

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

In the Matter of)	
)	
IP-Enabled Services)	WC Docket No. 04-36
)	
Petition of SBC Communications, Inc.,)	
For a Declaratory Ruling Regarding)	
IP Platform Services)	
)	
Petition of SBC Communications, Inc.,)	WC Docket No. 04-29
For Forbearance from Application of)	
Title II Common Carrier Regulation to)	
IP Platform Services)	

REPLY COMMENTS OF COVAD COMMUNICATIONS

James Kirkland
Senior Vice President and
General Counsel
Covad Communications
110 Rio Robles
San Jose, CA 95134-1813

Susan J. Davis
Vice President of Government and
External Affairs

Praveen Goyal
Senior Counsel for Government &
Regulatory Affairs

Covad Communications
600 14th St., NW Suite 750
Washington, DC 20005
(202) 220-0400

July 14, 2004

I. Introduction

Covad Communications, by its attorneys, herewith respectfully submits its reply comments in response to the Notice of Proposed Rulemaking (*NPRM*) released on March 10, 2004, by the Commission seeking comment on issues relating to IP enabled services, or services and applications making use of Internet Protocol (IP), including but not limited to Voice over IP (VoIP) services.¹ In these reply comments, Covad also responds to the petitions of SBC Communications, Inc., for clarification and forbearance with respect to “IP Platform” services.² Covad submits these reply comments to join the various commenters arguing for the need for a federal regulatory framework for IP enabled services like VoIP services, based on their interstate jurisdictional characteristics. At the same time, Covad takes exception to those commenters arguing that the growing, but still incipient, availability of IP enabled services like VoIP eliminates the need for preserving existing regulations providing for competitive access to underlying bottleneck transmission facilities.

Rather than incumbent operators with legacy businesses to protect, it is entrepreneurial companies like Covad that will be at the forefront of deployment of VOIP technology. Covad was the first company to deploy mass market DSL services in the nation. Covad has invested hundreds of million of dollars in building the leading nationwide facilities-based broadband network, reaching nearly 50 million homes and businesses in 35 states. Covad’s broadband facilities include Digital Subscriber Line

¹ See *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, FCC 04-28, 19 FCC Rcd 4863 (rel. Mar. 10, 2004) (*NPRM*).

² See Petition of SBC Communications, Inc., For a Declaratory Ruling Regarding IP Platform Services, in WC Docket No. 04-36, filed Feb. 5, 2004; and *Wireline Competition Bureau Extends Comment Deadlines for SBC’s “IP Platform Services” Forbearance Petition*, WC Docket No. 04-29, Public Notice, DA 04-899 (rel. Mar. 30, 2004).

Access Multiplexers (DSLAMs), IP routers, and ATM switches in over 2000 central offices across the nation. Today, Covad continues to invest in facilities-based competition through the deployment of VoIP services. This year, Covad acquired a leading VOIP service provider, Gobeam, and in March we raised \$125 million in new capital to help fund a nationwide VoIP rollout. By the end of 2004, Covad plans to roll out its business-class VoIP services nationwide to 100 major markets. In 2005, Covad will develop consumer VoIP services across its nationwide broadband facilities. This rapid rollout of VOIP services requires modest and minimally intrusive unbundling of ubiquitous phone company loops and transport services at stable, cost based prices. The fact that local phone companies may elect at some time to provide VOIP services over their legacy telephone networks, cannot and should not serve as the basis for removal of procompetitive regulations that support rapid deployment and innovation by alternative providers.

II. Consensus Support for National Deregulatory Framework

Numerous commenters join Covad in contending that IP-enabled services should be classified as jurisdictionally interstate information services.³ Numerous commenters also agree with Covad that voluntary industry efforts should be given breathing room to develop appropriate technological means to achieve social policy objectives for IP enabled services, such as 911 services and law enforcement access, without immediately applying government regulation.⁴ Finally, a number of commenters agree with Covad

³ See, e.g., Comments of AT&T Corp., at 42-48; Comments of BellSouth Corporation, at 10-14, 32-36; Comments of Cablevision Systems Corp., at 11-13; Comments of Cisco Systems, Inc., at 6; Comments of CompTel/Ascent, at 3-5; Comments of DialPad Communications Inc., *et al.*, at 8-9; Comments of 8x8, Inc., at 11-12.

