

October 16, 2003

VIA ELECTRONIC FILING

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

Re: *Comments of Covad Communications on Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 01-338*

Dear Ms. Dortch:

Covad Communications herewith submits its comments in response to the Commission's Further Notice of Proposed Rulemaking in the above-referenced docket, released on August 21, 2003.¹ For the reasons stated below, Covad believes it is premature for the Commission to undertake any reinterpretation of section 252(i) or to adopt revisions to its current "pick-and-choose" rules implementing section 252(i). In the absence of concrete marketplace evidence of the competitive benefits of any new regime implementing section 252(i), the Commission should not consider such a drastic revision to these critical rules.

In the Further Notice, the Commission solicits comment on whether it should alter its current interpretation of section 252(i) of the Telecommunications Act of 1996, under which competitive LECs may "pick-and-choose" individual terms out of other competitive LECs' interconnection agreements with incumbent LECs approved under section 252.² The Commission also seeks comment on a new proposed rule implementing such a new interpretation, under which the current pick-and-choose rules would continue to exist, but from which incumbent LECs could choose to "opt-out" by filing an SGAT. Under the Commission's new proposal, only such an SGAT would remain subject to "pick-and-choose," while individual interconnection agreements approved under section 252 would have to be adopted in their entirety where competitive LECs exercise their section 252(i) rights.³

The Commission's Further Notice seems premised on the speculative notion that reinterpreting the statute and adopting a new "all-or-nothing" regime in place of the current "pick-and-choose" rules will "provide market-based incentives for incumbents and CLECs to

¹ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, CC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, FCC 03-36, paras. 713-729 (rel. Aug. 21, 2003) ("Further Notice").*

² *See id.*, at para. 721.

³ *See id.*, at para. 725.

negotiate innovative commercial alternatives to the UNE platform’ and other network elements and interconnection arrangements.”⁴ Yet the Commission fails to cite even a plausible hypothetical scenario under which such “innovative commercial alternatives” to current interconnection agreement terms would actually be negotiated, let alone offer a concrete example of such an agreement.

Covad believes that, absent any credible evidence of the innovative new commercial arrangements the Commission simply speculates will arise, it is premature for the Commission to adopt the drastic changes it proposes to its current “pick-and-choose” rules. Indeed, the Commission does not even cite a single instance where incumbent LECs have approached the Commission seeking regulatory relief for an innovative commercial agreement that the incumbent LECs have negotiated and to which they have agreed, subject only to relief from the “pick-and-choose” requirement. The Commission promises to provide the incumbent LECs with a regulatory windfall without so much as a shred of actual marketplace evidence that real, negotiated agreements are simply waiting to be signed but for the Commission’s pick-and-choose rules, and without any concrete commitments from incumbent LECs to enter into such agreements if a new “all-or-nothing” regime is instituted. In the glaring absence of such concrete marketplace evidence, the Commission should not adopt changes to its interpretations or its rules under section 252(i) solely on the basis of speculation over what may arise.

Accordingly, Covad urges the Commission to refrain from conducting any further proceedings under the Further Notice. Unless concrete marketplace evidence can be offered that the “innovative commercial agreements” sought after by the Commission actually exist, waiting to be signed but for the Commission’s pick-and-choose rules, any further proceedings would amount to simple aiming in the dark – amending vital rules simply on the basis of speculation and hypothesis.

Respectfully submitted,

/s/ Praveen Goyal

Praveen Goyal
Senior Counsel for Government &
Regulatory Affairs
Covad Communications Company
600 14th Street, N.W., Suite 750
Washington, D.C. 20005
202-220-0400
202-220-0401 (fax)

⁴*Id.* at para. 720.