competitive provision of wholesale xDSL transmission services when it detariffed competitive exchange access services.[16] Because Covad is non-dominant in its provision of competitive exchange access, there is simply no need for a tariffing requirement to guard against carrier abuses. Unlike a dominant carrier, Covad is in no position to take advantage of or discriminate against its ISP customers. In any event, any concerns about individual instances of abuse or discrimination are matters for <u>enforcement</u> of Covad's common carrier obligations – not a basis for denying Covad common carrier status, and thereby denying access to the

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[14] *See Broadband NPRM* at para. 26 & n. 60, citing *Advanced Services Order,* 13 F.C.C.R. 24012 ¶ 35 (1998). *See also Universal Service Report to Congress* ¶ 15 ("the provision of transmission capacity to Internet access providers and Internet backbone providers is appropriately viewed as 'telecommunications service' or 'telecommunications.'"); *Second 706 Report* ¶ 21 ("bulk DSL services sold to Internet Service Providers are . . . telecommunications services").

[15] *In the Matter of NorLight*, Declaratory Ruling, 2 FCC Rcd 132, para. 21 (1987).

[16] *See Hyperion Telecommunications, Inc., Petition Requesting Forbearance*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CC Docket Nos. 96-3, 96-7 and 97-146, FCC No. 97-219, 12 FCC Rcd 8596 (1997).

UNEs over which Covad provides service. Indeed, it would be absurd for the Commission to detariff competitive common carrier services, only to declare that by virtue of detariffing those services are no longer common carrier services and thus UNEs are no longer available for their provision.

Accordingly, it is clear that Covad's wholesale xDSL transmission services are telecommunications services. The same analysis applies to the small minority of cases in which Covad uses unbundled loops as an input to its own information service offering. When Covad uses leased telecommunications facilities as an input to its own ISP services, it is making use of a service that it has also offered directly to the public for a fee. Such telecommunications offered to the public for a fee are defined in the statute as telecommunications services. Therefore, Covad is purchasing the line-shared loop for the provisioning of a telecommunications service when it uses that service as an input to a Covad-affiliated ISP service, every bit as much as when it purchases the same line-shared loop to provide telecommunications services to a third party ISP. Indeed, the Commission has already conclusively resolved this issue. In the *Local Competition First Report and Order,* the Commission ruled that "telecommunications carriers that have interconnected or gained access under section . . . 251(c)(3) [also] may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well. Under a contrary conclusion, a competitor would be precluded from offering information services in competition with the incumbent LEC under the same arrangement, thus increasing the transaction cost for the competitor."[17] As the Commission has already concluded, then, a rule that held that only the ILECs that control the nation's bottleneck copper loop facilities may offer both information and telecommunications services over those facilities would be grossly anticompetitive. Were the Commission now to reverse that holding, it would make the insupportable determination that only four companies in the entire country – the four Bell companies – can offer consumers an integrated package of DSL and ISP services.

Indeed, the Commission has consistently treated the self-provisioned telecommunications of common carriers as common carrier services. In the *Frame Relay Services Order*, the Common Carrier Bureau found that AT&T's frame relay service incorporated a self-provisioned common carrier basic service, rather than consisting of solely an enhanced service.[18] In fact, even as recently as the *Advanced Services Order*, the Commission treated the BOCs as self-provisioning telecommunications services for the provision of their own information services: "BOCs offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing

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[17] *Local Competition First Report and Order*, ¶ 995. *See also Computer 3 Remand Proceeding, FNPRM*, ¶ 32 n.98 (citing ¶ 995 with approval).

[18] *See Independent Data Communications Manufacturers Association, Inc., Petition for Declaratory Ruling*, Memorandum Opinion and Order, DA 95-2190, 10 FCC Rcd. 13717 (1995) (*Frame Relay Services Order*).

obligation to offer competing ISPs nondiscriminatory access to the *telecommunications services* utilized by the BOCs themselves."[19] Of course, the treatment of such underlying telecommunications is precisely what is at issue in the *Broadband NPRM* proceeding, where the Commission is examining whether to remove the *Computer II* compulsion under which the BOCs make this underlying telecommunications available as a telecommunications service. How the Commission chooses to dispose of the BOCs' *Computer II* obligation, however, will not change the fact that Covad continues to operate as a common carrier in its provision of wholesale xDSL transmission services, including self-provisioned telecommunications services. Even if the Commission decides to remove the compulsion for the BOCs to make xDSL transmission available as a common carrier service, and the BOCs follow suit by eliminating that service offering, Covad will continue to operate as a common carrier in its provision of xDSL transmission services indiscriminately to the public. And as long as Covad continues to operate as a common carrier in its provision of xDSL services, consistent with Commission precedent, both its xDSL service offerings to unaffiliated ISPs and its self-provisioned xDSL transmission service to its affiliated ISP will remain common carriage.

In sum, the unbundled loop, including the high frequency portion of the loop, is a transmission medium used to provide "telecommunications." Carriers, including both the incumbents and CLECs such as Covad, routinely offer to carry telecommunications over those facilities to the public for a fee, and so plainly meet the statutory definition of offering "telecommunications services." And whether or not the Commission ultimately concludes that the incumbents may cease offering these services, and whether or not the incumbents choose to do so, as long as Covad and other CLECs can provide telecommunications services over these facilities, the facilities remain "network elements" subject to the unbundling requirements of section 251(c)(3). Finally, as the Commission has already held, Covad has every right to use these leased telecommunications services itself as an input to an information service offering, so long as it remains a telecommunications carrier offering telecommunications services over those same arrangements. For the reasons above, that is precisely what Covad is – a telecommunications carrier offering wholesale xDSL telecommunications services. Covad thus urges the Commission to make clear that, regardless of how it decides to proceed in the *Broadband NPRM* proceeding, the existing rights of competitors like Covad to access UNEs will remain undisturbed.

[19] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, para. 37 (1998).

Respectfully submitted,

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