⁴ See, e.g., Comments of BellSouth at 50-51; Comments of DialPad, *et al.* at 20-21; Comments of ITAA at 29-30.

that the existing regulatory frameworks governing universal service and intercarrier compensation must be reformed before the Commission begins imposing these obligations on providers of IP-enabled services.⁵ Thus, there appears to be broad-based consensus among commenters in favor of developing a national deregulatory framework for IP enabled services like VoIP services at the application layer.

Under this framework, IP enabled services like VoIP would be declared jurisdictionally interstate, subject to the FCC's regulatory jurisdiction in the first instance. Furthermore, they would be declared to be information services, rather than the more onerously regulated telecommunications services regulated under Title II of the Communications Act. Notably, however, the vast majority of commenters, including Covad, would apply these principles only to IP enabled services at the upstream application layer, rather than also to the underlying transmission facilities over which IP enabled services are accessed.

III. Continuing Need for Policies Preserving Facilities-Based Competition

A handful of commenters, however, would move aggressively beyond this consensus to have the Commission deregulate the bottleneck transmission facilities underlying IP enabled services offered at the application layer. For example, Verizon argues that VoIP services render traditional common carrier requirements on operators of bottleneck transmission facilities superfluous.⁶ To Verizon, VoIP provides an excuse to relieve itself of constraints on its ability to wield market power at the transmission facilities layer. BellSouth echoes this line, arguing that the nascent competition among

⁵ See, e.g., Comments of AT&T at 25, 30; Comments of ITAA at 27-28; Comments of MCI at 45, 48-50; Comments of Cisco at 9; Comments of Comptel/ASCENT at 16; Comments of Dialpad, *et al.* at 22.

⁶ See, e.g., Comments of Verizon at 16-21.

VoIP providers occurring at the application layer relieves the need for maintaining obligations for access to bottleneck facilities at the transmission layer.⁷ Paradoxically, these commenters point to the competition arising among VoIP providers as evidence in favor of relieving unbundling obligations – when in fact that competition itself is one of the beneficial results of rules and policies which have permitted competitive carriers to utilize ubiquitous bottleneck loops and transport to provide innovative competitive VOIP services.

a. Current Status of Facilities-Based Competition

As Covad’s initial comments explained, in most areas of the country, Covad remains the only provider of broadband access services left to compete with cable and ILEC broadband.⁸ The Bells attempt to paint a picture of robustly competitive broadband transmission platforms, citing the availability of satellite broadband, fixed wireless and broadband over powerline services.⁹ In fact, as the Bells know well, none of these transmission platforms represent serious competitive threats to the Bell companies’ broadband DSL and T1 services, and are unlikely to provide such a threat on any significant scale for a long time. Satellite broadband services cost significantly more than commonly available DSL and cable modem services, and have to date attracted few subscribers.¹⁰ Fixed wireless has so far proven to be an unsuccessful entry platform, with larger providers like AT&T, Winstar and Teligent having exited the fixed wireless

⁷ See Comments of BellSouth at 15-23.

⁸ See Comments of Covad at 8-9.

⁹ See “Competition in the Provision of Voice over IP and other IP Enabled Services,” Prepared for and Submitted by BellSouth, SBC, Qwest and Verizon, filed in WC Docket No. 04-36, Appendix A (May 28, 2004) (“BOC VoIP Report”).

¹⁰ See, e.g., Ex Parte Letter from David Lawson, AT&T, to Marlene Dortch, FCC, at 8-9 (filed in WC Docket No. 01-338, April 15, 2004).

business or simply gone out of business.¹¹ Not surprisingly, according to the Commission's latest data, satellite and fixed wireless broadband together account for less than 2% of total high-speed lines in service.¹² And broadband over powerline remains in its infancy, with hardly any commercial deployment and an uncertain future.¹³ It comes as no surprise, therefore, that according to the Commission's latest data, the incumbent telephone companies and cable providers control more than 93% of the nation's broadband access lines.¹⁴

Moreover, many end users lack a choice even amongst this limited set of two providers – for example, cable providers have historically focused their network deployment in residential areas, leaving most businesses with the incumbent telephone company as their only broadband option. In fact, recent figures show that cable penetration in the small business segment has actually dropped: “We projected cable modem would surpass DSL in this [the small business] segment by year-end 2003. However, cable modem penetration *dropped precipitously* in the small business market, or businesses with between 20 and 99 people. Cable operators also achieved limited

¹¹ See Letter from Praveen Goyal, Covad Communications, to Marlene Dortch, FCC, Attachment at 15 (filed in WC Docket No. 01-338, Nov. 15, 2002).

¹² See *High-Speed Services for Internet Access: Status as of December 31, 2003*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at Table 1 (June 2004).

¹³ Indeed, even Verizon has conceded that broadband over powerline is available commercially only on a limited trial basis in two discrete locations, and it is not clear whether these trials have actually attracted any customers. See Ex Parte Letter from David Lawson, AT&T, to Marlene Dortch, FCC, at n. 41 (filed in WC Docket No. 01-338, April 15, 2004).

¹⁴ See *High-Speed Services for Internet Access: Status as of December 31, 2003*, Industry Analysis and Technology Division of the Wireline Competition Bureau, Federal Communications Commission, at Tables 1, 5 (June 2004).. Specifically, out of a total of 28,230,149 high-speed lines (over 200kbps in at least one direction), RBOCs served 8,735,814 lines, other ILECs served 1,261,641 lines, and cable providers served 16,446,322 lines.

success in the remote office market, reaching only 4.2 percent of the market in 2003.”¹⁵

As the Yankee Group now recognizes, “*DSL operators dominate* the U.S. [small business] broadband and enterprise remote-office broadband market.”¹⁶

b. Innovation Is Stifled without Facilities-Based Competition

As both the Department of Justice and the FCC have long recognized, these monopoly and duopoly conditions are insufficient to produce competitive outcomes. Duopoly competition is problematic not simply because the firm with the larger market share may exercise market power, but also because *both* participants are likely to have the incentive and ability to maintain prices above competitive levels rather than attempting to ruthlessly compete with each other, as they would need to do in a market with multiple firms.¹⁷ Accordingly, as the FCC has concluded, “both economic theory and empirical studies” indicate that “five or more relatively equally sized firms” are necessary to achieve a “level of market performance comparable to a fragmented, structurally competitive market.”¹⁸ This view is borne out by the experience with mobile wireless services. There, competition and innovation did not flourish until the cellular duopoly was seriously challenged by new entrants utilizing PCS spectrum.¹⁹ As explained in Covad’s initial comments, under such duopoly or even worse monopoly

¹⁵ Yankee Group, *Cable and DSL Battle for Broadband Dominance* (February 2004), at 4-5 (emphasis added).

¹⁶ *Id.* at 4 (emphasis added).

¹⁷ See United States Department of Justice/Federal Trade Commission, *Horizontal Merger Guidelines*, Section 2 (rev. Apr. 8, 1997).

¹⁸ Report and Order, *2002 Biennial Regulatory Review – Review of the Commission’s Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 18 FCC Rcd. 13620, ¶ 289 (2003).

¹⁹ See *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, WT Docket No. 02-379, Eighth Report, FCC 03-150, at paras. 17-19 (2003).

conditions, the Commission can expect two things to happen: (1) incumbent providers, with the inherent advantages that control over their broadband transmission facilities allows, are incented to squeeze third party VoIP providers out of the market, raise their costs to make them uncompetitive, or coopt them by acquisition; and (2) incumbent providers will refrain from aggressively competing with each other, to avoid provoking predatory responses in each other's core businesses (voice and video).

It is not difficult to imagine the myriad ways in which incumbent providers could exercise their market power over underlying transmission facilities to marginalize or discriminate against upstream providers of VoIP application services. As explained in Covad's initial comments, control over underlying transmission facilities confers a myriad of advantages to incumbent providers, including the ability to control quality of service. The "disadvantages" that virtual operators of stand alone VoIP services will face are very real. The simple ability to integrate a facilities-based transmission service with VoIP services will allow integrated service providers to (1) use packet prioritization techniques; (2) charge higher prices for high speed data service and lower prices for add-on VoIP service; and (3) charge a price premium for real-time communications.²⁰

Preserving competition in the provision of underlying broadband transmission services will prevent incumbent providers from employing these advantages anti-competitively. Instead, much as the availability of facilities-based alternatives like line-sharing helped create a robustly competitive market for ISPs, competition in the underlying broadband transmission layer will dramatically improve the prospects for vigorous retail competition and for development of a robust wholesale market for

²⁰ See Comments of Covad at 7-8.

broadband transmission services to third party providers of IP enabled services. After all, as demonstrated by the Commission's previous line sharing rules, competition in the transmission layer enabled hundreds of independent ISPs to voluntarily purchase broadband access services from a willing provider – Covad. In the absence of such wholesale competition, third party providers of IP enabled services will be left only to purchase from two very reluctant wholesale suppliers – namely, incumbents with legacy core businesses to protect.

Just as importantly, large incumbents with substantial investments in existing facilities are less likely, left to their own devices, to be aggressive innovators in disruptive technologies like VOIP. As Covad explained in its initial comments, the incumbent telephone companies, due to their substantial core legacy businesses, face conflicting incentives in deploying VoIP, which threatens the more than \$150 billion they have invested in outdated circuit-switched voice networks.²¹ As Stratecast Partners recently wrote,

The four RBOCs – BellSouth, Qwest, SBC and Verizon – have been the most conservative in the deployment of VoIP services. With the largest installed base of legacy TDM-based infrastructure there has been little incentive, and one could argue a large disincentive, for the RBOCs to migrate local voice services to VoIP.²²

As Stratecast further wrote, although the Bells would use VoIP to compete out-of-region, observers should not expect much in the way of such VoIP competition:

[W]ith a number of in-region challenges confronting the RBOCs the focus on expanding out of region for them is not a top priority at this time.²³

²¹ See Comments of Covad at 9-10.

²² “Business VoIP Services Assessment,” Stratecast Partners (Frost & Sullivan), Communications Service Strategies and Opportunities, Vol. 2 No. 6, at 5 (May 2004).

²³ *Id.*

The Bells' history in deploying DSL technology is instructive. As is now widely acknowledged, the incumbent phone monopolies were slow to deploy ADSL precisely because it threatened to cannibalize lucrative, legacy monopoly services such as ISDN, T1, and second line telephone service.²⁴

As explained in Covad's initial comments, the cable industry also has conflicting incentives with regards to deploying VoIP services. Under duopoly conditions, the ILECs and cable providers have every incentive not to aggressively compete in each others' core businesses. As explained in Covad's initial comments, and as attested to by independent analysts, cable will be inhibited from deploying VoIP heavily to compete in the ILECs' core voice businesses for fear of inviting a predatory response in cable's data and voice businesses.²⁵ This economic reality highlights another limitation of duopoly competition in the IP transmission layer. To the extent that the cable industry does pursue VOIP services, this is no guarantee that the industry will make further investments to optimize their transmission networks for VOIP. They may merely elect to provide VOIP services on a "best efforts" basis utilizing their existing internet access capabilities. In this scenario, cable companies would not drive any significant transmission layer innovation, but would simply be "virtual" voice carriers, like Vonage, over their own networks.

Unlike the established telephone and cable companies, Covad has no legacy business to protect. On the contrary, Covad has always been a broadband company, with a network designed from the ground up to provide advanced broadband services like VoIP. Thus, Covad has every incentive to roll out VoIP services as quickly as possible to

²⁴ See Comments of Covad at 10.

²⁵ See *id.* at 10-11.

as many businesses and consumers as it reaches. Furthermore, Covad adds a unique and critical ingredient to the deployment of VoIP services – namely, its own nationwide, facilities-based broadband network. Covad’s management of last-mile broadband transmission facilities enables it to offer VoIP services that rival the legacy public switched telephone network in their reliability, quality of service, and public safety features, such as access to 911. For example, Covad’s control over its network based facilities allows it to use packet prioritization techniques to ensure that voice quality is maintained even as a user downloads large files or watches streaming media. Because Covad’s VoIP services are facilities-based, they offer more than simply a rough, “best efforts” imitation of traditional telephone services. Instead, Covad’s VoIP services offer a complete, high quality alternative to traditional telephony services – with all the additional features and enhancements of VoIP.

Moreover, as a wholesale provider of broadband transmission services, Covad has every incentive to leverage its control over last mile transmission facilities to the benefit of third party providers of IP enabled services purchasing its transmission services, rather than to discriminate against them to protect any legacy business. Thus, competition in the underlying transmission facilities layer will become increasingly more important over time in ensuring the competitiveness of upstream IP based services and applications like VoIP. To preserve and extend the competition being created by third party providers of IP enabled services, it will become increasingly more important to preserve and extend competition in the underlying provision of broadband transmission services. As explained in Covad’s initial comments, such robust competition in the broadband

transmission facilities layer will help ensure that the exciting innovation being witnessed today in the provision of third party IP enabled services like VoIP will continue unabated.

IV. Classification of IP Enabled Services

Thus, in contrast to the Bell companies, Covad believes that there is a continuing need for the application of Title II regulatory jurisdiction to the bottleneck transmission facilities underlying competitive IP enabled services. As explained in Covad's initial comments, Covad believes that the existing statutory framework in the 1996 Telecommunications Act, as well as the Commission's implementing rules and regulations, already provide the appropriate legal framework for the classification of IP-enabled services and the underlying transmission services over which they are offered. The existing legal framework both (1) promotes competition through regulation providing competitor access to downstream bottleneck transmission facilities; and (2) promotes innovation by largely deregulating competitive upstream information services like VoIP.

As explained above, notwithstanding Bell company claims to the contrary, bottleneck last-mile transmission facilities still largely reside in the control of at best two providers and in many cases only one provider. In this underlying transmission layer subject to the exercise of monopoly or duopoly market power, there is a continuing need for regulatory policies preserving competitor access. This is exactly the policy decision Congress made in section 251 of the 1996 Act, particularly section 251(c)(3)'s provisions requiring unbundling of incumbent LEC network facilities.²⁶ In turn, maintaining such competitive policies in the downstream physical transmission layer relieves the need for

²⁶ See 47 U.S.C. § 251(c)(3).

economic regulation at the upstream information service layer, by creating a level competitive playing field for upstream providers of information services like VoIP. Likewise, this is the policy decision Congress made by refraining from establishing any particular entitlements or requirements with regard to providers of “information services” in the 1996 Act,²⁷ a category the Commission has made clear includes all the services previously considered to be “enhanced services.”²⁸

Notably, Covad’s fellow providers of VoIP services support this policy approach. As Vonage states,

[E]conomic regulations should be targeted at layers that are subject to control by firms with market dominance. In the current marketplace, the logical and physical networks are controlled by a few firms that provide last mile connectivity. The Commission therefore should narrowly tailor regulations that prohibit such firms from using their control over bottleneck facilities to engage in unfair practices in order to obtain market share in content and application layers.²⁹

Similarly, in arguing for the continued application of core Title II unbundling requirements to incumbent LECs, AT&T states that “by preserving those rules that ensure equal wholesale access to broadband networks, the Commission can ensure a vibrant market for IP applications that are provided over those broadband networks.”³⁰

Accordingly, Covad urges the Commission to make clear that IP enabled services like VoIP services fall within the well-established category of information services, that in turn travel over underlying telecommunications services consisting of broadband telecommunications transmission facilities. As such, IP enabled services, such as VoIP

²⁷ See 47 U.S.C. § 153(20).

²⁸ See *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21956-57, para. 102 (1996).

²⁹ See Comments of Vonage at 9.

³⁰ See Comments of AT&T at 63.

services, are unregulated information services falling under Title I of the Communications Act. By contrast, the underlying transmission services over which IP enabled services are offered are telecommunications services regulated under Title II of the Communications Act.

V. Conclusion

For the reasons stated above, Covad respectfully requests that the Commission act consistently with the views expressed herein.

Respectfully submitted,

/s/ Praveen Goyal

James Kirkland
Senior Vice President and
General Counsel
Covad Communications
110 Rio Robles
San Jose, CA 95134-1813

Susan J. Davis
Vice President of Government and
External Affairs

Praveen Goyal
Senior Counsel for Government &
Regulatory Affairs

Covad Communications
600 14th St., NW Suite 750
Washington, DC 20005
(202) 220-0400

July 14, 2004